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THE SUPREMES FIND A THEME

The Court Steers to the Center And Stresses Equal Rights

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Garrett Epps

What in the world is happening at the Supreme Court? The justices split three ways in deciding whether the government could restrict "indecent" programming on cable TV, and then refused to review *Hopwood v. Texas*, a closely watched case in which a lower court threw into doubt the whole area of affirmative action in higher education admissions.

But confusion at the Rehnquist court is old news; we've been reading about it for nearly a decade. More interesting were two key decisions that may signal the emergence of a stable center on the court -- a center whose influence may last long after the sun has set on the Rehnquist era. The important cases are *United States v. Virginia*, in which the court ordered the state-sponsored Virginia Military Institute to admit women, and *Romer v. Evans*, in which the court told Colorado and its voters that they could not amend the state's constitution to exclude gays and lesbians from civil-rights laws.

Both cases were decided by the same six-vote majority: Justices Stevens, O'Connor, Kennedy, Souter, Ginsburg and Breyer. The two opinions suggest that these six have begun to unite around a theory of American political life and of the court's place in it. The theory stresses the right of each citizen to participate on equal terms in the political process; more important, it gives a specific definition of what "equal participation" should be. That's good news -- even for those who don't fully agree with the theory.

Ask yourself what the public pays Supreme Court justices to do. The court is a well-funded bureaucracy, assigned one relatively pleasurable task: interpreting the Constitution and federal statutes in the context of actual disputes. We want the court's decisions to be "correct," whatever that means; but it's at least as important that they be clear. Society cannot live by law if it can't understand it.

In these terms, the public hasn't gotten its money's worth from the Rehnquist court. Having gained almost complete control of its docket in 1988, the court has sharply cut back its case load (only 75 cases this term, the lightest load since the early 1950s). Of the cases it takes, it "decides" many in a morass of plurality opinions, special concurrences and partial dissents that are almost incomprehensible even to trained specialists. Here, for example is the beginning of the court's opinion in *Adarand Constructors v. Pena*, a high-profile affirmative-action case from the 1994-95 term:

> "O'CONNOR, J., announced the judgment of the Court and delivered an opinion with respect to Parts I, II, III-A, III-B, III-D, and IV, which was for the Court except insofar as it might be inconsistent with the views expressed in the concurrence of SCALIA, J., and an opinion with respect to Part III-C. Parts I, II, III-A, III-B, III-D, and IV of that opinion were joined by REHNQUIST, C. J., and KENNEDY and THOMAS, JJ., and by SCALIA, J., to the extent heretofore indicated; and Part III-C was joined by KENNEDY, J."

Everybody straight about that? I teach these cases for a living, and I am still puzzling over that one. The court's secretiveness and prestige hide its squabbling from public view; but this kind of gibberish is the judicial equivalent of the self-indulgent congressional food fights that are boffo with C-SPAN viewers. It's also a distinct novelty in Supreme Court history. Chief Justice John Marshall built the court's prestige in the early 1800s by refusing to allow dissents at all; the entire decade of the 1930s -- a now-legendary time of turmoil and ideological strife on the court -- produced fewer dissents and concurrences than are announced in one term of the current court.

This year, however, the court spoke clearly, and correctly, in two of its most important cases. Both opinions probed beneath state rationalizations for discrimination. Colorado defended its harsh amendment as simply barring gays from "special rights;" Justice Anthony Kennedy wrote that "we find nothing special in the protections Amendment 2 withholds . . . Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."

VMI's lawyers claimed that maintaining a prestigious all-male school fostered "diversity"; Justice Ruth Bader Ginsburg wrote that a plan that "serves the state's sons" but "makes no provisions for its daughters" represents not diversity but discrimination. VMI argued that the vast majority of women would not profit from its harsh "adversative" educational style. That was constitutionally

irrelevant, said the court: "The question is whether the State can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords . . . . There is no reason to believe that the admission of women capable of all the activities required of VMI cadets would destroy that institute rather than enhances its capacity to serve the "most perfect Union.' "

Whether the court calls its inquiry "rational relationship" review (as in the Colorado case) or "skeptical scrutiny" (as in the case of VMI), its opinions imply that it will carefully analyze neutral-sounding legalisms offered to justify unequal treatment. Its central theory seems to be that every American has a right to carve out his or her niche in society, without government classifications that tilt the playing field. Gay people and women pay the same taxes as others, cast the same votes and salute the same flag; they must have an equal chance -- not to win inclusion, but to fight for it, whether in the state legislature or in the admissions office of a college their taxes pay for.

The court's vision, though, is far from complete. First Amendment questions still split the six-justice center, and they have yet to propose a convincing theory in cases involving race. Justices O'Connor and Kennedy tend to view the Constitution as mandating no more than individual equality, while Justices Souter and Ginsburg seem to believe that a history of discrimination may justify some remedial measures. Confusion and factionalization may persist in this crucial area on the bench as it does in the nation at large -- or the court may resolve it in favor of a "color-blind" participation right that many observers will find insensitive.

Nonetheless, the 1995-96 term may be remembered as the time when court-watchers first saw the light at the end of a long, dark tunnel. The Reagan-Bush vision of a Supreme Court that would enforce radical conservative values has definitively failed. It was rejected as decisively by Republican appointees (Justices O'Connor, Kennedy, Souter) as by Justices Ginsburg and Breyer, President Clinton's nominees.

But there will be no reflowering of Bill Brennan-style liberalism either. If the Warren court saw itself as defending individual rights, the new court may come to see its own role as defending the right of individuals to fight their own battles. This right will take precedence over the rights of governments to stack the political deck, whether in defense of "traditional values," "states' rights" or any other set of governmental interests.

For more than a quarter-century, the role of the court has been an object of intense political dispute. Out of that process may come a new view of the role of courts -- one that draws inspiration less from political ideology than from the American tradition of judicial independence. This term may mark the moment when that new vision began to drift into focus.

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COURT RULINGS ON RACE DISMAY CIVIL RIGHTS ADVOCATES
A LACK OF UNIFORM STANDARDS IS CITED

The Boston Globe
Friday, July 5, 1996
Ann Scales, Globe Staff

WASHINGTON -- In a session that touched on many of the pressure points of American life, the Supreme Court handed down a thunderous expression of intolerance for sex and gender bias but was reluctant to wade deeper into race issues.

Civil rights advocates argued that the court refused to apply the standards it set for sex and gender bias to racial issues, leaving many of them to say they dread the court's next term.

"I'm not particularly looking forward to cases going to the Supreme Court these days," said Theodore M. Shaw, associate director-counsel for the NAACP Legal Defense and Educational Fund.

The justices handed gays and women victories in two decisions -- one that struck down the constitutionality of the all-male Virginia Military Institute and another that overruled a statewide referendum in Colorado that outlawed discrimination against homosexuals.

At the same time, on matters of race, the court continued what civil rights leaders say is a pattern of chipping away at policies designed to protect the constitutional rights of minorities. Those actions included:

- Striking down three congressional districts in Texas and one in North Carolina. The court's opinion stated that legislative districts drawn to increase the representation of racial and ethnic minorities were unconstitutional.
- Deciding that death row inmates who have lost their appeals in state court have only one chance to appeal in federal court. Civil rights leaders say the ruling will adversely affect minorities, who make up a disproportionate number of death row inmates.
- Allowing a lower-court ruling to stand that struck down the affirmative action admissions program at the University of Texas Law School. Justices Ruth Bader Ginsburg and David H. Souter took the unusual step of explaining that the case was not accepted because its central question was moot; the law school no longer uses the program.

"Given the way the Supreme Court has been going on racial discrimination cases," Shaw said, "the fact that it chose to pass on this may be a blessing in disguise."

Scott Bullock, staff attorney at the conservative Institute for Justice, said it is "hard to generalize" about the term. "There is really no consistency running through a lot of the decisions this year," he said. Bullock applauded the ruling on voting districts, saying it struck down "racial gerrymandering," but said he was perplexed by the Colorado gay rights decision. "It opened up a lot of questions that will have to be settled later," he said.

Charles Ogletree, a constitutional law professor at Harvard Law School, said the justices' opinions this term indicated they were "prepared to recognize certain interest groups and yet basically turned their heads on the issue of race. There is a disturbing message for minorities."

Ron Daniels, executive director of the liberal Center for Constitutional Rights, said the Supreme Court this term "left black America in a quandary. The court seems to reflect a kind of the consensus of American society, that inclusiveness as a value has broken down," he said. "The court has actually turned the clock back for minorities," Daniels added.

Ogletree and Shaw said they would be watching the court's October term for rulings in an Arizona case that would make English the state's official language, a voting rights case in Georgia and one on disparity in sentencing involving crack cocaine.

"Race has always been the great American divide and, although the race question isn't a bipolar question anymore in that we live in a multiracial society, the heart of the race question remains the black-white divide," Shaw said.

But, more than that, Bullock said, the court term "underscores how quickly the court could change with a presidential election or the appointment of even one or two other justices."

SUPREME COURT CONSISTENT ON GROUP RIGHTS

International Herald Tribune
July 8, 1996
Joan Biskupic

In some of the biggest decisions of the recently ended term, the Supreme Court followed a simple rule: Government cannot treat people differently.

That meant states could not draw lines between men and women, or homosexuals and heterosexuals, or between blacks and whites.

The admonition against such distinctions came in cases involving the Virginia Military Institute, an anti-gay rights amendment in Colorado, and in black and Hispanic congressional voting districts in North Carolina and Texas. Each of these cases yielded different votes and shifting coalitions, alternately pleasing liberals and conservatives outside the court, with the only constant being the votes of Justices Sandra Day O'Connor and Anthony M. Kennedy in the majority.

With their generally conservative but pragmatic, incremental approach, these two Ronald Reagan appointees (Justice O'Connor in 1981, Justice Kennedy in 1988) define the center and control the court.

"They see serious constitutional problems with policies that disadvantage people based on personal characteristics and status rather than on their individual merit," said Paul Gewirtz, a law professor at Yale University. "This connects their skepticism of most race-based affirmative action, which is usually seen as 'conservative,' with their opposition to the anti-gay rights amendment, which is typically seen as 'liberal.'"

At stake is how government classifies people, in providing benefits or meting out punishment. Virginia, for example, wanted to keep women out of its elite military-style school, Virginia Military Institute. Colorado wanted to prohibit municipalities from enacting ordinances specifically protecting homosexuals from discrimination. The court ruled that homosexuals, like women in the Virginia Military Institute case, cannot be singled out for different treatment by government.

"A state cannot so deem a class of voters a stranger to its laws," Justice Kennedy wrote in *Romer v. Evans*, the case striking down Colorado's prohibition on local gay rights laws.

In the blockbuster ruling of the term, the court, by a 6-to-3, vote held that public "animus" toward homosexuals did not justify treating them differently under the law from anyone else.

When the justices later invalidated four predominantly black and Hispanic congressional districts, the majority suggested the states acted not out of animus but on the basis of stereotypes.

As the court for the third time in four years rejected districts drawn so that a majority of their voters were black or Hispanic, Justice O'Connor stressed that the nation's efforts to remedy race discrimination and achieve a "colorblind" society are not, in most cases, advanced with color-conscious policies. "At the same time that we combat the symptoms of racial polarization in politics," she wrote, "we must strive to eliminate unnecessary race-based state action that appears to endorse the disease."

Civil-rights campaigners have protested that such "minority majority" districts are needed to keep up the numbers of black and Hispanic representatives in Congress.

But Justice O'Connor wrote that the court "cannot pick and choose in our efforts to eliminate unjustified racial stereotyping by government actors."

That view reinforces the race-neutral imperative of a five-justice majority involving affirmative action in contracting and other voting rights policies.

Justice John Paul Stevens, dissenting from these rulings, asserted this term that the majority was wrongly equating remedial efforts intended to compensate blacks for past wrongs with poll taxes and discrimination that kept blacks from voting only a generation ago.

"While any racial classification may risk some stereotyping," Justice Stevens wrote, "the risk of true discrimination in this case is extremely tenuous in light of the long history of resistance to giving minorities a full voice in the political process."

The five justices who have struck down government actions they considered too race-conscious (Chief Justice William H. Rehnquist, along with Justices Antonin Scalia, Clarence Thomas, O'Connor and Kennedy) have also pressed to restrict the reach of the federal government.

They have repeatedly ruled that the federal government overstepped its authority to right wrongs in society.

COURT DECLARES GAYS NOT LEGALLY DIFFERENT

Ruling Rejects Distinctions Based on Prejudice

The Washington Post
Wednesday, May 22, 1996
Joan Biskupic

At the heart of Monday's Supreme Court ruling favoring gay rights was the premise that there is no reason to treat homosexuals differently under the law.

The court said implicitly that homosexuals are not categorically bad or evil in a way that allows government to exclude them from its benefits and protections.

From this generally conservative court and at a time when homosexuality remains a sensitive subject within families and a fractious topic for lawmakers, those views are nothing less than remarkable.

"That's what makes the opinion as profound as it is," said Douglas Kmiec, a Notre Dame law professor and former Justice Department official in the Reagan administration. "I think this was an effort by the majority to cut off other arguments. I think they want to resolve it at its core."

Georgetown University law professor Chai Feldblum, who is also legal counsel to the Human Rights Campaign, said of the court's view that homosexuals should not be singled out and that public prejudice cannot justify government discrimination: "To many of us in the [gay rights] movement this seems a single basic truth. But this is revolutionary in the law."

The justices themselves signaled they thought they were starting something big when they voted 6 to 3 to strike down a Colorado constitutional amendment that barred cities from protecting homosexuals from discrimination.

The author of the opinion, Justice Anthony M. Kennedy, began with reference to the powerful admonition of Justice John Marshall Harlan's dissent in the 1896 *Plessy v. Ferguson*, which upheld separate accommodations for blacks and whites. Harlan said the Constitution "neither knows nor tolerates classes among citizens."

Kennedy equated gay rights with civil rights throughout and said public "animus" toward homosexuals is not legitimate grounds for discrimination. The opinion referred nowhere to the court's only other major gay rights case, the 1986 *Bowers v. Hardwick*, which said states could make certain homosexual conduct a crime and declared the Constitution does not protect private consensual relations between people of the same sex.

The five other justices who signed Kennedy's opinion declined to write separately -- a sign that they wanted to put their full weight behind the majority statement, which was a relatively brief 14 pages and written with unusual forcefulness.

Justice Antonin Scalia, who wrote the statement of the three dissenting justices and took the unusual step of reading portions of it from the bench, angrily observed that the majority was putting "the prestige of this institution" behind equal rights for homosexuals.

How the principles of equality voiced this week will affect lawsuits over whether gay people may marry each other, the military can exclude homosexuals, or employers can deny jobs based on sexual preference will be seen only as cases wend through the courts. Cultural notions of heterosexual marriage and the court's traditional deference to the military in its affairs will plainly affect some disputes.

"Now governments defending discrimination against gay people have a higher burden," Stanford University law professor Kathleen Sullivan said yesterday. "They must say, 'we are doing this for a good reason, not just because our troops are uncomfortable with gay people.' In the marriage context, the reason can't be dislike or distaste for gay people."

The case of *Romer v. Evans* began in 1992 when Colorado voters adopted a constitutional amendment that forbade local governments from enacting ordinances prohibiting bias based on sexual orientation. Colorado officials had argued that such ordinances gave gay people "special protection."

But Kennedy rejected the idea that there was anything special about the protection granted homosexuals in the municipal anti-discrimination ordinances. To the contrary, he said, that cities such as Denver and Aspen simply had guaranteed homosexuals access to the political process. "We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them," Kennedy, a 1988 Ronald Reagan appointee, wrote. "These are protections against exclusion from an almost limitless number

of transactions and endeavors that constitute ordinary civil life in a free society."

While today's Supreme Court is strongly conservative, this week's ruling shows how tough social policy issues defy the norm. Four years ago, Kennedy and Justices Sandra Day O'Connor (a 1981 Reagan appointee) and David H. Souter (a 1990 appointee of George Bush) broke from their conservative brethren to uphold a right to abortion. This week O'Connor and Souter joined Kennedy, as did Clinton appointees Ruth Bader Ginsburg and Stephen G. Breyer and John Paul Stevens, a 1975 Gerald Ford appointee and the most senior of today's liberal-leaning bloc.

Scalia was joined by Chief Justice William H. Rehnquist (appointed by Richard M. Nixon in 1972 and elevated to chief by Reagan in 1986) and Clarence Thomas (George Bush's 1991 appointee).

Scalia accused the majority of being "so long on emotive utterance and so short on relevant legal citation." Scalia relied on the 1986 *Bowers* case and said, "If it is constitutionally permissible for a state to make homosexual conduct criminal, surely it is constitutionally permissible for a state to enact other laws merely disfavoring homosexual conduct."

"... Of course it is our moral heritage that one should not hate any human being or class of human beings," Scalia wrote. "But I had thought that one could consider certain conduct reprehensible -- murder, for example, or polygamy, or cruelty to animals -- and could exhibit even 'animus' toward such conduct. Surely that is the only sort of 'animus' at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*."

ANTI-GAY AMENDMENT STRUCK DOWN

U.S. Supreme Court Votes 6-3 to Nullify Colorado Measure

The Baltimore Sun
Tuesday, May 21, 1996
Lyle Denniston

WASHINGTON -- Giving gay-rights advocates a breakthrough victory after a nearly three-decade campaign for legal protection, the Supreme Court ruled yesterday that the Constitution assures homosexuals a measure of equality in the nation's public life.

In the first-ever Supreme Court decision favoring a major homosexual-rights cause, the court's 6-3 vote struck down the most pervasive form of inequality for gay men, lesbians and bisexuals.

It nullified a Colorado constitutional amendment that denied those individuals nearly all forms of government protection against discrimination based on their sexual identities. All existing gay-rights laws in the state would have been repealed, and no new ones could have been created except by amending the state's constitution.

That amendment was one of a series of voter-initiated attempts across the country to wipe out gains that gay-rights activists have made in the enactment of anti-bias laws or policies at the state and local level.

Colorado's amendment, Justice Anthony M. Kennedy said for the majority, "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. A state cannot so deem a class of persons a stranger to its laws."

Because the ruling appeared to be shaped narrowly to deal with Colorado's far-ranging attack on gay political action, it left much to be decided in future cases.

The decision contained no hints, for example, about the fate of the current policy -- the "don't ask, don't tell" rule -- that bars most homosexuals from the military. The decision also does not address other public policies that treat homosexuals differently, such as the denial of the option to marry legally, to teach in public schools, to have custody of children, and to have equal access to housing and jobs.

Gay-rights activists claimed a major legal breakthrough. Matthew Coles of the American Civil Liberties Union said the decision "marks a sea change in the struggle of lesbians and gay men for equality in America. It establishes as a general principle that lesbians and gay men are entitled to the same constitutional protections granted to everyone else."

Activists on the other side railed against the court. Gary L. Bauer, president of the Family Research Council, called the ruling the work of "an out-of-control, unelected judiciary." He added that it "should send chills down the back of anyone who cares whether the people of this nation any longer have the power of self-rule."

Kennedy read dispassionately a summary of his ruling from the bench. Then, speaking nearly twice as long, Justice Antonin Scalia read much of his dissenting opinion. The dissent was a scathing denunciation of the court for making new law and for disparaging the moral sentiments of the people of Colorado.

"I think it no business of the courts to take sides in this culture war," Scalia said.

Kennedy's majority included Justices Stephen G. Breyer, Ruth Bader Ginsburg, Sandra Day O'Connor, David H. Souter and John Paul Stevens.

Joining Scalia in dissent were Chief Justice William H. Rehnquist and Justice Clarence Thomas.

Since the gay-rights movement began as a political force after the riots sparked by a police raid on a gay bar, the Stonewall Inn, in New York City's Greenwich Village in 1969, the issue of homosexual rights under the Constitution has raised two core legal questions. The court touched on only one of those yesterday.

One issue is whether homosexuals are, like racial minorities or women, entitled to direct constitutional protection against government discrimination and, if so, how much protection they should get: the full guarantee of equality for minorities when race is used to deny rights, or the lesser guarantee of some equality for women when gender is used to deny rights.

That is the issue behind the most controversial disputes over gay rights: the challenge to discrimination against homosexuals in the military, and the plea for the right of homosexuals to marry or to have legal recognition for gay partnerships.

The court made only a small beginning yesterday in defining the constitutional status of homosexuality. And in doing so, it made no mention

of the issues of gays in the military or same-sex marriage and partnerships.

Relying heavily on a brief submitted in the Colorado case by a group of law professors and written by Laurence H. Tribe of Harvard, the court said the Constitution does not allow government to pick "a single named group" and impose upon that group alone a broad "disability."

Whether the group is identifiable as homosexuals, or by some other single trait, the Constitution does not allow government to deny such a group protection "across the board."

The court did not have to say whether the Constitution extends more than this general form of equality to homosexuals. Still, the court never before had said that homosexuals share in that broad guarantee against discrimination.

The second major issue on gay rights is whether gay men and lesbians have any constitutional right to privacy when they engage in sexual activity. That part of the rights campaign has not fared well in the courts.

The most important Supreme Court ruling on gay rights before yesterday was a 1986 decision that homosexuals have no right of privacy that shields them from criminal prosecution for private sexual acts.

The Supreme Court's majority made no mention of that ruling yesterday. But Scalia argued that it should have led the court to uphold the Colorado amendment: If states are free to make gay sexual activity a crime, he said, surely they should be free to write laws limiting homosexual political activity.

THE GAY RIGHTS RULING

Excerpts From Court's Decision on Colorado's Provision for Homosexuals

The New York Times

Tuesday, May 21, 1996

Following are excerpts from the Supreme Court's decision today in *Romer v. Evans*, declaring unconstitutional a Colorado state constitutional provision that nullified civil rights laws singling out homosexuals for protection. Justice Anthony M. Kennedy wrote the majority opinion, which was joined by Justices John Paul Stevens, Sandra Day O'Connor, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer. Justice Antonin Scalia's dissenting opinion was joined by Chief Justice William H. Rehnquist and Justice Clarence Thomas.

FROM THE DECISION By Justice Kennedy

One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson* (1896) (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution.

The enactment challenged in this case is an amendment to the Constitution of the State of Colorado, adopted in a 1992 statewide referendum. The parties and the state courts refer to it as "Amendment 2," its designation when submitted to the voters. The impetus for the amendment and the contentious campaign that preceded its adoption came in large part from ordinances that had been passed in various Colorado municipalities. . . . What gave rise to the statewide controversy was the protection the ordinances afforded to persons discriminated against by reason of their sexual orientation. Amendment 2 repeals these ordinances to the extent they prohibit discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships."

Yet Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class. . . .

Soon after Amendment 2 was adopted, this litigation to declare its invalidity and enjoin its enforcement was commenced in the District Court for the City and County of Denver. . . .

The trial court granted a preliminary injunction to stay enforcement of Amendment 2, and an appeal was taken to the Supreme Court of Colorado. Sustaining the interim injunction and remanding the case for further proceedings, the State Supreme Court held that Amendment 2 was subject to strict scrutiny under the 14th Amendment because it infringed the fundamental right of gays and lesbians to participate in the political process. . . . On remand, the state advanced various arguments in an effort to show that Amendment 2 was narrowly tailored to serve compelling interests, but the trial court found none sufficient. It enjoined enforcement of Amendment 2, and the Supreme Court of Colorado, in a second opinion, affirmed the ruling. *Evans v. Romer*. We granted certiorari and now affirm the judgment, but on a rationale different from that adopted by the State Supreme Court.

The state's principal argument in defense of Amendment 2 is that it puts gays and lesbians in the same position as all other persons. So, the state says, the measure does no more than deny homosexuals special rights. This reading of the amendment's language is implausible. . . .

Sweeping and comprehensive is the change in legal status effected by this law. So much is evident from the ordinances that the Colorado Supreme Court declared would be void by operation of Amendment 2. Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies. . . .

We cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. . . . We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them. . . .

The 14th Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.

Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group. . . . Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class . . .

By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we insure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.

Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. . . .

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.' "

Laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons. Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. We conclude that, in addition to the far-reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose, and Amendment 2 does not.

The primary rationale the state offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups. The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them. . . .

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A state cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed.

FROM THE DISSENT By Justice Scalia

The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a "bare . . . desire to harm" homosexuals, ante, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. . . .

In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, see *Bowers v. Hardwick* (1986), and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias. Whether it is or not, is precisely the cultural debate that gave rise to the Colorado constitutional amendment (and to the preferential laws against which the amendment was directed). Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions. This Court has no business imposing upon all Americans the resolution favored by the elite class from which the members of this institution are selected, pronouncing that "animosity" toward homosexuality, ante, is evil. I vigorously dissent. . . .

The central thesis of the Court's reasoning is that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decision-making than others. . . . [I]t seems to me most unlikely that any multi-level democracy can function under such a principle. For whenever a disadvantage is imposed, or conferral of a benefit is prohibited, at one of the higher levels of democratic decision-making (i.e., by the state legislature rather than local government, or by the people at large in the state constitution rather than the legislature), the affected group has (under this theory) been denied equal protection. . . . The Court's entire novel theory rests upon the proposition that there is something special . . . in making a disadvantaged group (or a nonpreferred group) resort to a higher decision-making level. That proposition finds no support in law or logic. . . .

The case most relevant to the issue before us today is not even mentioned in the Court's opinion: In *Bowers v. Hardwick* we held that the Constitution does not prohibit . . . making homosexual conduct a crime. . . . If it is constitutionally permissible for a state to make homosexual conduct criminal, surely it is constitutionally permissible for a state to enact other laws merely disfavoring homosexual conduct. . . . And *a fortiori* it is constitutionally permissible for a state to adopt a provision not even disfavoring homosexual conduct, but merely prohibiting all levels of state government from bestowing special protections upon homosexual conduct. . . .

No principle set forth in the Constitution . . . prohibits what Colorado has done here. But the case for Colorado is much stronger than that. What it has done is not only unprohibited, but eminently reasonable. . . .

The Court's opinion contains grim, disapproving hints that Coloradans have been guilty of "animus" or "animosity" toward homosexuality. . . . Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible -- murder, for example, or polygamy, or cruelty to animals -- and could exhibit even "animus" toward such conduct. . . . The Colorado amendment does not, to speak entirely precisely, prohibit giving favored status to people who are homosexuals; they can be favored for many reasons -- for example, because they are senior citizens or members of racial minorities. But it prohibits giving them favored status because of their homosexual conduct . . .

[T]hough Coloradans are, as I say, entitled to be hostile toward homosexual conduct, the fact is that the degree of hostility reflected by Amendment 2 is the smallest conceivable. The Court's portrayal of Coloradans as a society fallen victim to pointless, hate-filled "gay-bashing" is so false as to be comical. Colorado not only is one of the 25 states that have repealed their anti-sodomy laws, but was among the first to do so. But the society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong and socially harmful. . . .

There is a problem, however, which arises when criminal sanction of homosexuality is eliminated but moral and social disapprobation of homosexuality is meant to be retained. . . . Because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income and of course care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality. . . .

I do not mean to be critical of these legislative successes; homosexuals are as entitled to use the legal system for reinforcement of their moral sentiments as are the rest of society. But they are subject to being countered by lawful, democratic countermeasures as well.

That is where Amendment 2 came in. It sought to counter both the geographic concentration and the disproportionate political power of homosexuals by (1) resolving the controversy at the statewide level, and (2) making the election a single-issue contest for both sides. It put directly, to all the citizens of the state, the question, Should homosexuality be given special protection? They answered no. The Court today asserts that this most democratic of procedures is unconstitutional. . . .

Today's opinion has no foundation in American constitutional law, and barely pretends to. The people of Colorado have adopted an entirely reasonable provision which does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment. Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate means to that legitimate end, but a means that Americans have employed before. Striking it down is an act not of judicial judgment, but of political will.

COURT RULING BREAKS ALL-MALE SCHOOL BARRIERS

Decision Expected to Open VMI, Citadel to Qualified Women

The Herald-Sun (Durham, N.C.)
Thursday, June 27, 1996
Aaron Epstein, Knight-Ridder

WASHINGTON -- Women broke through the last bastion of all-male public education Wednesday when the Supreme Court overwhelmingly declared that they cannot be excluded from the Virginia Military Institute -- nor relegated to a "pale imitation" of it.

The 7-1 ruling is expected to open both VMI and The Citadel in South Carolina to women. Those venerable, strict military-style institutions, renowned for training men to be leaders, are the only remaining state colleges that limit classes to one sex.

"The constitutional violation in this case is the categorical exclusion of women from an extraordinary educational opportunity afforded men," declared Justice Ruth Bader Ginsburg, who as a civil rights lawyer a generation ago argued in the Supreme Court for equality for women.

"What has been rejected is what Virginia attempted to create -- one high-quality institution for men and one substandard institution for women," said Attorney General Janet Reno, whose Justice Department led the legal fight against VMI's gender discrimination.

Because the court did not decide the constitutionality of separate -- but equal -- state schools for men and women, Virginia theoretically could set up a women's program identical to VMI's.

However, experts said that would be a practical impossibility, and Deval Patrick, head of the Justice Department's civil rights division, said, "admitting women to VMI is the only remedy that fits the Constitution."

George Allen, Virginia's Republican governor, said, "the nation's highest court has spoken, and we need to bring Virginia into compliance." He said he would consult with state officials and VMI "to determine an appropriate course of action."

Officials at The Citadel declined to comment. But the speaker of the South Carolina House, Rep. David Wilkins, said, "it appears to me there's no other option" than to admit women to The Citadel.

VMI, founded 157 years ago in Lexington, Va., is the oldest military institution in the nation. It operates unusually rigorous, regimented, Spartan and stressful programs designed to produce "citizen-soldiers." Confederate Gen. Thomas "Stonewall" Jackson taught there and Gen. George C. Marshall, World War II and postwar soldier and diplomat, is its most illustrious alumnus. The loyalty of its graduates has produced the largest per-student endowment of U.S. undergraduate schools.

The Justice Department, prompted by a complaint from a female high-school student eager to attend VMI, filed suit in 1990 to open the school to women. Virginia sought to preserve VMI's all-male heritage by arguing that its deliberately hostile, high-pressure, physically rigorous military environment would be inappropriate for educating most women, who were said to prefer cooperative methods.

But Ginsburg, announcing the decision from the bench in slow, firm tones, said generalizations and stereotypes about the "typical" man or woman "will not suffice to deny opportunity to women whose talent and capacity place them outside the average description." Some women would want to attend VMI, can meet its requirements and would flourish there, she said. To afford them equal protection of the laws, as required by the Constitution's 14th Amendment, they "cannot be offered anything less," Ginsburg observed.

Yet Virginia did offer women something much less, she said. It created "a pale shadow of VMI in . . . the range of curricular choices and faculty stature, funding, prestige, alumni support and influence." The state set up a parallel program for women at Mary Baldwin College, a private women's college in Staunton, Va. A Richmond, Va.-based federal appeals court upheld the separate program as "substantively comparable," and 41 women attended classes in the 1995-96 school year. (In South Carolina, 22 women enrolled in a similar program apart from The Citadel, at all-female Converse College in Spartanburg.)

Justice Antonin Scalia was the sole dissenter in Wednesday's decision.

The success of women as students in the Army, Navy and Air Force academies, and as members of the armed forces considerably weakened Virginia's effort to keep them out of VMI, the court said.

Justice Clarence Thomas disqualified himself from the case. His son, Jamal, is a senior at VMI.

Ginsburg likened the Mary Baldwin program to the unconstitutional attempt by Texas 50 years ago to set up a separate, unaccredited law school for

blacks who were refused admission to the flagship University of Texas Law School. "Virginia's remedy affords no cure at all for the opportunities and advantages withheld from women who want a VMI education and can make the grade," Ginsburg said.

The appeals court's "substantive comparability" test was wrong, she said. Defenders of a gender-based law or policy must prove that it "serves important governmental objectives" and is "substantially related to the achievement of those objectives," she said. In addition, Ginsburg said, the government must demonstrate an "exceedingly persuasive justification" for such gender discrimination.

Scalia argued that Ginsburg's use of that language served to "load the dice" against gender-based acts of government.

Justices John Paul Stevens, Sandra Day O'Connor, Anthony Kennedy, David Souter and Steven Breyer joined Ginsburg's opinion.

Chief Justice William H. Rehnquist agreed with the result but not the reasoning. Virginia's constitutional failure was not the exclusion of women from VMI but the offer of an alternative to women that was "distinctly inferior," he said. It would be sufficient, he concluded, to provide a separate school with "the same quality of education" as VMI.

Although the VMI decision was limited to state colleges and universities, numerous private schools for men or women feared it could have an adverse impact on them because they accept government money or tax breaks.

Cathleen Cleaver, director of legal studies at the conservative Family Research Council, which supported Virginia, said the ruling would make it difficult for private schools to set up athletic or other programs for men or women only. "If you accept federal money, you lose," she said.

Some feminist groups also expressed disappointment. Kathy Rodgers, executive director of the National Organization for Women Legal Defense Fund, said the court failed to heed its request to give women the highest legal protection against discrimination, a level given to racial minorities. "The ruling doesn't go as far as we hoped it would," she said.

THE VMI RULING

Court: Women Can Go to VMI

The Baltimore Sun

Thursday, June 27, 1996

Lyle Denniston

WASHINGTON -- Writing into the Constitution a new layer of protection for equality of the sexes, the Supreme Court yesterday ordered the Virginia Military Institute to open its cadet ranks to women, probably ending the institute's 157 years as a place only for men. The 7-1 ruling is based on the Constitution's guarantee of legal equality, applying to any government-run institution or one that relies on public money.

It seems sure to apply to the only other single-sex military college operated by a state with state money, The Citadel in Charleston, S.C. Young women are applying even now to go to VMI or The Citadel, and some of them are now likely to become cadets.

Seven years after an anonymous Virginia woman was rebuffed in a bid to attend VMI, setting off the legal battle that ended yesterday, the court ruled that a state college or public school that is "unique" cannot constitutionally be reserved for just one sex. It did so by spelling out a new, and tougher, constitutional "measuring rod" for judging discrimination based solely on sex. Attorney General Janet Reno said the court "overwhelmingly has given life to the promise in the Constitution that all of us deserve an equal shot at educational opportunity." The Justice Department has been challenging VMI's ban on women for six years.

VMI's superintendent, Maj. Gen. Josiah Bunting III, called the ruling a great disappointment. "The institute teaches respect for duly constituted authority," he said, "and we shall discharge our responsibilities under the court's order."

Although yesterday's ruling dealt directly only with equality in public higher education, it was sweeping in scope. It is likely to encourage lawsuits against differing treatments of the sexes in other government programs, including the military. Some language in the ruling made it appear that it would not go so far as to nullify all single-sex education in public colleges or public schools, though some critics of the decision said they feared it would do exactly that.

Justice Ruth Bader Ginsburg, a one-time women's rights lawyer who three years ago became the second woman to serve on the court, wrote the ruling that seemed to push the court closer to establishing an equal rights guarantee as part of the Constitution. "The court today is making the Constitution's guarantee of equality real for women because it toughens significantly the standard of review" for sex bias, said Janet Gallagher, director of the American Civil Liberties Union's Women's Rights Project, which Ginsburg had founded and led before she became a federal judge.

Critics also noticed the ruling's breadth.

"The Supreme Court effectually instituted the Equal Rights Amendment," said Robert L. Maginnis, a senior policy analyst at the Family Research Council. He noted that an equal rights amendment had failed to win ratification. "The Supreme Court bypassed the Constitution," he said.

The court said that all laws or government policies that treat the sexes differently, based solely on sex, are unconstitutional unless they have an "an exceedingly persuasive justification" -- a standard the court said could not be met by relying on assumptions or stereotypes about the capacities of men or women. "Generalizations about 'the way women are,' estimates of what is appropriate for most women," Ginsburg said, "no longer justify denying opportunity to women whose talent and capacity place them outside the average description."

The VMI lawsuit, and a companion case in lower courts that challenges exclusion of women from The Citadel, symbolize a new debate over the status of women under the Constitution's guarantee of "equal protection of the laws." The court first applied that guarantee to women in 1971. But it never interpreted it as broadly as it did yesterday.

Confronting VMI's long tradition as a training school for future male leaders, Ginsburg said the Lexington, Va., institution had followed a "historic and constant plan -- a plan to afford a unique educational benefit only to males."

However much that "serves the state's sons, it makes no provision whatever for her daughters," she said. "That is not equal protection."

Rejecting Virginia's claims that it had not violated women's rights by keeping them out of VMI, and its argument that it should be allowed to set up a program for women somewhere else, the court ordered VMI to admit women.

A separate program for women, opening last fall at Mary Baldwin College, a private women's

college in Staunton, "does not match the constitutional violation" in keeping them out of the unique program at VMI, the court ruled. "Women seeking and fit for a VMI-quality education cannot be offered anything less," it said.

Ginsburg conceded that most women might not want to attend VMI, which stresses sometimes harsh treatment of cadets, in an atmosphere of little privacy, with the aim of molding them into "citizen-soldiers." Many men might not want that, either, she said, but that is not the issue. The question is whether women who are "ready, willing and able" to succeed at VMI can be denied by a state the "opportunities that VMI uniquely affords." The court rejected arguments that women wouldn't be up to the stresses of the program and that VMI would have to change to accommodate them.

Because the opinion stressed the "unique" program and prestige of VMI, it did not appear to rule out all forms of single-sex education in public colleges or schools. A footnote in the main opinion said the court was not questioning government approaches to "diverse educational opportunities," including single-sex schooling.

Maginnis suggested that the ruling "may invalidate all 87 single-sex educational facilities" across the nation, including 82 that exist for females.

While the decision appears to leave VMI and The Citadel with the option of keeping women out by becoming private institutions, both say they could not afford to do without public money.

Ginsburg's opinion was supported by Justices Stephen G. Breyer, Anthony M. Kennedy, Sandra Day O'Connor, David H. Souter and John Paul Stevens.

Chief Justice William H. Rehnquist agreed, in a separate opinion, that VMI had acted unconstitutionally and that the program at Mary Baldwin College was not a remedy. But he rejected the new sex-bias standard of the majority and said he would not necessarily require VMI to admit women as the only remedy.

Justice Antonin Scalia, the lone dissenter, denounced the ruling, saying "it drastically revises our established standards for reviewing sex-based classifications." He said the decision "shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half."

The ninth justice, Clarence Thomas, took no part in the case, apparently because his son, Jamal, attends VMI.

THE SUPREME COURT

Excerpts From High Court's Ruling Against the Male-Only Policy of V.M.I.

The New York Times

Thursday, June 27, 1996

Following are excerpts from the Supreme Court's decision today in *United States v. Virginia*, holding that the equal protection guarantee of the 14th Amendment requires admission of women to the all-male Virginia Military Institute.

Justice Ruth Bader Ginsburg wrote the majority opinion, which was joined by Justices John Paul Stevens, Sandra Day O'Connor, Anthony M. Kennedy, David H. Souter and Stephen G. Breyer. Chief Justice William H. Rehnquist filed a separate concurring opinion. Justice Antonin Scalia dissented. Justice Clarence Thomas did not participate in the case.

FROM THE DECISION By Justice Ginsburg

Virginia's public institutions of higher learning include an incomparable military college, Virginia Military Institute (V.M.I.). The United States maintains that the Constitution's equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities V.M.I. affords. We agree.

Founded in 1839, V.M.I. is today the sole single-sex school among Virginia's 15 public institutions of higher learning. V.M.I.'s distinctive mission is to produce "citizen-soldiers," men prepared for leadership in civilian life and in military service. V.M.I. pursues this mission through pervasive training of a kind not available anywhere else in Virginia.

Assigning prime place to character development, V.M.I. uses an "adversative method" modeled on English public schools and once characteristic of military instruction. V.M.I. constantly endeavors to instill physical and mental discipline in its cadets and impart to them a strong moral code. The school's graduates leave V.M.I. with heightened comprehension of their capacity to deal with duress and stress and a large sense of accomplishment for completing the hazardous course.

V.M.I. has notably succeeded in its mission to produce leaders; among its alumni are military generals, members of Congress and business executives. The school's alumni overwhelmingly perceive that their V.M.I. training helped them to realize their personal goals. V.M.I.'s endowment reflects the loyalty of its graduates; V.M.I. has the largest per-student endowment of all undergraduate institutions in the nation.

Neither the goal of producing citizen-soldiers nor V.M.I.'s implementing methodology is inherently unsuitable to women. And the school's impressive record in producing leaders has made admission desirable to some women. Nevertheless, Virginia has elected to preserve exclusively for men the advantages and opportunities a V.M.I. education affords. . . .

We note, once again, the core instruction of this Court's path-marking decisions in J.E.B. v. Alabama: Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action. . . .

The burden of justification is demanding and it rests entirely on the state. The state must show "at least that the (challenged) classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' " The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. . . .

"Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women "for particular economic disabilities (they have) suffered," to "promot(e) equal employment opportunity," to advance full development of the talent and capacities of our nation's people. But such classifications may not be used, as they once were to create or perpetuate the legal, social and economic inferiority of women.

Measuring the record in this case against the review standard just described, we conclude that Virginia has shown no "exceedingly persuasive justification" for excluding all women from the citizen-soldier training afforded by V.M.I. We therefore affirm the Fourth Circuit's initial judgment, which held that Virginia had violated the 14th Amendment's equal protection clause. Because the remedy proffered by Virginia, the Mary Baldwin V.W.I.L. [Virginia Women's Institute for Leadership] program, does not cure the constitutional

violation, i.e., it does not provide equal opportunity, we reverse the Fourth Circuit's final judgment in this case.

The Fourth Circuit initially held that Virginia had advanced no state policy by which it could justify, under equal protection principles, its determination "to afford V.M.I.'s unique type of program to men and not to women." Virginia challenges that "liability" ruling and asserts two justifications in defense of V.M.I.'s exclusion of women.

First, the commonwealth contends, "single-sex education provides important educational benefits," and the option of single-sex education contributes to "diversity in educational approaches." Second, the commonwealth argues, "the unique V.M.I. method of character development and leadership training," the school's adversative approach, would have to be modified were V.M.I. to admit women. We consider these two justifications in turn.

Single-sex education affords pedagogical benefits to at least some students, Virginia emphasizes, and that reality is uncontested in this litigation. Similarly, it is not disputed that diversity among public educational institutions can serve the public good. But Virginia has not shown that V.M.I. was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the state. In cases of this genre, our precedent instructs that "benign" justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded. . . .

A purpose genuinely to advance an array of educational options, as the court of appeals recognized, is not served by V.M.I.'s historic and constant plan, a plan to "affor(d) a unique educational benefit only to males." However "liberally" this plan serves the state's sons, it makes no provision whatever for her daughters. That is not equal protection.

Virginia next argues that V.M.I.'s adversative method of training provides educational benefits that cannot be made available, unmodified, to women. Alterations to accommodate women would necessarily be "radical," so "drastic," Virginia asserts, as to transform, indeed "destroy," V.M.I.'s program. . . .

Education, to be sure, is not a "one size fits all" business. The issue, however, is not whether "women or men should be forced to attend V.M.I."; rather, the question is whether the state can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that V.M.I. uniquely affords. . . .

Women's successful entry into the Federal military academies, and their participation in the nation's military forces, indicate that Virginia's fears for the future of V.M.I. may not be solidly grounded. The state's justification for excluding all women from "citizen-soldier" training for which some are qualified, in any event, cannot rank as "exceedingly persuasive," as we have explained and applied that standard. . . .

In the second phase of the litigation, Virginia presented its remedial plan: maintain V.M.I. as a male-only college and create V.W.I.L. (Virginia Women's Institute for Leadership) as a separate program for women. The plan met district court approval. The Fourth Circuit, in turn, deferentially reviewed the state's proposal and decided that the two single-sex programs directly served Virginia's reasserted purposes: single-gender education, and "achieving the results of an adversative method in a military environment." Inspecting the V.M.I. and V.W.I.L. educational programs to determine whether they "afford(ed) to both genders benefits comparable in substance, (if) not in form and detail," the court of appeals concluded that Virginia had arranged for men and women opportunities "sufficiently comparable" to survive equal protection evaluation. The United States challenges this "remedial" ruling as pervasively misguided.

A remedial decree, this court has said, must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in "the position they would have occupied in the absence of (discrimination)." The constitutional violation in this case is the categorical exclusion of women from an extraordinary educational opportunity afforded men. A proper remedy for an unconstitutional exclusion, we have explained, aims to "eliminate (so far as possible) the discriminatory effects of the past" and to "bar like discrimination in the future."

Virginia chose not to eliminate, but to leave untouched, V.M.I.'s exclusionary policy. For women only, however, Virginia proposed a separate program, different in kind from V.M.I. and unequal in tangible and intangible facilities. . . .

V.W.I.L. affords women no opportunity to experience the rigorous military training for which V.M.I. is famed. Instead, the V.W.I.L. program "de-emphasize(s)" military education and uses a "cooperative method" of education "which reinforces self-esteem". . . .

As earlier stated, generalizations about "the way women are," estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description. Notably, Virginia never asserted that V.M.I.'s method of education suits most men. It is also revealing that Virginia accounted for its failure to make the V.W.I.L. experience "the entirely militaristic experience of V.M.I." on the ground that V.W.I.L. "is planned for women who do not necessarily expect to pursue military careers." By that reasoning, V.M.I.'s "entirely militaristic" program would be inappropriate for men in general or as a group, for "(o)nly about 15 percent of V.M.I. cadets enter career military service". . . .

Virginia, in sum, while maintaining V.M.I. for men only, has failed to provide any "comparable single-gender women's institution." Instead, the commonwealth has created a V.W.I.L. program fairly appraised as a "pale shadow" of V.M.I. in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence.

FROM THE DISSENT By Justice Scalia

Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. To achieve that desired result, it rejects (contrary to our established practice) the factual findings of two courts below, sweeps aside the precedents of this Court and ignores the history of our people.

As to facts: it explicitly rejects the finding that there exist "gender-based developmental differences" supporting Virginia's restriction of the "adversative" method to only a men's institution and the finding that the all-male composition of the Virginia Military Institute (V.M.I.) is essential to that institution's character. As to precedent: it drastically revises our established standards for reviewing sex-based classifications. And as to history: it counts for nothing the long tradition, enduring down to the present, of men's military colleges supported by both states and the Federal Government.

Much of the Court's opinion is devoted to deprecating the closed-mindedness of our forebears with regard to women's education, and even with regard to the treatment of women in areas that have nothing to do with education. Closed-minded they were as every age is, including our own, with regard to matters it cannot guess, because it simply does not consider them debatable. The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution.

So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: they left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter-majoritarian preferences of the society's law-trained elite) into our basic law. Today it enshrines the notion that no substantial educational value is to be served by an all-men's military academy so that the decision by the people of Virginia to maintain such an institution denies equal protection to women who cannot attend that institution but can attend others. Since it is entirely clear that the Constitution of the United States -- the old one -- takes no sides in this educational debate, I dissent. . . .

I have no problem with a system of abstract tests such as rational-basis, intermediate, and strict scrutiny (though I think we can do better than applying strict scrutiny and intermediate scrutiny whenever we feel like it). Such formulas are essential to evaluating whether the new restrictions that a changing society constantly imposes upon private conduct comport with that "equal protection" our society has always accorded in the past. But in my view the function of this Court is to preserve our society's values regarding (among other things) equal protection, not to revise them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees.

For that reason it is my view that, whatever abstract tests we may choose to devise, they cannot supersede and indeed ought to be crafted so as to reflect those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts. More specifically, it is my view that "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down". . . .

And the rationale of today's decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny. Indeed, the Court indicates that if any program restricted to one sex is "uniqu(e)," it must be opened to members of the opposite sex "who have

the will and capacity" to participate in it. I suggest that the single-sex program that will not be capable of being characterized as "unique" is not only unique but nonexistent.

In any event, regardless of whether the Court's rationale leaves some small amount of room for lawyers to argue, it ensures that single-sex public education is functionally dead. The costs of litigating the constitutionality of a single-sex education program, and the risks of ultimately losing that litigation, are simply too high to be embraced by public officials. . . .

Should the courts happen to interpret that vacuous phrase as establishing a standard that is not utterly impossible of achievement, there is considerable risk that whether the standard has been met will not be determined on the basis of the record evidence indeed, that will necessarily be the approach of any court that seeks to walk the path the Court has trod today. No state official in his right mind will buy such a high-cost, high-risk lawsuit by commencing a single-sex program. The enemies of single-sex education have won; by persuading only seven Justices (five would have been enough) that their view of the world is enshrined in the Constitution, they have effectively imposed that view on all 50 states.

95-1100 BOARD OF COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLA. v. BROWN

Civil rights actions—Municipal liability—Official policy—Deliberate indifference—Sheriff's hiring decisions.

Ruling below (CA 5, 67 F.3d 1174, 57 CrL 1277):

County sheriff's decision to hire reserve deputy sheriff without checking his criminal record amounted to "official policy" for purposes of municipal liability under 42 USC 1983 as interpreted in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978); single hiring decision also amounted to "deliberate indifference" to citizens' Fourth Amendment rights for purposes of *Monell* liability; evidence was sufficient for jury to conclude that sheriff's decision to hire reserve deputy was cause of injuries unconstitutionally inflicted on plaintiff by deputy during traffic stop; judgment for plaintiff is affirmed.

Questions presented: (1) Does U.S. Constitution impose liability on county for single hiring decision that comports with state law in every respect, when there is no evidence that county's hiring practice in past has resulted in deprivation of citizen's constitutional rights? (2) Does hiring of reserve deputy sheriff who has one misdemeanor conviction for assault and battery and traffic violations establish causative link (amounting to deliberate indifference) between decision to hire him and his subsequent use of force during course of arrest? (3) Are federalism concerns implicated by opinion that imposes liability on county for hiring reserve deputy sheriff with one misdemeanor assault and battery conviction and other minor offenses, when Oklahoma proscribes only hiring of individuals with felony records?

Petition for certiorari filed 1/5/96, by Wallace B. Jefferson, Sharon E. Callaway, and Crofts, Callaway & Jefferson, all of San Antonio, Texas.

JUSTICES TO DECIDE MUNICIPAL LIABILITY ISSUE

The New York Times
Tuesday, April 23, 1996
Linda Greenhouse

Accepting a case that could revive debate over whether local governments are responsible for misbehavior by their employees, the Supreme Court today agreed to hear an Oklahoma county's appeal of a ruling that it was liable under Federal law for a deputy sheriff's violent behavior because it had disregarded the man's own police record and tendency toward violence when it hired him.

The narrow question in the case is whether the county's negligent hiring decision, an apparently isolated act that was not part of a larger pattern and that did not by itself violate Oklahoma law, was sufficient to make the county legally responsible for a woman's injuries under Federal civil rights law.

The woman, Jill Brown, was a passenger in her husband's truck when the deputy, Stacy Burns, stopped them after a chase across the Texas line in 1991. Mr. Burns pulled Mrs. Brown from the cab and flung her to the pavement, injuring her knees so severely that after four operations, she will need total knee replacements.

A Federal District Court jury in Beaumont, Tex., awarded her nearly $800,000, to be paid jointly by Bryan County, Okla., and by Mr. Burns. A Federal appeals court upheld most of the award last year.

Federal court cases involving the excessive use of force by police officers, or other types of misbehavior by local officials, are hardly uncommon. A Reconstruction-era Federal law, the Civil Rights Act of 1871, permits suits for damages in Federal court against those who violate federally guaranteed statutory or constitutional rights.

In a landmark ruling in 1978, the Supreme Court overturned an earlier decision that had shielded local governments from liability under that law, opening them to suit for the first time for actions by officials that could be tied to some official policy or custom.

In upholding the finding of liability in the Oklahoma case, the United States Court of Appeals for the Fifth Circuit found that the policy at issue was one that permitted the hiring of a law-enforcement officer with a record of numerous traffic violations as well as arrest for assault and battery and for resisting arrest. "The violation of Mrs. Brown's constitutional rights was affirmatively linked to Bryan County's decision to hire Burns for law-enforcement activities," the appeals court said.

What makes the case potentially noteworthy is that the county has dressed its Supreme Court appeal in a states'-rights rhetoric that essentially challenges the jurisdiction of Federal courts to reach such decisions. Oklahoma law does not bar a person with a misdemeanor record from working in law enforcement, the county said, arguing that by basing liability on the hiring decision, the Fifth Circuit was impermissibly setting its own hiring qualifications for law-enforcement personnel.

That was "a serious blow to federalism," the county said, adding, "Where the hiring decision is not itself unconstitutional and no Federal law governs the hiring decision, concepts of federalism dictate that the State of Oklahoma's qualifying standards for police service should control."

"This is an ideal case for this Court to demonstrate how federalism affects a Federal court's review of municipal liability," the county said.

Now that the Supreme Court has agreed to hear the case, *Bryan County Board of Commissioners v. Brown,* No. 95-1100, the question is whether the Justices will accept the county's invitation for a broad review of municipal liability for Federal civil rights violations.

Chief Justice William H. Rehnquist, as an Associate Justice, was one of two dissenters from the 1978 decision, *Monell v. New York City Department of Social Services*, that opened local governments to suit under the civil rights law. He, along with Warren E. Burger, then the Chief Justice, warned that the decision would have unfortunate consequences. The earlier decision that had provided immunity to local governments "protected municipalities and their limited treasuries from the consequences of their officials' failure to predict the course of this Court's constitutional jurisprudence," Justice Rehnquist said in his dissenting opinion in 1978.

While there is essentially no chance that the Court would return to the days of complete municipal immunity, the Justices are in the middle of revisiting many aspects of the federalism question and may well give Bryan County's arguments a sympathetic hearing.

The case could, for example, produce a ruling that sets a stricter definition of the policy or custom that needs to be linked to the constitutional violation. The Court might disavow suggestions in some of its rulings during the 1980's that a single

incident, as occurred in this case, could be sufficient to establish liability, and could instead insist -- as Bryan County is arguing -- that a pattern of violations must be shown.

In another action today, the Court agreed to decide whether a central protection embodied in another Federal civil rights act, which bars employment discrimination, extends to former as well as current employees.

That law is Title VII of the Civil Rights Act of 1964. A provision of the law makes it illegal for an employer to retaliate against "employees or applicants for employment" for having brought a complaint of employment discrimination.

The Court today accepted an appeal by a man who filed a complaint of racial discrimination under Title VII after his employer, the Shell Oil Company, dismissed him in 1991. The next year, after a former supervisor at Shell gave him an unfavorable reference for a job with another company, the man, Charles T. Robinson Sr., filed a second Title VII complaint against Shell, saying the unfavorable reference amounted to retaliation.

The Federal District Court in Baltimore dismissed the retaliation complaint on the ground that only current employees or applicants for employment were protected by that section of the law. After a three-judge panel of the United States Court of Appeals for the Fourth Circuit, in Richmond, overturned that decision, the full appeals court reinstated it last November, 7 to 5.

In his appeal, *Robinson v. Shell Oil,* No. 95-1376, Mr. Robinson, who is black, is arguing that excluding former employees from the no-retaliation provision "leads to grossly absurd results."

Jill BROWN, Plaintiff-Appellee, Cross-Appellant,

v.

BRYAN COUNTY, OK, et al., Defendants,

Bryan County, OK and Stacy Burns, Defendants-Appellants, Cross-Appellees

United States Court of Appeals,Fifth Circuit.

67 F.3d 1174

Oct. 23, 1995

... REYNALDO G. GARZA, Circuit Judge:

SUBSTITUTE PANEL OPINION

A claim for damages was brought against Reserve Deputy Stacy Burns (Burns) and Bryan County, Oklahoma (Bryan County), by Jill Brown (Mrs. Brown) pursuant to 42 U.S.C. § 1983 and Oklahoma law. The case proceeded to trial, in which the jury found in favor of the Plaintiff on every interrogatory submitted. The district court entered a judgment in accordance with the jury's verdict with one exception: Mrs. Brown was not allowed to recover for loss of past income or future earning capacity. Burns and Bryan County (collectively the "Appellants") appeal the judgment against them while Mrs. Brown appeals the portion of the judgment that denied her recovery for lost past income and future earning capacity. For the reasons stated below we affirm the district court's judgment.

BACKGROUND

In the early hours of May 12, 1991, Todd Brown (Mr. Brown) and Mrs. Brown were traveling from Grayson County, Texas, to their home in Bryan County, Oklahoma. After crossing into Oklahoma, Mr. Brown, who was driving, noticed a police checkpoint. He decided to avoid the checkpoint and headed back to Texas, allegedly to spend the night at his mother's house. Although the parties offer conflicting stories leading to the pursuit, Deputy Sheriff Robert Morrison (Deputy Morrison) and Burns stated that they "chased" the Browns' vehicle at a high rate of speed before successfully pulling it over. Mr. Brown testified that he was oblivious to the deputies' attempts to overtake him until both vehicles had traveled approximately three miles. By the time the two vehicles eventually stopped, the parties had crossed into Grayson County, Texas, four miles from the Oklahoma checkpoint.

Immediately after exiting the squad car, Deputy Morrison unholstered his weapon, pointed it toward the Browns' vehicle and ordered the occupants to raise their hands. Burns, who was unarmed, rounded the corner of the truck to the passenger's side. After twice ordering Mrs. Brown from the vehicle, Burns pulled her from the seat of the cab and threw her to the ground. Burns employed an "arm bar" technique whereby he grabbed Mrs. Brown's arm at the wrist and elbow, extracted her from the vehicle and spun her to the ground. Mrs. Brown's impact with the ground caused severe injury to her knees, requiring corrective surgery. While Mrs. Brown was pinned to the ground, Burns handcuffed her and left to assist Deputy Morrison in subduing her husband. Mrs. Brown remained handcuffed anywhere from a minimum of thirty minutes to just over an hour.

According to Mrs. Brown's version of the facts, which will be reviewed in greater detail below, the deputies' pursuit and the force consequently applied against her were unprovoked. Furthermore, she claims that her detention constituted false imprisonment and false arrest. Due to the injuries resulting from that encounter, Mrs. Brown seeks compensation from Burns and Bryan County. Mrs. Brown premised the county's liability, *inter alia*, on the hiring of Burns by Sheriff B.J. Moore (Sheriff Moore), the county policymaker for the Sheriff's Department.

DISCUSSION

The Appellants have presented this Court with a host of issues to support their position that the lower court erred. For efficiency's sake, we will address only those points that we believe merit review. We first address the claims against Burns for the constitutional injuries that Brown suffered.

I.

In their first argument, Burns and Bryan County allege that the force applied against Mrs. Brown was proper. Appellants claim that the evidence "undisputedly" established that Burns' actions on the morning of May 12, 1991, were objectively reasonable. Therefore, the jury's findings should be reversed.

All claims that a law enforcement officer has used excessive force--deadly or not--in the course of an arrest, investigatory stop, or other "seizure" of a free citizen, are analyzed under the Fourth Amendment and

its "reasonableness" standard. The test of reasonableness under the Fourth Amendment requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. The "reasonableness" of the particular force used must be judged from the perspective of a reasonable officer at the scene, rather than with the 20/20 vision of hindsight. In cases implicating excessive force, "not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Fourth Amendment. Thus, the question is whether the officer's actions are "objectively reasonable" in light of the facts and circumstances confronting him, without regard to his underlying intent or motivation.

Determining whether Burns' actions were reasonable depends on whose story the trier of fact accepts as true. According to the testimony of Burns and Deputy Morrison, they were involved in a "high-speed" pursuit after the Browns abruptly turned their truck and sped from the checkpoint. After a four mile "chase" both vehicles came to a full stop. The deputies exited their vehicle and made several commands for the occupants to raise their hands before those commands were obeyed. After rounding the truck, Burns twice ordered Mrs. Brown to exit the vehicle, but she did not comply. He then perceived that she was "lean[ing] forward" in the cab of the truck as if she were "grabbing a gun." He was "scared to death," so he extracted her from the vehicle. He spun her around, dropped her to the ground via the arm bar maneuver and handcuffed her. That was the lowest amount of force he deemed necessary to extract her and ensure he and his partner's safety.

Certainly, Appellants' version of the facts supports a claim that Burns acted reasonably and with an appropriate amount of force. The Browns, however, paint a strikingly different picture. They testified that they were oblivious to the attempts made by the deputies to catch up to them (the Browns) after avoiding the Oklahoma checkpoint. Mr. Brown avoided that stop because he feared the possibility of being harassed or unnecessarily detained by the deputies. He further testified that he did not believe that he turned the truck around either in a reckless fashion nor with wheels squealing or throwing gravel, and that he drove away at a normal rate of speed. Finally realizing that they were being pursued, Mr. Brown pulled over only to find a gun pointed at him. They were ordered to put their hands up and they did so.

Mrs. Brown then testified that Burns ran to her side of the vehicle and ordered her to get out. She was paralyzed with fear and heard Burns repeat the command. According to her testimony, however, she was not slow in responding to Burns' orders and she did not make any sudden moves while exiting the vehicle. Her only forward movement was to exit the truck and, contrary to Burns' testimony, she did not reach for anything. Then, while she was exiting the truck, Burns suddenly grabbed her arm, yanked her out, spun her around and threw her to the pavement. She could not break her fall because one arm was raised and Burns firmly gripped the other.

In addition to this conflicting testimony, both sides elicited expert testimony concerning the reasonableness of Burns' actions. Mrs. Brown's expert, for example, concluded that the force applied by Burns in this situation was unjustified and excessive. The jury weighed all the evidence, evaluated the conflicting testimony and rendered a verdict in Mrs. Brown's favor. Under our standard of review, when the evidence supports the verdict, this Court will not impose its own opinion in contravention to the jury's. Therefore, we will not interfere with the fact finder's conclusion that Burns' actions were unreasonable and that the force he used was excessive.

II.

Notwithstanding the jury's findings, Appellants also assert that there was probable cause to arrest Mrs. Brown. They argue that the facts justified Burn's actions, thereby precluding Mrs. Brown's § 1983 claim for false arrest.

There is no cause of action for false arrest under § 1983 unless the arresting officer lacked probable cause. To determine the presence or absence of probable cause, one must consider the totality of the circumstances surrounding the arrest. Whether officers have probable cause depends on whether, at the time of the arrest, the " 'facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that [the arrested] had committed or was committing an offense.' "

Furthermore, although flight alone will not provide probable cause that a crime is being committed, in appropriate circumstances it may supply the " 'key ingredient justifying the decision of a law enforcement officer to take action.'"

To reiterate, whether Burns had probable cause to arrest Mrs. Brown depends in large part on whether the facts, as Burns knew them, were sufficient to warrant a prudent man's belief that Mrs. Brown committed or was in the process of committing a crime. The facts material to that determination were hotly contested, especially the contradictory testimony relating to the pursuit and Mrs. Brown's movements while exiting the vehicle. Thus, it was for the fact finder to determine whether Burns had probable cause to arrest Mrs. Brown. Assuming arguendo that the deputies had a reasonable suspicion to perform an investigatory stop, we nevertheless find the evidence sufficient to support the jury's finding that Burns did not have probable cause to arrest Mrs. Brown, and that his doing so violated her constitutional right to be free from false arrest.

As the jury found that Burns did not have probable cause to detain or arrest Mrs. Brown, it could also find from the evidence that she was falsely imprisoned. To set out a claim for false imprisonment the plaintiff must prove (1) an intent to confine, (2) acts resulting in confinement, and (3) consciousness of the victim of confinement or resulting harm. Under § 1983, the plaintiff must also prove the deprivation of a constitutional right, i.e., an illegality under color of state law. The evidence establishes that Mrs. Brown believed herself to be under arrest: even though she had committed no crime, she remained handcuffed for approximately an hour before being released, during which time she was never informed of the nature of the charges for which she was being detained, and subsequently no charges were ever brought. In light of such evidence, a finding of false imprisonment is proper.

III.

Appellants also contest the jury's finding that Burns was not entitled to qualified immunity. A proper analysis of a qualified immunity defense requires us to conduct a two (sometimes three) prong inquiry. First, we determine "whether the plaintiff has asserted a violation of a constitutional right at all." Second, we establish whether the law was clearly established at the time of the official's action. Third, we evaluate the "objective reasonableness of [the] official's conduct as measured by reference to clearly established law." It is clear that by 1991, use of excessive force, false arrest and false imprisonment had been held to violate citizens' constitutional rights, thus the qualified immunity defense fails if Burns did not act with probable cause. And as the trier of fact determined that Burns did not have probable cause to arrest Mrs. Burns, he is not entitled to qualified immunity.

IV.

Burns asserts that the evidence is insufficient to support the jury's award of punitive damages. He argues that application of the arm bar technique did not rise to a level of "flagrant" conduct and further, that it did not evidence malice or give rise to an inference of evil intent. Nevertheless, the Supreme Court has ruled that punitive damages are recoverable in a § 1983 action. One of the primary reasons for § 1983 actions and punitive damages is to deter future egregious conduct. A jury may assess punitive damages in an action under § 1983 if the defendant's conduct is shown to be motivated by evil motive or intent, or involved reckless or callous indifference to the federally protected rights of others. The question is whether the acts of Burns, which caused the deprivation of Mrs. Brown's constitutional rights, rose to a level warranting the imposition of punitive damages. In light of the evidence before it, we believe that the jury could properly infer that Burns' acts were unjustified and that he acted with callous or reckless indifference to Mrs. Brown's constitutional rights. Therefore, punitive damages were justified.

V.

On cross-appeal, Mrs. Brown argues that it was error for the district court to grant Appellants' Motion for Judgment Notwithstanding the Jury Verdict (JNOV) as it relates to her claims for loss of past income and future earning capacity. Mrs. Brown asserts that neither Bryan County nor Burns specifically raised an issue concerning the sufficiency of the evidence supporting that portion of the judgment, thus the district court's action was unjustified and the award must be reinstated. She insists that there is absolutely no legal predicate on which the district court could base its actions. Therefore, as evidence was offered to support this award, Mrs. Brown argues that the original jury award should be reinstated.

This Court has determined that it "would be a constitutionally impermissible re-examination of the jury's verdict for the district court [or this Court] to enter judgment n.o.v. on a ground not raised in the motion for directed verdict." It is undisputed that the Appellants did not address the sufficiency of the evidence supporting the jury's award for loss of past income and future earning capacity in their motions for either directed verdict or JNOV. Thus, the lower court should not have decided whether sufficient evidence exists to support this award. However, as the Appellants point out, Mrs. Brown failed to object to this error at trial, and it is the "unwavering rule in this Circuit that issues raised for the first time on appeal are reviewed only for plain error." In other words, this Court will reverse only if the error complained of results in a "manifest miscarriage of justice." Furthermore, contrary to Mrs. Brown's contention, the issue is not whether any

evidence exists to support the jury verdict. Instead, the issue is whether the district court's action constituted plain error.

Upon reviewing the record, we do not believe that the lower court's error resulted in a manifest miscarriage of justice. The only evidence offered in support of the award comprised of Mrs. Brown's testimony, which reflected that she had accepted an offer to commence work a few days after the day of the incident. Her compensation would have been measured on a commission basis, which she believed would have paid between $1,500 to $1,800 a month. The district court's ruling that this evidence was lacking does not arise to plain error. Mrs. Brown's failure to object at the appropriate time denied the district court the opportunity to rectify any errors. Therefore, the court's ruling will stand.

VI.

Having found that Burns violated Mrs. Brown's constitutional rights, the next inquiry concerns the possible liability of Bryan County. Liability will accrue for the acts of a municipal official when the official possesses "final policymaking authority" to establish municipal policy with respect to the conduct that resulted in a violation of constitutional rights.

Bryan County stipulated that Sheriff Moore was the final policymaker for the Sheriff's Department. As such, it is patently clear that Sheriff Moore is an official "whose acts or edicts may fairly be said to represent official policy and whose decisions therefore may give rise to municipal liability under § 1983."

Mrs. Brown argues that a municipality can be held liable under § 1983 based on a final policymaker's single decision regarding the hiring or training of one individual. Appellants, on the other hand, argue that § 1983 liability cannot attach on the basis of a policymaker's single, isolated decision to hire or train one individual.

An argument similar to the Appellants' was rejected by this Court in *Gonzalez v. Ysleta Indep. Sch. Dist.* In *Gonzalez,* the Ysleta Independent School District (YISD) was sued for a single decision to transfer a teacher accused of sexually harassing a student, rather than removing him from the classroom. YISD argued that this ad hoc, isolated decision, even when made by policymakers, did not constitute the sort of "policy" upon which municipal liability could be predicated under Monell. This was especially true there, insisted YISD, as the decision was contrary to the district's own formal policy for handling such matters. This argument proved unpersuasive.

Based on the facts before it, the *Gonzalez* panel concluded that the final policymaker's single, conscious decision, i.e., the Board of Trustee's decision to transfer the teacher rather than remove him from the classroom, constituted a "policy" attributable to the school district. This conclusion was logical, as "[n]o one has ever doubted . . . that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body . . . because even a single decision by such a body unquestionably constitutes an act of official government policy." To deny compensation to the victim in such a case would be contrary to the fundamental purpose of § 1983. So, it is clear that a single decision may create municipal liability if that decision were made by a final policymaker responsible for that activity.

Mrs. Brown argues that Burns' lengthy criminal history should have prevented Sheriff Moore from hiring him. Burns' history revealed a string of offenses that, she claims, demonstrates a disregard for the law and a propensity for violence. Moreover, she maintains that a thorough investigation of Burns' background would have revealed that his parole had been violated by his numerous offenses. Thus, she argues that Burns' screening and subsequent employment by Sheriff Moore were inadequate and subjected Bryan County to liability.

During the application process Sheriff Moore ordered a printout of Burns' criminal record, which revealed the following citations and arrests: nine moving traffic violations, Actual Physical Control (APC) of a motor vehicle while intoxicated, driving with a suspended license, arrest for assault and battery, conviction for possession of a false identification and an arrest for resisting lawful arrest. . . .

We believe that the evidence supports the jury's conclusion that Sheriff Moore did not conduct a good faith investigation of Burns. Although it is true that Sheriff Moore ran a NCIC check of Burns, this action was futile given that Burns' arrest history was all but ignored. Sheriff Moore conceded that Burns' record was so long that he did not bother to examine it. And, except for this feeble attempt to screen him, no other effort was made to investigate Burns. A further examination would have revealed that Burns had repeatedly violated probation, and that a warrant was subsequently issued for his arrest. In light of this history, it should have been obvious to Sheriff Moore that a further investigation of Burns was necessary.

We also find the evidence sufficient for a jury to conclude that Sheriff Moore's decision to hire Burns amounted to deliberate indifference to the public's welfare. In light of the law enforcement duties assigned

to deputies, the obvious need for a thorough and good faith investigation of Burns, and the equally obvious fact that inadequate screening of a deputy could likely result in the violation of citizens' constitutional rights, Sheriff Moore can reasonably be said to have acted with deliberate indifference to the public's welfare when he hired Burns. The failure to conduct a good faith investigation of the prospective employee amounted to Sheriff Moore deliberately closing his eyes to the Burns' background. Such indifferent behavior cannot be tolerated when the prospective applicant will be employed in a position of trust and authority.

Additionally, the jury could find that hiring an unqualified applicant and authorizing him to make forcible arrests actually caused the injuries suffered by Mrs. Brown. That is, the policymaker's (Sheriff Moore's) single action of hiring Burns without an adequate review of his background directly caused the constitutional violations of which Mrs. Brown now complains. Therefore, the violation of Mrs. Brown's constitutional rights was affirmatively linked to Bryan County's decision to hire Burns for law enforcement activities.

CONCLUSION

After a thorough review of the record, this Court finds that the evidence supports the jury's verdict holding Burns and Bryan County liable for Mrs. Brown's § 1983 claim based on her false arrest, false imprisonment and the inadequate hiring of Burns. We also find that the district court did not plainly err in dismissing the jury's award for Mrs. Brown's loss of past income and future earning capacity. For these reasons, the jury's verdict stands and the district court's judgment is

AFFIRMED.

EMILIO M. GARZA, Circuit Judge, concurring in part and dissenting in part: [OMITTED]

95-1376 ROBINSON v. SHELL OIL CO.

Anti-retaliation provision of Title VII—Definition of employee—Former employee.

Ruling below (CA 4, 70 F.3d 325, 64 LW 2356, 69 FEP Cases 522):

Former employees are not "employees" within meaning of anti-retaliation provision of Title VII of 1964 Civil Rights Act.

Question presented: Does term "employees" in Section 704(a) of 1964 Civil Rights Act, making it unlawful for employer to discriminate against any of its employees or applicants for employment because they have availed themselves of Title VII's protections, include former employees?

Petition for certiorari filed 2/27/96, by Allen M. Lenchek, of Rockville, Md.

COURT TO RULE ON WORKERS' SHIELD FROM EX-EMPLOYERS

Md. Man Says Company Punished Him for Filing Bias Charges over Firing

The Baltimore Sun
Tuesday, April 23, 1996
Lyle Denniston

WASHINGTON -- The Supreme Court agreed yesterday to decide if a worker fired from one job allegedly because of race has a right to seek new work without his former bosses retaliating by interfering with his search. A Maryland man, Charles T. Robinson Sr., persuaded the court to consider whether he is covered by a federal law that protects workers from retaliation after they have accused their companies of illegal discrimination in the workplace.

That law is designed to assure workers not only that they can pursue claims of bias, but also that, once they do, their employers cannot make them suffer for having exercised their rights. A dispute has arisen among federal appeals courts around the nation, however, on whether that law covers a company's former employees, as well as its current employees.

The 4th U.S. Circuit Court of Appeals in Richmond, Va., ruled in November that once Mr. Robinson was no longer employed by Shell Oil Co., he could not challenge under civil rights law anything that Shell may have done after their relationship came to an end.

A total of nine U.S. appeals courts have now ruled on that issue; one of them agrees with the Richmond court, while seven others disagreed and have assured workers that leaving a job does not cut off their rights to claim that their former employer retaliated.

Mr. Robinson, who now lives in a Maryland suburb of Washington, was a sales representative for Shell when he was fired more than four years ago. He contended that he was discharged because of his race; he is black. His race bias complaint failed in federal court in Baltimore. While that court case went ahead, Mr. Robinson applied for a job at Metropolitan Life Insurance Co. That company contacted Shell and got back a negative report on him: Shell said that he had been fired, that Shell would not rehire him, that his job performance was below average and that he had a poor job attendance record.

Mr. Robinson was then denied a job at the insurance company. Yesterday, his attorney, Allen M. Lencheck of Rockville, said that Mr. Robinson later got a job with Metropolitan Life, but has since left that position and now works for another company.

After Shell gave its negative report on him, Mr. Robinson went back into federal court, claiming that Shell was retaliating for his earlier claim of bias. At Shell's request, the new case was thrown out when the judge concluded that the law does not apply to former employees. The Supreme Court will hear arguments on the case next fall and issue a final decision about a year from now.

CIVIL RIGHTS CASE

In another civil rights case, the court agreed yesterday to spell out what kind of hiring decisions may make a county or city government legally responsible for the acts of an employee who violates someone's rights.

A deputy sheriff hired by his uncle, an Oklahoma county sheriff, despite a lengthy criminal record of convictions and arrests was found to have used excessive force when he pulled a woman out of her car and threw her to the ground, injuring her knees. He said the woman was refusing to obey his orders to get out of the car after a high-speed chase.

The county also has been held responsible for the deputy's actions on the theory that the sheriff should have investigated his background before hiring him and should not have hired him at all. The county contends in an appeal that a single hiring decision by a county official should not be enough to blame the county for the misdeeds of a worker it hires.

OTHER ACTIONS

In another action, the court refused to review the constitutionality of an Oklahoma City ordinance that makes it a crime for one person to solicit another person in public to engage in sex. That law was used to prosecute a gay man for inviting a plainclothes police officer in a park to engage in a homosexual act.

The court also turned aside, without comment, a plea by the Federal Communications Commission to clarify its power to enforce the federal law that bars radio and television stations from overcharging political candidates for airing their campaign advertisements. A lower court has questioned the FCC's power to be the sole authority to monitor charges for political ads.

COURT WILL REVIEW 'EMPLOYER' DEFINITION

U.P.I.

Monday, March 8, 1996

Michael Kirkland

The Supreme Court agreed Monday to review a Chicago case and the conditions under which a small business can escape discrimination suits. In the case involving alleged sex discrimination, a lower court has rejected the method the Equal Employment Opportunity Commission uses to count employees to determine if a business is large enough to come under civil rights law. The Supreme Court accepted the case without comment. Argument probably will be heard next winter. Crucial to the case is how federal civil rights law is interpreted. Title VII of the the 1964 Civil Rights Act, which deals with discrimination, applies to an employer who "has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." Darlene Walters was employed as a payment collector by Metropolitan Educational Enterprises Inc., an encyclopedia and educational materials sales company. When she was denied promotion to credit manager in 1989, Walters filed a gender discrimination suit under the Civil Rights Act. When she was fired in 1990, she filed a retaliation suit against the company. The EEOC joined the retaliation case in 1993. For the purposes of the Civil Rights Act, the EEOC counts as "employees" all workers who are on employer's payroll for a particular working day. But the federal judge accepted Metropolitan's argument that, for the purposes of the act, workers should be counted as hourly paid "employees" only if they are physically at work or on paid leave for a particular day. Since under that definition Metropolitan did not have enough employees for the 20-week period to be governed by the Civil Rights Act, the judge dismissed the case. After an unsuccessful appeal, Walters and the EEOC asked the Supreme Court in separate petitions to review the case. The court consolidated the cases Monday when it granted review. (No. 95-259, *Walters vs. Metropolitan Education Enterprises et al*; and No. 95-779, *EEOC vs. Metropolitan etc*)

Charles T. ROBINSON, Sr., Plaintiff-Appellant,
Equal Employment Opportunity Commission, Amicus Curiae,
v.
SHELL OIL COMPANY, Defendant-Appellee.

United States Court of Appeals, Fourth Circuit.

70 F.3d 325

Nov. 29, 1995

. . . HAMILTON, Circuit Judge:

Section 704(a) of Title VII of the Civil Rights Act of 1964 (commonly referred to as Title VII's anti-retaliation provision) makes it unlawful "for an employer to discriminate against any of his employees or applicants for employment" who have either availed themselves of Title VII's protections or assisted others in so doing. Subsection 2000e(f) of Title VII defines "employee" as "an individual employed by an employer." The issue before the en banc court is whether the term "employees" includes former employees. We conclude that it does not.

I.

Shell Oil Company (Shell) terminated Charles T. Robinson (Robinson) from its employment in 1991. Shortly thereafter, Robinson filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that Shell had terminated him because of his race. While that charge was pending, Robinson applied for a job with another company that contacted Shell, as Robinson's former employer, for an employment reference. According to Robinson, Shell gave him a negative reference. Robinson attributed the negative reference to Shell's intention to retaliate against him for filing the EEOC charge.

Robinson subsequently filed this action. Robinson's complaint alleged that after he filed a charge of race discrimination against Shell with the EEOC, Shell provided "false information and negative job references to perspective [sic] employers." The complaint further alleged that such action violated the anti-retaliation provision of Title VII of the Civil Rights Act of 1964.

Contending the anti-retaliation provision of Title VII does not provide former employees a cause of action against their former employers for post-employment retaliation, Shell moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted. In support of its motion, Shell cited Polsby v. Chase which held that the anti-retaliation provision of Title VII does not apply to former employees. Upon Shell's motion, the district court dismissed the complaint. Subsequently, the Supreme Court summarily vacated Polsby.

Robinson appealed to this court. A divided panel of this court reversed the judgment of the district court, but, on Shell's suggestion, we vacated the panel decision and reheard the case en banc. We now affirm.

II.

Section 704(a) of Title VII of the Civil Rights Act of 1964 provides in pertinent part: (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. In reviewing the propriety of the district court's dismissal of Robinson's complaint, our task is to apply Title VII's anti-retaliation provision to the facts before us. The dispute regarding the correct application centers on the scope of the term "employees." Robinson asserts the term "employees" includes former, as well as current, employees. According to Robinson, this interpretation is favorable because it gives effect to the remedial purpose of Title VII to eradicate illegal discrimination in the work place. Conversely, relying on the plain language of the statute, Shell asserts that the term "employees" includes only current employees. . . .

In deciding whether Title VII's anti-retaliation provision provides a former employee a cause of action against his former employer for post-employment retaliation, we find the statutory language unambiguously answers the question "no." First, we look at the language Congress used: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." Subsection 2000e(f) defines "employee" for purposes of all provisions of Title VII as "an individual employed by an employer." Read *in pari materia*, these sections of Title VII provide a remedy for acts of retaliation to employees and applicants for employment who have either availed themselves of Title VII's protections or assisted others in so doing.

Although subsection 2000e(f) defines the term "employee" as "an individual employed by an employer," Robinson contends, rather remarkably, that the term "employees" as used in Title VII's anti-retaliation provision means "former employees." His contention is legally untenable. Title VII defines "employee" for purposes of all provisions of Title VII; thus, that definition controls the meaning of "employee" wherever it appears throughout the statute. Because Title VII does not define "employee" as an individual no longer employed by an employer, then, under the rules of statutory construction, that meaning is excluded as a meaning from the term "employee." We are simply prohibited from reading into the clear language of the definition of "employee" that which Congress did not include. If Congress intended Title VII to remedy discrimination beyond the employment relationship, then it could have easily done so by including "former employee" when defining the term "employee."

Neither is the language comprising Title VII's definition of the term "employee" ("an individual employed by an employer"), ambiguous. The rules of statutory construction require us to give the words Congress used to define "employee" their common usage. The term "employed" as used in subsection 2000e(f) is commonly used to mean "performing work under an employer-employee relationship." Certainly, the term "employed" is not commonly used to mean "no longer performing work under an employer-employee relationship." Furthermore, "employer" as used in subsection 2000e(f) is commonly used to mean "one who employs the services of others." Again, no meaningful argument can be made that the term "employer" is commonly used to mean "one who no longer employs the services of others." Accordingly, we reject any notion that the language in Title VII's definition of the term "employee" is ambiguous.

Because the language in Title VII's definition of "employee" is not ambiguous, any attempt to resort to legislative history is foreclosed. Therefore, this court is bound to apply literally the term "employees" in Title VII's anti-retaliation provision as defined by Congress in subsection 2000e(f) without examination of any other sources of legislative intent, unless such application falls within one of the exceptions to literal application.

Here, neither exception applies because both require Congress to have made plain that it intended a result different than literal application would produce. Indeed, the absence of any language in Title VII's anti-retaliation provision referring to former employees is strong evidence that Congress did not intend Title VII to protect former employees. Additionally, Congress' inclusion of "applicants for employment" as persons distinct from "employees," coupled with its failure to likewise include "former employees," is strong evidence of Congressional intent that the term "employees" in Title VII's anti- retaliation provision does not include former employees. With no applicable exception to prevent literal application of the words Congress chose, we hold, as we must, that the meaning of the term "employees" in Title VII's anti- retaliation provision does not include former employees as urged by Robinson. Because "former employees" are not included in the statutory language, Title VII's anti-retaliation provision does not protect them. Given that the statute does not protect former employees, Robinson has no claim under its aegis.

We are not unmindful that our holding is embraced by only one circuit court and at odds with the majority of circuit courts that have addressed this question. In concluding that Title VII's anti-retaliation provision and other parallel statutes reach post-employment retaliation, the decisions in the majority have interpreted the term "employee" broadly to " 'include[ ] a former employee as long as the alleged discrimination is related to or arises out of the employment relationship.' " Essentially, the rationale supporting this interpretation is that a literal application of the term "employees" produces a result that would defeat the underlying policies of Title VII to eradicate discrimination in the work place. For example, in Charlton, the court opined that "post-employment blacklisting is sometimes more damaging than on- the-job discrimination because an employee subject to discrimination on the job will often continue to receive a paycheck while a former employee subject to retaliation may be prevented from obtaining any work in the trade or occupation previously pursued."

The rationale of these decisions totally disregards, without explanation, the established analytical framework for statutory construction. Instead, they rely on broad considerations of policy. Most divine what they posit as Congress' intent from the reach of Title VII. None of these decisions directly address the absence of Congressional expression on this issue. These decisions are, therefore, at odds with the well-settled rule that in the absence of expressed Congressional intent, courts must assume that Congress intended to convey the language's ordinary meaning. Indeed, these decisions fail to heed the Supreme Court's repeated mandate: "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' " Furthermore, these decisions of our sister circuits disregard Title VII's definition of "employee" as the definitive source for

determining the meaning of the term "employees" as used in Title VII's anti-retaliation provision. In short, we are completely unpersuaded by their analyses, which depend for their substance on broad policy arguments which are simply not supported by the plain language of Title VII.

III.

Although extending Title VII to cover former employees is tantalizing fruit, our judicial inquiry must cease when the language of a statute is plain and unambiguous. Such is the rule of law. In no uncertain terms, Congress, for whatever reason, has chosen, through the anti-retaliation provision of Title VII, to protect "employees," i.e., "individual[s] employed by an employer," and "applicants for employment," but not to protect former employees. Because Robinson's complaint alleges post-employment retaliation, the district court properly dismissed his complaint under Federal Rule of Civil Procedure 12(b)(6). Accordingly, we affirm.

K.K. HALL, Circuit Judge, dissenting:

Imagine that on Friday, the first day of the month, XYZ Corporation decides to terminate two of its line workers, Smith and Jones, and immediately gives them two weeks' written notice. Smith and Jones, each believing that she has been unlawfully discriminated against, file charges with the EEOC on Monday the fourth. Unable, however, to afford the luxury of undue optimism, both Smith and Jones explore the possibility of signing on with XYZ's competitor, LMNOP, Inc.

On Tuesday the twelfth, XYZ's personnel department receives a letter from its LMNOP counterpart, requesting employment information and references on Smith and Jones. Annoyed that the pair have filed EEOC charges against the company, XYZ's personnel director intentionally and vindictively prepares false reports for dissemination to LMNOP. The spurious reports are placed in separate envelopes and stamped for mailing on Friday the fifteenth, which also happens to be Smith and Jones's last day at XYZ. Although Smith's report is included in Friday's outgoing mail, Jones's report is inadvertently excluded, and, therefore, not sent to LMNOP until Monday the eighteenth.

The majority cannot dispute that XYZ's conduct toward Smith and Jones was equally culpable, and that the company's behavior was precisely that which Title VII's anti-retaliation provision was designed to prohibit. Nevertheless, under the approach adopted today by the majority--an approach in diametric opposition to that employed by the vast preponderance of our sister circuits and by the EEOC itself--Smith would be entitled to file a retaliation charge, and Jones would be left out in the cold. Because the majority's decision will soon create many more Joneses than Smiths, I must respectfully dissent.

I.

A.

The majority acknowledges that, even if the term "employees" as used in Section 704(a) unambiguously designates only those persons earning a paycheck from the offending employer at the moment of retaliation, this court may nevertheless expand the scope of the designation to avoid a grossly absurd or plainly unintended result. As illustrated by the XYZ hypothetical, the majority's construction of Section 704(a) will inevitably lead to grossly absurd results; that those results are also plainly unintended can be readily understood by examining Congress's purpose in enacting Title VII.

B.

"In determining the meaning of [a] statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." The statutory scheme in this case is Title VII, and Congress's purpose in enacting it is easily discerned.

Title VII is sweeping, remedial legislation; it applies to virtually all entities that affect the employment relationship, and it proscribes a vast range of ignoble behavior. There is a detailed enforcement procedure--including resort to the federal courts, which are accorded broad power to grant legal and equitable relief. Congress demonstrated, by giving Title VII a broad reach, that it is serious about eradicating discrimination and its invidious effects within the employment relationship. That is why the statute was enacted, and that is why the anti-retaliation provision was included; Congress understood that Title VII could only be enforced effectively if the persons most aggrieved by discriminatory practices could come forward without fear of retribution. Unfortunately, the majority's construction of the term "employees" in Section 704(a) will actively hinder the enforcement mechanism.

This hindrance will work on two levels. There is, of course, the obvious hindrance of allowing an employer to escape sanctions for behavior that is clearly unlawful. More subtle, however, is the hindrance on enforcement that will almost certainly result from the remaining employees' reluctance to bring subsequent

violations to the EEOC's attention; no reasonable employee will come forward if there is any chance that his or her term of employment will soon end, thus giving the employer carte blanche to retaliate. Moreover, an aggrieved person should not be forced to remain with an abusive employer solely to ensure that he or she receives the full protection of Title VII.

C.

Today's decision erodes a crucial Title VII enforcement mechanism; it thus will inevitably erode the substantive protections of Title VII itself. Because Congress's inclusion of Section 704(a) was intended to strengthen--not weaken-- the statute, I would interpret the section's language in a manner consistent with that intent.

My interpretation of Section 704(a) hardly brands me a maverick; indeed, the majority's approach is the eccentric one. No fewer than six courts of appeal have concluded, as I do, that the section's protection extends to those employees no longer actively engaged in working for the retaliating employer. Until now, the Seventh Circuit had stood alone in reaching the opposite conclusion. Moreover, the EEOC itself has appeared before this court, as amicus curiae, to urge that we adopt the dominant rule fashioned by our sister circuits.

Two of those courts have explicitly concluded that the primary focus in determining whether a plaintiff states a claim under Section 704(a) should be on whether the alleged retaliation either arose from the employment relationship or was related to the employment. I wholeheartedly agree. By choosing instead to focus exclusively on the time when the employee was actively working, the majority has framed its inquiry much too narrowly; such a myopic approach only frustrates Congress's attempt, through Title VII, to eradicate workplace discrimination.

II.

To this point, I have accepted, for the purposes of argument, the majority's contention that the term "employees," as used in Section 704(a), is unambiguous. I have argued that the result arrived at by the majority is nevertheless grossly absurd and so clearly contrary to Congressional intent as to justify expanding the asserted ordinary meaning of the term to embrace, if necessary, an extraordinary meaning.

In actuality, my burden is not as difficult as the majority purports it to be. If it were, it is unlikely that six other courts of appeal, comprised of judges who are doubtlessly familiar with the canons of statutory construction, would have all arrived at a conclusion that the majority of this court apparently finds so bewildering.

I believe it likely that our sister circuits have, at least implicitly, grounded their decisions on a premise that I find inescapable--that the term "employees" is ambiguous. Indeed, under the statute's tautological definition of the term as "individual[s] employed by an employer," one could no more comprehend what an employee is than one could ascertain the legal essence of the term designee, if defined merely as an "individual designated by a designator." To comprehend the meaning of employee (or designee), one must first understand what it means to employ (or to designate). The root "employ," of course, may mean many different things, even within the business/labor context; though it is often used to describe the current contractual relationship between a company and a designated worker, that is not its exclusive meaning. Where the use of a term in a particular context admits of more than one meaning, that term is, ipso facto, ambiguous.

III.

Because the term "employees," as used in Section 704(a) is ambiguous, it is our duty to construe its meaning. I choose to interpret the term consistently with what I perceive to be the clear intent of Congress to effectively remedy the problem of discrimination in employment--a problem that today's decision will not assist in solving.

MURNAGHAN, Circuit Judge, dissenting: [OMITTED]

95-779 EQUAL EMPLOYMENT OPPORTUNITY COMMISSION v. METROPOLITAN EDUCATIONAL ENTERPRISES INC.

Definition of employer—Number of employees on payroll.

Ruling below (CA 7, 60 F.3d 1225, 64 LW 2071, 68 FEP Cases 499):

Definition of "employer" in Title VII of 1964 Civil Rights Act, which includes those with "fifteen or more employees in each of twenty or more calendar weeks in the current or preceding calendar year," requires that at least 15 employees be at workplace or on paid leave for each day of work week in order for week to be counted, and is not satisfied by "payroll method" based on number of employees on payroll in given week.

Question presented: Does Title VII apply to employer who has 15 or more employees on its payroll for every working day of requisite number of weeks?

Petition for certiorari filed 11/15/95, by Drew S. Days III, Sol. Gen., Deval L. Patrick, Asst. Atty. Gen., Paul Bender, Dpty. Sol. Gen., Beth S. Brinkmann, Asst. to Sol. Gen., C. Gregory Stewart, EEOC General Counsel, Gwendolyn Young Reams, Assoc. Gen. Counsel, Carolyn L. Wheeler, Asst. Gen. Counsel, and Dori K. Bernstein, EEOC Atty.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellant,

and

Darlene Walters, Intervening Plaintiff-Appellant,

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INCORPORATED, and Leonard Bieber, Defendants-Appellees

United States Court of Appeals, Seventh Circuit.

60 F.3d 1225

July 18, 1995.

. . .CUMMINGS, Circuit Judge.

This case presents the question whether, by virtue of recent legislative developments or a closer look at old ones, this Court should overrule its decision in *Zimmerman v. North American Signal Co.* In that case, we defined "employer" in the context of the Age Discrimination in Employment Act ("ADEA"), a construction since extended to other anti-discrimination legislation including Title VII. The Equal Employment Opportunity Commission ("EEOC") urges us to adopt a more expansive definition. Intervening plaintiff Darlene Walters joins in this plea for the simple reason that our *Zimmerman* definition forecloses her Title VII retaliatory discharge claim against the defendants, her former employer and the company's president. We are not persuaded that subsequent events dictate overruling *Zimmerman*, however, and therefore reject the EEOC's and Walters' invitation to do so.

BACKGROUND

The EEOC sued Metropolitan under § 704(a) of Title VII in 1993, alleging that Metropolitan had fired Walters three years earlier in retaliation for her filing of a gender discrimination charge. Walters subsequently intervened as plaintiff. Metropolitan moved to dismiss the suit for lack of subject matter jurisdiction, alleging that the company was not an "employer" under Title VII, and the parties proceeded to discovery on that question. In August 1994, after analyzing the parties' stipulations regarding Metropolitan's payroll records, the district court granted defendants' motion to dismiss on the ground that Metropolitan did not qualify as an employer under Title VII and there was accordingly no federal jurisdiction.

Under Title VII, an employer is "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." The statute does not explicitly prescribe a method of counting employees to verify whether the requisite minimum of 15 is reached, but two have emerged from case law. One, endorsed by the EEOC and adopted by a number of courts, is the "payroll method." It looks at the number of employees maintained on an employer's payroll within a given week: if this number is at least 15 for at least 20 calendar weeks the jurisdictional minimum is satisfied, regardless of whether or not every employee on the payroll shows up for work every day of the calendar week.

The alternative method counts all salaried employees toward the minimum, but takes a different approach toward hourly or part-time workers. Such workers are considered employees only on days when they are physically present at work or are on paid leave. The jurisdictional minimum of employees must be at the workplace or on paid leave for each day of the work week, or the week will not be counted.

In *Zimmerman*, the Seventh Circuit endorsed this counting system and rejected the payroll approach. The panel in that case examined the statutory language of the ADEA and focused on its provision (like Title VII's) that an employer must have the requisite number of employees "for each working day of a week before that week can be counted toward the jurisdictional minimum." Seeing no way to reconcile the phrase "for each working day" with the payroll method, the panel held that the correct method excluded hourly paid workers on days when they were neither working nor on paid leave. To conclude otherwise, the *Zimmerman* panel held, would render the words "for each working day" superfluous and would be contrary to the "explicit definitional restriction chosen by Congress." The panel also noted that had Congress wanted to define the jurisdictional minimum in terms of the number of employees on the payroll each week, it could certainly have done so.

ANALYSIS

The EEOC and Walters aim a fusillade of arguments at *Zimmerman*. Primarily they contend that in enacting the Family and Medical Leave Act ("FMLA"), Congress endorsed the payroll method over the *Zimmerman* alternative in a manner that counsels deference from this Court. They also point to other case law and the EEOC's own guidelines which are contrary to the holding in *Zimmerman*. Finally, they submit that the payroll approach comports better with public policy considerations.

In considering these arguments, we bear in mind that compelling reasons are required to overturn Circuit precedent. "Stare decisis is of fundamental importance to the rule of law," and has even greater force when the precedent in question involves a statutory construction.

We also note that this Court based *Zimmerman* on a reading of the statute's plain text that we continue to endorse. As the *Zimmerman* panel noted, the phrase "for each working day" must be given some meaning within the context of the statute, and the most natural interpretation of that phrase looks to the number of employees physically at work on each day of the week. Plaintiffs suggest an alternative interpretation that looks to situations when an employee joins or exits the payroll mid-week; this seems a highly unlikely reading of the statute, particularly since instances where employees begin work on Wednesdays or depart on Thursdays are unlikely to occur with sufficient frequency to merit inclusion in a federal anti-discrimination statute.

While agreeing that the statute could have been worded more clearly, we believe that the *Zimmerman* court's interpretation of its plain text has stood the test of time and a new set of appellate eyes. Generally, a judicial construction of the plain language of the statute ends the matter conclusively: the law is clear that when a court can glean the meaning of a statute from its text, it should look no further.

Notwithstanding this fact, plaintiffs contend that the recent passage of the FMLA, with a definition of "employer" that closely tracks those in the ADEA and in Title VII, is reason enough for us to re-examine *Zimmerman* 's holding. The Senate Report for the FMLA endorses the payroll approach to identifying employers:

> The quoted language parallels language used in Title VII of the Civil Rights Act of 1964 and is intended to receive the same interpretation. As most courts and the EEOC have interpreted this language, "employs * * * employees for each working day" is intended to mean "employ" in the sense of maintain on the payroll. It is not necessary that every employee actually perform work on each working day to be considered for this purpose.

Such congressional commentary, unfortunately for plaintiffs, has little effect on our view of Title VII. First, the Congress that passed the FMLA has no special sanction to interpret the actions of a previous Congress. "The interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute."

Second, although plaintiffs designate the adoption of the FMLA as a "significant development of the law on the proper interpretation of the statutory definition of 'employer' contained in Title VII," this purported legal milestone occurred not within the text of the statute, but within legislative history, which has no force of law. As the District of Columbia Circuit recently observed, "A congressional report, even a conference report, is not legislation . . . and it does not change the law."

The Supreme Court has explicitly rejected the notion that judicial interpretation of a statute owes deference to language in a legislative report. In *Pierce v. Underwood*, the Court held that where there was an "almost uniform appellate interpretation" of legislation, re-enactment of the same statutory language would be presumed to re-enact that "settled judicial interpretation" regardless of a legislative report to the contrary. While further action taken by Congress can justify the abandonment of statutory precedent, legislative history is not akin to legislative action.

In this case, as plaintiffs point out, there is an existing Circuit split, not a settled judicial interpretation, regarding the correct means of determining who is an employer. Still, we note that had Congress truly intended to enact the payroll method into law, it certainly could have done so in clear and unambiguous terms. Instead, knowing (because *Zimmerman* and other like cases so instructed it) that Title VII's and the ADEA's "for each working day" language was problematic, Congress chose not to respond to these concerns in enacting the FMLA. If indeed Congress wished to resolve the Circuit conflict in a particular direction, this was "a strange way to make a change."

Plaintiffs also argue that judicial and regulatory authority from other Circuits and from the EEOC support overruling *Zimmerman*. Among our sister Circuits, the First and Fifth have adopted the payroll method, as have a number of district courts; the Eighth Circuit and several other district courts have adopted

the *Zimmerman* approach. The EEOC's Statement of Policy Guidance explicitly rejects the *Zimmerman* approach and endorses the payroll method.

Regarding the Circuit split, it is enough to note the large number of recent cases on both sides of the issue; that some courts have disagreed with our analysis while others have adopted it hardly presents a pressing reason to overturn settled precedent. The EEOC's Compliance Manual, on the other hand, was promulgated well after our decision in *Zimmerman*. While we afford deference to legitimate agency interpretations of statutory language made before we have ruled on an issue, the converse is not true: the judiciary, not administrative agencies, is the final arbiter of statutory construction.

Finally, plaintiffs urge us to consider potential policy problems inherent in our retention of the *Zimmerman* standard in the face of a conflicting interpretation regarding the FMLA. We have not yet been asked to interpret the FMLA and decline to create a conflict where none yet exists. Plaintiffs also present a parade of horribles that could result from continued application of *Zimmerman*, most notably an employer's ability to evade the strictures of anti-discrimination legislation simply by structuring operations to avoid having the jurisdictional minimum present on each working day. Yet in more than a decade since this Court ruled in *Zimmerman*, this parade has had conspicuously few participants. Finally, plaintiffs argue that the payroll method is simpler to implement; this rationale, however, simply is not sufficient to override settled statutory interpretation.

CONCLUSION

Failing to see a compelling reason for overturning our Circuit precedent in *Zimmerman*, we affirm the judgment of the district court dismissing plaintiffs' suit for lack of jurisdiction.

RIPPLE, Circuit Judge, concurring.

I join the judgment of the court. Although the correctness of *Zimmerman v. North American Signal Company*, is not free from doubt, I must conclude, with some reluctance, that the EEOC has not made a sufficiently strong case to warrant our overruling established precedent of long standing. As the majority notes, our obligation to adhere to the doctrines of stare decisis and precedent is especially strong when we are dealing with matters of statutory construction. That obligation is tempered somewhat by our obligation to reassess our work when a thoughtful divergence of opinion emerges from the other circuits. Upon examination of the case law to the contrary, however, I cannot say that those cases cast such a shadow on *Zimmerman* as to justify its overruling. This issue is one, however, that deserves definitive legislative attention. The ambiguity of the present situation ought to be clarified. The scope of Title VII ought to be the same in Boston and New Orleans as it is in Chicago.

95-1521 DEPT. OF STATE v. LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS INC.

Immigrant visa applications—Vietnamese applicants.

First ruling below (CA DC, 45 F.3d 469):

Department of State's interpretation and application of 22 CFR 42.61, which provides that, "[u]nless otherwise directed by the Department," alien applying for immigrant visa shall apply at consular office where he resides (or can remain physically present until application is processed), to allow department, under "unless otherwise directed" proviso, to cease processing Vietnamese immigrants in Hong Kong at consular office and require instead that they return to Vietnam for visa processing in accordance with Comprehensive Plan of Action adopted by nations in region, discriminates against Vietnamese immigrants on basis of their nationality in violation of Immigration and Nationality Act, which provides in 8 USC 1152(a) that "no person shall ... be discriminated against in the issuance of an immigrant visa because of the person's ... nationality ... or place of residence."

Second ruling below (CA DC, 2/2/96):

Because challenged policy is likely to be applied to individual plaintiff if her current application for immigrant visa is turned down, case is not moot, and thus government's petition for rehearing is denied.

Questions presented: (1) Does policy of U.S. Government not to accept immigrant visa applications from Vietnamese migrants who have been determined not to be refugees until they return to their country of origin violate 8 USC 1152(a)(1), which provides that no person shall be discriminated against in issuance of immigrant visa because of that person's nationality? (2) May court review decision not to process immigrant visa application based on consular venue considerations?

Petition for certiorari filed 3/21/96, by Drew S. Days III, Sol. Gen., Frank W. Hunger, Asst. Atty. Gen., Edwin S. Kneedler, Dpty. Sol. Gen., Paul R.Q. Wolfson, Asst. to Sol. Gen., and Michael J. Singer and Robert M. Loeb, Justice Dept. attys.

S.F. COUNSEL PRESSURING U.S. ON VIET REFUGEES

The Recorder
Tuesday, May 21, 1996
Keith Donoghue

One of the world's longtime migration hot spots, Southeast Asia, again burst onto the international scene earlier this month when Vietnamese refugees began rioting and breaking out of a Hong Kong detention compound.

The frustrations of the detainees have long been on the mind of one San Francisco lawyer in particular. Working with co-counsel in Washington, D.C., immigration attorney Robert Jobe has been pursuing several cases aimed at forcing the U.S. government to make haste in admitting Vietnamese detainees in Hong Kong who are eligible for U.S. visas.

In a no-holds-barred battle with the U.S. Department of State, Jobe has won some and lost some. But the most significant ruling in the case was a victory for the detainees: In February of last year, the D.C. Circuit U.S. Court of Appeals ruled that the American consul general in Hong Kong was unlawfully discriminating against Vietnamese on the basis of their nationality. The State Department has filed a petition for certiorari with the U.S. Supreme Court.

At issue in *U.S. Department of State v. Legal Assistance for Vietnamese Asylum Seekers* are procedures designed to encourage migrants who do not face persecution to return to Vietnam. Rather than help them find other avenues for entering the United States -- for example, through visas reserved for aliens with family ties in the country -- the counsel general in 1994 told applicants that their requests would be processed only in Vietnam.

In response, Jobe and three lawyers from the Washington, D.C., office of New York's Hughes Hubbard & Reed sued on behalf of a class of aliens who have U.S. relatives willing to sponsor them for entry visas. Jobe calls U.S. policy requiring these aliens to return to Vietnam "cruel."

"Those people have the right to leave [Hong Kong detention camps]," he says. "They want to come to this country; they have the right to come to this country."

The State Department maintains that its policy is a matter of diplomacy required by an international agreement designed to discourage waves of Vietnamese migration. As such, the department argues, it is entitled to deference from the courts. The department also maintains that American immigration policy toward Vietnamese migrants has been generous, citing a program through which 410,000 Vietnamese nationals have been resettled in the United States.

Although Jobe has won a favorable appellate ruling, his plaintiffs, who seek class certification, have to contend with a companion case that could spell trouble. In that case, after a U.S. district judge ordered the consul general in Hong Kong to process the visa applications of a number of detainees, the D.C. Circuit moved the appeal directly to the en banc court.

LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS; Thua Van Le; Em Van Vo; Thu Hoa Thi Dang; Truc Hoa Thi Vo, Appellants

v.

DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, et al., Appellees.

United States Court of Appeals, District of Columbia Circuit.
45 F.3d 469
Feb. 3, 1995

. . .SENTELLE, Circuit Judge:

This is an appeal from a grant of summary judgment by a not-for-profit corporation, Legal Assistance for Vietnamese Asylum Seekers, Inc. ("LAVAS"); two detained Vietnamese immigrants in Hong Kong; and their American citizen sponsors, against the United States Department of State and various government officials in their official capacities (collectively "the State Department" or "Department"). Appellants allege the State Department violated its own regulations as well as the Immigration and Nationality Act when refusing to process the visa applications of Vietnamese immigrants, who had not been screened in as political refugees, at the United States Consulate in Hong Kong. Because we find the district court erred in granting summary judgment in favor of appellees, we reverse and remand.

I. BACKGROUND

Since April 1975, when the North Vietnamese captured Saigon, large numbers of refugees have fled Vietnam to Hong Kong. Between June 1979 and June 1988, the treatment of these persons was guided by an informal agreement under which Hong Kong and other nations in the region committed themselves to granting temporary refuge in exchange for a commitment from the United States and other western countries to resettle these immigrants. As part of this agreement, the Hong Kong Government accorded these immigrants presumptive refugee status.

However, due to an increase in the number of persons fleeing Vietnam in the late 1980s, the Hong Kong Government announced it was revoking the presumptive refugee status of the Vietnamese immigrants as of June 15, 1988. Thereafter, all new arrivals would be detained and screened by local immigration authorities to determine whether they individually qualified for refugee status. In June 1989, this approach was adopted throughout the region in the form of a Comprehensive Plan of Action ("CPA"), a joint statement of policy also adopted by the United States. The CPA provides that asylum seekers who are screened out, that is those who do not qualify as refugees under the criteria established in the Refugee Convention, should return to Vietnam. Once returned, those eligible for immigrant visas may apply through the Orderly Departure Program, established to provide for the departure of Vietnamese directly from Vietnam to their resettlement destinations.

The United States permits Vietnamese immigrants, who have as sponsors close relatives who are United States citizens or permanent resident aliens in the United States, to enter as beneficiaries of immigrant visas under the criteria set forth in the Immigration and Nationality Act ("INA"). To obtain a visa, eligible Vietnamese immigrants and their sponsors must complete several steps. First, the sponsor must file a petition with the Immigration and Naturalization Service ("INS"). If the INS approves the petition, the Vietnamese applicant must complete and submit to the United States State Department an application for an immigrant visa. Third, the applicant must provide various documents to a United States consulate, and appear at the consulate for final processing of the visa application.

From June 1979 to April 1993, the State Department processed applications for Vietnamese boat people in Hong Kong at the United States consulate. Although the Department directed its posts in November 1991 to advise screened out applicants to return to Vietnam, the United States consulate in Hong Kong ignored this change in policy. The consulate continued to process the visa applications from screened out Vietnamese. To facilitate this processing, the Consulate General issued letters to the Hong Kong Government requesting that Vietnamese be made available for interviews at the consulate.

In April 1993, however, after an exchange of cables in which the United States consulate in Hong Kong argued it should be permitted to continue processing those immigrants who had been screened out, the Department specifically instructed the consulate to cease such activity. Applicants who had been screened

out were thus required to return to Vietnam for visa processing. The United States consulate officially informed the Hong Kong Government of the policy change on September 24, 1993.

On February 25, 1994, appellants brought this action against the State Department and various officials. Appellants sought declaratory and injunctive relief on behalf of a class of Vietnamese nationals desiring to be processed at the United States consulate in Hong Kong, yet who were instructed they would have to return to Vietnam for processing. Appellants also sought such relief on behalf of a class of sponsoring United States citizens and permanent residents who were related to the detained plaintiffs.

Appellants alleged that the State Department's change in policy was in violation of the INA and the regulations promulgated thereunder, the Administrative Procedure Act ("APA"), and the United States Constitution. Following a hearing consolidating appellants' application for a preliminary injunction with the trial of the action on its merits, the district court issued a final order on April 28, 1994, granting the State Department's motion for summary judgment and denying appellants' cross motion for summary judgment.

II. DISCUSSION

As a threshold issue, appellees contend all of the appellants lack standing to bring this action. The APA grants standing to any party who is "adversely affected or aggrieved by agency action within the meaning of a relevant statute." The party must suffer injury in fact, and the interest sought to be protected must arguably be within the zone of interests protected by the statute in question. We first address the issue of whether the sponsoring resident appellants possess standing. Appellants argue these plaintiffs suffer the requisite injury in fact and are within the zone of interest protected by the INA.

We agree. First, as to injury in fact, the State Department's conduct prolongs the separation of immediate family members. The detained appellants must either remain in Hong Kong, where they are denied the opportunity to be processed, or, if they are required first to return to Vietnam, their processing will be further delayed. We have previously found injury in fact where the plaintiffs were far less aggrieved than in the case at bar.

Second, the resident appellants are within the zone of interest protected by the INA. As the Supreme Court held in Clarke, the zone of interest test does not necessarily require a specific congressional purpose to benefit the would-be plaintiff. It is sufficient if the plaintiffs " 'establish that their particular interest[ ]' " falls within the area of interests Congress intended to protect. The INA authorizes the immigration of family members of United States citizens and permanent resident aliens. In originally enacting the INA, Congress "implement[ed] the underlying intention of our immigration laws regarding the preservation of the family unit." Given the nature and purpose of the statute, the resident appellants fall well within the zone of interest Congress intended to protect.

Appellees also contend that neither LAVAS nor the detained appellants in Hong Kong have standing. We need not reach this issue. If one party to an action has standing, a court need not decide the standing issue as to other parties when it makes no difference to the merits of the case.

We now turn to the merits of the appeal. Appellants allege the State Department's refusal to process the visas of the detained appellants in Hong Kong violates 22 C.F.R. § 42.61(a) of the Department's visa regulations. The regulation concerns the circumstances under which an immigrant seeking a visa can have his case processed in a given consular district. The parties dispute the proper interpretation of this regulation, but we need not construe the version of the regulation in effect at the time the dispute arose because it has been rendered moot by 1994 amendments to 22 C.F.R. § 42.61(a). Visa applicants have no vested right in the issuance of a visa. They are certainly not entitled to prospective relief based on a no longer effective version of a later amended regulation. It is the amended version which will now govern the admission of the detained Vietnamese, and it is that version we must construe: (a) Alien to apply in consular district of residence. Unless otherwise directed by the Department, an alien applying for an immigrant visa shall make application at the consular office having jurisdiction over the alien's place of residence; except that, unless otherwise directed by the Department, an alien physically present in an area but having no residence therein may make application at the consular office having jurisdiction over that area if the alien can establish that he or she will be able to remain in the area for the period required to process the application. . . .

Under this regulation, an alien desiring a visa shall apply at the consular office where he resides. Alternatively, an alien physically present in an area has the option of applying at the consular office having jurisdiction over that area if he satisfies a precondition. However, asserting its authority under the regulation to "direct otherwise," the Department has ceased processing Vietnamese immigrants in Hong Kong at the consular office. Nationals of other countries not subject to the CPA are still processed at the consular office.

Although appellees' regulation permits this differing treatment, appellants claim the discrimination violates 8 U.S.C. § 1152(a) of the INA. This section provides "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's . . . nationality . . . or place of residence." Appellants argue that the Department violated the statute in drawing an explicit distinction between Vietnamese nationals and nationals of other countries when refusing to process the visas of the screened out Vietnamese immigrants. Appellants assert this statute compels this court to invalidate any attempt to draw a distinction based on nationality in the issuance of visas. In contrast, appellees urge us to adopt the position that so long as they possess a rational basis for making the distinction, they are not in violation of the statute. Appellees maintain the goal of encouraging voluntary repatriation and the aims of the CPA certainly provide a rational basis for the practices and policies in question.

We agree with appellants' interpretation of the statute. Congress could hardly have chosen more explicit language. While we need not decide in the case before us whether the State Department could never justify an exception under the provision, such a justification, if possible at all, must be most compelling--perhaps a national emergency. We cannot rewrite a statutory provision which by its own terms provides no exceptions or qualifications simply on a preferred "rational basis."

Appellees rely on *Narenji v. Civiletti* for the proposition that their nationality-based discrimination passes muster under section 1152(a) as long as they possess a rational justification. In *Narenji*, we upheld an INS regulation requiring nonimmigrant alien students in the United States who were natives or citizens of Iran to report to an INS office to provide information concerning their nonimmigrant status. The INA delegated to the Attorney General the authority to prescribe conditions of admission to the United States for nonimmigrant aliens. The INA also authorized the Attorney General to order the deportation of any nonimmigrant alien who failed to comply with the conditions of his status. We held that a broad mandate of the INA delegating to the Attorney General the authority to prescribe conditions of admission to the United States on the part of nonimmigrant aliens authorized the Attorney General to draw distinctions among nonimmigrant aliens on the basis of nationality. We then examined whether the regulation violated the Constitution. In finding no violation, we stated that we would sustain classifications on the basis of nationality drawn by the Congress or the Executive in the immigration field, so long as they were not wholly irrational. Appellants argue that *Narenji* compels us to sustain the distinctions drawn in the present regulations.

Appellees' reliance on *Narenji* is misplaced. In that case the court was considering the power of the Immigration and Naturalization Service to promulgate nationality-based regulations and the constitutionality of such regulations if otherwise properly promulgated. Under constitutional standards we found no equal protection violation. The *Narenji* court did not consider the effect on the agency regulatory authority to make distinctions of a statute flatly forbidding nationality-based discrimination. Here the agency's nationality-based regulation runs athwart such a statute. The appellees' proffered statutory interpretation, leaving it fully possessed of all its constitutional power to make nationality-based distinctions, would render 8 U.S.C. § 1152(a) a virtual nullity.

Section 1152 is a part of the Immigration and Nationality Act. This is an act committed to the administration of the Immigration and Naturalization Service and we review its interpretations deferentially under the standard of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* Even under that standard the Service's present interpretation fails. Where Congress has unambiguously expressed its intent, we need go no further. Here, Congress has unambiguously directed that no nationality-based discrimination shall occur. There is no room for the Service's interpretation proffered by the Department.

Under the APA, this court is obligated to hold unlawful and set aside agency action found to be not in accordance with law. The interpretation and application of the regulation so as to discriminate against Vietnamese on the basis of their nationality is in violation of the Act, and therefore not in accordance with law.

The dissent's contention that the distinction drawn by the Department is the permissible line between legal and illegal immigrants as opposed to the impermissible nationality-based line between Vietnamese and non-Vietnamese illegal immigrants is simply not supported by the record. The case reaches us on appeal from summary judgment. At the summary judgment stage in the district court, the defendants expressly stated in their "Statement in Response to Plaintiffs' Statement of Material Facts as to which there is no Genuine Dispute," that "in approximately April, 1993, the Department changed its practice or policy relating to the processing of immigrant visa petitions of Vietnamese nationals residing illegally in Hong Kong." The Department has never contended here or in the district court that this change was made as to any other nationals than Vietnamese nationals nor that illegally present nationals of other countries would be treated

the same as illegally present Vietnamese nationals. We neither hold nor imply that any statute requires that the same treatment be afforded legal and illegal status.

III. CONCLUSION

Accordingly, we reverse the district court's grant of summary judgment in favor of appellees and remand the case for a disposition consistent with this opinion.

It is so ordered.

RANDOLPH, Circuit Judge, dissenting:

My objections to the majority opinion are, first, that the decision on the merits is in error, and second, that the prospect of mootness should have precluded any decision on the merits. I realize that discussing the issues in this sequence inverts the usual order. But the majority's mistake on the merits is the more serious in terms of lasting consequences and I shall therefore begin with it.

The British crown colony of Hong Kong is one of the most densely populated regions in the world. Within its tiny area, nearly six million people reside. Because of Hong Kong's proximity to Vietnam it has become one of the prime destinations for Vietnamese "boat people," more than 750,000 of whom have fled to the countries of Southeast Asia during the past nineteen years. After the fall of Saigon in 1975, the United States pressed "first asylum" countries such as Hong Kong to provide a safe haven for these people until they could be resettled elsewhere or returned to Vietnam. But as the years passed, the influx of boat people continued. Since June 1988, more than 71,000 individuals from Vietnam have arrived on Hong Kong's shores and wound up in its detention camps. In an effort to stem the tide and to relieve itself of the burdens imposed by this mass exodus, Hong Kong entered into a Comprehensive Plan of Action with fifty other nations, including the United States. Developed in 1989, the Plan governs the screening of asylum seekers and provides that those persons not recognized as "refugees" pursuant to international criteria--those who have been "screened out"--must return to Vietnam in order to seek resettlement in a third country.

For the moment, Hong Kong and the other "first asylum" countries are exercising forbearance. They are following a program of voluntary repatriation for those who have been "screened out." Hong Kong is, in other words, asking these people to depart voluntarily rather than forcibly expelling them, as it presumably has every right to do since they are there illegally. The head of the State Department's Bureau of Refugee Programs believes that it is "fundamentally important to the success" of the Comprehensive Plan that "Vietnamese in the camps have the clear perception that there is no alternative for the screened out but to return to Vietnam." "[A]nything that clouds that perception or gives birth to rumors that resettlement of the screened out is possible will reduce voluntary repatriation and create a situation in which resort to mandatory repatriation by first asylum governments is made more likely."

The potential repercussions of the majority's decision are, to say the least, disquieting. The flight of illegal aliens to Hong Kong and elsewhere has created an international crisis. Fifty nations have sought to avert the flood by stopping the flow. Not processing their visas in Hong Kong removes one of the reasons so many of these people are leaving their homeland and embarking on the dangerous journey across the South China Sea. Now the majority holds that it is illegal for the United States consular office in Hong Kong to abide by the Comprehensive Plan and refuse to process immigrant visas for Vietnamese boat people detained in the camps. Why? Because this is discrimination on the basis of nationality and 8 U.S.C. § 1152 provides, with certain exceptions, that "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."

But it is not nationality that precludes visa processing. The so-called "discrimination" the majority detects stems from the illegal status of the screened out boat people, rather than from the fact (if it is a fact) that they are all Vietnamese nationals. Compare two Vietnamese nationals in Hong Kong, one there illegally and currently living in a detention camp and the other there legally, perhaps working or on holiday. As implemented, the current regulation allows processing of the legal Vietnamese but not the illegal one. That is not discrimination on the basis of nationality, but discrimination on the basis of legality. And the statute does not forbid it. Still less is the State Department's current regulation a "nationality based regulation," as the majority supposes. The regulation reads: (a) Alien to apply in consular district of residence. Unless otherwise directed by the Department, an alien applying for an immigrant visa shall make application at the consular office having jurisdiction over the alien's place of residence; except that, unless otherwise directed by the Department, an alien physically present in an area but having no residence therein may make application at the consular office having jurisdiction over that area if the alien can establish that he or she will be able to remain in the area for the period required to process the application. . . . There is not a word here relating to an alien's nationality. Within the United States illegal aliens are treated far differently than

those who are legally here. It is beyond belief that distinguishing--that is, discriminating--among visa applicants on the same ground is forbidden. The regulation, through the words "unless otherwise directed," permits the State Department to make this distinction and section 1152 does not forbid it.

To show that the State Department was discriminating against the detainees because they were Vietnamese, the majority quotes a statement of the defendants and italicizes two words: "in approximately April, 1993, the Department changed its practice or policy relating to the processing of immigrant visa petitions of Vietnamese nationals residing illegally in Hong Kong." Consider the quotation again, this time without the distracting italics. It indicates that the State Department's policy dealt only with those Vietnamese "residing illegally in Hong Kong." That makes my point, not the majority's. Other Vietnamese in Hong Kong may be processed. What causes the difference in treatment? Not nationality, but the common sense international distinction between aliens who enter a country illegally and those who enter legally.

There may be room for an argument that the State Department will process other illegal immigrants--that is, other than the Hong Kong detainees--in foreign countries despite their illegal status, and therefore the Vietnamese boat people are being singled out because they are Vietnamese. But there is no evidence that this sort of thing is going on; and the regulation is so new that I doubt whether any world-wide customary practice under it can yet be discerned.

Given the profound consequences of judicial intervention and the danger that a decision might dismantle this carefully wrought international program designed to bring a humane and swift end to the continuing problem of illegal immigration, it is critical that we decide only what we have to decide. The majority has followed another course, which brings me to my second objection. Of the five plaintiffs, two are--or were--screened out Vietnamese residing in one of the Hong Kong camps. The oral argument in this case revealed that these alien-plaintiffs may have already been processed. Their preference numbers came up nearly a year ago. At the time of the district court's decision--April 1994--the State Department was still processing detainees whose visa applications were current, that is, those whose preference numbers had been reached. It therefore appears quite likely that the alien-plaintiffs are now in the United States. If they are, their two sponsors, who are also plaintiffs, have no further interest in the case. The case was never certified as a class action. The district court made no findings regarding the status of the alien-plaintiffs and neither the plaintiffs' nor the government's counsel at oral argument could say whether a live controversy still exists.

If the alien-plaintiffs have already received relief, the case could not be saved by qualifying as one capable of repetition but evading review. The capable of repetition part of the formulation means the complaining party is likely to be subjected to the same challenged activity in the future. We so held in *Christian Knights of the Ku Klux Klan v. District of Columbia.* If the individual Hong Kong plaintiffs already had their applications processed, they will not suffer the same fate in the future.

Without the aliens or their sponsors in the case, our deciding the merits would be warranted only if the remaining plaintiff, LAVAS, had standing, which it does not. The harm it alleges--a possible future strain on its resources--is general and speculative; and the organization is not within the zone of interest the statute was meant to protect.

The proper course therefore should have been to remand the case to the district court to make a finding whether the case is moot. We do not have to be entirely certain the case has become moot; if there is cause to believe it has met that fate, a remand is warranted. That is what the Supreme Court does when it encounters this sort of situation.

AGAINST DOCTOR-ASSISTED SUICIDE

Rush to a Lethal Judgement

The New York Times
Sunday, July 21, 1996
Stephen L. Carter

Many years ago, a psychiatrist who was treating someone I loved asked me to remember that she had the right to kill herself if she wanted to. Sometimes, he said softly, the decision to commit suicide is the decision of a rational mind, a reasonable if tragic answer to the question of whether life is worth continuing.

When he said "right," he did not, of course, mean constitutional right; he meant moral right, a part of human dignity. As long as her mind was sound, she had the right as an autonomous individual to decide whether to continue living. Her responsibilities to her loved ones and her community might have carried weight in the moral calculus, but the final decision had to be hers alone.

Although I saw the logic of his position then and see it now, the law has traditionally offered a rather different understanding. Suicide was a felony under England's common-law regime, and was illegal everywhere in the United States into this century. Some cynics have identified the age-old prohibition on suicide as a matter of royal selfishness -- at common law, if you committed a felony, your worldly goods went to the crown -- but the better answer is that the laws reflected a strong belief that the lives of individuals belonged not to themselves alone but to the communities in which they lived and to the God who gave them breath.

Nowadays, we have a broader notion of individual autonomy. Our laws increasingly reflect the belief that our lives do belong to us alone. Some anti-suicide statutes are still on the books, but today the societal distaste for suicide is registered through the civil, not the criminal, law: people who try suicide but do not succeed may be involuntarily hospitalized to determine whether they are continuing threats to themselves. So although we certainly try to prevent suicide, we no longer punish it.

There is one exception: most jurisdictions continue to treat the person who directly assists someone else's suicide as a felon. That is the basis, for example, of Michigan's prosecutions of the notorious "suicide doctor," Jack Kevorkian, who, as of this writing, has been involved in more than 30 suicides. Many a family harbors its secret story of indirect assistance -- leaving the bottle of sleeping pills within reach of the dying relative, for example -- but the reason for the secrecy in part has been the traditional view that assistance of any kind is at least immoral and often illegal.

In recent months, however, two Federal appellate courts have held that terminally ill patients have a constitutional right to seek the assistance of physicians in ending their lives. With the entire dispute plainly on its way to the Supreme Court anyway, opponents and supporters of what has come to be called the "right to die" are even now battling their way through the implications. The moral questions raised by assisted suicide are weighty, but our ability as a society to deal with them has been seriously weakened by the judicial rush to enshrine one side's moral answer in the framework of constitutional rights.

The two cases presented the same basic question, but the courts dealt with it in very different ways. In March, the Court of Appeals for the Ninth Circuit, based in San Francisco, decided the case of *Compassion in Dying v. State of Washington*, resting the right to assisted suicide for the terminally ill on the due process clause of the 14th Amendment, the same provision in which the courts have located the abortion right. The right to choose how to end one's own life, the court explained, was a direct descendant of the right to choose whether to bear a child, and, as with abortion, the state must have a very strong reason before it may interfere.

Then, less than a month later, the Second Circuit struck down New York's assisted-suicide ban in the case of *Quill v. Vacco*. The Second Circuit rejected the due process argument, pointing out that the United States Supreme Court has limited that approach to cases in which the state is interfering with a fundamental liberty "deeply rooted in this Nation's history and tradition," like the freedom to marry or procreate. The right to obtain assistance in suicide, the court sensibly concluded, does not fit this definition. But the *Quill* court found a rationale of its own: the right to assisted suicide is supported, said the judges, by another part of the 14th Amendment -- the equal protection clause. Why? Because New York allows mentally competent terminally ill patients on life support to direct the removal of the supporting apparatus, even when the removal will hasten or directly cause their deaths, but prohibits those who do not need life support from obtaining drugs to hasten or directly cause their deaths. So the state is discriminating, in the court's terms, by allowing some of the terminally ill, but not others, to die quickly.

The logic of *Quill*, although more attractive than that of *Compassion in Dying*, seems terribly forced, not least because the state allows many other distinctions among the terminally ill -- for example, wealthier patients often have access to experimental drugs and therapies that others do not. These distinctions may not always seem sensible or fair but they hardly rise to the level of constitutional concern.

And there is a larger analytical problem with both decisions. If the right to choose suicide with the help of a physician is of constitutional dimension, it is difficult to discern how it can be limited to those who are terminally ill. Terminal illness is not a legal category -- it is a medical category, and one that even doctors sometimes have trouble defining. Some of us who teach constitutional law -- the old-fashioned types, I suppose -- still tell our students that constitutional rights arise by virtue of citizenship, not circumstance. This implies that each of us (each who is a competent adult, at least) possesses an identical set of rights. So if there is indeed a constitutional right to suicide, assisted or not, it must attach to all citizens.

If the right to pursue assistance in suicide attaches to all citizens, then the Constitution is at present being violated by all the state laws permitting the involuntary hospitalization of individuals who try suicide. Instead of locking them up, we should be asking them if they would like assistance in their task. In fact, the Second Circuit has matters precisely backward: if everybody except the terminally ill were allowed to seek the assistance of physicians in suicide, the equal protection claim might have merit. If, on the other hand, the terminally ill are allowed to seek suicide, the court's concern for equality might suggest that everybody should be allowed to do it, lest the state discriminate between two groups who want to die, those who desire to commit suicide because they are terminally ill and those who desire to commit suicide because they are dreadfully unhappy.

Except in emergencies, a court decision is the worst way to resolve a moral dilemma. Constitutional rights, as they mature, have a nagging habit of bursting from the analytical confinements in which they are spawned. When the Supreme Court struck down organized classroom prayer in 1962, nobody other than a few opponents of the rulings, dismissed as cranks, envisioned a future in which courts would order traditional religious language and symbols stripped from official buildings and state seals. And did the justices who voted to legalize abortion in 1973 really imagine that two decades later, the United States would be home to 1.5 million abortions a year?

In the case of the right to assisted suicide, the risks are many. For example, it is far from obvious that the right can be limited to adults. The abortion right isn't. The Supreme Court has ruled that pregnant minors must be allowed to demonstrate to a judge that they are mature enough to make up their own minds about abortion. It does not take much of a stretch to imagine a judge concluding that a young person mature enough to decide that a child should not come into the world is also mature enough to decide that her (or his) own life is not worth living.

And there are other, more ominous difficulties. Some worried medical ethicists have predicted that a right to assisted suicide might lead exhausted families to encourage terminally ill relatives to kill themselves. Moreover, women are more likely than men to try suicide, but men succeed much more often than women. With the help of health care workers, women, too, might begin to succeed at a high rate. Is this form of gender equality what we are looking for?

But the biggest problem with the idea of a constitutional right to assisted suicide is that the courts (if the decisions stand) are pre-empting a moral debate that is, for most Americans, just beginning. To criticize the constitutional foundation for the recent decisions is not at all to suggest that the policy questions are easy ones. There are strong, thoughtful voices -- and plausible moral arguments -- on both sides of the assisted-suicide debate, as there are in the larger euthanasia debate. The questions are vital ones: Do our mortal lives belong to us alone or do they belong to the communities or families in which we are embedded? Will this new right give the dying a greater sense of control over their circumstances, or will it weaken our respect for life?

These are, as I said, weighty questions, and the policy arguments on either side are the stuff of which public political and moral debates are made. And a thoughtful, well-reasoned debate over assisted suicide is precisely what we as a nation need; we do not need judicial intervention to put a decisive end to a conversation that we as a people have scarcely begun. Because the arguments on both sides carry such strong moral plausibility -- and because the claim of constitutional right is anything but compelling -- the questions should be answered through popular debate and perhaps legislation, not through legal briefs and litigation. In an ideal world, the Supreme Court would swiftly overturn *Quill* and *Compassion in Dying*, allowing the rest of us the space and time for the moral reflection that the issue demands.

APPEALS COURT WON'T REVIEW SUICIDE RULING

Decision Allowing Doctor-Assisted Deaths in Eight States Stands

Washington Officials Plan Appeal to Supreme Court

Los Angeles Times
Thursday, June 13, 1996
Henry Weinstein, Times Legal Affairs Writer

Despite two blistering dissents, a federal appeals court in San Francisco on Wednesday declined to review its landmark decision holding that mentally competent, terminally ill adults have a constitutional right to hasten their deaths with the assistance of a physician.

The action by the U.S. 9th Circuit Court of Appeals clears the way for the state of Washington to move forward with its effort to get the U.S. Supreme Court to review the controversial March 6 decision. Washington Atty. Gen. Christine Gregoire had announced earlier that she would go to the Supreme Court, but that process was delayed after a 9th Circuit judge asked that all 24 active 9th Circuit judges review the decision in *Compassion in Dying vs. Washington*.

The March decision held, by an 8-3 vote, that Washington's law making physician-assisted suicide a felony is a denial of due process of law under the 14th Amendment to the federal Constitution.

The ruling, written by Los Angeles Appellate Judge Stephen Reinhardt, effectively struck down similar statutes in seven other Western states that are part of the 9th Circuit. On Wednesday, two conservative appellate judges lambasted the majority in the earlier decision for creating a new constitutional right without any justification.

"No magician--not David Copperfield, not even Harry Houdini--can produce a rabbit from a hat unless the rabbit is in the hat to begin with," wrote Judge Stephen S. Trott of Idaho.

"With all respect," Trott's dissent said, Reinhardt, "has in fact succeeded in pulling a nonexistent liberty interest out of thin constitutional air, a liberty interest that does not exist in the document itself."

Reinhardt's analysis relied heavily on language drawn from U.S. Supreme Court abortion cases because the issues have "compelling similarities," he wrote.

Trott emphasized that the significance of the case "has far more to do with our role and power as federal judges than with the merits or desirability of physician-assisted suicide. The issue most deserving of attention is whether we have exceeded our lawful interpretive power to remind the democratic process what it can and cannot do."

Along the same line, Judge Diarmuid F. O'Scannlain of Oregon noted that in 1991 Washington residents rejected an initiative legalizing physician-assisted suicide.

O'Scannlain also chastised the majority of his colleagues for declining to reconsider the decision. "By our failure to convene the full court to rehear this case, a mere one-third of the 24 active judges eligible to vote has been empowered to strike down criminal laws, not just in Washington," but also in Alaska, Arizona, California, Hawaii, Idaho, Montana and Nevada, he wrote.

The March decision reinstated a 1994 ruling by U.S. District Judge Barbara Rothstein in Seattle. She agreed with the contentions of four physicians and Compassion in Dying, a nonprofit organization that provides support and counseling to terminally ill adults considering suicide, that Washington's law making assisted suicide a felony imposed an undue burden on people seeking to hasten their death with the help of a doctor. Her decision was overruled 2 to 1 by the 9th Circuit Court of Appeal, setting the stage for the later 8-3 decision.

Initial appeals of a federal trial judge's decisions are heard by three-judge panels. If a majority of the judges of a circuit agree to do so, a panel decision can be reviewed by all the judges in the circuit. However, the 9th Circuit, the largest in the nation, has a different procedure. Since the 9th Circuit was expanded from 13 to 23 judges in 1979, the court has been authorized to have 11-judge panels hold en banc reviews.

The circuit's judges grant en banc review to only a minuscule number of cases--about a dozen out of 4,500 cases a year--according to Cathy Catterson, the court's chief clerk.

Moreover, this case marked only the third time there had been a request for a review by all the circuit's judges, and none of those requests has been granted. Because of the way such issues are handled, there is no written opinion explaining why the majority of 9th Circuit judges declined further review.

However, USC constitutional law professor Erwin Chemerinsky said he thought Wednesday's decision "is much more about procedure than substance. Even judges who may disagree with the March ruling don't want to create the precedent of the entire court sitting as a whole. Otherwise, you wouldn't have finality after an en banc ruling because there would be the possibility of another hearing."

To buttress his point, Chemerinsky noted that Judge Robert Beezer of Seattle, who wrote the lead dissent to Reinhardt's opinion, did not dissent on Wednesday, nor did Judge John Noonan of San Francisco, who authored the original 9th Circuit opinion upholding Washington's law. Chemerinsky also noted that since there is a high likelihood that the U.S. Supreme Court will take the case, several 9th Circuit judges probably thought further review by the circuit would be "needless work." Washington's initial brief to the Supreme Court is due July 5.

COLLEGES LOSE BIG RACE CASE

The Sacramento Bee
Tuesday, July 2, 1996
Aaron Epstein, Knight-Ridder Newspapers

Leaving legal clouds over the future of affirmative action in higher education, the Supreme Court on Monday allowed public colleges and universities in three Southern states to be barred from considering race or national origin in student admissions.

The justices, refusing to hear objections from the Clinton administration and 10 states, left intact a New Orleans federal appeals court's ruling in March that the University of Texas Law School's affirmative action program amounted to unconstitutional discrimination against whites.

But because the court didn't issue a ruling of its own, it left no nationwide guidance on the current validity of its 1978 conclusion in the landmark *Bakke* case that colleges could consider race as one of many factors in an effort to obtain a diverse student body.

The *Bakke* case has set the standard for affirmative action in higher education. Allan Bakke, who is white, sued the University of California after he was denied admission to the UC Davis Medical School in 1973 and 1974. The court ordered Bakke admitted and ruled that strict racial quotas in admissions were unconstitutional. But the court also ruled that an applicant's racial or ethnic background could be one among many considerations in admissions.

The Texas law school program, aimed at increasing the enrollment of African Americans and Latinos, was invalidated in Texas, Louisiana and Mississippi by a panel of the U.S. 5th Circuit Court of Appeals, which said *Bakke* was no longer valid law. That decision was unique among federal appeals courts.

As a result of the Supreme Court's refusal to intervene, the appeals court ruling is certain to be cited in support of efforts to scrap similar affirmative action programs beyond the three states.

Last July, the UC Board of Regents banned using race as a criterion in admissions. A race-neutral admissions system will be phased in, beginning with professional and graduate programs next year, and will be fully in place for the 1998 freshman class.

The appeals court decision goes even further than the regents' ban, UC officials said Monday. UC lawyers said the ruling appeared to call into question UC's extensive network of recruitment and counseling programs in the state's high schools aimed at boosting college eligibility among African Americans and Latinos. The appeals court said that building a racially diverse student body is not a constitutionally permissible goal. The UC regents, in banning racially based affirmative action, upheld diversity as a legitimate university goal.

Ward Connerly, chairman of the California Civil Rights Initiative, the anti-affirmative action measure on the state's November ballot, said: "The court, in effect, has endorsed the lower court's ruling. We are witnessing the end of an era. There now can be no argument that racial and gender preferences in government programs are unconstitutional."

But Theodore Shaw of the NAACP Legal Defense and Educational Fund said he did not expect a similar affirmative action case to reach the high court soon. Meanwhile, "affirmative action, while still under siege, is alive."

The justices' action leaves the nation with no uniform, nationwide answer to some fundamental constitutional questions on affirmative action in higher education: Can race or national origin be considered in public college admissions? Is diversity of the student body a sufficiently important governmental goal to justify such affirmative action?

Justice Ruth Bader Ginsburg, joined by David Souter, acknowledged that the issue was "of great national importance." However, she said the disputed affirmative action program at the University of Texas Law School had been discontinued and replaced, leaving the justices with no current dispute to review. "This court . . . reviews judgments, not opinions," Ginsburg wrote. "Accordingly, we must await a final judgment on a program genuinely in controversy before addressing the important question" raised in the case, *Texas vs. Hopwood.*

The lead plaintiff was Cheryl Hopwood, a white graduate of California State University, Sacramento, who was rejected for admission to the University of Texas law school. Hopwood, a white working mother who is raising a severely disabled daughter, was turned down in 1992 despite her high college grades and law school admissions test score.

Hopwood and three rejected white male applicants filed a suit that was dubbed "*Bakke II*." They said they were victims of an affirmative action program that gave preferences to African Americans and Latinos who had lower academic qualifications than theirs.

(Bee staff writer James Richardson and The Bee Capitol Bureau contributed to this report.)

TEXAS HIT HARD BY HOPWOOD DECISION

State Moves Fast While Mississippi, Louisiana Hold Back on Affirmative Action Changes

Austin American-Statesman
Thursday, July 11, 1996
Mary Ann Roser

Of the three states that must live under a court decision ending university affirmative action programs, Texas is undergoing the greatest upheaval and appears to be the biggest loser.

While Louisiana and Mississippi are still discussing what changes, if any, might be required now that the Supreme Court has refused to hear the so-called Hopwood case, Texas has been quick to react.

Some critics, including Al Kauffman, a senior attorney for the Mexican American Legal Defense and Educational Fund, say Texas has "gone too far too quickly."

Despite that, Attorney General Dan Morales advised last week that no college or university in Texas, public or private, can take race into account when admitting students or awarding scholarships, fellowships or other financial aid -- common strategies for attracting minorities to diversify campuses.

Neither Louisiana nor Mississippi has made any such declarations. Lawyers and higher education officials in both states said they are still studying Hopwood and might -- or might not -- make adjustments. Both states are operating under previous legal agreements and appear to have fewer race-based programs than Texas.

"We're moving much more cautiously," said William Jenkins, Louisiana State University provost. "... Until directed otherwise, we are going to leave everything in place as it is."

All three states fall under the jurisdiction of the 5th U.S. Circuit Court of Appeals, which in March forbid universities from considering race when admitting students. The ruling was in a reverse discrimination lawsuit filed by four white students denied admission to the University of Texas School of Law in 1992. It thrust Texas into chaos at a time when fall enrollment decisions were being made. UT and other Texas schools temporarily suspended race-based admissions and financial aid awards. Mississippi and Louisiana, however, adopted a "wait and see" posture.

CASE'S IMPACT ON LOUISIANA

When the Supreme Court issued its surprise decision July 1 not to hear *Hopwood*, Morales advised that the ruling covered financial aid as well as admissions. Officials in the other two states, as well as some groups in Texas, aren't so sure.

LSU and other Louisiana institutions are following a 1994 settlement in a desegregation case that requires fellowships for minority graduate students and pours more money into facility improvements at predominantly black schools. The settlement was worked out by a 5th Circuit judge. "We're under the 5th Circuit decree to do what we're doing. That's our problem," Jenkins said. *Hopwood* is "a Catch-22 for us."

Lawyers are still studying the ruling, and no decisions have been made, LSU Chancellor William E. Davis said. If changes are required, it "could have serious implications for affirmative action programs in higher education," he said.

Eamon Kelly, president of Tulane University in New Orleans, a private institution, said the *Hopwood* decision could put schools in the three states at a competitive disadvantage for attracting minorities. Tulane takes race into account in some admissions decisions but is waiting for lawyers to complete a review before changing anything, Kelly said. As far as minority financial aid awards go, "I'm not sure we have any," but "I don't believe *Hopwood* covers scholarships or fellowships," he said. Kelly added, however, that the same legal reasoning would likely apply to financial aid, thus opening the door to future lawsuits.

CASE'S IMPACT ON MISSISSIPPI

In Mississippi, the *Hopwood* decision appears to be having the least impact --for now. "It would have had more impact had Mississippi not already been through a major case involving admissions standards at all the public universities," said Mississippi State University President Donald Zacharias. The school is reviewing its scholarships but has reached no conclusions. "I don't anticipate that there will be any significant impact on us," Zacharias said.

Based on a 1995 ruling, now under appeal, each of Mississippi's eight public universities must have the same admissions standards in place this fall. Improvements also must be made at the three historically black institutions to wipe out vestiges of segregation. Officials at the black schools have

expressed concerns that, because they must raise standards to the same level as the white schools, their enrollments will drop. Some adjustments might be necessary, they said.

In addition, professional schools, such as medicine and law, are reviewing programs designed to attract minorities, officials said. "We're going to examine it on a case-by-case basis," said Lloyd Arnold, a special assistant attorney general assigned to the Board of Trustees of State Institutions of Higher Learning.

CHALLENGES AHEAD FOR UT

Asked if Texas was too quick to advise against minority scholarships and fellowships, as some Texas civil rights groups have argued, UT System Vice Chancellor and General Counsel Ray Farabee said no. Two other suits filed since *Hopwood* challenge minority financial aid programs. "It would be very difficult for a lawyer to counsel his clients in any way other than to avoid using race as a basis in making fellowship and other financial aid awards," he said.

At the same time, it might be possible for private groups and individuals to make scholarship awards to minorities -- so long as UT is not involved. That issue is under review, Farabee said. "We also are honoring multi-year scholarships and fellowships" previously pledged to minority students, he added.

HIGH COURT PUTS UT AT A DISADVANTAGE

Public Forum - What They're Saying . . .

About the Supreme Court and Hopwood vs. UT Law School

Austin American-Statesman
Wednesday, July 3, 1996
Sanford Levinson

Every competent lawyer knows that a decision of the Supreme Court not to review a case is not a decision on the merits. Thus it is simply wrong to say that the court, in deciding not to hear the *Hopwood* case, had "upheld" the 5th Circuit Court's decision.

All one can confidently say is that the justices decided that the case did not present the best vehicle for deciding what the national law should be regarding affirmative action in higher education. Thus *Hopwood* has no legal effect at all outside the boundaries of the 5th Circuit (Texas, Louisiana and Mississippi). One can argue that its effect is limited to the University of Texas law school, given that no other school was part of the litigation.

The panicked responses of university authorities following the original decision in April and again Monday, after announcement of the Supreme Court's nondecision, demonstrate that competent lawyers view *Hopwood* as requiring drastic changes in the admissions process of the university. These could go so far as to include, perhaps, a complete blindness to the racial or ethnic status of applicants -- except for the possibly nonexistent circumstances in which the University itself had discriminated against members of the group in question.

But educational institutions in the 47 states outside the 5th Circuit can also rely on an opinion by Justices Ruth Bader Ginsburg and David Souter stating that the court's decision was based only on the fact that the 1992 admissions process under which Cheryl Hopwood was denied admission was no longer being defended by the university. There was, therefore, no longer any live controversy before the court. Surely they realized that their brief opinion would encourage most educational institutions to continue their own race-sensitive admissions programs, whatever onsome uniform national rule.

As a practical matter, university will be under an extreme disadvantage --at least until the Supreme Court decides what it wishes to say -- in competing for talented members of minority groups who might, nonetheless, be unable to gain admission in a completely "race-" or "ethnicity-blind" process. To the extent that *Hopwood* will be construed as applying to faculty hiring as well, then the disadvantages to the university will be even greater.

Whatever else one might say about affirmative action in general, no rational person can believe it makes sense that UT is forced to play under one set of rules while peer universities in Virginia, Michigan, North Carolina and elsewhere are free to play under different rules. Yet this is one of the most dramatic consequence of the Supreme Court's inaction.

Will the adoption of "race-neutral" admissions or hiring procedures change the actual composition of the student body or faculty? Who could really believe that the answer is no? No one has plausibly argued that abolishing affirmative action would in fact have no consequences. Indeed, this is one of the few things that both supporters and opponents of affirmative action agree on.

Perhaps some believe that affirmative action is so bad, as a matter of social justice, that it is worth paying the cost of UT having a substantially all-white law school, the most likely result of adherence to the 5th Circuit's commands.

I disagree, but at least the argument is squarely joined. To deny, however, that *Hopwood* is a blow to the hopes of many (though surely not all) African Americans or Mexican Americans to attend or teach at the university and, just as important, that it is a potentially devastating blow to UT's attempts to achieve the genuine goods produced by diversity within its student body and faculty is to raise questions about one's capacity to tell elemental truths.

(Levinson holds the W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law at the University of Texas School of Law.)

DUCKING ON AFFIRMATIVE ACTION

The New York Times
Wednesday, July 3, 1996

In a hurtful blow to affirmative action in higher education, the Supreme Court said on Monday that it would not hear an appeal by the state of Texas from a lower court ruling that barred public universities from using race as a factor in selecting students. With this sidestepping, the Court left officials in at least three Southern states who are working to open educational opportunities for minorities in an untenable state of uncertainty. It also sowed confusion nationwide -- hardly an uplifting way for the Court to finish its term and head into recess. The Court should instead have seized the opportunity to reject the lower court's flawed pronouncement and reaffirmed its historic commitment to carefully designed affirmative action.

The high court seemed insensitive to the long history of racism at the University of Texas Law School, whose affirmative action program was challenged by rejected white applicants, giving rise to the case. As late as 1971, the law school admitted no black students. The Court also ignored the Clinton Justice Department, which filed a brief warning that the "practical effect" of the lower court's holding "will be to return the most prestigious institutions within state university systems to their former 'white' status."

The refusal to hear the case left standing a ruling by the United States Court of Appeals for the Fifth Circuit that caused justifiable consternation in the academic world three months ago. An appellate panel invalidated a special admissions program at the Texas law school aimed at increasing the number of black and Mexican-American students. In doing so, the panel took the gratuitous, additional step of declaring the Supreme Court's landmark 1978 affirmative action decision in the so-called *Bakke* case no longer good law. That case, involving a suit by a rejected white applicant who sought entry to a California state medical school, resulted in a ruling that barred the use of quotas in affirmative action plans but permitted universities to use race as a factor in choosing among applicants to serve the "compelling interest" of creating a diverse student body.

If *Bakke* is no longer good law, it is for the Supreme Court to declare. But instead of grabbing the case to reassert *Bakke*'s sound principle, the justices found a way out in the odd posture of the case. In an unusual one-paragraph opinion that was also signed by Justice David Souter, Justice Ruth Bader Ginsburg said that the Court was denying review because the case did not actually present a live controversy. The kind of two-track admissions system that inspired the legal challenge is no longer used or defended by Texas, she explained. Like most other colleges and universities, the University of Texas Law School now uses a single applicant pool, in which race is one factor to be considered among others in choosing among the qualified.

Justice Ginsburg's message, a welcome one, was that the Court's refusal to hear the case should not be read as an endorsement of the Fifth Circuit's analysis. But, in fact, there was a remaining live controversy before the Court in the Fifth Circuit's direction to a state's leading law school to completely exclude race as a factor in future admissions. The shame is the Court declined to address it.

Instead, the Court left behind a mess. Its refusal to hear the case has put educational institutions in the three states that make up the Fifth Circuit -- Texas, Louisiana and Mississippi -- in a terrible spot. They could face punitive damages if they fail to change their practices to conform to an ill-considered ruling that may ultimately be judged an incorrect statement of the law.

Nervous educators elsewhere in the nation can find some comfort at least in Justice Ginsburg's benign explanation. Eventually, this equal rights battle will find its way back to the Supreme Court. Meanwhile, it is premature to give up on affirmative action programs still needed to blot out historic racial bias and promote educational diversity.

JUSTICES DECLINE TO HEAR CAMPUS DIVERSITY CASE

Ruling Against Race-Based Admissions Stands

The Washington Post
Tuesday, July 2, 1996
Joan Biskupic

The Supreme Court yesterday let stand a lower court ruling that public universities may not in most circumstances consider a student's race as a factor in admissions decisions. By refusing to hear the high-profile case, the justices passed up an opportunity to resolve the uncertainty and turmoil surrounding affirmative action on the nation's campuses.

With no recorded dissent, the justices turned down the University of Texas's appeal of a decision rejecting a law school affirmative action plan intended to build up enrollment of blacks and Mexican Americans.

Texas officials and the Clinton administration had urged the court to use the case to rule that public officials have a compelling interest in making sure state-run universities have a diverse student body. But yesterday's action produces no new clarity for affirmative action policies nationwide, and instead, college administrators said, it confounds the legal landscape.

The order casts doubt on all affirmative action programs in Texas, Louisiana and Mississippi -- the three states covered by the 5th U.S. Circuit Court of Appeals, which last March said universities could not justify affirmative action policies based on the benefits of racial diversity. The appeals court said the Texas law school's policy of giving preference to minority applicants violated the Constitution's equal protection guarantee.

Two justices yesterday suggested that the court's refusal to review that ruling was based on procedural grounds and should not be interpreted as a sign of how the high court eventually would rule on whether it is constitutional for colleges nationwide to use race in deciding whom to admit.

"Whether it is constitutional for a public college or graduate school to use race or national origin as a factor in its admissions process is an issue of great national importance," Justice Ruth Bader Ginsburg wrote in a statement signed by Justice David H. Souter.". . . [W]e must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition."

Ginsburg observed that the 1992 admissions policy challenged by a group of rejected white students had since been replaced. None of the other justices issued a public comment suggesting their reasons for refusing to review the case of *Texas v. Hopwood*.

While the high court in recent years has struck down race-based policies in government contracting and congressional voting districts, it has yet to revisit a landmark 1978 case standing for the proposition that universities have a compelling interest in educational diversity that justifies race preferences in admissions.

College administrators contacted yesterday said they believe they are still bound by the high court's 1978 decision, *Regents of the University of California v. Bakke*, endorsing racial diversity.

David Merkowitz, a spokesman for the American Council on Education, the nation's largest coalition of colleges and universities, said yesterday's action "creates another level of uncertainty" for colleges torn over affirmative action. "We would hope that universities take this for what it is -- a non-decision," Merkowitz said. "We're telling them to stay the course."

Yesterday's action marked the second time in two years that the justices had refused to review a lower court rejection of a college affirmative action policy. Last term, the justices let stand a 4th U.S. Court of Appeals ruling dismantling a University of Maryland scholarship program exclusively for blacks.

In the Texas case, the 5th Circuit said the high court's 1978 ruling allowing affirmative action based on the goal of racial diversity had been superseded by more recent high court decisions against race-based policies in other areas. The appeals court said an affirmative action plan would meet court standards only if it was narrowly drawn to remedy the present effects of past discrimination at a particular institution. That is a tough standard to meet.

"To believe that a person's race controls his point of view is to stereotype him" the 5th Circuit panel said, concluding, "the law school may not use race as a factor in law school admissions."

Yesterday the Supreme Court neither endorsed nor rejected that view. Ginsburg intimated that the 5th Circuit's statement that diversity never can justify using race in admissions was not squarely before the court and that the appeals court decision

officially reflected only a judgment against a now-defunct policy.

Texas officials "challenge the rationale relied on by the Court of Appeals," Ginsburg said. "This court, however, reviews judgments, not opinions." She said the judgment of the lower court was that the particular admissions procedures used in 1992 -- evaluating white and minority applicants on two separate tracks and setting lower test score standards for minority applicants -- were unconstitutional.

The law school has since replaced that program with a policy that considers race with several personal factors unique to a student. That policy has never been subject to challenge.

Theodore B. Olson, who represented Cheryl J. Hopwood and other white students who challenged the Texas policy, asserted yesterday that public colleges in Texas, Louisiana and Mississippi must abide by the appeals court ruling.

He said he considered the statement by Ginsburg, who has voted in the past for race-based remedies, "an effort to put a good face on things."

"What the 5th Circuit said is clear: If the law school continues to operate a disguised or overt program based on race, [school officials] will be subject to damages" to compensate students who were improperly turned down, Olson said.

Officials at Louisiana State University said the high court's order eventually could undercut affirmative action. But Raymond Lamonica, vice chancellor and professor at LSU law school, said yesterday the school would continue to use a policy of admitting some African American students with below-standard test scores, under the terms of a lower court order in a race-discrimination lawsuit against Louisiana's higher education system.

Texas Attorney General Dan Morales said in a statement that UT's law school would continue its new program that makes race one of many considerations in the application process. "Cultural, ethnic and racial diversity in an academic or any other environment benefits all," Morales said. "Our universities should strive for such diversity. However, as I have consistently indicated, it is simply wrong to give one applicant an automatic advantage over another applicant, based solely upon the color of one's skin."

(Staff writer Rene Sanchez contributed to this report.)