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Martin v. Wilks

Frank E. Deale

MARTIN v. WILKS

by Frank E. Deale*

I. INTRODUCTION

Although the United States Supreme Court's holding in *Martin v. Wilks*[1] is clear, the controversy surrounding the case stems from two issues: 1) whether it was necessary for the Court to reach the issue on the facts of the case before it; and 2) what the ultimate consequences of the case for affirmative action plans and race discrimination employment litigation in general will be.

Martin held that the "impermissible collateral attack" doctrine, which had been utilized by the vast majority of courts of appeal to insulate "title VII" consent decrees from subsequent attack,[2] violated the accepted general principle of American jurisprudence that when one is not a party to a litigation, one is not bound by the judgment, decree or order arising therefrom.[3] Courts have used this "impermissible collateral attack" doctrine, or its functional equivalent, to prevent challenges to consent decrees which provide affirmative action relief and resolve claims of discrimination covered by title VII of the Civil Rights Act of 1964.[4] In assuring that the parties would not face multiple and continuing liabilities from a course of conduct that a consent decree has discontinued, the collateral attack doctrine also had served the purposes of finality and

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* Legal Director, Center for Constitutional Rights, New York, New York; Adjunct Faculty, City University of New York Law School at Queens College. B.A. 1976, Antioch College; J.D. 1979, University of Pennsylvania Law School. The views expressed are solely those of the author.

1. 109 S. Ct. 2180 (1989).

2. *Id.* at 2185. The cases cited indicate that at that time of the Court's decision only the 7th Circuit, in Dunn v. Carey, 808 F.2d 555 (7th Cir. 1986), allowed collateral attacks on consent decrees by nonparties. *Martin*, 109 S. Ct. 2185 n.3.

3. *See, e.g.*, Hansberry v. Lee, 311 U.S. 32, 40 (1940). *Hansberry* involved a number of landowners who were all privy to an agreement not to allow their lots to be sold to or lived upon by blacks. Several of the landowners brought suit against others who had allowed their land to be acquired and occupied by blacks in violation of the agreement. *Id.* at 37-38. The defendants claimed that the agreement was invalid, to which the plaintiffs answered that the agreement had been held valid by an earlier judgment decree. *Id.* at 38. The defendants then argued, and the Supreme Court agreed, that they could not be bound by the previous decree since they were not parties to that action. *Id.* at 38, 40 (relying on Pennoyer v. Neff, 95 U.S. 714 (1877)).

4. *Martin*, 109 S. Ct. at 2185-86. Title VII of the Civil Rights Act of 1964 is codified at 42 U.S.C. §§ 2000e to 2000e-17 (1988).

judicial efficiency.[5] In following the consent decrees, courts have assumed that nonparties had a duty to inform themselves and intervene in litigations where their rights may be affected,[6] and which, up until now, has essentially precluded subsequent challenges by nonparties who have had the opportunity to litigate.

Notwithstanding the apparent unanimity in the courts of appeal, it became evident in 1982 that the Supreme Court would have to address the issue of proliferation of the impermissible collateral attack doctrine. The first hint that some members of the Court were concerned by this issue came in *Thaggard v. City of Jackson*.[7] The case began in 1975 with litigation instituted by the United States Department of Justice and a number of black plaintiffs alleging that the city of Jackson had maintained a pattern and practice of discriminating against minority job applicants in hiring for, and promoting members of, the city police department.[8] In an attempt to resolve the litigation, the city entered into consent decrees providing affirmative action relief to black plaintiffs.[9] That relief was challenged in a subsequent lawsuit by white police officers who alleged that the city was discriminating against them by reason of the decree.[10] The Fifth Circuit Court of Appeals affirmed the decision of the district court dismissing the case, concluding that the allowance of such a challenge would expose the parties who signed the decree to "inconsistent or contradictory proceedings."[11] The Supreme Court denied *certiorari*.[12]

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5. *See, e.g.*, Hefner v. New Orleans Pub. Serv., Inc., 605 F.2d 893 (5th Cir. 1979) (allowing plaintiff to attack the decree at this point would severely undercut important notions of judicial efficiency and finality of judgment, and would unfairly prejudice other parties and nonparties); *see also* Prate v. Freedman, 430 F. Supp. 1373, 1375 (W.D.N.Y.) (allowing collateral attack on decrees would "result in continued uncertainty for all parties involved and render the concept of final judgments meaningless"), *aff'd without opinion*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978).

6. *See* FED. R. CIV. P. 24 (discussing intervention as a right and permissive intervention).

7. 687 F.2d 66 (5th Cir. 1982).

8. *Id.* at 67.

9. *Id.* The decrees in the cases required that the city of Jackson: 1) adopt and achieve a goal of hiring blacks for one half of all vacancies in all job classifications until the proportion of blacks to whites equalled the proportion of blacks to whites in the working age population in Jackson; and 2) establish separate promotion lists for white and black employees, promoting alternately from each list in a one-to-one ratio until the proportion of blacks in supervisory positions, and in the ranks of patrolperson, is equal to the proportion of blacks to whites in the working age population in Jackson. *Id.*

10. *Id.*

11. *Id.* at 68 (quoting O'Burn v. Shapp, 70 F.R.D. 549 (E.D. Pa. 1976)).

12. Ashley v. City of Jackson, Miss., 464 U.S. 900, *reh'g denied*, 464 U.S. 1003 (1983).

However, in a dissent from that decision, Justice Rehnquist argued that the Court should hear the case, citing the "fundamental premise of preclusion law that nonparties to a prior action are not bound by the judgment."[13]

In Justice Rehnquist's view, "[n]onparties have an independent right to an adjudication of their claim that a defendant's conduct is unlawful."[14] Justice Rehnquist also stated:

> This principle should apply with all the more force to a consent decree, which is little more than a contract between the parties, formalized by the signature of a judge. The central feature of any consent decree is that it is not an adjudication on the merits. The decree may be scrutinized by the judge for fairness prior to his approval, but there is no contest or decision on the merits of the issues underlying the lawsuit. Such a decree binds the signatories, but cannot be used as a shield against all future suits by nonparties seeking to challenge conduct that may or may not be governed by the decree.[15]

Only Justice Brennan joined Justice Rehnquist in his dissent.[16] That these two Justices, with their contrasting approaches to interpreting the Constitution, agreed that this issue should be heard by the full Court assured that the issue would be aired in due course.

In *Marino v. Ortiz*,[17] the Court granted *certiorari* to assess a challenge to a consent decree entered in a title VII discrimination suit brought by black and Latino candidates for positions as police officers.[18] The decree was challenged by a group of whites who claimed that they

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13. *Id.* at 902 (Rehnquist, J., dissenting).

14. *Id.*

15. *Id.*

16. *Id.* at 900.

17. 484 U.S. 301 (1988).

18. *Id.* at 303-04. The decree allowed for the promotion of black and Latino candidates for police positions until the racial/ethnic composition of the new sergeants was equal to that of the composition of candidates taking the test. The decree was signed by all the co-defendants including the Sergeants Benevolent Association and the Sergeants Eligible Association, two organizations representing officers who obtained provisional appointments to the rank of sergeant and those officers who were on the eligible list for appointment. Also permitted to sign the decree was another group representing several white ethnic societies and individual officers. *Id.* at 303.

were entitled to promotions based on their higher examination scores.[19] The Court split four to four on the question of whether the decree could be subject to such a collateral attack,[20] thereby upholding the Second Circuit Court of Appeals determination that such a challenge was barred.[21] The case was decided on January 13, 1988, a little over a month before Justice Kennedy took his seat on the Court.

II. BACKGROUND

The Supreme Court decided *Martin v. Wilks*, shortly after the highly controversial Bork Senate confirmation fight. The Bork confirmation hearings underscored the political and legal significance of retiring Justice Powell's vote on a highly fragmented Court. Justice Kennedy joined a majority opinion of Chief Justice Rehnquist, providing the fifth vote necessary to prevent continued use of the impermissible collateral attack doctrine.[22] Chief Justice Rehnquist began his opinion with the observation that

> [a]ll agree that "[i]t is a principle of general application in anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."[23]

Following this opening salvo, the Court set forth a number of reasons based on law and policy to support its conclusion.[24]

Foremost in the Court's analysis was the notion that the interests served by the impermissible collateral attack doctrine would be "better

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19. *Id. But cf.* Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982) ("reverse discrimination" actions constituted impermissible collateral attacks upon earlier consent decrees), *cert. denied*, 464 U.S. 900, *reh'g denied*, 464 U.S. 1003 (1983).

20. *Marino*, 484 U.S. at 304. Although the Court does not release the voting lineup when it is split, the subsequent decision in *Martin* leads to a strong inference that Rehnquist, C.J., White, O'Connor and Scalia, JJ., were of the opinion that a district court may not dismiss as an impermissible collateral attack a lawsuit challenging a consent decree by nonparties, and Brennan, Marshall, Blackmun and Stevens, JJ., were of the view that such cases should be dismissed. *See Martin*, 109 S. Ct. at 2188; *id.* at 2189 (Stevens, J., dissenting).

21. Marino v. Ortiz, 806 F.2d 1144 (2d Cir. 1986).

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

23. *Id.* at 2184 (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940)).

24. *See id.* at 2185-88.

served by mandatory joinder procedures."[25] By placing the burden of informing all potentially interested parties to a lawsuit on the plaintiff, rather than requiring that potential defendants or others whose rights may have been affected intervene under Federal Rule of Civil Procedure 23, the Court implemented its underlying concern that "[t]he linchpin of the 'impermissible collateral attack' doctrine -- the attribution of preclusive effect to a failure to intervene -- is therefore quite inconsistent with Rule 19 and Rule 24."[26]

It was clear from the opinion that the Court was able to anticipate some of the difficulties its resolution of this matter would impose on plaintiffs and employers in employment discrimination suits.[27] This article will discuss some of these difficulties. However, there was some dispute in the majority and dissenting opinions as to whether the district court's decision, and even the Supreme Court in previous cases itself, had applied the doctrine as it has been understood.[28]

In 1974, the NAACP Legal Defense and Education Fund, Inc., and individual black plaintiffs filed separate class action complaints against the city of Birmingham and the Jefferson County Personnel Board, alleging that the hiring and promotion of firefighters was being carried out in a racially discriminatory manner.[29] After trial, but before entry of judgment, two consent decrees were signed by the parties which provided long term goals for the hiring of black firefighters.[30] After a fairness hearing, but before final approval of the decrees, the Birmingham Firefighters Association filed objections as an *amicus curiae* and, later, along with two association members, sought to intervene in the action.[31]

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25. *Id.* at 2185 (quoting 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4452 (1981)). The court stated that "Rule 19(a) provides for mandatory joinder in circumstances where a judgment rendered in the absence of a person may 'leave . . . persons already parties subject to a substantial risk of incurring . . . inconsistent obligations . . . .'" *Id.* (quoting FED. R. CIV. P. 19(a)) (footnote omitted).

26. *Id.* at 2186. *See also* FED. R. CIV. P. 24(a). This is the rule on intervention as of right which states that "[u]pon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest . . . and he is so situated that the disposition of the action may . . . impair or impede his ability to protect that interest . . . ." *Id.*

27. *See Martin*, 109 S. Ct. at 2187.

28. *See, e.g., id.* at 2188-89 (Stevens, J., dissenting). White employees may not be deprived of their legal rights. However, consent decrees may, as a practical matter, produce changes in opportunities for employment or promotion, although white employees are not bound by the decrees in any legal sense. *See id.*

29. *Id.* at 2183 (majority opinion).

30. *Id.*

31. *Id.*

Intervention was denied to this group on the basis of being untimely.[32] Another group of seven firefighters who filed a complaint seeking injunctive relief against the operation of the decree was also denied relief.[33]

After these two denials of intervention were affirmed on appeal,[34] yet another group of white firefighters brought suit against the city and the board alleging that they too were being denied promotions in favor of blacks who were "less qualified."[35] The city and the board, along with a group of blacks who intervened on the side of the defendants, moved to dismiss this action based on the impermissible collateral attack doctrine.[36] The district court denied the motions, although the city had admitted to making race-conscious decisions.[37]

The Eleventh Circuit Court of Appeals reversed the district court and held that the plaintiffs were wrongfully precluded from raising their claims.[38] The court explicitly rejected the impermissible collateral attack doctrine, holding that the policies in favor of the doctrine "must yield to the policy against requiring third parties to submit to bargains in which their interests were either ignored or sacrificed."[39] After granting *certiorari*, the Supreme Court affirmed this decision five to four.[40]

The Supreme Court was sharply divided over the analysis of the district court decision.[41] The majority of the Court held that the white plaintiffs should have been allowed to challenge employment decisions taken pursuant to the decrees.[42] The court of appeals had reversed the lower court's decision when it found that the district court erred in holding

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32. *Id.*

33. *Id.* (the seven firefighters argued that the decrees would operate to illegally discriminate against them).

34. *Id.* (relying on United States v. Jefferson County, 720 F.2d 1511 (11th Cir. 1983)).

35. *Id.*

36. *Id.*

37. *Id.*

38. *In re* Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1497-98 (11th Cir. 1987).

39. *Id.* at 1498 (citing Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 589 n.4 (1984) (O'Connor, J., concurring) ("The policy favoring voluntary settlement does not, of course, countenance unlawful discrimination against existing employees.")).

40. *Martin*, 109 S. Ct. at 2188.

41. Rehnquist, C.J., delivered the opinion of the Court in which White, O'Connor, Scalia and Kennedy, JJ., joined. Stevens, J., filed a dissenting opinion in which Brennan, Marshall and Blackmun, JJ., joined. *Id.* at 2182.

42. *Id.* at 2183.

that the plaintiffs were bound by a decree to which they were not parties.[43] Yet, Justice Stevens, in his dissenting opinion, reiterated that the district court concluded that the consent decrees were justified and lawful because the city "had not promoted any black officers who were not qualified or who were demonstrably less qualified than the whites who were not promoted."[44] In essence, the dissent claimed that the district court had not applied the impermissible collateral attack doctrine to bar the litigation by the white firefighters, but rather had rejected the claims of the white firefighters on the merits.[45]

III. DISCUSSION

The Supreme Court's conclusion that the burden of notifying relevant parties to a lawsuit must fall on the plaintiffs through utilization of the rules for joinder of parties[46] will have enormous repercussions for future employment discrimination cases. Plaintiffs will now have to devote large amounts of time, energy and resources to assessing who the proper defendants should be when contemplating litigation. Prior to the decision in *Martin*, most litigation of this type focused on the discriminating agency,[47] the municipality,[48] and a small number of private individuals.[49] Now, however, plaintiffs will have to consider joining as parties to the decrees unions, trade associations, and any group which could have an

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43. *In re Birmingham*, 833 F.2d at 1497 (the 11th Circuit Court of Appeals reversed and remanded the case with instructions that the district court try plaintiffs' claim of unlawful discrimination).

44. *Martin*, 109 S. Ct. at 2194 (Stevens, J., dissenting).

45. *Id.* at 2195 ("[T]he Court of Appeals, and the majority opinion all fail to draw attention to any point in this case's long history at which the [district court] judge may have given the impression that any nonparty was legally bound by the consent decree.") (footnote omitted). Certainly this is a plausible conclusion in light of the fact that a five day trial ensued below on the claims of the white firefighters. *See id.* at 2201.

46. *Id.* at 2186 (majority opinion) (relying on Penn-Cent. Merger and N & W Inclusion Cases, 389 U.S. 486, 505 n.4 (1968)).

47. *See, e.g.*, Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616 (1987) (plaintiff brought suit against the Santa Clara County Transportation Agency alleging discrimination in the Agency's hiring and promotion practices); Brown v. General Servs. Admin., 425 U.S. 820 (1976) (plaintiff brought suit against the General Services Administration claiming that it had discriminated against him by failing to promote him).

48. *See, e.g.*, Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO v. City of Cleveland, 478 U.S. 501 (1986) (plaintiff sued the city of Cleveland alleging discrimination in the municipality's hiring, promoting and assigning of firefighters).

49. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (the "person" in this case is a fictitious person in the form of the private corporation defendant who allegedly violated title VII by firing a black employee).

interest in defeating an affirmative action plan or race discrimination suit at a particular job site. In cases where individuals feel that a consent decree or affirmative action plan will result in the promotion of unqualified minority applicants, the potential nonminority job seekers for those positions become highly relevant.[50] It will be virtually impossible to identify all individuals and organizations who might seek to relitigate the issues that have been resolved by the consent decree.

Once these individuals and/or organizations have been identified, there will have to be a strategic decision whether to join them as party defendants. If they are joined, it will bring into the litigation people and organizations who may not be directly responsible for acts of discrimination but who may be affected by the judgment or the relief.[51] An action which was initially conceived of as a bi-polar suit, will be transformed into a multi-polar or polycentric suit, with all the difficulties endemic to such actions.[52] Those groups and individuals which have been brought into such litigation may not have an interest in the litigation until they have been sued. Yet bringing them into the litigation will most assuredly develop antagonistic relationships ultimately destructive of intergroup relations, morale at the job site, and the congressionally expressed preference for conciliation and settlement of such actions.[53]

The chief means by which these policies have been effectuated has been through the consent decree.[54] An employer confronted with

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50. *See generally* Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989). For a more detailed analysis of *Wards Cove*, see Reed, *The Immediate Fallout of Wards Cove*, 7 N.Y.L. SCH. HUM. J. RTS. 65 (Symposium 1990).

51. *See* Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200 (1988). *See also* Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFFALO L. REV. 485, 489 (1989). To sue or join as a party defendant in a discrimination suit one who is not responsible for acts of discrimination could expose the plaintiff to liabilities under Rule 11 of the Federal Rules of Civil Procedure. That rule allows for the assessment of a fine against attorneys who sign a pleading which is not well grounded in fact. Researchers have concluded that Rule 11 has already been applied disproportionately against civil rights plaintiffs. *Id.*

52. *See generally* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978). The late Professor Fuller noted that a problem or case which is polycentric, *i.e.*, containing several different parties or persons with conflicting viewpoints, will necessarily complicate the adjudicative process. *Id.* at 394-95 ("In such a case it is simply impossible to afford each affected party a meaningful participation . . . .").

53. For a discussion of the congressional preference for conciliation and settlement, as opposed to litigation, see United Steelworkers of Am. v. Weber, 443 U.S. 193, 203-04 (1979) (discussing H.R. REP. No. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963)).

54. *See generally* Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887.

> Between 1972 and 1983, the Justice Department sued and obtained relief under Title VII against 106 state and local government employ-

wideranging multi-polar litigation will be extremely unlikely to settle such an action because of fears that the action may be kept alive by party defendants who would prefer that the fight continue.[55] There is even less incentive for settlement if entry of the consent decree will not absolve the employer from future litigation which challenges acts authorized by the decree. Furthermore, Justice Stevens' dissenting opinion noted that the reasoning of the majority applies as much to judgments and litigated orders as to consent decrees,[56] which, will compound the difficulties discussed above.

IV. CONCLUSION

Prior to *Martin*, the Court did not address the standard to be applied in cases where a nonparty is attacking the relief provided by a consent decree. The Eleventh Circuit Court of Appeals concluded that the test adopted by the Court in *United Steelworkers of America v. Weber*[57] and *Johnson v. Transportation Agency, Santa Clara County, California*,[58] should govern.[59] These cases held that voluntary affirmative action programs will pass muster if: 1) there is a manifest statistical imbalance that reflects an underrepresentation of minorities or women in traditionally segregated job categories; and 2) the relief designed to remedy the imbalance does not unnecessarily trammel the rights of nonminority employees or create an absolute bar to their advancement.[60]

The Court's reluctance to discuss the standard should come as no surprise because its political makeup is shifting, as indicated by the Court's most recent decision in the affirmative action area, *City of Richmond v. J.A.*

> ers; of these cases, ninety-three -- some eighty-eight percent -- were settled by consent decree. It would be fair to say that far more employees and job applicants are directly affected by the provisions of consent decrees than by litigated judgments in Title VII cases.

Id. at 894 (footnotes omitted).

55. *See Martin*, 109 S. Ct. at 2200 (Stevens, J., dissenting).

56. *Id.* at 2200 n.30 (relying on 29 C.F.R. § 1608.8 (1989)). In reaching its decision, the majority refused to give weight to 29 C.F.R. § 1608.8 which has been interpreted by the Equal Employment Opportunity Commission to insulate actions taken pursuant to court order from liability under title VII, and does not distinguish between orders "entered by consent or after contested litigation." *Id.* at 2199-200 & n.30 (quoting 29 C.F.R. § 1608.8).

57. 443 U.S. 193 (1979).

58. 480 U.S. 616 (1987).

59. *In re* Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1500 (11th Cir. 1988).

60. *Id.*

Croson Co.[61] In that case, the Court struck down an affirmative action plan which required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount to minority business enterprises.[62] Justice O'Connor, in the majority opinion, stated that the plan violated the fourteenth amendment, adding that "[t]here is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry."[63] This language of the opinion had the approval of Justice Kennedy[64] who was not sitting on the Court when *Weber* and *Johnson* were decided. Justice Powell, who was replaced by Justice Kennedy, had joined in the *Johnson* majority in creating the "manifest imbalance" test.[65]

One may safely assume that the manifest imbalance test, which has served for over a decade as a legal predicate for voluntary affirmative action plans, will be replaced by a more stringent test.[66] As a consequence, some consent decrees may be challenged under a standard which is different from the standard accepted when originally signed. One of the few cases concerning challenged consent decrees decided after *Martin*, is *Henry v. City of Gadsden, Alabama*.[67] In *Henry*, the trial court felt it necessary to conclude, not only that the decree entered into satisfied the test appropriated from *Weber* and *Johnson*, but also that there was a statistical prima facie case of discrimination established as a justification for the consent decree.[68]

Moreover, before *Croson*, there was never a majority to hold that a governmental affirmative action plan that disadvantaged whites must be tested by strict scrutiny.[69] It is now established, because of *Martin*, that strict scrutiny applies to such plans which have not been enacted or approved by Congress.[70] The question then arises whether all the noncongressional, pre-*Croson* affirmative action plans embodied in consent

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61. 109 S. Ct. 706 (1989).

62. *Id.* at 712-13.

63. *Id.* at 724 (emphasis in original) (citation omitted).

64. *Id.* at 712.

65. *Johnson*, 480 U.S. at 618.

66. The Court's recent trend of replacing the manifest imbalance test is addressed in more depth by the author in an upcoming issue of the *New York University Review of Law and Social Change*.

67. 715 F. Supp. 1065 (N.D. Ala. 1989).

68. *Id.* at 1068-69.

69. *Cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (the plurality applied a test less stringent than strict scrutiny).

70. *See Croson*, 109 S. Ct. at 721; Metro Broadcasting, Inc. v. F.C.C., 110 S. Ct. 2997, 3009 (1989).

decrees are now vulnerable to collateral attack because they may not survive strict scrutiny.

V. AFTERWORD

As of this writing, the Court has not yet agreed to hear any affirmative action cases for the October, 1990 Term. When the Court does hear another affirmative action case, the manner in which it deals with the issues discussed above will have great bearing on the future of affirmative action.