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Recent Supreme Court cases in the area of employment discrimination signal the beginning of the crumbling and eventual destruction of civil rights laws that have developed since the abolition of slavery.

Three major cases help make up the foundation of present day civil rights law: *Fullilove v. Klutznick*,[1] *McDonnell Douglas Corp. v. Green*,[2] and *Runyon v. McCrary*.[3] In just one term of the Supreme Court, these three cases were either severely limited or overturned. *Fullilove* was limited by *City of Richmond v. J.A. Croson Co.*;[4] *McDonnell Douglas* essentially was overturned by *Wards Cove Packing Co. v. Atonio*;[5] and *Runyon v. McCrary* essentially was overturned by *Patterson v. McLean Credit Union*.[6]

In *Fullilove*, the Court considered the constitutionality of a federal minority set-aside program.[7] Through fact-finding Congress had determined that the country had discriminated against minorities by excluding them from the construction industry.[8] In an attempt to remedy this past discrimination, Congress created a minority set-aside program for federal construction projects.[9] Under this program, a percentage of the federal dollars for con-

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1. 448 U.S. 448 (1980).
2. 411 U.S. 792 (1973).
3. 427 U.S. 160 (1976).
4. 109 S. Ct. 706 (1989).
5. 109 S. Ct. 2115 (1989).
6. 109 S. Ct. 2363 (1989).
7. Fullilove v. Klutznick, 448 U.S. 448, 453 (1980).
8. *Id.* at 478.
9. *Id.* The program was part of the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116. *Id.* at 453-54.

struction projects is set aside for minority contractors.[10] In response to this legislation, states set up their own minority set-aside programs, relying on Congress' findings of discrimination.[11]

After *Croson*, state and local municipality minority set-aside plans are essentially unconstitutional. The *Croson* Court reasoned that because the City of Richmond had failed to document self-inflicted discrimination in the Richmond construction industry when it set up its set-aside program[12] and had instead relied on Congress' earlier findings of discrimination when it created the federal set-aside program, its minority set-aside program and all other programs similarly justified were invalid.[13] The *Croson* Court required a more particularized finding of discrimination.[14] Presently, therefore, on the state and local level, essentially all minority set-asides are invalid. On the federal level, however, set-asides are allowed.

Croson's immediate effect is that once again the door to participation in the construction industry has been closed, on the state and local levels, to minorities, females, and other protected individuals. Before *Fullilove*, minorities received only .13% of Atlanta's government contracts.[15] After *Fullilove* and before *Croson*, Atlanta could boast that 34.6% of their government contract dollars went to minority contractors.[16] Civil rights attorneys fear that as a result of *Croson* pre-*Fullilove* minority contractor figures will return. Once again, minority and female businesses will not be subcontractors on state and local projects and will not receive state or local contracts as they did before *Croson*.

In response to *Croson*, the American Contract Compliance Association is urging state and local municipalities to attempt to make the particularized finding of discrimination required by the Court, while plotting other strategies. This is a complicated and burdensome task. How long documenting particularized discrimination will take depends on a number of factors, such as the depth of the data kept by the state or municipality and the availability of funds to research and make the finding. Presently, the majority of

10. The Act requires state and local government units receiving federal funds for local public works programs to use 10% of the funds to procure services or supplies from minority business enterprises (MBEs). 42 U.S.C. § 6705(f)(2) (1982).

11. *See, e.g.*, City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 726 (1989). *See generally* Leslie Nay & James Jones, Jr., *Equal Employment and Affirmative Action in Local Governments: A Profile*, 8 Law & Inequality 103 (1989).

12. *Croson*, 109 S. Ct. at 723-24.

13. *Id.* at 726.

14. *Id.* at 727.

15. Wall St. J., Mar. 6, 1989, at B5.

16. *Id.*

the programs are in the fact-finding posture. At one extreme, jurisdictions like Minneapolis are fighting to keep a minority and female set-aside program without adhering to *Croson*.[17] At the other extreme, the City of San Francisco has made the particularized findings of self-inflicted discrimination demanded by *Croson* and therefore is able to operate a minority and female set-aside program in compliance with *Croson's* mandate.[18]

The second major case in the three-tiered foundation of civil rights law is *Runyon v. McCrary*.[19] A little history of how the *Runyon* case became law is important.

After passage of the thirteenth amendment to the United States Constitution, which outlawed slavery and also gave Congress the authority to pass laws to eliminate effectively the badge of slavery,[20] Congress did pass legislation to eliminate the badge of slavery. It passed legislation to prohibit lynchings and the racial harassment of blacks, and to allow blacks to participate in all aspects of society.[21] *Runyon* upheld the application of the thirteenth amendment and the legislation that resulted from it to cases of racial discrimination in private employment.[22]

One of the most important aspects of the *Runyon* decision is that it provided an opportunity for blacks and other minorities to file cases against such organizations as the Ku Klux Klan under Sections 1981 and 1982.[23] Throughout the United States there has been a general acceptance of the doctrine established in *Runyon*. This doctrine was so entrenched in law that forty-seven state attorneys general asked the Supreme Court to not overturn *Runyon* in *Patterson v. McLean Credit Union*.[24] Sixty-seven out of the one hundred United States Senators and 119 out of the 365 members of the House of Representatives also asked that the *Runyon* decision not be overturned.[25]

Nevertheless, in *Patterson v. McLean*, the Supreme Court, on its own motion, asked for a rehearing of *Runyon*. That action sounded an alarm to those who support civil rights and a wake-up

17. Star Tribune, Apr. 6, 1989, at 1B.

18. San Francisco Cal., Administrative Code Ch. 12D, Ordinance 139-84 (1989).

19. 427 U.S. 160 (1976).

20. Eric Foner, *An Unfinished Revolution*, in The Return of Jim Crow: The Bitter Fruit of the Reagan Court in Patterson v. McLean 4-5 (1989).

21. *Id.*

22. Runyon v. McCrary, 472 U.S. 160, 172 (1976) (quoting Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975)).

23. Jeanne Mirer, *Questions and Answers*, in The Return of Jim Crow: The Bitter Fruit of the Reagan Court in Patterson v. McLean 10-11 (1989).

24. *Id.* at 11.

25. *Id.*

call welcomed by anti-civil rights white supremacists. The Court's decisions sent a message that these supremacy groups now had a powerful ally.

The *Patterson* Court held that Section 1981 of the Civil Rights Act of 1866 cannot be used in cases of racial harassment in the employment context.[26] In theory, *Patterson* simply limited *Runyon*, but the practical effect of the decision was to eliminate the vehicle through which minorities bring their cases to court. No longer can a claimant bring Section 1981 cases to federal district court under a theory of racial harassment. Although *Patterson* did not overturn *Runyon* outright, in essence, the Court threw it out the back door. Employers cannot discriminate in the selection process, but they can treat employees so badly through racial harassment that minorities will quit "voluntarily." So through the back door, the Court effectively has overturned *Runyon*.

Patterson will be felt most significantly in southern states that do not have state legislation prohibiting racial harassment, where, coincidentally, the Ku Klux Klan continues to run rampant. Minnesota will feel *Patterson's* effect when white supremacist groups use racial harassment and intimidation to try to suppress the advancement of blacks and other minorities.

The third case of importance is *Wards Cove Packing Co. v. Atonio*.[27] *Wards Cove* limited the holding of *McDonnell Douglas* by reducing the respondent's burden in an employment discrimination case brought under Title VII of the Civil Rights Act of 1964.[28] Instead of placing the burden of persuasion on the employer to demonstrate the non-discriminatory reason for a particular business practice, as was required by *McDonnell Douglas*,[29] the *Wards Cove* Court held that the complainant had to show that the reason given by respondent did not have *any* reasonable business necessity.[30] Almost all policies can have some reasonable business effect, so the Court essentially has held that a complainant will not be allowed to prove her case.

Second, and equally as devastating, the *Wards Cove* Court stated that statistics in and of themselves are not sufficient proof of discrimination.[31] Under *Wards Cove*, unless a complainant can show that an employer systematically refused to hire qualified minorities who had in fact applied for jobs, complainant will not pre-

26. Patterson v. McLean, 109 S. Ct. 2363, 2373 (1989).
27. 109 S. Ct. 2115 (1989).
28. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989).
29. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, n.14 (1973).
30. *Wards Cove*, 109 S. Ct. at 2125-26.
31. *Id.* at 2121-22.

vail. It appears that the Court is saying that separateness by itself is not unequal, and that the complainant has to prove that this separateness is unequal and unjust.

With these cases, the Supreme Court has reversed hundreds of years of civil rights progress: in *Wards Cove*, the Court reversed almost forty years of established precedent; in *Runyon*, almost 100 years; and in *Croson*, at least thirteen years. Now civil rights advocates must attempt to overcome this devastating attack.

At the national level, civil rights advocates are advising their local affiliates about alternative vehicles to fight white supremacy and racial discrimination. Two alternative forums in which to combat racism are being reexamined and utilized in this struggle: first legislatures, both state legislatures and the United States Congress; second, the state court systems. Federal courts will be of little help because some theorists now believe that the federal court door is closed to minorities. As evidence of this, a study reported in the *Washington Post*, in January of 1989, revealed startling disparities between the treatment of civil rights cases by Reagan appointees and Carter appointees.[32] Carter appointees' support of claimants' discrimination claims was approximately four times higher than that of Reagan appointees.[33]

Because the majority of federal judges are Reagan appointees, the federal courts are less receptive to these types of claims than they had been in the past. Consequently, civil rights advocates are taking their battles to the state legislatures and state courts rather than the federal courts. The United States Senate, where the Civil Rights Act of 1990,[34] was recently introduced, also seems to be concerned about these recent Supreme Court decisions. In fact, thirty-four Senators have cosponsered the bill, introduced by Senator Edward Kennedy.[35] Although the bill has not yet been passed and amendments are likely, civil rights activists are hopeful it *will pass* and restore and strengthen civil rights laws that ban discrimination.

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32. Wash. Post, Jan. 29, 1989, at A1.

33. *Id.*

34. S. 2104, 101st Cong., 2d Sess., 136 Cong. Rec. S991 (daily ed. Feb. 7, 1990). The Civil Rights Act of 1990 would overturn *Patterson* and *Wards Cove*. *Id.*

35. *Id.*