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REFLECTIONS ON THE SUPREME COURT'S 1988 TERM: THE EMPLOYMENT DISCRIMINATION DECISIONS AND THE ABANDONMENT OF THE SECOND RECONSTRUCTION†*

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I. INTRODUCTION

July 2, 1989, was the 25th anniversary of the enactment of the Civil Rights Act of 1964,[1] passed in the wake of the assassination of President John F. Kennedy. Congress designed Title VII[2] of that landmark legislation to eliminate discrimination from the American workplace,[3] and it placed the considerable power of federal law and the federal courts behind the demand for equal employment opportunity in the private as well as public sector.[4]

Guiding this law through the 88th Congress was no mean political feat. The *New York Times* recently published a photograph of

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[1] 42 U.S.C. §§ 2000a–2000h(6) (1982).

[2] 42 U.S.C. §§ 2000e–e–17 (1982).

[3] H.R. REP. No. 914, 88th Cong., 1st Sess. 18, 26 (1963). *See generally* Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431 (1966).

[4] The law was amended in 1972 to cover governmental as well as private employers. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (1972).

the ceremony in which President Lyndon Johnson signed the Civil Rights Act.[5] Seated in the first row in the photograph are Senators Everett Dirkson and Hubert Humphrey, together with Congressmen Charles Halleck and Emanuel Celler. How was agreement possible among persons of such conflicting political philosophies on a matter as controversial as Title VII?

Part of the explanation may be found in the vague nature of the statute's language. It prohibits "discrimination" in employment opportunities "because of" an individual's race, color, religion, sex, or national origin.[6] The legislation does not provide a definition of "discrimination." It does not specify how discrimination is to be proven or disproven in court. It does not disclose what "because of" actually means in practice — whether the impermissible reason must be *the sole reason* for the challenged employment decision, or merely *one of the reasons* behind it. The statute fails to address the question of the extent of a court's power to remedy discrimination by ordering racial (or other) preferences, or whether an employer can establish such preferences voluntarily without running afoul of the law. Rather, these fundamental questions, and numerous others, were left to the courts to answer. Title VII may thus aptly be described as "judicial legislation." Legislators with diametrically different views on these questions could still join together in 1964 in support of the proposed law.

Over the past 25 years, the federal courts have been busy defining the scope and content of Title VII. They have developed the two basic theories of discrimination that we now call disparate treatment and disparate impact.[7] They have devised the schemes of proof in which inferences of discrimination may be raised by certain sequences of events,[8] and by statistics.[9] The courts have drawn the

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[5] N.Y. Times, Jul. 2, 1989, at 16.

[6] 42 U.S.C. § 2000e–2 (1982). The operative text provides:

> It shall be an unlawful employment practice for an employer–(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; (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, religions, sex, or national origin.

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

[8] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[9] *See* Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

contours of appropriate relief, including affirmative or group remedies (both court-ordered and voluntary) that are designed not to compensate actual victims but rather to dismantle patterns of discriminatory practices.[10]

Over those 25 years, the Justices on the Supreme Court had reached a reasonably reliable consensus as to the direction in which Title VII should proceed. That consensus broke down last Term, and we have witnessed a fundamental change in the Court's interpretation of Title VII (as well as other civil rights legislation) and its attitude toward the persisting problem of discrimination in our society. While the Bush Administration would have us believe that these are only "technical" changes,[11] an exploration of the decisions reveals otherwise.

II. The Definition of "Discrimination" and the Standards of Proof Under Title VII

A. *Disparate Treatment*

Since the Court's 1971 decision in *Griggs v. Duke Power Co.*,[12] authored by Chief Justice Warren Burger, "discrimination" within the context of Title VII has had two meanings: disparate treatment and disparate impact. Disparate treatment is the familiar form of intentional, deliberate conduct motivated by bias against the employee, such as the refusal to promote a woman because she is a woman. Proof of discriminatory motive is essential to the plaintiff's case. A plaintiff may prove motive by either direct evidence, such as an admission by a manager that females are not considered for promotion in the firm, or indirect circumstantial proof, such as demonstrating that the female plaintiff has the qualifications for advancement possessed by others who have been promoted, that she nevertheless was rejected, and that a man was promoted in her place.[13] This prima facie showing raises an inference, or suspicion, that gender motivated the adverse decision. The employer must then articulate the non-discriminatory reasons it claims justified the

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[10] *See* Johnson v. Transp. Agency, Santa Clara County, California, 107 S. Ct. 1442 (1987); United States v. Paradise, 107 S. Ct. 1053 (1987); Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 106 S. Ct. 3019 (1986); Firefighters Local 1784 v. Stotts, 467 U.S. 561 (1984); United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979).

[11] Boston Globe, Sept. 11, 1989, at 14, col. 2; Boston Globe, Aug. 23, 1989, at 3, col. 1.

[12] 401 U.S. 424 (1971).

[13] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

decision. Those reasons are subject to further scrutiny because the plaintiff has the opportunity to demonstrate that they are pretextual — mere excuses to cover bias.

Disparate treatment claims can also be pursued in the aggregate, as a class action alleging deliberate systemic practices of discrimination. Here the plaintiffs can establish a prima facie case by reliance upon statistical imbalances between the number of minority or female workers one would expect to be employed, given the make-up of the labor market from which applicants are drawn, and the number that are actually employed.[14] Such imbalances raise an inference of discriminatory motivation, requiring the employer to come forward with another explanation.

Disparate treatment emerged from last Term relatively unchanged. *Price Waterhouse v. Hopkins*[15] resolved the question of the appropriate standard of causation to be applied in a Title VII case. Ms. Hopkins was a candidate for partnership in the defendant accounting firm, but was put on hold indefinitely and eventually rejected. She brought a Title VII action alleging that the rejection was based on her gender. Evidence in her favor included the almost complete exclusion of women from the 662 partnership slots at Price Waterhouse, and her own tremendous personal success at the firm, including landing a $25 million contract. In addition, she pointed to comments made by several partners in their evaluations of her which United States District Judge Gesell found were clearly motivated by bias against females. For example, she was criticized for being too aggressive, and she was advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[16]

Judge Gesell found, however, that Price Waterhouse did have additional, non-discriminatory reasons for rejecting Hopkins: primarily, her lack of interpersonal skills. The problem became, therefore, the familiar one in individual treatment cases: sorting out the legitimate from the discriminatory reasons. How important a role must discrimination play in the decision before a court can say that the decision was "because of" sex? This question had, in the words of the Court, "left the Circuits in disarray."[17]

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[14] *See* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).

[15] 109 S. Ct. 1775 (1989).

[16] 618 F. Supp. 1109, 1117 (D.D.C. 1985).

[17] *Price Waterhouse*, 109 S. Ct. at 1784 n.2. *See generally* Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982).

Under the formulation that the Court adopted in *Hopkins*, plaintiff bears the initial burden of proving that gender (or other impermissible criteria) played a motivating part in the challenged decision. The defendant employer can nevertheless avoid liability by proving (by a preponderance of the evidence) that it would have made the same decision even if there had been no gender bias. In effect, then, this "harmless error" standard will require litigants to reconstruct the decisionmaking process in court and extrapolate the likely result as if the factor of discrimination had *not* been present.[18]

B. *Disparate Impact*

Disparate impact discrimination is a "no-fault" theory of Title VII liability that was developed by a unanimous Court in *Griggs* and refined in the years since 1971. The decisions of the past two Terms have changed the theory dramatically.

The premise behind impact theory is that if an ostensibly neutral employment practice (such as an "objective" written examination) has an exclusionary effect that operates as the functional equivalent of intentional discrimination, then that practice must be scrutinized to determine whether it serves an essential purpose of the employer's operation.[19] If the practice does not serve such a purpose then, given its exclusionary effect, it cannot be justified and is deemed violative of Title VII. In such a case, it is irrelevant that deliberate intent to discriminate is lacking or cannot be proven. Title VII, as the *Griggs* Court read it, is directed as much against discriminatory effects as it is against discriminatory motivation: "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[20]

Thus, when the Duke Power Company in *Griggs* utilized "objective" selection devices like the possession of a high school diploma

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[18] Other than the causation question, two additional points should be noted about *Hopkins*. First, it confirms prior precedent extending the coverage of Title VII beyond the traditional employer-employee relationship. *See* Hishon v. King & Spaulding, 467 U.S. 69 (1984) (partnership in a law firm). Second, it establishes that sex-stereotyping is a form of discrimination prohibited by Title VII. An employer cannot make personnel decisions based on stereotypical notions of the proper conduct and role of females or males.

[19] *See* Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971).

[20] *Griggs*, 401 U.S. at 432. Title VII requires "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.* at 431.

or the achievement of a passing grade on an intelligence test, and those devices resulted in the disproportionate rejection of minority applicants,[21] the burden shifted to the employer to show that the devices "bear a demonstrable relationship to successful performance of the jobs for which [they were] used."[22] It was not enough to convince the courts, as the company did, that it had no intent or design to exclude minorities. Rather, the "touchstone is business necessity."[23] Because Duke Power could not produce evidence of a substantial relationship between these devices and success on the job, the company was in effect arbitrarily excluding minority candidates and thus in violation of Title VII.

In the years following *Griggs*, the federal judiciary was actively involved in reviewing an enormous range of "objective" selection devices that stood as obstacles to the employment of minorities and women, including height-weight minimums for law enforcement positions,[24] written examinations,[25] experience requirements,[26] no-spouse hiring rules,[27] and exclusion of applicants with any record of arrest.[28] In the process, it became apparent that many employers had systematically over-screened their applicants, insisting on requirements that might look good on paper but had little if anything to do with the ability to perform the jobs in question.[29] Under *Griggs*, there was no need to delve into the motives of the employers, and such requirements fell.[30]

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[21] This was demonstrated not by actual applicant flow figures, but by resort to census figures showing that whites in North Carolina were approximately three times more likely to have completed high school than blacks. *See id.* at 430 n.6. Such *potential* disparate impact also served as the basis for the decision in Dothard v. Rawlinson, 433 U.S. 321 (1977) (disproportionate impact of height-weight minimum for correction officer demonstrated on the basis of national census figures). *But see* New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (suggesting the necessity in certain circumstances for presentation of actual applicant flow data to demonstrate adverse impact).

[22] *Griggs*, 401 U.S. at 431.

[23] *Id.*

[24] Dothard v. Rawlingson, 433 U.S. 321 (1977).

[25] Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

[26] Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972).

[27] EEOC v. Rath Packing Co., 787 F.2d 318 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 307 (1986); Yuhas v. Libbey-Owens-Ford Co., 562 F.2d 496 (7th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978).

[28] Green v. Missouri Pac. R.R. Co., 523 F.2d 1290 (8th Cir. 1975).

[29] *See generally* Brodin, *Costs, Profits, and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318 (1978). Under the standards of proof that developed in impact cases, even if an employer could prove that a challenged practice actually did predict job performance, the plaintiff could still prevail by demonstrating that less discriminatory alternatives achieved the same goals. *See Albemarle Paper Co.*, 422 U.S. at 425.

[30] As the Court has noted, Congress "recognized and endorsed the disparate-impact

Title VII remained at this stage until the decision in *Watson v. Fort Worth Bank & Trust*,[31] issued at the end of the 1987 Term. Prior to that decision, the dividing line had been relatively sharp between cases alleging deliberate bias and those challenging specific neutral practices under *Griggs*.[32] *Watson* significantly blurred that line, and the Court's decision this Term in *Wards Cove Packing Co., Inc. v. Atonio*[33] may have obliterated it.

Clara Watson, a black woman, was denied four promotions by the Fort Worth Bank, all in a process of subjective evaluation by her supervisors and in the absence of any formal or precise requirements for promotion. She filed a Title VII action proceeding on both disparate impact and disparate treatment grounds. Both the district and circuit courts rejected her impact claim, holding that discretionary and subjective personnel systems could not be analyzed under impact theory.[34] Because this represented a split in the circuits, the Court granted certiorari.

The Supreme Court reversed and held, with each participating Justice in agreement, that impact theory applies equally to subjective as well as objective personnel practices.[35] In the opinion of the Court, Justice O'Connor reasoned that limitation of impact theory to objective practices would create an incentive for employers to abandon those merit-based practices in favor of more easily defensible subjective decisionmaking, which could only be challenged successfully upon a showing of deliberate intent to discriminate.[36]

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analysis employed by the Court in *Griggs*." Connecticut v. Teal, 457 U.S. 440, 447 n.8 (1982). *See also* Thomson, *The Disparate Impact Theory: Congressional Intent in 1972 — A Response to Gold*, 8 INDUS. REL. L.J. 105, 116 (1986) ("Congress ratified *Griggs* and the disparate impact theory of discrimination").

When Congress has disagreed with the Court's interpretation of Title VII, it has taken action to change it, as illustrated by its 1978 amendments of the definition section to include pregnancy as a prohibited ground for selection, thus overruling General Elec. Co. v. Gilbert, 429 U.S. 125 (1976). Act of Oct. 31, 1978, Pub. L. No. 95-555, 92 Stat. 2076 (adding a new § 701(k)). *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678 (1983) (Congress "unambiguously expressed its disapproval" of the *Gilbert* decision).

[31] 108 S. Ct. 2777 (1988).

[32] That line had begun to blur in certain decisions. *See* A. LARSON, EMPLOYMENT DISCRIMINATION § 76.32 (1989), discussing several circuit courts' extension of impact theory to subjective selection systems. *Compare* Segar v. Smith, 738 F.2d 1249 (D.C.Cir. 1984) *with* Pouncy v. Prudential Ins. Co. of Am., 668 F.2d 795 (5th Cir. 1982).

[33] 109 S. Ct. 2115 (1989).

[34] There were some circuit court decisions to the contrary. *See Watson*, 108 S. Ct. at 2783.

[35] *Id.* at 2787, 2791. In both contexts, the Court emphasized, it is the plaintiff's burden to isolate and identify the devices allegedly responsible for any observed statistical disparities, and to establish a causal relationship between the device and the disparity. *Id.* at 2788.

[36] *See id.* at 2786.

In stretching impact theory to cover both objective and discretionary practices, however, the *Watson* Court also significantly changed the nature of impact litigation. It did so by loosening the previously tight standard of job relation set down in *Griggs* and its progeny. A plurality of four Justices[37] indicated that employers would no longer be required to produce in court formal validation studies to demonstrate empirically that the challenged device predicted job performance.[38] Nor would the employer bear the burden of proof on the question of "manifest relationship" between selection device and job. Rather, the plaintiff would have the burden of demonstrating the lack of business necessity, or the availability of devices that achieve the same purpose for the employer but without the discriminatory effect.[39]

Wards Cove Packing Co., Inc. v. Atonio[40] expanded impact theory yet again to include multi-component selection systems with both discretionary and objective features. As its dimensions grew bigger, however, impact theory was also losing its unique no-fault character.

The litigation in *Wards Cove Packing Co., Inc.* involved a challenge to the hiring practices in the Alaskan salmon industry. The defendant companies operated canneries in which jobs were divided into skilled and unskilled, the former paying more and providing better working conditions than the latter. The skilled jobs were filled mostly by whites and the unskilled mostly by minorities, and the employees were separated in different living quarters and dining areas. Plaintiffs alleged that the racial stratification resulted from defendants' selection practices, which included subjective and objective criteria,[41] and they sought to pursue both disparate treatment and disparate impact claims.

Plaintiffs were unsuccessful on both counts in the district court. The United States Court of Appeals for the Ninth Circuit reversed and remanded, holding that the plaintiffs had made out a prima facie case of disparate impact on the basis of the internal workforce statistics showing a disparity between the high percentage of whites in the skilled jobs and the high percentage of minorities in the unskilled jobs.[42] The Ninth Circuit further held that this shifted the

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[37] O'Connor, Rehnquist, White, and Scalia were the four.

[38] 108 S. Ct. at 2790.

[39] *Id.* at 2790–91.

[40] 109 S. Ct. 2115 (1989).

[41] These included nepotism, a rehire preference, and an English language requirement. *Id.* at 2120.

[42] 827 F.2d 439 (9th Cir. 1987).

burden to the employer on remand to prove that business necessity justified the devices.

The Supreme Court reversed. While agreeing that impact theory was applicable to the defendants' complex selection system, the Court disagreed that a prima facie case had been made out. Moreover, a majority of the Justices[43] now held that the burden of persuasion on the question of business justification lies with the plaintiff, not the employer.[44]

Since *Griggs*, plaintiffs have generally demonstrated discriminatory impact by showing that the challenged practice had either an actual or at least a potential exclusionary effect. Thus, in *Griggs* itself, the plaintiff's proof focused on the high school diploma requirement's effect on the potential pool of applicants: available statewide data indicated that white applicants would be three times more likely to possess the diploma than black applicants. In other cases, plaintiffs have used the actual applicant pool to demonstrate the disproportionate impact of a particular device.[45]

Thus, it is not surprising that the *Wards Cove* Court rejected the internal workforce comparison used by the Ninth Circuit.[46] The Court held that the proper comparison must be between the racial composition of the qualified labor market from which workers are hired and the persons holding the jobs.[47] But proof of such a disparity, the Court emphasized, is only the first crucial step in the proof of an impact case. Plaintiffs must further demonstrate "specific causation," *i.e.*, that "the disparity they complain of is the result of one or more of the employment practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on the employment opportunities for

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[43] Justice Kennedy joined the previous plurality from *Watson*.

[44] 109 S. Ct. at 2125–27.

[45] *See* Connecticut v. Teal, 457 U.S. 440 (1982) (the impact of a civil service examination).

[46] Such an approach, the Court wrote, "would mean that any employer who had a segment of his work force that was — for some reason — racially imbalanced, could be haled into court and forced to engage in the expensive and time-consuming task of defending the 'business necessity' of the methods used to select the other members of his workforce." 109 S. Ct. at 2122.

[47] *Id.* at 2121. Thus, for example, if the population of persons qualified to be skilled workers for Wards Cove Packing Co. was 25% minority, and its skilled workforce was 2% minority, the Supreme Court presumably would find the beginnings of an impact case.

This is *the same* comparison that is the focus of the systemic disparate *treatment* case, where the statistical imbalance serves an evidentiary purpose of permitting an inference of discriminatory motivation. *See* Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

whites and non-whites."[48] The cumulative effect of several practices cannot be used to establish the necessary causal connection.[49]

In the context of a multi-component selection process, proving specific causation is likely to be difficult at best. But the greater importance of *Wards Cove Packing Co., Inc.* lies in its treatment of the business justification defense. Adopting a scheme modeled on the defense of an individual disparate treatment case,[50] the Court, now by a five Justice majority, held that the employer simply must produce evidence (not necessarily empirical) of business purpose, but that the burden remains on the disparate impact plaintiff to prove *the absence of* business necessity.[51] This was a clear break from past precedent, including the Court's own line of decisions from *Griggs* to *Watson*.[52] Moreover, in the *Wards Cove* scheme, "there is no requirement that the challenged practice be 'essential' or 'indispensible' to the employer's business for it to pass muster."[53]

Business necessity, in short, is no longer the affirmative defense it was conceived of in *Griggs*, but rather has become a negative element of the plaintiff's case. Given the typical imbalance in resources between the litigants in discrimination cases, that burden on the plaintiff is likely to be insurmountable in many instances.

Justice White, in his opinion for the Court in *Wards Cove Packing Co., Inc.* added a telling comment regarding the scheme of proof. He indicated that a plaintiff who could not prove the lack of business necessity could nevertheless still prevail by proving the existence of a less discriminatory alternative — another practice that would achieve the same purposes for the employer but without the disparate racial or gender impact. The availability of such an alternative, particularly where employers refused to adopt it, "would belie a claim by [the employers] that their incumbent practices are being employed for non-discriminatory reasons," and demonstrate that the practices were mere pretexts for discrimination.[54] This statement reveals that a majority of the Court now apparently views

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[48] *Wards Cove Packing Co., Inc.*, 109 S. Ct. at 2125.

[49] *Id.* at 2124.

[50] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

[51] *Wards Cove Packing Co., Inc.*, 109 S. Ct. at 2125–27.

[52] *See id.* at 2128–32, and cases collected at 2130 n.14. (Stevens, J., dissenting). "Decisions of this Court and other federal courts repeatedly have recognized that while the employer's burden in a disparate treatment case is simply one of coming forward with evidence of legitimate business purpose, its burden in a disparate impact case is proof of an affirmative defense of business necessity." *Id.* at 2130 (Stevens, J., dissenting).

[53] *Id.* at 2126.

[54] *Id.* at 2126–27.

impact theory through fault-colored eyeglasses.[55] The Justices have, in short, shifted the focus of impact cases to the covert intentions and motives of the employer, the same focus as treatment cases, and thus carrying the same substantial difficulties of proof.[56]

Before *Watson* and *Wards Cove Packing Co., Inc.*, impact theory was characterized by its singular focus on objective practices, its formidable standard of proof for the employer's demonstration of job relation or business necessity, and its explicit rejection of any focus on the intent or motivation of the employer in utilizing the practice. These recent decisions materially alter each attribute and, in so doing, place in serious doubt the future of impact theory as an effective weapon against nonmerit-based exclusion of minorities and women. Justice Blackmun was prompted to wonder "whether the majority still believes that race discrimination — or, more accurately, race discrimination against non-whites — is a problem in our society, or even remembers that it ever was."[57]

III. Court Awarded Attorneys Fees

Prospective Title VII plaintiffs and their counsel will find further discouragement in *Independent Federation of Flight Attendants v. Zipes*,[58] a case concerning the award of attorneys fees to successful plaintiffs. Section 706(k) of Title VII authorizes the award of attorneys fees to "prevailing parties."[59] The Court has previously held that fees could be awarded to a prevailing defendant from a losing plaintiff only if the latter's case is found to be frivolous, unreasonable, or without foundation. In contrast, fee awards to prevailing plaintiffs against losing defendants are to be virtually automatic.[60] The distinction in standards reflects the Court's recognition that plaintiffs are acting as private attorney generals when pursuing Title VII cases, and should not be discouraged from doing so by a reading of section 706(k) that leaves them open to an award of fees

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[55] The Court speaks of the possibility that there were few qualified nonwhite applicants "for reasons that are not petitioners' fault," and thus that cannot constitute disparate impact. *Id.* at 2122.

[56] The United States Court of Appeals for the Ninth Circuit presaged this shift in a 1983 opinion, referring to impact theory "as a form of pretext analysis to handle specific employment practices not obviously job-related." Spaulding v. University of Washington, 740 F.2d 686, 707 (9th Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984).

[57] *Wards Cove Packing Co., Inc.*, 109 S. Ct. at 2136 (Blackmun, J., dissenting).

[58] 109 S. Ct. 2732 (1989).

[59] 42 U.S.C. § 2000e–5(k) (1982).

[60] *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

merely because they do not prevail. In contrast, a defendant who does not prevail has by definition been adjudged a violater of federal law.

Zipes confronted the Court with the question of a fee award against a losing intervenor. An action had been brought by female flight cabin attendants challenging TWA's policy of terminating attendants who became mothers. TWA abandoned the policy, and the focus of the litigation turned to the question of remedy for past victims of the policy. The parties agreed to a tentative settlement that would credit these persons with competitive seniority. At that point the union representing the flight attendants intervened to challenge modification of the seniority system. The challenge was ultimately rejected after considerable litigation, and plaintiffs subsequently sought an award of attorneys fees against the union. The district court held that fee awards against intervenors should be made under the same standard as awards against defendants (*i.e.*, be virtually automatic) and the plaintiffs were awarded attorneys fees in the amount of $181,000.[61]

The Court reversed and remanded. While ruling that district courts have the authority to award fees against unsuccessful intervenors, the Court held that in cases where the intervenor was not charged or adjudged liable for its own Title VII violation, such fees may be awarded only if the intervenor's action was frivolous, unreasonable, or without foundation.[62] The standard to be applied, in other words, is the nearly insurmountable standard for the award of fees against losing plaintiffs.

As a result of *Zipes*, plaintiffs in Title VII litigation will generally have to bear the cost of litigating third-party claims and defenses (presumably regarding liability as well as remedy). The likely consequence of the decision, Justice Marshall observed in his dissent, will be that

> defendants can rely on intervenors to raise many of their defenses, thereby minimizing the fee exposure of defendants and forcing prevailing plaintiffs to litigate many, if not most, of their claims against parties from whom they have no chance of recovering fees. Without the hope of obtaining compensation for the expenditures caused by intervenors, many victims of discrimination will be forced

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[61] Airline Stewards & Stewardesses Ass'n v. Trans World Airlines, Inc., 640 F. Supp. 861, 867 (N.D. Ill. 1986).

[62] *Zipes*, 109 S. Ct. at 2739.

to forgo remedial litigation for lack of financial resources. As a result, injuries will go unredressed and the national policy against discrimination will go unredeemed.[63]

IV. The Affirmative Action Question

Since the mid-1970s the "affirmative action" issue has dominated the political discourse regarding fair employment law. Is it permissible, in the interest of remedying the effects of past discrimination, to employ race-conscious preferences that in themselves constitute a form of "reverse discrimination?" Stated differently, the issue is the extent to which a court may order — or litigants may consent to, or employers may voluntarily adopt — group relief that goes beyond compensating actual victims of discrimination. The emotion of the issue is created in large part by the fact that we are talking about a zero-sum game: if minorities or females are to be given a preference, whites and males will generally be disadvantaged.

Since *Regents of the University of California v. Bakke*,[64] the Supreme Court has been struggling with the question of race-conscious relief. As a matter of enforcing Title VII and other civil rights statutes, it has long been argued that merely making actual victims whole will neither significantly advance employment opportunities for minorities and women, nor present a credible deterrent against future violations. The granting of race-conscious relief following a determination of liability under Title VII thus has become a familiar part of the legal landscape, and has secured the approval of the Supreme Court.[65] As the Court has observed, the purpose of such relief "is not to make identified victims whole, but rather to dismantle prior patterns of employment discrimination and to prevent discrimination in the future."[66]

The more difficult question is the extent to which an employer or labor union voluntarily may impose race-based remedies on the workplace. Beginning with *United Steelworkers of America v. Weber*,[67]

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[63] *Id.* at 2746 (Marshall, J., dissenting).

[64] 438 U.S. 265 (1978). This case dealt with the setting aside for minority applicants of a number of positions in the medical school entering class. An earlier case raising the question, DeFunis v. Odegaard, 416 U.S. 312 (1974), was dismissed as moot.

[65] *See* United States v. Paradise, 107 S. Ct. 1053 (1987); Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986).

[66] 478 U.S. at 474–75.

[67] 443 U.S. 193 (1979).

a majority of the Supreme Court has supported the concept of voluntary affirmative action, within certain limitations. Over the dissent of Justice Rehnquist and Chief Justice Burger, the *Weber* Court rejected a Title VII reverse discrimination case brought by a white man challenging a private sector affirmative action program (reserving fifty percent of the crafts training positions for black employees) negotiated as part of the collective bargaining agreement. The Court developed a two-part analysis for review of such plans.[68] First, there had to be sufficient justification for such action, which in *Weber* came in the form of a long-standing underrepresentation locally and nationally of minorities in the particular industry. Second, the plan had to be "narrowly tailored" and not overly-broad. Thus, the racial preference would have to be temporary (*e.g.*, expire when parity was reached); not completely exclude whites from the jobs; not require the discharge of whites to make room for blacks; and constitute a flexible goal rather than an unyielding quota.

Since *Weber*, the Court has revisited the voluntary affirmative action question in the context of public employers, and it has tightened its scrutiny of such preferences.[69] In *Wygant v. Jackson Board of Education*,[70] the Court struck down (under the Equal Protection Clause) the preferential layoff protection provision of a collective bargaining agreement between the Board of Education and the teachers' union. The provision suspended the previous reverse seniority layoff practice. A plurality of the Justices rejected the notion that societal discrimination alone could justify such race-conscious decisionmaking by a public employer. Rather, in his opinion for the Court, Justice Powell emphasized the need for "particularized findings" of discrimination — the employer "must have sufficient evidence to justify the conclusion that there ha[d] been prior discrimination."[71]

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[68] It should be noted that the majority declined "to define in detail the line of demarcation between permissible and impermissible affirmative action plans." *Id.* at 208.

[69] It has been argued that the Court has applied basically the same standards to Title VII and Equal Protection cases. *See generally* Note, *Voluntary Public Employer Affirmative Action: Reconciling Title VII Consent Decrees with The Equal Protection Claims of Majority Employees*, 28 B.C.L. REV. 1007 (1987). *But see* Johnson v. Santa Clara Transp. Auth., 107 S. Ct. 1442, 1449 n.6 (1987) (suggesting that the standards are not identical).

[70] 106 S. Ct. 1842 (1986).

[71] *Id.* at 1848. Such evidence was found lacking in the record below. Moreover, the layoff preference was held to violate the requirement that race-conscious relief must be narrowly tailored because the challenged plan required the discharge of senior white teachers, in favor of junior black teachers. *Id.*

In her concurring opinion, Justice O'Connor read this as not requiring that the programs' adoption "be accompanied by contemporaneous findings of actual discrimination," but simply that "the public actor has a firm basis for believing that remedial action is required."[72] She added that "[t]he imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations."[73] As will be seen, the Court came very close to imposing just such a requirement last Term.

In its 1987 Term, the Court upheld the operation of a gender-preference plan unilaterally adopted by a public employer. *Johnson v. Transportation Agency, Santa Clara County, California*[74] rejected the Title VII claim of a white male who was denied a promotion in favor of a female ranked immediately below him on the civil service eligible list. Diane Joyce got the job pursuant to an affirmative action plan that made gender *a factor* in the selection process. Recognizing that "voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace,"[75] the majority rejected the dissent's assertion that affirmative action plans may be adopted only upon a showing that the employer itself had engaged in past discrimination.[76] Such a standard would thwart voluntary efforts because "the prospect of liability created by such an admission would create a significant disincentive for voluntary action."[77] Rather, the justification necessary to support affirmative action is the existence of "manifest imbalance" reflecting the underrepresentation of the group in question.[78] The statistics demonstrating this imbalance would have to be finely tuned to the qualified labor market from which the positions have been filled, and not simply a comparison to the general population.[79] Because *none* of the 238 skilled crafts positions at issue in *Johnson* was filled by a female, the Court found sufficient justification for affirmative action. Moreover, the Court concluded that the agency's plan was narrowly tailored in that it set flexible goals in-

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[72] *Id.* at 1853 (O'Connor, J., concurring).
[73] *Id.* at 1855 (O'Connor, J., concurring).
[74] 107 S. Ct. 1442 (1987).
[75] *Id.* at 1451.
[76] *Id.* at 1451 n.8.
[77] *Id.*
[78] *Id.* at 1452.
[79] *Id.*

stead of a fixed quota, and gender was only one of several factors considered in the promotion decision.[80]

Last Term's decision in *City of Richmond v. J.A. Croson Co.*,[81] while reflecting a continuing consensus in favor of the concept of affirmative action, represents so significant a tightening of the justification necessary to support it that many potential initiators will be discouraged from acting. The City of Richmond, Virginia, had adopted a Minority Business Utilization Plan which set aside thirty percent of city construction contracts to go to minority-owned firms. The adoption of the plan was based not on evidence that the city had actually discriminated against minority contractors, but rather on the imbalance between a black population of fifty percent and minority participation in city contracts of less than one percent. An unsuccessful white bidder challenged the plan as unconstitutional.

Although disagreeing on the appropriate standard of scrutiny, all the Justices except Scalia concluded that under the right circumstances, race-conscious relief was lawful.[82] Justices O'Connor, Rehnquist, White, and Kennedy adopted "strict scrutiny" as the appropriate level of review, holding that such plans would have to be narrowly designed to remedy the present effects of *identifiable* past discrimination.[83]

While a ten percent minority set-aside adopted by Congress for federal construction projects had previously passed constitutional muster,[84] the Richmond plan was struck down. The majority held that it suffered from the same defects as the lay-off preference in *Wygant*: the City did not have "a strong basis in evidence to support its conclusion that remedial action was necessary" to remedy past discrimination, and the plan was not "narrowly tailored" to remedy prior discrimination.[85]

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[80] Such an approach has been referred to as the "Harvard Plan." *See id.* at 1455.

[81] 109 S. Ct. 706 (1989).

[82] Justice Scalia wrote separately and espoused the absolute colorblind principle: government may not prefer persons of one race over the other, but must merely compensate proven victims of discrimination. *Id.* at 735 (Scalia, J., concurring). Justice Kennedy indicated his agreement with this view, but joined O'Connor in deference to precedent. *Id.* at 734 (Kennedy, J., concurring).

[83] Justice Stevens preferred not to engage in the debate over the proper standard of review. *Id.* at 732 (Stevens, J., concurring). Justices Marshall, Brennan, and Blackmun argued for a more relaxed "important governmental objectives" standard. *Id.* at 743–45 (Marshall, J., dissenting).

[84] *See* Fullilove v. Klutznick, 448 U.S. 448 (1980). The *Croson* Court held that affirmative action instituted by state and local governments must be scrutinized more strictly than that which is the product of Congressional action. *See City of Richmond*, 109 S. Ct. at 717–20.

[85] The Court concluded that "none of the evidence presented by the city points to any

Justice O'Connor wrote the opinion of the Court. In discussing the factual justification necessary to support a race preference, she rejected the Fourth Circuit's view that a city's minority set-aside could be justified only by findings of past discrimination on the part of the city *itself*.[86] Rather, a showing that the city had been a "passive participant" in systematic exclusion of minorities by private industry would suffice to support the set-aside.[87] But general comparisons of minority population with minority participation would not suffice; only particularized findings of past discrimination would justify a set-aside.[88] Moreover, the Court seems to suggest that the city must identify and define the discrimination *prior to* the adoption of the plan, so that it may narrowly tailor the remedy to the problem.[89]

Beyond these concerns, the governmental unit contemplating affirmative action must consider (and perhaps attempt) race-neutral means to redress the past discrimination such as programs of training or financial aid to small businesses.[90] Racial preferences are to be reserved for "the extreme case" in which alternatives, including "appropriate measures" against known perpetrators of discrimination, fail to dismantle the closed system.[91] Further, the goal set for minority participation must not amount to "outright racial balancing," but must reflect labor market realities.[92] Lastly, programs should include provisions for waivers in which a non-preferred bidder is given the opportunity to demonstrate that the party claiming the preference has not suffered the effects of discrimination.[93]

In short, while the Court continues to profess preference for voluntary as opposed to court-ordered compliance with civil rights laws, it has established an impressive array of obstacles that must be negotiated prior to engaging in affirmative action.[94] Justice

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identified discrimination in the Richmond construction industry." 109 S. Ct. at 727. Moreover, Justice O'Connor noted that the definition of minority in the Richmond plan included black, Spanish-speaking, Oriental, Indian, Eskimo, and Aleut. Because of the complete absence of evidence of past discrimination in that community against five of these groups, the scope of this definition obviously went beyond the narrow confines of remedying the effects of such past treatment. The plan, in short, was deemed "grossly overinclusive." *Id.* at 728.

[86] *Id.* at 716–17.

[87] *Id.* at 720.

[88] *Id.* at 723–25.

[89] *Id.* at 723–30.

[90] *Id.* at 728–30.

[91] *Id.* at 729.

[92] *Id.* There is a distinct risk that defining the appropriate remedial goal by reference to minority participation in the racially closed market will perpetuate underrepresentation.

[93] *Id.* at 728–29.

[94] Justice Marshall described the decision as "a deliberate and giant step backward in

O'Connor rejects the concern that localities will not engage in the "bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination,"[95] but *Croson* will undoubtedly serve as a major disincentive against affirmative action.[96] The political as well as financial costs to a locality of documenting a case of identifiable past discrimination in an industry are not to be underestimated.

Thus, though *the concept* of affirmative action seems safe with the Court for the indefinite future, its reality clearly is going to be a different story. Post-*Croson* challenges to existing set-asides have been filed around the nation, and those programs have not fared well under that decision's strict scrutiny.[97]

A decision that may prove equally destructive to the future of race-conscious relief is *Martin v. Wilks*.[98] This case involved a collateral challenge to a consent decree, entered in a prior Title VII action, which established goals for the hiring and promotion of minorities in various agencies of Birmingham, Alabama. The Supreme Court had previously recognized the propriety of such mutually agreeable relief in the context of resolving Title VII litigation.[99]

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this Court's affirmative action jurisprudence," a "grapeshot attack on race-conscious remedies in general," and a "full-scale retreat from the Court's longstanding solicitude to race-conscious remedial efforts." *Id.* at 740, 757 (Marshall, J., dissenting). He read the majority as signalling "that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice." *Id.* at 752.

[95] *Id.* at 729.

[96] As the dissenters saw it, the decision "will inevitably discourage or prevent governmental entities, particularly States and localities, from acting to rectify the scourge of past discrimination." *Id.* at 740 (Marshall, J., dissenting).

[97] *See, e.g.*, Milwaukee County Pavers Ass'n v. Fielder, 707 F. Supp 1016 (W.D. Wis. 1989) (A state statutory set-aside program designed to increase participation of "socially and economically disadvantaged" businesses in the awarding of highway contracts was preliminarily enjoined under *Croson*. The court concluded that the *Croson* criteria for evaluating race-conscious plans applied to this program because there was a statutory presumption that minority groups are socially disadvantaged and thus within the program's preference), *modified on other grounds*, 710 F. Supp. 1532 (W.D. Wis. 1989); American Subcontractors Ass'n v. Atlanta, 259 Ga. 14, 376 S.E.2d 662 (1989). (The City of Atlanta's minority and female business enterprise set-aside program was held to violate the Georgia Constitution's equal protection clause. Applying the *Croson* strict scrutiny analysis, the court found "woefully inadequate" the evidence offered to demonstrate a "strong basis" for the conclusion that remedial action was necessary. The court found studies indicating a general under-utilization of minority contractors in the nation and the state insufficient to support the city's program. The court further concluded that the plan was not "narrowly tailored" because it was not linked to identifiable past discrimination and the city had failed to explore less drastic alternative remedies).

[98] 109 S. Ct. 2180 (1989).

[99] See Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 3063 (1986), in which the Court rejected a challenge to a consent decree that provided race-conscious

Martin began with a 1974 case brought by the NAACP, challenging the City of Birmingham's hiring and promotion practices. A trial was held in 1976, and the district judge found that the defendants' test used to screen entry-level applicants was racially biased. A second trial was then held, focusing on promotion practices. Before the decision was rendered, however, the parties negotiated two consent decrees providing long- and short-term goals for minority hiring and promotion in various agencies, including the fire department. Notice of these proposed decrees was published in local newspapers, and a hearing was held prior to final approval. The Firefighters Association appeared at the hearing and filed objections to the decrees as amicus curiae. Other objections came from certain black firefighters, who attacked the decrees as inadequate, and individual white firefighters, who opposed the race preferences.[100]

After the hearing, the Firefighters Association sought to intervene to oppose the proposed decrees, but the district court denied intervention as untimely.[101] The district court overruled the objections that had been raised and approved the decrees, finding strong indication in the record that the City would ultimately be found liable for the alleged discrimination, and that the remedy provided in the decrees was flexible and narrowly tailored within the parameters of *Weber, et al.* In addition, the court responded to the specific objections that had been raised to the entry of the decrees. In short, there was a "genuine adversary proceeding" and a full airing of the issues surrounding the propriety of the relief ordered.[102]

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remedies benefitting persons who were not actual victims of discrimination. The decree had been entered in a Title VII action over the objections of the intervenor union.

Compare Firefighters Local 1784 v. Stotts, 467 U.S. 561 (1984), in which the Court overturned a district court order providing for a minority preference against layoff in the Memphis Fire Department. The court had issued the order, which suspended the last-in/first-out seniority system, to protect the gains in minority employment that had resulted from earlier affirmative action consent decrees providing for preferential hiring. The *Stotts* Court held that such interference with the operation of a bona fide seniority system could not be justified except to compensate actual victims of past discrimination. *Id.* at 583.

The Reagan Justice Department, under Ed Meese, seized upon the *Stotts* decision as the deathknell of race-conscious relief and so notified state and local governments around the nation. The Court subsequently explicitly rejected so broad a reading of *Stotts*. *See* Local 28, Sheet Metal Workers v. EEOC, 106 S. Ct. 3019, 3048–50 (1986).

[100] 109 S. Ct. at 2183, 2191.

[101] The Eleventh Circuit subsequently affirmed the order denying leave to intervene, together with the dismissal of an earlier collateral suit brought by seven white firefighters challenging the operation of the consent decrees. *See Martin*, 109 S. Ct. at 2183; United States v. Jefferson County, 720 F.2d 1511 (11th Cir. 1983).

[102] *See Martin*, 109 S. Ct. at 2191–92 (Stevens, J., dissenting).

Some two years after the consent decrees were entered, Wilks and several other white Birmingham firefighters filed a Title VII action against the city, alleging that they were denied promotion because of their race. The defendants admitted that they were making race-conscious decisions, pursuant to the consent decrees, and thus moved to dismiss the reverse discrimination case as an impermissible collateral attack on those decrees.

The courts had widely recognized and applied the "impermissible collateral attack" doctrine as necessary to protect the integrity and finality of judicial decrees.[103] Under it, persons who might be adversely affected by the relief sought in a litigation, and who are aware of such litigation, must seek to intervene in those proceedings in order to have their input. If they decide to pass up the opportunity to intervene, then they will not be permitted to challenge the relief issued in a subsequent new proceeding.

The *Wilks* plaintiffs had been aware of the prior discrimination case, and of the proposed consent decrees, but had not sought to intervene or interpose objections to the decrees; therefore, the district court dismissed their action. The Eleventh Circuit reversed and remanded for a trial on the merits. The court explicitly parted company with the other circuits on the question of collateral attack, holding that the "strong public policy in favor of voluntary affirmative action plans" had to "yield to the policy against requiring third parties to submit to bargains in which their interests were either ignored or sacrificed."[104]

On certiorari, the United States Supreme Court affirmed, agreeing with the Eleventh Circuit that the white firefighters were entitled to challenge the prior consent decrees in a separate proceeding. In a sweeping opinion premised on the "principle of general application in anglo-American jurisprudence that one is not bound by a judgment *in personam* in litigation in which he is not designated as a party or to which he has not been made a party by service of process," the Court rejected the impermissible collateral

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[103] As the Court in *Martin* noted, the doctrine "commanded the approval of the great majority of federal courts of appeals." *Id.* at 2185 (& cases collected at 2185 n.3). *See also* 2 A. LARSON, *supra* note 32, § 56.24, at 11–84.9 (and cases cited). The doctrine served to "immunize parties to a consent decree from charges of discrimination by nonparties for actions taken pursuant to the decree." 109 S. Ct. at 2184. Collateral attack on certain narrow grounds, such as lack of jurisdiction over the subject matter or collusion in the entry of the decree, was permitted. *Id.* at 2189 (Stevens, J., dissenting).

[104] *In re* Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1498 (11th Cir. 1987).

attack doctrine.[105] The opinion by Chief Justice Rehnquist holds that the burden of intervention cannot any longer be placed on the person whose interest may be adversely affected by the relief requested in the litigation. Rather, the burden is now on the civil rights plaintiffs to join such parties under FRCP 19. The Court wrote:

> The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted. It makes sense, therefore, to place on them a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit. The 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.[106]

The *Martin* Court conceded that there are "difficulties" involved in "identifying those who could be adversely affected by a

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[105] 109 S. Ct. at 2184 (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940)). While the four dissenters conceded this principle, they contended that a decree may nevertheless permissibly *affect* nonparties:

> There is no reason, however, why the consent decrees might not produce changes in conditions at the white firefighters' place of employment that, as a practical matter, may have a serious effect on their opportunities for employment or promotion even though they are not bound by the decrees in any legal sense. The fact that one of the effects of a decree is to curtail the job opportunities of nonparties does not mean that the nonparties have been deprived of legal rights or that they have standing to appeal from the decree without becoming parties.

Id. at 2189 (Stevens, J., dissenting).

[106] *Id.* at 2186. It should be noted that the drafters of FRCP 19 explicitly contemplated intervention of the absent party as an alternative to mandatory joinder: "[T]he absentee may sometimes be able to avert prejudice to himself by voluntarily appearing in the action or intervening . . . ." FED. R. CIV. P. 19 Advisory Committee's Note to 1966 Amendment. Indeed, the drafters noted that "[i]n some situations it may be desirable to advise a person who has not been joined of the fact that the action is pending, and in particular cases the court in its discretion may itself convey this information by directing a letter or other informal notice to the absentee." *Id.*

Chief Justice Rehnquist's view that the proper route in civil rights cases is mandatory joinder, and not voluntary intervention, had been previously expressed by him as a minority view. *See* Carpenters 46 Northern California Counties JATC v. Eldredge, 459 U.S. 917, 921–22 (1982) (Rehnquist, J., dissenting from denial of certiorari) ("It is respondents who have sought to affect the hiring practices of some 4500 employers; it is respondents, and not the absent employers, who should shoulder the responsibility of joining the necessarily affected employers or suffering dismissal of their lawsuits").

decree granting broad remedial relief" and joining them in the suit.[107] Yet, in the Court's eyes the problem results from the broad equitable relief plaintiffs request in civil rights cases, and thus these plaintiffs should suffer the consequences.[108]

It would be difficult to conjure up a more begrudging indulgence of the right of minorities and women to seek remedies for discriminatory conduct. It would be equally difficult to imagine a more chilling precedent for prospective plaintiffs and their counsel who, if they contemplate federal litigation to enforce their rights to equal opportunity, must now confront the arduous task of identifying and joining any and all parties whom the desired relief might at some point impact.[109] It would be harder still to devise a scenario more likely to discourage defendants from entering into consent decrees than this one, in which an unjoined person lurking in the wings may at any point emerge with a lawsuit in which liability is predicated upon compliance with the original consent judgment.[110]

Martin v. Wilks opens all existing consent decrees to collateral attack and presumably relitigation of the underlying issues.[111] If the

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[107] 109 S. Ct. at 2187.

[108] The problems "arise from the nature of the relief sought." *Id.* at 2187.

[109] It must be remembered that the failure to join indispensible parties is grounds for dismissal of the federal action. *See* FED. R. CIV. P. 19(b); *Eldredge*, 459 U.S. at 923 (Rehnquist, J., dissenting). But "the possibility of an adverse effect on non parties, even when it is entitled to consideration, should not automatically result in dismissal of the action if they are not joined." F. JAMES & G. HAZARD, CIVIL PROCEDURE § 10.12, at 535 (3d ed. 1985) (& citations). Failure to join an indispensible party is not a jurisdictional defect depriving the court of power to act. *Id.* at 544.

[110] This is particularly troublesome because as one treatise puts it,

> Settlements are generally favored in the law for reasons of judicial economy and because it is expected that the parties will generally be more satisfied by a process of self-imposed compromise and agreement than by court-imposed adjudication, particularly in light of the savings in time and expense for the litigants.
>
> In employment discrimination cases, settlements are especially favored. Such cases are often so protracted — involving multiple appeals, intervening changes in the decisional law, a decade or more of unresolved conflict, and massive legal fees — that they rival antitrust litigation. The savings in time and expense to both the court and the litigants is therefore more valuable in employment discrimination cases . . . .

2 A. LARSON, *supra* note 32, § 56.10, at 11-81 (citations omitted).

[111] This is an interesting result for Chief Justice Rehnquist to reach, given his adamant commitment to the doctrines of finality in other contexts. In Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981), the Court, in an opinion by Justice Rehnquist, rejected the view of the Ninth Circuit that there should be a "public policy" exception to the doctrine of res judicata. The exception would have permitted non-appealing plaintiff consumers to benefit

Court's decision is what it appears to be, namely a call for what in an earlier era of the civil rights struggle would be termed "massive resistence" to the civil rights decrees of federal courts,[112] then the march to undo court-approved affirmative action around the nation is underway.[113] It is apparent that court clerks are going to be dusting off a lot of dead case files in the coming years.

Moreover, the Court's rejection of the impermissible collateral attack doctrine would seem to apply equally well to relief ordered by a judge after full trial and without the consent of the parties.[114]

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from a reversal of a judgment based on precedent that the Supreme Court had since overruled. Rehnquist wrote that

> "A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action]." We have observed that "[t]he indulgence of a contrary view would result in *creating elements of uncertainty and confusion and in undermining the conclusive character of judgments*, consequences which it was the very purpose of the doctrine of res judicata to avert."
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> . . . .
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> "Simple justice" is achieved when a complex body of law developed over a period of years is even-handedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata."

Id. at 398–99, 401. (citations omitted; emphasis added). The Chief Justice had previously weighed in against approaches that "tend to reduce the district courts to issuers of 'paper decrees which neither adjudicate nor, in the end, protect rights.' This is hardly a sound way to expend the energies of overburdened district judges." *Eldredge*, 459 U.S. at 922 (Rehnquist, J., dissenting). *See also* Stone v. Powell, 428 U.S. 465 (1976), in which the Court excluded from federal habeas corpus review claims that the petitioner's conviction resulted from the introduction of evidence seized in violation of the fourth amendment. The Court, per Justice Powell (with Rehnquist participating), explained that such collateral review and relitigation undermined "the necessity of finality in criminal trials." 428 U.S. at 465 n.31.

[112] *See generally* R. KLUGER, SIMPLE JUSTICE 948–52 (1975); D. BELL, RACE, RACISM AND AMERICAN LAW 381–87 (2d ed. 1980).

Justice Scalia was overt in his encouragement to potential intervenors who seek to challenge proposed affirmative action consent decrees: "an intervenor of the sort before us here is particularly welcome since we have stressed the necessity of protecting, in Title VII litigation, 'the legitimate expectations of employees . . . innocent of any wrongdoing.'" Independent Federation of Flight Attendants v. Zipes, 109 S. Ct. 2732, 2737–38 (1989) (citation omitted).

[113] *See, e.g.*, Boston Globe, June 13, 1989 at 6, col. 6; at 17, col. 1. Both articles describe the plans to challenge affirmative action decrees in force in the Boston police and fire department since the 1970's.

[114] As Justice Stevens observed,

> Any remedy that seeks to create employment conditions that would have obtained if there had been no violations of law will necessarily have an adverse impact on whites, who must now share their job and promotion opportunities

Thus, under the regime envisioned by *Martin*, a judgment entered by a court of competent jurisdiction and final at the completion of the appellate review process may be reopened by another court. There is "no end to litigation and no fixed established rights"; a "judgment, though unreversed and irreversible, would no longer be a final adjudication of the rights of the litigants, but the starting point from which a new litigation would spring up."[115] And the Court has failed to indicate any time limit on the right to pursue collateral attack.

This apparent lack of concern regarding time limitations and repose contrasts sharply with the Court's disposition of another civil rights case decided the same day as *Martin v. Wilks*. In *Lorance v. AT&T Technologies, Inc.*,[116] three black women had filed a Title VII action challenging the modification of AT&T's seniority system in a way that ultimately caused them to be demoted from their positions. The plaintiffs asserted that the modifications, which had occurred in 1979 but were not applied to them until 1982, had been designed to protect certain positions for incumbent white males. Concluding that the limitations period should run from the point at which the seniority system was altered, and not the point at which such changes actually impacted the plaintiffs, the Court held that the complaints must be dismissed as untimely. The Court reached this result despite the fact that "[o]n the day AT&T's seniority system was adopted, there was no reason to believe that a woman who exercised her plantwide seniority to become a tester would ever be demoted as a result of the new system."[117] Justice Scalia explained for the majority that "allowing a facially neutral system to be challenged, and entitlements under it to be altered, many years after

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with blacks. Just as white employees in the past were innocent beneficiaries of illegal discriminatory practices, so is it inevitable that some of the same white employees will be innocent victims who must share some of the burdens resulting from the redress of past wrongs.

109 S. Ct. at 2200 (Stevens, J., dissenting).

[115] *Id.* at 2196 n.21 (Stevens, J., dissenting) (citation omitted).

[116] 109 S. Ct. 2261 (1989).

[117] *Id.* at 2270 (Marshall, J., dissenting). The Court's limitations ruling applies "even if the employee who subsequently challenges that system could not reasonably have expected to be demoted or otherwise concretely harmed by the new system at the time of its adoption, and, indeed, even if the employee was not working in the affected division of the company at the time of the system's adoption." *Id.*

Lorance also continues the special treatment afforded seniority systems under Title VII, immunizing them from attack on anything other than a showing of actual discriminatory intent. *See id.* at 2265, 2267. *See generally* Brodin, *The Role of Fault and Motive in Defining Discrimination: The Seniority Question Under Title VII*, 62 N.C.L. Rev. 943 (1984).

its adoption would disrupt those valid reliance interests that § 703(h) [the seniority proviso of Title VII] was meant to protect."[118]

Thus, on the same day, the Court issued one decision allowing white males, who were aware of but had declined to join a federal action seeking to restructure personnel practices in their department, to pursue a subsequent collateral attack on the prior judgment; and another decision dismissing an action by black females because they were obligated "to anticipate, and initiate suit to prevent, future adverse applications of a seniority system, no matter how speculative or unlikely these applications may be."[119] The *Lorance* result was justified as necessary to avoid disrupting the reliance of white males on an allegedly discriminatory seniority system; yet, the Court exhibited no such concern in *Martin v. Wilks* for the reliance interests surrounding the final remedial decree of a federal district court.

V. 42 U.S.C. § 1981

The focus of much of the public and legal profession's attention during the 1988 Term was on the landmark post-Civil War enactment now codified at 42 U.S.C section 1981. The statute provides black citizens with "the same right to make and enforce contracts as is enjoyed by white citizens."

After allowing it to lie dormant for 100 years, the Supreme Court revived section 1981 in the mid-1970s as a remedy for private (as well as public) sector race discrimination that supplemented (and was not supplanted by) Title VII.[120] The statute quickly became a popular vehicle for challenging discrimination, as it affords several notable advantages over Title VII. It is not limited to employers of fifteen or more employees, as is Title VII. It is not confined by the short statutory limitations period, nor the administrative exhaustion requirements, of the 1964 act. Unlike Title VII actions, jury trials are available in section 1981 claims. And, perhaps most important, while Title VII monetary damages are limited to lost wages and benefits (and those only for a period of two years prior to the filing of the administrative complaint), prevailing plaintiffs in section 1981 cases can recover tort damages — compensatory damages for

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[118] *Lorance*, 109 S. Ct. at 2269.

[119] *Id.* at 2273 (Marshall, J., dissenting).

[120] *See* 3 A. LARSON, *supra* note 32, § 88.00, at 18-1 to 18-22 (1989); M. PLAYER, EMPLOYMENT DISCRIMINATION LAW 611–19 (1988); M. ZIMMER, C. SULLIVAN & R. RICHARDS, CASES & MATERIALS ON EMPLOYMENT DISCRIMINATION 894–95 (2d ed. 1988).

emotional distress and humiliation, and, in appropriate cases, punitive damages as well.[121] This latter distinction becomes most important in those cases in which the plaintiff is allegedly subjected to unlawful harassment but can point to no tangible lost pay or fringe benefit for which monetary relief is available under Title VII.

During the 1987 Term, five of the Justices, acting on their own initiative and without any request from the parties to the lawsuit, decided to use the case of *Patterson v. McLean Credit Union* as a vehicle to reconsider those decisions that had given Reconstruction Era statutes like section 1981 new life. Waves of anxiety were sent through the civil rights community.

Brenda Patterson had filed her action claiming that as a teller employed by the defendant credit union for ten years, she had been subjected to systematic harassment and mistreatment — including the refusal to promote her or give her routine wage increases, and her ultimate discharge from employment — based on the fact that she was black. The district court determined that a claim for racial harassment was not actionable under section 1981, and thus declined to submit that part of the case to the jury at trial. The United States Court of Appeals for the Fourth Circuit agreed and affirmed. After hearing oral argument on this point, the Supreme Court ordered the parties to file briefs addressed to the question of whether section 1981 prohibited discrimination in the private sector, and the case was set down for reargument.[122]

The Court issued its long-awaited decision in *Patterson* on June 15, 1989, deciding not to overrule its prior decisions holding that section 1981 prohibits racial discrimination in the making of private employment contracts.[123] But as Justice Brennan observed, "[w]hat the Court declines to snatch away with one hand it takes away with the other."[124] The five-Justice majority held that section 1981 applies only to *the formation* of the employment contract itself, and not to conduct that occurs *after* the parties enter into the contract. Thus section 1981 is not to be interpreted as a general prohibition against discrimination in employment, but merely a protection of the opportunity to enter into an employment contract on non-racial terms. Breach of the terms of that contract, as well as the imposition of

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[121] *See generally* A. LARSON, *supra* note 32, § 88.00, at 18–23 to 18–56.
[122] *Patterson*, 109 S. Ct. at 2369.
[123] *Id.* at 2369–71.
[124] *Id.* at 2379 (Brennan, J., dissenting).

discriminatory working conditions once employment has begun, are no longer actionable under section 1981.[125] Rather, plaintiffs must pursue such claims under the more restrictive provisions of Title VII.[126]

While the nature of section 1981's prohibition was thus substantially narrowed by *Patterson*, the scope of municipal liability in public sector cases under the statute was also curtailed during the 1988 Term. In *Jett v. Dallas Independent School District*,[127] a white man employed by the Dallas school system as a teacher and head football coach at a predominantly black high school brought a section 1981 action alleging racial discrimination. Jett asserted that the recommendation of the school principal, a black man, that he be removed from his coaching position, as well as his subsequent transfer by the superintendent to another school where he had no coaching responsibilities, were racially motivated. The jury found for the plaintiff and awarded him $650,000 against the school district, $150,000 against the principal and school district jointly and severally, and $50,000 in punitive damages against the principal in his individual capacity.[128]

The United States Court of Appeals for the Fifth Circuit reversed in part and remanded, holding that municipal liability under section 1981 must be limited in the same manner that the Court had previously held it to be under section 1983;[129] that is, a locality is liable for the conduct of its official only if that official either has been delegated policymaking authority, or acted pursuant to a well settled custom amounting to official policy. This decision placed the Fifth Circuit at odds with the other circuits that had ruled on this

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[125] With regard to Patterson's claim that she had been discriminatorily denied promotion, the Court suggested that if it could be shown that the change in position would have constituted a new contract with the employer, then the claims would be actionable under section 1981.

[126] As noted above, that means that victims of racial harassment will be unable to obtain monetary compensation for their emotional distress. The only remedy Title VII affords for such harassment is prospective injunctive relief. *See generally* A. LARSON, *supra* note 32, § 88.00, at 18-23 to 18-56.

Four members of the Court would have held that a plaintiff states a valid claim under § 1981 if "the acts constituting the harassment were sufficiently severe or pervasive as effectively to belie any claim that the contract was entered into in a racially neutral manner." 109 S. Ct. at 2389 (Brennan, J., dissenting).

[127] 109 S. Ct. 2702 (1989).

[128] Defendants did not raise the issue of whether section 1981 covered this type of post-contract conduct, and thus the Court noted but declined to rule on the *Patterson* question here. *Id.* at 2709–10.

[129] *See* Monell v. New York City Dep't of Social Serv., 436 U.S. 658 (1978).

question and had concluded that local governments are liable under a theory of *respondeat superior* for their employees' violations of section 1981.[130]

On certiorari, a divided Supreme Court agreed with the Fifth Circuit.[131] Municipal liability can no longer be predicated on *respondeat superior* in an action under section 1981.[132] It will be the plaintiff's burden in actions against governmental entities to establish not only the substantive claim of intentional discrimination, but also that the official engaging in the discrimination was either invested with policymaking authority by the locality (so that the official's conduct can be said to represent municipal policy)[133] or acted pursuant to a longstanding practice or custom of the local government.

Section 1981 thus emerges from the 1988 Supreme Court Term like a patient who is ordered to undergo surgery, being advised that she probably will not survive the procedure. To her delight, she awakens alive in the recovery room, but then finds that all her limbs have been amputated. As a remedy against discrimination in both

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[130] *See* cases cited at 109 S. Ct. at 2709.

[131] The dissenters wrote that

> To anyone familiar with this and last Terms debate over whether [*Runyon*] should be overruled, see [*Patterson*], today's decision can be nothing short of astonishing. After being led to believe that the hard question under 42 U.S.C. § 1981 . . . was whether the statute created a cause of action relating to *private* conduct, today we are told that the hard question is, in fact, whether it creates such an action on the basis of *governmental* conduct. Strange indeed, simultaneously to question whether § 1981 creates a cause of action on the basis of private conduct (*Patterson*) and whether it creates one for governmental conduct (this case)–hence to raise the possibility that this landmark civil-rights statute affords no civil redress at all.

Id. at 2724 (Brennan, J., dissenting).

[132] *See id.* at 2723. The Court ruled that section 1983 afforded the only available cause of action against governmental discrimination, and that section 1981 actions must be brought through the vehicle of a section 1983 action.

[133] The Court instructed that this is a question of state law, to be resolved by the judge before the case is submitted to the jury. *Id.*

In another governmental liability decision of significance for future civil rights litigation, the Court held that neither states nor state officials (acting in their official capacity) are "persons" within the meaning of § 1983. Will v. Michigan Dep't of State Police, 109 S. Ct. 2304, 2312 (1989). Will was a state trooper who sued in state court claiming he had been denied a promotion because of his brother's political activities. He named as defendants the Department and the Director of State Police in his official capacity. Resolving a conflict in the decisional law on this point, the Court held that neither defendant was subject to a damage action under § 1983. *Id.* at 2311. Thus, litigants who seek a remedy against a state for the deprivation of civil liberties can no longer use that statute. The Court added the caveat that actions seeking injunctive relief, and not damages, may proceed against state officials in their official capacity.

public and private employment, 42 U.S.C. section 1981 is not the statute it used to be.

VI. Conclusion

Justice Kennedy, writing for the Court in *Patterson*, concluded:

> [T]he law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension. Neither our words nor our decisions should be interpreted as signaling one inch of retreat from Congress' policy to forbid discrimination in the private, as well as public, sphere.[134]

There is considerable cause for scepticism regarding this noble pronouncement. The 1988 Term's decisions have made it significantly harder to establish liability under Title VII, and significantly easier to defend against such actions. Impact theory, which had proved an invaluable tool in bringing excluded groups into the workplace, has clearly lost its cutting edge. The scope of section 1981's prohibition, as well as its applicability to governmental conduct, have been substantially narrowed. Those governmental entities inclined to engage in voluntary affirmative efforts to increase opportunities for minorities now must exhaust race-neutral alternatives, document a record of specific discrimination, and narrowly confine their efforts to undoing the present effects of that discrimination. Perhaps most important, abandonment of the impermissible collateral attack doctrine has dramatically undercut the integrity and enforcibility of federal remedial decrees.

The structure for enforcement of civil rights legislation that has been dismantled during the 1988 Term was not the product of the "liberal" and controversial Warren Court, but rather of the "conservative" Burger Court. By the 1985 Term, that Court already consisted of seven justices appointed by Republican presidents;[135] yet, *Griggs*'s disparate impact theory, a broad interpretation of section 1981, and affirmative race-conscious relief were all intact. The established doctrine uprooted last Term had been, in short, planted and nurtured by a majority of Justices not known for their progressive leanings. They joined, however, in recognizing the com-

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[134] 109 S. Ct. at 2379.

[135] Burger, Blackmun, Powell and Rehnquist were appointed by President Nixon; Stevens by President Ford; O'Connor by President Reagan; and Brennan by President Eisenhower.

pelling necessity for finally resolving what Gunnar Myrdal long ago identified as the most persistent of American tragedies: racism.[136]

The post-Civil War period witnessed the federal government's effort to protect the newly freed slaves and integrate them into American society. This first Reconstruction was, however, abandoned after 10 years, and blacks were subjected to brutal and oppressive treatment at the hands of state and local authorities as well as terrorist groups like the Ku Klux Klan.[137] Another Reconstruction occurred in the mid-1960s, with the enactment and revival of federal legislation designed to assure minorities and women equal opportunity and a place in the American economic mainstream. Unfortunately, last Term's decisions spell a judicial abandonment of that second Reconstruction. This comes at a time when the economic gap between white and non-white Americans is widening.[138]

Once again the fate of the Nation's disadvantaged has been cast to the winds.

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[136] *See* G. MYRDAL, AN AMERICAN DILEMMA (1944).

[137] *See generally* D. BELL. *supra* note 112, at 30–38 (& citations therein); E. FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877 (1988).

[138] *See* REPORT OF THE NATIONAL URBAN LEAGUE, reported in Boston Globe, Jan. 29, 1989, at A19. Black per capita income, as a percentage of white income, is declining. Black poverty is up, while white poverty is down. Black unemployment remains twice that of white.