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BEDROCK PRINCIPLES, ELUSIVE CONSTRUCTION, AND THE FUTURE OF EQUAL EMPLOYMENT LAWS

Stephen A. Plass[*]

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INTRODUCTION

After two years of bitter struggles,[1] a new Civil Rights Act was passed.[2] Proponents of civil rights legislation had been battling on several fronts. One front concentrated on attacking unequal employment practices, while the other is still searching for a road to entrepreneurial equality.[3] Most of these activities centered on the Civil

1. *See* Marcia Coyle & Fred Strasser, *The Sides Find Consensus in Civil Rights Bill*, NAT'L L.J., Nov. 11, 1991, at 5 ("After two years of bitter fighting among the White House, Congress, civil rights groups and business, legislation overturning seven recent high court rulings on job discrimination is about to become law . . . ."); *see also Sabotage Charged on Rights Bill Talks*, MIAMI HERALD, Apr. 16, 1991, at 7A ("Civil rights advocates charged on Monday that the Bush administration has tried to sabotage their negotiations with business leaders towards a compromise civil rights bill because it wants to keep the question of job quotas alive as a political issue.").

2. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

3. In City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), the Court imposed strict scrutiny standards to overturn a city set-aside program. *Id.* at 493. Refusing to defer to state interest, Justice O'Connor wrote that remedial schemes by state and local governments, unlike those by Congress, are not grounded in a specific constitutional mandate to enforce the Fourteenth Amendment, which serves as a check on state action premised on race. *Id.* at 490. A majority of the Court concluded that societal discrimination was an inadequate predicate for the Richmond set-aside program and that the standard of review for such remedial policies is strict scrutiny. *Id.* at 493 (plurality opinion) (Scalia, J., concurring). Justice O'Connor felt that "searching judicial inquiry" was necessary to identify benign or remedial schemes, and "smoke out" illegitimate legislative action that is motivated by or is the product of racial politics. *Id.* The Court found that the city lacked specific findings of discrimination in the local construction industry. *Id.* at 505. It also found that the program was not narrowly tailored or tied to any discriminatory harm being redressed, *id.* at 507, randomly included racial groups for coverage, thereby making the plan over-inclusive, *id.* at 506, and failed to consider race neutral alternatives such as capital and bonding assistance to disadvantaged contractors of all races, *id.* at 507-10. Justice Stevens found the program problematic because it was not premised on efficient performance in the public interest, represented legislative as opposed to judicial remediation, and promoted racial stereotypes. *Id.* at 512-16 (Stevens, J., concurring). Justice Scalia, although agreeing with the decision, wrote separately to voice his position on remedial schemes. He advocated for a consistent colorblind standard for all racially motivated remedial efforts. Only in unusual situations such as disman-

tling an officially segregated school system or in a life-threatening "social emergency" would he deviate. *Id.* at 520-24 (Scalia, J., concurring). Justices Marshall, Brennan, and Blackmun dissented. Writing for the dissenters, Justice Marshall noted that the record contained substantial evidence of discrimination of which Richmond was a part. As such, the city's goal of eliminating the effects of discrimination and preventing the continuation of exclusionary policies, provided justification for its program. *Id.* at 528-42. For these reasons, Justice Marshall called for a lower standard of review, noting that:

> Today, for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures . . . . A profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism.

Id. at 551-52. Justice Marshall also distanced himself from the Court's limitation on state action. Citing the legislative history of Reconstruction Amendments, he found nothing that limited the states' exercise of police power to work with the federal government to redress discrimination and its effects. *Id.* at 557-60.

Bound by the standards set out in *Croson,* lower courts have found many state set-aside programs unconstitutional. *See, e.g.,* Main Line Paving Co. v. Board of Educ., 725 F. Supp. 1349 (E.D. Pa. 1989) (finding only generalized findings of discrimination, failure to limit remediation to identified victims, and failure to narrowly tailor the program or consider race and gender-neutral alternatives); Milwaukee County Pavers Ass'n v. Fiedler, 710 F. Supp. 1532 (W.D. Wis.), *modifying* 707 F. Supp. 1016 (W.D. Wis. 1989) (finding that Wisconsin program could not withstand strict scrutiny analysis); American Subcontractors Ass'n v. City of Atlanta, 376 S.E.2d 662 (Ga. 1989) (finding no evidence of discrimination to support the program, and determining that the program was over-inclusive and failed to consider race-neutral alternatives). *But see* Coral Constr. Co. v. King County, 729 F. Supp. 734 (W.D. Wash. 1989) (program passes constitutional muster by being narrowly tailored to remedy identified discrimination).

Croson and its progeny have spawned several legislative initiatives. *See, e.g.,* Equal Opportunity Authorization Act, S. 1235, 101st Cong., 1st Sess. (1989) (intended to amend the 1964 Civil Rights Act so as to legislatively sanction set-asides). The proposed amendment would constitute § 719 of Title VII and is captioned "SET ASIDES FOR STATES AND POLITICAL SUBDIVISIONS." Its provisions are:

> (a) FINDINGS—Congress finds that—
>
> (1) there has been a long and continual history of discrimination on the basis of race, color, religion, sex, or national origin by private contractors in employment and subcontracting; and
>
> (2) such discrimination has been exacerbated by states and the political subdivisions of such states in awarding contracts.
>
> (b) AUTHORIZATION—Congress, pursuant to its power to enforce the Fourteenth Amendment to the Constitution, determines that States and the political subdivisions of States may enact reasonable provisions setting aside a percentage of funds for spending on contracts to be awarded to firms that have ownership, control, or employment practices which further the goal of remedying the discrimination referred to in subsection (a).

Id.

Hearings were also conducted before the Committee on Government Operations, 101st Cong., 2d Sess. (1990). These hearings, which were investigative in nature, gathered documentation of continuing discrimination in the construction industry. For a discussion of the legislative background and constitutionality of set-asides, see Stephen A. Plass, *Judicial Versus*

Rights Act of 1964,[4] with central focus on Title VII.[5]

The employment legislative fervor was triggered by several Supreme Court decisions. First, *Price Waterhouse v. Hopkins*[6] held that an employer is not liable for discrimination if it would have made the same decision absent consideration and reliance on prohibited considerations.[7] In *Wards Cove Packing Co. v. Atonio*[8] the Court determined that disparate impact plaintiffs must show more than disparity to establish their case. Specifically, the wrongful practice must be identified and causation must be shown. In addition, the Court lightened the employer's burden.[9] *Martin v. Wilks*[10] increased the vulnerability of consent decrees to collateral attack,[11] and *Lorance v. AT&T Technologies*[12] found that the statute of limitations for discriminatory seniority policies begins to run at the time such policies are adopted, regardless of when they affect employees.[13] Additionally, the Court decided in *Patterson v. McLean Credit Union*[14] that § 1981[15] covered only pre-contract discrimination,[16] and further ruled in *Independent Federation of Flight Attendants v. Zipes*[17] that plaintiffs can recover attorney's fees from losing intervenors only in limit-

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Legislative Charting of National Economic Policy: Plotting a Democratic Course for Minority Entrepreneurs, 24 LOY. L.A. L. REV. 655 (1991). In light of the fierce battle that was necessary for a new civil rights law, and given powerful popular opposition to preferential schemes, the odds are stacked against proponents of legislation that protects or prefers minority entrepreneurs.

4. 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000h-6 (1988)).

5. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-718, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1988)). This Article focuses primarily on the employment cases and legislative initiatives although relevant equality principles from other contexts are sometimes referenced.

6. 490 U.S. 228 (1989).

7. *Id.* at 242 (discussing gender as being a prohibited consideration).

8. 490 U.S. 642 (1989).

9. *Id.* at 657. In effect the Court decided that the "bottom line" argument is as ineffective in establishing plaintiff's case as it is in providing an employer with a defense. *See* Connecticut v. Teal, 457 U.S. 440 (1982) (explaining that Title VII does not provide for bottom line defense. The statute focuses on discriminatory bars to opportunities, not overall results).

10. 490 U.S. 755 (1989).

11. *Id.* at 762-63.

12. 490 U.S. 900 (1989).

13. *Id.* at 906.

14. 491 U.S. 164 (1989).

15. 42 U.S.C § 1981 (1988).

16. *Patterson*, 491 U.S. at 179.

17. 491 U.S. 754 (1989).

ed circumstances.[18]

Part I of this Article discusses the original limitations of Title VII for plaintiffs, and shows that the Court narrowed the statute further in the above-noted employment cases, among others. It then illustrates what appears to be the Court's methodical and permanent move away from an analytical scheme grounded in the broad remedial purposes of civil rights legislation. The Article documents the Court's constant reliance on "bedrock" Anglo-American jurisprudential principles in deciding cases to highlight the shift from remedial purposes analysis to narrow textual construction as an enduring interpretive standard.

The first part further observes that injection of bedrock principles and text-focused analysis into the civil rights area is not theoretically negative, because of abundant deeply-rooted interpretive principles favoring discrimination victims. Further, this part calls on the Court to utilize supportive "American" rules as a symbol of its articulated commitment to civil rights, while abiding by professed constitutional and statutory demands of neutrality, strict scrutiny, and color blindness. Recognizing the potential benefits of textualism, the first part argues that the 1991 Act can thrive under this interpretive methodology if analysis is free of judicial manipulation.

Part II of this Article analyzes the legislative proposals and demise of the Civil Rights Act of 1990, then proceeds to evaluate the subsequent competing proposals that ultimately forged the 1991 legislation. The actual impact of the 1991 Act on Supreme Court decisions narrowing Title VII is carefully considered in an attempt to predict what actual gains were made for employees that are discriminated against. This part also discusses other legislative gains that in many instances were not tied to specific Court rulings. Part II concludes that while many significant gains were made for discrimination victims, the 1991 Act is not a panacea, as partly evidenced by continuing legislative battles and judicial disagreement.

Part III studies the thorny problem of determining when the Act takes effect. In this part, the Act's language and structure are evaluated, as well as its legislative history and various court decisions construing it. This evaluation will highlight the internal conflicts of the text, the contradictory statements of legislators, and conflicting interpretations of judges. Although the Court has not articulated clear

18. *Id.* at 761 (concluding that plaintiff must show that the intervenor's action "was frivolous, unreasonable or without foundation").

rules on the subject of retroactivity, this part predicts a construction disfavoring retroactivity and subordinating the interest of employees, despite the availability of substantial legal and policy reasons countenancing a different result.

Part IV analyzes the Court's fractured jurisprudence on affirmative action in employment cases, and the evolution of solid judicial and popular theoretical opposition to remedial schemes. This part specifically considers the effect of the 1991 Act on affirmative action in view of the concerted effort by legislators to avoid this issue in trying to secure passage of the 1991 legislation. Predicting a bleak future for affirmative action, attention is also given to reparations, a doubtful but increasingly discussed remedial device. In view of popular judicial, legislative, and executive opposition to preferential schemes, this part concludes that the quest for equal employment may be stifled by a conservative Court, competing national priorities, and changed societal attitudes. This part also concludes that broad-based and powerful opposition to remediation makes forging ties with the Court essential to the success of future civil rights protection.

I. TITLE VII—ORIGINAL LEGISLATION AND CONSTRUCTION

A. *Legislative Limitations of Title VII*

As originally enacted, Title VII was the product of compromises that accommodated the special interests of both businesses and union leaders, while attempting to protect employee rights.[19] Time and again the limitations of these compromises were brought to light as specific cases outside the wording of the statute compelled redress grounded in the legislation's purpose as opposed to its textual mandate.[20] Over the years, the statute has been increasingly utilized to tackle subtle and sophisticated discriminatory schemes.[21] Initially, a

19. *See* H.R. REP. NO. 914, 88th Cong., 1st Sess. 29 (1963).

20. *See, e.g.*, United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979). In *Weber*, the Court had to reconcile its prior holding in McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), that Title VII protects blacks and whites, with its decision to approve voluntary plans negotiated by the company and union, which negatively impacted a white employee. The Court found that Title VII's legislative history and its interpretation of § 703(j) supported a conclusion that voluntary programs grounded in race are permissible. *Weber*, 443 U.S. at 205-06.

21. *See, e.g.*, Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied sub nom.*, Meese v. Segar, 471 U.S. 1115 (1985). The subtle and sophisticated nature of present-day discrimination is further insulated from attack by motive-based standards established by the Court. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976).

supportive Supreme Court gave teeth to the statute by regarding it as remedial[22] and construing its ambit as allowing motive-based inquiry, as well as consideration of consequences.[23] Subsequent decisions setting out burden of proof requirements[24] accommodated the difficulty of proof for discrimination victims, while attempting to avoid unnecessary infringement on management and union prerogatives.[25] The statute does not require quotas or racial balancing by employers.[26]

Although pitched and interpreted as a broad remedial measure, Title VII provided limited relief to discrimination victims.[27] Injunctive and equitable relief formed the grist of its redress mechanism.[28] Essentially limited to prospective injunctive mandates, reinstatement, and back-pay, many injuries naturally and normally flowing from violations went unremedied.[29] Non-wage injuries were often uncompensated.[30]

Punitive and compensatory damages other than back pay were unavailable.[31] These relief limitations impeded attainment of Title VII's remedial and deterrence goals. As a result, Title VII plaintiffs contemporaneously placed reliance on § 1981's[32] complimentary re-

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22. *See* Pullman-Standard v. Swint, 456 U.S. 273 (1982); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

23. *Griggs*, 401 U.S. at 431.

24. *See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

25. *See Weber*, 443 U.S. 193.

26. *Id.* at 205-06.

27. *See* Bailey v. Great Lakes Canning, Inc., 908 F.2d 38 (6th Cir. 1990); Protos v. Volkswagen of Am., Inc., 797 F.2d 129 (3d Cir.), *cert. denied*, 479 U.S. 972 (1986); *see also* Padway v. Palches, 665 F.2d 965 (9th Cir. 1982); Farmer v. ARA Servs., Inc., 660 F. 2d 1096, 1107 (6th Cir. 1981) (holding that compensatory damages other than back pay are not available under Title VII).

28. *See* 42 U.S.C. § 2000e-5(g).

29. Front pay has been given in some cases. *See, e.g.*, Spears v. Board of Educ., 843 F.2d 882 (6th Cir. 1988); Thorne v. City of El Segundo, 802 F.2d 1131 (9th Cir. 1986); Shore v. Federal Express Corp., 777 F.2d 1155 (6th Cir. 1985); Goss v. Exxon Office Sys. Co., 747 F.2d 885 (3d Cir. 1984).

30. Physical, mental, and psychological harm are typically uncompensated. *See* Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989) (inferring no recovery for medical bills and other non-wage injuries); Williams v. Atchinson, Topeka & Santa Fe Ry., 627 F. Supp. 752 (W.D. Mo. 1986) (no recovery for emotional distress).

31. *See* Bruno v. Western Elec. Co., 829 F.2d 957 (10th Cir. 1987) (punitive damages); Goss v. Exxon Office Systems Co., 747 F.2d 885 (3d Cir. 1984) (back pay); Johnson v. Al Tech Specialties Steel Corp., 731 F.2d 143 (2d Cir. 1984) (punitive and compensatory damages for emotional distress).

32. 42 U.S.C. § 1981.

medial provisions to fill the void. Section 1981 offers a full range of compensatory[33] and punitive[34] relief possibilities to most class members that Title VII protects. However, women are not captured under § 1981's umbrella and are therefore limited to Title VII's remedial scheme.

B. Recent Court-Imposed Limitations

1. The Causation and Same Decision Test

According to *Price Waterhouse v. Hopkins*,[35] an employer can discriminate in ways prohibited by Title VII and avoid liability by showing that it would have made the same decision absent the prohibited conduct.[36] In that case, the Court was called upon to interpret the antidiscrimination provisions of Title VII which prohibit employers from making employment decisions "because of" an individual's sex.[37] It concluded that the language of the statute was plain on its face in prohibiting employers from taking gender into account.[38] However, it found that common sense supported its construction that "because of" meant "relied on," and was not intended as colloquial shorthand for "solely because of."[39] Confirmation of

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33. *See* Richards v. New York City Bd. of Educ., 668 F. Supp. 259 (S.D.N.Y 1987), *aff'd*, 842 F.2d 1288 (2d Cir. 1988); Muldrew v. Anheuser-Busch, Inc., 728 F.2d 989 (8th Cir. 1984).

34. *See* Williamson v. Handy Button Mach. Co., 817 F.2d 1290 (7th Cir. 1987); Stallworth v. Shuler, 777 F.2d 1431 (11th Cir. 1985).

35. 490 U.S. 228 (1989).

36. *See id.* at 258. Despite its contravention of the statutory mandate prohibiting the consideration of sex in employment decisionmaking, the *Price Waterhouse* decision was viewed in many quarters as a pro-plaintiff ruling. *See* Charles S. Ralston, *Court vs. Congress: Judicial Interpretation of the Civil Rights Acts and Congressional Response*, 8 YALE L. & POL'Y REV. 205 (1990); Charles A. Shanor & Samuel A. Marcosson, *Battleground for a Divided Court: Employment Discrimination in the Supreme Court, 1988-89*, 6 LAB. LAW. 145 (1990). *But see* Roy L. Brooks, *The Structure of Individual Disparate Treatment Litigation After* Hopkins, 6 LAB. LAW. 215, 231-32 (1990) (arguing that *Price Waterhouse* standards are more favorable to employers than plaintiffs).

37. 42 U.S.C. § 2000e-2(a)(2). This section provides:

It shall be an unlawful employment practice for an employer—

. . . .

> (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 opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

38. *Price Waterhouse*, 490 U.S. at 239-40 (citing 42 U.S.C. §§ 2000e-2(a)(1) & (2)).

39. *Id.* at 241. The premise for the Court's conclusion is partly based on recognition that Title VII was designed to police mixed or dual motive cases. *Id.*

this construction was obtained by reference to the provision's legislative history which showed that an amendment to include the word "solely" in front of "because of" was rejected.[40] The Court found further support in the statute's structure by noting that elsewhere in the statute's text there was a provision that allows employers to consider gender under specified circumstances.[41] Rejected was the employee's contextual argument that the relief section of the statute supported a finding of liability once a prohibited consideration played a role in the employer's decision.[42]

Applying conventional rules of civil litigation,[43] the Court went on to hold that the employer's burden is governed by the "preponderance" of evidence standard.[44] The Court rejected the clear and convincing standard advocated by the plaintiff, finding that standard to be the exception rather than the rule for determining liability.[45] In addressing the issue of causation,[46] the Court was not persuaded that

40. *Id.* at 241 n.7.

41. *Id.* at 242 (pointing to 42 U.S.C. § 2000e-2(e), which allows an employer to consider gender if it is a bona fide occupational qualification).

42. *Id.* at 244-45 n.10. The Court reasoned that the remedies provision could not surmount statutory mandates in other provisions of the statute. *Id.* at 245 n.10.

43. The Court was not shy in stating that for litigation purposes, Title VII cases should be treated like any other civil case. *Id.* at 253.

44. *Id.*

45. *Id.* ("Only rarely have we required clear and convincing proof where the action defended against seeks only conventional relief.").

46. *Id.* at 239-47. Causation issues have historically been thorny for courts analyzing mixed-motive cases. Circuit courts had utilized a variety of approaches which included such standards as "but for," "substantial factor," "motivating factor," or "discernible factor." *Id.* at 238-39 n.2. While finding that plaintiff is not required to show the exact role an illegitimate consideration played, the Court found that plaintiff must show that the employer relied on the illegitimate consideration, *id.* at 252, and that such reliance on the illegitimate factor was a "motivating part" of the employer's decision, *id.* at 244. The Court could not reach a consensus on how much evidence plaintiff needed to establish a prima facie case. However, a requirement that plaintiff produce substantial evidence pervades the opinion. *See id.* at 271 (O'Connor, J., concurring) (plaintiff needs direct evidence). The Court interpreted the "because of" language in § 703(a) as contemplating and covering more than one reason for employer conduct. *Id.* at 241. Justice White, in concurrence, adopted the standards set out in Mt. Healthy City Sch. Dist. Bd. of Educ. v. Boyle, 429 U.S. 274 (1978), on the premise that an employee should not be better off because a protected right is infringed, when the employer has legitimate reasons for acting. Justice White's approach would also require a showing that the protected conduct was a substantial or motivating factor. *Id.* at 259 (White, J., concurring). Justice O'Connor interpreted the words "because of" to mean "but for" causation, *see id.* at 262-63 (O'Connor, J., concurring), analogizing this situation to common law tort actions. *See id.* at 262-66. She found that once plaintiff showed that an illegitimate consideration was a substantial factor, the employer must prove that the same decision would have been "justified" by legitimate reasons. Placing this risk of non-persuasion on the employer was regarded by Justice O'Connor as comporting with the deterrence and make-whole purpos-

the employer should be liable if wrongful conduct played "any" role in the decisionmaking.[47] Traditional legal principles supporting liability once fault is established were not adopted, which would have facilitated taking the inquiry to the next step, where relief would be determined in light of the equities favoring the employer.[48] Even after recognizing the statute's condemnation of illegitimate motives,[49] the Court found that, on balance, employer prerogatives outweighed

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es of Title VII. *See id.* at 261-77. O'Connor's concern about Title VII's deterrence and make-whole purposes is curious in light of her narrow views enunciated in *Croson*, and her opinion in Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992-93 (1988) (O'Connor, J., concurring), which was adopted in *Wards Cove*. The dissenting Justices' analysis in *Price Waterhouse* departed from that of the other Justices. They found that the plain statutory language tied liability to causation, and as a result, "but for" causation was needed to establish liability. They also found that "because of" meant "solely because of" in view of the fact that: 1) the presence or consideration of illegitimate motives is of no moment since the employer does not commit a violation if it would have made the same decision for legitimate reasons; and 2) any other construction would create internal conflict in the statute. The dissenters further found that burden-shifting in Title VII litigation is inconsistent with well-established burden allocations in this area. *Price Waterhouse*, 490 U.S. at 279-93 (Kennedy, J., dissenting).

For a good analysis of the evolution and competing concerns affecting the Court's causation jurisprudence, see Robert Belton, *Causation and Burden-Shifting Doctrines in Employment Discrimination Law Revisited: Some Thoughts on* Hopkins *and* Wards Cove, 64 TUL. L. REV. 1359, 1382-1405 (1990) [hereinafter Belton, *Burden-Shifting*]; Robert Belton, *Causation in Employment Discrimination Law*, 34 WAYNE L. REV. 1235 (1988) [hereinafter Belton, *Causation*] (discussing the confusion created by the Court's failure to distinguish between causation analysis for determining Title VII liability as opposed to relief, and unhelpful references to decisional standards developed under the constitution).

47. Plaintiff was not able, however, to get the Court to bifurcate its analysis in this fashion. Rather, the Court extended its liability analysis to include both illegitimate and legitimate motives, noting that the statute preserved broad employer freedoms. *See Price Waterhouse*, 490 U.S. at 241-42. A finding of liability once the employer relies on any illegitimate consideration is very important from a deterrence standpoint, even if the damages assessed are nominal or negligible. *See* Alfred W. Blumrosen, *Society in Transition II:* Price Waterhouse *and the Individual Employment Discrimination Case*, 42 RUTGERS L. REV. 1023, 1052-53 (1990) (arguing that the "same decision" test increases the probability that employers will rely on prohibited factors, and thereby inhibits the legislative goal of a bias-free workplace).

48. *See Price Waterhouse*, 490 U.S. at 238. Plaintiff argued that the presence of legitimate reasons may serve to limit the relief granted but not to avoid a finding of liability once it has been demonstrated that an illegitimate factor was considered. For some persuasive commentaries supporting plaintiff's view, see Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471 (1990); Mark C. Weber, *Beyond* Price Waterhouse v. Hopkins*: A New Approach to Mixed Motive Discrimination*, 68 N.C. L. REV. 495 (1990). *But see* Belton, *Causation*, *supra* note 46.

49. *Price Waterhouse*, 490 U.S. at 240. The Court found that the employer relied on illegitimate factors, which is a possible technical violation. It went on to say, however, that no actual violation can be found until the employer's legitimate considerations are reviewed as well. *Id.* at 237, 251.

employee rights, thereby absolving from liability an employer with legitimate explanations for its decision.[50] This new standard effectively deprived lower courts of traditional avenues of relief in mixed-motive cases.[51] Further, it had the potential to undermine the deterrence function of the statute by allowing employers to avoid liability in some instances where discrimination is proven.[52]

2. Facially Neutral Policies and the Statute of Limitations—The Clairvoyant Employee Problem

In *Lorance v. AT&T Technologies*,[53] the Court held that the statute of limitations for a facially neutral seniority policy that discriminated against women began to run from the time of its adoption.[54] In interpreting Title VII's requirement that a charge be filed "within three hundred days after the alleged unlawful employment practice occurred,"[55] the Court determined that the context of the statute and text of another statutory scheme were adequate interpretive tools. The Court never pointed to any recognized construction that "occurred" meant "was adopted," and instead relied on the similarities between Title VII and the National Labor Relations Act ("NLRA"),[56] and cases interpreting the NLRA.[57] With heavy reliance on the

50. *Id.* at 241-42.

51. In the past, lower courts granted attorney fees and ordered the employer to stop discriminating even after the employer demonstrated that non-discriminatory reasons supported its decision. *See* Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985); King v. Trans World Airlines, Inc., 738 F.2d 255 (8th Cir. 1984); Ostroff v. Employment Exch., Inc., 683 F.2d 302 (9th Cir. 1982).

52. *See, e.g.*, EEOC v. Alton Packaging Corp., 901 F.2d 920 (11th Cir. 1990) (Discrimination on the part of the employer was proven by direct evidence establishing that the person responsible for promotion decisions had uttered a racial slur. However, the employer was able to prove by a preponderance of the evidence that the plaintiff would not have been promoted even in the absence of a discriminatory motive, thus avoiding liability.); Gautier v. Watkins, 747 F. Supp. 82 (D.D.C. 1990) (The court assumed that the plaintiff had made a prima facie showing of racial discrimination. Plaintiff claimed that he was passed over for a promotion because he was not black. However, the court stated that defendant was not liable because they proved by a preponderance of the evidence that, in the absence of discrimination, the same decision would have been made.).

53. 490 U.S. 900 (1989).

54. *Id.* at 905. The Court cited Chardon v. Fernandez, 454 U.S. 6 (1981), Delaware State College v. Ricks, 449 U.S. 250 (1980), and United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977) for the proposition that the time of the discriminatory act, rather than the time of the discriminatory consequences, is the proper focus. *Lorance*, 490 U.S. at 907.

55. 42 U.S.C. § 2000e-5(e).

56. 29 U.S.C. §§ 151-169 (1988).

57. *Lorance*, 490 U.S. at 909-12. The dissent objected to the Court's construction, arguing that it is unsupported by the text or precedents interpreting Title VII. *Id.* at 915

NLRA, and court precedents interpreting that statute, the Court made the value judgment that the line must be drawn at the time the policy was adopted.

As a result, the Court rejected plaintiff's "continuing violation" argument[58] which was grounded on solid legal precedent,[59] finding this contention only "plausible."[60] Therefore, it ruled that the statute of limitations began to run long before the plaintiff was aware of, affected by, or harmed by the policy.[61] Past judicial flexibility in pursuit of fairness[62] in this area was replaced with a theoretical construct that is particularly harmful in view of evidence that discriminating employers are sophisticated, and capable of designing policies that evade early recognition of their consequences.[63]

(Marshall, J., dissenting). Justice Marshall observed that: "This severe interpretation of § 706(e) will come as a surprise to Congress, whose goals in enacting Title VII surely never included conferring absolute immunity on discriminatorily adopted seniority systems that survive their first 300 days." *Id.* at 914 (footnote omitted).

58. *Id.* at 905-07.

59. *See* Bazemore v. Friday, 478 U.S. 385 (1986); Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); Corning Glass Works v. Brennan, 417 U.S. 188 (1974). Justice Marshall found:

> Tellingly, none of the Courts of Appeals presented with a claim of a continuing violation has reached the result the majority today reaches. Indeed, two of the Courts of Appeals have interpreted our precedents to *permit* claims of continuing violation. Even the Seventh Circuit, finding petitioners' *claim time barred*, in the judgment under review, adopted a far narrower interpretation than the majority, under which the limitations period begins to run on the date when the employee first becomes subject to the seniority system.

Lorance, 490 U.S. at 919 n.3 (Marshall, J., dissenting) (citations omitted) (first emphasis in original).

60. *Id.* at 908. In evaluating the discriminatory impact model for seniority claims, the Court found that, "[a]s an original matter this is a plausible, and perhaps even the most natural, reading of § 703(h)." *Id.*

61. *Id.* at 914 (Marshall, J., dissenting) (the decision requires "employees to sue anticipatorily or forever hold their peace").

62. *See* Johnson v. General Elec., 840 F.2d 132 (1st Cir. 1988); Halferty v. Pulse Drug Co., 821 F.2d 261 (5th Cir. 1987); Cook v. Pan Am. World Airways, Inc., 771 F.2d 635 (2d Cir. 1985); Hall v. Ledex, Inc., 669 F.2d 397 (6th Cir. 1982); Jenkins v. Home Ins. Co., 635 F.2d 310 (4th Cir. 1980); Hodgson v. Behrens Drug Co., 475 F.2d 1041 (5th Cir. 1973) (accepting continuing violation theory); *see also* Glass v. Petro-Tex Chem. Corp., 757 F.2d 1554 (5th Cir. 1985) (using "the degree of permanence that would trigger awareness" approach); Berry v. Board of Supervisors, 715 F.2d 971 (5th Cir. 1983).

63. *Lorance*, 490 U.S. at 917 (Marshall, J., dissenting) ("The distinction the majority erects today serves only to reward those employers ingenious enough to cloak their acts of discrimination in a facially neutral guise, identical though the effects of this system may be to those of a facially discriminatory one.").

Concerns about stale claims[64] and disruptive influences[65] on seniority systems overwhelmed the national interest in prohibiting discrimination in employment.[66] This analysis also failed to consider that employers and unions may use seniority systems to perpetuate a legacy of discrimination,[67] which in some respects has been accommodated by the Court.[68] Insulating and "immunizing"[69] such systems from attack, therefore, destroys the viability of many meritorious claims by making them unenforceable.

Decisional law since *Lorance* has broadened its scope and application.[70] For example, in *Colgan v. Fisher Scientific Co.*,[71] plaintiff protested his termination under the Age Discrimination in Employment Act ("ADEA"),[72] only to find *Lorance* controlling and his claim barred by the 300 day statute of limitations period in the ADEA.[73] The court cited the short limitations period in the statutory scheme and the disruptive influences noted in *Lorance* as support for its conclusion.[74] The court held that the statute began to run when Colgan received an unfavorable evaluation, not three months later when he was discharged.[75] It further found no difficulty in relying on Title VII precedents to resolve the ADEA claim.[76]

64. *Id.* at 914.

65. *Id.*

66. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 174 (1989) ("'[E]very pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination.'" (quoting Bob Jones Univ. v. United States, 461 U.S. 574, 593 (1983))).

67. *See, e.g.*, Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984); International Bhd. Teamsters v. United States, 431 U.S. 324 (1977).

68. *Id.*; *see also Lorance*, 490 U.S. 900 (reaffirming the primacy of seniority in employment relations, the need for proof of discriminatory purpose in attacking such systems, and the legitimacy of a seniority system even if its operation leads to discriminatory consequences).

69. *See id.* at 915 (Marshall, J., dissenting).

70. Beavers v. American Cast Iron Pipe Co., 751 F. Supp. 956, 960-61 (N.D. Ala. 1990) (extending *Lorance* to insurance and medical benefit claims and rejecting plaintiff's contention that the *Lorance* analysis was grounded on the special nature of seniority systems).

71. 747 F. Supp. 299 (W.D. Pa. 1990), *vacated*, 935 F.2d 1407 (3d Cir.), *and cert. denied*, 112 S. Ct. 379 (1991).

72. 29 U.S.C. §§ 621-634 (1988).

73. *Colgan*, 747 F. Supp. at 303; *see also* Hamilton v. First Source Bank, 928 F.2d 86 (4th Cir. 1990); EEOC v. City Colleges, 740 F. Supp. 508, 514-15 (N.D. Ill. 1990), *aff'd*, 944 F.2d 339 (7th Cir. 1991).

74. *Colgan*, 747 F. Supp. at 302-03.

75. *Id.*

76. *Id.* at 301 n.3.

Similarly, in *Hendrix v. Yazoo City*,[77] the Fifth Circuit relied on *Lorance* in departing from its continuing violation methodology[78] in analyzing Fair Labor Standards Act[79] claims.[80] In *Kuemmerlein v. Board of Education of Madison Metropolitan School District*,[81] a § 1983[82] case, primary reliance was placed on *Lorance* and the need for certainty and protection against stale claims to justify a similar result.[83] Further, in *Addison v. Piedmont Aviation, Inc.*,[84] a case arising under the Railway Labor Act,[85] a federal district court relied on *Lorance* in rejecting plaintiffs' claims as "attempts to rekindle stale grievances in the light of more recent events."[86]

3. Tougher Disparate Impact Burdens

Before *Wards Cove Packing Co. v. Atonio*,[87] Title VII plaintiffs had two litigation models. The first model, "disparate treatment," focused on the employer's motive[88] in decisionmaking, while the second model, "disparate impact," focused on the consequences of the employer's conduct.[89] Although the text of section 703 of Title VII did not specifically provide for impact suits, the Court initially gave this language an interpretation grounded in its legislative history.[90] It

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77. 911 F.2d 1102 (5th Cir. 1990).

78. *Id.* at 1103. The court cited Halferty v. Pulse Drug Co., 821 F.2d 261 (5th Cir. 1987), as its most recent holding approving the continuing violation theory. *Hendrix*, 911 F.2d at 1104.

79. 29 U.S.C. §§ 201-219.

80. *Hendrix*, 911 F.2d at 1104.

81. 894 F.2d 257 (7th Cir. 1990).

82. 42 U.S.C. § 1983.

83. *Kuemmerlein*, 894 F.2d at 260.

84. 745 F. Supp. 343 (M.D.N.C. 1990).

85. 45 U.S.C. §§ 151-188 (1988).

86. *Addison*, 745 F. Supp. at 348.

87. 490 U.S. 642 (1989).

88. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

89. *See id. But see* Blumrosen, *supra* note 47, at 1058-59 (stating that the Court's interpretation in *Teamsters* narrowed Title VII's range by creating two hard categories—disparate treatment and disparate impact, thereby excluding unconscious discrimination which results in unequal treatment).

90. 42 U.S.C. § 2000e-2 provides:

(a) 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 discriminate 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

determined that Title VII was directed at any arbitrary or artificial barrier that operates to freeze the status quo of past discriminatory practices.[91]

Although the specific issue was not before the *Wards Cove* Court,[92] it determined that it was timely and appropriate to outline new standards for disparate impact plaintiffs.[93] It found that such plaintiffs must identify each specific practice that is alleged to be unlawful.[94] Then, a showing must be made of how each practice causes a significant disparate impact.[95] This approach represents a departure from past construction and prior recognition by courts that a group of employment practices producing a disparate impact is sufficient for a plaintiff to establish a prima facie case.[96]

Further, the Court found that an employer is no longer required to show that the challenged practice was "essential"[97] or "significantly correlated"[98] to the job. Rather, the employer's burden was reduced to a showing that the practice "serves"[99] legitimate employment goals. Moreover, to establish this defense, the employer need

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> employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

91. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); *see also* Connecticut v. Teal, 457 U.S. 440, 450-51 (1982) (holding that § 703(a)(2) is broad, and captures facially neutral limitations and classifications that serve as barriers to equal employment opportunities; thus, plaintiffs could pursue a discrimination claim by relying on statistical data even though evidence of employer intent to discriminate was unavailable).

92. Once the Court had determined that plaintiff's statistics did not show disparate impact, its review role was arguably over. The Court's eagerness to make a mark in this area was telegraphed by *Wards Cove*'s predecessor, Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 1000-01 (1988) (Blackmun, J., concurring) (arguing that the plurality was out of bounds for discussing plaintiffs' burden because the only issue before the Court was whether employer's use of subjective criteria was covered by the "impact" theory).

93. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656-62 (1989).

94. *Id.* at 656.

95. *Id.*

96. *See* Power v. Alabama Dep't of Educ., 854 F.2d 1285, 1293 (11th Cir. 1988), *cert. denied*, 490 U.S. 1107 (1989); Green v. U.S.X. Corp., 843 F.2d 1511, 1520 (3d Cir. 1988), *vacated*, 490 U.S. 1103 (1989); Segar v. Smith, 738 F.2d 1249, 1271-72 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985); *see also* Griffin v. Carlin, 755 F.2d 1516, 1529 (11th Cir. 1985); Williams v. City and County of San Francisco, 483 F. Supp. 335, 340 (N.D. Cal. 1979), *rev'd*, 685 F.2d 450 (9th Cir. 1982).

97. *See* Dothard v. Rawlinson, 433 U.S. 321, 331 (1977).

98. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).

99. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989).

only "produce"[100] evidence of business justification.[101] Plaintiffs were further saddled with the responsibility of showing that the practice was not justified by business needs.[102]

In essence, *Wards Cove* overruled the existing interpretation of disparate impact proof requirements which was formulated approximately two decades ago by a unanimous Supreme Court and effectively fleshed out since then.[103] *Wards Cove*'s proof requirements, in effect, eliminated the distinction between treatment and impact cases[104] by rejecting the prior interpretation that Title VII is directed primarily at discriminatory consequences, not motive.[105] Coming at a time when proof of motive is very difficult to acquire in discrimination cases, *Wards Cove* represented an overwhelming challenge for Title VII plaintiffs.

Rather than face an outcry from overruling statutory civil rights precedents,[106] the Court humbled itself to having written unclear opinions, susceptible to varying interpretations.[107] Anticipating the burdens[108] that the new requirements placed on plaintiffs, solace was offered in liberal, albeit deficient, discovery rules,[109] and the holding's conformity "with the usual method" of burden allocation.[110] The move to judicial "business as usual" represents a depar-

100. *Id.*

101. *Id.*

102. *Id.*

103. Business necessity proof had traditionally been the responsibility of defendant. *See* Connecticut v. Teal, 457 U.S. 440, 446-47 (1982); *Dothard*, 433 U.S. at 329; *Albemarle Paper*, 422 U.S. at 425; Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

104. *See Wards Cove*, 490 U.S. at 669-71 (Stevens, J., dissenting).

105. *See Griggs*, 401 U.S. at 432; *see also* H.R. 238, 92d Cong., 1st Sess. 8 (1972) (Title VII intended to reach "all" discriminatory practices).

106. *See Griggs*, 401 U.S. 424, and its progeny. The dissenters in *Wards Cove* commented that the majority's holding was tantamount to a summary rejection of the construction given this statute as evidenced by prior Court decisions. *Wards Cove*, 490 U.S. at 671-72 (Stevens, J., dissenting). They also pointed to congressional acquiescence and approval of prior interpretations by utilizing the previously established standard in later statutory schemes. *Id.* at 666 n.9.

107. *Wards Cove*, 490 U.S. at 660 (stating "[w]e acknowledge that some of our earlier decisions can be read as suggesting otherwise").

108. The Court fully understood that requiring impact plaintiffs to show each wrongful practice with specificity, as well as causation, is extremely demanding. *Id.* at 657. The very fact of plaintiff's inability to get "smoking gun" proof had necessitated an interpretation of Title VII allowing impact claims.

109. *Id.* at 657. The dissent highlighted the deficiency of this proposition by noting that in the case at bar, defendant did not maintain the required information that arguably made discovery rules advantageous. *Id.* at 673 n.20 (Stevens, J., dissenting).

110. *Id.* at 659-60 (Stevens, J., dissenting). However, the dissent noted that proof require-

ture from past construction and sensitivity shown for impact plaintiffs,[111] and reflects a new selective application of standards.[112]

However, the Court's relief rules did not follow traditional recovery principles. Specifically, no affirmative obligation was placed on culpable defendants since their legal obligation could be met by "adopting" the correct behavior which plaintiff is required to fashion.[113] Justice Stevens regarded such primary sensitivity to employer concerns as the Court's "latest sojourn into judicial activism."[114] The decision's impact was immediate, and lower court judges quickly confirmed that *Wards Cove* wrought dramatic changes in disparate impact standards[115] and employment discrimination law generally.[116] Scholars also quickly observed that the decision was not supported by the statute, court precedents interpreting it or proof principles governing this area.[117]

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ments previously allocated to employers were no different than for a typical affirmative defense. *Id.* at 670.

111. In the past, impact plaintiffs who established their prima facie case typically prevailed unless the employer could show business necessity. *See Griggs*, 401 U.S. at 431.

112. In rejecting a requirement that employers show the practice to be essential or indispensable, the Court noted that, "this degree of scrutiny would be almost impossible for most employers to meet . . . ." *Wards Cove*, 490 U.S. at 659. Further, while the Court was all too willing to get involved in "costs" and "burdens" evaluation of plaintiff's proffered alternative practice, it instantly lost competence when evaluating the employer implemented practice being challenged. *Id.* at 653.

113. According to the Court, after plaintiff has identified the specific practice, proved causation, and proved the existence of equally effective, less discriminatory alternatives, the employer need only adopt these alternatives to avoid liability. *Id.* at 659-61.

114. *Id.* at 663 (Stevens, J., dissenting).

115. *See* Allen v. Seidman, 881 F.2d 375, 377 (7th Cir. 1989) (noting that *Wards Cove* changed the "ground rules" lower courts previously followed for disparate impact cases, and brought about a dramatic change in the law).

116. *See* Green v. USX Corp., 896 F.2d 801, 804 (3d Cir. 1990) (stating that *Wards Cove* brought "significant changes in employment discrimination law"); *see also* Hill v. Seaboard Coast Line R.R. Co., 885 F.2d 804, 812 n.12 (11th Cir. 1989) (noting that *Wards Cove* overruled the law on business necessity in that circuit).

117. *See, e.g.*, L. Camille Hébert, *Redefining the Burdens of Proof in Title VII Litigation: Will the Disparate Impact Theory Survive* Wards Cove *and the Civil Rights Act of 1990?*, 32 B.C. L. REV. 1 (1990) (tracing the legislative and judicial evolution of impact theory and arguing for its continuing application as a distinct theory of recovery); Candace S. Kovacic-Fleischer, *Proving Discrimination After* Price Waterhouse *and* Wards Cove*: Semantics as Substance*, 39 AM. U. L. REV. 615 (1990) (arguing that the Court mistakenly relied on "presumption" principles in deciding *Wards Cove*, and emphasizing the need to distinguish between presumption and inference, as well as production and persuasion when deciding cases in this area).

4. Limiting the Scope of § 1981

In *Patterson v. McLean Credit Union*,[118] the Court was called upon to interpret the antidiscrimination mandate of § 1981[119] in the "making and enforcement"[120] of contracts. The Court held that this provision does not prohibit discrimination on the job and is limited to discrimination in the hiring process.[121] Applying plain meaning[122] construction principles, the Court determined that the "making" prong only related to discriminatory refusals to contract, or offers to contract, on discriminatory terms.[123] The "enforcement"[124] prong was determined to be specifically related to equal or nondiscriminatory access to legal processes.[125] Amidst claims of fidelity to the national policy prohibiting discrimination,[126] the Court glossed over the com-

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118. 491 U.S. 164 (1989).

119. 42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

120. *Patterson*, 491 U.S. at 171.

121. *Id.* at 177. The Court determined that neither logic nor semantics could justify an interpretation that extended § 1981 coverage to postformation conduct. *Id.* The suggestion that logic might have persuaded the Court to rule differently is misleading, since the Court had flatly rejected logic in interpreting another civil rights statute. *See* Lorance v. AT&T Technologies, Inc., 490 U.S. 900, 907 n.3 (1989) (rejecting the most natural and plausible reading of § 703(h) of the 1964 Civil Rights Act).

122. *Patterson*, 491 U.S. at 176. Rather than trace the legislative history to get a general sense of the statute's purpose and essence, the Court opted for a mechanical conclusory starting point finding that Congress intended to grant only two limited rights in § 1981: one right to make contracts, the other to enforce contracts. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 177. The Court found that this prong was designed to prohibit "discrimination that infects the legal process in ways that prevent one from enforcing contract rights, by reason of his or her race . . . ." *Id.*

126. *Id.* at 174 ("[E]very pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination." (citing Bob Jones Univ. v. United States, 461 U.S. 574 (1983))). Then, in an almost apologetic fashion, the Court concluded that:

> The law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension. Neither our words nor our decisions should be interpreted as signaling one inch of retreat from Congress' policy to forbid discrimination in the private, as well as the public, sphere.

Id. at 188. One need only read this conservative Court's civil rights decisions, however, to ascertain the "miles" of retreat in this area. Of late, the Court has been forthcoming in

pelling legislative history supporting a broader construction.[127]

Although the Court conceded that offers with discriminatory terms fall within the ambit of § 1981 at the formation stage,[128] it rejected a construction and test that would catch postformation conduct that "belie[s] any claim that the contract was entered into in a racially neutral manner."[129] Extensive discussion and reliance on stare decisis principles were substituted for a fair consideration of the statute's text, its legislative history, and the legal nuances of at-will employment.[130] Further, the Court's reliance on stare decisis as the basis of its decision and the observation that "correctness" is not its governing standard suggested that the reasons offered were pretextual.[131] The Court went on to find that postformation conduct

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openly recognizing discrimination and the harm it causes. *See* City of Richmond v. J.A. Croson, 488 U.S. 469, 527 (1989) (Scalia, J., concurring) ("It is plainly true that in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups."); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 278 n.5 (1986) ("No one disputes that there has been race discrimination in this country."). However, the Court has not gotten beyond acknowledgment of harm worked by discrimination. Rather, constitutional color-blindness has been introduced as a standard for all seasons, at a time when its greatest utility is in blocking remedial efforts. *See Croson*, 488 U.S. at 491-93. It is ironic, therefore, that color-blindness was relegated to dissent in past constitutional analysis in order to pave the way for majoritarian race-based advantage. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting).

127. *Patterson*, 491 U.S. at 174-75. Justice Brennan, in dissent, cited extensive legislative history to support his and other dissenters' conclusion that § 1981 was intended to apply beyond refusals to contract in a nondiscriminatory manner. *Id.* at 189-219 (Brennan, J., dissenting). He noted that "[s]ection 1 of the Civil Rights Act was also designed to protect the freedmen from the imposition of working conditions that evidence an intent on the part of the employer not to contract on nondiscriminatory terms." *Id.* at 206 (citations omitted).

128. *Id.* at 176-77.

129. *See id.* at 166. For this construction, the dissent proposed a test of "severe or pervasive" conduct, *id.* at 208 (Brennan, J., dissenting), which was rejected by the majority.

130. *See* Mack A. Player, *What Hath* Patterson *Wrought? A Study in the Failure to Understand the Employment Contract*, 6 LAB. LAW. 183, 187 (1990) (contending that the Court gave a grudging interpretation of § 1981 and failed to understand that at-will employment is not a monolithic relationship).

131. Some observers believed that the Court wanted to overrule *Runyon* and tested the waters by ordering the parties to brief and argue the legality of that case. This decision was greeted with public outrage which may have caused the Court to recoil. *See* Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 179 n.12 (1989); *see also* Reginald C. Govan, *Framing Issues and Acquiring Codes: An Overview of the Legislative Sojourn of the Civil Rights Act of 1991*, 41 DEPAUL L. REV. 1057, 1063 (1992) (the Court's decision to review *Runyon* "unleashed a firestorm of opposition from Congress, religious groups and the civil rights and labor communities, all of whom filed amicus briefs"). In *Patterson*, the Court went to great lengths to emphasize the importance of the rule of law over the erratic proclivities of men. Yet the Court concluded that the "prevailing sense of justice" in this country is the controlling

was actionable under the broader proscriptions of Title VII,[132] and that such specific coverage lessened the need for a different interpretation.[133] The Court also found that its construction did not frustrate the objectives of the statute.[134]

Like the other civil rights cases, *Patterson* untied the construction of civil rights statutes from its moorings of purpose. Analysis of discrimination claims under § 1981 was approached in a narrow manner, despite broad legislative goals and the potential resultant discriminatory consequences of a narrow construction.[135] As such, this integral part of and complement to Title VII was construed to be available to victims of discrimination only in limited circumstances.[136] The decision's impact was immediate, and numerous cases have demonstrated its effects.[137]

5. Eroding the Integrity of Consent Decrees

In *Martin v. Wilks*,[138] the Court addressed the increasing hostil-

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standard. *Patterson*, 491 U.S. at 174. The Court found that: "Whether *Runyon*'s interpretation of § 1981 as prohibiting racial discrimination in the making and enforcement of private contracts is right or wrong as an original matter, it is certain that it is not inconsistent with the prevailing sense of justice in this country." *Id.* Further, rather than be guided by "growth of judicial doctrine," or legislative history, the Court ruled that "whether or not *Runyon* was correct as an initial matter, there is no special justification for departing here from the rule of *stare decisis*." *Id.* at 175 n.1. While this self-contradiction is flagrant and disheartening, it does illuminate the human proclivities of members of the Court and their response to societal proclivities in opposition to remedial schemes. To some extent, it adopts Justice Rehnquist's personal conclusion that men cannot fashion laws to create an equitable multiracial society. *See* Cleveland Bd. of Educ. v. Reed, 445 U.S. 935, 938 (1980) (Rehnquist, J., dissenting from denial of certiorari).

132. *Patterson*, 491 U.S. at 180. The Court pointed to its "implicit" approval of harassment actions under Title VII, where the conduct is severe and pervasive enough to alter working conditions and create an abusive environment. *Id.*

133. *Id.* at 181.

134. *Id.* at 180-82.

135. *Id.* at 189 (Brennan, J., dissenting) ("[The Court] . . . gives this landmark civil rights statute a needlessly cramped interpretation. The Court has to strain hard to justify this choice to confine § 1981 within the narrowest possible scope, selecting the most pinched reading . . . [and] ignoring powerful evidence about the Reconstruction Congress' concerns . . . .").

136. Discrimination victims have placed heavy reliance in the past on § 1981 because of its broad relief scheme which includes jury trials and compensatory and punitive damages, all of which are unavailable under Title VII.

137. *See, e.g.*, Carroll v. General Accident Ins. Co., 891 F.2d 1174 (5th Cir. 1990); Council v. City of Topeka, No. 88-4195-S (D. Kan. Jan. 11, 1990); Coleman v. Domino's Pizza, Inc., 728 F. Supp. 1528 (S.D. Ala. 1990); Miller v. Shawmut Bank of Boston, N.A., 726 F. Supp. 337 (D. Mass. 1989).

138. 490 U.S. 755 (1989).

ity to consent decrees, manifested in the form of reverse discrimination suits. The Court found that a court-approved consent decree that provided notice, and facilitated a hearing and consideration of objections of interested parties, did not preclude individuals who were not joined in the litigation from later challenging the decree.[139] Using *in personam* jurisdiction principles as authority, the Court determined that white firefighters who sat by the sidelines and did nothing while the decree was being formulated must still have their day in court.[140]

Once the issue was framed in deep-rooted Anglo-American jurisprudential terms, it was decided that all the protections afforded nonparties by mandatory intervention and joinder rules should govern.[141] No credence was given to the "impermissible collateral attack"[142] argument, although its widespread adoption by the circuits had made it the majority rule.[143] Although conceding the strong public policy in favor of voluntary affirmative action plans,[144] and recognizing the burdens mandatory joinder entails for civil rights litigants,[145] no accommodation to preserve the integrity of consent decrees was made. Rather, the Court conveniently laid blame on the "Rules" as compelling its conclusion.[146]

139. *Id.* at 758-59.

140. *Id.* at 761-63. Justice Stevens, in dissent, developed the competing truism in Anglo-American jurisprudence that an interested or affected party may be disadvantaged or harmed if that person sits idly by on the sidelines and watches the litigation take place. *Id.* at 769-77 (Stevens, J., dissenting). While a party failing to intervene or not joined cannot be deprived of legal rights, the grounds for later attack become narrower because that individual's status is one of collateral attacker versus appellant. *Id.* at 771-72 (Stevens, J., dissenting).

141. *Id.* at 764-68. Rule 19 of the Federal Rules of Civil Procedure was therefore deemed controlling.

142. *Id.* at 762-63 n.3. At the time the case was decided, the Court could only identify one other circuit that allowed nonparties to attack consent decrees. *Id.* at 763 n.3.

143. Referring to petitioners impermissible attack argument, the Court found: "The position has sufficient appeal to have commanded the approval of the great majority of the federal courts of appeals . . . ." *Id.* at 762 (footnote omitted). Absent from the Court's finding is the law and logic that persuaded circuit courts to take this approach.

144. *See id.* at 761.

145. *Id.* at 766-67 (noting burdening factors such as the difficulty in identifying adverse claimants who may be numerous, the potential for inconsistent judgments stemming from failure to join, and wasted resources on duplicative litigation). The Court maintained that civil rights plaintiffs must bear these risks and burdens although they have "less able shoulders." *Id.* at 767.

146. *See id.* (stating that "[e]ven if we were wholly persuaded by these arguments as a matter of policy, acceptance of them would require a rewriting rather than an interpretation of the relevant Rules"). For a more expansive argument in support of the application of Rule

The Court's adoption of stringent intervention and joinder rules represented an avoidance of equally compelling permissive rules that it had previously determined satisfy due process concerns.[147] Further, by sheltering all "adversely affected"[148] persons under the mandatory joinder and intervention umbrella, a large number of affirmative action plans and consent decrees were open to attack by a showing that individuals were "affected,"[149] even if they had intentionally bypassed opportunities to intervene.[150] The elimination of finality attributes attendant to consent decrees may have led to a true "litigation bonanza,"[151] thereby eroding settlements as the preferred mode of resolving discrimination disputes.

The *Wilks* decision created a battle of attrition environment for civil rights litigants. Many settlements and affirmative action plans that were regarded as firm gains became vulnerable to new challenges. By destroying finality and predictability of past judgments and

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19, see Samuel Issacharoff, *When Substance Mandates Procedure:* Martin v. Wilks *and the Rights of Vested Incumbents in Civil Rights Consent Decrees*, 77 CORNELL L. REV. 189, 236 (1992) (arguing that vested "seniority-based property rights," in conjunction with the reliance and expectational interests of white public sector employees, command the procedural due process protection of Rule 19, and suggesting that the "burdens" of remediation should be allocated to the employer, while recognizing that white incumbents benefitted from the employer's discriminatory conduct).

147. *See* Tulsa Professional Collection Serv. v. Pope, 485 U.S. 478 (1988); Matthews v. Eldridge, 424 U.S. 319 (1976); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (finding that notice and opportunity to be heard satisfy due process and are sufficient to preclude collateral attack). The dissent in *Wilks* stated that:

> There is nothing unusual about the fact that litigation between adverse parties may, as a practical matter, seriously impair the interests of the third persons who elect to sit on the sidelines. Indeed, in complex litigation this Court has squarely held that a sideline-sitter may be bound as firmly as an actual party if he had adequate notice and a fair opportunity to intervene and if the judicial interest in finality is sufficiently strong.

490 U.S. at 792 (Stevens, J., dissenting) (citations omitted).

148. *Wilks*, 490 U.S. at 766-70.

149. *Id.* at 767.

150. *See id.* at 768 ("Insofar as the argument is bottomed on the idea that it may be easier to settle claims among a disparate group of affected persons if they are all before the court, joinder bids fair to accomplish that result as well as a regime of mandatory intervention."); *cf. id.* at 770-71 (Stevens, J., dissenting). The dissent argued that:

> There is no reason . . . why the consent decree might not produce changes in conditions at the white firefighters' place of employment that, as a practical matter, may have a serious effect on their opportunities for employment or promotion even though they are not bound by the decrees in any legal sense.

Id.

151. President Bush, in vetoing the Civil Rights Act of 1990, characterized it as a litigation bonanza. 136 CONG. REC. S16562 (daily ed. Oct. 24, 1990). The *Wilks* decision will more likely create a litigation bonanza in the form of reverse discrimination suits.

settlements, *Wilks* broadened the battlefront immeasurably, thereby spreading civil rights advocates very thin. Although a few minorities have benefitted[152] from *Wilks*, the decision's primary utility has been in dismantling hard-won gains.[153]

6. Insulating Losing Intervenors from Attorney's Fees

Soon after deciding *Wilks*, the Court decided *Independent Federation of Flight Attendants v. Zipes.*[154] This case presented the specific issue of whether losing intervenors were liable for plaintiffs' attorney's fees under section 706(k)[155] of Title VII.[156] The Court found that losing intervenors are liable only when their actions could be regarded as "frivolous, unreasonable, or without foundation."[157] To reach this conclusion, the Court elevated the American rule that winners generally are not entitled to attorney's fees from losers,[158] over the text-specific "prevailing party" standard in the statute.[159] In effect, the Court used a general recovery principle to trump plain text. The Court supplemented its conclusion with another general principle that fees liability and merits liability run together,[160] while paying

152. *See, e.g.*, Jansen v. City of Cincinnati, 904 F.2d 336, 339-41 (6th Cir. 1990) (allowing the class of black applicants and employees to intervene in reverse discrimination case brought by white applicants); Riddle v. Cerro Wire & Cable Group, Inc., 902 F.2d 918, 921-23 (11th Cir. 1990) (holding that a consent decree entered on female employee's behalf, but to which she was not a party, is not res judicata to the Title VII claim against employer); Bridgeport Guardians, Inc. v. City of Bridgeport, 735 F. Supp. 1126, 1132-33 (D. Conn. 1990) (holding that an agreement to a promotional process in earlier decree is not a bar to new discrimination claims); Richardson v. Lamar County Bd. of Educ., 729 F. Supp. 806, 812-13 (M.D. Ala. 1989) (holding that a settlement under a consent decree is not res judicata because state and county boards' interests were not aligned).

153. *See Riddle*, 902 F.2d 918; *Bridgeport Guardians*, 735 F. Supp. 1126; *Richardson*, 729 F. Supp. 806.

154. 491 U.S. 754 (1989).

155. 42 U.S.C. § 2000e-5(k) provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

156. *Zipes*, 491 U.S. at 755.

157. *Id.* at 760 (citation omitted).

158. *Id.* at 758.

159. The prevailing party approach was established to facilitate and encourage private enforcement of Title VII. *See generally* Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 402 (1968). Despite that statute's literal wording, the Court in *Zipes* determined that the argument that the prevailing party must be given primacy was a non sequitur. Instead, it offered the tortured explanation that: "To say that *only* the prevailing party gets fees is not to say that the prevailing party's interests are always first and foremost in determining *whether* he gets them." *Zipes*, 491 U.S. at 760 (emphasis in original).

160. *See id.* at 763. In Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240

lip service to the statutory discretion granted lower courts that was clearly provided for in section 706(k).[161] The Court also disregarded precedents establishing that fee payment is not inextricably tied to liability,[162] and substituted its judgment for that of Congress, which it rationalized with assumptions about what Congress intended.[163]

Although the Court recognized the chilling effect its decision would have on Title VII plaintiffs,[164] it established an environment where intervenors can drain plaintiffs' resources by re-litigating issues which plaintiffs have already prevailed on.[165] Further, the Court took the opportunity to polish the image of intervenors,[166] who in Title VII litigation essentially function as plaintiffs' adversaries.[167]

(1975), the Court held that absent statutory authorization, attorney fees should not generally be awarded to winning parties. It further held that awards under a court's inherent powers are limited to common fund and benefit, or bad faith situations. *Id.* at 257-60. Unfortunately, Title VII does not specifically deal with fee awards against losing intervenors. *See* Kentucky v. Graham, 473 U.S. 159, 164 (1985) (holding that where statute does not specify, loser should pay). This leaves much room for an interpretation that promotes private enforcement of the statute, which holds intervenors who essentially function as plaintiff's adversaries responsible for aggravating plaintiff's litigation costs. *See* Vulcan Soc'y of Westchester County, Inc. v. Fire Dep't, 533 F. Supp. 1054, 1061-62 (S.D.N.Y. 1982).

A different situation is presented when the traditional civil rights plaintiff is a defendant intervenor, as in cases where such plaintiffs join with employers to defend challenges to affirmative action programs on reverse discrimination grounds. In such cases where defendant-intervenor is a functional plaintiff, an award of fees to a prevailing defendant also promotes the underlying goals of the statute by giving minorities incentive to vindicate civil rights violations. *See* Baker v. City of Detroit, 504 F. Supp. 841, 850-51 (E.D. Mich. 1980) (avoiding the Court's holding in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), that prevailing defendants must show plaintiff's case was groundless or frivolous to get fee award, and awarding fees through liberal construction of the Fees Award Act). Similar analysis was utilized in the voting rights area. *See* Donnell v. United States, 682 F.2d 240, 245-49 (D.C. Cir. 1982), *cert. denied*, 495 U.S. 1204 (1983); *see also* Haycraft v. Hollenbach, 606 F.2d 128, 132 (6th Cir. 1979) (desegregation); Akron Ctr. for Reprod. Health v. City of Akron, 604 F. Supp. 1268, 1273-74 (N.D. Ohio 1984) (abortion).

161. *Zipes*, 491 U.S. at 772 (Marshall, J., dissenting) (noting that "the majority . . . ignores Congress' explicit conferral of discretion on the district courts, and instead establishes an absolute rule that, in all circumstances, a court must treat an intervenor like a plaintiff for fee liability purposes") (footnote omitted).

162. *Id.* at 771-72.

163. *Id.* at 758-60.

164. *See id.* at 762 ("Even if the inability generally to recover fees against intervenors did create some marginal disincentive against Title VII suits . . . .").

165. While the majority focused on how much the culpable defendant had spent on attorney's fees, it paid no attention to the financial hardship that intervenors imposed on the plaintiff. *See id.* at 761-62. Harm to plaintiff was noted by the dissent to be approximately $200,000 after three years of litigation. *Id.* at 770-71.

166. Intervenors were variously referred to as blameless, innocent, not disfavored by Congress, welcome, and promoting vigorous adversary proceedings. *Id.* at 761-66.

167. The Court correctly noted that an intervenor can advance the same arguments as

In placing the interests of intervenors on the same footing as that of plaintiffs, the Court restructured the hierarchical scheme Congress established in the statute for determining attorney fee awards.[168] By limiting the discretion that Congress gave lower courts in plain permissive language, the Court disregarded textual directives it selectively advocated as the key to statutory construction.[169]

To make matters worse, the Court expanded its ruling to collateral attacks.[170] Although the issue was not before it,[171] nor decided in *Wilks* as suggested,[172] the Court stated that *Wilks* "establishes that a party affected by the decree in a Title VII case need not intervene but may attack the decree collaterally—in which suit the original Title VII plaintiff defending the decree would have no basis for claiming attorney's fees."[173] This broad-brushed approach triggered Justice Marshall's response that the collateral attack statement constituted "conclusory dicta of the worst kind."[174]

The likely consequence of *Zipes* is that Title VII defendants will increase their reliance on intervenors to raise their defenses, and thereby minimize their fee exposure.[175] Already constrained by limited resources,[176] plaintiffs may be forced to accept discriminatory conduct, which in effect constructively discharges them from their position as private attorneys general.[177]

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defendant. *Id.* at 765. This assessment is an understatement, because if intervenors were allied to plaintiffs, the *Zipes* decision would probably have been welcomed by the civil rights community.

168. Although the Court recognized congressional desires to equip discrimination victims to enforce Title VII through the award of attorney fees, it nonetheless disregarded potent legislative history that refuted its interpretation. *Id.* at 758-60.

169. Justice Marshall observed that even congressional hostility to categorical rules in this area did not serve as a restraint on the Court. *Id.* at 771 (Marshall, J., dissenting).

170. *See id.* at 762-65.

171. Justice Scalia, writing for the Court, set out the issue in the opening paragraph: "In this case we must determine under what circumstances § 706(k) permits a court to award attorney's fees against intervenors who have not been found to have violated the Civil Rights Act or any other federal law." *Id.* at 755.

172. *See id.* at 762.

173. *Id.*

174. *Id.* at 777 n.6 (Marshall, J., dissenting).

175. *Id.* at 780 (Marshall, J., dissenting).

176. "Without the hope of obtaining compensation for the expenditures caused by intervenors, many victims of discrimination will be forced to forgo remedial litigation for lack of financial resources." *Id.* "Congress recognized that victims of discrimination often lack the resources to retain paid counsel, and frequently are unable to attract lawyers on a contingency basis . . . ." *Id.* at 773 (citation omitted).

177. *See id.* at 758-59; *see also id.* at 772 ("Given the scarcity of public resources available for enforcement," private individuals are the primary enforcers of civil rights laws).

Already confined by the compromises of the legislative process, Title VII was clearly not a panacea for discrimination victims. The Court's narrow construction only served to diminish the statute's potential for achieving its goal of a discrimination-free workplace.

C. *The Bedrock Jurisprudence Rationale*

The use of constitutional, statutory, or common law theories to resolve Title VII issues is flawed in the first instance because of their different genesis and genre.[178] But flaws aside, application of "bedrock"[179] Anglo-American principles is not, as a general proposition, a harmful reference point for civil rights plaintiffs. However, the selective use of bedrock principles to defeat fair employment claims betrays the Court's commitment to achieving the goals of civil rights legislation.

There is no shortage of bedrock principles to support the claims

178. Many of the common law analogies were developed in the *Price Waterhouse* case. Because causation issues naturally spring from employer reliance on legitimate and illegitimate considerations, this area has been one of bountiful legal critique. *See, e.g.*, Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1 (1990) (Professors Blumoff and Lewis illustrate the defect of analogizing mixed-motive analysis under Title VII to "but for" causation analysis in tort theory. They point out that multiple forces tort cases lack a motivation element that makes the legality of a defendant's actions irrelevant. They further point out that tort theory presupposes the existence of truly independent forces coming together to cause harm, while Title VII contains a statutory proscription that certain factors not be considered. And that separating discriminatory from legitimate motives in an employer's thought process is virtually impossible.); Blumrosen, *supra* note 47, at 1035-37 (arguing that reliance on constitutional analysis in *Mt. Healthy* and the National Labor Relations Act in *Teamsters* to resolve mixed-motive cases is tantamount to blaming employees for being members of protected groups—a condition they have no control over); *id.* at 1042 ("Psychological forces cannot be measured by the same calculus used for physical mechanical forces.").

At the relief stage, common law analogies would be equally misleading. Contract and tort remedies, for example, are not confined by damage caps and discretionary injunctive and declaratory relief rules. Rather, they provide a panoply of remedies not available in the employment discrimination area.

179. *See, e.g.*, First Publications v. Rural Tel. Serv., 111 S. Ct. 1282 (1991); Lankford v. Idaho, 111 S. Ct. 1723 (1991); Sawyer v. Smith, 497 U.S. 227, 228 (1990); United States v. Eichman, 496 U.S. 310, 319 (1990); Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989). Although the Court makes constant reference to the term "bedrock," it never really defines its meaning or parameters of operation. Judging from the context of its usage it may be fairly said that the term is intended as a reference to well established foundational legal principles. However, the absence of qualifying or limiting standards allows the Court to freely choose which principles it wants to assign that label to. Although one may disagree with the Court's determination in the cases discussed, that a particular principle is "bedrock," this Article accepts the Court's determination for purposes of discussion, and focuses instead on many deeply rooted concepts that the Court ignores or subjugates in its analysis.

of civil rights plaintiffs. For example, it is fundamental to American jurisprudence that if one's legally protected right is violated, the violator will be held responsible.[180] This principle holds true, even if there is no economic harm to the wronged party. In such cases, the court may simply award injunctive or other limited relief.[181] *Price Waterhouse*'s holding that proven wrongdoing may still not provide a basis for liability, departs from bedrock common law causation rules for mixed-motive and concurrent cause cases.[182] In this area, courts historically inquired whether the defendant's illegal conduct played a role or was the dominant force in causing the harm; they did not hypothesize what the defendant would have done absent the illegal consideration.[183] Liability and relief in mixed-motive cases are also well supported by the statute.[184] Moreover, "same decision" and "harmless error" causation analysis falls short of Title VII's deterrence and compensation goals.[185]

The conclusion in *Lorance* that the statute of limitations for discriminatory seniority policies begins to run when such policies are adopted also contravenes the long established and widely accepted "continuing violation" theory.[186] *Lorance* also reflects a shift away

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180. Prior to Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), this principle had been followed by some courts in civil rights cases. In promotion cases where the employer demonstrated that non-discriminatory reasons supported the denial of opportunity, courts still enjoined the unlawful portion of the employer's conduct and sometimes awarded plaintiff attorney's fees. *See* Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985); King v. Trans World Airlines, Inc., 738 F.2d 255 (8th Cir. 1984); Ostroff v. Employment Exch., Inc., 683 F.2d 302 (9th Cir. 1982); Nanty v. Barrows Co., 660 F.2d 1327 (9th Cir. 1981).

181. *Nanty*, 660 F.2d at 1333.

182. *See generally* Weber, *supra* note 48 (discussing mixed forces causation as it affects liability in the common law context and juxtaposing that to the Court's approach in *Price Waterhouse*; Professor Weber concludes that traditional common law rules, Title VII, and legal theories generally, support the imposition of liability and the award of damages in mixed-motive discrimination cases).

183. *Id.* at 513-14.

184. *Id.* at 534-36. Imposing liability and awarding damages in mixed-motive cases also advances the statute's deterrence function. *Id.* at 531-32.

185. *See* Belton, *Burden-Shifting*, *supra* note 46; Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982) (discussing Title VII's legislative history and court precedents *vis-a-vis* mixed-motive analysis, and proposing a causation theory measured against the statute's goals, policy concerns, and the public interest).

186. *See* Bazemore v. Friday, 478 U.S. 385 (1986); Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); Corning Glass Works v. Brennan, 417 U.S. 188 (1974); Johnson v. General Elec., 840 F.2d 132 (1st Cir. 1988); Cook v. Pan Am. World Airways, Inc., 771 F.2d 635 (2d Cir. 1985); Hall v. Ledex, Inc., 669 F.2d 397 (6th Cir. 1982); Jenkins v. Home Ins. Co., 635 F.2d 310 (4th Cir. 1980); Hodgson v. Behrens Drug Co., 475 F.2d 1041 (5th

from balanced, equitable, and humanitarian considerations previously applied to determine how soon a claimant must begin asserting a legal right.[187] *Wards Cove*'s adoption of the "usual methods of proof"[188] approach, which requires that plaintiff identify the wrongful practice and show causation, departs from legislative intent, statutory precedents and fairness standards historically applied by courts under similar circumstances.[189]

Early in the development of American jurisprudence, courts recognized the difficulty innocent victims might have in obtaining evidence of wrongdoing. Rules, such as *res ipsa loquitur*,[190] were de-

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Cir. 1973).

187. *See* Urie v. Thompson, 337 U.S. 163, 169-81 (1948). The equitable principles outlined in *Urie* were applied by virtually every court in the country to preserve plaintiffs' rights. *See, e.g.*, Prudential-LMI Commercial Ins. v. Superior Court, 798 P.2d 1230, 1238 (Cal. 1990) (interpreting insurance code's one-year statute of limitations provision triggered by the inception of loss as intending to allow time for reasonable discovery of loss); *see also* United States v. Kubrick, 444 U.S. 111, 123-24 (1979) (holding that plaintiffs could recover under the Federal Trade Commission Act even after the statute of limitations ran because the statute is only triggered when a reasonably diligent claimant knows enough to protect himself); Callahan v. State, 464 N.W.2d 268, 271 (Iowa 1990) (interpreting Iowa's Tort Claims Act, which bars claims two years after they occurred, as allowing plaintiff additional time to discover injury).

The Court in *Lorance* relied on Delaware State College v. Ricks, 449 U.S. 250 (1980), for the proposition that the first discriminatory act triggers the statute of limitations provision, regardless of when the most painful effects are felt. *Lorance v. AT&T Technologies*, 490 U.S. 900, 906-08 (1989). Besides being factually distinguishable, *Delaware State College* in large measure rests on the application of equitable standards since the employee had knowledge and understood the implication of his denial of tenure. Because the Court's interpretation is at odds with the remedial purposes of the statute, Justice Marshall noted, "[t]his severe interpretation of § 706(e) will come as a surprise to Congress, whose goals . . . never included conferring absolute immunity on discriminatorily adopted seniority systems that survive their first 300 days." *Id.* at 914 (Marshall, J., dissenting).

188. *Wards Cove*, 490 U.S. at 657.

189. *See* Blumoff & Lewis, *supra* note 178, at 72-77.

190. This doctrine, defined in BLACK'S LAW DICTIONARY 1305 (6th ed. 1990), as "the thing speaks for itself," was used as early as 1614 in cases where usury was clear on the face of an instrument. *See* Roberts v. Tremayne, 79 Eng. Rep. 433 (1614). It became regarded as a common-law doctrine of jurisprudence in Byrne v. Boadle, 159 Eng. Rep. 299 (1863). As developed in *Byrne*, the rule shifted evidentiary burdens to the defendant after plaintiff established a prima facie case by showing that the event occurred, minus evidence of causation. *See* Stebel v. Connecticut Co., 96 A. 171 (Conn. 1915); *see also* JOHN H. WIGMORE, EVIDENCE § 2509, at 498 (2d ed. 1923). The idea is that evidence of the true cause of harm is accessible to defendant, not plaintiff, and therefore plaintiff should not shoulder that burden. Like pre-*Wards Cove* disparate impact burden allocation, certain facts warrant an inference of negligence and use of circumstantial evidence where direct evidence is lacking. *See* Sweeney v. Erving, 228 U.S. 233 (1913). The doctrine gives plaintiff a procedural advantage that is otherwise unavailable. *See* William L. Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241 (1936) (arguing that the doctrine may create a

veloped to accommodate plaintiffs, and were later expanded with doctrines such as enterprise liability, market share, and risk contribution theories which shift causation, proof, and relief responsibilities to defendants.[191] Further, it is quite aberrational in Anglo-American jurisprudence for a court to impose a penalty that requires the culpable party to adopt the correct behavior, which the innocent party is required to fashion.

Patterson's plain meaning approach to civil rights statutory construction, and reliance on stare decisis principles to uphold *Runyon*, do violence to the text, context, and purpose of civil rights statutes and well established construction principles. The Court's refusal in *Johnson* to overrule *Weber*, exemplifies traditional stare decisis that is minority-friendly.[192] *Wilks*'s imposition of mandatory intervention rules, and *Zipes*'s application of the American rule in determining fee recovery, must overcome countervailing sensitivity to the rights of discrimination victims.[193]

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permissible inference, presumption, or place the ultimate burden of proof on defendant); *see also* Johnson v. United States, 333 U.S. 46 (1948) (arguing that application of the doctrine warrants but does not compel an inference of negligence). The widespread use of this doctrine continues despite criticism. *See* John F. Thorne III, Comment, *Mathematics, Fuzzy Negligence, and the Logic of Res Ipsa Loquitur*, 75 NW. U. L. REV. 147 (1980).

191. *See* Hall v. E.I. DuPont de Nemours & Co., 345 F. Supp. 353, 371-80 (E.D.N.Y. 1972) (enterprise liability case shifting burden to show causation to defendants because of plaintiff's inability to identify particular manufacturer); Sindell v. Abbott Labs., 607 P.2d 924, 936-38 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980) (shifting burden of proof to defendants to show that they could not have made the product that injured plaintiff); Collins v. Eli Lilly Co., 342 N.W.2d 37, 51-53 (Wis.), *cert. denied*, 469 U.S. 826 (1984) (adopting a "risk contribution" theory to impose all relief responsibilities on any one member of the potential class of defendants causing the injury).

Legal scholarship has also provided substantial analytic support for expanded modes of proof and recovery. For a critical discussion of this shift in legal thinking on causation, burden allocation, and group liability over individual liability principles, see Robert A. Baruch Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. REV. 1473 (1986); Stephen A. Spitz, *From Res Ipsa Loquitur to Diethylstilbestrol: The Unidentifiable Tortfeasor in California*, 65 IND. L.J. 591 (1990) (characterizing concert of action and alternative liability theories as enhanced res ipsa loquitur).

Adjustments in traditional proof and recovery principles have also been made in the area of toxic torts to respond to the idiosyncracies of that area. *See* Ora F. Harris, Jr., *Toxic Tort Litigation and the Causation Element: Is There Any Hope of Reconciliation?*, 40 SW. L.J. 909 (1986).

192. *See* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1409-14 (1988) (arguing that respect for *Weber*'s integrity is grounded in traditional stare decisis analysis, and rejecting Justice Scalia's contentions that *Weber* misinterpreted unambiguous statutory text, materially departed from prior Court decisions interpreting Title VII, and converted the statute from an instrument of color-blindness to one of racism).

193. This sensitivity calls for uniformity and protection of "innocent" intervenors rights,'

An initial reading of the latest employment decisions may give the impression that the Court is moving its analysis of civil rights employment laws to achieve coherence with mainstream Anglo-American jurisprudential rules governing liability and relief. However, these decisions more accurately reflect an employer protective analytical scheme, with statutory antidiscrimination goals subjugated to color-blind criteria. Principles of stare decisis which prevented the Court from overruling *Runyon* may be too weak a restraint whenever a conservative Court takes a second look at the holdings in *United Steelworkers of America v. Weber*[194] and *Johnson v. Transportation Agency*.[195] Justice O'Connor warned in *Johnson* that her stare decisis convictions were overwhelmed by Justice Scalia's statutory construction arguments.[196] Fidelity to neutral principles and stare decisis in *Patterson*, in order to avoid overruling *Runyon v. McCrary*,[197] is devious because they were adopted with full recognition that § 1981 was left vulnerable.[198] Imposition of procedural rules in *Wilks* to dismantle hard won gains cannot be easily reconciled with their contemporaneous use in *Lorance* to bar valid discrimination claims.

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notwithstanding the fact that there is a significant distinction between an intervenor seeking to prevent remediation, and one who is a civil rights advocate. *See* David Goldberger, *First Amendment Constraints on the Award of Attorney's Fees Against Civil Rights Defendant-Intervenors: The Dilemma of the Innocent Volunteer*, 47 OHIO ST. L.J. 603, 624 (1986) (arguing that the losing intervenor's right to advocacy justifies harm to plaintiff in the form of increased litigation costs and delay in the exercise of a constitutional right); Brian Z. Tamanaha, *The Cost of Preserving Rights: Attorneys' Fee Awards and Intervenors in Civil Rights Litigation*, 19 HARV. C.R.-C.L. L. REV. 109, 130 (1984) (proposing a unified system that puts intervenors on the same plane as plaintiffs).

194. 443 U.S. 193 (1979) (holding that Title VII permits voluntary affirmative action plans that grant preferences to particular groups).

195. 480 U.S. 616 (1987) (holding that Title VII permits an employer to consider an employee's sex in awarding a promotion).

196. *See id.* at 647-56 (O'Connor, J., concurring).

197. 427 U.S. 160 (1976) (holding that § 1981 prohibits private schools from excluding black students solely on the basis of race).

198. As Justice Brennan pointed out in *Patterson*, Justice Kennedy and other Justices that constituted the majority, did not rule that *Runyon* was correctly decided and subsequently ratified by Congress. Patterson v. McLean Credit Union, 491 U.S. 164, 189-219 (1989) (Brennan, J., concurring in part and dissenting in part); *see also* Daniel A. Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 2, 14-15 (1988) (discussing the role and weight of public values in overruling statutory precedents in the civil rights context; Professor Farber observed that societal values should be weighted favorably and the justices who opposed the reconsideration of *Runyon* adhered to principles of judicial candor by making it known that racial equality undergirded their position).

D. *The Move Towards Textualism*

The Court's interpretation of Title VII, as requiring that discrimination victims prove intent, dramatically curtailed the statute's reach, and represented a continuing defeasance of victims' rights not commanded by statutory text. The text of Title VII does not specify an intent requirement.[199] The decision to saddle victims with motive-based responsibility evidenced a relapse into the discredited interpretive format used for Reconstruction-era civil rights statutes, that required state action in order for protection to accrue to black employees forced off their jobs by violence and threats.[200]

The movement towards text-exclusive statutory construction creates the potential for further shrinking of statutory protection. Lately, the Court has increasingly abandoned the use of and reliance on legislative history in construing statutes, and has primarily focused on statutory text and context.[201] Unfortunately, Justice Scalia, the Court's leading advocate of textualism, has been a nemesis of dis-

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199. *See generally* 42 U.S.C. §§ 2000e to 2000e-17; *see also* Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 296-300 (1971) (arguing that a requirement of intent violates the plain text of Title VII). *But see* Lino A. Graglia, *Racial Preferences, Quotas and the Civil Rights Act of 1991*, 41 DEPAUL L. REV. 1117, 1125 (1992) (arguing that § 706(g) of Title VII evidences the statute's design to prohibit only intentional discrimination). Section 706(g) provides in relevant part: "If the court finds that the respondent has intentionally engaged in an unlawful employment practice . . . the court may enjoin the respondent . . . ." 42 U.S.C. § 2000e-5(g). Under Professor Graglia's interpretation, the specific statutory language "because of," is trumped by enforcement options of a court *once intent is found.* Recently, the Court rejected the premiss of such an interpretation by finding that a remedies provision in Title VII cannot surmount a specific statutory mandate. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 245 n.10 (1988). Moreover, the statutory structure does not support such a construction. When Congress wanted to prohibit *only* intentional discrimination, it specifically legislated such a requirement as evidenced by the language dealing with seniority systems in § 703(h). *See* 42 U.S.C. § 2000e-2(h).

200. Hodges v. United States, 203 U.S. 1 (1906) (holding that black employees were not protected in their employment from a group of whites who ran them off their jobs using violence, threats, and intimidation, because this was purely private action). *Hodges* was not overruled until 1968. Jones v. Alfred Mayer Co., 392 U.S. 409 (1968). For a discussion of the evolution of the early civil rights statutes, their application in the employment area, and the Court's destructive interpretations, see Barry L. Refsin, *The Lost Clauses of Section 1981: A Source of Greater Protection After* Patterson v. McClean Credit Union, 138 U. PA. L. REV. 1209 (1990); *see also* Michael Reiss, *Requiem for an "Independent Remedy": The Civil Rights Acts of 1866 and 1871 as Remedies for Employment Discrimination*, 50 S. CAL. L. REV. 961 (1977).

201. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990). Besides rejecting the use of extra-textual materials, this movement advocates greater reliance on new canons of construction and interpretations of parallel statutory schemes.

crimination victims. Even worse, textualism as espoused by Justice Scalia is catching on in the Court.[202] For this reason, the Court's statutory construction opinions have become increasingly noteworthy.

1. Dichotomy Between Textualist Theory and Practice

In *Pavelic & LeFlore v. Marvel Entertainment Group*,[203] the Court applied plain meaning construction to Rule 11 of the Federal Rules of Civil Procedure[204] to find its sanctions applicable only to the attorney who signed court documents.[205] Writing for the Court, Justice Scalia determined that Rule 11 imposed a duty on the signer alone and therefore liability runs only to the signer, not his law firm generally.[206] Justice Scalia conceded that the language was susceptible to other interpretations, but concluded that the plain language and its entire structure supported a narrow interpretation. Law firm accountability and agency arguments did not persuade the Court to reach a different result.[207]

Another example of the Court's plain meaning bent can be found in *Hallstrom v. Tillamook County*.[208] In this case the Court applied plain meaning construction to the Resource Conservation and Recovery Act of 1976 ("RCRA"),[209] although it produced an absurd result. Under the RCRA, citizens are prohibited from bringing a lawsuit prior to the expiration of sixty days after notice to the defendant.[210] Using literal construction, the Court found that the sixty-day notice requirement was an absolute precondition to suit and therefore a sixty-day stay by a court after suit was filed could not be substituted.[211] Although the purpose of the notice provisions was essentially satisfied by the sixty-day stay, and the litigation had already run its course, the Court ruled that the statute's clear text compelled dismissal.[212]

The application of plain meaning construction and textualism generally to employment antidiscrimination statutes has led to particu-

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202. *Id.*
203. 493 U.S. 120 (1989).
204. FED. R. CIV. P. 11.
205. *Pavelic*, 493 U.S. at 123-24.
206. *Id.* at 124.
207. *Id.* at 126.
208. 493 U.S. 20 (1989).
209. 42 U.S.C. § 6972 (1988).
210. *Id.* § 6972(b)(1)(A)(iii).
211. *Hallstrom*, 493 U.S. at 26.
212. *Id.* at 31-33.

larly harsh results. Take for example the *Zipes* opinion which Justice Scalia authored. The language at issue was the fee-shifting provision of section 706(k) which provided, in relevant part, that a "court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ."[213] None of these words appears to be ambiguous. Taken as a whole, they also make grammatical sense. The instruction to a reviewing court is clear. In everyday usage, "may" is commonly used and understood as a grant of permission. It is also defined that way in the dictionary,[214] and has the same meaning in legal parlance. The same is true of the use and understanding of the phrase "prevailing party" in the legal context. It is generally understood to mean the winner of particular issues or the overall litigation.

Justice Scalia found that the language in section 706(k) was *not* plain. Keep in mind that as a textualist, he uses a broad definition of plain[215] and had remarked on at least one occasion that Title VII was a model in statutory draftsmanship.[216] By determining that the language was not plain, Justice Scalia was able to trump the text with judicial canons of construction. To buttress his interpretation he relied on the American rule that winners are not usually entitled to fees from losers, and the principle that fee liability and merits liability run together.[217] Additionally, he cited case law for the proposition that a losing party's interests may sometimes take precedence over those of a prevailing party, and supplied his own assessment that the text did not say that the prevailing party's interest is first and foremost.[218]

Undaunted, he worked further destruction to the text by inverting the permission evidenced by the word "may" and converting it to "may not," thereby disregarding congressional hostility to categorical rules in the fee shifting area.[219] Justice Scalia continued his interpretation "in light of the competing equities that Congress normally takes into account"[220] arguing that his interpretation served "congressional

213. 42 U.S.C. §2000e-5(k).

214. THE NEW YORK TIMES EVERYDAY DICTIONARY 424 (1982).

215. *See, e.g.*, Unites States v. Taylor, 487 U.S. 326, 344-45 (1988) (Scalia, J., concurring) (stating that text may be plain without having specific language on the issue).

216. Johnson v. Transportation Agency, 480 U.S. 616, 657 (1987) (Scalia, J., dissenting). Chief Justice Burger made the same observation about Title VII in United Steelworkers v. Weber, 443 U.S. 193, 216 (1979) (Burger, C.J., dissenting).

217. Independent Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, 758-59 (1989).

218. *Id.* at 760 (citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), for the proposition that conceded statutory goals must compete with *other* considerations to determine what the statute means).

219. *See id.* at 771 (Marshall, J., dissenting).

220. *Id.* at 761. The reference to matters that Congress typically considers is a bitter

policy in favor of 'vigorous' adversary proceedings."[221] He concluded that his interpretation did not contravene Congress' goals because the losing party in this case did not violate the law.[222]

Not only did Justice Scalia substitute his personal judgment for that of plain text in *Zipes*, but his assessment of congressional goals was not grounded in any specific evidence. Extensive legislative history established that Congress made a clear conferral of discretion on district court judges, with the objective of making discrimination victims whole.[223] Congress ranked plaintiffs highest in the fee recovery scheme, and provided them with a source of fees to facilitate vindication of their rights.[224] Justice Scalia placed intervenors on a par with plaintiffs, although he was aware that intervenors essentially function as plaintiffs' adversaries in Title VII proceedings.

In *Lorance*, Justice Scalia rejected "a plausible, and perhaps even the most natural, reading of § 703(h)"[225] of Title VII, in favor of Court precedent. The Court was also called upon to interpret the statute of limitations provisions of section 706(e), which required plaintiffs to file a charge within 180 or 300 days after the alleged unlawful employment practice occurred.[226] Because the policy at issue was fair in form, employees had no clue as to its potential future consequences. The Court was asked to determine when the wrongful practice "occurred" in view of the policy's facial neutrality.

Writing for the Court, Justice Scalia did not find that the text was plain, because the provision is obviously not self-actuating, and

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irony because Justice Scalia is unwilling to rely on information coming directly from Congress. His ability to discern what the *entire* Congress normally considers is questionable, and his willingness to utilize factors that went into the enactment of the statute raises questions of judicial policymaking he so vigorously cautions against.

221. *Id.* at 766 (quoting *Christiansburg Garment*, 434 U.S. at 419).

222. *See id.* at 761-64. Flagrant disregard of congressional goals appears to be a greater abdication of judicial responsibility than reliance on legislative history to achieve congressional goals that plain text controverts.

223. *See id.* at 772 (Marshall, J., dissenting).

224. Justice Marshall argued in his dissent:

> While the majority pays lipservice to the objectives of Title VII, it is guilty of establishing its own "judge-made ranking of rights." By elevating intervenors to the same plane as Title VII plaintiffs, the majority undermines Congress' determination that Title VII plaintiffs alone are "the chosen instruments" for vindicating the national policy against discrimination.

Id. at 774 n.3 (citation omitted); *see also id.* at 776 n.4 (stating that "[b]y contrast, several fee-shifting statutes outside the civil rights field specify that attorney's fees are available only upon a showing of injury in violation of the underlying statute").

225. Lorance v. AT&T Technologies, 490 U.S. 900, 908 (1989).

226. 42 U.S.C. § 2000e-5(e).

when an unlawful employment practice actually occurs can vary with the circumstances. Justice Scalia conceded that his task required a value judgment.[227] He phrased the competing interests in neutral legal terms as a balance between the rationales for allowing valid claims and barring stale ones.[228] In simple terms this boiled down to weighing the interest of employees to be free from discrimination, and the interest of employers to be free from the sanctions of antidiscrimination laws in a time certain, after a wrongful act is committed. Justice Scalia interpreted section 706(e) to mean that the statute begins to run from the time the policy is "adopted,"[229] even though employees may not be aware, affected, or harmed at that time. As his interpretive guide, he used the NLRA and case law interpreting that statute, because of the NLRA's substantive similarities to Title VII. Justice Scalia concluded that the context of the two statutes supported this approach. Completely brushed aside was the plain legal interpretive potential of "occurrence" evidenced by the continuing violation theory developed and accepted by courts.

In *Patterson*, the Court was called upon to interpret § 1981, which provides:

> All persons within the Jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions, of every kind, and to no other.[230]

At issue in *Patterson* was whether § 1981's making and enforcing antidiscrimination mandate protected on-the-job discrimination.[231]

The drafters of § 1981 obviously did not pull a coup in assembling this language. Nonetheless, the Court found that the language was plain.[232] It adopted a construction that "make" means "form," and therefore only policed discriminatory refusals to contract or offers to contract on discriminatory terms. It then determined that "enforce"

227. *Lorance*, 490 U.S. at 911 (quoting Delaware State College v. Ricks, 449 U.S. 250, 260 (1980)).

228. *Id.* (citing *Delaware State College*, 449 U.S. at 260).

229. *Id.* at 912 n.5.

230. 42 U.S.C. § 1981 (1988).

231. Patterson v. McLean Credit Union, 491 U.S. 164, 170-71 (1989).

232. *Id.* at 176-77.

means "redress," and therefore only policed a discriminatory bar to legal processes.[233] Further, the Court found that neither semantics nor logic supported a different interpretation.[234]

Readers of § 1981 will likely be surprised to learn that the statute is so clear. The text does not say make "employment" contracts, and the words "sue," "be parties," and "give evidence" that come after "enforcement" may logically be read as additional rights, as opposed to a description of enforcement rights. The remainder of the text is even more cloudy. The Court's finding that the text is plain is therefore quite curious.

Other issues of construction had to be resolved in *Patterson.* It was clear to the Court that there was some overlap between § 1981 and Title VII. To resolve the overlap issue, the Court utilized its own canon that the earlier statute (§ 1981) should not be read broadly when this would circumvent the detailed remedial scheme of a later statute (Title VII).[235] This canon was chosen over the more recognized canon that when statutes overlap, a court is "not at liberty 'to infer any positive preference for one over the other.'"[236] Nonetheless, the Court decided that its construction made the two statutory schemes coherent, and settled for an interpretation that concededly frustrated the congressional objectives of Title VII.[237]

The textualists in *Patterson* infused meaning from the air, avoiding compelling canons of construction in their apparent quest to limit employees' civil rights. To achieve this goal the Court had to reject the construction that "make" arguably covers postformation conduct by the employer "that demonstrates that the contract was not really made on equal terms at all."[238] The Court also had to sidestep expansive legislative history which documented that an amendment to Title VII which would have foreclosed the use of § 1981 to remedy employment discrimination claims was rejected, and Congress specifically noted that the two statutes protected similar rights although detailing different prerequisites for filing.[239]

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233. *Id.* at 177-78.

234. *Id.* at 178.

235. *See id.* at 181-82.

236. *Id.* (quoting Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975)).

237. *See id.* at 174 ("After examining the point with care, however, we believe that a sound construction of the language of § 1981 yields an interpretation which does not frustrate congressional objectives in Title VII to any significant degree.").

238. *Id.* at 207 (Brennan, J., dissenting).

239. *Id.* at 189-213 (Brennan, J., dissenting).

2. Defects of Textualism

The ideological and practical defects of textualism are well documented.[240] Moreover, Congress has consistently rejected pinched textualist construction of civil rights statutes.[241] As a result, insistence on plain meaning construction despite repeated congressional guidance in this area verges on the subversive. The Court has not articulated a credible reason or proposed a legitimate theory for abandoning deep-rooted consideration of and reliance on legislative history as contextual data. Add to this the flaws of textualism, and the importance of broad construction that includes sensitizing considerations such as the statute's historical and legislative context, and the Court's error becomes magnified.

To maintain credibility, the Court must at the very least, apply bedrock principles and textualist construction honestly and consistently, to the extent they are legitimate. Only by withstanding well-founded claims that its methodology is designed to promote a hidden agenda[242] can the Court reduce the costs and acrimony associated with securing congressional declarations overruling its interpretations.[243] Legislative history, context, and goals have historically been core considerations for judges interpreting statutes. Despite potential for

240. *See, e.g.*, Eskridge, Jr., *supra* note 201, at 670-78, 683-84 (concluding that avoidance of legislative history is not constitutionally mandated as the textualists argue, and noting that less judicial substitution of judgment for that of Congress is not a proven accomplishment of the new textualism; Professor Eskridge also recognized the potential for abuse of textualism to undo Congress' work); *see also* Steven R. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37, 55-63 (1991) (outlining the scholars' main criticisms of textualism); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Towards a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1310 (1990) (highlighting that there is no empirical evidence that the mutual assent of Congress and the President to statutory text yields awareness of the precise meaning of the statutory language).

241. *See* Greenberger, *supra* note 240, at 37-51 (discussing the many civil rights decisions that Congress was forced to overrule within the last twenty years).

242. *See* Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 308-09 (1990) (pointing out that the textualist methodology is executive-enhancing, and emphasizing the role of context and legislative history in statutory interpretation); *see also* Stephen F. Ross, *Reaganist Realism Comes to Detroit*, 1989 U. ILL. L. REV. 399 (contending that text-focused analysis is a convenient tool of Republican judges seeking to defer to executive actions and regulations).

243. *See* Farber, *supra* note 198, at 13 (amending a statute to reinstate previous interpretation involves social costs, commitment of legislative resources, and opportunity costs for other issues); *see also* Charles S. Ralston, *Court vs. Congress: Judicial Interpretation of the Civil Rights Acts and Congressional Response*, 8 YALE L. & POL'Y REV. 205 (1990).

abuse, these considerations have proven their value as interpretive guides and should not be abandoned, particularly when their replacement is ideologically and practically inferior. Desires for clarity and uniformity in this area should not come with a heavy price tag for remedial schemes which attempt to account for the nation's legacy of discrimination. Harm suffered from historical or societal discrimination, concededly wrongful and injurious,[244] should play some role in employment remedial schemes. Societal discrimination and other historical wrongs should not fall in the category of "stale" claims, ineligible for consideration, or insufficient to form a basis for relief.[245] Despite modest gains in recent years, minorities still need antidiscrimination laws that respond to the changing nature of employment discrimination, and accommodate employees' paucity of direct evidence of bias.

II. CONGRESSIONAL RESPONSE

A. *The 1990 and 1991 Civil Rights Acts*

Congress responded to the flurry of employment decisions narrowing employee protection against discrimination. The Civil Rights Act of 1990[246] was introduced and subsequently approved by both houses of Congress. However, it was vetoed[247] by President Bush, who labeled the legislation a quota bill.[248] Sufficient congressional support could not be garnered to override the President's veto.[249] The Democrats and the civil rights community regrouped, and at the beginning of the next congressional session, they introduced House Bill 1,[250] titled the Civil Rights Act of 1991 ("1991 Act").[251] In direct response to the President's concerns about quotas, House Bill 1

244. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 188 (1989) ("The law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension."); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 527 (1989) (Scalia, J., concurring) ("It is plainly true that in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups.").

245. The irony is that societal discrimination, which provided the foundation for racial advantage, is now an insufficient foundation for racial remediation.

246. H.R. 4000, 101st Cong., 2d Sess. (1990).

247. 136 CONG. REC. S16,562 (daily ed. Oct. 24, 1990).

248. *Id.*

249. In the Senate, the bill, S2104, passed with a vote of 65 to 34, 136 CONG. REC. S9966 (daily ed. July 18, 1990). In the House, the vote for H.R. 4000 was 272 to 154 in favor of the bill. 136 CONG. REC. H6769 (daily ed. Aug. 3, 1990).

250. H.R. 1, 102d Cong., 1st Sess. (1991).

251. *Id.*

expressly provided that quotas be neither required nor encouraged.[252] Despite this provision, President Bush still contended that the legislation was a quota bill and introduced his own legislation, House Bill 1375.[253]

Believing that neither House Bill 1 nor the Bush Administration's ("Administration") bill could attract sufficient votes for passage or an ultimate veto override, several "substitute" bills or amendments were offered by other legislators. As a compromise to House Bill 1, the Brooks-Fish Amendment or Bipartisan Substitute,[254] was offered. The Michel Amendment[255] was offered as a substitute for the Administration bill, and another substitute bill referred to as the Towns-Schroeder Bill[256] was proposed. The Towns-Schroeder Bill and the Michel Amendment were defeated in the House,[257] and the Bipartisan Substitute survived, but without enough votes to override a veto.[258] The Brooks-Fish Amendment then went to the Senate,[259] where Senator Danforth responded by introducing more narrow legislation,[260] which initially ran into opposition from the White House.[261] However, after extensive negotiations and compromise,[262] the Danforth proposal passed the Senate by an over-

252. *Id.* § 13.

253. H.R. 1375, 102d Cong., 1st Sess. (1991).

254. H.R. 1, 102d Cong., 1st Sess. (1991) [hereinafter Brooks-Fish Amendment] (not named Brooks-Fish Amendment until 137 CONG. REC. H3928 (daily ed. June 5 (1991)).

255. H.R. 1, 102d Cong., 1st Sess. (1991).

256. *Id.* (not called Towns-Schroeder Bill until 137 CONG. REC. H3883 (daily ed. June 4, 1991)).

257. 137 CONG. REC. H3896, H3908 (daily ed. June 4, 1991).

258. *Id.* at H3958 (daily ed. June 5, 1991) (the vote was 264 to 166).

259. *Id.* at S9265 (daily ed. July 8, 1991).

260. S. 1745, 102d Cong., 1st Sess. (1991).

261. The White House also rejected Senator Danforth's legislation, calling it a quota bill. In response, Senator Danforth contended that the President's concerns about quotas were pretextual and designed to preserve the quota issue for election purposes, since quotas are so unpopular with the American public. *See* Charles Gren, *GOP Senator Blasts Bush on Civil Rights Bill*, MIAMI HERALD, Sept. 26, 1991, at A7.

262. Over a dozen separate amendments were proposed prior to the bill's passage in the Senate. *See, e.g.*, 137 CONG. REC. S15,446 (daily ed. Oct. 30, 1991) (amendment No. 1290 to No. 1287 offered by Senator Rudman); *id.* at S15,451 (amendment No. 1291 to No. 1287 offered by Senators Nickles and Specter); *id.* at S15,458 (amendment No. 1292 to No. 1287 offered by Senators Warner, Mikuski, Stevens, Robb, Wirth, Kennedy, Sarbanes, and Adams); *id.* at S15,461 (amendment No. 1293 to No. 1287 offered by Senator McCain); *id.* at S15,471 (amendment No. 1294 to No. 1287 offered by Senators Hatch, Jeffords, Mitchell, and Dole); *id.* at S15,471 (amendment No. 1295 to No. 1287 offered by Senators Hatch, Kennedy, and Danforth); *id.* at S15,500) (amendment No. 1296 to No. 1287 offered by Senators Hatch and Dole); *id.* at S15,501 (amendment No. 1297 to No. 1287 offered by

whelming majority.[263] The legislation was then sent to the House, where it received overwhelming support, except for minor amendments, and passed easily.[264] The President subsequently signed this legislation titled the Civil Rights Act of 1991.[265] This law effectively reversed most of the above-noted cases, but some standards enunciated by the Court were left intact. Further, several key issues such as affirmative action[266] and retroactivity[267] were left unanswered, and require critical examination. Moreover, a strengthened, ideologically conservative Supreme Court charged with interpreting the new legislation, requires close scrutiny.

1. Adjusting Causation and Liability Rules

House Bill 1 adopted the employee's proposal in *Price Waterhouse v. Hopkins* by providing for a violation any time an impermissible consideration contributed to the employer's decision.[268] Proof that the employer would have made the same decision for legitimate reasons would therefore only affect the remedy, not liability.[269] The bipartisan bill provided for a violation whenever an impermissible consideration was a "motivating factor," even if other legitimate considerations played a role.[270] This approach was less attractive to plaintiffs than House Bill 1, but more advantageous than the Administration's bill which did not deal with this issue, thereby leaving *Price Waterhouse* standards intact. The bipartisan bill also allowed for damages to the extent injury could be traced to the wrongful conduct.[271]

The new Civil Rights Act confirms the *Price Waterhouse* standards by providing for a *violation* whenever a prohibited consideration was a "motivating factor" in making a decision.[272] This change reflects a partial gain for employment discrimination plaintiffs

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Senators Hatch and Mitchell).

263. *Id.* at S15,501 (amendment No. 1274—the amendment in the nature of a substitute, as amended—was agreed to). The bill, S. 1745, was passed by a vote of 93 to 5. *Id.* at S15,503.

264. 137 CONG. REC. H9557 (daily ed. Nov. 7, 1991) (the vote was 381 to 38).

265. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

266. *See infra* notes 344-424 and accompanying text.

267. *See infra* notes 337-43 and accompanying text.

268. H.R. 1, § 5(a).

269. *See id.*

270. Brooks-Fish Amendment, *supra* note 254, § 103(a).

271. *Id.* § 103(b).

272. § 107, 105 Stat. at 1075-76.

who would have been better off with language such as "contributing factor," or better, "any role." The new language should deter employers from relying on impermissible considerations in making adverse decisions since it allows courts to grant some relief even if the employer demonstrates that it would have made the same decision absent reliance on the impermissible factor. However, an employee's remedies are limited.[273]

2. Expanding the Statute of Limitations

To deal with the time of adoption approach spelled out in *Lorance v. AT&T Technologies*, House Bill 1 and the bipartisan bill provided that the statute of limitations would begin to run from the time the unlawful practice occurred or adversely affected an employee.[274] These bills also sought to extend the statute of limitations to two years and 540 days respectively.[275] The Administration's proposal provided for a violation when the seniority system was adopted, when an employee became subject to it, or when an employee was injured by its application.[276] This proposal also required that the plaintiff show that the seniority system was motivated by an intent to discriminate.[277] Further, the Administration's proposal left the existing statute of limitations periods intact by omitting any provision on this issue.

The 1991 Act changes *Lorance*'s time of adoption approach by providing that the limitations period begins to run from the time of adoption, when an employee becomes subject to it, or at the time of injury.[278] The seniority system must also have been adopted for in-

273. Section 107(b) amends § 706(g) to read as follows:

(B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

274. H.R. 1, § 7; Brooks-Fish Amendment, *supra* note 254, § 105. This approach was intended to reverse United Air Lines v. Evans, 431 U.S. 553 (1977).

275. H.R. 1, § 7; Brooks-Fish Amendment, *supra* note 254, § 105.

276. H.R. 1375, § 7.

277. *Id.*

278. § 112, 105 Stat. at 1078-79. This section provides:

[A]n unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this

tentionally discriminatory purposes to violate the 1991 Act.[279] These standards are essentially what the Bush Administration had proposed. Although the new law broadens the limitations period, it saddles employees with motive-based standards that are tough to satisfy. This means that employees will no longer have to be clairvoyant when a policy fair in form is instituted; however, finding the smoking gun to enforce statutory rights will be difficult.

3. Restoring *Griggs*

In response to *Wards Cove Packing Co. v. Atonio*, House Bill 1 and the bipartisan bill included specific provisions designed to overrule *Wards Cove* and codify *Griggs v. Duke Power Co.*[280] These provisions were intended to return proof standards in impact cases to their pre-*Wards Cove* condition. As such, once plaintiff demonstrated disparate impact, the employer would be required to prove business necessity to avoid liability. There seemed to have been consensus between the competing bills that business necessity ought to be the controlling standard.[281] However, there was a parting of ways on the definition of business necessity.[282] To address *Wards Cove's* requirement that the specific practice be isolated, the Brooks-Fish Amendment further provided that plaintiff may be excused from identifying the specific practices if a court determined that a specific practice cannot be identified.[283] Further, a practice required by busi-

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title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

279. *Id.*

280. 401 U.S. 424 (1971); *see also* H.R. 1, § 3; Brooks-Fish Amendment, *supra* note 254, § 101.

281. H.R. 1375, § 4, also requires employers to show business necessity, as did other bills introduced and defeated. *See* 137 CONG. REC. S15,316-19 (daily ed. Oct. 29, 1991) (remarks of Sen. Hatch).

282. H.R. 1 defined business necessity as "a significant relationship to successful performance of the job," H.R. 1, § 3(o)(1), while the bipartisan bill's standard was "a significant and manifest relationship to the requirements for effective job performance," Brooks-Fish Amendment, *supra* note 254, § 101. The Administration's bill required that the "practice has a manifest relationship to the employment in question or that the respondent's legitimate employment goals are significantly served by, even if they do not require, the challenged practice." H.R. 1375, § 3(n).

283. Brooks-Fish Amendment, *supra* note 254, § 102. H.R. 1375, on the other hand, required that the plaintiff identify the particular challenged employment practice. It further absolved the employer of liability unless it refused to adopt an alternative shown by plaintiff to be comparable in cost and effectiveness in predicting job performance or achieving the

ness necessity is still unlawful if the plaintiff shows that another practice with less disparate impact serves the employer well.[284]

The new law confirmed statutory authority for impact claims.[285] Further, it retained the consensus that business necessity ought to be the governing standard, and shifted this burden back to the employer, thereby codifying *Griggs*.[286] In addition to a specific statement that *Griggs* is codified, the Act stated that its particular purpose is to return the business necessity analysis to pre-*Wards Cove* status.[287] Moreover, Congress employed the unusual strategy of setting aside "exclusive" legislative history on this subject to combat competing views about the employer's burden.[288]

To obtain bipartisan support and presidential approval, the Act left some *Wards Cove* requirements intact. To dispel concerns about quotas, the 1991 Act requires that a complaining party either identify the specific wrongful practice or show the court that the employer's decisionmaking process cannot be broken down into separate identifiable practices.[289] This standard is a bit tougher than the bipartisan proposal, which excused the plaintiff if the specific practice could not

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employer's goals. H.R. 1375, § 4.

284. Brooks-Fish Amendment, *supra* note 254, § 102.

285. Civil Rights Act of 1991 § 3, 105 Stat. at 1071.

286. § 105, 105 Stat. at 1074.

287. § 3(2), 105 Stat. at 1071. However, § 105(a), 105 Stat. at 1074, amends § 703 of the Civil Rights Act of 1964 by adding subsection (k)(1)(A) which sets out the employer's burden as "consistent with business necessity," not "required by business necessity" as developed under Griggs. The word "consistent" can be fairly regarded as creating a lighter burden than previously established by the word "required."

288. Section 105(b), 105 Stat. at 1075, which provides:

> No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/alternative business practice.

289. Section 105(a), 105 Stat. at 1074, amends § 703 of the Civil Rights Act of 1964 to read as follows:

> (B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact . . . the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

The requirement that plaintiff identify each practice with specificity responded to concerns that employers would be forced to adopt quotas if plaintiffs were allowed to simply point to an imbalance in the workforce to establish a violation.

be identified.[290] *Wards Cove*'s requirement that causation be shown was generally retained as a prerequisite for impact plaintiffs in the new law.[291] Moreover, even if plaintiff overcomes each requirement, relief is essentially limited to the employer's adoption of plaintiff's proposed alternative.[292]

4. Expanding § 1981

Both House Bill 1 and the bipartisan bill responded to *Patterson* by providing that the right to make and enforce contracts included the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of contractual relationships.[293] This approach worked an effective reversal of *Patterson* and emerged as an agreeable approach for the President. The new law prohibits post-hiring discrimination by providing a broad definition of the phrase "make and enforce."[294] Besides effectively reversing *Patterson*, the 1991 Act eliminates doubts about whether § 1981 applies to private discrimination, thereby removing *Runyon* from its vulnerable stare decisis pedestal.[295] The § 1981 amendments therefore represent firm gains for discrimination victims.

5. Protecting Consent Decrees

To address *Wilks*, House Bill 1 and the bipartisan bill bound individuals with notice of a proposed judgment and opportunity to object before its entry.[296] In instances where reasonable efforts were made to provide notice to interested individuals, future challenges were also precluded.[297] Further, individuals whose interests were adequately represented by a party in the lawsuit were also bound by the judgment.[298] The Administration's proposal was silent on consent decrees, thereby leaving *Wilks*'s standards in place.

290. Brooks-Fish Amendment, *supra* note 254, § 102.

291. *See generally* § 105(a), 105 Stat. at 1074.

292. *Id.*

293. H.R. 1, § 12; Brooks-Fish Amendment, *supra* note 254, § 110.

294. Section 101, 105 Stat. at 1071-72, which adds subsection (b) to 42 U.S.C. § 1981, providing: "For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

295. *Id.* Section 101 also adds subsection (c) to 42 U.S.C. § 1981, which provides: "The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

296. H.R. 1, § 6; Brooks-Fish Amendment, *supra* note 254, § 104.

297. H.R. 1, § 6.

298. *Id.*

Gains were made in this area for plaintiffs in the 1991 Act, which limits third party challenges to consent decrees in some respects.[299] The legislation sets out a requirement of "actual" notice to interested parties who may be adversely affected, plus a reasonable opportunity to present objections. It also precludes challenges when interested parties' interests are fairly represented by direct parties.[300] Plaintiffs are therefore relieved of mandatory joinder obligations imposed by the Federal Rules of Civil Procedure.[301] The new law sets out standards that, if met by plaintiffs, will generally protect the integrity of consent decrees.

6. Leaving *Zipes* Intact

Due to the chilling potential of *Zipes*, a provision was inserted in House Bill 1 and the bipartisan bill to allow the recovery of attorney fees from unsuccessful intervenors.[302] Further, using a standard of fairness, the bills also allowed for recovery from the original party against whom relief was granted, or based on an equitable allocation.[303] The bipartisan bill also provided for expert fees, litigation expenses, voluntary fee waivers or negotiations, and prohibited coerced waivers.[304] The Administration's proposal capped expert fees

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299. Section 108, 105 Stat. at 1076, adds new subsection (n)(1)(B) to § 703 of the Civil Rights Act of 1964, and provides:

> A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws—
>
> (i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had—
>
> (I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and
>
> (II) a reasonable opportunity to present objections to such judgment or order; or
>
> (ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

300. *Id.*

301. *Id.* However, subsection (n)(1)(B) further provides: "(2) Nothing in this subsection shall be construed to—

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened."

302. *See* H.R. 1, § 9; Brooks-Fish Amendment, *supra* note 254, § 107.

303. *See* H.R. 1, § 9; Brooks-Fish Amendment, *supra* note 254, § 107.

304. Brooks-Fish Amendment, *supra* note 254, § 107.

at $300 per day as part of the prevailing party's costs.[305]

The new law has a provision for expert fees but does not specifically address the losing intervenor holding of *Zipes*.[306] As a result, Court standards outlined in *Zipes* remain controlling.

B. Additional Legislative Proposals and Changes

Additional provisions designed to restore, and in some instances broaden Title VII's scope included House Bill 1 and the bipartisan bill that civil rights laws be broadly construed;[307] provisions for jury trials;[308] unlimited compensatory damages in cases of intentional discrimination;[309] punitive damages in cases of malicious, reckless or indifferent conduct;[310] retroactivity for all approved changes in Title VII to the dates of the cases they impact;[311] a prohibition of "race norming";[312] the extension of Title VII's coverage to Congress;[313] making statute of limitations under the ADEA and Title VII uniform;[314] extraterritorial application of Title VII;[315] a provision for expert fees for plaintiffs;[316] and another for the recovery of

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305. *See* H.R. 1375, § 9.

306. *See* §§ 103, 113, 105 Stat. at 1074, 1079, dealing with the issue of attorney's fees generally. Section 113(b) amends § 706(k) of Title VII to allow courts to include expert fees as part of attorney's fee awards.

307. H.R. 1, § 11; Brooks-Fish Amendment, *supra* note 254, § 109.

308. H.R. 1, § 8; Brooks-Fish Amendment, *supra* note 254, § 106.

309. H.R. 1, § 8.

310. *Id.* In the bipartisan bill, a cap of $150,000 was set for punitive damage awards, or an amount equal to compensatory damages plus equitable relief, whichever is greater. Brooks-Fish Amendment, *supra* note 254, § 106(b).

311. H.R. 1, § 15; Brooks-Fish Amendment, *supra* note 254, § 113.

312. Brooks-Fish Amendment, *supra* note 254, § 116. "Race norming" refers to the practice of adjusting employment test scores on the basis of race, color, religion, sex, or national origin. *See, e.g.*, Baynes v. AT&T Technologies, Inc., 976 F.2d 1370, 1375 n.5 (11th Cir. 1992); Luddington v. Indiana Bell Tel. Co., 966 F.2d 225, 228 (7th Cir. 1992).

313. H.R. 1, § 16; Brooks-Fish Amendment, *supra* note 254, § 114.

314. H.R. 1, § 17; Brooks-Fish Amendment, *supra* note 254, § 117.

315. Brooks-Fish Amendment, *supra* note 254, § 119. This provision was intended to reverse EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227 (1991), which held that Title VII does not cover American citizens employed overseas by American companies.

316. Brooks-Fish Amendment, *supra* note 254, § 107. In West Virginia Univ. Hosp. v. Casey, 111 S. Ct. 1138 (1991), the Court held that fees paid by a prevailing party to experts assisting with case preparation were not recoverable as reasonable attorney's fees. Using his brand of textualist statutory construction, Justice Scalia, writing for the majority, compared the text of fee shifting provisions in civil rights laws with the text of other federal fee shifting statutes. He determined that expert fees and attorney fees are treated as separate items in statutory construction, and Congress had specifically limited fees for experts to $30 per day for witnesses. Rejecting a construction "grounded in the remedial purpose" of the statute, Justice Scalia concluded that where statutory language is unambiguous, the Court's only role

interest against the federal government.[317]

The Administration's proposal was silent on the statute's construction regarding jury trials;[318] did not provide for punitive damages, but allowed for "equitable" relief in harassment cases;[319] provided for neither retroactivity[320] nor extraterritoriality;[321] was silent on race norming; and included an amendment that extended the statute's coverage to Congress.[322]

The new law does not contain a "broad construction" clause,[323] but amends Title VII to provide for compensatory damages in cases of intentional discrimination.[324] It also provides for punitive damages for malicious and reckless conduct.[325] However, these damage awards have caps, depending upon the employer's size.[326] Provisions for jury trials are included;[327] race norming is prohibited;[328] cover-

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is to enforce its terms. *See also* Crawford Fitting Co. v. Gibbons, 482 U.S. 437 (1987) (offering similarly narrow construction of fees provision).

317. Brooks-Fish Amendment, *supra* note 254, § 108. This provision was designed to overturn Library of Congress v. Shaw, 478 U.S. 310 (1986), which held that § 706(k) of Title VII only waived federal government immunity with respect to attorney's fees, not interest.

318. *See generally* H.R. 1375.

319. *Id.* § 8. A cap of $150,000 is placed on this provision, and the award must be justified by the equities, statutory purpose, and public interest. *Id.*

320. *See id.* § 14.

321. *See generally id.*

322. *Id.* § 11.

323. *See generally* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

324. *Id.* § 102, 105 Stat. at 1072. Compensatory damages had traditionally been available only under § 1981, and were limited to race and ethnicity discrimination. The 1991 Act broadens Title VII's compensatory damages relief coverage to include disability discrimination. *Id.* Section 102 adds subsection (a)(2) to 42 U.S.C. § 1981. By including disability in its scope of coverage, the 1991 Act supplants the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990), which did not provide for compensatory damages.

325. § 102, 105 Stat. at 1072. Section 102 adds subsection (b)(1) to 42 U.S.C. § 1981.

326. Section 102 adds subsection (b)(3) to 42 U.S.C § 1981. Caps under the new law may result in employer reliance on Title VII when defending against plaintiffs eligible under § 1981 and Title VII who allege violations of both laws. For example, a black woman alleging race discrimination under both statutes might trigger a defense that plaintiff's harm, if proven, is traceable to sex discrimination (subject to damage caps under Title VII), as opposed to race discrimination (not subject to caps under § 1981).

327. *See id.* Section 102 adds subsection (c) to 42 U.S.C. § 1981. Jury trials had essentially been available only to employees covered by § 1981. However, Title VII plaintiffs alleging sex, religion, or national origin discrimination did not get a trial by jury. Additionally, public sector employees were not entitled to jury trials because of their exclusion from § 1981 coverage. *See* Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989) (noting that § 1981 does not provide an independent federal damages remedy for racial discrimination by local governmental entities because Congress intended that § 1983 remedies control in actions

age is extended to Congress,[329] previously exempted state employees,[330] and American employees abroad;[331] and some recovery is provided for expert fees paid by plaintiffs for case preparation.[332]

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against state actors). The 1991 Act gives a trial by jury right to both private and public sector employees. § 102(c), 105 Stat. at 1073.

328. Section 106, 105 Stat. at 1075, provides:

> It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

329. *Id.* § 117, 105 Stat. at 1080. Senate employees, presidential appointees not subject to Senate confirmation, and previously exempted staff of elected officials are now covered. House employees are not covered, but can utilize internal House rules and processes. Senate employees can file their claims with the office of fair employment practices, presided over by appointed officials. *See* Government Employees Act of 1991, Pub. L. No. 102-166, § 303, 105 Stat. 1088 (1991). Jury trials and punitive damages are unavailable, but appeals to the Federal Courts of Appeals are permissible. *Id.* § 309(a). Presidential appointees and staff of elected officials can go to the EEOC, with rights of review by the U.S. Court of Appeals for the Federal Circuit. *Id.* §§ 320, 321. Final responsibility for relief lies with the President and Senators. *Id.* § 323.

330. § 321, 105 Stat. at 1088. Under Title VII certain elected and appointed officials were exempted. *See* 42 U.S.C. § 2000e-(f). This definitional section provides:

> The term 'employee' . . . shall not include any person elected to public office in any State or political subdivision of any State by qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

The new Act does not eliminate this exemption, but expands coverage to non-elected officials by providing:

> The rights, protections, and remedies provided pursuant to section 302 and 307(h) of this Title shall apply with respect to employment of any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof—
>
> (1) to be a member of the elected official's personal staff;
>
> (2) to serve the elected official on a policymaking level; or
>
> (3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

§ 321(a), 105 Stat. at 1097. Appointed state judges, therefore, are now covered. *See* Gregory v. Ashcroft, 111 S. Ct. 2395, 2403-04 (1991) (holding that appointed state judges fall within the exemption created for certain "employees" under § 630(f) of the Age Discrimination in Employment Act (which is the same as § 2000e of the Civil Rights Act of 1991)).

331. § 109, 105 Stat. at 1077. This section essentially overrules EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227 (1991) (holding that Title VII does not apply extraterritorially to regulate employment practices of U.S. employers who employ U.S. citizens abroad).

332. § 113, 105 Stat. at 1079. Title VII, § 1981, and § 1981(a) plaintiffs are eligible, and to this extent, the holding in West Virginia Univ. Hosp. v. Casey, 111 S. Ct. 1138 (1991) (holding that fees for services rendered by experts in civil rights litigation could not

Interest is also now recoverable against the federal government.[333]

The 1991 Act contains a general statement that it takes effect upon enactment, but does not deal specifically with post-Act claims based on pre-Act conduct.[334] However, it curiously carves out the sections on extraterritorial application[335] and disparate impact cases filed before March 1, 1975, and initially decided after October 30, 1983, from retroactive application.[336] Because the Act's structure is conflicting, retroactivity has assumed a leading role in employment discrimination lawsuits.

III. THE RETROACTIVITY DISPUTE

Despite its many provisions clearly strengthening or expanding employment discrimination laws, the new Civil Rights Act does not address when it takes effect in an unassailable way. As a result, retroactivity has already become a contentious issue. The Lawyers' Committee for Civil Rights Under Law construes the 1991 Act as applying retroactively because of the carved out exceptions to retroactivity.[337] However, the Equal Employment Opportunity Commission

be shifted to losing party), is overruled.

333. § 114, 105 Stat. at 1079. This section works a reversal of Library of Congress v. Shaw, 478 U.S. 310 (1986) (holding government liable for costs, exclusive of interest), and also extended the period for filing from 30 to 90 days. *Id.*

334. § 402(a), 105 Stat. at 1099.

335. *Id.* Section 109(b), 105 Stat. at 1077, adds subsection (c) to § 702 of the Civil Rights Act of 1964.

336. *Id.* § 402(b), 105 Stat. at 1099. This provision exempts the defendants in *Wards Cove* from coverage. To address this exemption, one bill was introduced in the House and another in the Senate, titled "Justice for *Wards Cove* Workers Act." *See* H.R. 3748, 102d Cong., 1st Sess. (1991); S. 1962, 102d Cong., 1st Sess. (1991). The carving out of exceptions has created some confusion about retroactivity. This lack of clarity is aggravated by various conflicting interpretive memos inserted into the legislative history by Senators.

337. *See* RES IPSA, Nov. 1991 [Lawyers' Committee newsletter, on file with author]. Lawyers' Committee provided a more elaborate interpretation on the retroactivity issue in a January 24, 1992 memo as follows:

> Sec. 108 of the Act limits challenges to litigated and consent judgments and orders resolving employment discrimination claims where the challenging party had sufficient notice and an opportunity to be heard, 'prior to the entry of the judgment or order.' This section is clearly worded so as to protect existing as well as future judgments and orders where the statutory conditions are met, which obviously protects conduct that occurred prior to the enactment of the Act.
>
> Sec. 112 of the Act expands the right to challenge discriminatory seniority systems, even if the discriminatory aspects were adopted long before the challenge. Under this section, the plain intent is that future challenges can be made to discriminatory seniority systems adopted before November 21, 1991.
>
> Sec. 113 of the Act allows the award of expert fees in title VII actions

("EEOC") interprets the 1991 Act as taking effect from the date of enactment.[338] Under the EEOC's interpretation, discrimination occurring prior to the date of the Act, or suits filed before that date, cannot benefit from the mandates of the new law.[339] Legislative histories developed in both the Senate and House provide little guidance because of conflicting views expressed in both forums.[340] Federal

and in "any" action or proceeding under 42 U.S.C. § 1981 or the new § 1981A. arguing that this provision allows the recovery of expert witness fees. Of necessity, all awards will occur after November 21, 1991, but the statute does not indicate that the court must disallow recovery for expert services performed before that date. This is on all fours with the facts of *Bradley*.

Sec. 114 of the Act allows awards of interest on back pay in cases against Federal agencies under section 717 of the Civil Rights Act of 1964, 'to compensate for delay in payment.' It would violate the stated purpose if awards of interest were limited to interest for the time after November 21.

Sec. 115(4) of the Act amends the Age Discrimination in Employment Act of 1967 by providing that ADEA charging parties may bring suit within 90 days after the receipt of a Notice of Right to Sue. The language seems clearly applicable to charges already on file with the Commission, which, of course, would involve conduct that occurred prior to the Act's enactment. Unless the Act is interpreted to apply to pending cases, Congress may again have to enact special extensions of the suit-filing period because of the EEOC's delays in processing ADEA charges. [footnote omitted].

Sec. 116 of the Act seeks to ensure that nothing in the Act could be construed in a manner that would endanger otherwise lawful court-ordered remedies, affirmative-action plans, and conciliation agreements which are otherwise in accordance with the law. The plain language of the section contemplates protection for existing as well as future court orders, affirmative action, and conciliation agreements, all of which occurred before the Act and would therefore not need protection from the Act unless it applied to conduct occurring before its enactment.

338. *See EEOC Policy Guidance on Retroactivity of Civil Rights Act of 1991*, Daily Lab. Rep. (BNA) No. 1, at D-1 (Jan. 2, 1992).

339. *Id.*

340. *Compare* 137 CONG. REC. S15,483 (daily ed. Oct. 30, 1991) (Sen. Danforth's interpretation of no retroactivity) *and id.* at S15,478 (Sen. Dole's interpretation of no retroactivity, and citing with approval Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) and Kaiser Aluminum. & Chem. Corp. v. Bonjorno, 110 S. Ct. 1570 (1990)) *with* 137 CONG. REC. at S15,485 (statement of Sen. Kennedy); *see also id.* at S15,963 (daily ed. Nov. 5, 1991) (statement of Sen. Kennedy offering interpretation of retroactivity). Legislative history in the House is similarly conflicting. *Compare* 137 CONG. REC. H9530 (daily ed. Nov. 7, 1991) which states that:

> The bill states that it takes effect on the date of enactment. The intent of the sponsors is that this language be given its normal effect, and that the provisions of the bill be applied to pending cases except where the bill expressly provides otherwise . . . . The application of this bill to pending cases is eminently fair. Much of the conduct of employers and other respondents at issue in pending cases was committed before the Supreme Court radically altered the legal landscape, at a time when the defendants were on notice that the law applied to their conduct and they could be held accountable for their misdeeds. Our restoration of the law to these

courts are also split on this issue.[341] Unfortunately for discrimination victims, however, the Court is likely to side with the EEOC[342] as

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> pending cases will often mean that the parties will be governed by the law they all understood to exist at the time the actions in question were taken. To fail to apply the law retroactively in these situations would give the respondents an undeserved windfall from the intervening Supreme Court errors. The application of this bill to pending cases thus does not involve any of the problems of unfairness or potential unconstitutionality which would have attended the retroactive imposition of novel requirements, or those which would have been impossible to predict . . . . Practical concerns, as well as those of elementary fairness, have led us to the conclusion that the application of the bill to pending cases is essential . . . .

with id. at H9548.

> Section 402 of the Act specifies that the Act and the amendments made by the Act take effect on the date of enactment. Accordingly they will not apply to cases arising before the effective date of the Act . . . . Not only would retroactive application of the Act and its amendments to conduct occurring before the date of enactment be contrary to the language of section 402, but it would be extremely unfair. For example, defendants in pending litigation should not be made subject to awards of money damages of a kind and an amount that they could not possibly have anticipated prior to the time suit was brought against them.

341. *See, e.g.*, High v. Broadway Indus., Inc., No. 90-1066-CV-W-3, 1992 U.S. Dist. LEXIS 446 (W.D. Mo. Jan. 7, 1992) (no retroactivity); Burchfield v. Derwinski, 782 F. Supp. 532 (D. Colo. 1992) (no retroactivity); Khandelwal v. Compuadd Corp., 780 F. Supp. 1077 (E.D. Va. 1992) (motion to amend national origin complaint to include compensatory and punitive damages denied); Hansel v. Public Serv. Co., 778 F. Supp. 1126 (D. Colo. 1991) (same); Van Meter v. Barr, 778 F. Supp. 83 (D.D.C. 1991) (damage provisions of 1991 Act not applicable to pending suit); James v. American Int'l Recovery, Inc., 57 Empl. Prac. Dec. Cas. (BNA) 1226 (N.D. Ga. Dec. 3, 1991) (1991 Act does not apply to cases arising before Act's effective date). *But see* Stender v. Lucky Stores, Inc., No. C-88-1467 MHP, 1992 U.S. Dist. LEXIS 10789 (N.D. Cal. Apr. 29, 1992) (statute's text only makes sense if applied to pending cases); Mojica v. Gannett Co., No. 90-C-3827, 1992 WL 51685 (N.D. Ill. Mar. 3, 1992) (damage provisions of 1991 Act applicable to pending cases); Graham v. Bodine Elec. Co., 782 F. Supp. 74 (N.D. Ill. 1992) (language of statute consistent with a conclusion of retroactive application); La Cour v. Harris County, No. CIV.A.H-89-1532, 1991 WL 321020 (S.D. Tex. Dec. 6, 1991) (granting jury trial in Title VII suit).

342. This persuasion is exemplified by Justice Scalia's argument in Kaiser Aluminum & Chem. Corp., v. Bonjorno, 494 U.S. 827, 841 (1990) (Scalia, J., concurring), that non-penal legislation must be applied prospectively unless Congress specifically provides otherwise. Justice Scalia called on the Court to overrule Bradley v. School Bd., 416 U.S. 696 (1974), and adopt a presumption against retroactivity, as outlined in Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988). In *Bradley*, the Court held that the law in effect at the time of decision should control, unless manifest injustice would result, or the statute or its legislative history mandates otherwise. *Bradley*, 416 U.S. at 711. *Bradley* rejected a requirement of clear congressional intent as a prerequisite for applying intervening law to pending cases. *Id.* at 715. Later, in *Bowen*, the Court ruled that the congressional grant of rulemaking authority to an agency does not include authority to promulgate retroactive rules unless such power was conveyed in express terms, even if substantial justification for retroactivity exists. *Bowen*, 488 U.S. at 208-09.

The *Kaiser* decision avoided resolving the apparent conflict between *Bowen* and *Bradley* by finding that the statute at issue clearly evidenced congressional intent against retroactivity. *See Kaiser*, 494 U.S. at 837-38. The EEOC has decided to follow standards

its jurisprudence shifts from presumption of retroactivity to clear statement rules.[343]

Although the Court will likely insist on prospective application as the correct textual construction of the new Act, the law and equities favoring retroactivity are substantial. Title VII and § 1981 gave employers notice that discriminatory conduct is prohibited. To the extent that the Court interpreted these statutes incorrectly, thereby narrowing the rights and remedies of discrimination victims, employers were given an undeserved windfall. In the 1991 Act, Congress established that many of the Court's interpretations were incorrect; therefore, the new legislation essentially constitutes deferred justice for employees who were deprived of their original legal entitlements.

New provisions in the 1991 Act that expand antidiscrimination laws may provide a stronger basis for challenge by employers. Unfortunately, such challenges would to some extent be grounded in the shameful proposition that discrimination is acceptable as long as it is cost effective. To argue on notice grounds that the new compensatory and punitive damages provisions should only have prospective application is in many ways to say, "I would not have discriminated had I known it would cost me that much." In view of the national policy favoring bias-free workplaces, and the many legal and policy justifications supporting retroactivity, the Court has ample rationale for such a construction if it so chooses.

IV. The Future of Affirmative Action

Besides retroactivity, another critical employment issue, affirmative action, was left unresolved by the 1991 Act. As noted below, Congress' failure to take this issue head-on was to some extent purposeful because of its political fragility.

A. *The Affirmative Action Debate*

A key interpretive mechanism used by previous Justices to shore

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outlined in *Bowen*.

343. *See* Hilda E. Kahn, *Completed Acts, Pending Cases, and Conflicting Presumptions: The Retroactive Application of Legislation After Bradley*, 13 GEO. MASON U. L. REV. 231, 260 (1990) (suggesting that restorative amendments (which the 1991 amendments are) with some support for retroactivity in the legislative history would be an insufficient showing to overcome *Bowen*'s clear intent requirement); William V. Luneburg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106, 134-38, 142-49 (arguing that the Court does not have a well articulated basis for its clear statement rules in *Bowen*, and suggesting the demise of the *Bradley* line of cases).

up Title VII was the finding of support in the statute's legislative history for a variety of affirmative action programs.[344] However, affirmative action has always been a thorny issue for the Court, and its decisions on this subject lack coherence. Affirmative action in employment triggers emotional responses similar to concerns articulated about preferential schemes in other areas.[345] Employment programs

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344. In the past, the Court finessed its way around § 703(j)'s prohibition of preferential treatment to any person or group by relying on § 706(g)'s grant of authority to the *court* to "order such affirmative action as may be appropriate . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g).

345. Notably, the fields of education and public contracting trigger such emotional responses. The Court first looked at affirmative action in the context of educational opportunities, and years later in the employment context. From the outset, the divisiveness of racial preferences became apparent. In DeFunis v. Odegaard, 416 U.S. 312 (1974), the Court avoided reviewing a law school preferential admissions scheme on mootness grounds. The dissent accurately observed that few constitutional issues in recent history have stirred as much debate, and warned that the questions avoided would return to the courts. *Id.* at 350 (Brennan, J., dissenting). A few years later, they did. In Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), the challenged scheme was a medical school's preferential admissions policy. The resulting decision set the stage for whittling away at reliance on societal discrimination to support preferential schemes grounded in race through the imposition of strict scrutiny standards. *Id.* at 303. *Bakke*, an equal protection case, required identified victims and a finding of a statutory or constitutional violation by a public body as necessary predicates for a preferential admissions program. *Id.* at 315-19. As such, the preferential scheme cannot be supported solely by the disparate impact of a particular selection practice. *Id.* Although Justice Powell concluded that the goal of diversity may be compelling in some circumstances, programs must be narrowly tailored to satisfy the Equal Protection Clause. *Id.*

Special judicial attention to racial classifications evolved out of the Court's assessment that minorities were underrepresented or excluded in the political process, and therefore needed protection. *See* United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938). The *Bakke* Court ruled that the strict scrutiny inquiry under *Carolene Products* was not limited to situations where minorities are disadvantaged by racial classifications. *Bakke*, 438 U.S. at 290. This approach has survived, with heightened attention to the political strength of minorities, and its role in establishing preferential schemes. Couched in the rhetoric of racial politics, new-found political strength is seemingly more destructive of minority interests than facilitative of a fair distribution of opportunities. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989); *see also* Daniel A. Farber & Philip P. Frickey, *Is* Carolene Products *Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 685 (1991) (arguing that the original intent of *Carolene Products*'s minority-protective language retains vitality despite political gains made by minorities, and that Justice Scalia and others' assessment that it is diffuse majority groups that are the victims of the political process, and therefore harmed by affirmative action, is misplaced); Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U. L. REV. 1307, 1340-41 (1991) (noting that racial politics has always infected the political process to the majority's advantage and to disallow minorities an opportunity to remedy discrimination through the political process is itself discriminatory). In fact, if the cliche "we've come a long way" is true, it is likely that affirmative action promotes cohesiveness rather than divisiveness, since many blacks attribute their success to such programs.

that survived Court scrutiny did so essentially through avoidance of thorny constitutional questions or through the use of broad statutory interpretation methodologies. Now, analysis tied to race-neutral principles and questionable textualism appears fortified and ready to defeat "goals and consequences" construction.

The redistributive goals of affirmative action are now being considered in the context of a sagging economy.[346] Diminishing employment opportunities have heightened tensions between those who have and those who want access. The pressures of competition are increasingly being felt in the political arena where candidates are being fatally evaluated based on their position on preferential schemes.[347]

B. The Employment Affirmative Action Cases

In *United Steelworkers of America v. Weber*,[348] Justice Brennan wrote that Title VII permits voluntary affirmative action plans that grant employment opportunity preferences to black employees.[349] Faced with language limitations in the statute specifically prohibiting discrimination on the basis of race,[350] the Court narrowed its inquiry to whether the Act forbade the type of plan being challenged.[351] Ruling that the Equal Protection Clause and Title VII mandates were not implicated, Justice Brennan relied on the statute's structure, its legislative history and historical context to conclude that there was no congressional intent to preclude private sector race-conscious pro-

346. Numerous writers have observed that redistributive programs such as affirmative action fare better when labor markets are expanding. *See* STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 3 (1991); E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 151 (1988); John J. Donahue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 999 (1991) (concluding that a strong economy and low unemployment are favorable conditions for employment discrimination victims).

347. *See infra* note 426 and accompanying text.

348. 443 U.S. 193 (1979).

349. *Id.* at 205-06.

350. The employee challenging the *Weber* plan cited the specific antidiscrimination mandate of §§ 703(a) & (d) of Title VII, 42 U.S.C. §§ 2000e-2(a) & (d), and a prior Court decision interpreting Title VII as protecting black and white employees. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278 (1976) (holding that the Act prohibits discrimination against *any* racial group, minority, or majority).

351. United Steelworkers of Am. v. Weber, 443 U.S. 193, 200-01 (1979). The Court noted that state action was not involved, the Equal Protection Clause was not implicated, and the plan was adopted voluntarily. As such, the Court was not faced with interpreting Title VII mandates or court-ordered remedies under Title VII. *Id.*

grams.[352] This conclusion drew extensive dissents from Justices Burger and Rehnquist, who regarded it as a clear departure from past decisions and a usurpation of congressional power.[353] Both Justices felt that clear text and plain meaning construction mandated a different result.[354]

Another pro-minority decision addressing what Title VII "permits" was *Local 28 of the Sheet Metal Workers' International Ass'n v. EEOC*.[355] As framed by the Court, the issue in this case was whether the Act prohibited court-ordered, race-based goals that benefitted individuals who were not identified victims of discrimination.[356] By citing specific statutory authority for such goals, and referencing other provisions of the statute, previous administrative interpretations and Title VII's legislative history, Justice Brennan, in the majority opinion, found that section 706(g)[357] did not intend such a general ban.[358] However, the Court noted that judicial discretion

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352. *Id.* at 197. With respect to the statute's structure, the Court pointed to the text of § 703(j), which states:

> Nothing contained in this title shall be interpreted to require any employer, [or] . . . labor organization . . . subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance . . . [in the workforce].

Id. at 205 n.5 (quoting § 703(j) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(j)). Specifically, the Court noted that this provision stated that employers are not "required" to adopt preferential schemes, and if Congress wanted to preclude voluntary efforts, it would have provided that employers are not required or "permitted" to establish such schemes. *Id.* at 204-07. The Court reasoned that Congress' failure to include this additional limitation evidenced an intent to grant employers flexibility to voluntarily undertake remedial efforts. *Id.* The Court also concluded that a literal application of the statute would produce an absurd result. *Id.* at 204. It continued its analysis by moving from specific statutory mandate, to the provisions' legislative history. *Id.* at 203-08. It pointed to major elements of the plan that parallel the purposes of the statute thereby making it permissible. *Id.* at 208. For example, the Court noted that the plan was designed to destroy old patterns of discrimination, did not trammel the rights of white employees, and was temporary to eliminate racial imbalance. *Id.*

353. *Id.* at 216, 219-55 (Burger, Rehnquist, JJ., dissenting).

354. *Id.* at 217, 220-21. The dissenting Justices argued that the clarity of the statute allowed literal and plain meaning construction. They therefore found the Court's use of legislative history to trump plain text an attempt by the Court to rewrite, as opposed to construe, the legislation. The dissenters did not buy the Court's contention that legislative purpose should control because a literal application of the statute's text would produce an absurd result, since, they argued, the legislative history did not grant anyone the right to discriminate.

355. 478 U.S. 421 (1986).

356. *Id.* at 446-47.

357. 42 U.S.C. § 2000e-5(g).

358. *Sheet Metal Workers*, 478 U.S. at 446-70. Although § 706(g), 42 U.S.C. § 2000e-5(g) specifically prohibits ordering a union to admit employees not discriminated against,

should be exercised with sensitivity, and that Congress did not intend section 706(g) as a mechanism for achieving a racially balanced workforce.[359] This decision triggered dissents from four Justices who essentially felt that the Court's interpretation of section 706(g) conflicted with the mandates of section 703(j). The dissenters concluded that the statutory prohibition of quotas and the illegal displacement of nonminorities by minority nonvictims foreclosed the interpretation offered by the Court.[360]

Another race-conscious plan under a court-approved consent decree was challenged in *Local Number 93, International Ass'n of Firefighters v. Cleveland*.[361] This challenge raised the question of whether such a consent decree, which benefitted non-victims, violated section 706(g) of Title VII.[362] At the outset, the Court distinguished consent decrees from court orders, so as to secrete such decrees from the textual mandates of the statute. Once consent decrees were re-

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Justices Brennan, Marshall, Blackmun, and Stevens concluded that § 706(g) was not a general ban on programs that benefit non-victims. First, the Court found that the statute specifically granted broad discretion to courts to award "appropriate" and "equitable" relief for unlawful discrimination. *Id.* at 446. Then it construed the last sentence of § 706(g), which provided:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union . . . if such individual was refused admission, suspended, or expelled, or was refused employment or advancement . . . for any reason other than discrimination on account of race, color, religion, sex, or national origin . . . .

Id. (quoting § 706(g) of the Civil Rights Act of 1964). The Court determined that although this language prohibits a court from ordering a union to take remedial steps for reasons other than discrimination, it did not say that a court may order relief "only" to actual victims. *Id.* at 446-77. In this regard, the Court distinguished between what the statute prohibits or requires textually and what it permits as remedies. *Id.* at 464. To confirm its interpretation, the Court cited interpretations given by the EEOC and the Justice Department. *Id.* at 465-66. Further confirmation was found by broadly construing the remedial parameters of the statute. *Id.* at 465-70. The Court found that the actual mandate of § 706(g) may be overridden when there is a finding of persistent and egregious discrimination because the statute gives district courts broad discretion to grant equitable relief to remedy discrimination. *Id.* at 446-51.

Earlier interpretations of § 706(g) were also grounded in broad statutory goals, but only addressed relief concerns for actual victims. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

359. *Sheet Metal Workers*, 478 U.S. at 453. Justice Powell, who joined the majority opinion, supported the court-ordered plan because of the egregious violations involved and his judgment that the goal was not a quota. However, he cautioned that if the goal required replacements of journeymen because of race, he would not have supported the decision. *Id.* at 483-89.

360. Justices O'Connor, White, Rehnquist, and Burger shared these concerns. *Id.* at 489-500.

361. 478 U.S. 501 (1986).

362. *See id.* at 515.

moved from the reach of the statutory prohibition applicable to court orders, the road was paved for the Court's conclusion that consent decrees may benefit non-victims and still be "approved" by a court.[363] Support for this conclusion was found in the voluntariness of consent decrees, and their furtherance of Title VII's fundamental objective of voluntary compliance.[364] According to the Court, the fact that a court might not be empowered to enforce challenged portions of the decree later found to be unlawful, did not deprive that court of the authority to approve the decree from the outset.[365] The dissenting Justices argued that the language of section 706(g) and Title VII generally, did not support the Court's construction.[366] They also maintained concerns about burdening nonminority victims and the need for proven discrimination under the statute, as a predicate for a preferential plan.[367]

In *Johnson v. Transportation Agency*,[368] the Court continued to breathe life into preferential employment schemes through a broad interpretation of Title VII. In *Johnson*, a public employer's voluntary adoption of a plan with goals for minorities and women was at issue.[369] Under the plan, a qualified female employee was awarded a position over a male employee who scored higher than she did during the interviewing process.[370] Despite the clear language of section 703 prohibiting discrimination against "any individual," and lower court findings that sex was the determining factor in the employer's decision, the Court ruled that the employer's action was not forbidden by Title VII. The Court relied on its analysis in *Weber* and the importance of voluntariness in the statute's design, to support its conclusion. In a plurality opinion, Justice Brennan rejected the contention that such a plan can only be supported by an imbalance in the job

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363. *Id.* at 518-24. Six justices agreed with this position, relying heavily on *Weber*, although *Weber* was a private sector case which did not implicate the Fourteenth Amendment, and did not deal with a consent decree.

364. *Id.* at 515-19.

365. *Id.* at 528-30. The Court determined that the consent decree was valid because it did not bind the objecting union. *Id.* at 529-30.

366. *Id.* at 531-35 (White, J., dissenting) (noting that §§ 703 and 706(g) refute the Court's conclusion); *id.* at 535-45 (Rehnquist, J., dissenting) (noting that Court precedent and the language of § 706(g) does not support the Court's interpretation).

367. Justices White and Rehnquist, and Chief Justice Burger, noted these concerns. *Id.* at 531-32, 535, 540-41.

368. 480 U.S. 616 (1987).

369. *Id.* at 619-20.

370. *Id.* at 624-25.

category significant enough to support a prima facie case against the employer.[371]

The Court noted that sex was one of many factors considered, that the male employee did not have an absolute entitlement to the position, and the plan did not unnecessarily trammel the rights of male employees.[372] Moreover, the Court added that the plan was designed to "attain" rather than "maintain" a balanced workforce.[373] Justice Scalia wrote a stinging dissent, chiding the Court for departing from the plain text and precedent forbidding reliance on societal discrimination. Even more, he charged the Court with expanding the meaning of the statute to compel discrimination.[374]

United States v. Paradise[375] is another instructive and minority-friendly employment affirmative action case. The equal protection challenge in this case stemmed from a court-ordered decree mandating greater integration within Alabama's Department of Public Safety.[376] Finding that the Department of Public Safety failed to make proper progress under the decree that set a goal of twenty-five percent representation for black state troopers, the district court ordered the Department to award at least fifty percent of its promotions to the rank of corporal to black troopers, if qualified blacks were available.[377] This order was challenged on equal protection grounds, but it was upheld on the basis that it survived strict scrutiny analysis.[378] The plurality opinion, written by Justice Brennan, found the court order not to be a goal by itself but a device to achieve a goal.[379] Further,

371. *Id.* at 630. Justice O'Connor, in her opinion, concurring in the judgment, stated that a plan must rest on a "manifest imbalance" in the job category. *Id.* at 649 (O'Connor, J., concurring in judgment).

372. *Id.* at 638. The Court analogized the program to the Harvard plan that Justice Powell endorsed in Regents of the Univ. of Cal. v. Bakke, 483 U.S. 265 (1978).

373. *Johnson,* 480 U.S. at 639.

374. *See id.* at 657, 665, 667, 669-70, 677 (Scalia, J., dissenting).

375. 480 U.S. 149 (1987) (involving a decree requiring the Alabama Department of Public Safety to refrain from engaging in employment discrimination, including in promotions).

376. *Id.* at 149-66 (discussing the procedural history and facts of the case).

377. *Id.* at 162-63.

378. *Id.* at 167. In a plurality opinion, Justice Brennan noted that the Court had not yet reached a consensus on the appropriate review standard for "remedial" schemes. However, because this goal satisfied strict scrutiny standards, resolution of that issue was not a prerequisite to resolving this case. *Id.* Justice Stevens concurred in the judgment, but felt that standards set out in the school desegregation cases should govern. *Id.* at 189-95 (Stevens, J., concurring).

379. *See id.* at 179-80 (noting that "the 50% figure is not itself the goal; rather it represents the speed at which the goal of 25% will be achieved").

the Court ruled that the order was temporary and would end once the Department devised a plan that did not have a discriminatory impact on blacks.[380]

The predictive value of the pro-affirmative action cases has declined dramatically because of the Court's changed composition. The new Justices (Kennedy, Souter, and Thomas) are likely to join Justices Rehnquist, Scalia, White, and O'Connor in interpreting Title VII, detached from its legislative history.[381] Absence of an affirmative action mandate in Title VII forced the Court in the past to devote a great deal of analytic energy to "what is permissible or not prohibited" under the statute as opposed to what the statute requires. The 1991 Act did not fill this void, thereby making the cases rejecting such analysis increasingly instructive, because the dissenters of yesterday are a majority today. As a result, the two employment cases noted below and the *Croson* decision are emerging as more reliable guides in this area.

First, in *Firefighters Local Union No. 1784 v. Stotts*,[382] seniority principles were elevated above a protective scheme for black employees. In *Stotts*, a consent decree establishing hiring and promotion goals for blacks was at issue. As applied, this decree allowed junior black employees to displace senior white employees during a layoff, unless the collective bargaining contract's seniority provision was enforced.[383] The district court enjoined the operation of the seniority system which resulted in the layoff of senior white employees.[384] Writing for the Court, Justice White dismissed the injunction on the narrow proposition that section 703(h) of Title VII prohibits interference with bona fide seniority systems.[385] Justice White further found that the consent decree did not address the issue of layoffs, and that the lower court did not have authority to modify its decree when

380. *Id.* at 178. The dissenters focused on "relief," and found that this aspect of the decision failed strict scrutiny review standards because it was not narrowly tailored. *See id.* at 196 (White, J., dissenting); *id.* at 201 (O'Connor, J., dissenting).

381. *See* Eskridge, Jr., *supra* note 201, at 656-66 (noting that Justice Scalia's brand of textualism, which attempts to avoid legislative history at all costs, has been influencing the Court).

382. 467 U.S. 561 (1984).

383. *Id.* at 565-68.

384. *Id.* at 568.

385. *See id.* at 576-78 (noting that § 703(h) allows different standards of compensation terms or privileges of employment pursuant to a bona fide seniority system, and that Memphis's system qualified as such). The Court could have ruled this was an impermissible affirmative action plan because it discriminated against white employees.

such modification would interfere with a bona fide seniority system.[386] Further, the beneficiaries of the decree were not identified victims of discrimination.[387] By limiting the operation of this consent decree, *Stotts* triggered questions about when and how judicial remedies may be granted in Title VII cases.[388]

Second, in *Wygant v. Jackson Board of Education*,[389] a preferential scheme for black teachers was trumped by the application of strict scrutiny standards. This case presented facts and issues similar to *Stotts*, except the layoff plan benefitting black teachers was voluntarily negotiated by the union and the School Board.[390] In a plurality opinion, Justice Powell rejected the plan on equal protection grounds. Reliance on societal discrimination, in conjunction with role model arguments tied to the goal of proportional representation for minority students and teachers, was determined to be an insufficient factual predicate to support the plan.[391] By distinguishing the layoffs in this case from hiring goals, and noting the absence of judicial findings that the School Board engaged in discrimination, Justice Powell went on to recognize that public sector employers may only engage in affirmative action under certain circumstances.[392]

More recently, the affirmative action debacle moved from employment to entrepreneurship in *City of Richmond v. J.A. Croson Co.*[393] In *Croson*, the city's thirty percent set-aside program for minority contractors was challenged on equal protection grounds.[394] The plan was invalidated in a majority opinion authored by Justice O'Connor. Applying strict scrutiny standards,[395] the Court found that

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386. *Id.* at 576-80.

387. *Id.* at 579-80 (referring to § 706(g), Justice White noted that the provision's make-whole purpose only runs to actual victims).

388. *Stotts* raised questions about what constraints courts must operate under when ordering goals, etc., to protect minority employees. The case established that a bona fide seniority system under § 703(h), cannot be overridden by a consent decree, "modified" to protect minority employees who are not identified victims of discrimination. *See generally id.*

389. 476 U.S. 267 (1986).

390. *Id.* at 270.

391. *Id.* at 274-76. Justice O'Connor joined Justice Powell in this conclusion, *id.* at 288 (O'Connor, J., concurring), and Justice Powell further stated that layoff is not a permissible affirmative action methodology because it places the entire burden of remediation on "particular" persons, *id.* at 283.

392. *Id.* at 277. Justice O'Connor, however, did not agree that proven discrimination was an indispensable predicate for preferential schemes. *Id.* at 289 (O'Connor, J., concurring). It also appeared that Justice Powell's requirement of findings of discrimination was not limited to pre-program findings. *Id.* at 286.

393. 488 U.S. 469 (1989).

394. *Id.* at 476-77.

395. The Court determined that the Fourteenth Amendment protects each individual from

the city did not rely on the requisite foundational findings of discrimination in the city's construction industry that could justify race-driven contract awards.[396] Further, the plan was not narrowly tailored, and race neutral alternatives were not considered.[397] The *Croson* Court relied on the "American" principle of color-blindness, citing the evils of quotas to justify its conclusions. Justice Scalia, concurring in the judgment, wrote: "When we depart from this American principle we play with fire, and much more than an occasional DeFunis, Johnson, or Croson burns."[398]

The Court's latest word on preferential schemes came in *Metro Broadcasting, Inc. v. FCC.*[399] Here, the Court dealt with a Fifth Amendment equal protection challenge to two FCC policies that gave an edge to minorities.[400] In his departing opinion, and writing for a majority, Justice Brennan found that these benign congressional policies, even though not "remedial," are constitutionally permissible.[401] The Court held that such programs were valid if they served important governmental objectives and are substantially related to achieving those objectives. Programming and broadcast diversity, the foundation of the program, were determined to be important governmental objectives, and the policies were determined to be substantially related to achieving those objectives.[402] Justice Thomas, who replaced Justice

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rigid rules that deprive them of personal rights on the basis of race. It further found that searching judicial inquiry is the only means by which courts can ferret out which classifications are benign or remedial, and which are motivated by racial politics and are therefore illegal. The Court also noted concerns about stigmatic harm and reinforcement of stereotypes if racial classifications were not reserved for remedial settings. *Id.* at 493.

396. *Id.* at 505-06. Generalized findings of discrimination in the construction industry were found to be a faulty guide for a remedial scheme that addressed low participation of minority contractors in the local construction industry. *Id.* at 504-05. The Court ruled that the city's findings did not come close to establishing a constitutional violation, and the program failed to consider the race-neutral factors that may account for any disparity. *Id.* at 507.

397. *Id.* at 507-10. The Court ruled that, at best, the city's program was maintained for administrative convenience, because no attempt was made to determine whether participating minority contractors had been discriminated against. As such, the city's assumption that minority contractors will enter the construction industry in lockstep proportion to their representation in the population was unfounded. *Id.*

398. *Id.* at 527 (Scalia, J., concurring).

399. 110 S. Ct. 2997 (1990).

400. *Id.* at 3002.

401. *Id.* at 3008-09. The Court distinguished action taken by state and local governments, which are governed by *Croson*'s strict scrutiny standards, from action taken by the federal government, which is entitled to great deference. *Id.*; *see also* Fullilove v. Klutznick, 448 U.S. 448 (1980). Further, the Court found that Congress can remediate in reliance on societal discrimination, and stands above racial politics which may be used as a means of discriminating. *Metro Broadcasting*, 110 S. Ct. at 3009.

402. *Id.* Justice O'Connor dissented, and was joined by Chief Justice Rehnquist and

Marshall, a key supporter of the *Metro Broadcasting* decision, sees this issue differently.[403]

C. The 1991 Act's Response

In enacting the 1991 Civil Rights Act, Congress was not immune from evaluative pressures, particularly since public confidence in the legislative process has declined.[404] To get bipartisan support, the 1991 Act was pitched as a restorative measure rather than expansive or new legislation. Once couched in restorative terms, members of Congress who supported affirmative action had to tread lightly when discussing this issue, because Title VII did not explicitly provide for such programs. As shown in the cases, affirmative action jurisprudence under Title VII was essentially developed by the Court. The 1991 Act provides: "Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law."[405] Senator Kennedy interpreted the Act as approving affirmative action

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Justices Scalia and Kennedy. Justice O'Connor found that the majority's decision did violence to the equal protection guarantees of the Constitution, and that strict scrutiny was required for these FCC policies. *Id.* at 3029. Justice O'Connor maintained her federal/state distinction articulated in *Croson* by conceding wide remedial latitude for Congress under the Fourteenth Amendment, but noted the inapplicability of such congressional freedom in this case. *Id.* at 3030. Justice O'Connor also found the lack of specific evidence of discrimination and hence the need for remedial measures problematic. *Id.* at 3033-43; *see also* Charles Fried, Metro Broadcasting, Inc. v. FCC: *Two Concepts of Equality*, 104 HARV. L. REV. 107 (1990) (criticizing the Court for departing from strict scrutiny as a criterion for decisionmaking, and warning of the dangers to individualism if diversity can be casually cited to support government action when race is used by the government).

403. *See* Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992) (finding that the awarding of extra credit to female broadcasters on the basis of sex violates the Equal Protection Clause of the Fifth and Fourteenth Amendments).

404. To the extent that a fair process can protect against fallout from what may be viewed as unfair results, Congress is deprived of this cushion. *See* LIND & TYLER, *supra* note 346, at 163 (stating that, "[a]lthough citizens may react to policies in part on the basis of personal gains or losses from these policies, their sense of distributive and procedural justice will act as a cushion of support, leading them to accord some support to policies and leaders if they view them as having acted fairly"). This theory is probably not workable, however, in an environment where individuals are battling to support themselves and their families and care more about results than procedures.

405. § 116, 105 Stat. at 1079. The legislation does not reflect an affirmative statutory mandate, or even an "adoption and encouragement" approach for affirmative action, and also failed to grant specific authorization to the states to adopt such plans. For a discussion of Congress' power to authorize such schemes, see Mary C. Daly, *Some Runs, Some Hits, Some Errors—Keeping Score in the Affirmative Action Ballpark from* Weber *to* Johnson, 30 B.C. L. REV. 1, 88 (1988).

law as it is currently written.[406] Senator Hatch, however, construed the legislation as being entirely neutral on this subject.[407] Legislative history as developed in the House is even more at odds.[408] Even President Bush joined the interpretive fray by signaling his disapproval of protective programs. One day before signing the legislation, the President issued a directive, originally included in his signing statement, discontinuing preferential schemes in federal agencies.[409] Although this directive was withdrawn, other aspects of the signing statement remain potentially destructive legislative history.[410]

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406. 137 CONG. REC. S15,235 (daily ed. Oct. 25, 1991) (stating that "the bill is intended not to change the law regarding what constitutes lawful affirmative action and what constitutes impermissible reverse discrimination").

407. *Id.* at S15,320 (daily ed. Oct. 29, 1991) (stating that the Act "expresses neither Congressional approval nor disapproval of any judicial decision affecting court-ordered remedies, affirmative action, or conciliation agreements including the Weber, Johnson, Local 78, and Paradise Supreme Court decisions").

408. *Compare id.* at H9530 (daily ed. Nov. 7, 1991),

> Section 116 provides that nothing in this legislation is to be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law a [sic] previously established by Congress in Title VII and by the decisions of the United States Supreme Court. The intent of this provision is clear: the legislation is not intended to change in any way what constitutes lawful affirmative action or what constitutes impermissible reverse discrimination from what the law was prior to the legislation. A provision evidencing this intent has been included in every proposed version of the legislation since it was introduced in 1990, and every version has been explained by its sponsors in the same way: the intent is to leave things the way they were before passage of the legislation with respect to the legality of affirmative action.

with id. at H9548, stating that:

> This legislation does not purport to resolve the question of the legality under Title VII of affirmative action programs that grant preferential treatment to some on the basis of race, color, religion, sex or national origin, and thus 'tend to deprive' other 'individual[s] of employment opportunities . . . on the basis of race, color, religion, sex or national origin.' In particular, this legislation should in no way be seen as expressing approval or disapproval of United Steelworkers v. Weber, 443 U.S. 193 (1979), or Johnson v. Transportation Agency, 480 U.S. 616 (1987), or any other judicial decision affecting court-ordered remedies, affirmative action, or conciliation agreements.

409. The order stated: "Any regulation, rule, enforcement practice, or other aspect of these programs that mandates, encourages, or otherwise involves the use of quotas, preferences, set-asides, or other similar devices, on the basis of race, color, religion, sex, or national origin, is to be terminated as soon as is legally feasible." Signing Statement—S. 1745, "Civil Rights Act of 1991." [Directive on file with author]

410. The order was withdrawn after it was leaked and met with stiff resistance from numerous legislators and the civil rights community. *See* R.A. Zaldivar & Aaron Epstein, *Bush Signs Rights Bill Amid Dispute: Critics Claim an Attempt at Sabotage*, MIAMI HERALD, Nov. 22, 1991, at A1, 21A ("Some Democrats boycotted the signing ceremony, and some civil rights advocates said they believe the episode shows that the administration will keep

Another key provision affecting affirmative action is section 106, which states:

> It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.[411]

This provision has been regarded as having the potential to end affirmative action.[412] However, adjustments made as part of a "legiti-

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trying to sabotage the new law."). This move by the President, which was viewed as an attempt to undermine the statute, is reminiscent of President Reagan's politically manipulative use of signing statements. *See* William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699, 708-09, 713-14 (1991). Under the Reagan Administration, Attorney General Meese convinced the publishers of the *United States Code Congressional and Administrative News* that presidential signing statements should be included in the Legislative History Section of that publication. President Reagan, unlike his predecessors, used signing statements to advocate a position on unresolved politically sensitive issues or to offer a construction that undermined the statutory structure. *Id.* at 704-05. Because the Supreme Court has historically considered and relied on views of the executive branch, particularly to confirm plain meaning construction, the President's directive had far-reaching implications. *See* Allison C. Giles, Note, *The Value of Nonlegislators' Contributions to Legislative History*, 79 GEO. L.J. 359, 363 nn.21 & 23 (1990) (noting how a study of this subject showed the Court considering the views of the executive branch more often than any other nonlegislative source, and using it most often to confirm plain meaning construction). This data is particularly instructive because of the 1991 Act's limited statement on affirmative action, and the present Court's overwhelming preference for narrow construction of civil rights legislation.

The President's retraction of his directive does not resolve the issue favorably for civil rights advocates, however. The signing statement retained an endorsement of Senator Dole's memo inserted into the legislative record by regarding that memo as authoritative interpretive guidance. Senator Dole's statement argued that the new law does not address the legality of affirmative action programs. *See* 137 CONG. REC. S15,477-78 (daily ed. Oct. 30, 1991):

> This legislation does not purport to resolve the question of the legality under Title VII of affirmative action programs that grant preferential treatment to some on the basis of race, color, religion, sex, or national origin, and thus "tend to deprive" other "individual[s] of employment opportunities . . . on the basis of race, color, religion, sex or national origin." In particular, this legislation should in no way be seen as expressing approval or disapproval of United Steelworkers v. Weber, 443 U.S. 193 (1979), or Johnson v. Transportation Agency, 480 U.S. 616 (1987), or any other judicial decision affecting court-ordered remedies, affirmative action, or conciliation agreements.

As a result, the President's statement still provides potent authority for a Court that seems all too willing to reshape the law in this area. Even if the Court abides by a textual methodology of statutory construction, and therefore refuses to consider the President and Senator Dole's statements, it could find sufficient interpretive flexibility from the words of the statute to prohibit affirmative action.

411. § 106, 105 Stat. at 1075.

412. *See* Graglia, *supra* note 199, at 1138.

mate" affirmative action plan will likely satisfy court scrutiny.

These two statutory provisions leave affirmative action programs on a precarious footing.[413] The statutory text says that preferential adjustments should not be made for protected class members, but at the same time takes a hands-off approach by avoiding Supreme Court decisions upholding such preferences. By providing that affirmative action that is "in accordance with the law" is unaffected, Congress left the Court broad discretion to determine when a plan is lawful. The failure to codify decisions such as *Weber* and *Johnson* allows the Court to interpret the Act's text as generally prohibiting preferential schemes except to the extent that *it* determines that they are lawful. Using textualist methodology, the Court can easily avoid legislative history which in this case is replete with conflicting statements. Further, the defeat of the 1990 Act based on allegations that it was a quota bill, in addition to the President's directive discontinuing federal programs, may quietly assure the Court that a construction prohibiting affirmative action generally is desirable.

D. *Interpreting the 1991 Act*

As noted earlier, there is clear evidence of growing support for plain text analysis. Under this interpretive methodology, distinctions between what the statute requires or permits will likely dissipate as the Court focuses more on what the statute states. Clear language will be literally enforced even if the spirit of the statute or its goals are frustrated. Reliance on legislative history may decline, and will therefore be unavailable to trump plain text or circumvent literal application that would produce absurd results. Only those employers that can demonstrate constitutional or statutory violations will be eligible to implement remedial schemes.[414] As such, reliance on societal discrimination will be defective.[415] Second, only preferential plans that

413. Another provision implicated in the affirmative action debate is § 105. The business necessity provision in § 105 did not resolve the question of what the employer's burden is in disparate impact cases. As a result, it is unclear whether employers will implement affirmative action plans on the premiss that they could not satisfy the statute's burden of proof requirements after plaintiff has shown an imbalance in the workforce.

414. Chief Justice Rehnquist and Justices O'Connor, White, and Scalia hold this position, and now have the benefit of three additional conservative Republican appointees: Justices Kennedy, Souter, and Thomas. This thinking was first developed in Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977), a Title VII case that outlined the statistical comparisons that are probative in establishing a statutory violation.

415. Notwithstanding the continuing recognition of disparate impact suits under Title VII, particularly in light of the tightened rules under *Wards Cove* and the 1991 Act's failure

benefit identified victims of wrongdoing will be recognized.[416] Further, programs that deprive others of opportunities, or require that they bear burdens or make sacrifices, will not be upheld.[417]

Justices Powell, Brennan, and Marshall, who considered statutory and historical context plus legislative history to avoid frustrating statutory goals, have retired. These Justices also accepted less than prima facie violations of the law as valid foundations for remedial or affirmative action programs. As a result, the Court now lacks several Justices who were willing to go beyond textual mandate to attain the goals of civil rights legislation. The Court now has a solid majority of Justices whose interpretive methodology is known more for defeating civil rights plaintiffs' claims and attempts at remediation, than for accounting for past injustices.[418]

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to completely change those rules.

416. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 579 (1984) (stating that even identified victims may have to wait for vacancies).

417. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 284 (1986) (holding that the selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause); *Stotts*, 467 U.S. at 579 (stating that, "[e]ven when an individual shows that the discriminatory practice has had an impact on him, he is not automatically entitled to have a nonminority laid off to make room for him. He may have to wait until a vacancy occurs"); United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979) (upholding an affirmative action plan that did not require the discharge of white workers and their replacement with black hirees).

418. From the outset, Justice White and Chief Justice Rehnquist had narrow ideas about the protection afforded by § 1 of the Civil Rights Act of 1866. 42 U.S.C. § 1981. They felt that the provision's legislative history and Court dictum supported a conclusion that private individuals are not required to enter into contractual relations with blacks, even if the motivation is discrimination. *See* Runyon v. McCrary, 427 U.S. 160, 192-95 (1976) (White, J., dissenting). At the same time, these Justices support the view expounded by Justice Marshall, that Title VII protects blacks and whites from discrimination. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 296 (1976). Justice White, in turn, joined Justice Rehnquist in Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579 (1978), to reaffirm this proposition. Subsequently, Justice Rehnquist took the position that the legislative history of Title VII does not support a conclusion that Congress authorized affirmative action programs. *Weber*, 443 U.S. at 244-46 (1979) (Rehnquist, J., dissenting). Justice Scalia joined him in reaffirming this conclusion years later in Johnson v. Transportation Agency, 480 U.S. 616, 670 (1987) (Scalia, J., dissenting). Justice O'Connor, although concurring in the judgment in *Johnson*, noted that her decision rested on stare decisis principles. She adverted to her strong support for Justice Scalia's position because the Court had "chosen to follow an expansive and ill-defined approach to voluntary affirmative action by public employers despite the limitations imposed by the Constitution and by the provisions of Title VII . . . ." *Id.* at 648 (O'Connor, J., concurring). Relying on the persuasive force of Justice Scalia's dissent, Justice O'Connor suggested that if the issue of overruling *Weber* was put squarely before the Court, her leanings favored *Weber*'s demise. *Id.* Justice Kennedy, the likely fifth vote, is a strict constructionist. Although his views have not been fully disclosed, his dissent in Metro Broadcasting, Inc. v.

Congress' neutrality on affirmative action in the 1991 Act further weakens the foundation laid by prior Justices for such programs through broad construction of Title VII.[419] The President's directive when he signed the new law, that federal agencies must phase out regulations authorizing racial preferences, signals continuing hostility to affirmative action, and ratifies the Court's universal colorblind analysis. As a result, employment affirmative action which represents equal employment opportunity "on the cheap"[420] now seems to have

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FCC, 110 S. Ct. 2997, 3028 (1990), and his opinion in Patterson v. McLean Credit Union, 491 U.S. 164 (1989), are telling. Other likely supportive votes include Justices Souter and Thomas, both of whom are strict constructionists.

419. Statutory purpose and congressional inaction were cited in *Weber* and *Johnson* as evidence of congressional endorsement of affirmative action schemes. *Weber*, 443 U.S. at 204-07; *see also id.* at 216 (Blackmun, J., concurring) ("And if the Court has misperceived the political will, it has the assurance that because the question is statutory Congress may set a different course if it so chooses."); *Johnson*, 480 U.S. at 629 n.7. *But see id.* at 671-72 (Scalia, J., dissenting) (arguing that congressional inaction does not prove judicial correctness because of the many and competing variables that may cause legislative acquiescence).

420. *See* CARTER, *supra* note 346, at 72, 80, 82-84 (arguing that America is getting a bargain with affirmative action that never reached the oppressed masses of blacks, and has thereby avoided bearing the true costs of equality). Many blacks see reparations for slavery and its legacy as a more responsible accounting for human and civil rights violations. *See* Derek Reveron, *Blacks are Told Economically They May Never Catch Up*, MIAMI HERALD, Oct. 27, 1991, at 1K (Dean of business school at Jackson State University proposes a $600 billion to $1 trillion reparations plan to compensate blacks for lost economic opportunities caused by slavery); *see also* BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS (1973); Darrell Dawsey, *Civil Rights Activist Campaigns for Slavery Reparations*, MIAMI HERALD, Feb. 16, 1991, at 25A (Civil rights activist still fighting for his forty acres and a mule); CAPITAL SPOTLIGHT, Jan. 17, 1991 (Nigerian President calls on western nations to compensate for slavery contending it marginalized Africa).

However, the imponderables of reparations for slavery are many. *See* Derrick A. Bell, Jr., *Dissection of a Dream*, 9 HARV. C.R.-C.L. L. REV. 156, 159-65 (1974) (reviewing Professor Bittker's book and highlighting constitutional, jurisdictional, and procedural difficulties that affect congressional and court authority to grant reparations, problems of identifying defendants, and measuring and paying damages). Professor Bell concluded that it would be a miracle if Congress enacted reparations legislation, and suggested that even if reparations advocates had a foolproof legal strategy, it would never be adopted. *Id.* at 165. Despite the limitations articulated by professor Bell, legislation for reparations was introduced recently. *See* H.R. 1684, 102d Cong., 1st Sess. (1991). However, professor Bell's assessment seems prophetic. Billcast reported the odds that H.R. 1684 will pass as ten percent in the House Committee on the Judiciary, eight percent in the Senate Committee, nine percent on the House floor, and seven percent in the Senate.

The lack of congressional interest in this area presents a bitter irony for blacks because of Congress' recent expenditure of $1.25 billion to Japanese Americans interned during the second world war. *See* S. 1093, 99th Cong., 1st Sess., 131 CONG. REC. S5222-35 (daily ed. May 2, 1985) (providing for payments of $20,000 to individuals who are members of the class of United States citizens of Japanese ancestry who were victims of World War II internment orders). The checks and letters of apology were actually delivered in October 1990, and some internees refused compensation. *Japanese American Internees Get Checks*,

a bleak future.[421]

In *Fullilove v. Klutznick*,[422] Justice Stevens, referring to class-wide discrimination against black Americans, wrote: "[T]he wrong committed against the Negro class is both so serious and so pervasive that it would constitutionally justify an appropriate class-wide recov-

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MIAMI HERALD, Oct. 10, 1990, at 5A. For some background on the Japanese internment cases and subsequent developments, see Yasui v. United States, 320 U.S. 115 (1943) (upholding second conviction in reliance on Hirabayashi v. United States, 320 U.S. 81 (1943)); *Hirabayashi*, 320 U.S. 115 (upholding constitutionality of, and conviction under, military curfew orders promulgated under authority conferred by Executive Order No. 9066). The constitutionality of military orders stemming from the war and Executive Order No. 9066 was again challenged in Korematsu v. United States, 323 U.S. 214 (1944). Again, the Court upheld the constitutionality of another exclusion order and a conviction thereunder. *Id.*; *see also Ex parte* Mitsuye Endo, 323 U.S. 283 (1944) (successfully challenging detainment at a relocation center). In 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians ("CWRIC"), to review Executive Order No. 9066 and make recommendations. *See Hearings Before the Subcomm. on Admin. Law & Govtl. Relations of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 1 (1980). Information acquired by the CWRIC essentially established that the military orders promulgated pursuant to Executive Order No. 9066 were not justified by military necessity. Relying on newly discovered evidence, Korematsu, Yasui, and Hirabayashi filed petitions for writs of error *coram nobis* to vacate their convictions. Korematsu's and Hirabayashi's writs were granted, Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987); Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984), while Yasui's petition was dismissed on mootness grounds because of his death, Yasui v. United States, 772 F.2d 1496 (9th Cir. 1985). Based on the findings of the CWRIC, legislation was introduced to acknowledge the wrong, apologize to the affected individuals, educate the public, make restitution, prevent similar wrongdoing in the future, and credibly declare to the world this country's commitment to human rights. *See* H.R. 442, 99th Cong., 1st Sess. 131 CONG. REC. E61 (daily ed. Jan. 3, 1985) (titled "Civil Liberties Act of 1985"). This legislation passed easily and set the stage for the appropriation of $1.25 billion to compensate internees. For a general treatment of this subject, see Barbara L. Tang, Note, *The Japanese Internment and Reparations: Creating a Judicial or Statutory Cause of Action Against the Federal Government for Constitutional Violations*, 21 LOY. L.A. L. REV. 979 (1988).

Even more ironic was Congress' indifference to the many theoretic limitations advocated against reparations. *See generally* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (discussing and rejecting arguments that compensation to one group may result in an unending clamor for compensation by other harmed groups; that the lengthy passage of time has made such claims stale; that insurmountable difficulties will be encountered in trying to identify wrongdoers and victims; and that damages may be incalculable). In fact, in making the appropriations for Japanese Americans, Congress cited many of the arguments advocates for reparations for blacks have made over the years. *See* 131 CONG. REC. E61-62 (daily ed. Jan. 3, 1985). In addition to the symbolic value of an apology, Congress recited the educative, preventive, deterrence, restitution, and human rights functions of reparations. *Id.*

421. *See* CARTER, *supra* note 346, at 17-18. Professor Carter observes that affirmative action that is redistributive in nature will always face strong opposition from middle class Americans.

422. 448 U.S. 448 (1980).

ery measured by a sum certain for every member of the injured class."[423] The more popular view on remedial measures, however, seems to be Justice O'Connor's sentiment that "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs."[424] Plain meaning construction, strict scrutiny standards, and "American" principles of justice, which always seemingly fail to account for injustices against minorities, are now at the helm. As a consequence, the quest for equal employment will be limited to equal treatment, leaving equal achievement purely aspirational.[425] The "American dreams" analysis of *Weber* is now faltering under the "American principles" rationale of *Croson*.

CONCLUSION

The Civil Rights Act of 1991 reflects significant congressional achievement that will become increasingly difficult to duplicate.[426] The provision for compensatory and punitive damages is certainly an accomplishment.[427] So, also, is protection for post-contract discrimination, expanded coverage for particular groups, and other gains noted herein. However, standards outlined in the 1991 Act and those set out by the Court that were left intact, which predicate liability only upon proof of illegal motive, present formidable obstacles for discrimination victims. Satisfying the motive-based requirements which pervade the statute is going to be very difficult. Meeting impact standards that require identifying specific practices and showing causation will be

423. *Id.* at 537 (Stevens, J., dissenting).

424. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505-06 (1989).

425. For a discussion of the dichotomy between equal treatment and equal achievement, see Fiss, *supra* note 199, at 235-49.

426. Politically, affirmative action and other protective schemes for minorities are so unpopular that Senate seats and governors' mansions are being determined by how closely candidates align themselves with minority interests. *See* Robert S. Boyd, *A Word from the Voters Discontent: Incumbents Get Message*, MIAMI HERALD, Nov. 7, 1991, at 1A, 22A ("In Mississippi, white voters' resentment of welfare and affirmative action to benefit blacks elected a Republican governor."). Harris Wofford, the Democrat who defeated former Republican Attorney General Richard Thornburg for a Pennsylvania Senate seat, advised Democrats to avoid getting "too deeply involved in targeting programs for the poor." *Id.* The American voters' sense of fairness is now being fired more by self interest than by sensitivity to racial injustices.

427. Since the Act's passage, legislation has been introduced in an attempt to get the damage caps removed. *See* Equal Remedies Act of 1991, 137 CONG. REC. S18336 (daily ed. Nov. 29, 1991).

equally tough. If the Court continues to use stringent proof requirements, the future may bear limited successes for employment discrimination plaintiffs. Moreover, congressional neutrality on remedial schemes and lack of clarity on retroactivity gives this strict constructionist Court an out to apply neutral principles and detach itself from remediation or true make-whole responsibilities. Having survived legislative, political and intellectual critics, remediation now comes head to head with a conservative Supreme Court. It is doubtful that remedial schemes can survive this formidable opponent. Therefore, strategies that effectively respond to the Court's analytic methodology and popular sensitivities are key to the future success of civil rights litigants.

In increasingly competitive employment and entrepreneurial markets, people are extremely sensitive about job opportunities. Bearing burdens for equality and remediation, however slight, is not an attractive proposition for workers.[428] The idea that fault should be the basis of liability and remediation is being effectively transferred to the employment area.[429] Attenuated wrongs or those not directly traceable to an employer's conduct are increasingly regarded as failing to provide the required nexus that forms the basis for liability.[430] Unpersuasive is the argument that beneficiaries of a wrong should shoulder some of the burdens of remediation. The political battles that were waged to pass the new civil rights law reflect the unpopularity

428. A popular sentiment in the nation today is that blacks gained unearned advantages through legislation, court decisions, and government programs. For a good discussion of how the Reagan administration took advantage of this sentiment, see Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986); Patricia J. Williams, Metro Broadcasting, Inc. v. FCC*: Regrouping in Singular Times*, 104 HARV. L. REV. 525 (1990).

429. Although many individuals benefit directly from discrimination or its legacy, *see* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 561 (1989) (Blackmun, J., dissenting), the prevailing attitude seems to be that those who are negatively impacted by affirmative action qualify more as innocent victims than wrongdoers, *see* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986); *see also* Johnson v. Transportation Agency, 480 U.S. 616, 666-67 (1987) (Scalia, J., dissenting) (affirmative action programs likely to affect classes of individuals unlikely to have been victims of historic societal discrimination). *But see* Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 308-15 (1990) (the rhetoric of innocence is a powerful symbol in our culture because of its ties to religion, chastity, and freedom from guilt; but pervasive unconscious racism belies any claim of innocence); *see also* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324-25 (1987) (stating that by requiring that a blameworthy perpetrator be identified before discrimination is recognized, the Court distorts reality and destroys the foundation for remediation).

430. Wards Cove Packing Co. v. Atonio, 490 U.S. 644, 657 (1989).

of statutory protection for particular groups. Even more troublesome and unpopular are remedial schemes that prefer particular groups. This unpopularity suggests that minorities and women may one day find the congressional well dry, and they should therefore begin designing strategies that can survive the Court's bedrock construction and textualist analytic schemes.

Judicial resort to textual construction and bedrock Anglo-American jurisprudential principles that defeat civil rights claims comes at a particularly precarious time for discrimination victims who now compete for employment opportunities in a shrinking job market. Across-the-board judicial subscription to such principles, coupled with increasing opposition to affirmative action programs and the imponderables of reparations, signal the demise of any attempt at serious accounting for wrongs committed against members of protected classes. If the latest Supreme Court decisions signal a conviction that a sufficient period for remediation has elapsed, fairness dictates that, where appropriate, bedrock jurisprudential principles and rules of construction that support plaintiffs be identified and adopted.