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The Civil Rights Act of 1991 and the Future of Affirmative Action: A Preliminary Assessment

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THE CIVIL RIGHTS ACT OF 1991 AND THE FUTURE OF AFFIRMATIVE ACTION: A PRELIMINARY ASSESSMENT

*Robert Belton**

INTRODUCTION

The Supreme Court decided a number of civil rights cases[1] during its 1988 Term in which it substantially eroded Title VII of the Civil Rights Act of 1964 ("Title VII").[2] Title VII broadly prohibits discrimination in employment on the basis of race, color, sex, religion, or national origin.[3] Doctrinal developments under Title VII have been important for affirmative action as a remediation policy to effectuate this nation's professed commitment to equality. Affirmative action, based on race-specific remedies, is a remediation policy pursuant to which race[4] is specifically taken into account in the allocation of jobs and other benefits or opportunities in the public and

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1. Patterson v. McLean Credit Union, 491 U.S. 164, 171-75 (1989) (limiting the scope of section 1981); Price Waterhouse v. Hopkins, 490 U.S. 228, 239-52 (1989) (establishing standards for evaluating mixed-motive employment discrimination claims); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650-55 (1989) (substantially undercutting the disparate impact theory of discrimination the Court enunciated in Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)); Martin v. Wilks, 490 U.S. 755, 766-68 (1989) (broadening the right of white employees and applicants to challenge affirmative action plans in consent decrees); Lorance v. AT&T Technologies, Inc., 490 U.S. 900, 904-13 (1989) (requiring discriminatory intent for allegations of sex discrimination in seniority systems); *see also* EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227, 1230-36 (1991) (holding that Title VII does not have extraterritorial effect); West Virginia Univ. Hosp. v. Casey, 111 S. Ct. 1138, 1140-48 (1991) (limiting the availability of expert witness fees to prevailing plaintiffs in civil rights cases); Library of Congress v. Shaw, 478 U.S. 310, 318-20 (1986) (finding U.S. government not liable for interest on Title VII judgments). For a more complete discussion of the cases, see Mark S. Brodin, *Reflection on the Supreme Court's 1988 Term: The Employment Discrimination Decisions and the Abandonment of the Second Reconstruction*, 31 B.C. L. REV. 1, 8-9, 16-25 (1989); William P. Murphy, *Supreme Court Review*, 5 LAB. LAW. 679, 680-81 (1989). *See also* Leroy D. Clark, *The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization*, 38 CATH. U. L. REV. 795, 811-15 (1989) (noting the retrenchment of the Court from support of affirmative action).

2. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

3. *See* ROBERT BELTON, REMEDIES IN EMPLOYMENT DISCRIMINATION LAW 1-34 (1992).

4. This article focuses on racial discrimination. Many of the observations and comments, however, are equally applicable to discrimination on the basis of sex.

private sectors.[5] As I argued in an earlier article,

> The affirmative action concept embodies a policy decision that some forms of race-conscious remedies are necessary to improve the social and economic status of blacks in our society. That policy decision, however, cannot be isolated from the history that gave rise to the affirmative action concept. When viewed in light of that history—decades of blatant public and private discrimination against blacks as a group—the underlying premise of affirmative action is manifest: If the chasm between "equality" as an abstract proposition and "equality" as a reality is to be bridged, something more is needed than mere prohibitions of positive acts of discrimination and the substitution of passive neutrality. That something more, the affirmative action concept dictates, must include race-conscious remedies.[6]

Congress, primarily in response to the Court's 1988 Term employment discrimination decisions, enacted the Civil Rights Act of 1991 ("1991 Civil Rights Act" or "1991 Act")[7] to either overturn or otherwise modify these decisions.[8] The 1991 Civil Rights Act be-

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5. The legality of affirmative action under the Equal Protection Clause also has been the subject of a great deal of controversy. The Supreme Court in City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507-08 (1989), resolved the issue of whether affirmative action plans, when challenged under the Equal Protection Clause, are subject to strict scrutiny. The soundness of *Croson*, as a matter of constitutional principle, and its effect on the continuing effort of this country to remedy past, present, and continuing racial discrimination is beyond the scope of this Article. For a discussion of *Croson* from this perspective, see T. Alexander Aleinikoff, *A Case for Race Consciousness*, 91 COLUM. L. REV. 1060, 1095-1110 (1991); Patricia J. Williams, Metro Broadcasting, Inc. v. FCC: *Regrouping in Singular Times*, 104 HARV. L. REV. 525, 525-46 (1990) (discussing the Supreme Court's decision in Metro Broadcasting Inc. v. FCC, 110 S. Ct. 2997 (1990), upholding a limited affirmative action plan designed to increase the number of minority owners of broadcast stations).

6. Robert Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C. L. REV. 531, 534 (1981).

7. Pub. L. No. 102-166, 105 Stat. 1071 (codified at scattered sections of U.S.C.).

8. The 1991 Act amends five federal statutes on discrimination in employment: Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988); the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1988); the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111-12213 (1988); the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1988); and the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988 (1988). In addition, the 1991 Act creates three new statutes: Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072 creates 42 U.S.C. § 1981a (Supp. II 1991), which provides for compensatory and punitive damages in employment discrimination cases; *Id.* § 202, 105 Stat. 1071, 1081 creates the Glass Ceiling Act to study discrimination against minorities and women in high level positions in businesses; and *Id.* § 301, 105 Stat. 1071, 1088 creates the Government Employee Rights Act, which prohibits discrimination against individuals on the basis of race, color, sex, national origin, and religion for Senate employees, presidential appointees, and some previously exempted state employees.

The 1991 Act also overturned or modified the other Supreme Court decisions cited *supra* note 1. One irony in the enactment of the 1991 Act is that President Bush overturned civil rights cases decided by a Court composed of Reagan appointees who made a difference in the decisions in these cases. President Reagan appointed Justice O'Connor in 1981, Justice Scalia in 1986, and Justice Kennedy in 1987.

came effective on November 21, 1991, upon the signing by President Bush. It culminated a two-year effort and was the result of a compromise between Congress and the Bush Administration.[9] The widely publicized confirmation hearings of Justice Thomas[10] and the Louisiana gubernatorial election of 1991 in which David Duke was a candidate[11] were major and substantial contributing developments providing the driving force for the Act. Both of these events centered on, in substantial part, the continuing reality of racism.[12] Concern about racism also had been a major stumbling block that had thwarted earlier legislative efforts to overturn or modify the Court's 1988 Term employment discrimination decisions.[13] Thus, a major issue in the debate about whether legislation should be enacted in response to the Supreme Court's civil rights decisions was the legality of affirmative action. President Bush had vetoed the Civil Rights Act of 1990[14] on the ground that it was a "quota" bill.[15]

Perhaps no aspect of this nation's effort to remedy the past, present, and continuing effects of racial injustice in the public and private sectors has generated as much controversy as affirmative ac-

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9. *See* 137 CONG. REC. S15,277 (daily ed. Oct. 25, 1991) (statement of Sen. Danforth). For a discussion of the legislative debate leading to the 1991 Act, see 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 (1992).

10. *See, e.g., The Sexual Harassment Charges*, 137 CONG. REC. S14,564 (daily ed. Oct. 8, 1991) (voting to continue investigation of Anita Hill's allegations of sexual harassment by Clarence Thomas).

11. *See generally* Anthony Lewis, *Abroad at Home: Politics of Resentment*, N.Y. TIMES, Oct. 25, 1991, at A33; Roberto Suro, *Ex-Klan Chief Has Even Odds in Governor's Race*, N.Y. TIMES, Oct. 19, 1991, §1, at 1.

12. *See* Neil A. Lewis, *Thomas Opponents Seek To Bring Up Issue of Race*, N.Y. TIMES, Sept. 16, 1991, at A16; Andrew Rosenthal, *Theater of Pain: 'A Terrible Wrong Has Been Done, But To Whom*, N.Y. TIMES, Oct. 13, 1991, § 4 (Week in Review), at 1.

13. *See, e.g.*, John A. Farrell, *Bush Endorses Senate's Rights Bill: Democrats See Victory over Issue of Quotas*, BOSTON GLOBE, Oct. 26, 1991, at 1.

14. The Civil Rights Act of 1990 passed in the Senate by a vote of 65-34 on July 18, 1990, and in the House of Representatives by a vote of 273-154 on August 3, 1990. President Bush vetoed the bill on October 23, 1990. VETO—2104, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES RETURNING WITHOUT MY APPROVAL S. 2104, THE CIVIL RIGHTS ACT OF 1990, S. DOC. NO. 35, 101st Cong. 2d Sess. (1990) [hereinafter VETO MESSAGE]. Senate efforts to override President's Bush's veto failed by one vote, 66-34. Tom Wicker, a New York Times columnist, wrote that President Bush, in vetoing the 1990 Civil Rights Act, "was dabbl[ing] in white backlash." Tom Wicker, *The Nation: Precedent for a Veto*, N.Y. TIMES, Oct. 24, 1990, at A25. For a discussion of the 1990 Civil Rights Act, see Govan, *supra* note 9; Leland Ware, *The Civil Rights Act of 1990: A Dream Deferred*, 10 ST. LOUIS U. PUB. L. REV. 3 (1991).

15. VETO MESSAGE, *supra* note 14; *see also* Holly K. Hacker, *Panel Says Bush Policies Foster Racial Conflicts*, L.A. TIMES, Apr. 18, 1991, at A22 (reporting that the Citizen's Commission on Civil Rights accused President Bush of embracing policies that contribute to racial tensions).

tion.[16] Much of the debate about affirmative action swirls around whether the disparate impact theory of discrimination should continue to be part of our civil rights jurisprudence.[17] The Supreme Court established the doctrinal foundations for the disparate impact theory in its 1971 Title VII decision *Griggs v. Duke Power Co.*[18] The disparate impact theory holds that a facially neutral policy or practice that disproportionately excludes blacks from jobs and promotions constitutes unlawful discrimination unless justified by business necessity.[19] The importance of the disparate impact theory lies in the fact that it does not require a showing of intentional discrimination. The disparate impact theory, however, is only one of two Title VII theories of discrimination. The other theory, disparate treatment, requires proof of intentional discrimination.[20] Of the two theories, disparate impact legitimates affirmative action.[21] The Supreme Court, in *Wards Cove Packing Co. v. Atonio,*[22] one of its 1988 Term decisions, substantially eroded the doctrinal and analytical underpinnings of the *Griggs* disparate impact theory. The major

16. Another remediation issue, busing of public school children to effectuate the school desegregation mandate of Brown v. Board of Education, 347 U.S. 483 (1954), has and continues to generate a great deal of controversy. Busing during the Nixon administration, like affirmative action during the Reagan and Bush administrations, became a mobilizing issue for the Republican party. *See* CHARLES B. EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 88-90 (1991); *see also* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., IT'S NOT THE DISTANCE, "IT'S THE NIGGERS": COMMENTS ON THE CONTROVERSY OVER SCHOOL BUSING (1972). However, the rhetoric over busing does not seem to have reached the crescendo that affirmative action has.

17. *Compare, e.g.,* Belton, *supra* note 6, at 534-98 *and* Alfred W. Blumrosen, *Griggs Was Correctly Decided—A Response to Gold,* 8 INDUS. REL. L.J. 443, 447-52 (1986) (arguing in support of the disparate impact theory) *with* Michael E. Gold, Griggs' *Folly: An Essay on the Theory, Problems and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform,* 7 INDUS. REL. L.J. 429, 489-564 (1985) *and* William Bradford Reynolds, *Justice Department Policies on Equal Employment and Affirmative Action,* 35 N.Y.U. CONF. LAB. 443, 447 (1983) (arguing that *Griggs* is not supported by the legislative history of Title VII and should be rejected). Congress, in the 1991 Civil Rights Act, rejected Gold's position by codifying the disparate impact theory. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, 1074 (codified at 42 U.S.C. § 2000e-2(k)(1) (1988 & Supp. III 1991)).

18. 401 U.S. 424 (1971). The author was one of the attorneys who represented the black plaintiffs in *Griggs.*

19. *See id.* at 431 (holding that Title VII "proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity.").

20. *See, e.g.,* Teamsters v. United States, 431 U.S. 314, 335 n.15 (1977) (noting the distinction between the disparate impact and disparate treatment theories of discrimination); *see also* BELTON, *supra* note 3, ch. 2 (1992) (discussing theories of discrimination in employment discrimination law).

21. Belton, *supra* note 6, at 588-98.

22. 490 U.S. 642 (1989).

force driving the Court's dismantling of *Griggs* was the conservative majority's opposition to affirmative action.[23]

With all of the civil rights laws now on the books,[24] statutory as well as constitutional, one well may ask, why was the 1991 Civil Rights Act necessary? The 1991 Act provides one answer. In section 2, Congress found that additional legislation was necessary in order to "deter unlawful harassment and intentional discrimination in the workplace"; that the decision of the Supreme Court in *Wards Cove* "has weakened the scope and effectiveness of Federal civil rights protections"; and that "legislation is necessary to provide additional protections against unlawful discrimination in employment."[25] The purpose section of the Act, section 3, states that the Act is necessary

> (1) to provide appropriate remedies for intentional discrimination and unlawful harassment[26] in the workplace;
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> (2) to codify the concepts of "business necessity" and "job relatedness" enunciated by the Supreme Court in *Griggs* and in the other Supreme Court decisions prior to *Wards Cove;*
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> (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII . . . ; and
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> (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.[27]

President Bush, upon signing the 1991 Act, stated that even with the Act this nation "would not have done enough to advance the American dream of equal opportunity for all."[28] He also stated in his veto message of the Civil Rights Act of 1990 that

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23. *See* Robert Belton, *The Dismantling of the* Griggs *Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction,* 8 YALE L. & POL'Y REV. 223, 237-44 (1990).

24. The United States has a host of civil rights laws, orders, and regulations prohibiting discrimination in the public and private sectors on a broad range of criteria, including, for example, race, sex, religion, and national origin. For a concise summary of federal civil rights laws, see SUBCOMM. ON THE CONSTITUTION OF THE SENATE COMM. ON THE JUDICIARY, 98TH CONG., 2D SESS., FEDERAL CIVIL RIGHTS LAWS: A SOURCEBOOK (Comm. Print 1984); *see also* BELTON, *supra* note 3, ch. 1.

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

26. The courts have held that sexual and racial harassment are prohibited under Title VII. *See, e.g.,* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63-69 (1986) (sexual harassment); Harris v. International Paper Co., 765 F. Supp. 1509, 1516-25 (D. Me. 1991) (racial harassment).

27. Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071 (citations omitted).

28. *Statement on Signing of the Civil Rights Act of 1991,* 27 WEEKLY COMP. PRES. DOC. 1702 (Nov. 21, 1991).

"[d]iscrimination on the basis of race, national origin, sex, religion, or disability is worse than wrong[;] [i]t is a fundamental evil that tears at the fabric of our society."[29]

The reasons set out in the findings and purposes sections of the 1991 Civil Rights Act and President Bush's 1990 veto message and signing statements simply mask the real reason that additional civil rights legislation is necessary. The real reason, I submit, is the past, present, and continuing effects of racism.[30] This nation has professed a commitment to a policy of eliminating racism in our society. Very few, if any, would doubt the reality of racism in the United States; its reality is well documented.[31] The Supreme Court recognizes the continuing reality of racism in our society. For example, in *Wards Cove Packing Co. v. Atonio*,[32] Justice White writing for the majority observed, and correctly so, that "it is unfortunately true that race discrimination exists in our country."[33] Justice

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29. VETO MESSAGE, *supra* note 14. For an assessment of President Bush's civil rights record that concludes it consists more of rhetoric than substantive developments, see CITIZENS' COMMISSION ON CIV. RTS., LOST OPPORTUNITIES: THE CIVIL RIGHTS RECORD OF THE BUSH ADMINISTRATION MID-TERM (Susan M. Liss & William L. Taylor eds., 1991).

30. The term *racism* evokes strong negative feelings. It has been defined, in operational terms, to mean the way people actually behave, and it must be viewed as *"any attitude, action, or institutional structure which subordinates a person or group because of his or their color."* The "visibility of skin color" is a key component of this definition. ANTHONY DOWNS, UNITED STATES COMMISSION ON CIVIL RIGHTS, RACISM IN AMERICA AND HOW TO COMBAT IT 5-6 (1970). Another scholar has defined *racism* as involving three distinct but interrelated acts: discrete acts of intentional discrimination, acts based on stereotypical notions about blacks, and institutional racism as reflected in the actual composition of, for example, colleges, corporations, churches, and other major institutions. ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 203 (1992). *See generally* JOEL KOVEL, WHITE RACISM: A PSYCHOHISTORY (1970) (analyzing the psychological nature of racism). One of the most powerful arguments on the nature of racism is found in Charles R. Lawrence, III, *The Id, Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 328-55 (1987).

Because the term *racism* is so emotionally charged, it is interesting to note that the term *disadvantage* is perhaps the present politically correct term to identify racism. *See generally* Randall L. Kennedy, *The Political Correctness Scare*, 37 LOY. L. REV. 231 (1991) (discussing the recent controversy over "politically correct" thought).

31. *See* EDSALL & EDSALL, *supra* note 16, at 88-89; HACKER, *supra* note 30, at 203; HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 25-50 (1985); Cardell K. Jacobson, *Resistance to Affirmative Action: Self-Interest or Racism?*, 29 J. CONFLICT RESOL. 306, 308-28 (1985); Thomas F. Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673, 674-701 (1985).

32. 490 U.S. 642 (1989).

33. *Id.* at 649 n.4. Justice White's observation on the existence of racial discrimination was made in response to the accusation by Justice Blackmun, in his dissenting opinion, that "[o]ne wonders whether the majority still believes that racial discrimination—or, more accurately, racial discrimination against non-whites—is a problem in our society, or even remembers that it ever was." *Id.* at 662 (Blackmun, J., dissenting) (citation omitted).

O'Connor, writing for the majority in *City of Richmond v. J.A. Croson Co.*,[34] an affirmative action case decided in 1989, framed the issue as requiring the Court to "confront again the tension between the Fourteenth Amendment's guarantee of equal treatment to all citizens, and the use of race-based measures to ameliorate the effects of past discrimination on the opportunities enjoyed by members of minority groups in our society."[35] The recent confirmation hearings of Justice Clarence Thomas[36] and the gubernatorial election in Louisiana, in which David Duke, a former neo-Nazi and head of the Klu Klux Klan,[37] was a candidate are simply the more recent anecdotal and high profile illustrations of the pervasiveness of the phenomenon of racism.

If the real reason for the 1991 Civil Rights Act is grounded in a policy commitment to eliminate racism, then an appropriate question is whether the 1991 Act has more potential to help effectuate that policy objective than similar legislation adopted during the First and Second Reconstructions.[38] My purpose here is to offer a preliminary assessment on this question as it relates to affirmative action. First, however, the historical context must be examined. That historical context, which is briefly reviewed below, requires a consideration of developments under the First and Second Reconstructions because the 1991 Civil Rights Act can be described as ushering in the Third Reconstruction.[39]

I. THE FIRST AND SECOND RECONSTRUCTIONS

The roots of racism go back to the institution of slavery. Slavery was constitutionalized when the framers refused to recognize blacks as full citizens.[40] Early developments on the issue of whether blacks

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34. 488 U.S. 469 (1989).

35. *Id.* at 476-77. She further noted that "the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs." *Id.* at 499. *But see* Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992) (arguing that racial equality is not a realistic goal).

36. *See The Thomas Confirmation: Excerpts from Senate Debate on Thomas Nomination*, N.Y. TIMES, Oct. 16, 1991, at A18.

37. *See* Suro, *supra* note 11.

38. *See infra* notes 40-77 and accompanying text (discussing the First and Second Reconstructions).

39. *See* Belton, *supra* note 23, at 244-56 (discussing the need for a Third Reconstruction).

40. The original Constitution did not explicitly mention slavery or race, but the issue of slavery is dealt with in three provisions: Article I, Section 2, Clause 3 counted slaves as only three-fifths of a person for apportionment of membership in the House of Representatives; Article I, Section 9, Clause 1 forbade Congress to limit importations of slaves; and Article IV, Section 2, Clause 3

should be recognized as full citizens, with the same set of civil rights accorded to whites, reached a judicial zenith in the 1857 decision of the Supreme Court in *Dred Scott v. Sandford*.[41] In a profound statement that undergirds much of the history of racism in this country, the Court said that slaves have been "regarded as of an inferior order, and are altogether unfit to associate with the white race, . . . and that they have no rights which the white man was bound to respect."[42]

The term *reconstruction,* in the civil rights context, is a shorthand description of the legal, political, and social efforts to eliminate slavery and the racist legacy of slavery captured in the *Dred Scott* philosophy.[43] There have been two reconstruction periods.[44] The First Reconstruction, which some have dated as occurring between 1863 and 1877, focused on eliminating the institution of slavery.[45] During the First Reconstruction, Congress enacted three amendments to the Constitution: The Thirteenth Amendment abolished slavery and involuntary servitude;[46] the Fourteenth Amendment prohibits states from denying any citizen the equal protection of law;[47] and the Fifteenth Amendment guarantees the right to vote.[48] Congress also enacted civil rights legislation, the substance of which parallels in some significant respects similar legislation enacted during the Second Reconstruction.[49] What happened under the laws en-

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provided that fugitive slaves who escaped into another state would be returned to their owners. Justice Thurgood Marshall has argued that because of the racist origins of the Constitution it was "defective from the start." Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document,* 40 VAND. L. REV. 1337, 1338 (1987); *see also* Raymond T. Diamond, *No Call to Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution,* 42 VAND. L. REV. 93, 95-98 (1989) (discussing Justice Marshall's criticism of the original Constitution).

41. 60 U.S. (19 How.) 393 (1857).

42. *Id.* at 407. The Court reviewed more than 100 years of colonial legal treatment of blacks in reaching its decision that blacks had been a subordinate and inferior class who had been subjugated by the dominant white race.

43. *See generally* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988); MANNING MARABLE, RACE REFORM AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945-1990 (1991); C. Vann Woodward, *From the First Reconstruction to the Second,* HARPER'S, Apr. 1965, at 25.

44. *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 11-29 (2d rev. ed. 1966).

45. *See, e.g.,* FONER, *supra* note 43 (discussing the First Reconstruction between 1863-1877).

46. U.S. CONST. amend. XIII.

47. U.S. CONST. amend. XIV.

48. U.S. CONST. amend. XV.

49. *See generally* Eugene Gressman, *The Unhappy History of Civil Rights Legislation,* 50 MICH. L. REV. 1323 (1952) (explaining the First Reconstruction and the judicial strict constructionism that reduced its effectiveness).

acted during the First Reconstruction? The history of the dismantling of the First Reconstruction has been extensively documented.[50] The combination of political compromises[51] and Supreme Court decisions, which emasculated the early civil rights legislation, signaled the demise of the First Reconstruction. Even before Congress completed its First Reconstruction program, the Supreme Court began judicially dismantling it. The enunciation of the "separate but equal" doctrine in 1896 in *Plessy v. Ferguson,*[52] and the enactment of black codes in the southern states, effectively repudiated the First Reconstruction by legitimating overtly racist treatment of blacks in education, housing, voting, employment, the administration of justice, and political and civil rights.[53] The message of *Plessy* legitimated a return to the *Dred Scott* philosophy as was made clear in Justice Harlan's dissent in *Plessy:*

> The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of [black] citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution, by one of which the blacks of this country were to be made citizens of the United States and of the States in which they reside . . . . The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what can more certainly create and perpetuate a feeling of mistrust between these races, than State enactments, which, in fact, proceed on the ground that [black] citizens are

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50. *See, e.g.,* WOODWARD, *supra* note 44.

51. The Hayes-Tilden Compromise resolved the presidential election of 1876. Tilden, the Democrat, appeared to have won the electoral count by one vote, but the returns from several southern states were challenged. Blacks had played a significant role in the southern states whose returns were challenged. The Democrats agreed to declare Republican Hayes president in return for a promise from the Republicans, who had engineered the First Reconstruction, that the federal government would withdraw federal troops from the South. The presence of federal troops in the southern states after the Civil War was for the purpose of aiding in the enforcement of civil rights that Congress had legislated. After the federal troops were withdrawn, progress in the elimination of racism under the post-Civil War civil rights legislation rapidly came to a halt. *See* DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW § 1.8 (2d ed. 1980).

52. 163 U.S. 537 (1896). Plessy had brought suit for a writ of prohibition against the judge before whom Plessy had been taken for violation of a Louisiana statute, adopted in 1890, that provided for separate facilities for black and white passengers on trains. *See also* CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 3-115 (1987) (discussing *Plessy* against the historical-social context in which black racial inferiority was the order of the day and lower courts were embracing the separate-but-equal doctrine, as a jurisprudential civil rights principle).

53. *See* JACK GREENBERG, RACE RELATIONS AND AMERICAN LAW 79-114 (1959).

> so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?[54]

Even though Justice Harlan correctly perceived the devastating effects of racism under the "separate but equal" doctrine, his dissent in *Plessy* also enunciated the color-blind theory of equality.[55] The color-blind theory of equality often has been uncritically championed as the reason that affirmative action is unlawful.[56]

Even though the beginning of the Second Reconstruction has been dated at different historical points,[57] the Supreme Court's decision in *Brown v. Board of Education*[58] was indeed a seminal development that ushered in the Second Reconstruction. Following *Brown*, and particularly during the 1960s, Congress enacted a host of civil rights laws that again were intended to remedy the problems of race in our society. The Civil Rights Act of 1964 ("1964 Act") is one of the most important pieces of legislation that Congress enacted during the Second Reconstruction.[59] The widely publicized civil rights demonstrations of the 1960s vividly portrayed the brutality and inhumane reality of racism[60] and were a major driving force for the enactment of the 1964 Act.[61] One of the most important

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54. *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting).

55. *Id.* at 559 (Harlan, J., dissenting).

56. Professor Graglia, for example, is an advocate of this position. *See* Lino A. Graglia, *Racial Preferences, Quotas, and the Civil Rights Act of* 1991, 41 DEPAUL L. REV. 1117 (1992); Lino A. Graglia, *Title VII of the Civil Rights Act of 1964: From Prohibiting to Requiring Discrimination in Employment*, 14 HARV. J.L. & PUB. POL'Y 68 (1991); Lino A. Graglia, *Race-Conscious Remedies*, 9 HARV. J.L. & PUB. POL'Y 83 (1986). For a powerful and well-documented argument that Justice Harlan's metaphor, "Our Constitution is color-blind," fosters white racial domination, see Neil Gotanda, *A Critique of "Our Constitution Is Color Blind,"* 44 STAN. L. REV. 1 (1991). *See also* Patricia A. Williams, *The Obliging Shell: An Informal Essay on Formal Equality*, 87 MICH. L. REV. 2128, 2142 (1989) ("So-called formal equal opportunity has done a lot but misses the heart of the problem. It put the vampire back in its coffin, but it was no silver stake. The rules may be color-blind but people are not.").

57. *See, e.g.*, MARABLE, *supra* note 43, at 3. Marable selects 1945 as the beginning date, which is the end of World War II. *Id.* Others have used 1954 as a starting date of the Second Reconstruction, which is the year in which the Supreme Court decided Brown v. Board of Education, 347 U.S. 483 (1954).

58. 347 U.S. 483 (1954).

59. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at scattered sections of U.S.C.). The Civil Rights Act of 1964 contains ten titles prohibiting discrimination in areas such as voting rights, housing, education, and employment. *See generally* H.R. REP. NO. 914, 88TH CONG., 2D SESS. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2394-2409 (title by title analysis of the reach of the 1964 Act).

60. *See* JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965 (1987); *Eyes on the Prize* (PBS television broadcast 1987).

61. *See generally* CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT, at 15-28, 232-33 (1985) (discussing the civil

components of the 1964 Act is Title VII.[62] The doctrinal developments under Title VII have been a major cornerstone of the Second Reconstruction.[63] *Griggs v. Duke Power Co.*,[64] handed down in 1971, is one of the most important Supreme Court civil rights cases decided during the Second Reconstruction because it enunciated the disparate impact theory. The reach of the *Griggs* disparate impact theory has not been limited to employment, but has been utilized to challenge discrimination in other areas such as voting[65] and housing.[66]

In a 1976 article that I wrote reviewing the first decade of judicial developments under Title VII, I concluded on an optimistic note: "Optimism for future progress under fair employment laws can be expressed only because of the recent judicial and legislative perception of the causes and consequences of discrimination based upon . . . race."[67] That optimism was short lived, because during its 1976 Term, the Supreme Court, in a series of Title VII cases, set in motion the genesis for the dismantling of the Second Reconstruction.[68] Others have suggested that the genesis of the demise of the Second Reconstruction began at even an earlier[69] or later date.[70]

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rights movement and its impact on the passing of the 1964 Act).

62. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

63. *See* Robert Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U. L.J. 225, 240-67, 271-76, 279-86, 290-307 (1976) (reviewing the first decade of favorable developments under Title VII).

64. 401 U.S. 424 (1971).

65. *See, e.g.*, Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1101 (1991) (noting the failure of black electoral equality) [hereinafter *Triumph of Tokenism*]; Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1423-30 (1991) (same) [hereinafter Guinier, *Elusive Quest*].

66. *See generally* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 10.4(1) (1991) (reviewing the effect of *Griggs* on discrimination in housing); Mark. W. Zimmerman, Note, *Opening the Door to Race-Based Real Estate Marketing:* South-Suburban Housing Center v. Greater South Suburban Board of Realtors, 41 DEPAUL L. REV. 1271 (1992) (analyzing the legality of affirmative race-based real estate marketing).

67. Belton, *supra* note 63, at 305.

68. *See* Harry T. Edwards, *The Coming of Age of the Burger Court: Labor Law Decisions of the Supreme Court During the 1976 Term*, 19 B.C. L. REV. 1, 4-5 (1977) (noting that the ten Title VII decisions handed down by the Court "will have lasting, far reaching impact on the development of Title VII").

69. *See generally* Derrick Bell, *A Hurdle Too High: Class-Based Roadblocks to Racial Remediation*, 33 BUFF. L. REV. 1 (1984).

70. *See, e.g.*, Eleanor Holmes Norton, *Equal Employment Law: Crisis in Interpretation—Survival Against the Odds*, 62 TUL. L. REV. 681, 700 (1988) (noting that the danger of the Rehnquist Court lies in "scraping, trimming, and chipping away" the decisions of the Second Reconstruction).

Still others have suggested that the civil rights cases decided during the Court's 1988 Term brought about the end of the Second Reconstruction.[71]

As with the First Reconstruction, both political and judicial forces were at work bringing about the dismantling of the Second. President Reagan[72] and his chief spokesperson on civil rights—Assistant Attorney General William Bradford Reynolds[73]—spearheaded a campaign to dismantle affirmative action and the doctrinal underpinning of the *Griggs* disparate impact theory. Two cases decided by the Supreme Court, key to its dismantling of the doctrinal underpinning of affirmative action, were *Wards Cove Packing Co v. Atonio*[74] and *Martin v. Wilks*.[75] The dismantling in *Wards Cove* consisted of establishing a rigorous evidentiary threshold for plaintiffs who sought to make out a prima facie case of disparate impact discrimination. The Court replaced the *Griggs* business necessity defense with a more lenient legitimate-business-justification defense, ruled that an employer has only the burden of production of evidence rather than the burden of persuasion on the more lenient legitimate-business-justification defense, and recognized a cost defense in employment discrimination cases.[76] In *Martin v. Wilks,* the Court made it easier for white males to attack affirmative action plans under the disparate treatment theory.[77]

II. AFFIRMATIVE ACTION UNDER TITLE VII PRIOR TO THE CIVIL RIGHTS ACT OF 1991

As noted above, the *Griggs* disparate impact theory provides the doctrinal foundations for affirmative action.[78] The *Griggs* disparate impact theory is premised on the recognition that racism is not only the result of intentional discrimination, but includes as well facially

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71. *See, e.g.*, Brodin, *supra* note 1, at 29-30.

72. *See* NORMAN C. AMAKER, CIVIL RIGHTS AND THE REAGAN ADMINISTRATION 13-157 (1988) (comparing the civil rights enforcement record of the Reagan administration with all six of President Reagan's predecessors).

73. *See* Drew Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309, 337-39 (1984); Joel Selig, *The Reagan Justice Department and Civil Rights*, 1987 U. ILL. L. REV. 431, 431-43.

74. 490 U.S. 642 (1989).

75. 490 U.S. 228 (1989).

76. *See* Belton, *supra* note 23, at 240-44 (analyzing *Wards Cove*).

77. *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 (1992).

78. *See* Belton, *supra* note 6, at 541-49.

neutral subjective and objective policies and practices that often are the result of unconscious racism. Thus, for example, the Court, in holding that subjective criteria may be challenged under the *Griggs* disparate impact theory, noted that the disparate treatment theory, standing alone, is not capable of ferreting out decisions based on subconscious stereotypical thinking and prejudice.[79]

The leading cases on the legality of affirmative action under Title VII are *United Steelworkers of America v. Weber*,[80] *Johnson v. Transportation Agency*,[81] and *Local 28, Sheet Metal Workers' International Ass'n v. EEOC*.[82] In *Weber*, the employer had a hiring policy under which it employed as craftworkers only persons who had prior craft skill. Most blacks who were interested in craft positions could not meet the prior craft experience requirement because, historically, they had been excluded from craft jobs on racial grounds.[83] The hiring criterion—prior craft experience—was facially neutral. In an effort to comply with the mandate of Title VII (and to avoid a Title VII lawsuit by blacks),[84] the employer and the union adopted an affirmative action plan. The plan provided for the selection of craft trainees on an alternating basis under which fifty percent would be black and fifty percent would be white. Weber, a white employee, who had not been selected at the time a black was entitled to be selected under the alternating selection policy, sued the employer and the union under Title VII. He alleged that he had been the victim of intentional racial discrimination under the disparate treatment theory. As described by Justice Blackmun, the employer was on a "high tightrope without a net beneath" him.[85] On the one hand, the employer was subject to liability under the disparate impact theory because, arguably, blacks would be able to establish a prima facie case of discrimination under the disparate impact theory and the employer, arguably, would be unable to justify its prior-craft-experience test under the business necessity doctrine. On the other hand, the employer would be liable for a

79. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988).

80. 443 U.S. 193 (1979).

81. 480 U.S. 616 (1987).

82. 478 U.S. 421 (1986).

83. *Weber*, 443 U.S. at 198 n.1.

84. Blacks had been successful in a prior Title VII case against the same employer. *Id.* at 210 (Blackmun, J., concurring) (citing Parson v. Kaiser Aluminum & Chem. Corp., 575 F.2d 1374, 1378 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979)).

85. *Id.* at 209-10 (Blackmun, J., concurring) (citing Steelworkers v. Weber, 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting)).

Title VII violation in a disparate treatment suit brought by whites if the employer took race into account in, ironically, establishing a hiring policy that would reduce the possibility of blacks successfully prevailing in a disparate impact claim.[86]

The Supreme Court, in a five-to-four decision, upheld the affirmative action plan. *Weber* established a three-pronged test for determining whether affirmative action plans can survive a Title VII challenge. First, the plan must be designed to remedy societal discrimination as reflected in the composition of the employer's workforce. Second, the plan must not unduly trammel the legitimate employment opportunities of whites. And third, the plan must be a temporary or transitional remedial plan that is not designed to maintain a racial balance in the workforce beyond the need to eliminate the effects of societal discrimination.[87] Justice Rehnquist, joined by Chief Justice Burger, dissented on the ground that Title VII provides a remedy only for intentional discrimination under the disparate treatment theory and that any policy, such as an affirmative action plan, that specifically takes race or sex into account is unlawful.[88]

The Court applied the *Weber* three-pronged test in upholding an affirmative action plan that had been adopted by a public employer in *Johnson v. Transportation Agency*.[89] Johnson, the plaintiff, like the plaintiff in *Weber*, was a white male. Johnson brought a Title VII action challenging the affirmative action plan on the ground that the employer had taken sex into account in awarding the contested employment opportunity to a female. Johnson and the successful female candidate were both deemed to be qualified for the promotion, but Johnson had scored marginally better than Diane Joyce, the female, on a qualifying ability test.[90] One of the major differences between *Johnson* and *Weber* was that the record in *Johnson* did not contain specific evidence that the employer had a history of discriminating against women.[91] Thus, the case posed

86. *Id.* (Blackmun, J. concurring).

87. *Id.* at 208 (Blackmun, J., concurring).

88. *Id.* at 219-55 (Rehnquist, J., dissenting).

89. 480 U.S. 616 (1986).

90. The scores of the applicants who had taken a test as part of the selection process ranged from 70 to 80. Johnson was tied for second on the test with a score of 75, while Joyce ranked third with a score of 73. *Id.* at 623-24.

91. *Id.* at 664 (Scalia, J., dissenting) ("The most significant proposition of law established by [the] decision is that racial or sexual discrimination is permitted under Title VII when it is intended to overcome the effect, not of the employer's own discrimination, but of societal attitudes

nicely the question of whether consideration of societal discrimination would justify an affirmative action plan.[92] The majority held that it did.

Justice White, who had joined the majority in *Weber*, dissented in *Johnson*. He dissented on the ground that his understanding of *Weber* was premised on the view that Title VII remedies only disparate treatment or intentional discrimination and that disparate impact discrimination would not support affirmative action.[93] Justice Scalia, joined by Justices Rehnquist and White, dissented. Justice Scalia's dissent was based on the same rationale as Justice White's: Only intentional discrimination is prohibited under Title VII.[94]

Weber and *Johnson* involved the issue of the legality of voluntarily adopted affirmative action plans. *Local 28, Sheet Metal Workers' International Ass'n v. EEOC*[95] involved the issue of whether a federal court could judicially order an affirmative action plan as a remedy for unlawful discrimination under Title VII. The district court had imposed a numerical remedy only after finding that the defendant union was in civil contempt of an earlier imposed non-affirmative action remedy. A major argument advanced by the union and joined by the Solicitor General of the United States was that the trial court exceeded its authority under section 706(g)[96] of Title VII because the remedy was not limited to identifiable victims of unlawful discrimination. In a six-to-three decision, the Court rejected the union's argument. First, the Court held that in most instances a court, upon finding a violation of Title VII, need only order the defendant to cease engaging in discriminatory conduct and award back pay and other non-affirmative action relief. Second, the Court held that section 706(g) does not prohibit courts from ordering affirmative action relief when necessary to remedy "persistent or egregious discrimination or where necessary to dissipate the linger-

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that have limited the entry of certain races, or of a particular sex, in certain jobs.").

92. *Id.* at 634 ("It is clear that the decision to hire Joyce was made pursuant to an Agency plan that directed that sex or race be taken into account for the purpose of remedying underrepresentation."). The story of *Johnson* is chronicled in MELVIN I. UROFSKY, A CONFLICT OF RIGHTS: THE SUPREME COURT AND AFFIRMATIVE ACTION (1991).

93. *Johnson*, 480 U.S. at 657 (White, J., dissenting).

94. *Id.* at 657-77 (Scalia, J., dissenting).

95. 478 U.S. 421 (1986).

96. 42 U.S.C. § 2000e-5(g) (1988). Section 706(g) provides district courts with authority to award appropriate forms of relief upon a finding of a violation of Title VII. *Id.* The scope of the forms of relief a court may award is extensively treated in BELTON, *supra* note 3.

ing effects of pervasive discrimination."[97] The Court further reasoned that "affirmative race-conscious relief may be the only means available 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.' "[98] Third, and most important, the Court held that judicially ordered affirmative action, in appropriate cases, need not be limited to actual victims of discrimination.[99] Justice Powell concurred in a separate opinion,[100] and Justice O'Connor concurred in part and dissented in part.[101] Justices White and Rehnquist, each joined by Chief Justice Burger, wrote separate dissenting opinions. The dissenters expressed the view that Title VII provides relief only for identifiable victims of discrimination, that is, only those blacks who have been found to be actual victims of unlawful discrimination.[102]

Parties to employment discrimination cases often settle before trial. In a number of cases, particularly those brought under the disparate impact theory, the parties will enter into consent decrees[103] that have an affirmative action component. In *Martin v. Wilks*,[104] the Supreme Court considered whether the doctrine of collateral estoppel precludes white employees from collaterally attacking a consent decree that embodies an affirmative action component by filing a separate lawsuit under the disparate treatment theory. In an opinion written by the Chief Justice, the Court held that the doctrine of collateral estoppel did not bar the subsequent Title VII disparate treatment claim by white employees. The Court further held that (1) mere knowledge by the white employees of the prior dis-

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97. *Sheet Metal Workers*, 478 U.S. at 445.

98. *Id.* at 450 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973)).

99. *Id.* at 470-75. In United States v. Paradise, 480 U.S. 149, 165-84 (1987), a case challenging a judicially imposed affirmative action court order under the Equal Protection Clause, the Court also held that affirmative action remedies need not be limited to actual victims of discrimination.

100. *Sheet Metal Workers*, 478 U.S. at 483-88 (Powell, J., concurring).

101. *Id.* at 489-99 (O'Connor, J., concurring in part and dissenting in part).

102. *Id.* at 499-500 (White, J., dissenting); *id.* at 500 (Rehnquist, J., dissenting).

103. A consent decree is an agreement between parties that normally embodies a compromise. In exchange for the saving of costs and elimination of risk of loss, each party gives up something it might have won had it proceeded with the litigation. Rule 23 of the Federal Rules of Civil Procedure requires approval of any settlement of a class action, and a consent decree is a judicial approval of the settlement by the parties. *See* Local No. 93, International Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 522 (1986).

104. 490 U.S. 755 (1989).

crimination case did not impose an obligation on the white employees to intervene in the prior suit; (2) voluntary settlement in the form of a consent decree between one group of employees and their employer cannot adversely affect the rights of persons who are not parties to the suit; and (3) the congressional policy favoring settlement of employment discrimination cases does not support a rule that the white employees should be collaterally estopped from challenging the affirmative action consent decree in a separate lawsuit. Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, dissented.[105]

The overarching legal and policy issue in *Weber, Johnson, Sheet Metal Workers,* and *Wilks* was whether racism, as evidenced by societal discrimination, is an appropriate legal basis on which to legitimate affirmative action plans. "Societal discrimination," the existence of which has been recognized by the Supreme Court,[106] is a shorthand description for present and continuing effects of a long history of overt and subtle discrimination against blacks and women.[107] Societal discrimination is manifest not only in employment but in housing,[108] voting,[109] and education[110] as well. A majority of the Justices in *Weber, Johnson,* and *Sheet Metal Workers* were willing to recognize societal discrimination as a legitimating force for affirmative action. The majority recognized that just as the

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105. *Id.* at 769-93 (Stevens, J., dissenting).

106. *See supra* notes 32-35, 87 and accompanying text (discussing the holding in United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979)).

107. *See* Robert Sedler, *The Constitution and the Consequences of the Social History of Racism,* 40 ARK. L. REV. 677, 677-88 (1987). In most instances in which the term *societal discrimination* is used, it is never defined with any precision, and the context in which it is used most often suggests an "ephemeral, abstract kind of conduct, committed by no one in particular, and committed against no one in particular, a kind of amorphous inconvenience for persons of color." Thomas Ross, *Innocence and Affirmative Action,* 43 VAND. L. REV. 297, 313 (1990). Justice Powell seemed to define "societal discrimination" as any discrimination not practiced by the employer or other defendant who has adopted an affirmative action plan. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275 (1986) (noting that in the past, the Court has allowed affirmative action only for "prior discrimination" by the defendant involved). Justice O'Connor also seems to subscribe to Justice Powell's definition. *Id.* at 288 (O'Connor, J., concurring in part) (stating that " 'societal discrimination' . . . is discrimination not traceable to a [defendant's] own actions").

108. See SCHWEMM, *supra* note 66 (providing a detailed discussion of housing discrimination law).

109. *See* Guinier, *Triumph of Tokenism, supra* note 65, at 1080; Guinier, *Elusive Quest, supra* note 65, at 1416.

110. *See, e.g.,* Ayers v. Allain, 914 F.2d 676 (5th Cir. 1990) (en banc) (desegregation in higher eduction), *cert. granted sub nom.* United States v. Mabus, 111 S. Ct. 1579 (1991) James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained,* 90 COLUM. L. REV. 1463, 1465-76 (1990) (arguing that desegregation in education is not a "dead" concept).

law has played a substantial and pivotal role in legitimating a regime of racism,[111] it must also play a substantial and pivotal role in remedying racism. The dissenters in these cases, although arguably willing to recognize the continuing persistence of societal discrimination, subscribed to a view of color-blindness that blinds them to the reality of racism. The dissenters were more concerned with protecting the historically privileged status of the dominant group—white males. The view of the dissenters is graphically illustrated in Justice Scalia's dissenting opinion in *Johnson:*

> [T]he only losers [under affirmative action plans] are the Johnsons of the country, for whom Title VII has been not merely repealed but actually inverted. The irony is these individuals—predominantly unknown, unaffluent, unorganized—suffer this injustice at the hand of a Court fond of thinking itself the champion of the politically impotent.[112]

It does not take a great deal of imagination to correctly conclude that the group of individuals that Justice Scalia had in mind in his reference to the "Johnsons" is white males. The conservative majority's decision in *Wilks* must be viewed as its attempt to preserve white male hegemony that is reminiscent of the *Dred Scott* philosophy.

III. AFFIRMATIVE ACTION UNDER THE 1991 CIVIL RIGHTS ACT

Congress attempted to undo the damage to the disparate impact theory wrought in *Wards Cove* and *Wilks* in the 1991 Civil Rights Act. Although as a general proposition, the Act has broad implications for the continued vitality of affirmative action, this part of the article identifies several sections that are deemed to have particular application to affirmative action.

A. Section 105 and Disparate Impact

Section 703(a)(2) of Title VII provides the statutory basis for the *Griggs* disparate impact theory.

> 703(a) It shall be an unlawful employment practice for an employer—

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111. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); Plessy v. Ferguson, 163 U.S. 537 (1896); *see also* DERRICK A. BELL, RACE, RACISM AND AMERICAN LAW (2d ed. 1980) (developing the thesis on the efficacy of the role of the law in creating, maintaining, and eliminating racism in American society). *But see* DERRICK A. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987) (graphically depicting the persistence of racism and the difficulty of the role of the law in dealing effectively with its elimination).

112. Johnson v. Transportation Agency, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting).

> (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.[113]

Congress codified the disparate impact theory in the 1991 Civil Rights Act. The codification of the disparate impact theory and its analytical framework are found in two sections. First, section 104[114] amends section 701[115] of Title VII by defining *demonstrates* to mean the burdens of production and persuasion.[116] Second, section 105 amends section 703 by adding new section 703(k).

> (k)(1)(A) An unlawful employment practice based on disparate impact is established under [Title VII] only if—
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> (i) a [plaintiff] demonstrates that [an employer] uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the [employer] fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
>
> (ii) the [plaintiff] makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the [employer] refuses to adopt such alternative employment practice.
>
> (B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the [plaintiff] 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 [an employer's] decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

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113. 42 U.S.C. § 2000e-2(a)(2) (1988). Section 703(a) has two substantive sections. The first section, 703(a)(1), makes it an unlawful employment practice for an employer "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." *Id.* § 2000e-2(a)(1). Section 703(a)(1) is the statutory basis for the disparate treatment theory. The Court did not explicitly state, until eleven years after *Griggs*, that the disparate impact theory was grounded in its construction of Section 703(a)(2). In *Connecticut v. Teal*, 457 U.S. 440, 448 (1982), the Court stated that the disparate impact theory reflects the language of Section 703(a)(2) and Congress' basic objectives in enacting Title VII. The basic objectives, the Court found, are to achieve equality of opportunity and to remove barriers that historically have operated to favor white employees in the workplace. *Id.*

114. Pub. L. No. 102-166, § 104, 105 Stat. 1071, 1074 (codified at 42 U.S.C. § 2000e(m) (1988 & Supp. III 1991)).

115. 42 U.S.C. § 2000e (1988).

116. For a discussion of the burden allocation rules in employment discrimination law, see Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205 (1981).

> (ii) If the [employer] demonstrates that a specific employment practice does not cause the disparate impact, the [employer] shall not be required to demonstrate that such practice is required by business necessity.
>
> (C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice'.[117]

The most critical part of section 105 of the 1991 Act as it relates to affirmative action is the business necessity defense. The business necessity defense has important implications for affirmative action, and it is primarily for this reason that President Bush claimed that the 1990 Civil Rights Act was a quota bill. His position was the same as expressed by the Court in *Wards Cove:* If the employer's obligation to rebut a prima facie case of disparate impact is too rigorous, employers would more likely adopt affirmative action plans to make it difficult to establish a prima facie case.[118] Although the 1991 Civil Rights Act clearly imposes the burdens of production and persuasion regarding business necessity on the employer, the debate in Congress and between President Bush and Congress was whether a rigorous standard of business necessity, which the lower courts had adopted prior to *Wards Cove,*[119] puts employers on a "high tightrope":[120] the difficult choice between adopting affirmative action plans to avoid liability under the disparate impact theory or risking liability under the disparate impact theory if it does not.[121] One of the driving forces in *Wards Cove* was the Court's view that a rigorous standard of business necessity encourages employers to adopt affirmative action remediation measures to avoid liability under the disparate impact theory.[122]

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117. Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074 (codified at 42 U.S.C. § 2000e-2(k) (1988 & Supp. III 1991)).

118. *See* VETO MESSAGE, *supra* note 14, at 2.

119. *See, e.g.,* EEOC v. Rath Packing Co., 787 F.2d 318, 327-28 (8th Cir. 1986) (practice must be essential to safety); Crawford v. Western Elec. Co., 745 F.2d 1373, 1384-86 (11th Cir. 1984) (subjective system of promotion held not to meet business necessity standard); Contreras v. City of Los Angeles, 656 F.2d 1267, 1275-80 (9th Cir. 1981) (discriminating tests impermissible unless they are predictive of important elements of work behavior).

120. United Steelworkers of Am. v. Weber, 443 U.S. 193, 209-10 (1979) (Blackmun, J., concurring) (citing Steelworkers v. Weber, 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting)).

121. *See* VETO MESSAGE, *supra* note 14, at 2.

122. The point was forcefully made in Watson v. Fort Worth Bank & Trust Co., 487 U.S. 977 (1988), where the Court noted that the employer faced a Hobson's choice:

> If quota and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely

Congress did not resolve the debate over the appropriate standard for business necessity in the 1991 Act. For example, section 105(b) 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.[123]

The interpretive memorandum to which reference is made provides that:

> The final compromise on S. 1745 agreed to by several Senate sponsors, including Senators Danforth, Kennedy, and Dole, and the Administration, states that with respect to *Wards Cove*—Business necessity/cumulation/alternative practice—the exclusive legislative history is as follows:
>
> The terms "business necessity" and "job relatedness" are intended to reflect the concepts enunciated by the Court in *Griggs* . . . and in other Supreme Court decisions prior to *Wards Cove* . . . .
>
> When a decision-making process includes particular, functionally integrated practices which are components of the same criterion, standard, method of administration, or test, such as the height and weight requirements designed to measure strength in *Dothard v. Rawlinson,* 433 U.S. 321 (1977), the particular, functionally integrated practices may be analyzed as one employment practice.[124]

Section 105(b) was undoubtedly included in the statute itself for the benefit of members of the Court like Justice Scalia, whose approach to statutory construction has been described as textualist.[125] The textualist school of statutory interpretation advocates the view that the only legitimate source for interpretive guidance in statutory cases is the text of the statute at issue, or related provisions of enacted law that shed light on the meaning of the disputed text.[126]

Decisions is a key term in the Interpretive Memorandum on the

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> adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met.

Id. at 993 (plurality). The Court was unable to garner a majority willing to dismantle *Griggs,* but it seems clear that its concern with the Hobson's choice identified in *Watson* was the driving force behind its decision in *Wards Cove. See* Belton, *supra* note 23, at 237-40 (explaining the decision in *Watson* and its significance to *Wards Cove*).

123. Pub. L. No. 102-166, § 105(b), 105 Stat. 1071, 1075.

124. 137 CONG. REC. S15,276 (daily ed. Oct. 25, 1991).

125. *See, e.g., Uncivil Rites,* NEW REPUBLIC, Dec. 16, 1991, at 9 (noting that Justice Scalia is reluctant to enforce Congress' intentions unless there are no ambiguities).

126. *See, e.g.,* Nicholas S. Zeppos, *Justice Scalia's Textualism: The 'New' New Legal Process,* 12 CARDOZO L. REV. 1597 (1991) (discussing the textualist school of legislative interpretation).

appropriate standard of business necessity because it refers to returning the state of the law to *Griggs* and other Supreme Court "decisions." If the term *decisions* is construed to include *Watson,* which was decided before *Wards Cove,* then an employer would not necessarily be required to validate[127] a challenged employment practice in order to satisfy its burden of persuasion on business necessity. If, however, the term *decisions* is construed to mean only those decisions of the Court in which there is a majority position, then *Watson*'s rejection of the validation requirement must be deemed to have been overturned by the 1991 Civil Rights Act. The proper interpretation of *decisions* is not free from doubt, and how the courts construe the term will have important implications for affirmative action. The Supreme Court faced a similar issue in *Newport News Shipbuilding & Dry Dock Co. v. EEOC.*[128] A major issue that divided the Court in that case was whether Congress, in enacting the Pregnancy Disability Act, an amendment to Title VII, intended to overrule both the specific holding and test of sex discrimination adopted by the Court in *General Electric Co. v. Gilbert.*[129] *Gilbert* held that an employee fringe-benefit package that excluded pregnancy-related conditions was unlawful sex discrimination under Title VII. The sex discrimination test that *Gilbert* enunciated was based on a distinction between pregnant and nonpregnant persons. Based on this test, the Court found no violation because the exclusion of pregnancy-related conditions was between pregnant and nonpregnant persons, and not between males and females.[130] Congress responded to *Gilbert* by enacting the Pregnancy Disability Act of 1978.[131] The amendment specifically defined *sex* to include pregnancy and pregnancy-related conditions. In *Newport News,* a majority of the Court held that the amendment overturned both the specific holding of *Gilbert* and its test of sex discrimination.[132]

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127. Validation is a methodology for determining whether a meaningful predictive relationship exists between an employment criterion, for example a test, and the test taker's ability to perform a job. *See generally* P. Jefferson Ballew, Comment, *Courts, Psychologists, and the EEOC's Uniform Guidelines: An Analysis of Recent Trends Affecting Testing as a Means of Employee Selection,* 36 EMORY L.J. 203, 209-12 (1987) (offering a substantial treatment of the concept of validation in the context of employment discrimination).

128. 462 U.S. 669 (1983).

129. 429 U.S. 125 (1976).

130. *Id.* at 134-35.

131. Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (codified at 42 U.S.C. § 2000e(k) (1988)).

132. *Newport News,* 462 U.S. at 676.

B. Section 106, Race Norming, and General Ability Testing

The fact that blacks do not perform as well as whites on general ability tests, including those used in employment, is well documented.[133] The conventional explanation is grounded in the view that cultural bias explains the difference in performance levels. Several strategies have been employed to adjust for the different performance levels of blacks and whites in order to provide confidence in the evaluation process when standardized testing is used. Two of these strategies are differential validation and race norming. Differential validation, which was endorsed by the Supreme Court in *Albemarle Paper Co. v. Moody*,[134] involves establishing different cut-off or passing scores for blacks and whites. Race norming, or within-group scoring, measures test performance only against other members of the same group. For example, blacks are evaluated in comparison to the performance of other blacks, and whites are evaluated only in comparison to other whites.[135]

Section 106 of the 1991 Civil Rights Act now makes it an unlawful employment practice for employers "to adjust the scores of, use different cut off scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin."[136] This section also prohibits courts from ordering differential validation or race norming, and overrules *Albemarle* to the extent that it approved of that form of relief.[137] The prohibition in section 106 was politically motivated. It was included by the congressional Democrats to take away a potential Willie Horton-type issue from the Republicans in the 1992 presidential election.[138] Willie Horton, a convicted black felon, had been furloughed by Governor Michael Dukakis, the 1988 Democratic presidential candidate.

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133. *See generally* Mark Kelman, *Concepts of Discrimination in 'General Ability' Testing*, 104 HARV. L. REV. 1158 (1991).

134. 422 U.S. 405, 435-36 (1975).

135. *See* Linda S. Blits & Jan H. Gottfredson, *Employment Testing and Job Performance*, PUB. INTEREST, Winter 1990, at 18-20. The Department of Labor first made use of race norming in 1981 with the use of the General Aptitude Test Battery, and was subject to a great deal of critical commentary. Kelman, *supra* note 133, at 1204-22; Timothy Noah, *Job Testing Scored on Racial Curve Stirs Controversy*, WALL ST. J., Apr. 26, 1991, at B1.

136. Pub. L. No. 102-166, § 106, 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(l) (1988 & Supp. III 1991)).

137. *See* 137 CONG. REC. S15,476 (daily ed. Oct. 30, 1991) (Interpretive Memorandum of Sens. Burns, Cochran, Dole, Garn, Groton, Grassley, Hatch, Mack, McDain, McConnell, Murkowski, Simpson, Seymour, and Thurman).

138. *See* Govan, *supra* note 9, at 1077-83.

While on furlough, Horton had engaged in criminal conduct, including the rape of a white female. The Republicans, whose presidential candidate was George Bush, prominently featured a series of politically inspired Willie Horton television commercials, speeches, and leaflets that were clearly racist in an appeal to white voters.[139] Race became a major factor in the 1988 presidential election.[140]

Differential validation and race norming can be considered an integral part of the affirmative action remediation effort to eliminate racism in the workplace. With section 106, Congress has now removed an important racial remediation strategy for the elimination of racism in the workplace.

C. *Section 107, Affirmative Action, and Mixed-Motive Cases*

In *Price Waterhouse v. Hopkins*,[141] the Court clarified the law on mixed-motive cases arising under Title VII. A mixed-motive case is one in which an employer, in making an employment decision, has relied upon both a legitimate reason and a reason made unlawful under Title VII.[142] *Hopkins* held that when a Title VII plaintiff presents direct evidence that race or sex was a motivating factor in the adverse employment decision about which the plaintiff seeks relief, the burden of persuasion shifts to the employer to prove by a preponderance of the evidence that it would have made the *same decision* even if it had relied solely on the legitimate reason. *Hopkins* held that the same-decision defense is a liability-determining rather than a relief-limiting rule. As a liability-determining rule, the same-decision defense is a doctrine for determining whether the employer has violated Title VII. Some lower courts had held that the same-decision defense is a relief-limiting rule. Under some lower courts' view of same-decision, direct evidence showing that the employer had been motivated by an unlawful reason would establish a violation of Title VII, and the same-decision defense would be applied to determine what relief, if any, should be awarded to proven victims of employment discrimination.[143]

Section 107 of the 1991 Act reverses *Hopkins*. Section 107

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139. *See* EDSALL & EDSALL, *supra* note 16, at 19, 114, 222-24.

140. *Id.*

141. 490 U.S. 228 (1988).

142. *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, 1364-75 (1990).

143. *Id.* at 1369-71.

provides:

> (a) Except as otherwise provided in this title, an unlawful employment practice is established when the [plaintiff] demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.
>
> (b) On a claim in which [a plaintiff] proves a violation under [section (a)] and a [defendant] demonstrates that the [defendant] 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 [this Section]; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment described in subparagraph (A).[144]

An interpretive memorandum—the Dole Memorandum—included in the legislative history of the 1991 Civil Rights Act states that section 107 is equally applicable to cases involving unlawful "affirmative action plans, quotas, and other preferences."[145] Section 107 has been hailed as the death-knell[146] or "killer provision"[147] for affirmative action.

Reliance on Section 107 to launch a campaign to convert this provision into a "killer provision" for affirmative action is fraught with a great deal of difficulty. First, the rhetoric of President Bush in opposing the 1990 Civil Rights Act on the ground that it was a "quota bill"[148] must be considered in conjunction with his publicly announced position at the signing ceremony on November 21, 1991. In the signing ceremony, President Bush clearly stated that nothing in the 1991 Civil Rights Act overturns the government's affirmative action programs.[149] President Bush's statement on affirmative action was prompted by the highly publicized and controversial proposed signing statement prepared by White House Counsel C. Boyden

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144. Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075-76 (codified at 42 U.S.C. § 2000e-2(m) (1988 & Supp. III (1991)).

145. 137 CONG. REC. S15,276 (daily ed. Oct. 25, 1991).

146. *See* Fred Barnes, *Last Laugh*, NEW REPUBLIC, Dec. 16, 1991, at 9 ("The Democrats and civil rights leaders put [in section 107], even though it appears to outlaw [affirmative action plans].").

147. *Uncivil Rites*, *supra* note 125, at 9.

148. *See* Farrell, *supra* note 13, at 1.

149. *See* Andrew Rosenthal, *Reaffirming Commitment, Bush Signs Rights Bill*, N.Y. TIMES, Nov. 22, 1991, at A1, A11.

Gray. Gray's statement proposed that the federal government's affirmative action regulations be wiped out contemporaneously with the President's signing of the 1991 Civil Rights Act.[150] Executive Order 11,246 requires federal contractors to take corrective action in the form of affirmative action when an analysis of their employment practices supports a conclusion that blacks and women are underrepresented in their work forces.[151] President Bush moved quickly at the signing ceremony to distance himself from the brouhaha generated by Gray's proposed dismantling of the government's affirmative action program.

A second hurdle—this one legal—that must be overcome in any attempt to construe section 107 as a "killer provision" for affirmative action is the issue of whether that section not only overturns *Price Waterhouse* but also that part of *Johnson v. Transportation Agency* which holds that an affirmative action plan is not an affirmative defense.[152] *Johnson* held that cases brought by white males challenging voluntarily adopted affirmative action plans "fit[] readily within the analytical framework" of single-motive pretext cases (disparate treatment).[153] The single-motive pretext cases rely on circumstantial evidence, unlike the mixed-motive cases in which there is direct evidence that the employer's intent to discriminate was a motivating factor.[154] There is nothing in the legislative history of section 107 to even remotely suggest that Congress intended to overturn any aspect of *Johnson,* including its analytical framework for evaluating challenges to affirmative action plans under Title VII. In addition, as discussed below, sections 116 and 108 are important provisions that must be reckoned with in any argument advocating

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150. *See* Steven A. Holmes, *Bush To Order End of Rules Allowing Race-Based Hiring,* N.Y. TIMES, Nov. 21, 1991, at A1; Rosenthal, *supra* note 149, at A1.

151. The principal government regulations on affirmative action, 41 C.F.R. § 60-1-999, were promulgated to enforce Executive Order 11,246, 3 C.F.R. § 339 (1964-65 Compil.), *reprinted in* 42 U.S.C. § 2000e note (1988). A history of the Executive Order is found in *Contractor's Ass'n v. Secretary of Labor,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971); *see also* BELTON, *supra* note 3, § 1.16; Russel W. Galloway & Stephen E. Ronfeldt, *Enforcing the Affirmative Action Requirement of Executive Order 11,246,* 8 CLEARINGHOUSE REV. 481, 481-82 (1974).

152. *See supra* notes 89-94 and accompanying text (explaining the holding in Johnson v. Transportation Agency, 480 U.S. 616 (1986)).

153. *Johnson,* 480 U.S. at 626 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)); *see also* BELTON, *supra* note 3, ch. 2 (discussing the five basic analytical models under the disparate treatment theory).

154. *E.g.,* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 250-51 (1981) (allegations of gender discrimination based on firing of female employee and retention of male employees).

that section 107 is the "killer provision" of affirmative action.

D. Section 116 and Affirmative Action

Section 116 of the 1991 Civil Rights Act provides that "[n]othing 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."[155] This section seems clearly to codify decisions such as *Sheet Metal Workers* in which the Supreme Court upheld the authority of district courts to impose court-ordered affirmative action plans in appropriate cases.[156] It also seems clear that conciliation agreements embodying affirmative action components that are part of a consent decree are covered under section 116 as well, provided the consent decrees meet the requirements of section 108.

The category of affirmative action plans that raises problems about the proper construction of section 116 involves voluntarily adopted plans such as those at issue in *Weber*[157] and *Johnson*.[158] The legislative history on section 116 offers conflicting views on whether section 107 is applicable to voluntarily adopted affirmative action plans. Senator Kennedy, for example, advocated the position that section 116 is not intended to "change the law regarding what constitutes lawful affirmative action and what constitutes impermissible reverse discrimination."[159] Senator Dole advocated the position that section 116 does not purport to resolve the question of the legality of affirmative action under Title VII, and the 1991 Act should in no way be seen as expressing approval or disapproval of *Weber* and *Johnson*.[160]

A key phrase in section 116 is "in accordance with the law." One construction of this phrase is the view that *Weber* and *Johnson* are an integral part of the fabric of Title VII jurisprudence. Neither case was expressly or impliedly overturned under the 1991 Civil Rights Act. Whether these cases continue to be deemed an integral part of the fabric of Title VII jurisprudence depends, in substantial

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155. Pub. L. No. 102-166, § 116, 105 Stat. 1071, 1079 (codified at 42 U.S.C. § 1981 (1988 & Supp. III 1991)).

156. *See supra* notes 95-102 and accompanying text (discussing the holding in *Sheet Metal Workers*).

157. *See supra* notes 83-88 and accompanying text (discussing *Weber*).

158. *See supra* notes 89-94 and accompanying text (discussing *Johnson*).

159. 137 CONG. REC. S15,235 (daily ed. Oct. 25, 1991).

160. *Id.* at S15,478 (daily ed. Oct. 25, 1991) (Dole Interpretive Memorandum).

part, on the views of two new justices. Justices Brennan and Marshall, who participated in *Weber* and *Johnson,* have retired. They have been replaced by Justices Souter and Thomas. Their votes are critical to how section 116 will be construed in cases involving voluntarily adopted affirmative action plans. Justice Thomas, prior to his nomination to the Supreme Court, publicly expressed his opposition to affirmative action—in his writings,[161] confirmation hearings when he was up for a seat on the District of Columbia Circuit Court of Appeals,[162] and a judicial decision—[163] even though he was a beneficiary of affirmative action in his admission to the Yale Law School.[164] On the other hand, he has joined Justice Scalia[165] in several important civil rights decisions in his brief tenure on the Court.[166] Justice Souter has not indicated how he is likely to come out on the issue. In *UAW v. Johnson Controls,*[167] however, Justice Souter joined with the majority in holding that a fetal protection plan that limited the employment opportunities of fertile women did not survive a Title VII challenge.

E. Section 108

Section 108 of the 1991 Civil Rights Act bars collateral attacks on affirmative action consent decrees and judicially imposed affirmative action orders, unless certain specific statutory conditions are satisfied. Section 108 provides:

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161. *See* Clarence Thomas, *Civil Rights as a Principle Versus Civil Rights as an Interest, in* ASSESSING THE REAGAN YEARS 395-396 (David Boaz ed., 1988); Clarence Thomas, *Affirmative Action Goals and Timetables, Too Tough? Not Tough Enough!,* 5 YALE L. & POL'Y REV. 402, 403 (1987). He has also criticized *Brown v. Board of Education* as being based on dubious social science and containing a "great flaw." Clarence Thomas, *Toward a Plain Reading of the Constitution,* 30 HOW. L.J. 983, 990 (1987).

162. *See Confirmation Hearing on Clarence Thomas To Be a Judge on the U.S. Court of Appeals for the District of Columbia, Hearings Before the Comm. on the Judiciary,* 101st Cong., 2d Sess. 58-65 (1990) (referring to a 1987 letter in which Justice Thomas wrote that "affirmative action programs create a narcotic of dependency").

163. Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992).

164. *See* Neil A. Lewis, *The Thomas Hearings: Thomas Undergoes Tough Questioning on Past Remarks,* N.Y. TIMES, Sept. 12, 1991, at A1.

165. *See* Zeppos, *supra* note 126, at 1604 (noting the statutory interpretive view of Justice Scalia).

166. Franklin v. Gwinnett County Pub. Schs., 112 S. Ct. 1028, 1032-38 (1992) (damages remedy available for an action brought to enforce Title IX); Hudson v. McMillian, 112 S. Ct. 995, 998-1002 (1992) (use of excessive force constitutes cruel and unusual punishment even though prisoner does not suffer serious injury). *But see* Presley v. Etowah County Comm'n, 112 S. Ct. 820, 827-32 (1992) (finding certain voting procedure changes not subject to federal preclearance).

167. 111 S. Ct. 1196 (1991).

> (n)(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).
>
> (B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights law—
>
> (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 appraise 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.[168]

Section 108 also provides that the 1991 Act shall not be construed to alter the standards on intervention under Rule 24 of the Federal Rules of Civil Procedure, or to litigated or consent decrees obtained through collusion or fraud, or those transparently invalid or entered by a court lacking subject matter jurisdiction.[169]

Section 108 overrules *Martin v. Wilks* by rejecting the standards under which the Supreme Court allowed collateral attacks on consent decrees.[170] The section also codifies the standards of *Sheet Metal Workers* under which a court would be justified in judicially ordering affirmative action.[171] The premise of section 108 is that affirmative action consent decrees and judicially imposed affirmative action judgments are statutorily protected when constitutional due process norms of notice and opportunity to be heard have been satisfied.

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168. Pub. L. 102-166, § 108, 105 Stat. 1071, 1076 (codified at 42 U.S.C. § 2000e-2(n)(1) (1988 & Supp. III 1991)).

169. *Id.* § 108, 105 Stat. 1071, 1076 (codified at 42 U.S.C. § 2000e-2(n)(2)(A), (C) (1988 & Supp. III 1991)).

170. See *supra* text accompanying note 77 (stating the holding in *Martin v. Wilks*).

171. See *supra* notes 95-102 and accompanying text (discussing the holding in *Sheet Metal Workers v. EEOC*).

IV. CONCLUSION

As Justice Marshall correctly observed in *City of Richmond v. J.A. Croson Co.*,[172] this nation's "battle against pernicious racial discrimination or its effects is nowhere near won."[173] The decisions of the conservative majority of the Court in cases such as *Wards Cove* and *Martin v. Wilks* "sound[ed] a full-scale retreat" from the Court's long-standing solicitude to race-conscious remedial efforts "directed toward deliverance of the century-old promise of equality,"[174] and substantially eroded the promise of affirmative action as a remediation measure for the present and continuing effects of racism in our society. Unlike *Weber, Johnson,* and *Sheet Metal Workers,* which adopted remediation doctrines that are premised on the reality of racism, *Wards Cove* and *Martin v. Wilks* conveyed a powerful message that "racism as usual" was to be the order of the day to preserve white male hegemony. The "racism as usual" message is captured, in substantial part, under the guise of "reverse discrimination." Claims of "reverse discrimination" are those brought by white males alleging that they are "victims" of discrimination as a result of affirmative action.[175] The "reverse discriminationists" argue that most of the jobs they otherwise would have been entitled to receive are awarded instead to blacks and women solely because of race or gender. These claims have been called the "Great White Myth,"[176] and rightly so because the reality of racism still permeates the workplace (and other aspects of our society).[177] Those who argue against affirmative action generally take a myopic view of the past and continuing effects of racial injustice and engage in very

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172. 488 U.S. 469, 528-61 (1989) (Marshall, J., dissenting).

173. *Id.* at 561.

174. *Id.*

175. *See* Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine,* 62 MINN. L. REV. 1049, 1052 (1978).

176. Anna Quindlen, *Public & Private: The Great White Myth,* N.Y. TIMES, Jan. 15, 1992, at A21.

177. *See* HACKER, *supra* note 30 (detailing the role of race in contemporary society in, for example, employment, housing, schools, administration of justice, and politics). In a 1990 study, two-person teams consisting of one black and one white job applicant applied for identical jobs. The results of that study, which attempted to pair equally attractive black and white job applicants, showed that whites faced discrimination 7% of the time, and blacks faced discrimination 20% of the time. Julia Lawlor & Jeffrey Potts, *Job Hunt: Blacks Face More Bias,* USA TODAY, May 15, 1991, at A1; *see also* Ian Ayers, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations,* 104 HARV. L. REV. 817, 827-48 (1991) (providing a statistical analysis of race discrimination in retail car sales); *White Racial Stereotypes Persist,* WASH. POST, Jan. 9, 1991, at A1 (reporting on the persistence of minority stereotypes amongst whites).

strident arguments that demonstrate greater hostility to remedies for racial injustice than to the injustice itself.[178] They also take a myopic view of racial discrimination by rejecting the disparate impact theory, which is premised on the reality of societal discrimination, preferring instead to narrowly define discrimination as a particularized act of intentional racial conduct.[179]

The 1991 Civil Rights Act restores some of the doctrinal and policy underpinnings of affirmative action that *Wards Cove* and *Martin v. Wilks* eroded. The future of the continued vitality of affirmation action, however, is not free from doubt because Congress refused or was unable to reach a consensus on whether *Weber* and *Johnson* are still good law. Two of the most important provisions on whether we can go forward in a straight line, during the Third Reconstruction, to effectuate the policy commitment to eliminating racism will turn on how the courts construe the business necessity defense and what is appropriate affirmative action according to "the law."[180] Whether *Weber* and *Johnson* are "the law" under the 1991 Civil Rights Act will be most undoubtedly tested by claims based on the statutory provision dealing with mixed-motive analysis. Will it, in fact, become the "killer provision" for affirmative action?[181] I hesitate to express the same optimism that I did in 1976 about the efficacy of Title VII to remedy racism in the workplace[182] because the configuration of the Court has substantially changed since that time. If, however, the Supreme Court follows its predecessors in dismantling the Third Reconstruction by continuing to erode the premise of affirmative action, we can expect to see the need for a Fourth Recon-

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178. *See, e.g.*, Morris Abrams, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1322-23 (1986); Lino A. Graglia, *The 'Remedy' Rationale for Requiring or Permitting Otherwise Prohibited Discrimination: How the Court Overcame the Constitution and the 1964 Civil Rights Act*, 22 SUFFOLK U. L. REV. 568, 580-621 (1988). One must wonder, as did Justice Blackmun in his dissent in *Wards Cove*, whether those who take a myopic view of the present and continuing effects of racial injustice "believe that race discrimination—or more accurately, race discrimination against non-whites—is a problem in our society, or even remember that it ever was." Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 662 (Blackmun, J., dissenting) (citation omitted).

179. *See* James F. Blumstein, *Defining Discrimination: Intent v. Impact*, 16 NEW PERSP. 29, 30-35 (1984) (arguing that the term *discrimination* should be limited to intentional acts).

180. *See* Steven A. Holmes, *Lawyers Expect Ambiguities in New Rights To Bring Years of Lawsuits*, N.Y. TIMES, Dec. 27, 1991, at A20; Robert Pear, *With Rights Act Comes Fight To Clarify Congress' Intent*, N.Y. TIMES, Nov. 18, 1991, at A1.

181. *See generally* Paul Burstein, *Reverse Discrimination Cases in the Federal Courts: Legal Mobilization by a Countermovement*, 32 SOC. Q. 511 (1991).

182. *See* Belton, *supra* note 63, at 240-67, 271-76, 279-86, 290-307.

struction in the future. Also, the Court has rejected the view that societal discrimination, standing alone, is a sufficient factual predicate upon which to uphold an affirmative action plan on constitutional grounds. Whether the now-conservative Court will adhere to the view, expressed in cases such as *Weber* and *Johnson,* that societal discrimination is an appropriate rationale for upholding affirmative action plans under Title VII remains to be seen.

A recent study projects that by the year 2000, the majority of entrants into the work force will be minorities and women, and minorities, including blacks, will be less of a minority than ever before.[183] These projections strongly argue for a more positive vision rather than a defensive or apologetic argument in favor of affirmative action policies.[184] Corporate America is beginning to recognize that affirmative action is a good business practice in view of the changing demographics of the labor market.[185] As I have suggested above, if the real reason for the 1991 Civil Rights is the reality of racism, as demonstrated in the persistence of societal discrimination, then courts and policy makers must be willing to face that reality in construing the Act. If they do not, will we need a Fourth Reconstruction?

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183. WILLIAM B. JOHNSTON & ARNOLD H. PACKER, WORKFORCE 2000: WORK AND WORKERS FOR THE 21ST CENTURY (1987) (documenting some key demographic and labor force changes affecting the way American businesses are conducted and their ability to compete in a global economy).

184. U.S. DEP'T OF LABOR, OPPORTUNITY 2000: CREATIVE AFFIRMATIVE ACTION STRATEGIES FOR A CHANGING WORKFORCE 10 (1988); Gary Peller, *Espousing Positive Vision of Affirmative Action Policies,* CHRON. HIGHER EDUC., Dec. 18, 1991, at B1; Catharine R. Stimpson, *It Is Time To Rethink Affirmative Action,* CHRON. HIGHER EDUC., Jan. 15, 1992, at A48.

185. *See, e.g.,* James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal and Political Realities,* 70 IOWA L. REV. 901, 932-39 (1985) (providing an economic analysis of affirmative action); Note, *Rethinking Weber: The Business Response to Affirmative Action,* 102 HARV. L. REV. 658, 659-68 (1989) (noting the movement towards nonremedial affirmative action); Peter T. Kilborn, *Affirmative Action—How To Make It Work?: A Company Recasts Itself To Ease Years of Job Bias,* N.Y. TIMES, Oct. 4, 1990, at A1; Jolie Solomon, *Firms Address Workers' Cultural Variety: The Differences Are Celebrated, not Suppressed,* WALL ST. J., Feb. 10, 1989, at B1.