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# THE RISE AND FALL OF SUPREME COURT CONCERN FOR RACIAL MINORITIES

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\* David C. Baum Professor, University of Illinois College of Law. The author thanks Greg Jordan, who was then a second-year student at the College of Law, for assistance with the research for this Article, and Ms. Ruth Manint, for her assistance with the preparation of this manuscript.

This Article was written in connection with "Confronting the Promise," a conference honoring the fortieth anniversary of the Supreme Court's decision in *Brown v. Board of Education*. The conference, which was sponsored by the Howard University School of Law and the Institute of Bill of Rights Law of the College of William and Mary, was held on May 17, 1994. I added two footnotes after I completed the original Article: note 169 refers to Supreme Court decisions rendered after the conference, but before the end of the October 1993 Term. I did not make any other attempts to update the Article. Thus, I have not included references to the published versions of the Senate Judiciary Committee hearings regarding Justice Ginsburg's confirmation. I inserted the name of Justice Breyer at several places in the Article in which I had originally used the phrase "whomever is appointed to replace Justice Blackmun." I did not make any attempt to predict how Justice Breyer might vote in, or affect, future Supreme Court decisions involving racial minorities. But I must express here my hope that Judge Breyer's opinion in *Latino Political Action Comm., Inc. v. City of Boston*, 784 F.2d 409 (1st Cir. 1986), in which he took what I would describe as a Rehnquist Court like view of the Voting Rights Act even before the Supreme Court had forced the lower federal courts to do so, is not indicative of how he will vote in Supreme Court cases that involve the interests of minority race voters.

Although one would never guess it by the number of footnotes in this Article, I really hate footnotes. I made that point in John E. Nowak, *Woe Unto You, Law Reviews!*, 27 ARIZ. L. REV. 317 (1985). I swiped that title from one of my heroes, the late Professor Fred Rodell. Unlike Professor Rodell, I do not have the courage of my convictions, and I will give citations to what I believe are relevant authorities throughout this Article. [Editors' & Author's Note: In addition, the editors added 250 footnotes.] The notes, however, contain little of substance. They primarily will be citations to Senate confirmation hearings, cases, and law review articles that arguably support a point I have made in the text. The reader need not read any of the notes to evaluate the substantive arguments presented in this Article. I take some solace in the fact that Judge Abner Mikva, a former student of Professor Rodell's, as well as a noted scholar and jurist, has also made some accommodation to the need to use notes to support statements in law reviews today. Because Judge Mikva is a person of more character than myself, he has made less of a departure from Professor Rodell's approach to legal writing than I have. Compare Abner J. Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647 (1985) (arguing against the importance of footnotes in legal writing) with Abner J. Mikva & Jeff Bleich, *When Congress Overrules the Court*, 79 CAL. L. REV. 729 (1991) (recognizing the usefulness of footnotes

## I. INTRODUCTION

Let me tell you a story about the Supreme Court and racial minorities. No, I am not going to tell you a story about real or fictional persons whose experiences make a point about the oppression of racial minorities in our society. I wish that I could tell that kind of story, but I lack the ability and the background of scholars who are associated with the critical legal studies movement or who can bring race consciousness to their writing. Those scholars might be able to tell you that kind of story.<sup>1</sup> In-

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only as means of citation).

1. Professor Jerome Culp, an author in this Symposium, previously has given us an insightful analysis of the problems encountered by scholars who use storytelling to explain aspects of racial discrimination in our society, and he cites many authors who use forms of storytelling in their scholarship. See Jerome M. Culp, Jr., *You Can Take Them to Water but You Can't Make Them Drink: Black Legal Scholarship and White Legal Scholars*, 1992 U. ILL. L. REV. 1021. This Article was in a symposium on race consciousness and legal scholarship, which offers the reader an introduction to critical race studies and race conscious legal scholarship. See Symposium, *Race Consciousness and Legal Scholarship*, 1992 U. ILL. L. REV. 945; Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993); see also Symposium—*Legal Storytelling*, 87 MICH. L. REV. 2073 (1989). For a critique of the use of storytelling in legal scholarship see Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993). Compare William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 644 (1994) (stating that questions of narrative jurisprudence are not just about technical issues of standards in legal scholarship) with Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflection on Scholarship and Truth*, 46 STAN. L. REV. 647 (1994) (challenging legal narrators' reliance on social constructionism). See generally Derrick A. Bell, Jr., *Racial Realism*, 24 CONN. L. REV. 363 (1992); Derrick A. Bell, Jr., *Racism: A Prophecy for the Year 2000*, 42 RUTGERS L. REV. 93 (1989); Derrick A. Bell, Jr., *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985).

My views, as expressed in this Article, are similar to the views of two of my favorite legal realists: the late Professor Fred Rodell and the late Judge Jerome Frank. See generally FRED RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955* (1955); JEROME FRANK, *LAW AND THE MODERN MIND* (1930). Professor Rodell and Judge Frank held different "realist views" about the nature of judicial rulings. See generally ROBERT J. GLENNON, *THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW* (1985). For an overview of the development of legal realism and a sampling of writings from legal realist scholars, see *AMERICAN LEGAL REALISM* (William W. Fisher et al. eds., 1993). In other speeches and essays, I have attempted to resurrect Professor Rodell's brand of legal realism in analyzing constitutional issues. See John E. Nowak, *Professor Rodell, The Burger Court, and Public Opinion*, 1 CONST. COMMENTARY 107 (1984); John E. Nowak, *Evaluating the Work of the New Libertarian Supreme Court*, 7 HASTINGS

stead, I am an old fashioned legal realist who believes that simply exposing the relationship between the political backgrounds of the Justices and their rulings is an important end in itself. The story I want to tell you is about how the Justices of the Supreme Court have used their power to either protect or harm the interests of racial minorities during the past sixty years.

Because the events leading to the Supreme Court's initial concern for protecting racial minorities from political oppression have been examined by others,<sup>2</sup> I will focus on the decline of Supreme Court concern for racial minorities between 1973 and 1993. That story is really about how fifteen people used the nine voting positions on the Court. Those people are Chief Justices Burger and Rehnquist, and Justices Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell, Stevens, O'Connor, Scalia, Kennedy, Souter, and Thomas.

My contribution to this Symposium will not involve an examination of constitutional theories regarding civil rights, or racial equality. Rather, I would like to show that as the membership of the Court has changed, the Court's approach toward protecting racial minorities has also changed. I believe that the rise and fall of Supreme Court protection for racial minorities simply reflects the political background of the Justices on the Court in each era. This argument was the only point of my presentation at the conference, and this Article is, in one sense, the "supporting evidence" for my presentation. I will try to prove my point by first giving my reader an overview of the membership of the Supreme Court during the past six decades. I will then examine

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CONST. L.Q. 263 (1980).

2. Two excellent works concerning the forces that influenced the Supreme Court to protect racial minorities in constitutional rulings are written by Professor Mark Tushnet, a contributor to this Symposium. See MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (1994) [hereinafter TUSHNET, MAKING CIVIL RIGHTS LAW]; MARK V. TUSHNET, THE NAACP: LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987) [hereinafter TUSHNET, THE NAACP]; see also DERRICK BELL, RACE, RACISM AND AMERICAN LAW §§ 1.1-1.17, 7.1-7.14 (3d ed. 1992) (discussing racism in the context of public schools); Derrick Bell, *Law, Litigation, and the Search for the Promised Land*, 76 GEO. L.J. 229 (1987) (book review of TUSHNET, THE NAACP, *supra*); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1 (1979).

the Court's rulings concerning four major civil rights topics: (1) the enforcement of federal civil rights statutes, (2) the invalidation of open and "hidden" racial classifications, (3) benign racial classifications (affirmative action), and (4) school desegregation.<sup>3</sup>

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3. I do not mean to imply that I believe I have the ability to identify those legal issues of most importance to racial minorities. Rather, I have made my best effort to choose issues that I believe might reflect the attitudes of Justices toward protecting racial minorities from suppression in our country. I realize that the Justices' attitudes toward racial minorities might be reflected in all of their rulings or, at least, in many areas that I have not focused upon in this Article.

I have chosen not to focus on two areas of constitutional law—state action and freedom of speech—implicated by important decisions of the United States Supreme Court concerning the civil rights movement. I believe that the Supreme Court has taken a somewhat more narrow view of the types of private action that sufficiently involve "state action" to be subject to the restriction of the Bill of Rights and the Fourteenth Amendment than did the Warren Court. However, I do not believe that the Burger and Rehnquist Court rulings on state action can be taken as true indications of the Justices' attitudes regarding racial minorities. By the mid-1970s, the Supreme Court had upheld the power of Congress to regulate racial discrimination in the private sector and had read a variety of civil rights statutes very broadly in order to prevent private sector racial discrimination. Since then, most of the Court's rulings concerning state action have considered when the Court, in the absence of federal civil rights legislation, should use the Fourteenth Amendment to protect groups other than racial minorities from private sector discrimination. For a comment on the change in the Court's state action rulings in the mid-1970s, see Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221. For an examination of all of the Court's state action rulings, see 2 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW*, § 16.1-16.5 (2d ed. 1992).

I am not addressing First Amendment topics in this Article for three reasons. First, the important subject of "hate speech" is being dealt with in this Symposium by Professor Delgado. Richard Delgado & Jean Stefancic, *The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547 (1995). I do not believe that there are a sufficient number of cases analogous to hate speech that would give me a basis for comparing the attitudes of the Justices in the 1990s to the attitudes of the Justices of the 1960s (which I will identify as the primary time of Supreme Court protection of racial minorities) regarding hate speech. Second, I believe that a smaller percentage of the First Amendment cases in the 1980s and 1990s involve civil rights demonstrations or racial issues than did the cases involving freedom of assembly in the 1960s. In recent years the Supreme Court has invalidated some government actions that seem to pose a direct threat to the freedom of association or the freedom of assembly of groups associated with the civil rights movement. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Some scholars may claim that the Supreme Court's decision in *NOW v. Scheidler*, 114 S. Ct. 798 (1994), allowing the use of the Racketeer Influenced and Corrupt Organizations Act (RICO) against persons who committed multiple crimes in attempting to stop the operation of abortion clinics, would allow the RICO statute to be used against civil rights demonstrators who

The Supreme Court's approach to civil rights issues of importance to racial minorities has undergone dramatic shifts during this century. The attitudes and rulings of the Justices concerning civil rights issues can be divided into six time periods. First, in the pre-New Deal era, the Court did virtually nothing to protect racial minorities from discrimination and oppression in our economic and political system. Second, from the late 1930s through the early 1950s, the Justices slowly began to protect racial minorities with incremental shifts in the Court's rulings concerning the meaning of equal protection and the scope of congressional power. Third, in the "first Warren Court," from 1954 to the early 1960s (while Earl Warren was Chief Justice), the Court made dramatic statements about the principle of racial equality but proceeded cautiously, as it faced a society unwilling to accept a more liberal view of civil rights. Fourth, in the "second Warren Court," from the early 1960s to the early 1970s (during the first years when Warren Burger was Chief Justice), the Court was an active leader in the protection of civil rights through its rulings concerning equal protection and its expansive reading of federal civil rights statutes. Fifth, from the mid-1970s through the mid-1980s the Court seemed to vacillate in its rulings regarding civil rights issues. Finally, since the late 1980s, the Supreme Court seems to have turned against racial minorities, as it has narrowed earlier rulings concerning the Equal Protection Clause and restricted the efforts of legislatures to help racial minorities.

## II. THE PLAYERS IN THE GAME—YOU CAN'T IDENTIFY THE JUSTICES WITHOUT A SCORECARD

The efforts of litigators and civil rights workers, whose accomplishments we honor in this Symposium, in bringing an end to

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engaged in protests at government buildings. However, *Scheidler* did not involve a civil rights demonstration; it would be unfair to the Justices of the Court to claim that their decision protecting abortion clinics shows that they would not protect civil rights demonstrators charged with some type of trumped-up RICO prosecution. Third, the First Amendment presents such a wide range of topics that it would take at least a separate article, and probably a book, to attempt to translate the Supreme Court's rulings in First Amendment decisions into an analysis of the Supreme Court's attitudes toward racial minorities.

the separate but equal doctrine were made easier by the fact that Democratic Presidents Franklin Roosevelt and Harry Truman were changing the membership of the Supreme Court.<sup>4</sup> In 1938 the Court had only three Justices who were appointed by Democratic Presidents: Justice Brandeis, who was appointed by President Wilson, and Justices Black and Reed, who were appointed by President Roosevelt. Those three Justices were joined by three Republican Justices in making one of the first decisions that began the erosion of the separate but equal doctrine.<sup>5</sup> By 1941 the Supreme Court was composed of Justices who reflected the goals of the Democratic Party at the time. Chief Justice Stone, originally a Coolidge appointee, was named Chief Justice by President Roosevelt. Seven of the eight Associate Justices were Roosevelt appointees; Owen Roberts was the only Republican appointee who remained on the Court at the start of World War II. The other Justices during this time were Justice Black (appointed in 1937), Justice Reed (appointed in 1938), Justice Frankfurter (appointed in 1939), Justice Douglas (appointed in 1939), Justice Murphy (appointed in 1940), Justice Jackson (appointed in 1941), and Justice Byrnes (appointed in 1941 and replaced in 1943 by Justice Rutledge).<sup>6</sup>

The Vinson Court, which spanned the years from 1946 to 1953, was composed completely of Democratic appointees. President Harry Truman appointed Chief Justice Vinson, who replaced Chief Justice Stone in 1946, and three Associate Justices. Justice Burton replaced Justice Roberts in 1945, Justice Minton replaced Justice Rutledge in 1949, and Justice Clark replaced Justice Murphy in 1949.

On May 17, 1954, when the Supreme Court decided *Brown*, the Court was composed of eight Democratic appointees and

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4. I will refer to the confirmation hearings for specific Supreme Court Justices when those hearings are noteworthy when evaluating my impression of Supreme Court Justices. I am not going to give citations to the confirmation hearings regarding, or law review articles about, most of the Justices on the Supreme Court. For a general overview of the background of the members of the Supreme Court, see HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS* (3d ed. 1992); ELDER WITT, *CONGRESSIONAL QUARTERLY'S GUIDE TO THE SUPREME COURT* 789-880 (2d ed. 1990).

5. *Missouri ex. rel. Gaines v. Canada*, 305 U.S. 337 (1938); see *infra* text accompanying note 281.

6. See ABRAHAM, *supra* note 4, app. D at 424.

Chief Justice Warren. President Eisenhower's appointments to the Court did not slow the pace of the Court's movement toward the protection of racial minorities. From 1954 until 1969, the Supreme Court was dominated by members of the Democratic Party. At the height of what we often think of as the Warren Court Era, the only Republicans on the Court were Justices Harlan and Stewart, and Chief Justice Warren. Republican Justice Whittaker would serve only from 1957 to 1962. Justice Brennan, who would serve on the Court from 1956 until 1990, was a Democrat who was appointed by a Republican President.<sup>7</sup>

The Supreme Court appointments by Presidents Kennedy and Johnson were crucial to the Court's enforcement of civil rights in the 1960s. When Felix Frankfurter left the bench in 1962, his successors might, in retrospect, be easier to categorize as liberal Democrats—Justice Goldberg (who served on the Court from 1962 to 1965) and Justice Fortas (who served from 1965 to 1969). Justice White, who served in President Kennedy's campaign and as a Deputy Attorney General for Robert Kennedy, replaced Justice Whittaker in 1962.<sup>8</sup> Justice Clark, a Truman appointee, was replaced by Thurgood Marshall in 1967.<sup>9</sup>

The Supreme Court in the early 1970s seemed to differ only slightly from the Warren Court in the Justices' approach to civil rights issues despite the turnover of four judicial positions between 1969 and 1972. Only two of the four Nixon appointees

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7. Justice Brennan received a recess appointment to the Court from President Eisenhower in 1956; he was nominated and confirmed in 1957. The hearings concerning the nomination of William Joseph Brennan, Jr. to be an Associate Justice are documented in *Nomination of William Joseph Brennan, Jr.: Hearings Before the Senate Comm. on the Judiciary*, 85th Cong., 1st Sess. (1957), reprinted in 6 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1972 (Roy M. Mersky & J. Myron Jacobstein eds., 1975) [hereinafter HEARINGS AND REPORTS, 1916-1972].

8. The hearings concerning the nomination of Byron R. White to be an Associate Justice are documented in *Nomination of Byron R. White: Hearings Before the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. (1962), reprinted in 6 HEARINGS AND REPORTS, 1916-1972, *supra* note 7.

9. The hearings concerning the nomination of Thurgood Marshall to be an Associate Justice are documented in *Nomination of Thurgood Marshall: Hearings Before the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967), reprinted in 7 HEARINGS AND REPORTS, 1916-1972, *supra* note 7.



could have been identified as being very "conservative" from their pre-Court records. Chief Justice Burger, appointed in 1969,<sup>10</sup> and Justice Rehnquist, appointed in 1972,<sup>11</sup> could have accurately been predicted to be very conservative in their rulings. Today Justice Blackmun might be described as a liberal in Republican clothing. Justice Blackmun was what the media would now term a "stealth nominee." His non-controversial appointment in 1970<sup>12</sup> followed two unsuccessful attempts by President Nixon to place other persons on the Supreme Court. Justice Powell, who replaced Justice Black in 1972, had no prior judicial service, and no clear "track record," despite his involvement in local government and in the American Bar Association. The Senate hearings concerning Lewis Powell were quite brief, at least when reviewed in the light of Senate practices in the 1980s and 1990s; there was little controversy regarding his appointment.<sup>13</sup> One possible explanation for the smooth confir-

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10. The hearings concerning the nomination of Warren E. Burger to be Chief Justice are documented in *Nomination of Warren E. Burger: Hearings Before the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969), reprinted in 7 HEARINGS AND REPORTS, 1916-1972, *supra* note 7. The Senate's consideration of the Burger nomination is documented in 115 CONG. REC. 15,174-96 (1969).

11. The hearings concerning the nomination of William H. Rehnquist to be an Associate Justice are documented in *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971), reprinted in 8 HEARINGS AND REPORTS, 1916-1972, *supra* note 7. The Senate's consideration of the Rehnquist nomination is partially documented in 117 CONG. REC. 45,411-45, 45,463 (1971).

The hearings concerning the nomination of William H. Rehnquist to be Chief Justice are documented in *Nomination of Justice William Hubbs Rehnquist: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986), reprinted in 12, 12A THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1986, at 305-1445 (Roy M. Mersky & J. Myron Jacobstein eds., 1989) [hereinafter HEARINGS AND REPORTS 1916-1986].

12. The hearings concerning the nomination of Harry A. Blackmun to be an Associate Justice are documented in *Nomination of Harry A. Blackmun: Hearings Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970), reprinted in 8 HEARINGS AND REPORTS, 1916-1972, *supra* note 7. The Senate's consideration of the Blackmun nomination is partially documented in 116 Cong. Rec. 14,853-58 (1970).

13. The hearings concerning the nomination of Lewis F. Powell, Jr. to be an Associate Justice are documented in *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971), reprinted in 8 HEARINGS AND REPORTS, 1916-1972, *supra* note 7. The Senate's consideration of the Powell nomination is partially documented in 117 CONG. REC.

mation is that Lewis Powell might have been perceived as a moderate Southern Republican with views on political issues that were, at least arguably, similar to the Southern Democrat whom he replaced on the Court.

The 1975 appointment of Justice Stevens to replace Justice Douglas made the Court more conservative only because of Douglas' unwavering record as a promoter of liberal causes. There was no reason to think that Stevens would not champion the interests of racial minorities and little questioning of Stevens on racial issues in his confirmation hearings.<sup>14</sup> Perhaps Justice Stevens' appointment may have reflected the views of then Attorney General Levy, as much or more than the views of President Ford. A decade after his appointment, Justice Stevens joined a core group of Justices that consistently voted to give the widest scope to federal legislative actions protecting racial minority interests. He has been, however, something of a "wild card" vote in racial affirmative action cases.

President Reagan's appointment of Supreme Court Justices in the 1980s led to a clear shift in the Court's rulings concerning racial minorities. The Reagan appointments, at first glance, might not seem to have made much of a change in the Court's composition if we think only in terms of political party affiliation. Justice O'Connor in 1981 replaced Justice Stewart, who was also a Republican appointee.<sup>15</sup> Justice Scalia in 1986, in

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44,737-45 (1971). There was some opposition to the appointment of Lewis Powell because of his service on the Richmond, Virginia School Board. See 8 HEARINGS AND REPORTS, 1916-1972, *supra* note 7, at 361-97.

14. The hearings concerning the nomination of John Paul Stevens to be an Associate Justice are documented in *Nomination of John Paul Stevens to be a Justice of the Supreme Court: Hearings Before the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975), reprinted in 8A HEARINGS AND REPORTS, 1916-1972, *supra* note 7, at supp. The Senate's consideration of Stevens' nomination is reprinted in 121 CONG. REC. 41,123-28 (1975).

15. The hearings concerning the nomination of Sandra Day O'Connor to be an Associate Justice are documented in *Nomination of Sandra Day O'Connor: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1982), reprinted in THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1981 (Roy M. Mersky & J. Myron Jacobstein eds., Supp. 1983). See generally Thomas R. Haggard, *Mugwump, Mediator, Machiavellian, or Majority? The Role of Justice O'Connor in the Affirmative Action Cases*, 24 AKRON L. REV. 47 (1990) (providing critical analysis of Justice O'Connor's affirmative action

one sense, took Justice Rehnquist's seat on the Court, as Justice Rehnquist became the Chief Justice who succeeded Warren Burger.<sup>16</sup> In 1988 Justice Kennedy replaced Justice Powell following the defeat of the Robert Bork nomination and the withdrawal of the Douglas Ginsburg nomination.<sup>17</sup> As we will see when we examine the Court's rulings since 1988, the Reagan Republicans reflected the conservative views of the President who appointed them.

In his confirmation hearings, then Judge Kennedy was clear about his commitment to the desegregation principle, but he made some unclear references to the first Justice Harlan's dissent in *Plessy*.<sup>18</sup> In retrospect, his statements should have led us to believe that he might take a "color-blind" approach to civil rights issues, thereby justifying his refusal to support legislative efforts to promote civil rights.

Less than two years after his appointment to the Supreme

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opinions); Rocco Potenza, *Affirmative Action: Will Justice O'Connor Author Its End?*, 22 U. TOL. L. REV. 805 (1991) (examining Justice O'Connor's views on the constitutionality of race-based affirmative action); Alfred Slocum, *At the Crossroads of Civil Rights: Tension Between the Wartime Amendments in the Jurisprudence of Justice O'Connor*, 13 WOMEN'S RTS. L. REP. 105 (1991) (discussing the tension between Justice O'Connor's racial neutrality and the Thirteenth Amendment).

16. The hearings concerning the nomination of Antonin Scalia are documented in *Nomination of Judge Antonin Scalia: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986), reprinted in 13 HEARINGS AND REPORTS, 1916-1986, *supra* note 11, at 89-464. See generally George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990) (suggesting that Scalia is driven as a Justice by his methodological commitments); Richard Nagareda, *The Appellate Jurisprudence of Justice Antonin Scalia*, 54 U. CHI. L. REV. 705 (1987) (predicting Justice Scalia's Supreme Court role based on an analysis of his appellate writings).

17. The hearings concerning the nomination of Anthony M. Kennedy to be an Associate Justice are documented in *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. (1987), reprinted in 15, 15A THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1987, at 261-1393 (Roy M. Mersky & Gary R. Hartman eds., 1991) [hereinafter HEARINGS AND REPORTS 1916-1987].

18. HEARINGS AND REPORTS, 1916-1987, *supra* note 17, at 148-53, 182-83. Regarding the error of persons who read Justice Harlan's dissent in *Plessy* as advocating a "colorblind" approach to equal protection issues, see T. Alexander Aleinikoff, *Re-Reading Justice Harlan's Dissent in Plessy v. Ferguson: Freedom, Antiracism, and Citizenship*, 1992 U. ILL. L. REV. 961.

Court, Justice Kennedy emerged as a key vote in forming a Supreme Court majority that would impair civil rights statutes. Justice Kennedy was appointed to the Court in February 1988; his first full Term was the October 1988 Term of the Supreme Court. In the Spring of 1989, Justice Kennedy: (1) voted to use "strict scrutiny" to eliminate virtually all forms of state or local affirmative action for racial minorities,<sup>19</sup> (2) voted to make it difficult for racial minority workers in low paying jobs to show that the predominance of white workers in higher paid positions was the result of racial discrimination,<sup>20</sup> (3) provided the fifth vote for increasing the ability of white persons to challenge private sector affirmative action programs that had been undertaken pursuant to consent decrees,<sup>21</sup> (4) provided the fifth vote for finding that women were barred from challenging seniority systems that had an alleged discriminatory purpose by finding that the limitation period for such suits ran from the date at which the seniority system was adopted, rather than the date at which the system was used to harm the women workers,<sup>22</sup> and (5) wrote a majority opinion that drastically limited the scope of one of the Reconstruction Era civil rights statutes.<sup>23</sup> Some of the 1989 decisions in which Justice Kennedy played a key role would be reversed by statute during the Bush Administration in the Civil Rights Act of 1991.<sup>24</sup>

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19. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

20. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). *Atonio* has been superseded by federal statute. See The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

21. *Martin v. Wilks*, 490 U.S. 755 (1989). *Martin* has been superseded by federal statute. See The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). For a discussion of the bar against collateral attacks of consent decrees, see Susan S. Grover, *The Silenced Majority: Martin v. Wilks and the Legislative Response*, 1992 U. ILL. L. REV. 43.

22. *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989). *Lorance* has been superseded by federal statute. See The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

23. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). *Patterson* has been superseded by federal statute. See The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). Justice Kennedy also provided the fifth vote for the majority opinion in *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989). In *Jett* the Supreme Court ruled that a city could not be held liable for its employees' violations of 42 U.S.C. § 1981 under a respondeat superior theory.

24. The Civil Rights Act of 1991 was adopted after President Bush had vetoed

Perhaps because of the performance of Justice Kennedy in civil rights cases, Justice Souter was questioned more closely regarding the need to protect racial minorities in his confirmation hearing.<sup>25</sup> He was specifically questioned about whether positions he had taken when with the Office of the New Hampshire Attorney General meant that he would not support the Voting Rights Act or that he would oppose all forms of racial affirmative action. During those hearings, then Judge Souter avoided directly answering questions concerning his position on constitutional issues. He gave answers that could be understood as indicating that he supported the goals of the Voting Rights Act and that he believed that Congress had the power to use benign racial classifications to remedy the plight of racial minorities in our society who had suffered from societal, as well as governmental, discrimination.<sup>26</sup> Indeed, in later years Justice Souter would prove true to his word. In 1993, he joined Justices White, Blackmun, and Stevens as they dissented from a ruling in which the Rehnquist Court threw into doubt the ability of the federal government to require states to avoid changes in voting laws that harmed racial minorities.<sup>27</sup>

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legislation that was in many ways similar to the final act.

For analysis of the interaction of Congress, the Supreme Court, and the President regarding the creation of civil rights, see Symposium, *Civil Rights Legislation in the 1990s*, 79 CAL. L. REV. 591 (1991). See also Grover, *supra* note 21 (discussing the bar against collateral attacks as developed through case law and congressional action).

25. The hearings concerning the nomination of David H. Souter to be an Associate Justice are documented in *Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. (1991), reprinted in 16 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1990, at 123 (Roy M. Mersky et al. eds., 1992) [hereinafter HEARINGS AND REPORTS, 1916-1990]. For a discussion of Justice Souter's first term, see Scott P. Johnson & Christopher E. Smith, *David Souter's First Term on the Supreme Court: The Impact of a New Justice*, 75 JUDICATURE 238 (1992); Christopher E. Smith & Scott P. Johnson, *Newcomer on the High Court: Justice David Souter and the Supreme Court's 1990 Term*, 37 S.D. L. REV. 21 (1992).

26. See 16 HEARINGS AND REPORTS, 1916-1990, *supra* note 25, at 202-10, 256-57, 263, 276-77, 316-18, 364-65, 374-75, 385, 429, 460-63.

27. *Shaw v. Reno*, 113 S. Ct. 2816 (1993). I will discuss *Shaw* in the sections of this Article concerning the Court's enforcement of the civil rights statutes, the Court's approach to "hidden" racial classifications, and racial affirmative action is-

Despite his earlier service in the executive branch and on the United States Court of Appeals, Justice Thomas' views concerning civil rights were left unclear in his nomination hearings.<sup>28</sup> With some help from Republican Senators, then Judge Thomas was able to remain noncommittal about Supreme Court rulings concerning racial affirmative action and Supreme Court rulings concerning Title VII of the Civil Rights Act that were made while he was the chairperson of the Equal Employment Opportunity Commission.<sup>29</sup> His views concerning the role of the judiciary regarding civil rights issues remain unclear. After his first two Terms on the Court, we do not have a sufficient basis to predict whether, throughout his service on the Court, he will be a defender of racial minorities. Justice Thomas voted with the Reagan appointees to significantly reduce the ability of the federal government to control changes in voting laws that had the effect of harming racial minorities.<sup>30</sup> However, he also wrote opinions indicating his support for punishing "hate crimes"<sup>31</sup> and supporting the ability of the government to support "historically black colleges."<sup>32</sup>

The Senate confirmed Justice Ginsburg's appointment to the

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sues.

28. The hearings concerning the nomination of Clarence Thomas to be an Associate Justice are documented in *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. (1991) [hereinafter *Thomas Hearings*].

29. For example, then Judge Thomas, in an interchange with Senator Specter, was able to avoid taking a position on the Supreme Court decisions regarding racial affirmative action issues and the burden of proof a plaintiff must meet in a Title VII case. See *id.* pt. 1, at 2316-36, 2489-90.

30. See *Shaw v. Reno*, 113 S. Ct. 2816 (1993); *Presley v. Etowah County Comm'n*, 112 S. Ct. 820 (1992). For a closer examination of those decisions, see *infra* notes 149-69 and accompanying text.

31. In *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993), the Justices unanimously upheld a statute allowing for enhancement of the sentence of a defendant convicted of committing certain crimes based upon evidence that the defendant had chosen his victims on the basis of their race. In *Dawson v. Delaware*, 112 S. Ct. 1093 (1992), the Court prohibited the introduction into a sentence hearing of the fact that the defendant was a member of a racist organization. Justice Thomas dissented from that ruling. *Id.* at 1100-05. (Thomas, J., dissenting). In *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), Justice Thomas joined the majority opinion that invalidated a "hate speech" statute.

32. *United States v. Fordice*, 112 S. Ct. 2727, 2744 (Thomas, J., concurring).

Court without any clear explanation of her opinion on the role of courts in protecting racial minorities.<sup>33</sup> Her record as a federal appellate judge provides little basis for predicting how she will vote in cases involving racial discrimination. In one court of appeals case she concurred in a judgment that merely implemented the Supreme Court's decision striking down preferences for minority race contractors.<sup>34</sup> Then Judge Ginsburg wrote separately in that case to say that "Justice Stevens reasoned [in some racial affirmative action cases], and I agree, that remedy for past wrong is not the exclusive basis upon which racial classification may be justified."<sup>35</sup> Her agreement with Justice Stevens' position tells us very little about the approach Justice Ginsburg will take towards the protection of racial minorities in the future.

Having identified the "players," I will now examine the Supreme Court rulings regarding the interests of minority race persons in several specific areas.

### III. THE SUPREME COURT AND CIVIL RIGHTS STATUTES—FROM THE CIVIL WAR TO THE BURGER COURT

The Supreme Court, in one sense, is always "behind" the other branches of the federal government when it comes to the enforcement of civil rights statutes. The Supreme Court cannot enforce civil rights statutes until Congress has enacted them; in many instances, the Court will not have the opportunity to interpret a statute unless the executive branch takes steps toward its enforcement. Nevertheless, the attitudes of Supreme Court Justices toward racial minorities may be reflected in their rulings concerning federal civil rights statutes. Examining the Court's decisions regarding these statutes allows us to decide whether the Justices are keeping pace with the other branches

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33. At the time this Article was written, the early months of 1994, a printed copy of the hearing of the Judiciary Committee regarding the nomination of Ruth Bader Ginsburg to the Supreme Court was not yet available. Anyone who watched or listened to even a small portion of these confirmation hearings should not be surprised by, or doubt, the statement that then Judge Ginsburg disclosed nothing about how she might rule on constitutional issues.

34. *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420 (D.C. Cir. 1992).

35. *Id.* at 429 (Ginsburg, J., concurring).

of the federal government in the protection of minorities. Supreme Court Justices can cause harm to racial minorities by finding constitutional barriers to the congressional protection of civil rights; the Court can impede the protection of racial minorities in our society by reading civil rights statutes in a narrow manner. Conversely, a Court with a majority of Justices who see themselves as protectors of the interests of racial minorities will endorse the constitutional power of Congress to pass civil rights statutes, read civil rights statutes as broadly as possible, and, when necessary, point out the shortcomings of existing federal civil rights statutes in a way that invites Congress to expand the protection of racial minorities.

Other scholars have analyzed the relationship of the Court and Congress in the protection of civil rights in the 1980s and 1990s using a variety of academic perspectives from equal protection analysis to game theories.<sup>36</sup> I want to demonstrate that we do not need legal or public choice theories to explain the Court's rulings. I believe these rulings simply are a reflection of the political background of the Justices and the Presidents who appointed them.

In this section of the Article, I do not attempt to canvass the Court's rulings concerning all federal civil rights statutes. I do not intend to present an exhaustive analysis of the Supreme Court's rulings concerning any specific portion of our federal civil rights statutes. After describing some of the most important Supreme Court decisions prior to the 1960s regarding the scope of congressional power to protect racial minorities, I will focus on the rulings of the Warren, Burger, and Rehnquist Courts regarding the Voting Rights Act, Thirteenth Amendment legislation, and Title VII.

In the era from the Civil War until World War II, the Justices can be described as being active opponents of, or at least completely indifferent to, the interests of racial minorities. In the 1940s and 1950s, the Supreme Court took important, but limited, steps toward using federal statutes to protect racial minorities. Only in the 1960s and early 1970s did the Supreme Court

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36. For articles analyzing this topic from a variety of academic perspectives, see Symposium, *supra* note 24.



protect racial minorities by expansively reading federal civil rights statutes and recognizing a wide scope of congressional power to protect civil rights. In the late 1970s, and much of the 1980s, the Court was more of a spectator of the congressional protection of racial minorities. While the Court did not invalidate the attempts of Congress to protect civil liberties, the Justices of this era did not give an expansive reading to congressional civil rights statutes unless required to do so by precedents set in the earlier era. Finally, since the late 1980s, the Supreme Court has impaired congressional efforts to protect civil liberties through the narrow reading of federal civil rights statutes. In some cases the Court upheld federal civil rights statutes by a closely divided vote, and those rulings may now be in danger of being overruled following the retirement of Justices Brennan and Marshall.

#### *A. Before the New Deal*

From the 1870s until the 1930s, the Supreme Court actively protected the interests of those who sought to suppress racial minorities through Jim Crow laws and outright violence. In *United States v. Cruikshank*,<sup>37</sup> the Supreme Court held that Congress was without constitutional authority to criminalize the assault or murder of African Americans by private individuals.<sup>38</sup> Though the Court in the 1890s recognized the limited power of the federal government to protect individuals from interference when voting in federal elections<sup>39</sup> or to protect them from violence when they were in the custody of a United States Marshal,<sup>40</sup> the Court did not allow the federal government to prevent private violence against minorities. These cases prevented the federal government from punishing individuals who had caused the death of scores, or perhaps hundreds, of

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37. 92 U.S. 542 (1876).

38. *Id.*; see also *United States v. Harris*, 106 U.S. 629 (1883) (finding no constitutional authority for a law preventing conspiracy to deprive a person of equal protection of the laws); *United States v. Reese*, 92 U.S. 214 (1876) (finding no constitutional authority for a law punishing those who prevent an African American from exercising his right to vote).

39. *Ex parte Yarbrough*, 110 U.S. 651 (1884).

40. *Logan v. United States*, 144 U.S. 263 (1892).

members of racial minorities.<sup>41</sup> The Court's refusal to endorse federal power to criminalize racially motivated crimes until the middle of the twentieth century probably was a contributing factor to thousands of murders.<sup>42</sup> Prior to the New Deal era, the Supreme Court also blocked congressional protection of racial minorities through civil rights laws. In the *Civil Rights Cases*,<sup>43</sup> the Supreme Court held that Congress could not use its powers under the Fourteenth Amendment to restrict the activity of private individuals in denying due process or equal protection to members of racial minorities.<sup>44</sup> The Court recognized that Congress could control state action under the Fourteenth Amendment, but it held that Congress could not declare illegal under its section 5 powers any state activity that the Court would not have independently found to be a violation of section 1.<sup>45</sup> That ruling rendered section 5 of the Fourteenth Amendment meaningless, as these Justices endorsed the separate but equal principle and found that very few government actions violated the Equal Protection Clause.<sup>46</sup> The Supreme Court in the *Civil*

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41. For a discussion of the violence that led up to and followed the Supreme Court rulings that restricted the ability of the federal government to punish the persons who had murdered more than 100 African Americans, see Brooks D. Simpson, *"This Bloody and Monstrous Crime,"* CONSTITUTION, Fall 1992, at 38.

42. There appear to have been, by a conservative estimate, almost 5000 lynchings of racial minorities. Tuskegee University Lynching Reports (unpublished). The state-by-state lynching estimates contained in the Tuskegee University study are quoted in Mark Mayfield & Tom Watson, *Guilt, Innocence Blur with Passage of Time*, USA TODAY, Sept. 25, 1992, at 2A; see also U.S. BUREAU OF THE CENSUS, THE STATISTICAL HISTORY OF THE UNITED STATES: FROM COLONIAL TIMES TO THE PRESENT 422 (1976) (showing the number of persons lynched, by race, from 1882 to 1970).

43. 109 U.S. 3 (1883). *The Civil Rights Cases* have been superseded by federal statute. See The Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447 (1988) and in scattered sections of 42 U.S.C.). The Court in this case examined provisions of the Civil Rights Act of 1875, 18 Stat. 335, ch. 114.

44. *The Civil Rights Cases*, 109 U.S. at 18-19.

45. *Id.* at 18.

46. By the end of the century, the Court endorsed the separate but equal doctrine in *Plessy v. Ferguson*, 163 U.S. 537 (1896). The Court declined to enforce the "equal" aspect of the separate but equal doctrine when it considered education cases, as the Court did not require local school boards to provide equal education for African American children. For a listing of the cases in this era, and a discussion of the Supreme Court's approach to racial classifications immediately following the Civil War, see 3 ROTUNDA & NOWAK, *supra* note 3, § 18.8. In this Article, I will make

*Rights Cases* also ruled that Congress had no power to protect racial minorities pursuant to section 2 of the Thirteenth Amendment, except insofar as Congress was literally eliminating slavery or some activity that the Supreme Court would have found to be a violation of section 1 of the Thirteenth Amendment.<sup>47</sup>

### B. *The New Deal to the 1950s*

The second phase of Court civil rights activity began with the election of Franklin Roosevelt, his proposed "court packing plan" that may have influenced the Justices in the 1930s to change their view of the scope of federal power, and his ability to name a majority of the Justices to the Court by 1941.<sup>48</sup> The Supreme Court slightly expanded the scope of the criminal statutes protecting civil rights in the 1940s and 1950s. In 1941, in *United States v. Classic*,<sup>49</sup> the Supreme Court began to endorse the federal protection of racial minorities when it held that Congress

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reference to the multivolume treatise that Professor Rotunda and I have published, which is supplemented annually. Student readers of this Article who do not have access to the multivolume treatise will find most of the sections I refer to in this Article appearing in a shortened and renumbered single volume ("hornbook") version of our treatise: JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW (4th ed. 1991).

47. *The Civil Rights Cases*, 109 U.S. at 20-22. The Supreme Court reaffirmed this position in *Hodges v. United States*, 203 U.S. 1 (1906), *overruled by Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Congress was not able to make use of its Article I commerce power to control racial discrimination in the private sector during this era because the Justices from the late 1800s until 1938 significantly restricted Congress' power to regulate any aspect of private sector commercial activity. See 1 ROTUNDA & NOWAK, *supra* note 3, §§ 4.5-4.7.

48. I have no intention of getting into a debate as to whether the "court packing plan" actually changed the views of the Justices on the Supreme Court in the 1930s regarding civil rights or commercial matters. See generally Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201 (1994) (discussing potential justifications for the Supreme Court's 1937 reversal of position). I suppose it is possible that a variety of other social factors might have made the Justices in the late 1930s start to rethink their positions concerning the civil rights of racial minorities. As we began to face the possibility of fighting fascist governments, the open suppression of civil rights at home was becoming less popular. In 1939, for example, the three original states that had not ratified the Bill of Rights in the 1700s, Connecticut, Georgia, and Massachusetts, passed legislation to formally ratify the first ten amendments to the United States Constitution. See 4 ROTUNDA & NOWAK, *supra* note 3, app. N, at 795 n.2.

49. 313 U.S. 299 (1941).

could protect an individual's right to vote in federal elections or primaries from interference by private individuals and state officials.<sup>50</sup> In 1945, the Supreme Court in *Screws v. United States*<sup>51</sup> upheld the conviction, under what is now 18 U.S.C. § 242, of police officers who beat an African American victim to death. The Court of the 1940s did not, however, totally repudiate its prior narrow reading of this statute. *Screws* was a very tentative decision in which the Court, without a majority opinion, found that the actions taken under "color of law" could be punished by the federal government,<sup>52</sup> and the trial judge's instructions were not so vague as to deprive the defendants (the police officers who beat the African American victim to death) of due process.<sup>53</sup>

Even prior to the New Deal era, the Court had invalidated state statutes that prohibited the sale of residential property to a member of a different race. These decisions were based primarily on a reading of the Due Process Clause that protected a property owner's right to dispose of his property as he saw fit.<sup>54</sup> On May 3, 1948, the Supreme Court decided two cases that began to give more meaningful protection to racial minorities in the housing market. In *Shelley v. Kraemer*,<sup>55</sup> the Court ruled that state court enforcement of a racially restrictive covenant prohibiting a white homeowner from selling his property to racial minorities violated equal protection.<sup>56</sup> In *Hurd v. Hodge*,<sup>57</sup> the Court found that Congress had intended to prohib-

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50. *Id.* at 323-24.

51. 325 U.S. 91 (1945).

52. *Id.* at 107-08.

53. *Id.* at 106-07.

54. See *Buchanan v. Warley*, 245 U.S. 60 (1917). It is possible to construe the Supreme Court decision as evidencing some concern for racial minorities as well as the rights of property holders. For a discussion of the Supreme Court's race relations decisions from 1910 to 1921, see Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444 (1982).

55. 334 U.S. 1 (1948).

56. *Id.* at 20. In the early 1950s, the Supreme Court extended *Shelley* by ruling in *Barrows v. Jackson*, 346 U.S. 249 (1953), that a white property owner who sold land to a member of a racial minority could not be subjected to monetary damages for the breach of a racially restrictive covenant. *Id.* at 258.

57. 334 U.S. 24 (1948). The *Hurd* decision was a very narrow one in which the

it the enforcement of racially discriminatory covenants in the District of Columbia in the portion of the Civil Rights Act of 1866 that is now codified as 42 U.S.C. § 1982 and that Congress had the power to do so under the Fourteenth Amendment.<sup>58</sup>

### C. *The 1950s and 1960s*

The 1950s marked a crucial turning point in the Supreme Court's approach to equal protection problems,<sup>59</sup> but they were also a time in which the Court proceeded rather cautiously in its opposition to racial discrimination.<sup>60</sup> In two 1951 cases, the Supreme Court left open the question of whether Congress intended to punish private conspiracies to deprive individuals of Fourteenth Amendment rights.<sup>61</sup>

In the 1940s and 1950s the Supreme Court widened Congress' Article I Commerce Clause power to deal with commercial matters. During those decades, the Court also endorsed Congress' use of the Commerce Clause to prohibit racial discrimination in

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Supreme Court held that the Civil Rights Act of 1866 prohibited the enforcement of racially discriminatory covenants without ruling on whether Congress had the power to invalidate private, racially-restrictive agreements completely. In contrast, the Supreme Court in the 1960s and 1970s would interpret the Civil Rights Act of 1866 to simply proscribe racially discriminatory property contracts. See *infra* notes 84-90 and accompanying text.

58. *Hurd*, 334 U.S. at 32-34.

59. For a discussion of the development of the Supreme Court's changing attitudes towards racial discrimination problems, see TUSHNET, *MAKING CIVIL RIGHTS LAW*, *supra* note 2; TUSHNET, *THE NAACP*, *supra* note 2.

60. The Court's rulings concerning racial discrimination in the 1950s will be discussed later in this Article. For analysis of the divisions of the Justices in many cases during this era, see sources cited *supra* note 2.

61. In *Williams v. United States*, 341 U.S. 97 (1951), the Supreme Court found that a private investigator who was accompanied by a City of Miami police officer when he investigated thefts of his client's property and beat four suspects until they confessed could be convicted of violating an individual's rights "under color of law." In a companion case, *United States v. Williams*, 341 U.S. 70 (1951), the Court by a five to four vote, and without a majority opinion, reversed the conviction of the same private detective and his employees who participated in beating the suspects on the charge of conspiracy to violate the civil rights of the victims. The four dissenting Justices in that case believed that the conspiracy statute used in the case could, and should, have been read to make criminal a conspiracy of private persons to intentionally deprive other private individuals of constitutionally guaranteed rights. *Williams*, 341 U.S. at 93 (Douglas, J., dissenting, joined by Reed, Burton, and Clark, JJ.).

channels of interstate commerce.<sup>62</sup> In 1964 the Supreme Court upheld the application of Title II of the Civil Rights Act so as to prohibit race discrimination in places of public accommodation and service establishments.<sup>63</sup>

In *Heart of Atlanta Motel v. United States*<sup>64</sup> and *Katzenbach v. McClung*,<sup>65</sup> the Court ruled that Congress had authority under the Commerce Clause to eliminate racial discrimination in commercial dealings. Justice Clark wrote the majority opinion in each case; he found that there was no need to address the question of whether Congress could have prohibited this type of racial discrimination based solely on the authority granted to it to enforce the Thirteenth or Fourteenth Amendments. Only Justices Douglas and Goldberg, who concurred in these cases, were ready to say that the Civil War Amendments, in addition to the Commerce Clause, granted Congress the power to eliminate private sector racial discrimination.<sup>66</sup>

Viewed from the perspective of 1994, the majority opinions by Justice Clark may seem surprisingly conservative in refusing to address questions of congressional power under the Civil War Amendments. But in 1964, when viewed against the background of seventy years of Supreme Court opposition to civil rights legislation following the Civil War and decades of treading cautiously in upholding very limited federal statutory protections

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62. See, e.g., *Boynton v. Virginia*, 364 U.S. 454 (1960); *Henderson v. United States*, 339 U.S. 816 (1950); *Mitchell v. United States*, 313 U.S. 80 (1941). For an examination of the Supreme Court's expansion of the federal commerce power during this era, see 1 ROTUNDA & NOWAK, *supra* note 3, § 4.9.

63. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

64. *Id.*

65. 379 U.S. 294 (1964).

66. *Heart of Atlanta Motel*, 379 U.S. at 279-80 (Douglas, J., concurring); *id.* at 292 (Goldberg, J., concurring). The Court would continue to expand the application of this portion of the Civil Rights Acts just as it expanded the scope of congressional power under the Commerce Clause.

In *Daniel v. Paul*, 395 U.S. 298 (1969), the Supreme Court, by an eight to one vote, upheld Title II of the Civil Rights Act of 1964 as it was applied to an amusement park. Justice Black dissented in *Daniel* because he did not believe that the commerce power of the federal government should extend to this type of court ruling despite the fact that he was appointed by President Roosevelt. See *id.* at 309-10 (Black, J., dissenting). Justice Black indicated that he would have voted to uphold the result in the case if Congress had clearly embraced the Public Accommodation Act on its power under § 5 of the Fourteenth Amendment. *Id.* at 309.

for racial minorities, the Supreme Court was taking a major step in endorsing the ability of Congress to proscribe private sector racial discrimination. On the same day that it issued the *Heart of Atlanta* and *McClung* decisions, the Supreme Court, in *Hamm v. City of Rock Hill*,<sup>67</sup> by a five to four vote, used the Civil Rights Act of 1964 as a basis for overturning prior convictions of several African Americans who engaged in "sit-in" demonstrations at lunch counters that refused to serve racial minorities.<sup>68</sup>

In the spring of 1966, the Supreme Court decided two cases that strengthened the ability of the federal government to impose criminal sanctions on persons who violated the civil rights of other individuals. In *United States v. Price*,<sup>69</sup> the Court held that government law enforcement personnel and private individuals who conspired to kill civil rights workers could be subject to criminal sanctions under 18 U.S.C. §§ 241, 242. In *United States v. Guest*,<sup>70</sup> the Court ruled that persons who conspired to threaten, beat, and kill members of racial minorities were subject to prosecution under 18 U.S.C. § 241, because the indictment contained a sufficient allegation of the state's participation in the conspiracy.<sup>71</sup>

Both the *Price* and *Guest* majority opinions stated that the Court was dealing with questions of statutory construction rather than constitutional issues.<sup>72</sup> Nevertheless, the cases were significant for two reasons. First, the opinions of the Justices in these cases, particularly that of Justice Brennan in *Guest*,<sup>73</sup> explained how federal statutes imposing criminal sanctions for civil rights violations could be clarified to provide for easier enforcement. In 1968, Congress enacted 18 U.S.C. § 245, which clarified and strengthened the federal government's ability to impose criminal sanctions for civil rights violations. Second, six Justices in *Guest*, though not in a majority opinion, advanced

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67. 379 U.S. 306 (1964).

68. *See id.*

69. 383 U.S. 787 (1966).

70. 383 U.S. 745 (1966).

71. *Id.* at 756.

72. *Id.* at 749; *Price*, 383 U.S. at 789.

73. *Guest*, 383 U.S. at 774 (Brennan, J., concurring in part and dissenting in part, joined by Warren, C.J., and Douglas, J.).

the view that Congress had the authority under section 5 of the Fourteenth Amendment to directly regulate individuals in the private sector who interfered with the civil rights of other persons.<sup>74</sup>

The Supreme Court in 1966 also strengthened the ability of the federal government to protect the voting rights of racial minorities. Despite a series of Supreme Court rulings declaring the most obvious, formal denials of voting rights on the basis of race unconstitutional, some state and local governments in the 1960s continued to use a variety of practices to effectively exclude racial minorities from exercising the right to vote.<sup>75</sup>

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74. The majority opinion in *Guest*, written by Justice Stewart, did not reach the question of whether Congress could prohibit private interferences with all types of civil rights under the power granted to Congress by § 5 of the Fourteenth Amendment. The six Justices who agreed that Congress could regulate such activities had different interpretations of the majority opinion. See *id.* at 761 (Clark, J., concurring, joined by Black and Fortas, JJ.); *id.* at 774 (Brennan, J., concurring in part and dissenting in part, joined by Warren, C.J., and Douglas, J.).

75. For an analysis of the Supreme Court rulings concerning racial discrimination and voting rights through the 1980s, see BELL, *supra* note 2, § 4.1-4.17.

In 1915, the Supreme Court invalidated the open exclusion of racial minorities from voting through the use of new voter tests that provided a "grandfather clause" to allow previously registered (white) voters to vote without passing the tests. *Guinn v. United States*, 238 U.S. 347 (1915). In 1927, the Court invalidated the exclusion of racial minorities from primary elections in *Nixon v. Herndon*, 273 U.S. 536 (1927). In 1932, the Court invalidated a state law delegating power to political parties to exclude racial minorities from party connections and the candidate selection process in *Nixon v. Condon*, 286 U.S. 73 (1932). In 1935, however, the Court refused to find that exclusion of racial minorities from a party candidate selection process violated the Fourteenth or Fifteenth Amendments when the political party did not rely on a state law or state administrators to establish or carry out its exclusion of racial minorities. *Grovey v. Townsend*, 295 U.S. 45 (1935), *overruled by* *Smith v. Allwright*, 321 U.S. 649 (1944) (finding that a state delegation of power to a political organization to exclude racial minorities from its primary elections violated the Fourteenth and Fifteenth Amendments). Finally, in *Terry v. Adams*, 345 U.S. 461 (1953), the Court found that a state could not allow a supposedly private, voluntary organization to conduct a pre-primary election and exclude racial minorities when that election realistically decided the outcome of the official Democratic primary election in Texas.

Federal statutes enacted in 1957, 1960, and 1964 made some inroads on racially discriminatory voting practices of state and local governments. The Civil Rights Act of 1957, Pub. L. No. 83-315, 71 Stat. 634 (1957), allowed the Attorney General to take some actions in court to stop public or private racial interference with the right to vote. The Act was amended in the Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (1960), to allow states to be joined as defendants and to allow the Attor-



In the Voting Rights Act of 1965, Congress attacked racial discrimination in election systems in a variety of ways. In *South Carolina v. Katzenbach*,<sup>76</sup> the Supreme Court upheld the portions of the Voting Rights Act that eliminated certain state and local voting qualifications in identified areas of the United States where voting tests had been used to exclude most potential racial minority voters.<sup>77</sup> In these areas of the country, Congress eliminated the use of various tests or devices (including literacy tests) as conditions of voting. These jurisdictions were required by section 5 of the Act to receive the approval of the Attorney General of the United States, or the United States District Court in the District of Columbia, for any change in their voting laws. The Voting Rights Act also created a system for federal examiners to be appointed to monitor elections and voting registration practices under certain circumstances. The Court in *South Carolina v. Katzenbach* found that all of these aspects of the Voting Rights Act were justified by Congress' power under section 2 of the Fifteenth Amendment.<sup>78</sup>

In the 1960s and early 1970s, the Court consistently assisted Congress in protecting the voting rights of racial minorities. One

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ney General to have some access to local voting records. The Civil Rights Act of 1964, 42 U.S.C. § 1971 (1964), provided for expedited voting cases before three judge courts and outlawed certain tactics used to keep racial minorities from voting.

It was not until the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965), that Congress finally created a comprehensive structure for the federal supervision of state and local voting practices that might involve racial discrimination. As late as 1959, the Supreme Court upheld the use of a literacy test as a condition for voting in state elections. *Lassiter v. North Hampton Election Bd.*, 360 U.S. 45 (1959). In *Lassiter*, the Court examined a decision from North Carolina in which the state court had stricken the grandfather clause provision from the North Carolina literacy test requirement. The Court upheld the literacy test because there was no proof that it would be used in a racially discriminatory manner. *See id.* at 53. In the Voting Rights Act of 1965, and later amendments to the Act, Congress eliminated the use of literacy tests as a condition of voting. The cases upholding those congressional actions are examined in the next paragraphs of the text. *See infra* notes 76-83 and accompanying text.

76. 383 U.S. 301 (1966). Justice Black dissented from the portion of the Supreme Court's ruling upholding § 5 of the Voting Rights Act. *Id.* at 356 (Black, J., dissenting). Section 5 prohibited a change in local voting laws in a jurisdiction covered by the Act without the approval of the Attorney General of the United States or the District Court in the District of Columbia. *Id.* at 357.

77. *Id.* at 315.

78. *Id.* at 327.

section of the Voting Rights Act prohibited any state or local government from using an English language literacy test as a condition of voting when it served to prevent a person from voting who had successfully completed at least the sixth primary grade in a school in the United States or its territories in which the predominant language was not English.<sup>79</sup> In *Katzenbach v. Morgan*,<sup>80</sup> the Court found that section 5 of the Fourteenth Amendment gave Congress the power to determine that the exclusion of voters on the basis of an English language voting requirement would constitute a denial of equal protection. This section of the Voting Rights Act also was justified under the Fifteenth Amendment.<sup>81</sup>

In 1969, the Court held that private individuals had standing to bring suit in a federal court to prevent a governmental entity subject to the preclearance requirements of section 5 of the Voting Rights Act from implementing a change in its voting laws without prior approval of the U.S. Attorney General or the Federal District Court for the District of Columbia.<sup>82</sup> In 1970, the Justices unanimously held that Congress had the power, under the Fourteenth and Fifteenth Amendments, to prohibit all state and local governments from using literacy tests as a condition of voting.<sup>83</sup>

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79. 42 U.S.C. § 1973b(e)(2) (1988).

80. 384 U.S. 641 (1966). In *Cardona v. Power*, 384 U.S. 672 (1966), a companion case to *Morgan*, the Court vacated a lower court decision due to a lack of clarity in the individual's complaint alleging a violation of the Voting Rights Act and the Fourteenth Amendment.

81. *Morgan*, 384 U.S. at 646.

82. *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).

83. *Oregon v. Mitchell*, 400 U.S. 112 (1970). In *Mitchell*, the Court unanimously upheld the provisions of the Voting Rights Act amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (amending 42 U.S.C. § 1973), insofar as the law barred the use of literacy tests. *Id.* However, through an odd division of the Justices, the Court invalidated the portion of the Act that extended the right to vote to 18-year-olds in state and local elections while it upheld the portion of the Act that gave otherwise qualified 18-year-olds the right to vote in federal elections. *Id.* at 118. For an examination of all aspects of this decision, see 3 ROTUNDA & NOWAK, *supra* note 3, § 19.3. The portion of the *Mitchell* decision restricting the power of Congress to grant the right to vote to 18-year-olds is not relevant to the topic of this Article. In any event, the Twenty-Sixth Amendment, which gives citizens of the United States who are otherwise qualified to vote, the ability to vote in all elections at age 18, overturned that aspect of the *Mitchell* decision. U.S. CONST. amend. XXVI.

The Warren Court also gave an expansive reading to Congress' power under section 2 of the Thirteenth Amendment and revived some Reconstruction Era civil rights statutes. A provision of the 1866 Civil Rights Act, now codified as 42 U.S.C. § 1982, guarantees the same rights to each person "as [are] enjoyed by white citizens [of the state, territory, or locality] to inherit, purchase, lease, sell, hold, and convey real and personal property."<sup>84</sup> For a century, this statute did little to protect the interests of racial minorities. Finally, in *Jones v. Alfred H. Mayer Co.*,<sup>85</sup> the Court found that the statute was a proper exercise of Congress' power under section 2 of the Thirteenth Amendment, and that it made illegal the actions of builders and realtors in refusing to sell or lease property to racial minorities.<sup>86</sup> The Court endorsed the view that Congress, under the powers granted to it by section 2 of the Thirteenth Amendment, could prohibit racial discrimination that the Justices might not independently believe constituted an incident of slavery that was proscribed by section 1 of the Amendment.<sup>87</sup> Congress could rationally conclude that racial discrimination in our society today might be one of the consequences of the fact that we were once a society that legalized slavery.<sup>88</sup> The Court found that any restriction on the congressional authority to enforce this statute would mean that the Thirteenth Amendment promise that slavery had ended would be a "mere paper guarantee."<sup>89</sup> In the next year, the Supreme Court found that section 1982 proscribed racial discrimination in rental properties and in transactions related to membership in a recreational facility.<sup>90</sup>

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84. 42 U.S.C. § 1982 (1988).

85. 392 U.S. 409 (1968).

86. *Id.* at 413.

87. *See id.* at 441 n.78.

88. *Id.* at 440.

89. *Id.* at 443 (quoting Cong. Globe, 39th Cong., 1st Sess., 1151). *See generally* 4 ROTUNDA & NOWAK, *supra* note 3, § 19.8.

90. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969).

#### IV. THE SHIFTING ATTITUDES OF JUSTICES TOWARD CIVIL RIGHTS

##### *A. Legislation in the Burger Court and Rehnquist Court: The Voting Rights Cases*

During the past two decades, the Supreme Court slowly retreated from strict enforcement of the federal civil rights statutes. The Court in the 1970s, despite some inconsistencies in its rulings, remained committed to interpreting civil rights statutes in a manner that protected racial minorities. The Court in the 1980s began to issue opinions that enforced federal civil rights statutes through closely divided votes of the Justices and began to take a "this far and no farther" approach to defining the scope of federal civil rights statutes. In the past six years, the Supreme Court has issued rulings that have undercut significantly the scope and importance of several federal civil rights statutes; in the past two Terms, the Court has diminished the importance of the Voting Rights Act.

A brief sketch of the Supreme Court's major rulings concerning the Voting Rights Act demonstrates that the Court's attitude toward the protection of racial minorities shifted when Republican Presidents were able to control the membership of the Court. We should now realize that we cannot rely on the Supreme Court to protect the voting rights of racial minorities. In other words, Professor Guinier was correct in saying that we must look for new ways to protect the voting power of racial minorities, and the political attacks on her reflect political attitudes that were evident in some of the Supreme Court's recent opinions.<sup>91</sup>

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91. See Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135 (1993); Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589 (1993); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991); Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413 (1991); Lani Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393 (1989); Lani Guinier, *Who's Afraid of Lani Guinier?*, N.Y. TIMES, Feb. 27, 1994, § 6 (Magazine), at 41; see also T. Alexander Aleinikoff & Richard H. Pildes, *Guinier Aims for Consensus Building Without Quotas*, L.A. DAILY

In the late 1960s and early 1970s, the Supreme Court gave a very expansive reading to section 5 of the Voting Rights Act. Section 5 requires certain jurisdictions to clear any change in their laws that might affect the voting power of racial minorities with either the Attorney General of the United States or the District Court in the District of Columbia.<sup>92</sup>

In the mid-1970s, the Court began to waver in its approach to the meaning of section 5. In *City of Richmond v. United States*,<sup>93</sup> the Court ruled that not all city annexations of land that affected the voting population of a jurisdiction subject to section 5 preclearance had to receive the approval of the Attorney General or the District Court.<sup>94</sup> Justice Powell did not participate in this five to three decision.<sup>95</sup> Justice White wrote for the majority and was joined by Chief Justice Burger and Justices Blackmun, Rehnquist, and Stewart.<sup>96</sup> Justices Brennan, Douglas, and Marshall dissented.<sup>97</sup> The *City of Richmond* decision apparently drew a battle line between some of the Democratic Justices who had served during the Warren era and the

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J., June 2, 1993, at 6; Clint Bolick, *Showdown Over Civil Rights—Lani Guinier Would Turn Electoral Process Into a Racial Spoils System*, L.A. DAILY J., June 2, 1993, at 6.

92. The preclearance requirements of the Voting Rights Act are codified at 42 U.S.C. § 1973c (1988). In 1969, the Supreme Court gave private persons the ability to invoke district court jurisdiction to require that a jurisdiction subject to the § 5 preclearance provisions followed those provisions and did not hold an election under a change in voting laws that had not been cleared by the Attorney General or the District Court in the District of Columbia. *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). In 1971, the Court applied the § 5 provisions to require preclearance of changes in polling places and the annexation of property to a city that might lessen the voting strength of racial minorities. *Perkins v. Matthews*, 400 U.S. 379 (1971). In 1973, the Supreme Court, by a six to three vote, held that the § 5 preclearance requirements required jurisdictions covered by § 5 to receive the approval of the Attorney General or the District Court for the District of Columbia for a state reapportionment plan. *Georgia v. United States*, 411 U.S. 526 (1973). Justices White, Powell, and Rehnquist agreed with the application of the § 5 preclearance requirements to reapportionment plans, but dissented on the grounds that the Attorney General did not make an objection contemplated by § 5. *Id.* at 542 (White, Powell, and Rehnquist, JJ., dissenting).

93. *Richmond v. United States*, 422 U.S. 358 (1975).

94. *Id.* at 378.

95. *Id.* at 379.

96. *Id.* at 361.

97. *Id.* at 379.

new Republican appointees with Justice White being a "swing vote."

Some of the Court's mid-1970s decisions gave conflicting signals regarding the Court's commitment to protecting racial minority voters. In 1976, the Court in *Beer v. United States*<sup>98</sup> ruled that a jurisdiction, which was subject to section 5 of the Voting Rights Act, would not be allowed to change its voting laws if the change reduced the voting strength of racial minorities.<sup>99</sup> However, the majority opinion by Justice Stewart also stated voting procedure changes clearly burdensome to racial minority voters were not subject to section 5 preclearance.<sup>100</sup>

In *United Jewish Organizations, Inc. v. Carey (UJO)*,<sup>101</sup> the Supreme Court, without a majority opinion, approved the State of New York's use of racial criteria to redraw districts for the state legislature to protect the voting power of racial minorities.<sup>102</sup> A majority of the Court held that the government's race-conscious action designed to support minority voting power did not violate the Voting Rights Act, the Equal Protection Clause, or the Fifteenth Amendment.<sup>103</sup> Although there was no majority opinion in this case, clearly *UJO* is a ringing endorsement of the power of the federal government to force states to actively enhance the voting power of racial minorities. In a plurality decision, Justice White stated that the Court's earlier

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98. 425 U.S. 130 (1976).

99. *Id.* at 141.

100. *Id.* Justice Marshall's dissent, which was joined by Justice Brennan, explained that the Court's new reading of § 5 sounded in part as if it were protecting the interest of racial minority voters, but, in fact, the Court was freeing changes in redistricting plans that would result in discrimination against racial minority voters from the § 5 preclearance procedures. *Id.* at 145 (Marshall and Brennan, JJ., dissenting). Justice White also dissented and agreed with much of Justice Marshall's analysis. *Id.* at 143 (White, J., dissenting). In a separate opinion, Justice White expressed the view that the Court should give a wider scope to the § 5 preclearance requirements. *Id.* Ultimately, the five member majority (with Justice Stevens not participating in the case) created an indecisive ruling that seemed to prohibit any retrogression in the voting strength of racial minorities while freeing from § 5 preclearance procedures many types of changes in voting practices that lower courts might find to be ones that on their face did not result in the dilution of minority race voting strength.

101. *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977).

102. *Id.* at 168.

103. *Id.* at 155.

rulings on the meaning of the Voting Rights Act established that the use of racial criteria to protect racial minority voting power complied with the Voting Rights Act, the Fourteenth Amendment, and the Fifteenth Amendment.<sup>104</sup> In a later section in this Article, I will reconsider *UJO* as a means of examining the Supreme Court's definition of racial discrimination and the Justices' attitudes towards the use of racial criteria to help racial minorities.<sup>105</sup>

Through the mid-1980s, the Court seemed committed to strong endorsement of the Attorney General's powers under section 5 of the Voting Rights Act.<sup>106</sup> However, increasing dis-

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104. *Id.* at 162 (White, J., joined by Stevens, Brennan and Blackmun, JJ.).

105. See *infra* notes 326-45, 503-04 and accompanying text.

106. In 1978, Supreme Court support for the Voting Rights Act lessened even though a majority of the Justices continued to vote to protect racial minorities under the Act. In *Dougherty County Bd. of Educ. v. White*, 439 U.S. 32 (1978), the Court held that the Voting Rights Act preclearance requirements applied to a school board that changed its rules for leaves of absence for its employees who ran for election, because of the potential for discrimination against racial minorities and dilution of the voting power of racial minority voters. The *White* decision, however, was rendered by a five to four vote of the Justices. Justice Stevens concurred only because he believed that prior cases required its result. *Id.* at 47 (Stevens, J., concurring). Justice Powell, joined by Chief Justice Burger, Justice Rehnquist, and in part by Justice Stewart, dissented. In 1978, the Court applied the Voting Rights Act preclearance requirements to a municipality's plan to use an at-large election for city council. *United States v. Board of Comm'rs*, 435 U.S. 110 (1978). The Court, by a six to three vote, found that § 5 applied not only to counties and political units within a state that register voters, but to any unit with power over the electoral process. *Id.* at 118. The Court reasoned that the mere failure of the Attorney General to object to the holding of a referendum election that adopted the voting changes did not constitute preclearance under § 5 when the proposal had not been formally submitted to him pursuant to the formalities required by the Court's interpretations of § 5 of the Voting Rights Act. *Id.* Justice Powell concurred in part and concurred in the judgment. *Id.* at 139. Justice Stevens, joined by Chief Justice Burger and Justice Rehnquist, dissented. *Id.* at 140.

The Supreme Court had held that reapportionment plans that are ordered by courts are not subject to the preclearance requirements of § 5, but in 1981 the Court, in *McDaniel v. Sanchez*, 452 U.S. 130 (1981), found that the preclearance requirements did apply to a court-adopted reapportionment plan if a legislative body originally had submitted the plan to the court.

In *City of Port Arthur v. United States*, 459 U.S. 159 (1982), the Supreme Court ruled that the district court properly conditioned clearance of a new election plan following annexation of territory on a requirement that a plurality of voters could control the election in certain districts. Justices Powell, Rehnquist, and O'Connor dissented. *Id.* at 169.

sension developed within the Court concerning the scope of the Voting Rights Act preclearance requirements. In 1982, the Court issued a per curiam ruling that affirmed a lower court order enforcing section 5 of the Voting Rights Act and prevented a local jurisdiction from changing its voting laws in a way that might dilute racial minority voting strength.<sup>107</sup> But Justices Rehnquist and Powell wrote a concurring opinion for the sole purpose of criticizing the extent to which the Voting Rights Act allowed the federal government to control the decisions of state and local governmental entities concerning their electoral practices.<sup>108</sup> In 1985, the Supreme Court unanimously ruled that section 5 required preclearance for setting a new filing date for general elections in covered jurisdictions, but Justices Powell and Rehnquist concurred only in the judgment of the Court.<sup>109</sup>

In 1987, by a vote of six to three, the Court found a city's

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In 1983, the Court found that a new city election plan that altered the election procedures for city council and mayor required approval even though the plan did not change racial minority voting strength. *Lockhart v. United States*, 460 U.S. 125 (1983). Justice White dissented without an opinion. *Id.* at 136. Justice Marshall and Justice Blackmun each issued an opinion concurring in part and dissenting in part. *Id.* at 136 (Marshall, J.); *id.* at 148 (Blackmun, J.).

In 1984, the Court unanimously held that changes in an election statute that had not been formally presented to the Attorney General in 1966 was not later retroactively cleared by the Justice Department when the Attorney General failed to object in 1971 to amendments to the 1966 state statute. *McCain v. Lybrand*, 465 U.S. 236 (1984). Although the Court was unanimous in its ruling, Justices Blackmun, Powell, and Rehnquist concurred in the judgment without issuing any written opinions. *Id.* at 258.

In 1984, dissension within the Court was evident concerning the scope of § 2 of the Voting Rights Act. Section 2 prohibits government actions that deprive persons of voting rights by diluting the voting power of racial minorities. In *Mississippi Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984), the Supreme Court, without opinion, summarily affirmed a lower court ruling concerning a violation of § 2. Justice Rehnquist joined by Chief Justice Burger dissented; they categorized the lower court ruling as construing the 1982 amendment to the Voting Rights Act to entitle racial minority plaintiffs to a district in which they constituted a majority of the voters. *Id.* at 1005 (Rehnquist, J., dissenting, joined by Burger, C.J.). Justice Stevens wrote a concurring opinion to rebut the implications concerning the meaning of the Court's summary judgment that had been made in the Rehnquist dissent. *Id.* at 1002 (Stevens, J., concurring).

107. *Blanding v. DuBose*, 454 U.S. 393 (1982) (per curiam). Chief Justice Burger concurred in the judgment without opinion.

108. *Id.* at 401 (Rehnquist, J., concurring, joined by Powell, J.).

109. *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 183 (1985).



annexation of land to be used for residential development subject to section 5 and that the annexation or any new voting practices should not receive preclearance unless the city met the burden of proving that the state action would not dilute the voting strength of minorities.<sup>110</sup> Justice Powell dissented in an opinion that was joined by Chief Justice Rehnquist and Justice O'Connor.<sup>111</sup>

In 1991, the Court gave mixed signals concerning its attitude towards the scope and meaning of the Voting Rights Act. In *Clark v. Roemer*,<sup>112</sup> Justice Kennedy wrote for a unanimous Court in ruling that in covered jurisdictions, section 5 requires preclearance for changes in the election of judge.<sup>113</sup> In two other 1991 cases, the Court held that the standards established in earlier cases concerning section 2 of the Voting Rights Act for the determination of whether a change in voting laws constituted an illegal dilution of minority race voting power should also apply to the election of judges.<sup>114</sup> Justice Scalia, joined by Justice Kennedy and Chief Justice Rehnquist, dissented from the rulings concerning the applicability of section 2 standards to judicial elections.<sup>115</sup> Justice Kennedy also filed a dissent in *Chisom* in which he questioned whether section 2 of the Voting Rights Act, as it had been amended in 1982, was "consistent with the requirements of the United States Constitution."<sup>116</sup>

In 1992, Reagan and Bush appointees undercut the authority of the Attorney General under section 5 of the Voting Rights Act. In *Presley v. Etowah County Commission*,<sup>117</sup> the Court ruled that changes in the decisionmaking authority of elected members of the county commissions in two Alabama counties

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110. *City of Pleasant Grove v. United States*, 479 U.S. 462, 469-72 (1987).

111. *Id.* at 472 (Powell, J., dissenting, joined by Rehnquist, C.J., and O'Connor, J.).

112. 500 U.S. 646 (1991).

113. *Id.* at 652.

114. *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Trial Lawyers' Ass'n v. Attorney Gen.*, 501 U.S. 419 (1991).

115. *Chisom*, 501 U.S. at 404 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Kennedy, J.); *Houston Trial Lawyers Ass'n*, 501 U.S. at 428 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Kennedy, J.).

116. *Chisom*, 501 U.S. at 418 (Kennedy, J., dissenting).

117. 112 S. Ct. 820 (1992).

were not subject to the section 5 preclearance requirements.<sup>118</sup> The changes to the powers of the county commissioners at issue in *Presley* had been made immediately after racial minorities first were elected to those commissions.<sup>119</sup> The minority candidates prevailed in elections held after consent decrees that required that each county commission be elected on a district, rather than an at-large, basis.<sup>120</sup> After the election, the lame duck commission adopted resolutions that stripped the commission of some of its powers and eliminated the prior practice of allowing each commissioner the authority to determine how to spend road district funds.<sup>121</sup> Decisionmaking authority regarding matters such as road districts was transferred to a county engineer who was a commission appointee.<sup>122</sup> The Attorney General of the United States during the Bush Administration found that this change in the allocation of authority within the county governmental units was a change in voting practices that was subject to the section 5 preclearance requirements.<sup>123</sup> The Justice Department took the position that the action of the majority race commissioners, in altering powers of individual commissioners, was a change in the local laws "with respect to voting" because these actions reduced the political voice of minorities.<sup>124</sup> The Court held that section 5 did not require preclearance of the change.<sup>125</sup> Justice Kennedy, writing for six Justices, found that the Court did not need to defer to the executive branch's interpretation of section 5.<sup>126</sup>

Justice White (the last Democratic appointee), Justice Stevens (who had been appointed during the Ford Administration), and

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118. *Id.* at 832.

119. *Id.* at 822.

120. *Id.* at 826.

121. *Id.*

122. *Id.*

123. *See id.* at 827.

124. *See id.* at 824 (citing 42 U.S.C. § 1973c (1988)). The Justice Department, as amicus curiae to the Court, argued that § 5 should be interpreted as applicable to all "routine actions of state and local governments at all levels." *Id.* at 824. The Justice Department has denied preclearance where changes in elected officials' power "had a potentially discriminatory impact on black voters." *Id.* at 833 (Stevens, J., dissenting, joined by White and Blackmun, JJ.).

125. *See id.* at 832.

126. *Id.* at 831.

Justice Blackmun (who had a long voting record of supporting the interests of racial minorities) were the only three members of the Court in 1992 willing to find that the preclearance provisions of the Voting Rights Act applied to the transfer of decisionmaking authority away from a county commission that had just been integrated.<sup>127</sup> The scope of the section 5 preclearance provision of the Act had not been limited by Congress, or by President Bush's Justice Department, but by the Reagan and Bush appointees on the Supreme Court.

A later section of this Article will examine the willingness of the Justices of the Burger and Rehnquist Courts to uphold laws that, although written in racially neutral terms, harm minorities when challenged as violations of the Equal Protection Clause. The Court's refusal in the last quarter century to protect racial minorities from even the most mildly disguised discriminatory laws is reflected in its decisions concerning whether changes in voting laws should be held to violate section 2 of the Voting Rights Act, which prohibits denying the vote to, or diluting the voting power of, racial minorities.<sup>128</sup>

Early in the Burger Court, the Supreme Court ruled that legislative redistricting plans do not violate the Equal Protection Clause or the Fifteenth Amendment if the only proof of racial discrimination in the voting plan was the fact that it resulted in the dilution of minority voting strength.<sup>129</sup>

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127. *Id.* at 840 (Stevens, J., dissenting, joined by White and Blackmun, JJ.)

128. *See* 42 U.S.C. § 1973 (1988).

129. *Whitcomb v. Chavis*, 403 U.S. 124, 149-53 (1971). The Supreme Court upheld a state legislative apportionment law that created a multimember legislative district, which included an area that the Supreme Court described as a racial minority "ghetto." *Id.* at 129. If the state had used only single member districts, creating a district where African American voters controlled, the outcome of the election would have been difficult to avoid. *See id.* at 149. However, the effect of the multimember districting was not sufficient to persuade a majority of the Burger Court that the state had engaged in racial discrimination. *Id.* at 149-53.

Two years later in *White v. Regester*, 412 U.S. 755 (1973), the Court found that a legislative redistricting plan violated the Equal Protection Clause because there was clear proof that the creation of two multimember state legislative districts in Texas were racially discriminatory. *Id.* at 765-70. The Court deferred to the findings of the district court that the history of official racial discrimination in Texas played a part in the creation of multimember districts designed to reduce or eliminate the voting strength of African American and Hispanic American voters. *Id.* The Court affirmed the district court ruling that the two multimember districts were invalid on

The Burger Court Justices were equally unsympathetic to claims under the Voting Rights Act of 1965 that the effect of electoral systems diluted minority race voting power. In 1979, in *Mobile v. Bolden*,<sup>130</sup> the Court held that the use of at-large elections for members of a city commission did not violate the Voting Rights Act or the Fifteenth Amendment,<sup>131</sup> even though no racial minority member had ever been elected to the commission.<sup>132</sup> No majority arose in *Bolden*; Justice Stewart, joined by Chief Justice Burger and Justices Powell and Rehnquist, found that section 2 of the Voting Rights Act did not ease the burden of plaintiffs trying to show that the creation or maintenance of an electoral system was designed to dilute the voting power of racial minorities.<sup>133</sup>

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the basis of racial discrimination. *Id.* at 765. In the same opinion, however, the Court reversed the district court and upheld the statewide redistricting plan as complying with one person, one vote principles. *Id.* at 763-64. At the same time it decided *White*, the Supreme Court in *Gaffney v. Cummings*, 412 U.S. 735 (1973), upheld the reapportionment plan for the Connecticut legislature despite claims that it violated the one person, one vote principle. *Id.* at 741. Justice Brennan, joined by Justices Douglas and Marshall, concurred in *White* insofar as the Court found a violation of equal protection in the Texas multimember districts; however, they dissented from the Court's rulings upholding the Texas and Connecticut statewide legislative maps against the one person, one vote challenge. *Id.* at 772 (Brennan, J., concurring in part and dissenting in part in *White* and dissenting in *Gaffney*, joined by Douglas and Marshall, JJ.) (the combined opinion of Justices Brennan, Douglas and Marshall with respect to *White* and *Gaffney* is located in *White*).

130. 446 U.S. 55 (1980).

131. *Id.* at 60-65.

132. *Id.* at 122 (Marshall, J., dissenting).

133. *Id.* at 61. (Stevens, J., announcing the judgment of the Court in an opinion joined by Burger, C.J., Powell, and Rehnquist, JJ.). Justice Blackmun concurred only in the result because he thought that the district court's remedy was improper even though he agreed that there might be a basis for finding purposeful discrimination. *Id.* at 80 (Blackmun, J., concurring). Justice Stevens concurred in the judgment of the Court; however, his analysis focused on the objective effects of the change in the voting laws or voting practices rather than the "subjective motivation of the decisionmaker." *Id.* at 90 (Stevens, J., concurring). Justice Stevens' test would make it even more difficult to show that an electoral system was created or maintained for a racially discriminatory purpose. Justice White dissented because he believed that the plaintiffs had made a sufficient showing of racially discriminatory purpose that met the standards established in the cases decided in the early 1970s. *Id.* at 103 (White, J., dissenting). Justices Brennan and Marshall, in separate dissenting opinions, argued that proof of discriminatory impact on minority race voters was sufficient to show a violation of the Voting Rights Act as well as the Fourteenth and Fifteenth Amendments. *Id.* at 94 (Brennan, J., dissenting); *id.* at 104 (Marshall, J.,

In 1982, Congress amended the Voting Rights Act to provide for greater protection of minority voters.<sup>134</sup> In the same year, the Supreme Court, in *Rogers v. Lodge*,<sup>135</sup> upheld lower federal court rulings that invalidated an at-large election system for a county board of commissioners.<sup>136</sup> The Court in *Rogers* found that evidence existed, beyond the statistical underrepresentation of minority members of the governmental board, to show that the at-large system was maintained for discriminatory purposes to preclude racial minorities from being elected to the county commission.<sup>137</sup>

In 1986, the Supreme Court interpreted the 1982 amendments to section 2 of the Voting Rights Act. Justice Brennan announced the judgment of the Court in *Thornburg v. Gingles*<sup>138</sup> and delivered an opinion that was, in part, a majority opinion and, in part, a plurality opinion.<sup>139</sup> The result of *Gingles* was a finding that the 1982 amendments only slightly eased the burdens of plaintiffs who challenged a voting law on the basis that the law diluted the voting strength of minority race voters.<sup>140</sup>

A majority of Justices in *Gingles* required a plaintiff to meet three conditions in order to establish a prima facie case of racial discrimination under amended section 2.<sup>141</sup> First, the plaintiff must show that the minority group that allegedly suffered discrimination is sufficiently large and geographically compact so that the group might have constituted a majority in an electoral district drawn with no racially discriminatory purpose.<sup>142</sup> Second, the plaintiffs must show that the minority voters are "polit-

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dissenting). *Mobile* was decided on the same day as *Williams v. Brown*, 446 U.S. 236 (1980). The dissents of Justices Brennan and Marshall apply to both cases. *Id.* at 236.

134. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (1982) (amending 42 U.S.C. 1973b (1976)).

135. 458 U.S. 613 (1982).

136. *Id.* at 627.

137. *Id.* at 623.

138. 478 U.S. 30 (1986).

139. *Id.* at 34.

140. See Jim R. Karpiak, *Voting Rights and the Role of the Federal Government: The Rehnquist Court's Mixed Messages in Minority Vote Dilution Cases*, 27 U.S.F. L. REV. 627, 639 (1993).

141. 478 U.S. at 50-51.

142. *Id.* at 50.

ically cohesive," so that they likely would influence or control elections in fairly drawn districts.<sup>143</sup> Third, the plaintiffs must show that white voters in the challenged legislative districts were likely to engage in racial bloc voting, so that the districting system dilutes the voting power of minority voters and insures the defeat of minority candidates.<sup>144</sup>

The Supreme Court has extended the impact of *Gingles*, and, thereby, maintained a narrow reading of section 2 of the Voting Rights Act. *Gingles* established the conditions for challenging a multimember district on the basis that it diluted the strength of minority race voters.<sup>145</sup> In 1993 the Supreme Court ruled that plaintiffs who alleged that a legislative redistricting plan created single member districts that violated section 2 through the dilution of minority voting strength also must meet the three *Gingles* conditions.<sup>146</sup>

The Supreme Court in 1993 also ruled that plaintiffs who allege that legislative districting had diluted minority race voting power through the packing of minority race voters into specific districts must meet the three *Gingles* conditions to prove a violation of the Voting Rights Act.<sup>147</sup> One method of engaging in racial gerrymandering is to pack minority race voters into districts that will provide them with the power to control a district election but that will keep those voters from influencing the outcome of elections in more than one district. For example, if two previous legislative districts each had fifty-five percent minority voters, a legislature intending to engage in racial gerrymandering might reshape the districts so that minorities constituted 100 percent of the voters in one district and ten percent in the second district. The minority race voters would thus be able to elect only one representative to the legislature. Minority vot-

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143. *Id.* at 51.

144. *Id.* Justices Stevens, Marshall, and Blackmun would have given more deference to the lower court determination that the facts in this case demonstrated a violation of § 2. *Id.* at 106 (Stevens, J., concurring in part and dissenting in part, joined by Marshall and Blackmun, JJ.).

145. Karpiak, *supra* note 140, at 627.

146. *Grove v. Emison*, 113 S. Ct. 1075, 1084 (1993).

147. *Voinovich v. Quilter*, 113 S. Ct. 1149, 1157 (1993). In *Voinovich*, the Court held that the district court erred by not applying the *Gingles* factors to determine the validity of a single-member district apportionment scheme. *Id.*

ers now must meet all the *Gingles* conditions to prove that this legislative practice violated the Voting Rights Act.<sup>148</sup>

In *Shaw v. Reno*<sup>149</sup> the Supreme Court, in an apparent effort to protect the power of white voters, disregarded its prior cases concerning the need to prove racially discriminatory purpose when challenging legislative districts under the Fourteenth Amendment, Fifteenth Amendment, and the Voting Rights Act.<sup>150</sup> In a later section of this Article, I will examine the *Shaw* decision in terms of how it reflects the Justices' views of equal protection principles.<sup>151</sup> Here we should note that the Court's ruling in *Shaw* shows that a majority of the Justices were not willing to give any deference to legislative or executive branch attempts to help minority voters.<sup>152</sup>

North Carolina, which is subject to the preclearance requirements of the Voting Rights Act, received an additional congressional seat following the 1990 census.<sup>153</sup> The Justice Department rejected the North Carolina legislature's first congressional redistricting plan because the Attorney General believed the state's initial drawing of district lines would have resulted in the dilution of minority race voting power.<sup>154</sup> The state did not challenge the Attorney General.<sup>155</sup> Instead, it enacted a congressional redistricting plan designed to allow racial minorities to control the outcome in two of its congressional districts.<sup>156</sup> In *Shaw*, the Supreme Court, by a five to four vote, ruled that the final North Carolina plan, on its face, involved a racial classification.<sup>157</sup> The State's attempt to aid minority race voters was subject to the compelling interest test, even though the State had drawn these congressional districts in response to Justice Department objections raised under section 5 of the Voting

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148. See *id.* at 1157-58.

149. 113 S. Ct. 2816 (1993).

150. See *id.* at 2828-32.

151. See *infra* notes 346-73, 490-504 and accompanying text.

152. See *Shaw*, 113 S. Ct. at 2819-32.

153. *Id.* at 2819.

154. See *id.*

155. *Id.*

156. See *id.* at 2819-20.

157. *Id.* at 2819, 2824.

Rights Act.<sup>158</sup> The majority remanded the case to the lower court for a determination of whether the action taken by the State was narrowly tailored to a compelling interest.<sup>159</sup> Justice O'Connor's opinion gave no indication that the Supreme Court would ever uphold these districts.<sup>160</sup>

Justice O'Connor, writing for the five-member majority in *Shaw*, ruled that the law creating the final congressional districts constituted racial discrimination on the face of the statute even though racial terms were not used in the statute itself.<sup>161</sup> The *Shaw* majority freed the plaintiffs from having to meet the conditions.<sup>162</sup> The plaintiffs did not have to prove a racially discriminatory purpose or the dilution of the voting strength of minority race voters in order to have the law subjected to the compelling interest test.<sup>163</sup> The plaintiffs in *Shaw* could not have met such a burden. After the final congressional districts were drawn, white voters in North Carolina controlled over eighty percent of the state's congressional seats even though white voters constituted less than eighty percent of the voting population.<sup>164</sup>

Justices Blackmun, White, Stevens, and Souter dissented in *Shaw*.<sup>165</sup> They believed that the case was factually and legally indistinguishable from *UJO*.<sup>166</sup> Unlike 1977, only a minority of Justices in 1993 would vote to use the Voting Rights Act to help

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158. *Id.* at 2832.

159. *Id.*

160. These portions of Justice O'Connor's opinion are discussed at *infra* notes 358-73 and accompanying text.

161. *Shaw*, 113 S. Ct. at 2819, 2828.

162. *Id.* at 2831. The Court remanded to the district court the issue concerning the application of the three *Gingles* threshold conditions and their impact on the constitutionality of § 2 of the Voting Rights Act.

163. *Id.* at 2831-32.

164. *Id.* at 2838. The difference between the statistical representation of racial minorities in the voting population and their representation in the North Carolina congressional district led the Attorney General to object to the first North Carolina districting plan. *See id.* at 2837.

165. *See id.* at 2834 (White, J., dissenting, joined by Blackmun and Stevens, JJ.); *id.* at 2843 (Blackmun, J., dissenting); *id.* at 2843 (Stevens, J., dissenting); *id.* at 2845 (Souter, J., dissenting).

166. *Id.* at 2834, 2837 (White, J., dissenting, joined by Blackmun and Stevens, JJ.); *see id.* at 2845-49 (Souter, J., dissenting) (*citing* United Jewish Orgs., Inc. v. Carey, 430 U.S. 144 (1977)).



racial minorities.

The *Presley* and *Shaw* decisions seem to turn the Voting Rights Act inside out. The Voting Rights Act, at least as it was interpreted by the Court in the 1960s and early 1970s, was meant to give the federal government the ability to strengthen the voting power of racial minorities. In *Presley*, the Court decided that it would not defer to the Attorney General in finding that government actions constituted the type of changes to voting laws that would endanger the voting power of minorities.<sup>167</sup> In *Shaw*, the Court found that the North Carolina congressional districts constituted racial discrimination even though there was no claim that the voting power of the majority had been diluted by the attempt to maintain the voting power of minority race voters.<sup>168</sup> Justice O'Connor's opinion in *Shaw* casts doubt on the ability of the other branches of government to protect minority voting power.

During the current Term the Supreme Court will decide several cases concerning the burdens that plaintiffs must meet to show that a state or local apportionment plan violates section 2 of the Voting Rights Act. If the Court places further barriers in the path of plaintiffs attempting to prove that legislative districts illegally dilute minority voting strength, the Republican Justices may be able to turn the clock back to the time before the Voting Rights Act existed.<sup>169</sup>

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167. *Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 831 (1992).

168. *See Shaw* 113 S. Ct. at 2828.

169. On June 30, 1994, six weeks after the conference for which this Article was written, the Supreme Court decided two cases that advanced the Republican Justices' goal of undercutting the impact of the Voting Rights Act. The most important of these cases is *Holder v. Hall*, 114 S. Ct. 2581 (1994), in which the Court, without a majority opinion, ruled that the size of a governmental authority could not be challenged under § 2 of the Voting Rights Act even if there was clear proof that the size of the governmental entity would suppress the voting power of racial minorities. *Id.* at 2588. In *Holder*, the Court immunized from a Voting Rights Act challenge a single commissioner form of government for a county in Georgia. *Id.* at 2584. The county had never elected a person of color to the commissioner position and had a history of openly oppressing racial minority interests in a wide variety of areas. *Id.* In 1985, the State of Georgia authorized the county to adopt a multimember county commission by referendum. *Id.* In a 1986 referendum, however, the voters in the county defeated the proposal for a multimember commission. *Id.* Five Republican Justices ruled that the county's refusal to adopt the multimember commission system and decision to keep the single commissioner system (which

would effectively guarantee that 51% of the population would receive 100% of the representation in the county government) was not subject to challenge under § 2 of the Voting Rights Act. *Id.* at 2588. Justice Kennedy announced the judgment of the Court in an opinion that was joined in its entirety only by Chief Justice Rehnquist. They believed that the size of the membership of a political subdivision of a governmental entity was not a "standard, practice, or procedure" related to voting as those words were used in § 2 of the Voting Rights Act, despite previous Supreme Court rulings finding that a change in the size of a county commission was a voting "standard or practice" subject to § 5 of the Voting Rights Act. *Id.* at 2585-88. Justice O'Connor wrote an opinion concurring in part, and concurring in the judgment, in which she found that prior Supreme Court cases required the determination that the "standard, practice, or procedure" language of § 2 of the Voting Rights Act must mean the same as the language in § 5 of the Act. *Id.* at 2588-89 (O'Connor, J., concurring). However, she believed that the judiciary was incapable of determining whether the refusal to change the size of a governmental entity diluted the voting power of racial minorities within the jurisdiction. *Id.* at 2590-91. Justice O'Connor, therefore, concurred "in the conclusion that respondents' dilution challenge to the size of the Bleckley County Commission cannot be maintained under § 2 of the Voting Rights Act." *Id.* at 2591.

Justice Thomas wrote an opinion concurring in the judgment in *Holder*, which was joined by Justice Scalia, that can only be described as a sweeping attack on the Voting Rights Act. *Id.* at 2591 (Thomas, J., concurring, joined by Scalia, J.). Justices Thomas and Scalia would overrule all prior Supreme Court cases that found that § 2 of the Voting Rights Act made illegal administrative or legislative actions that were designed to dilute the voting strength of racial minorities. *Id.* at 2618. They argued that § 2 of the Voting Rights Act was meant to do nothing except prohibit denying someone a ballot on the basis of their race, despite the fact that Congress voted to continue, and strengthen, the language of § 2 following Supreme Court rulings that invalidated city or state apportionment schemes under § 2 on the basis that those city or state practices diluted the voting strength of racial minorities. *Id.* at 2606.

Justices Blackmun, Stevens, Souter, and Ginsburg dissented in *Holder*. *Id.* at 2619 (Blackmun, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.). Justice Blackmun's opinion demonstrates how the Court could have established standards for determining whether a jurisdiction's selection of a particular size of governing authority is an attempt to dilute the voting power of racial minorities. *Id.* at 2619-24. Justice Stevens' opinion examines the Supreme Court's earlier rulings concerning the scope of § 2 of the Voting Rights Act and the congressional responses thereto. *See id.* at 2625-29 (Stevens, J., dissenting, joined by Blackmun, Souter, and Ginsburg, JJ.). The Stevens opinion reveals the unprincipled nature of Justices Thomas' and Scalia's attack on § 2 of the Voting Rights Act.

In *Holder*, the Court remanded the case for a determination of whether the plaintiffs could demonstrate that the county refused to adopt a multimember system for the primary purpose of preventing racial minorities from being elected to office. *Id.* at 2588. Only by showing racially discriminatory purpose under the standards established by the Burger Court and Rehnquist Court would the plaintiffs be able to show that the refusal to change the size of the governing authority violated the Equal Protection Clause of the Fourteenth Amendment and, perhaps, the Fifteenth Amendment. Given the rulings of the Burger Court and Rehnquist Court concerning

## V. THE SHIFTING ATTITUDE OF THE JUSTICES TOWARDS THIRTEENTH AMENDMENT LEGISLATION

The approach of the Supreme Court towards interpreting and enforcing Thirteenth Amendment legislation changed dramatically during the past quarter century. In 1968 and 1969, the

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the nature of proof required to show discriminatory purpose as a basis for invalidating a facially neutral law, this county's commissioner system may survive constitutional review despite the county's history of racial discrimination. I have discussed the Court's rulings concerning discriminatory purpose elsewhere in this Article. See *supra* notes 137-48 and accompanying text; *infra* notes 206-12 and accompanying text.

In *Johnson v. De Grandy*, 114 S. Ct. 2647 (1994), the Supreme Court ruled on three Florida cases that raised the question of whether legislative districts for the Florida House of Representatives and Florida Senate violated § 2 of the Voting Rights Act by diluting the voting strength of racial minorities. *Id.* at 2650. The Supreme Court ruled that the lower courts should not have found a violation of § 2 of the Voting Rights Act unless they determined that the "totality of circumstances" demonstrated that the apportionment system was designed to suppress minority race voting strength. *Id.* at 2656. Justice Souter wrote for seven Justices and found that, even if a plaintiff could meet all three requirements that had been established in *Thornburg v. Gingles*, 478 U.S. 30 (1986), for making out a prima facie violation of § 2 of the Voting Rights Act, the plaintiffs would not have established a basis for finding illegal dilution of the voting power of minority race persons unless that conclusion was supported by the "totality of circumstances." *Johnson*, 114 S. Ct. at 2657. According to Justice Souter, the fact that racial minorities had achieved proportional representation did not foreclose the possibility of showing illegal vote dilution, although proportional representation would make it difficult for minority plaintiffs to win a case under the totality of circumstances test. *Id.* at 2660-62. The majority opinion clearly stated that neither state legislatures nor courts were required to maximize the voting strength of racial minorities. *Id.* at 2660.

In one sense, *Johnson* only continues the trend towards interpreting the § 2 requirements in a way that makes it difficult for plaintiffs to prove illegal vote dilution. See *supra* notes 144-48 and accompanying text (describing this trend). This case also stands in sharp contrast to *Shaw v. Reno*, 113 S. Ct. 2816 (1993), in which the Court ruled that an attempt to strengthen and protect minority race voting power constituted a racial classification that was subject to the strictest judicial scrutiny. *Id.* at 2832; see *infra* notes 346-73 and accompanying text (analyzing the decision in *Shaw*). The message of the Rehnquist Court in *Shaw* and *Johnson* is that states will not be required to protect minority race voting power while any state attempt to strengthen minority race voting power may not survive judicial review.

The *Shaw*, *Holder*, and *Johnson* cases may demonstrate that at least five Republican Justices (Chief Justice Rehnquist and Justices O'Connor, Kennedy, Scalia, and Thomas) want to return to the 1890s, when the Court impaired legislative attempts to protect the interests of racial minorities and upheld a wide variety of racially discriminatory practices that did not involve the open denial of specific rights to racial minorities.

Supreme Court interpreted 42 U.S.C. § 1982 in a manner that prohibited racial discrimination in private real estate contracts or related transactions.<sup>170</sup> In the early Burger Court years, it appeared that the Court would continue to give a broad interpretation to Thirteenth Amendment legislation.<sup>171</sup>

In 1976, the Court, in *Runyon v. McCrary*<sup>172</sup> found that 42 U.S.C. § 1981, which gives all persons the same rights as "white citizens" to make and enforce contracts,<sup>173</sup> outlawed the practices of a private school that denied admission to qualified applicants solely because they were racial minorities.<sup>174</sup> The Burger Court gave the same wide reading to Congress' powers under the Thirteenth Amendment in *Runyon* as the Warren Court had in *Jones v. Alfred H. Mayer Co.*<sup>175</sup>

Despite the Court's ruling in *Runyon*, the opinions of the Justices indicated that the Court might take a more narrow approach towards the reading and enforcement of Thirteenth Amendment statutes in the future. The *Runyon* case was decided by a seven to two vote of the Justices, but Justice Stewart wrote for only five members of the Court in finding that the Court should give a broad reading to section 1981 in order to fulfill the intent of the Reconstruction Era Congress and the promise of the Thirteenth Amendment.<sup>176</sup> Justices Powell and Stevens, in separate concurrences, voted with the majority only on the basis of stare decisis.<sup>177</sup> Justices White and Rehnquist dissented in *Runyon*,<sup>178</sup> they would have restricted the scope of sections 1981 and 1982.<sup>179</sup>

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170. See *supra* notes 84-90 and accompanying text.

171. In 1973, the Court ruled that 42 U.S.C. § 1982 prohibited racial discrimination in the policies of an association of recreational property owners. See *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973).

172. 427 U.S. 160 (1976).

173. 42 U.S.C. § 1981 (1988).

174. *Runyon*, 427 U.S. at 172-74.

175. 392 U.S. 409 (1968).

176. *Runyon*, 427 U.S. at 179.

177. *Id.* at 186 (Powell, J., concurring); *id.* at 191-92 (Stevens, J., concurring).

178. *Id.* at 192 (White J., dissenting, joined by Rehnquist, J.).

179. *Id.* at 194-95. Another indication of the Court's changing attitude towards racial minorities can be found in the Court's mid-1970s rulings allowing white employees to use Thirteenth Amendment statutes to challenge employment preferences for minority race persons. See, e.g., *McDonald v. Santa Fe Trail Transp. Co.*, 427

In the 1980s, the Supreme Court restricted the impact of sections 1981 and 1982 by ruling that plaintiffs could not establish a violation of these statutory provisions merely by showing that public or private sector activities had an adverse impact on racial minorities. In *Memphis v. Greene*,<sup>180</sup> the Court considered whether the closing of one end of a city street that went through a white residential community and that was used by persons travelling to a neighborhood that had primarily minority race residents violated section 1982 or the Thirteenth Amendment.<sup>181</sup> The Court found that this action did not violate section 1982 or the Thirteenth Amendment because the plaintiffs who challenged the closing of the city street had failed to show that the city action was taken for a racially discriminatory purpose.<sup>182</sup>

The next year, the Supreme Court required persons alleging private racial employment discrimination to prove that the challenged employment policies had not only a racially disparate impact, but that the policies also were undertaken with a racially discriminatory purpose.<sup>183</sup> Requiring plaintiffs to prove discriminatory purpose was a way in which the Supreme Court could limit both Thirteenth Amendment statutes as well as the scope of the Fourteenth Amendment Equal Protection Clause.<sup>184</sup>

The Supreme Court in 1989 dealt a devastating blow to the impact of 42 U.S.C. § 1981. In *Patterson v. McLean Credit Un-*

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U.S. 273 (1976). In one sense such rulings broaden the scope of these Thirteenth Amendment statutes, but they also provided a statutory vehicle for whites to challenge voluntary affirmative action in the private sector. The Court's rulings in the 1980s allowing a variety of ethnic groups to use Thirteenth Amendment statutes such as §§ 1981 and 1982 to challenge racial discrimination against them is an indication that the Court was still concerned with the use of Thirteenth Amendment statutes to stop racial discrimination against minority ethnic groups. See *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987).

180. 451 U.S. 100 (1981).

181. *Id.* at 102.

182. *Id.* at 126-29.

183. *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982).

184. See *infra* notes 205-12 and accompanying text (analyzing the Court's rulings requiring plaintiffs to prove discriminatory purpose in equal protection cases).

ion<sup>185</sup> the Court ruled that section 1981 did not prohibit racially discriminatory actions that were unrelated to contract formation, such as racial harassment of employees or racially discriminatory conditions of employment.<sup>186</sup> The *Patterson* ruling meant that section 1981 would be of little real help to minority race persons who suffered discriminatory treatment in private business settings. In the Civil Rights Act of 1991, Congress amended section 1981 by adding new provisions that prohibited racial discrimination in the "making, performance, modification, and termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."<sup>187</sup> The fact that Congress, during the Bush Administration, had to revise a Reconstruction Era statute due to a Supreme Court ruling is clear evidence that the Supreme Court was the branch of the federal government least sympathetic to racial minorities.<sup>188</sup>

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185. 491 U.S. 164 (1989).

186. *Id.* at 176.

187. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

188. The Rehnquist Court, however, has not significantly undercut the expansive reading the Burger Court gave to another Thirteenth Amendment statute, 42 U.S.C. § 1985(3). In 1971, the Court held in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), that this statute provided for civil actions against governmental or private persons who conspired to deny individuals of their rights because those individuals were members of racial minorities or because they were exercising certain fundamental constitutional rights. *Id.* at 96-98. In later cases the Supreme Court found that, in order to state a cause of action under § 1985(3), an individual who claimed that there was a conspiracy to violate her rights would have to show that the state was involved in the conspiracy or that the aim of the conspiracy was to influence the activity of the state as well as some type of "class-based animus." *E.g.*, *United Bhd. of Carpenters & Joiners of Am., Local 610 v. Scott*, 463 U.S. 825, 830-37 (1983). Thus, persons who wished to invoke § 1985(3) to stop an interference with their ability to engage in speech unconnected to a racial dispute had to show that the conspiracy involved some type of government or state action or some attempt at influencing state action. *Id.* at 832-33.

In 1993, the Supreme Court held that women who sought abortions could not maintain an action under § 1985(3) against persons who interfered with their ability to have access to abortion clinics or the operation of abortion clinics because the Supreme Court found that their attitudes towards abortion did not constitute the type of "class-based animus" that was the basis of a § 1985(3) claim. *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 759-62 (1993). The Court later ruled that the criminal activities of persons who sought to interfere with the operation of abortion facilities might be subject to prosecution under the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1988). *NOW v. Scheidler*, 114 S.

## VI. THE SHIFTING ATTITUDES OF THE JUSTICES TOWARD TITLE VII

The Supreme Court's rulings concerning Title VII prohibitions of employment discrimination also reflect its shift away from the protection of racial minorities. I do not mean to imply that the Supreme Court in the last quarter century has been restricting all aspects of Title VII. Since Congress reversed the Supreme Court's initial position, and expressly made discrimination on the basis of pregnancy a form of sex discrimination, the Supreme Court has invalidated employer policies that disadvantage pregnant women.<sup>189</sup> And the Court has upheld applying Title VII in a wide variety of work environments, including law firms and other types of professional associations.<sup>190</sup> The Court, in the fall of 1993, found that the creation of a hostile environment for women workers was a violation of Title VII.<sup>191</sup> Focusing on the Title VII decisions that are of vital importance to racial minority and female employees reveals that the Court has engaged in a consistent retrenchment in its willingness to

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Ct. 798, 803-06 (1994).

189. The Supreme Court established its initial position in *Geduldig v. Aiello*, 417 U.S. 484 (1974), in which the Court refused to find that a pregnancy classification relating to state disability benefits constituted a sex classification and therefore refused to test the state's decision not to fund pregnancy benefits under a meaningful form of judicial review. *Id.* at 494-97. Furthermore, in *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), the Court found that the Title VII prohibition of sex discrimination did not outlaw employer actions related to pregnancy that might be considered discrimination against pregnant women. *Id.* at 136-40.

The Court seemed to change this position in *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142-43 (1977), in which it found that an employer's policy of denying employees returning from pregnancy accumulated seniority violated Title VII. Nevertheless, because of the Court's past failures to protect female workers, Congress amended Title VII in 1978 so that distinctions based on pregnancy or child birth would be a form of sex discrimination. Pub. L. No. 95-555, 92 Stat. 2076 (1978). Cases in which the Court has enforced this statute include *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983) (finding that discrimination regarding pregnancy benefits for employee spouses violated the statute), and *International Union, UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991) (finding that an employer's policy of excluding women who were not medically documented as being infertile from jobs that involved potential exposure to lead was facially discriminatory against women and that the employer failed to establish that sex was a bona fide occupational qualification for those jobs).

190. *See, e.g., Hishon v. King & Spalding*, 467 U.S. 69 (1984).

191. *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 370-71 (1994).

enforce Title VII prohibitions against racial discrimination.

I would not claim to be the first person who has noticed that the appointees of President Reagan to the Supreme Court have helped to form a majority that has changed the judicial approach towards Title VII. For example, G. Nelson Smith and Rodney Ruffin analyzed the Rehnquist Court rulings that were unfavorable to Title VII plaintiffs.<sup>192</sup>

Congress amended parts of Title VII, in the Civil Rights Act of 1991, in order to reverse some of the Rehnquist Court's decisions.<sup>193</sup> I would like to point out how the Court's rulings in

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192. G. Nelson Smith, II & Rodney P. Ruffin, *Title VII Litigation Before the Rehnquist Court: Attempting to Change a Judicial Leopard's Spots*, 2 GEO. MASON U. CIV. RTS. L.J. 45, 51-60 (1991); see also Robin O. Bell, *Justice Anthony M. Kennedy: Will His Appointment to the United States Supreme Court Have an Impact on Employment Discrimination?*, 57 U. CIN. L. REV. 1037 (1989); Alfred W. Blumrosen, *Society in Transition III: Justice O'Connor and the Destabilization of the Griggs Principle of Employment Discrimination*, 13 WOMEN'S RTS. L. REP. 53 (1991); Kurt R. Mattson, *The Demise of Disparate Impact Employment Discrimination in the Rehnquist Court*, 67 N.D. L. REV. 39 (1991); Barbara Palmer, Note, *Feminist or Foe? Justice Sandra Day O'Connor, Title VII Sex-Discrimination, and Support for Women's Rights*, 13 WOMEN'S RTS. L. REP. 159 (1991).

193. During the October, 1993 Term, the Supreme Court heard arguments in two cases concerning the retroactivity of the 1991 Civil Rights Act amendment to Title VII provisions allowing compensatory and punitive damages and the amendment of § 1981 regarding race discrimination by employers. President Bush vetoed legislation that the House of Representatives and Senate had approved and that amended Title VII and 42 U.S.C. § 1981 to expressly make those statutory revisions retroactive. Congress did not override the President's veto. Instead, Congress passed, and President Bush signed, the Civil Rights Act of 1991, which included substantive revisions to Title VII and § 1981 that were substantially similar to the 1990 draft legislation. However, the text of the 1991 Civil Rights Act was silent as to the retroactivity of its substantive provisions.

After this Article was written, but before the date of the conference, the Supreme Court ruled in two cases that key provisions of the Civil Rights Act of 1991 were not retroactive. In *Landgraf v. U.S.I. Film Prods.*, 114 S. Ct. 1483 (1994), the Court ruled that the revisions of Title VII adopted in § 102 of the Civil Rights Act of 1991 were not retroactive and did not apply to cases that were on appeal when the statute was enacted. *Id.* at 1508. Section 102 added compensatory and punitive damages to the remedies that could be awarded to successful Title VII plaintiffs and provided a right to a jury trial for cases in which such damages were requested. See Pub. L. No. 102-166, 105 Stat. 1071. Justice Stevens wrote the majority opinion in which he found that the difference in the language of the 1990 draft legislation, which was vetoed by President Bush, and the Civil Rights Act of 1991 meant that the language of the 1991 Act could not be read to require retroactive application of § 102. *Landgraf*, 114 S. Ct. at 1491-92. Justice Stevens stated that a retroactive application of the statutory provisions creating punitive or exemplary damages would



require the Court to address the question of whether the 1991 statute violated the Ex Post Facto Clause of Article I, § 9. *Id.* at 1505. The majority also found that the provision of the statute that granted only a right to compensatory damages was also subject to a presumption against retroactive application of statutes, *id.* at 1506, although Justice Stevens' opinion was less clear on the reasons for applying the presumption to this portion of the statute. Justice Scalia, joined by Justices Kennedy and Thomas, concurred only in the judgment of the Court. The three concurring Justices believed that Justice Stevens' majority opinion was unnecessarily complex and that there simply could be no retroactive application of a federal statute absent a clear congressional statement requiring retroactivity. *Id.* at 1522-23 (Scalia, J., concurring in judgment, joined by Kennedy and Thomas, JJ.). Justice Blackmun, in dissent, noted that Justice Stevens' analysis of the retroactivity question seemed to erroneously focus on a presumption against disturbing "vested rights" through retroactive application of new legislation. *Id.* at 1509 (Blackmun, J., dissenting). As Justice Blackmun pointed out, sex discrimination and racial discrimination had long been illegal; a retroactive application of the new statute would not make unlawful any prior action of an employer that might arguably be described as a statutory right or vested common law right. *Id.*

In *Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510 (1994), the Court held that § 101 of the Civil Rights Act of 1991, which amended 42 U.S.C. § 1981, was not retroactive and could not be applied to cases on appeal. *Rivers*, 114 S. Ct. at 1514-15. Once again, Justice Stevens wrote a majority opinion that relied on the difference between the language in the vetoed 1990 congressional action and the wording of the Civil Rights Act of 1991. *Id.* at 1517. The majority opinion also relied on the presumption against retroactive application of statutes, despite the fact that the statute was enacted to reverse a 1989 Supreme Court interpretation of a Reconstruction Era statute. *Id.* When the plaintiff in *Rivers* had filed her case, it was at least arguable that 42 U.S.C. § 1981 made it illegal for an employer to discriminate against one of his employees on the basis of her race. In *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Court held that 42 U.S.C. § 1981 prohibited employers from refusing to hire someone because of her race, but it did not prohibit racial discrimination by the employer following the initial contract formation. *Id.* at 179. It was on the basis of *Patterson* that the plaintiff in *Rivers* lost her case. *Rivers*, 114 S. Ct. at 1519. Before the Supreme Court, the plaintiff in *Rivers* argued that § 101 of the Civil Rights Act of 1991 merely restored the original meaning of 42 U.S.C. § 1981 and that the presumption against retroactivity was not applicable to this type of restorative statute. *Id.* at 1515. Justice Stevens wrote for five Justices in rejecting the plaintiff's argument. The Stevens opinion appeared to place great weight on the 1991 statute's prohibition of racial discrimination outside of employment in deciding that the statute was not merely restoring the original meaning of § 1981. *Id.* Justices Scalia, Kennedy, and Thomas used the exact same concurrence for *Rivers* as they had for *Landgraf*, and joined only in the judgment of the Court. *Landgraf*, 114 S. Ct. at 1522 (Scalia, J., concurring in judgment, joined by Kennedy and Thomas, JJ.). They believed that, in both *Rivers* and *Landgraf*, Justice Stevens' analysis was unnecessarily complex and that the absence of a clear congressional statement requiring retroactive application of a statute required only prospective application of the statute. *Id.* at 1522-23. Once again, Justice Blackmun dissented. *Id.* at 1520 (Blackmun J., dissenting). Justice Blackmun emphasized that the retroactive application of § 101 could not have disrupted any vested rights in that it only

the last twenty years concerning Title VII issues mirrored the changing attitude of the Court toward the Voting Rights Act and Thirteenth Amendment statutes.

We can analyze the Justices' approach towards Title VII more easily if we divide the Court's rulings into two general categories: (1) the cases defining a plaintiff's burden in proving racial discrimination; and (2) the scope of Title VII remedies for illegal discrimination.

In reviewing the Court's approach to defining the plaintiff's burden in Title VII cases, I believe we can combine the cases analyzing how a plaintiff can establish a *prima facie* demonstration of a Title VII violation—by demonstrating either illegally motivated decisionmaking or the employer's use of employment practices that have an adverse impact on racial minorities—and cases regarding how an employer can successfully rebut such claims. An expert in the area of employment discrimination would object to lumping these cases together because each strand of these cases relates to distinct types of employment practices and problems under Title VII.<sup>194</sup> Putting these cases together, however, makes sense in determining the Supreme

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restored a plausible meaning to a civil rights statute that had been enacted following the Civil War. *Id.* at 1521. The employer in *Rivers* could not have believed it was entitled to engage in racial discrimination against employees.

In the spring of 1994, Justice Blackmun was the only Justice interested in enforcing civil rights statutes in a manner similar to that which had been used by the Supreme Court in the 1960s and early 1970s, when a majority of the Justices favored interpreting civil rights statutes as broadly as possible in order to protect persons suffering racial discrimination. Since 1988, a majority of the Court has interpreted civil rights statutes in ways that protect persons who engage in such discrimination.

194. For an overview of employment discrimination law issues that subdivide these different types of problem areas and fully analyze the Supreme Court cases regarding each area, see MACK A. PLAYER, *EMPLOYMENT DISCRIMINATION LAW* (1988) (there is both a "practitioners edition" and a "student edition" of this treatise). For excellent, contemporary examinations of the Supreme Court decisions in the 1970s and early 1980s that dealt with problems of statistical proof in Title VII employment cases, see Elaine W. Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L. REV. 793 (1978); Elaine W. Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 TEX. L. REV. 1 (1977); Elaine W. Shoben, *The Use of Statistics to Prove Intentional Employment Discrimination*, LAW & CONTEMP. PROBS., Autumn 1983, at 221.

Court's attitude toward easing, or making more difficult, the burden of a minority member who has been denied employment or a promotion in demonstrating that her employer violated Title VII. These cases also may reflect the Justices' attitudes toward female workers, but I will not discuss the Justices' failure to take a strong stand against sex discrimination in this Article.<sup>195</sup>

In the 1970s and 1980s, the Supreme Court established a framework by which an individual claiming racial or sex discrimination could use statistical proof to make out a *prima facie* case. In *Griggs v. Duke Power Co.*,<sup>196</sup> the Court found that a plaintiff established a *prima facie* case of employment discrimination by showing the adverse impact of employment practices such as tests on minority groups.<sup>197</sup> Two years later, in *McDonnell Douglas Corp. v. Green*,<sup>198</sup> the Court, in a disparate-treatment case, established a framework for determining whether a plaintiff had produced evidence from which unlawful motivation could be inferred. Once the plaintiff produced such evidence, the defendant was required to present a legitimate, non-discriminatory reason for the practice that caused the adverse impact.<sup>199</sup> In the 1980s, the Supreme Court reaffirmed the *McDonnell Douglas* analytical framework.<sup>200</sup>

The Supreme Court's approach to the use of statistics to show that employment practices, devices, or standards involve sex or race discrimination was not uniformly favorable to plaintiffs during the 1970s and early 1980s. Occasionally, the Court found the plaintiff's statistical proof did not present a *prima facie* case of racial discrimination.<sup>201</sup> Nevertheless, the Court consistently held that statistical evidence of the adverse impact of employment practices on minorities or women was relevant evidence of

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195. For an overview of the Supreme Court's rulings concerning sex discrimination and the Equal Protection Clause, see 3 ROTUNDA & NOWAK, *supra* note 3, § 18.20-18.24.

196. 401 U.S. 424 (1971).

197. *Id.* at 431-32.

198. 411 U.S. 792 (1973).

199. *Id.* at 802.

200. See, e.g., *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983).

201. *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 583-87 (1979).

illegal discrimination. Thus, the Supreme Court required lower courts to give careful consideration to statistical evidence in Title VII claims and close scrutiny to an employer's explanation of why a challenged employment practice was, in fact, legitimate despite its disparate impact on racial minorities.<sup>202</sup>

As late as 1988, in *Watson v. Fort Worth Bank & Trust*,<sup>203</sup> the Supreme Court appeared to favor strict enforcement of Title VII. The Supreme Court in *Watson* found that an African American woman who had been denied promotions by her employer could win a Title VII suit if she could demonstrate that the ultimate impact of the subjective system for the promotion of employees had an adverse impact on minority applicants and if the employer was unable to make some demonstration regarding the "legitimacy" of its selection process for promotions.<sup>204</sup> But *Watson* was not a clear cut victory for Title VII plaintiffs. Justice O'Connor wrote an opinion in *Watson* that was, in part, a majority opinion and, in part, a plurality opinion. In the part of her opinion that was joined by Chief Justice Rehnquist and Justices White and Scalia, Justice O'Connor's language seemed to make it more difficult to demonstrate that subjective employment criteria were being used in a racially discriminatory manner.<sup>205</sup>

The next year, Justice Kennedy would provide the deciding vote in cases that would constitute significant setbacks for Title VII plaintiffs. In *Wards Cove Packing Co. v. Atonio*,<sup>206</sup> the Supreme Court, by a five to four vote, held that the demonstration of a statistical disparity between the high representation of racial minorities in low paying jobs and the low representation of racial minorities in higher paying jobs did not establish a

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202. See *Connecticut v. Teal*, 457 U.S. 440, 450-51 (1982); *Bazemore v. Friday*, 478 U.S. 385, 387 (1986).

203. 487 U.S. 977 (1988).

204. *Id.* at 985-91.

205. Parts II-C and II-D of Justice O'Connor's opinion were written for four Justices. *Id.* at 991-1000 (O'Connor, J., joined by Rehnquist, C.J., White and Scalia, JJ.). Justice Kennedy did not participate in the case. Justices Blackmun, Brennan, Marshall and Stevens concurred in the decision. *Id.* at 1000 (Blackmun, J., concurring in part and concurring in the judgment, joined by Brennan and Marshall, JJ.); *id.* at 1011 (Stevens, J., concurring in the judgment).

206. 490 U.S. 642 (1989).

violation of Title VII.<sup>207</sup> Instead of the internal representations, the complainant should have compared the low minority representation in high paying jobs with minority representation in the population from which the company's labor was supplied.<sup>208</sup> Justice White wrote the *Wards Cove* opinion that was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy. The majority ruled that the employer could rebut proof of the adverse impact of its policies on racial minorities with any justification that was not totally insubstantial.<sup>209</sup> Justice White specifically found that there was "no requirement that the challenged practice [which had a clearly adverse effect on minority employees] be 'essential' or 'indispensable' to the employer's business."<sup>210</sup> In response to this decision, Congress amended Title VII as part of the Civil Rights Act of 1991.<sup>211</sup>

The provisions of Title VII do not proscribe bona fide seniority systems that have the effect of disadvantaging female workers or minority race workers merely because those workers were the most recently hired members of an employer's work force. Regardless of whether a seniority system was adopted before or after the passage of Title VII, a seniority system will not be found to be a violation of Title VII unless the plaintiffs could demonstrate that the seniority system had been adopted, implemented, or used for a discriminatory purpose.<sup>212</sup>

In the spring of 1989, the Supreme Court made it more difficult for plaintiffs to challenge the use of seniority systems to mask race and sex discrimination. In *Lorance v. AT&T Technologies, Inc.*,<sup>213</sup> female workers alleged that a seniority system, which had been adopted in 1979, was used in 1982 to discriminate against women who were being demoted through the implementation of the seniority system.<sup>214</sup> The Supreme Court, by a

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207. *Id.* at 651-55.

208. *Id.* at 650-51.

209. *Id.* at 659.

210. *Id.*

211. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071-74 (1991).

212. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 69 (1982). By a five to four vote, the Justices held that seniority systems adopted after the passage of Title VII came under the statutory exception for bona fide seniority systems. *Id.* at 75-76.

213. 490 U.S. 900 (1989).

214. *Id.* at 902.

five to three vote, found that the claim of the women employees was barred by the time limitation for challenging a seniority system.<sup>215</sup> The *Lorance* majority ruled that the time limitation was measured from the date when the seniority system was adopted by the employer, rather than from the time when the women workers suffered the adverse consequences of the employer's use of the seniority system.<sup>216</sup> Justice Kennedy provided the fifth vote in the five to three decision. Justices Marshall, Brennan, and Blackmun dissented;<sup>217</sup> Justice O'Connor did not participate in the decision. The *Lorance* decision was also reversed by Congress in the Civil Rights Act of 1991.<sup>218</sup> Employees can now challenge the good faith of a seniority system under a time limit that begins at the time when the individual becomes subject to the system, the time at which the system was adopted, or the time at which the system was used in a way that injured the employee.<sup>219</sup>

In 1994, the Reagan appointees were joined by Justice Thomas in a decision that will provide assistance to employers who are trying to hide racial or sex discrimination in their employment practices. In *St. Mary's Honor Center v. Hicks*,<sup>220</sup> the Supreme Court held that a plaintiff was not necessarily entitled to a judgment in her favor after demonstrating that an adverse employment decision appeared to be made on the basis of intentional racial discrimination and proving that the employer's initial explanation for the employment decision was clearly pretextual.<sup>221</sup> Justice Scalia, in a majority opinion that was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas, ruled that the plaintiff's initial demonstration of the racially discriminatory impact of the employer's decisions and the pretextual nature of the employer's statements

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215. *Id.* at 906.

216. *Id.* at 909-12.

217. *Id.* at 913 (Marshall, J., dissenting, joined by Brennan and Blackmun, JJ.).

218. Civil Rights Act of 1991, Pub. L. No. 102-166, § 112, 105 Stat. 1071, 1079 (1991).

219. *Id.*

220. 113 S. Ct. 2742 (1993).

221. *Id.* at 2747-54.

was insufficient to win a Title VII case.<sup>222</sup>

Justice Souter wrote a dissent in *St. Mary's Honor Center* that was joined by Justices White, Blackmun, and Stevens.<sup>223</sup> Perhaps Justice Souter's vote provides some hope that the Reagan appointees will not be able to control the interpretation of Title VII for many more years. But, even if we assume that Clinton appointees will take a position equivalent to that of Justices White and Blackmun in this type of case, there are five Justices on the Supreme Court today who have demonstrated little or no sympathy for Title VII plaintiffs in race discrimination cases.

Later in this Article, I will examine the Supreme Court's ruling concerning the constitutionality of racial classifications used by governmental entities to advance the interests of racial minorities. This discussion demonstrates the Court's increasing hostility to racial affirmative action during the 1970s and 1980s. I will conclude my examination of the Court's rulings concerning federal civil rights statutes by examining the Court's statutory rulings on "affirmative action" and Title VII remedies. These cases indicate that a majority of the current Supreme Court Justices may be ready to limit, or reverse, earlier decisions upholding voluntary racial affirmative action plans by private employers or to cut back the scope of lower court remedial powers under Title VII.

In 1979, by a five to two vote, the Supreme Court in *United Steelworkers of America v. Weber*<sup>224</sup> ruled that Title VII did not prohibit employers or unions from seeking to remedy racial imbalances in job categories that in fact had low numbers of women or minority race persons.<sup>225</sup> The Court did not make any constitutional ruling in *Weber*, but it allowed employers, after bargaining with employees and unions, to adopt employment and promotion practices that would advance the interests of racial minorities and women.<sup>226</sup> In 1987, the Supreme Court

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222. *Id.*

223. *Id.* at 2756 (Souter, J., dissenting, joined by White, Blackmun, and Stevens, JJ.).

224. 443 U.S. 193 (1979).

225. *Id.* at 208-09.

226. *Id.* at 209. The Supreme Court has ruled that Title VII does not require an employer to hire a female or minority race job applicant or to promote female or

reaffirmed this position in *Johnson v. Transportation Agency*.<sup>227</sup> Justice Brennan, writing for five Justices in *Johnson*, ruled that Title VII did not prohibit a county transportation agency from adopting a plan that gave a preference in hiring to women and members of racial minorities.<sup>228</sup> Although the employer in *Johnson* was a government agency, the case did not present any constitutional issues because those issues had not been raised in the lower court litigation.<sup>229</sup>

Justice O'Connor concurred only in the judgment of the Court in *Johnson*.<sup>230</sup> She wrote separately to explain that she believed that Title VII and the Equal Protection Clause allowed only a very limited amount of discretion to employers in establishing hiring goals for women and minorities.<sup>231</sup> Justices White and Scalia and Chief Justice Rehnquist dissented in *Johnson*.<sup>232</sup> They believed that Title VII did not allow employers to adopt affirmative action programs that gave preferences to women or racial minorities.<sup>233</sup>

The Supreme Court, in 1989, found that the Equal Protection Clause prohibited state or local governments from using benign racial classifications to aid racial minorities.<sup>234</sup> The Court, as it is composed in 1994, might take a similarly strict approach towards affirmative action programs under Title VII by reversing *Weber* and *Johnson*. Even if we assume that Justice Ginsburg will vote to uphold *Weber* and *Johnson*, whether those decisions will be limited or reversed is anyone's guess. The outcome depends on whether Justices Kennedy, Souter, and Thom-

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minority race employees whenever their qualifications are equal to those of white male applicants or employees. See, e.g., *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981).

227. 480 U.S. 616 (1987).

228. *Id.* at 641-42.

229. *Id.* at 620 n.2.

230. *Id.* at 647 (O'Connor, J., concurring in the judgment).

231. *Id.* at 648.

232. *Id.* at 657 (White, J., dissenting); *id.* at 657 (Scalia, J., dissenting, joined by Rehnquist, C.J., and, in part, by White, J.).

233. *Id.* at 657 (White, J., dissenting); *id.* at 658 (Scalia, J., dissenting, joined by Rehnquist, C.J., and, in part, by White, J.).

234. *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). The Court's rulings concerning constitutional issues involving government programs that aid racial minorities are discussed *infra* notes 386-504 and accompanying text.



as join the *Johnson* dissenters and vote to use Title VII to restrict affirmative action programs.

The Supreme Court has never allowed lower courts to impose orders on private sector or public sector employers merely to insure statistical integration of the employers' workforce. If a lower court finds that an employer violated Title VII, the court must issue a remedial order. During the mid-1980s, the Supreme Court endorsed wide remedial powers for lower courts in Title VII cases.<sup>235</sup>

In 1986, a majority of the Supreme Court found that federal courts were empowered to enter consent decrees, or remedial orders, that established hiring and promotion goals to benefit members of racial minorities who had not themselves been the individual victims of the prior illegal discrimination.<sup>236</sup> The Court in *Local Number 93, International Association of Firefighters v. City of Cleveland*,<sup>237</sup> ruled that Title VII did not prohibit a federal court from entering a consent decree, agreed to by an employer and plaintiffs who had challenged the employer's practices as being racially discriminatory, that required the employer to promote minority race employees in order to meet certain integration standards.<sup>238</sup> In this case the city had agreed to a consent decree with an organization of African American and Hispanic American firefighters; the decree required the fire department to divide new promotions between

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235. Courts can issue a remedial order in a Title VII case only after finding that the employer had engaged in a specific act of illegal discrimination. Thus, in *Firefighters Local Union No. 1784 v. Stotts*, 469 U.S. 561, 577 (1984), the Supreme Court overturned lower court orders that had required a city to lay off white workers during a budgetary restriction before laying off more recently hired minority race workers. The Court held that Title VII allowed employers to use a seniority system that had an adverse impact on the employment of racial minorities absent proof that the system was designed or used for a discriminatory purpose. *Id.* at 577. The Supreme Court during the 1980s also ruled that the government would violate the Equal Protection Clause if, during layoffs due to a budgetary restriction, it laid off white teachers with more seniority than minority teachers for the purpose of maintaining racial balance in the faculty of the district schools. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-78 (1986); see *infra* notes 408-29 and accompanying text.

236. *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515-30 (1986).

237. *Id.* at 501.

238. *Id.* at 515-30.

minority and nonminority employees.<sup>239</sup> Although the employer was a government agency, the lower court litigation did not involve constitutional issues and no constitutional issues were addressed by the Supreme Court.<sup>240</sup>

In a second 1986 decision, the Court considered the scope of federal court remedies for illegal racial discrimination in a case involving both statutory and constitutional issues. In *Local 28 of the Sheet Metal Workers' International Association v. EEOC*,<sup>241</sup> the Supreme Court upheld an order of a federal district court that required a union to remedy proven racial discrimination against nonwhite persons who had applied for union membership.<sup>242</sup> Justice Brennan announced the judgment of the Court in an opinion that was, in part, a majority opinion, and, in part, a plurality opinion.<sup>243</sup> In a portion of his opinion supported by a majority, Justice Brennan ruled that the lower courts had properly decided that (1) the union had engaged in racial discrimination and had violated Title VII of the Civil Rights Act, (2) a fine against the union was a proper remedy in the case, and (3) money produced by a contempt fine could be used to establish a fund to increase nonwhite membership in the union's apprenticeship program.<sup>244</sup> Five Justices in the case also voted to uphold a portion of the district court's order that established a twenty-nine percent nonwhite membership goal for the union, although no majority opinion determined the legality or constitutionality of this portion of the lower court's order.<sup>245</sup> Justice Brennan was joined by Justices Marshall, Blackmun, and Stevens in finding that a remedial order, designed to remedy

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239. *Id.* at 510.

240. *Id.* at 513 n.5. Justice Brennan wrote for six members of the Court in finding that a provision of Title VII, which might appear to place limits on the remedial authority of federal courts in employment discrimination cases, did not bar a court from entering this type of consent decree. *Id.* at 521-22. The statute at issue was § 706(g) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(g). The case did not resolve the question of what limits were placed on the authority of courts by this statutory provision. *Local No. 93*, 478 U.S. at 515 n.7.

241. 478 U.S. 421 (1986).

242. *Id.* at 442-44.

243. The rulings of the Court, and the votes of the Justices, are summarized at the end of Justice Brennan's opinion. *Id.* at 482-83.

244. *Id.* at 442-44.

245. *Id.* at 441.

past discrimination through the use of integration standards, did not violate either Title VII or the Constitution.<sup>246</sup> Justice Powell wrote a separate concurring opinion; he believed that, in very limited circumstances, the judiciary could require preferential hiring goals to correct proven illegal discrimination by an employer.<sup>247</sup> The union charged with racial discrimination in this case had been the subject of federal and state attempts to remedy its racially discriminatory practices since the 1960s. Justice Powell found that this case presented an egregious violation of Title VII that justified a remedial order that employed a numerical goal for the integration of the union.<sup>248</sup>

The next year, in *United States v. Paradise*,<sup>249</sup> the Supreme Court upheld a district order that set numerical goals for the promotion of minority police officers in a state police department.<sup>250</sup> Justice Brennan announced the judgment of the Court in an opinion that was joined by Justices Marshall, Blackmun, and Powell. These Justices found that the lower court order that established numerical goals for the integration of the police force and the promotion of troopers within the police force was justified by the fact that the first district court order that found intentional racial discrimination within this law enforcement department had been issued in 1972.<sup>251</sup> It was only after many years of failed attempts to force the state police to remedy its prior illegal segregation that the lower court had issued the remedial order that involved numerical goals.<sup>252</sup> Justice Stevens concurred only in the judgment in *Paradise*; he found that the Supreme Court's school desegregation cases established

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246. *Id.* at 481 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.).

247. *Id.* at 485-89 (Powell, J., concurring in part and concurring in the judgment).

248. *Id.* Justices O'Connor and White believed that the membership goal or quota was not a remedy authorized by Congress for Title VII violations although they differed in their views regarding the scope of permissible Title VII relief. Compare *id.* at 489 (O'Connor, J., concurring in part and dissenting in part) with *id.* at 499 (White, J., dissenting).

249. 480 U.S. 149 (1987).

250. *Id.* at 185.

251. *Id.* at 172-77.

252. *Id.* at 186. Although he joined Justice Brennan's plurality opinion, Justice Powell wrote separately to explain why he believed that the history of this case justified the remedy. *Id.* at 186 (Powell, J., concurring).

the principle that lower courts should be given a reasonable degree of flexibility in fashioning remedies for proven racial discrimination by governmental entities.<sup>253</sup>

Four Justices dissented in *Paradise*. Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, wrote a dissent that did not totally exclude the possibility that lower courts might use some type of statistical analysis in fashioning a remedy for proven illegal discrimination.<sup>254</sup> However, the O'Connor dissent found that any such order must be very narrowly tailored to correct specific acts of illegal discrimination; she did not believe the lower court's two decades of efforts were narrowly tailored to correct the racial discrimination.<sup>255</sup> Justice White, in a separate dissent, simply indicated that he agreed with "much of what Justice O'Connor has written" and that he found that "the District Court exceeded its equitable powers in devising a remedy in this case."<sup>256</sup>

The Supreme Court has not had occasion to reconsider the scope of lower court remedial powers and authority to enter consent decrees in Title VII race discrimination cases after the appointment of Justice Kennedy. However, a recent Supreme Court decision concerning the standing of individuals to challenge consent decrees indicates that there may be a shift in the Supreme Court's approach to lower court authority to resolve litigation in which employers are charged with racial discrimination.

In 1989, by a five to four vote, the Court in *Martin v. Wilks*<sup>257</sup> held that white firefighters had the ability to challenge employment decisions taken pursuant to consent decrees that had been entered in an earlier case by the fire department and persons who alleged racial discrimination in the department's employment practices.<sup>258</sup> Even though the white firefighters had failed to intervene in the proceedings in which the consent decree had been entered, the Court in 1989 was

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253. *Id.* at 190 (Stevens, J., concurring in the judgment).

254. *Id.* at 197 (O'Connor, J., dissenting, joined by Rehnquist, C.J. and Scalia, J.).

255. *Id.* at 197-201.

256. *Id.* at 196 (White, J., dissenting).

257. 490 U.S. 755 (1989).

258. *Id.* at 768.

ready to allow them to challenge the legality and constitutionality of promotions and hiring of racial minorities that were undertaken pursuant to the litigation settlement.<sup>259</sup> Chief Justice Rehnquist wrote the majority opinion in *Martin*, which was joined by Justices White, O'Connor, Scalia, and Kennedy. Justice Stevens filed the dissenting opinion that was joined by Justices Brennan, Marshall, and Blackmun.<sup>260</sup>

The Clinton appointees to the Supreme Court will not have to consider whether to reverse *Martin*. That result was achieved by Congress. The 1991 Civil Rights Act limits the ability of persons to challenge consent decrees in employment discrimination cases.<sup>261</sup> Four members of the *Martin* majority remain on the Court. Their ability to restrict the scope of Title VII remedies may depend on the Bush appointees, Justices Souter and Thomas.

It is not possible to predict the future of the Supreme Court's positions concerning the extent of congressional power to protect racial minorities under the statutes that I have mentioned in this section of the Article or other federal civil rights statutes. However, it is clear that the Burger and Rehnquist Courts were less sympathetic to minority race plaintiffs seeking to invoke the protection of federal civil rights statutes than was the Warren Court or even the Burger Court of the early 1970s. The Court's rulings since the appointment of Justice Kennedy make it seem unlikely that the Supreme Court will return to the position it held in the late 1960s and early 1970s, when it gave an expansive reading to federal civil rights statutes. In the next sections of this Article, I will examine the Supreme Court's rulings concerning the constitutionality of laws that harm racial minorities. It should be no surprise to learn that we will find that the Supreme Court's commitment to using constitutional principles to protect racial minorities declined in the 1980s and 1990s, at the same time that the Court restricted federal civil rights statutes.

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259. *Id.* at 762-63.

260. *Id.* at 769 (Stevens, J., dissenting, joined by Brennan, Marshall, and Blackmun, JJ.).

261. See Grover, *supra* note 21, at 44-45.

## VII. THE SUPREME COURT'S TOLERANCE OF "OPEN" AND "SLIGHTLY HIDDEN" RACIAL CLASSIFICATIONS

The Supreme Court for the past forty years has been unwavering in its condemnation of the governmental use of racial classifications that harm racial minorities. In the past quarter century, however, the Court has moved away from the Warren Court's commitment to protecting the interests of racial minorities from oppression in our society. The Burger and Rehnquist Courts have shown a greater toleration than did the Warren Court for seemingly race-neutral laws that harm racial minorities. Before we examine the decline in the Supreme Court's use of the Equal Protection Clause to protect racial minorities, we should take a few moments, and paragraphs, to reflect upon the Supreme Court's rulings prior to the 1960s. We need not make a detailed analysis of the Supreme Court's pre-*Brown* rulings, as Professor Tushnet and others have chronicled the Supreme Court rulings and lower court litigation that led to *Brown* and to the end of court-approved segregation.<sup>262</sup> Instead, a brief review of some of the key decisions of the Supreme Court concerning racial discrimination between the Civil War and the Warren Court will give us a basis for evaluating the question of whether the Rehnquist Court may have more in common with the pre-*Brown* Supreme Court than with the Warren Court of the 1960s.

A review of the Supreme Court's rulings prior to *Brown* serves as a reminder that the Court can easily claim to be opposed to the use of racial classifications and racial discrimination while in fact it aids in the oppression of racial minorities. The Supreme Court's rulings between the 1870s and 1930s concerning racial classifications can be described as duplicitous. The Court took the position that racial discrimination was not to be tolerated and did, in fact, invalidate racial classifications that were openly used to deprive members of a racial minority of an identifiable legal right.<sup>263</sup> However, the Court simultaneously upheld

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262. See *supra* note 2.

263. A defender of the Supreme Court might claim that its decision in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), should be read as an effort to expose a subtle form of race discrimination. In *Yick Wo*, the Court considered a city ordinance that delegated to the board of supervisors discretion to decide whether to allow the use of wooden

laws that harmed racial minorities whenever the Justices could describe those laws as somehow being race neutral.<sup>264</sup> I will offer my readers just a few examples of how the Supreme Court seemingly gave constitutional protection to racial minorities with one hand while taking away such protection with the other.

The Supreme Court's toleration for laws that had an adverse impact on, or stigmatized, racial minorities is evident in its approval of an Alabama statute that provided more severe penalties for adultery and fornication if the people who engaged in the activity were of different races.<sup>265</sup> The Court tacitly approved laws that prohibited interracial marriage; it did not overrule its approval of laws against interracial sexual activity or marriage until the 1960s.<sup>266</sup>

The Justices who approved the "separate but equal" doctrine in *Plessy v. Ferguson*<sup>267</sup> did little to hide their hypocrisy. When the Court applied that doctrine in the educational setting, the Justices approved the separate and unequal treatment of minority race students. The Court allowed a local school board to tem-

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buildings as laundries. The board had turned down all of the approximately 200 Chinese applicants who had sought its approval but had approved the applications of all but one of the approximately 80 non-Chinese applicants. The Court ruled that this discrimination violated the Fourteenth Amendment of the United States Constitution. *Id.* at 374. The Court would not have invalidated the law on the day after its passage merely because of its impact on racial minorities.

264. When states were more subtle in discriminating against Asians, the Supreme Court upheld the discrimination. *See, e.g., Terrace v. Thompson*, 263 U.S. 197 (1923) (upholding a Washington law that prohibited land ownership by noncitizens at a time Chinese and Japanese persons who immigrated to the United States could not be naturalized under federal law). *See generally* 3 ROTUNDA & NOWAK, *supra* note 3, § 18.12 (discussing classifications based on alienage).

265. *See Pace v. Alabama*, 106 U.S. 583 (1882).

266. *See Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964); Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L.J. 49 (1964) (arguing for a reversal of the Supreme Court's normal legislative presumption in favor of miscegenation statutes in cases involving classification by race); *see also* BELL, *supra* note 2, § 2.2.2.

267. 163 U.S. 537 (1896). For an examination of the philosophy of Justice Brown, who wrote the opinion, and social theories that were evidenced in the opinion, see Robert J. Glennon, Jr., *Justice Henry Billings Brown: Values in Tension*, 44 U. COLO. L. REV. 553 (1973). For an analysis of the error committed by persons who read Justice Harlan's dissent in *Plessy* as advocating a "colorblind" approach to equal protection analysis, see T. Alexander Aleinikoff, *Re-Reading Justice Harlan's Dissent in Plessy v. Ferguson: Freedom, Antiracism, and Citizenship*, 1992 U. ILL. L. REV. 961.

porarily suspend, for economic reasons, a high school for African American children while maintaining a high school for white children;<sup>268</sup> it upheld a state statute requiring separate but equal accommodations on railroads,<sup>269</sup> and it upheld a state statute that prohibited private colleges from educating "both the white and negro races."<sup>270</sup> As late as 1927, the Court upheld the classification of a Chinese American child as a racial minority who must attend a minority race school under the "separate but equal" doctrine.<sup>271</sup>

During this era, the Supreme Court invalidated statutes and administrative rulings that excluded racial minorities from service on juries,<sup>272</sup> but the Court did not reverse the conviction of an African American defendant who had been tried before an all-white jury.<sup>273</sup> The Court in the early twentieth century invalidated laws prohibiting the sale of property to a member of a racial minority,<sup>274</sup> but invalidated congressional attempts to protect racial minorities from discrimination in property or business matters.<sup>275</sup>

Even prior to the New Deal, the Supreme Court invalidated open legal prohibitions against members of racial minorities voting in general or primary elections.<sup>276</sup> Similarly, the Court

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268. See *Cumming v. Board of Education*, 175 U.S. 528 (1899).

269. See *McCabe v. Atchison, T. & S.F. Ry.*, 235 U.S. 151 (1914) (holding that the railway company must provide a dining car for minority passengers even if the company would lose money by operating the separate, minority dining car).

270. See *Berea College v. Kentucky*, 211 U.S. 45 (1908).

271. See *Gong Lum v. Rice*, 275 U.S. 78 (1927). There was no real challenge to the "separate but equal" doctrine in education in this case; the Court ruled that the Chinese American child should be classified as "colored," not as "caucasian," for purposes of school assignment.

272. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1879).

273. See, e.g., *Virginia v. Rives*, 100 U.S. 313 (1879) (upholding state court's denial of defendants' motion to change the all-white jury to include one-third black males). See generally Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1401 (1983) (discussing the problem of racial discrimination in the makeup of juries).

274. See *Buchanan v. Warley*, 245 U.S. 60 (1917) (overturning city ordinance which forbade African Americans from occupying houses in blocks where the greater number of houses were occupied by whites).

275. See *supra* notes 75-80 and accompanying text.

276. See, e.g., *Nixon v. Herndon*, 273 U.S. 536 (1927); see also BELL, *supra* note 2, § 4.4 (discussing the Supreme Court's normal process of invalidating disenfranchise-



struck down the use of so-called "grandfather clauses" that states used to maintain a suffrage standard that existed prior to the Fifteenth Amendment. Such clauses allowed illiterate whites to vote while denying the right to African Americans who could not meet state literacy requirements.<sup>277</sup> The Court did not, however, invalidate other state acts that impaired the ability of racial minorities to vote. The use of poll taxes that deterred members of racial minorities from voting in state elections continued without opposition from the Court until the 1960s<sup>278</sup>—after the ratification of the Twenty-Fourth Amendment which prohibited the use of poll taxes in federal elections.<sup>279</sup> The Court allowed the use of literacy tests as a condition for voting absent clear proof that the test was used to exclude only racial minorities from voting.<sup>280</sup>

Evidence of the Court's movement toward protecting racial minorities in the 1938-1954 period came both in cases interpreting the Equal Protection Clause and cases interpreting federal statutes. In 1938, the Supreme Court for the first time deviated from the *Plessy* doctrine by invalidating a state's refusal to admit an African American to the state's law school.<sup>281</sup> In the 1940s and 1950s, the Court began to expand the impact of federal civil rights legislation. In 1941 and 1945, the Supreme Court upheld convictions under federal civil rights statutes of persons who engaged in acts of racial harassment and the murder of persons due to their race.<sup>282</sup> In the mid 1940s, however, the Court was not ready to challenge federal racial discrimination.

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277. See *Guinn v. United States*, 238 U.S. 347 (1915); *Myers v. Anderson*, 238 U.S. 368 (1915).

278. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). For an analysis of some of the means used to suppress minority race voters, see BELL, *supra* note 2, § 4.1-4.17.

279. U.S. CONST. amend. XXIV (prohibiting state and federal governments from denying any citizen the right to vote because of failure to pay tax).

280. See, e.g., *Lassiter v. North Hampton Election Bd.*, 360 U.S. 45 (1959) (upholding a state literacy requirement that applied to all voters irrespective of their race or color). Congress eliminated the use of literacy tests in the Voting Rights Act and the Supreme Court upheld those provisions. See *supra* notes 76-83 and accompanying text.

281. See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

282. See *supra* notes 49, 51 and accompanying text.

The Justices upheld the World War II exclusion and internment of Japanese Americans in the western United States.<sup>283</sup>

The Vinson Court began to repudiate racial discrimination in several areas. In 1948, the Court limited the states' ability to discriminate against Asian immigrants and Asian Americans by restricting state authority to give preferential treatment to persons on the basis of United States citizenship.<sup>284</sup> In the same year, the Court found that the Equal Protection Clause prohibited state courts from enforcing racially discriminatory covenants in real estate contracts.<sup>285</sup> In 1950, the Court ruled that a state-supported law school's refusal to admit an African American citizen on the basis of his race violated the Fourteenth Amendment.<sup>286</sup> In 1953, the last Term of the Vinson Court, the Justices refused to allow a county to delegate the operation of a primary election to a political organization that had prohibited minority race voters from participating in the candidate selection process.<sup>287</sup>

Not until the 1960s, did the Court become an active champion of civil rights and the protection of racial minorities from seemingly race-neutral laws used to suppress them in our society. The 1950s' Warren Court made a few landmark rulings on racial equality but did little to implement those rulings. Throughout the 1950s, the Court vacillated between brave statements and weak rulings on racial issues. In 1954, the Court, without explicitly overruling *Plessy*, repudiated its "separate but equal" doctrine in *Brown v. Board of Education*,<sup>288</sup> which is celebrated in

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283. See *Korematsu v. United States*, 323 U.S. 214 (1944); *Harabayashi v. United States*, 320 U.S. 81 (1943). In *Ex parte Endo*, 323 U.S. 283 (1944), the Supreme Court found that President Roosevelt's executive order relating to the internment of Japanese persons did not authorize the continued detention of Japanese persons who were found to be loyal and law-abiding citizens of the United States. The *Endo* decision was based on an interpretation of the President's order rather than constitutional principles. See 3 ROTUNDA & NOWAK, *supra* note 3, § 18.8(d).

284. *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410 (1948) (overturning a state statute barring issuance of commercial fishing licenses to non-citizens); *Oyama v. California*, 332 U.S. 633 (1948) (ruling that a land-conveyancing law placed an excessive burden on non-citizens' ability to convey land); see 3 ROTUNDA & NOWAK, *supra* note 3, § 18.12.

285. *Shelley v. Kraemer*, 334 U.S. 1 (1948); see *supra* notes 55-58.

286. *Sweatt v. Painter*, 339 U.S. 629 (1950).

287. *Terry v. Adams*, 345 U.S. 461 (1953); see *supra* note 75.

288. 347 U.S. 483 (1954). On the same day as the *Brown I* ruling, the Court ruled

this Symposium. However, in 1955, the Court in *Brown II* avoided confrontation with local school authorities by creating the "all deliberate speed" standard.<sup>289</sup>

The "brave" Warren Court issued per curiam rulings requiring the immediate desegregation of public facilities.<sup>290</sup> On the other hand, the "timid" Warren Court in the 1950s refused to overturn state laws that prohibited interracial sexual relationships or interracial marriages.<sup>291</sup> In 1958, the Court ruled that lower federal courts should not allow local political opposition to prevent desegregation of public schools.<sup>292</sup> The Supreme Court did not, however, review cases in which it had to consider the validity of lower court desegregation plans until the 1960s.<sup>293</sup> In the 1960s, the Warren Court actively supported the lower federal courts in issuing desegregation orders. During this era, the

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in *Bolling v. Sharpe*, 347 U.S. 497 (1954), that the segregation of public schools in the District of Columbia violated the implied equal protection guarantee of the Fifth Amendment Due Process Clause.

289. See *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

290. See, e.g., *Gayle v. Browder*, 352 U.S. 903 (1956) (segregation of buses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (segregation of public beaches and bath houses); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (segregation of municipal golf courses). For further citations to such cases see 3 ROTUNDA & NOWAK, *supra* note 3, § 18.8.

291. The Court avoided ruling in such cases, although its rulings were arguably based on procedural grounds. See, e.g., *Naim v. Naim*, 87 S.E.2d 749 (Va.), *vacated*, 350 U.S. 891 (1955) (per curiam). For a sample of the contemporary academic debate concerning these rulings, compare Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (arguing that there was no basis for dismissal on procedural grounds) with Louis H. Pollack, *The Supreme Court and the States: Reflections on Boynton v. Virginia*, 49 CAL. L. REV. 15, 45 n.79 (1961) (arguing that Wechsler's appraisal is too harsh).

292. See *Cooper v. Aaron*, 358 U.S. 1 (1958). For an analysis of the voting patterns of the Justices throughout the development of the constitutional principles that formed a basis for this ruling, see Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1 (1979). See generally Daniel A. Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. ILL. L. REV. 387.

293. See BELL, *supra* note 2, § 7.3.2; Robert L. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 244-45 (1968). Some states had delayed the implementation of remedies for segregated school systems by requiring persons who objected to those systems to use administrative remedies. It was not until 1963 that the Court ruled that the exhaustion of administrative remedies concept could not be used to delay federal court school desegregation cases. *McNeese v. Board of Educ.*, 373 U.S. 668 (1963).

Court found that racial classifications that harmed racial minorities should be subject to strict judicial scrutiny and should be upheld only if found to be necessary to a compelling state interest.<sup>294</sup> In 1964 and 1967, the Supreme Court invalidated statutes that prohibited interracial sexual activity or interracial marriage.<sup>295</sup> No racial classification that the Supreme Court has found to harm members of a racial minority has been upheld since the Warren Court established this principle.<sup>296</sup>

The Warren Court of the 1960s went beyond the mere prohibition of racial classifications that harmed racial minorities. The Court also invalidated state laws that did not mention race when those laws had the inevitable effect of denying a legal right or benefit to racial minorities. In 1960, in *Gomillion v. Lightfoot*,<sup>297</sup> the Court held that the alteration of a city's boundaries constituted a racial classification, though the Court did not require specific proof that the change was made for a racially discriminatory purpose. The law restructured the town in a manner that gave it twenty-eight sides and resulted in the virtual elimination of the ability of minority persons to vote in city elections. In 1964, the Supreme Court invalidated a state requirement that the race of candidates be identified on the ballot, holding that the law could be explained only as a way of helping voters engage in racial bloc voting in a way that would harm the candidacy of a racial minority.<sup>298</sup> The Warren Court, in these cases, did not demand evidence of improper legislative purpose. The Court recognized that the effect of these laws would harm racial minorities and, on that basis, ruled that these laws violated the Equal Protection Clause.

In 1967, in *Reitman v. Mulkey*,<sup>299</sup> the Supreme Court invalidated an amendment to the California Constitution that would have repealed statutes forbidding racial discrimination in real

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294. See *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964).

295. See cases cited *supra* note 294.

296. For an examination of the cases, see 3 ROTUNDA & NOWAK, *supra* note 3, § 18.8.

297. 364 U.S. 339 (1960).

298. See *Anderson v. Martin*, 375 U.S. 399 (1964).

299. 387 U.S. 369 (1967).

estate transactions and restricted the legislature's ability to enact new anti-discrimination statutes. The majority opinion in *Reitman* affirmed the lower court finding that the amendment would unconstitutionally involve the state in private racial discrimination.<sup>300</sup> The key vice of the state constitutional amendment was that it denied racial minorities access to the state legislature for aid in regulating property transactions but allowed access to state and local legislatures by proponents of measures designed to regulate property transactions in virtually any other way that limited the economic or personal choices of property owners.<sup>301</sup>

Two years after *Reitman*, the Burger Court invalidated an amendment to a city charter that provided that no ordinance dealing with racial, religious, or ancestral discrimination in housing could be implemented without the approval of the electorate.<sup>302</sup> Once again, the Court found that the statute's vice was the denial to proponents of racial integration and desegregation—clearly a group primarily composed of racial minorities—of the ability to go directly to the legislative body for a remedy to their problems.<sup>303</sup> Instead, racial minorities had to submit the proposed legislative solution to a new referendum.<sup>304</sup>

As we turn to the examination of the Equal Protection Clause rulings of the Burger and Rehnquist Courts, we should ask ourselves whether the Court can be said to be returning to the pre-*Brown* era. In that era, the Court invalidated the open use of racial classifications, but it upheld laws written in race neutral terms that harmed racial minorities. The Burger Court and Rehnquist Court have not deviated from the principle that laws that discriminate on their face against racial minorities will be subject to the strict scrutiny test and invalidated. In 1984, in

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300. See *id.* at 375-76.

301. For an excellent contemporary analysis of the decision, and the way in which the state law worked to exclude minorities from the political process, see Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69 (1967).

302. See *Hunter v. Erickson*, 393 U.S. 385 (1969).

303. *Id.* at 390-91.

304. *Id.*

*Palmore v. Sidoti*,<sup>305</sup> the Court ruled that a state could not use a best interest of the child concept to remove a child from a mother's custody merely on the basis that the mother had married a person of a different race. In *Hunter v. Underwood*,<sup>306</sup> the Court invalidated a provision of a state constitution that denied the right to vote to persons who had been convicted of specific crimes. Justice Rehnquist wrote for a unanimous Court in *Underwood* that there was clear proof that the state constitutional provision had been designed by the 1901 state constitutional convention for the purpose of disenfranchising African Americans.<sup>307</sup>

The Burger Court reaffirmed the century-old principle that exclusion of members of racial minorities from juries violated equal protection.<sup>308</sup> Indeed, the Burger Court and Rehnquist Court Justices have evidenced a greater concern for racial equality in jury selection than did the Warren Court. In 1965, the Warren Court refused to find that a plaintiff could establish a prima facie case of racial discrimination in the selection of jurors by analyzing a prosecutor's use of peremptory challenges in a single case.<sup>309</sup> The Burger Court in *Batson v. Kentucky*<sup>310</sup> found that proof of purposeful racial discrimination in the selection of even a single juror would constitute a violation of the Fourteenth Amendment.<sup>311</sup> Similarly, Rehnquist Court rulings found that racially motivated peremptory challenges by attorneys for defendants in criminal cases,<sup>312</sup> or by attorneys for either side in civil cases,<sup>313</sup> constituted the type of state action

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305. 466 U.S. 429 (1984).

306. 471 U.S. 222 (1985). Justice Rehnquist wrote for a unanimous Court of eight Justices; Justice Powell did not participate in the decision.

307. *Id.* at 228-33.

308. See *Castaneda v. Partida*, 430 U.S. 482 (1977); *Carter v. Jury Comm'n*, 396 U.S. 320 (1970); *Strauder v. West Virginia*, 100 U.S. 303 (1879).

309. *Swain v. Alabama*, 380 U.S. 202 (1965), *overruled by Batson v. Kentucky*, 476 U.S. 79 (1986).

310. 476 U.S. 79 (1986).

311. *Id.*

312. See *Georgia v. McCollum*, 112 S. Ct. 2348 (1992) (holding that use of preemptory jury challenges by a defendant in a criminal case to exclude persons from jury service because of their race violates equal protection).

313. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (holding that use of preemptory jury challenges in a civil case to exclude persons from the jury be-

that would violate the Equal Protection Clause. It is interesting that in both the 1870s and 1990s the Supreme Court found it important to avoid racial discrimination in jury selection systems, while the Court was simultaneously restricting the ability of Congress to protect racial minorities in other areas.

The Burger Court's movement away from protecting the interests of racial minorities was apparent in its rulings upholding government acts that had a disparate, harmful impact on racial minorities. The Court's position regarding the need to prove "discriminatory purpose" beyond the adverse impact of the law on racial minorities was established by a series of decisions in the 1970s.<sup>314</sup> Unless the law used racial terms or could only be rationally described as the total denial of a right to a group composed of members of a racial minority, the Burger Court would not invalidate a law on the basis of its adverse impact on racial minorities.<sup>315</sup>

In 1971, the Supreme Court allowed a city that had operated public swimming pools in a racially discriminatory manner to close all of its pools after a desegregation order, despite proof that the private pools in the town would serve only whites.<sup>316</sup> In the same year, the Court upheld a law that required a referendum before allowing low income housing into an area, despite the fact that preventing the establishment of low income housing would undoubtedly lead to a low representation of racial minorities in the town.<sup>317</sup> In 1972, the Court upheld a state's decision to use methods for determining an individual's monetary need under the Aid to Families with Dependent Children program that different from those it used for determining need under Aid to the Aged, Blind or Disabled program, despite the clear statistical proof that these formulae benefitted a predominantly white group of welfare recipients.<sup>318</sup>

In the mid-1970s, the Court strengthened the discriminatory purpose requirement in cases involving constitutional challenges

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cause of their race violates equal protection).

314. See *infra* notes 316-22 and accompanying text.

315. *Id.*

316. See *Palmer v. Thompson*, 403 U.S. 217 (1971).

317. See *James v. Valtierra*, 402 U.S. 137 (1971).

318. See *Jefferson v. Hackney*, 406 U.S. 535 (1972).

to government employment practices and housing policies. In *Washington v. Davis*,<sup>319</sup> the Court found that the District of Columbia did not violate the implied equal protection guarantee of the Fifth Amendment Due Process Clause by using a standardized test for prospective police officers, even though the statistical evidence clearly demonstrated that the test eliminated a disproportionately high percentage of minority race candidates.<sup>320</sup> The next year, in *Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>321</sup> the Supreme Court upheld a rezoning denial for a low and moderate income housing development that would have dramatically increased the percentage of minority residents in the city. The Court ruled that there was no proof that the purpose of the rezoning denial was to prohibit racial integration of the city.<sup>322</sup> These decisions make it clear that we must look to Congress to prevent those employment and housing practices that have an adverse impact on racial minorities in situations where the government and private entities taking those actions leave no clear proof of a racially discriminatory purpose.<sup>323</sup>

By the end of the 1970s, the Court established the "discriminatory purpose" principle as a barrier that protected government acts that had an undeniable, foreseeable adverse impact on racial minorities or women. In the 1980s, the Supreme Court

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319. 426 U.S. 229 (1976).

320. Because Title VII did not apply to the District of Columbia at that time, the plaintiffs could not make use of the statistical analysis cases referred to in *supra* notes 196-200.

321. 429 U.S. 252 (1977).

322. *Id.* at 269-71.

323. Following the remand of the decision in *Arlington Heights*, the court of appeals found that the racially disparate impact of the city's actions might constitute a violation of the Fair Housing Act, 42 U.S.C. §§ 3601-3619, 3631 (1988); the Supreme Court declined to review this decision. *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). The Supreme Court has not ruled on whether all forms of housing laws or practices that have a racially disparate impact on racial minorities violate Title VIII. The Supreme Court has upheld a court of appeals ruling that Title VIII was violated by a city that restricted multifamily housing projects to an area that was primarily inhabited by racial minorities, but the Court did not rule on the question of whether a disparate impact test was the appropriate means for determining violations of Title VIII. *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988) (*per curiam*).



ruled that the State of Georgia did not maintain or use its death penalty in a racially discriminatory manner, despite statistical proof that defendants whose victims were white were much more likely to receive the death penalty than were defendants whose victims were minority members.<sup>324</sup> The only government acts that plaintiffs could realistically challenge as racially discriminatory, other than statutes or regulations that used racial criteria on their face, were actions of governmental entities foolish enough to leave a "smoking gun" establishing that they had enacted a law with race-neutral language to harm racial minorities.

The Supreme Court's rulings concerning the Voting Rights Act, which we examined previously, mirrored its approach to interpreting the Fourteenth and Fifteenth Amendments. The Burger Court did not reverse prior Supreme Court cases that invalidated laws that openly prohibited minority race persons from voting in primary or general elections. The Burger Court did not, however, invalidate a voting regulation unless evidence established that the law was created or maintained for the specific purpose of diluting the voting power of minority race citizens. Statistical proof that the legislative districts within a city, county, or state had a disproportionate effect on racial minorities, by resulting in a disproportionately low percentage of racial minority participation or election, would not be sufficient to invalidate a districting plan.<sup>325</sup>

We need to reexamine two of the Voting Rights Act decisions that also involve Equal Protection Clause issues to understand the fundamental change that took place in the Supreme Court's approach to the constitutional principle of equal protection between the 1970s and the 1990s. Any consideration of the Justices' views regarding the meaning of the Equal Protection

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324. See *McCleskey v. Kemp*, 481 U.S. 279 (1987). The defendant in *McCleskey* submitted a statistical study of the death penalty in Georgia that took into account over 200 variables. The Supreme Court, by a five to four vote, refused to invalidate the death penalty for the defendant, and the state's death penalty system, despite the findings of the statistical study that showed that a black defendant convicted of killing a white person was far more likely to receive the death penalty than was a white person convicted of killing a black person. See *id.* at 286-87.

325. See *supra* notes 129-47 and accompanying text.

Clause must include a comparison of the Supreme Court's 1977 decision in *United Jewish Organizations v. Carey*<sup>326</sup> (the *UJO* case) and its 1993 decision in *Shaw v. Reno*.<sup>327</sup> In 1977, the Court had a majority of Justices who would not stand in the way of congressional protection of racial minorities. The Supreme Court in 1993 had a majority of Justices who would disregard earlier rulings concerning the nature of proof needed to establish the existence of a racial classification in order to strike legislative actions that helped minority race voters.

In both the *UJO* and *Shaw* decisions, the Court was confronted with a situation in which a state had used racial criteria to redraft legislative districts in order to secure the approval of the Attorney General under section 5 of the Voting Rights Act.<sup>328</sup> In the *UJO* case, the Justices, by a seven to one vote, ruled that the legislative redistricting that aided minority race members in New York complied with the Voting Rights Act, the Fourteenth Amendment, and the Fifteenth Amendment.<sup>329</sup> In *Shaw* the Court, by a five to four vote, deemed a similar action in North Carolina a racial classification on its face and subject to strict judicial scrutiny.<sup>330</sup> The *Shaw* Court remanded the case for a determination of whether the creation of legislative districts maintaining or increasing minority race voting power was narrowly tailored to promote a compelling interest of govern-

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326. 430 U.S. 144 (1977).

327. 113 S. Ct. 2816 (1993).

328. Section 5 of the Voting Rights Act is codified in 42 U.S.C. § 1973c (1988). The preclearance requirements of § 5 were examined in *supra* notes 92-127 and accompanying text.

329. *UJO*, 430 U.S. at 144. Only eight Justices participated in this case; Justice Marshall took no part in the decision. Justice White announced the judgment of the Court and filed an opinion that was joined in its entirety by Justice Stevens. Parts I, II, and III of the opinion were also joined by Justices Brennan and Blackmun; parts I and IV of the opinion were joined by Justice Rehnquist. Justice Brennan wrote a separate concurring opinion. *Id.* at 168 (Brennan, J., concurring in part); Justices Blackmun and Rehnquist did not write separate opinions in this case. Justice Stewart and Justice Powell concurred only in the judgment of the Court. *Id.* at 179 (Stewart, J., concurring in the judgment, joined by Powell, J.). Only Chief Justice Burger dissented. *Id.* at 180 (Burger, C.J., dissenting).

330. *Shaw v. Reno*, 113 S. Ct. 2816 (1993). Justices White, Blackmun, Stevens, and Souter dissented. *Id.* at 2834 (White, J., dissenting, joined by Blackmun and Stevens, JJ.); *id.* at 2843 (Blackmun, J., dissenting); *id.* at 2843 (Stevens, J., dissenting); *id.* at 2845 (Souter, J., dissenting).

ment.<sup>331</sup> The *Shaw* decision placed into question the districting practices that had been approved in *UJO*.

In *UJO*, the Court examined the redistricting of New York state senate and state assembly districts insofar as the redistricting involved counties in New York that were subject to the Voting Rights Act preclearance requirements.<sup>332</sup> In 1974, provisions of a new state statute relating to congressional, state senate, and state assembly districts were submitted to the Attorney General of the United States for preclearance.<sup>333</sup> The Attorney General concluded that as to certain districts, the state had not met its burden of proof in demonstrating that redistricting had neither the purpose nor the effect of abridging the right to vote by reasons of race or color.<sup>334</sup> New York did not challenge the Attorney General's objections.<sup>335</sup> Instead the state revised its districting plan in a way that created more substantial "non-white minorities" in two state assembly districts and two state senate districts.<sup>336</sup>

Although the Court did not issue a majority opinion in *UJO*, the Supreme Court upheld the redistricting plan by a seven to one vote of the Justices.<sup>337</sup> Justice Marshall did not participate in the *UJO* decision. Only Chief Justice Burger dissented.<sup>338</sup> Justice White announced the judgment of the Court; he was joined by Justices Brennan, Blackmun, and Stevens when he stated that "[u]nless [the Supreme Court] adopted an unconstitutional construction of § 5 [of the Voting Rights Act in earlier decisions], a reapportionment cannot violate the Fourteenth or Fifteenth Amendment merely because a State uses specific numerical quotas in establishing a certain number of black majority districts."<sup>339</sup> Justice Rehnquist joined the portion of Justice White's opinion in *UJO* that found that the affirmative use of

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331. *Id.* at 2832.

332. *UJO*, 430 U.S. at 144.

333. *Id.* at 149.

334. *Id.* at 149-50.

335. *Id.* at 150-51.

336. *Id.* at 151-52.

337. *Id.* at 144.

338. *Id.* at 180 (Burger, C.J., dissenting).

339. *Id.* at 162.

racial criteria in the redistricting did not violate the Fourteenth or Fifteenth Amendments, even if New York's actions were not required by the Voting Rights Act.<sup>340</sup>

Justice Stewart, joined by Justice Powell, wrote an opinion concurring only in the Court's judgment in the *UJO* case.<sup>341</sup> Although these two Justices recognized that the state had used racial criteria in order to protect minority voters, they found no indication of an intention to dilute the voting strength of whites in general or any specific subgroup of whites.<sup>342</sup> Justices Stewart and Powell reached this conclusion despite the fact that the voting strength of the Hasidic Jewish community was adversely affected by the final reapportionment plan.<sup>343</sup> Justices Stewart and Powell found that the cases regarding discriminatory purpose dictated the outcome of this case.<sup>344</sup> They concluded that:

Under the Fourteenth Amendment the question is whether the reapportionment plan represents purposeful discrimination against white voters. . . . Disproportionate impact may afford some evidence that an invidious purpose was present. . . . But the record here does not support a finding that the redistricting plan undervalued the political power of white voters relative to their numbers in [the redistricted county]. . . . That the legislature was aware of race when it drew the district lines might also suggest a discriminatory purpose. Such awareness is not, however, the equivalent of discriminatory intent. The clear purpose with which the New York Legislature acted—in response to the position of the United States Department of Justice under the Voting Rights Act—forecloses any finding that it acted with the invidious purpose of discriminating against white voters.<sup>345</sup>

In *Shaw v. Reno*,<sup>346</sup> the Supreme Court confronted a factual situation almost identical to *UJO*, except that the case came

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340. *Id.* at 165-68. This portion of Justice White's opinion was also joined by Justice Stevens.

341. *Id.* at 179 (Stewart, J., concurring in the judgment, joined by Powell, J.).

342. *Id.* at 179-80.

343. *See id.*

344. *See id.*

345. *Id.* (citations omitted).

346. 113 S. Ct. 2816 (1993).

from North Carolina rather than New York. Prior to the 1960s, North Carolina had a long history of using a variety of devices to reduce or eliminate the voting power of racial minorities. Forty of the 100 counties in North Carolina were subject to the preclearance requirements of the 1965 Voting Rights Act.<sup>347</sup> The North Carolina state legislature adopted a plan creating congressional districts and submitted it to the United States Attorney General pursuant to the administrative preclearance procedures of the Act.<sup>348</sup> The Attorney General objected to North Carolina's initial plan for congressional districts because only one of the twelve districts appeared to be one in which minority race voters would control the election of a representative to Congress.<sup>349</sup> Because twenty-two percent of the North Carolina population was comprised of racial minorities, primarily African Americans, the Attorney General believed that the state had not met its burden of showing that its districting plan would not have the effect of diluting the voting strength of racial minorities.<sup>350</sup>

North Carolina did not choose to challenge the Attorney General's decision in the District Court for the District of Columbia.<sup>351</sup> Instead, the North Carolina legislature adopted a new districting plan that created two districts in which minority voters would constitute a majority and, if they voted together, control the election for the congressional representative.<sup>352</sup> The second North Carolina districting plan was challenged in the United States District Court in North Carolina by persons who claimed that the new plan involved unconstitutional racial discrimination in favor of racial minorities.<sup>353</sup>

By a five to four vote, the Justices in *Shaw* ruled that the second congressional districting plan involved a racial classification on its face.<sup>354</sup> Justice O'Connor wrote the majority opinion

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347. *Id.* at 2820.

348. *Id.*

349. *See id.*

350. *See id.*

351. *Id.*

352. *See id.* at 2820-21.

353. *Id.* at 2821.

354. *Id.* at 2832.

in *Shaw*.<sup>355</sup> She found that districts which had been created to aid minority race voters involved a racial classification subject to strict judicial scrutiny.<sup>356</sup> The Supreme Court remanded the case to the lower courts for an initial determination of whether the districting plan was narrowly tailored to promote a compelling governmental interest.<sup>357</sup> Although her majority opinion did not make a ruling concerning the ultimate constitutionality of the North Carolina congressional districting plan, Justice O'Connor stated that "a reapportionment plan that satisfies § 5 [of the Voting Rights Act] still may be enjoined as unconstitutional."<sup>358</sup>

In *Shaw*, a majority of the Court disregarded all previous cases regarding the need to prove discriminatory purpose so that the Court could rule against the interests of minority voters. Justice O'Connor's majority opinion found that the North Carolina redistricting plan involved a racial classification "on its face," at least insofar as it related to one of the two congressional districts that would be controlled by minority voters.<sup>359</sup> North Carolina congressional district twelve, one of the two districts created after the Attorney General objected to the first reapportionment plan, was 160 miles long, and according to the Supreme Court, "for much of its length no wider than the [Interstate] 85 corridor."<sup>360</sup> Because Justice O'Connor found that this district constituted racial discrimination on the face of the law, those persons who attacked the plan did not have to make any demonstration that the law was the product of a racially discriminatory purpose.<sup>361</sup> She found that "no inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute . . . [or in] those 'rare' statutes that, although race neutral, are, on their face, 'unexplainable on grounds other than race.'"<sup>362</sup>

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355. *Id.* at 2819.

356. *Id.* at 2824-25.

357. *Id.* at 2832.

358. *Id.* at 2831.

359. *Id.* at 2825.

360. *Id.* at 2820-21.

361. *Id.* at 2824-25.

362. *Id.*

The difficulty with Justice O'Connor's statements, as pointed out by the dissenters in *Shaw*, is that the Supreme Court had never found a law that did not use racial terms to constitute a race classification "on its face" unless that law denied a racial group some benefit.<sup>363</sup> In *Gomillion v. Lightfoot*,<sup>364</sup> the redistricting of the town's boundaries had denied racial minorities the ability to vote in the city elections.<sup>365</sup> In *Reitman v. Mulkey*,<sup>366</sup> the law had denied those interested in integration the ability to get legislative relief without a change to the California Constitution.<sup>367</sup> No one was denied a right to vote by the redistricting map in *Shaw*; no identifiable racial group (not even the general category of "white persons") had their voting power diluted by the final districting map. If Justice O'Connor's majority opinion had required proof of a racially discriminatory purpose in order to show a violation of the Fourteenth or Fifteenth Amendment, the majority would have had to uphold the North Carolina plan. In the final redistricting plan, enacted following the Attorney General's objection to the first map, white voters in North Carolina controlled the outcome in over eighty percent of the North Carolina congressional districts.<sup>368</sup> Although over twenty percent of the population of North Carolina was composed of racial minorities, they would control less than twenty percent of the North Carolina delegation.<sup>369</sup>

Justice O'Connor's majority opinion in *Shaw* can be explained only as result-driven. The majority recast prior Supreme Court decisions in order to prevent the government from aiding minori-

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363. The dissenters in *Shaw* focused on the fact that the redistricting plan that was the subject of the strict scrutiny by the Supreme Court majority complied with the one person, one vote principle and that there was no allegation that the districts diluted the voting strength of white voters. In other words, in the view of the dissenters, the districting law simply did not cause any injury that constituted a cognizable constitutional claim. *Id.* at 2834 (White, J., dissenting, joined by Blackmun and Stevens, JJ.); *id.* at 2843 (Blackmun, J., dissenting); *id.* (Stevens, J., dissenting); *id.* at 2846 (Souter, J., dissenting).

364. 364 U.S. 339 (1960); see *supra* text accompanying note 297.

365. See *id.*

366. 387 U.S. 369 (1967); see *supra* text accompanying notes 299-301.

367. See *Reitman*, 387 U.S. at 370-75.

368. See *Shaw*, 113 S. Ct. at 2838 (White J., dissenting, joined by Blackmun and Stevens, JJ.).

369. See *id.*

ty voters. Justice O'Connor described the *UJO* case as one in which the plaintiffs had failed to allege that the legislative districts, on their face, could be understood only as an effort to segregate voters by race.<sup>370</sup> In other words, the O'Connor opinion in *Shaw* indicates that the plaintiffs in the *UJO* case would have won if they had only done a better job in the formal pleading of their case. Justice O'Connor disregarded those portions of Justice White's plurality opinion in *UJO* that expressly approved the affirmative use of racial criteria as the basis for creating districts that increase the voting strengths of minority race groups. She also disregarded the portions of the *UJO* concurring opinion of Justices Stewart and Powell in which they expressly found that the use of racial criteria to strengthen the voting power of minority race groups could not violate the Fourteenth or Fifteenth Amendments absent proof that the criteria were used for the purpose of diluting the voting strength of some racial group.

There is no way to explain the outcomes in *UJO* and *Shaw* other than by the change in the Court's personnel and the attitudes of today's Justices towards racial minorities. Justice O'Connor has voted to invalidate almost all forms of benign racial classifications that could be described as affirmative action. Justice Scalia has opposed any form of government action that consciously aids minority members unless those persons could be shown to have been the specific victims of illegal past discrimination. Justice Powell was replaced by Justice Kennedy, who started voting to restrict civil rights statutes in his first Term on the Supreme Court. Justice Rehnquist did not write in *Shaw* or in *UJO*; he simply switched his vote. Justice Thomas did not write in *Shaw*, but he provided the deciding vote.

The four dissenters in *Shaw* were Justice White (who had written the plurality opinion in *UJO*), Justices Blackmun and Stevens (who had joined part of Justice White's opinion in *UJO*), and Justice Souter.<sup>371</sup> A year earlier, Justice Souter voted against using the Voting Rights Act to protect racial minori-

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370. See *id.* at 2829.

371. *Id.* at 2834 (White, J., dissenting, joined by Blackmun and Stevens, JJ.); *id.* at 2845 (Souter, J., dissenting).



ties.<sup>372</sup> Perhaps Justice Souter will be true to statements in his confirmation hearings in which he indicated support for the Voting Rights Act and congressional authority to protect racial minorities.<sup>373</sup>

In *Shaw* the majority left open the question of whether Congress and the Attorney General could force a state to strengthen minority race voting power. In the next section of this Article, I will examine the Court's rulings concerning "affirmative action." I will conclude that section by returning to the question of whether the Supreme Court is poised to invalidate race conscious districting that aids minority voters.

#### VIII. THE BURGER COURT, THE REHNQUIST COURT, AND THE BENIGN USE OF RACIAL CLASSIFICATIONS

Laws that aid racial minorities are sometimes called "affirmative action programs" or "benign racial classifications." I will use those terms interchangeably. In this Symposium, Professor Tushnet examines the jurisprudential debate concerning racial affirmative action.<sup>374</sup> I will not attempt to engage in a detailed analysis of the Supreme Court's affirmative action rulings in a way that would help the reader use the cases to solve practical problems that are currently being confronted by local, state, and federal governmental entities. Such a task is best done in a treatise format.<sup>375</sup> Instead, I will give my readers an overview of these cases for the purpose of identifying the voting records of the individual Justices who have served in the Burger and Rehnquist Courts. An examination of these voting patterns will demonstrate that the Reagan appointees have prevented local and state governments from taking affirmative steps to aid racial minorities. Those Justices will need the help of at least one of the Bush appointees to reverse the earlier Supreme Court

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372. See *Presley v. Etowah County Comm'n*, 112 S. Ct. 820 (1992); see *supra* notes 117-27 and accompanying text.

373. See *supra* note 26.

374. See Mark A. Tushnet, *The Supreme Court and Race Discrimination, 1967-1991: The View from the Marshall Papers*, 36 WM. & MARY L. REV. 473 (1995).

375. For a more systematic analysis of all aspects of the affirmative action rulings, see 3 ROTUNDA & NOWAK, *supra* note 3, § 18.10.

decisions upholding the power of the federal government to create racial affirmative action programs. For the past forty years, the Supreme Court has allowed, and sometimes required, lower courts and other governmental entities to create race-conscious remedies for specific acts of racial discrimination that violate federal statutes or the Equal Protection Clause. The affirmative action cases that have divided the Justices involved the question of whether a city, state, or federal government may go beyond remedying identified illegal racial discrimination and voluntarily aid racial minorities.<sup>376</sup> Prior to the Burger Court era, the Supreme Court did not have to face the question of whether racial criteria could be used affirmatively to advance the interests of racial minorities by state or local governments. By the time racial affirmative action programs were adopted and challenged

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376. Before diagnosing the position of the Supreme Court concerning racial affirmative action, we must first set aside four types of cases that are arguably affirmative action cases but do not involve a governmental entity's voluntary use of racial classifications to benefit racial minorities. First, my discussion of racial affirmative action will not include federal laws that benefit persons on the basis of their membership in a recognized Native American tribe or because they are Native Americans. The government discrimination against persons because their ancestors were Native Americans should be invalid under the compelling interest test. The Court, however, has not used clear standards for determining the legitimacy of congressional regulations of Native Americans who are members of recognized tribes and living on reservation lands. The Supreme Court has allowed the government some leeway in the hiring of Native Americans in the Bureau of Indian Affairs. See *Morton v. Mancari*, 417 U.S. 535 (1974). See generally 1 ROTUNDA & NOWAK, *supra* note 3, § 4.2 (discussing regulation of Native Americans); *id.* § 18.10 (discussing affirmative action).

Second, I will not reexamine the cases in which the Supreme Court has interpreted federal civil rights statutes in a manner that allows private employers to use voluntarily any established policies that benefit racial minorities in hiring and promotions. In those statutory interpretation cases, the Court did not address the constitutionality of the government's use of voluntary racial affirmative action. See *supra* notes 224-33 and accompanying text.

Third, we must ignore the question of whether state, local, or federal governments may make some use of racial criteria in creating legislative districts that will enhance the voting power of minority racial groups. As we have seen, the Supreme Court has left open the question of whether such actions might ever be compatible with the Fourteenth and Fifteenth Amendments. I will revisit that subject at the end of this section of the Article.

Fourth, cases involving court-ordered remedies for specific acts of illegal racial discrimination do not present affirmative action issues. In the next section of this Article, I will examine some of the Court's rulings concerning the desegregation of schools that require lower courts to take cognizance of race when issuing remedial orders.

in litigation that would find its way to the Supreme Court, the Warren Court era had come and gone.

At one level, the Supreme Court decisions concerning racial affirmative action are a highly theoretical debate concerning the proper standard of review.<sup>377</sup> One set of Justices argues for the use of "strict scrutiny" and the "compelling interest test" to judge any racial classification, regardless of whether the classification is designed to help or hurt members of a racial minority.<sup>378</sup> Those Justices require the government to prove that the use of a racial classification is necessary to promote a compelling interest.<sup>379</sup> Another group of Justices advocates the use of the "intermediate test" to review a benign racial classification that does not burden or stigmatize any racial group.<sup>380</sup> This set of Justices votes to uphold a benign racial classification (affirmative action program) if they find that it has a substantial relationship to an important government interest, although they use the compelling interest test to examine, and invalidate, classifications that burden or stigmatize a racial minority.<sup>381</sup>

We can cut through the legal jargon, and understand the real differences between the Justices in the affirmative action cases, if we accept the following proposition as background for reading those cases: "The correction of societal discrimination (which means the correction of the imbalance in the distribution of goods, wealth, and opportunity in our society that is not traceable to any specific illegal action) is an important, but not compelling interest." That proposition is not adopted in any opinion of the United States Supreme Court, but it explains the entirety of the Justices' debate in the racial affirmative action cases.

The Justices who advocate the use of the intermediate standard of review find that the correction of societal discrimination

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377. For an explanation of the standards that the Court has used in determining whether a legislative or administrative use of a classification violates the equal protection guarantee, see 3 ROTUNDA & NOWAK, *supra* note 3, § 18.3. For the purposes of assessing the Court's rulings concerning voluntary government action designed to promote the interest of racial minorities, we need only deal with three or, perhaps, four possible standards of review.

378. *See id.*

379. *See id.*

380. *See id.*

381. *See id.*

against racial minority groups is a sufficient interest to justify laws that are tailored to correct the effects of racial discrimination.<sup>382</sup> In other words, they believe that the equal protection principle is not violated by some attempts to reallocate wealth, economic opportunity, or voting power so as to correct past racial discrimination in our society and create a more just balance in the distribution of those goods between persons of all races.<sup>383</sup>

The Justices who advocate the use of the compelling interest test are Justices who find a racial classification can rarely, if ever, be used unless it is part of a narrowly tailored remedy for a specific, identified illegal or unconstitutional act of racial discrimination.<sup>384</sup> It is not clear whether any of the Justices who advocate the use of the compelling interest test would go further and allow the use of benign racial classifications to promote any nonremedial goals, such as promoting diversity in education or correcting the effects of racial discrimination in the voting process in the early part of this century.

Since 1978, there have been five cases in which the Supreme Court has examined the constitutionality of government actions that were voluntarily undertaken to aid members of minority racial groups.<sup>385</sup> Three of these cases involved state or local affirmative action plans; two cases involved the federal government. I will examine the cases in those groupings because the Supreme Court has established different standards for state and federal racial affirmative action programs.

In 1978, in *Regents of the University of California v. Bakke*,<sup>386</sup> five Justices, without a majority opinion, ruled that the admissions program of the medical school of the University of California at Davis violated Title VI of the Civil Rights Act of 1964.<sup>387</sup> Justice Powell cast the decisive vote in *Bakke* and an-

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382. *See id.*

383. *See id.* § 18.10.

384. *See id.* § 18.3.

385. The Supreme Court, for jurisdictional reasons, avoided ruling on the constitutionality of a law school's racial affirmative action policy in *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

386. 438 U.S. 265 (1978).

387. *Id.*

nounced the judgment of the Court.<sup>388</sup> However, none of Justice Powell's statements concerning the constitutionality of the medical school's admissions program gained the support of even one other Justice.<sup>389</sup>

Four of the Justices in *Bakke* refused to make any statements concerning the constitutionality of the admissions program.<sup>390</sup> Chief Justice Burger and Justices Rehnquist, Stewart, and Stevens found that Title VI of the Civil Rights Act prohibited any use of race to affirmatively or negatively influence the admissions decisions in schools receiving federal money.<sup>391</sup> Because they believed that the admissions program at issue in *Bakke* violated Title VI, they made no statements concerning the constitutional standards to be used when reviewing a benign racial classification.<sup>392</sup> Later cases revealed that these four Justices were not able to agree on a standard of review for racial affirmative action cases.

Justice Powell agreed with Justices Blackmun, Brennan, Marshall, and White that Title VI, which prohibited racial discrimination in federally funded educational programs, barred only racial classifications that violated the Equal Protection Clause if the challenged action involved state action.<sup>393</sup> These five Justices reached the constitutional issue in this case; four of the Justices disagreed with Justice Powell.<sup>394</sup>

Justice Brennan, in an opinion that was joined by Justices Marshall, White, and Blackmun, concurred in the judgment of the Court only insofar as it left open the possibility that the use of race to affirmatively help minority candidates in the admis-

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388. *Id.*

389. *Id.*

390. *Id.* at 408-21 (Stevens, J., concurring in the judgment in part and dissenting in part).

391. *Id.* at 421.

392. *Id.*

393. *Id.* at 281-87; *id.* at 328-55 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). These five Justices agreed on the principle that Title VI prohibited those activities that, if they involved state action, would violate the Equal Protection Clause of the Fourteenth Amendment. They did not agree, however, on the basis for this ruling or the meaning of the constitutional standards. *See id.*

394. *Id.* at 355-79.

sions process was not totally prohibited by either Title VI or the Equal Protection Clause.<sup>395</sup> These Justices dissented from the ruling that found that the Davis medical school's use of statistical goals to ensure minority representation in the student body violated Title VI.<sup>396</sup> Justice Brennan's opinion took the position that the Court should use the intermediate equal protection standard for determining whether a racial classification that did not stigmatize or harm any identifiable racial minority group was constitutional.<sup>397</sup> Justice Brennan found that the end of ensuring racial diversity in the medical profession, which has a statistically low percentage of members of racial minorities when compared to the general population, was an interest that would support a truly benign racial classification.<sup>398</sup> The Justices who joined the Brennan opinion voted to uphold that admissions policy under both Title VI and the Equal Protection Clause because they found that the medical school's admissions policy of using race affirmatively to help members of racial minorities was substantially related to an important interest.<sup>399</sup>

Justice Powell wrote only for himself as he found that racial classifications had to be subject to the strict scrutiny standard of review regardless of whether they helped or hurt racial minorities.<sup>400</sup> In his view, a racial classification could not be upheld unless it was necessary to promote a compelling interest of government.<sup>401</sup> Justice Powell found that the student diversity was a compelling interest because the attainment of a diverse student body was related to "academic freedom" and the enrichment of the educational experience for both faculty and students.<sup>402</sup> On this basis, he voted to approve some of the race-conscious admissions practices used by universities.<sup>403</sup> Nevertheless, he did not find that a program that set numerical

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395. *Id.* at 325. Each of these Justices wrote an opinion, but all four of them joined in the Brennan opinion.

396. *Id.*

397. *Id.* at 359.

398. *Id.* at 362.

399. *Id.* at 325.

400. *Id.* at 290-91 (Powell, J.).

401. *Id.* at 305.

402. *Id.* at 311.

403. *Id.* at 314.

admissions goals or guaranteed admission to a minimum number of minority students was narrowly tailored to that compelling interest.<sup>404</sup> According to Justice Powell, a race-conscious admissions policy would be narrowly tailored to achieving a diverse student body only if the admissions policy allowed for consideration of race together with a wide variety of other factors in making admission decisions.<sup>405</sup>

Justice Powell cast his vote with Justices Brennan, Marshall, White, and Blackmun to the extent of reversing the California Supreme Court ruling that totally precluded the use of race as a factor in education admissions programs.<sup>406</sup> Justice Powell voted with Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens to invalidate the use of numerical racial goals in the admissions program under Title VI.<sup>407</sup> In 1978, only Justice Powell advocated the use of the compelling interest test, and even he viewed the test as a flexible one.

In 1986, the Supreme Court again examined a governmental racial affirmative action policy in a school setting. At that time, there appeared to be growing support among the Justices for using the compelling interest test in affirmative action cases, even though the only change in the membership of the Court between 1978 and 1986 was the replacement of Justice Stewart by Justice O'Connor.

In *Wygant v. Jackson Board of Education*,<sup>408</sup> the Court held

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404. *Id.* at 315.

405. *Id.* at 311-20. Justice Powell found that the state would have a compelling interest in eliminating the effects of identified illegal or unconstitutional discrimination, but, in *Bakke*, the university did not claim that it had the ability to make, or in fact had made, findings that in prior years it had discriminated against racial minorities in its admissions programs. *Id.* at 307-10. Justice Powell avoided the question of whether ensuring the provision of medical health services for impoverished communities with high minority populations was a compelling interest because he found that there was no proof that the special admissions program used by the Davis medical school would increase the number of doctors or the quality of health care for such communities. *Id.* at 311.

406. *Id.* at 320.

407. *Id.* at 315.

408. 476 U.S. 267 (1986). The events that led to the *Wygant* litigation had their roots in community racial tensions concerning a variety of topics. *Id.* at 270. After long negotiations, the local board of education and the local teachers union reached a collective bargaining agreement that provided that any layoffs would occur on a modified seniority basis whereby the school board would lay off minority and

that a local school board violated the Equal Protection Clause when, to maintain a racially integrated faculty at a time when it had to reduce the number of faculty members, it laid off white teachers before black teachers with less seniority.<sup>409</sup> Once again, no majority opinion issued from the Court; once again, the case was decided by a five to four decision of the Justices.<sup>410</sup> Although four Justices endorsed the use of a compelling interest test in *Wygant*, it appeared that a majority of the Court might be ready to give the states some leeway to create affirmative action programs.

Justice Powell announced the judgment of the Court in *Wygant*; his opinion was joined by Chief Justice Burger and Justice Rehnquist and, in part, by Justice O'Connor.<sup>411</sup> The plurality found that the decision to lay off nonminority teachers solely because of their race, in order to maintain a racial balance in the faculty, violated the Equal Protection Clause.<sup>412</sup> As he had in *Bakke*, Justice Powell found that a racial classification must be subject to the compelling interest test, regardless of whether the classification aided or burdened members of a minority race.<sup>413</sup> Although he did not exclude the possibility that maintaining a racially diverse faculty might be a compelling interest, Justice Powell's plurality opinion found that the layoff plan was not necessary to achieving or maintaining racial diversity in the school system.<sup>414</sup>

Justice O'Connor agreed with the portion of Justice Powell's opinion that endorsed the use of a compelling interest test for the review of all racial classifications.<sup>415</sup> She wrote separately in *Wygant* to note that the government's goal of having an integrated faculty might be achieved in a way that would survive

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nonminority teachers in the same proportions. *Id.* Minority race teachers were underrepresented among the senior faculty. *Id.* at 271. The agreed upon layoff system would not result in increasing the disparity between the percentages of minority and nonminority faculty members in the public school system. *Id.* at 270.

409. *Id.* at 282-84.

410. *Id.* at 267-320.

411. *Id.* at 276-83.

412. *Id.* at 284.

413. *Id.* at 274.

414. *Id.* at 283.

415. *Id.* at 285 (O'Connor, J., concurring in part and concurring in the judgment).



constitutional review if the government did not impose a disproportionate harm on nonminority teachers.<sup>416</sup> Justice O'Connor, in her concurrence, indicated that a majority of the Justices would uphold the decision of a public school system to take some affirmative steps to ensure the creation of an integrated work force through the consideration of race in hiring decisions.<sup>417</sup> Her opinion did not specify whether she would endorse the implementation of hiring goals in the absence of some proof of past employment discrimination by the government.<sup>418</sup>

Justices White and Stevens each took an approach to deciding the issues in *Wygant* that separated them from the other Justices and each other. Justice White concurred in the judgment of the Court in *Wygant* in an opinion that was not joined by any other Justice.<sup>419</sup> Justice White did not refer to any standard of review.<sup>420</sup> He simply asserted that "[w]hatever the legitimacy of hiring goals or quotas may be," the discharge of some persons from government employment in order to maintain a racial balance in the work force could not survive equal protection review.<sup>421</sup>

Justice Stevens dissented in an opinion that was not joined by any other Justice.<sup>422</sup> He believed that no formal standard of review should be used in these types of equal protection cases.<sup>423</sup> In Justice Stevens' view, there was no basis for the judicial invalidation of the layoff system because it had been adopted by the school board and the teachers union through a fair process.<sup>424</sup> It was "a step toward that ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race."<sup>425</sup>

Justice Marshall wrote a dissenting opinion in *Wygant* that

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416. *Id.* at 287.

417. *Id.* at 286.

418. *Id.* at 293.

419. *Id.* at 294 (White, J., concurring in the judgment).

420. *Id.* at 294-95.

421. *Id.* at 295.

422. *Id.* at 313 (Stevens, J., dissenting).

423. *Id.* at 313-20.

424. *Id.* at 318.

425. *Id.* at 320.

was joined by Justices Brennan and Blackmun.<sup>426</sup> The dissenting Justices voted to uphold the layoff policy under the intermediate standard of review.<sup>427</sup> They found that the correction of societal discrimination against racial minorities, which resulted in a disproportionately low number of racial minority faculty at the senior teaching ranks, was a sufficient end to justify a government program that maintained a racially integrated faculty.<sup>428</sup> Additionally, they believed that the case should have been remanded to the lower courts for determination of whether a basis existed for finding that the program was designed to remedy past governmental discrimination within the school district.<sup>429</sup>

After *Wygant*, the Court's position concerning the constitutionality of racial affirmative action was not clear. Only three Justices had endorsed the use of the intermediate standard to allow government policies that corrected the effects of societal discrimination. Justice O'Connor, one of the Justices who voted to review benign racial classifications under the strict scrutiny standard, did not appear to take the position that the government was completely prohibited from acting to correct the effects of societal discrimination. Justices Stevens and White seemed so flexible in their approach to reviewing affirmative action programs that it was impossible to clearly identify the standard they used in making their decisions.<sup>430</sup>

By 1989, the appointment of Justices Scalia and Kennedy, and an apparent hardening in the position of Justice O'Connor toward benign racial classifications, resulted in a Court that was ready to put an end to voluntary affirmative action programs by state or local governments. In *Richmond v. J.A. Croson Co.*,<sup>431</sup> the Supreme Court invalidated a city's plan for increasing the

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426. *Id.* at 295-312 (Marshall, J., dissenting).

427. *Id.* at 301.

428. *Id.* at 312.

429. *Id.* at 296-98, 303, 312.

430. These two Justices would later vote to establish different standards of review for federal affirmative action programs than for state affirmative action programs. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). This case is discussed at *infra* notes 476-88 and accompanying text.

431. 488 U.S. 469 (1989).

number of minority owned businesses that were awarded city construction contracts.<sup>432</sup> The City of Richmond adopted a plan for awarding city construction contracts that required contractors to subcontract at least thirty percent of the amount of a contract to subcontractor businesses that were owned by members of certain racial minority groups (identified as "Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts").<sup>433</sup> A prime contractor was allowed a waiver from the thirty percent requirement only in "exceptional circumstances."<sup>434</sup>

By a six to three vote, the Justices ruled that Richmond had violated the Equal Protection Clause.<sup>435</sup> In *Croson*, Justice O'Connor announced the judgment of the Court in an opinion that was, in part, a majority opinion and, in part, a plurality opinion.<sup>436</sup> The O'Connor opinion, when combined with the concurring opinions, made it doubtful the Court would uphold any government aid to racial minorities unless it was tailored to remedy some identified past illegal or unconstitutional discrimination.<sup>437</sup>

Justice O'Connor, in a portion of her opinion that was joined by Chief Justice Rehnquist, Justice White, and Justice Kennedy, found that all racial classifications had to be subject to the strict scrutiny-compelling interest standard.<sup>438</sup> Justices Kennedy and Scalia wrote concurring opinions in which they found that even the compelling interest test might not be a sufficiently strict standard for reviewing racial affirmative action programs.<sup>439</sup>

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432. *Id.*

433. *Id.* at 477.

434. *Id.* at 478.

435. *Id.* at 469.

436. *Id.*

437. *Id.* at 475-511, 518 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 520 (Scalia, J., concurring in the judgment). Justice Stevens concurred without endorsing the use of any formal test or standard of review. *Id.* at 514 (Stevens, J., concurring in part and concurring in the judgment). The three dissenting Justices recognized that the Supreme Court had, in fact, established a ruling by a majority vote that would require the compelling interest test for affirmative action programs. *Id.* at 551 (Marshall, J., dissenting). "Today for the first time, a majority of this court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures." *Id.* (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting).

438. *Id.* at 493-98, 509-11 (O'Connor, J.).

439. *Id.* at 518-20 (Kennedy, J., concurring in part and concurring in the

Apparently, Justices Kennedy and Scalia would not vote to uphold any benign use of a racial classification unless it was clearly necessary to remedy specific acts of illegal and unconstitutional racial discrimination.<sup>440</sup> Justice Stevens concurred in the invalidation of the city's affirmative action program without referring to any standard of review.<sup>441</sup>

Justice O'Connor wrote for a majority of the Justices when she ruled that the city's affirmative action plan could not be justified under the compelling interest standard because the city failed to demonstrate that its plan was narrowly tailored to correct identifiable acts of illegal racial discrimination against minority members of the construction industry within the City of Richmond.<sup>442</sup> In this portion of her opinion, Justice O'Connor found that the city could not simply rely on the statistical underrepresentation of racial minorities in local contractors' associations or in the construction businesses in Richmond.<sup>443</sup> If the city could show that prior city actions, or the actions of private contractors within the city, had deterred the creation of minority owned construction businesses, the city would have a compelling interest in creating a program to correct the identified racial discrimination.<sup>444</sup> Because the city had not identified prior illegal or unconstitutional discrimination within its boundaries, the majority found the affirmative action plan was not narrowly tailored to a compelling government interest.<sup>445</sup> Richmond could not use proof that minority owned businesses in other geographic areas within the state or nation had been the subject of open discrimination.<sup>446</sup>

A majority of Justices in *Croson* held the effects of nationwide

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judgment); *id.* at 519-21 (Scalia, J., concurring in the judgment).

440. *Id.*

441. *Id.* at 514-17 (Stevens, J., concurring in part and concurring in the judgment).

442. *Id.* at 498-508 (O'Connor, J.).

443. *Id.* at 503.

444. *Id.* at 500.

445. *Id.* at 505. Justice O'Connor also found that even if Richmond had identified past discrimination against minority owned construction businesses in the city, its use of a 30% quota for subcontracts with only limited opportunities for a waiver from the quota system was not narrowly tailored to the correction of prior discrimination. *Id.* at 507-08.

446. *Id.* at 500-01.

discrimination against minority owned businesses in society could not be used to justify Richmond's affirmative action program.<sup>447</sup> The only compelling interest available to the city was the interest in correcting identified discrimination within its borders.<sup>448</sup> After *Croson*, a city can justify a racial preference that aids minority owned businesses only if it can demonstrate prior acts of illegal or unconstitutional discrimination against businesses owned by the particular minority group and within the city's boundaries.<sup>449</sup> Such a remedial program could not extend beyond racial discrimination remedies mandated by federal statutes or the Equal Protection Clause.<sup>450</sup> Thus, all truly voluntary governmental aid to racial minorities apparently may be prohibited by the *Croson* majority.<sup>451</sup>

Justice Marshall wrote a dissent in *Croson* that was joined by Justices Brennan and Blackmun.<sup>452</sup> These Justices believed that benign racial classifications should be upheld if they were substantially related to an important government interest.<sup>453</sup> The most significant point of difference between the majority and the dissenting Justices was not the formal standard of review they endorsed but, rather, their views concerning governmental actions taken to correct societal discrimination. The dissenting Justices would not have required the City of Richmond to identify specific acts of the city government or local contractors that had deterred the creation of minority-owned construction or subcontractor businesses in the city.<sup>454</sup> The history of discrimination against minority race persons in Virginia,

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447. *Id.*

448. *Id.* at 505.

449. *Id.* at 505-06.

450. *Id.* at 509-11.

451. In a portion of her opinion that was a plurality opinion, Justice O'Connor stated: "Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified racial discrimination within its jurisdiction." *Id.* at 509 (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.). But, according to the plurality, to justify awarding a preference to minority owned businesses, the city would have to be able to at least rely on an inference of discriminatory exclusion that might be raised from statistical proof similar to that used in employment discrimination cases.

452. *Id.* at 528 (Marshall, J., dissenting, joined by Brennan and Blackmun, JJ.).

453. *Id.* at 535.

454. *Id.* at 540.

dating back to the days of the Confederacy, was sufficient to justify the benign use of racial classification in the view of the dissenters.<sup>455</sup> That history left little doubt that the disproportionately low percentage of racial minority owners of construction businesses was not merely a matter of chance.<sup>456</sup>

The *Croson* decision demonstrated that Chief Justice Rehnquist and the Reagan appointees—Justices O'Connor, Scalia, and Kennedy—were opposed to all forms of voluntary racial affirmative action and controlled the outcome of cases involving state or local affirmative action programs.<sup>457</sup> At least prior to the arrival of the Bush appointees, however, other views would prevail in federal racial affirmative action cases. In 1980 and 1990 the Court held that a benign racial classification in a federal law will comply with the equal protection component of the Fifth Amendment Due Process Clause so long as the classification has a substantial relationship to an important interest.<sup>458</sup>

In 1980, in *Fullilove v. Klutznick*,<sup>459</sup> the Supreme Court, by a six to three vote and without a majority opinion, upheld the constitutionality of the minority business enterprise of the Public Works Employment Act. The federal law at issue in *Fullilove* required that, absent a waiver, ten percent of the amount of federal public works projects be given to businesses in which a minority of the equity interest was owned by "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, [or] Aleuts."<sup>460</sup>

Chief Justice Burger announced the judgment of the Court in *Fullilove* in an opinion that was joined by Justices White and Powell.<sup>461</sup> This plurality opinion did not identify a specific standard of review for determining the constitutionality of federal racial affirmative action. The Chief Justice merely found that

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455. *Id.* at 544-46.

456. *Id.* at 546.

457. *See id.* at 469.

458. *See Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

459. 448 U.S. 448 (1980).

460. 42 U.S.C. § 6705(f)(2) (1988); *see Fullilove*, 448 U.S. at 454.

461. *Fullilove*, 448 U.S. at 448 (Burger, C.J., joined by White and Powell, JJ.).

the objectives of the legislation were within congressional power and that this particular program involved a sufficiently limited and flexible use of racial criteria so that the law was a permissible means for achieving the objectives of the statute.<sup>462</sup> Justice Powell, who joined the opinion of Chief Justice Burger, wrote separately in order to "place greater emphasis than the Chief Justice on the need to articulate judicial standards of review in conventional terms . . . ."<sup>463</sup> Justice Powell continued to believe that benign racial classifications should be subject to strict scrutiny,<sup>464</sup> but he also found that Congress had special authority under the Civil War Amendments to identify and remedy the continuing effects of racially discriminatory practices throughout the country.<sup>465</sup> On that basis, Powell found that the provision to the federal law that aided minority owned businesses was narrowly tailored to promote compelling interests of the federal government.<sup>466</sup>

Justice Marshall wrote a concurring opinion in *Fullilove* that was joined by Justices Blackmun and Brennan.<sup>467</sup> These Justices have consistently endorsed the use of an intermediate standard of review for examining benign racial classifications, regardless of whether the classifications were used in state or federal legislation. In *Fullilove*, these Justices did not advocate giving total deference to governmental entities who asserted that a racial classification was being used for a benign purpose. Justices Marshall, Blackmun, and Brennan indicated that an allegedly benign racial classification should be reviewed to ensure that the classification was not a mask for discriminating against or stigmatizing any racial or ethnic group.<sup>468</sup> Once it was determined that a racial classification was truly benign, the concurring Justices asserted that "the proper inquiry is whether racial classifications designed to further remedial purposes serve

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462. *Id.*

463. *Id.* at 495-96 (Powell, J., concurring).

464. *Id.* at 496.

465. *Id.* at 500.

466. *Id.* at 496.

467. *Id.* at 517 (Marshall, J., concurring in the judgment, joined by Brennan and Blackmun, JJ.).

468. *Id.* at 518.

important governmental objectives and are substantially related to achievement of those objectives."<sup>469</sup> Justice Marshall found that the purpose of remedying the effects of past racial discrimination against minority owned businesses in our society was an important interest and that the federal program was a reasonable means of correcting the effects of past discrimination in the contracting and construction businesses.<sup>470</sup>

In 1980, there were only three Justices—Justices Stewart, Rehnquist, and Stevens—who would limit the federal government's use of benign racial classifications to the remedying of specific acts of illegal discrimination against racial minorities.<sup>471</sup> One of these three, Justice Stevens, would later demonstrate a more flexible approach to the review of federal affirmative action programs.<sup>472</sup> Justices Stewart and Rehnquist, dissenting in *Fullilove*, advocated the use of a strict standard of review that would preclude the use of racial criteria to aid members of minority races unless the government needed to use those criteria to correct identified acts of illegal discrimination.<sup>473</sup> Justice Stevens wrote a separate dissent in *Fullilove*; he refused to commit to a specific standard for reviewing benign racial classifications.<sup>474</sup> Justice Stevens said that a racial classification should be upheld if it would "serve to define a group of persons who have suffered a special wrong and who, therefore, are entitled to special reparations."<sup>475</sup>

Ten years after *Fullilove*, in *Metro Broadcasting, Inc. v. FCC*,<sup>476</sup> the Supreme Court upheld two FCC policies that were designed to maintain and increase the number and percentages of minority owned radio and television stations. Although these two policies had initially been adopted by regulatory action,

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469. *Id.* at 519 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 359 (1978)).

470. *Id.* at 521.

471. *Id.* at 522, 532.

472. *Id.* at 532 (Stevens, J., dissenting). Justice Stevens would later join in establishing an intermediate standard of review for federal affirmative action programs. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 601 (1990) (Stevens, J., concurring).

473. *Fullilove*, 448 U.S. at 522 (Stewart, J., dissenting, joined by Rehnquist, J.).

474. *Id.* at 532.

475. *Id.* at 537.

476. 497 U.S. 547 (1990).



Congress, in appropriations legislation, had required the FCC to retain these policies.<sup>477</sup> The FCC policies gave preferential treatment to members of racial minorities and minority owned businesses who applied for a license to operate a radio or television station or who sought to acquire a license from a current station that was having its license challenged in FCC proceedings.<sup>478</sup> Justice Brennan wrote a majority opinion in *Metro Broadcasting* that was joined by Justices Marshall, White, Blackmun, and Stevens.<sup>479</sup> The majority expressly adopted the intermediate standard of review for determining the compatibility of benign racial classifications with the implied equal protection guarantee of the Fifth Amendment Due Process Clause.<sup>480</sup> In 1989, the Supreme Court, in *Croson*, had used the compelling interest test, to review state and local affirmative action programs.<sup>481</sup> That ruling was not overturned in *Metro Broadcasting*.<sup>482</sup> In 1990, Justice Brennan's opinion distinguished the *Croson* decision on the basis that Congress was less susceptible than state or local legislatures to pressures to divide government benefits among racial factions of society without any regard to promoting specific constitutional goals, such as correcting the effects of past discrimination.<sup>483</sup>

The majority in *Metro Broadcasting* ruled that the Court would uphold a racial classification that benefitted members of a minority race that was either part of a federal statute, or that

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477. *Id.* at 560 n.9 (citing Continuing Appropriations Act for Fiscal Year 1988, Pub. L. Nos. 100-202, 101 Stat. 1329-31).

478. *Metro Broadcasting*, 497 U.S. at 556-58.

479. *Id.* at 552.

480. *Id.* at 564-65.

481. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

482. *Metro Broadcasting*, 497 U.S. at 565-66.

483. Justice Brennan's majority opinion justified using a less rigorous standard for the review of benign racial classifications under the implied equal protection guarantee of the Due Process Clause of the Fifth Amendment than that used for the review of benign racial classifications under the Equal Protection Clause without expressly relying on the powers granted to Congress by the Thirteenth and Fourteenth Amendments. The majority found that the national legislature was less susceptible to the type of pressures that would result in awarding benefits to racial factions. In addition, Justice Brennan found that the *Fullilove* decision required the Court to use the intermediate standard if the Court was not prepared to overrule the *Fullilove* decision. *Id.* at 565-66.

was part of a regulatory action mandated or approved by Congress, so long as the classification had a substantial relationship to an important interest within the power of Congress.<sup>484</sup> Justice Brennan, joined by a majority of the Court, found that creating diversity in broadcasting was a sufficiently important interest to support a racial classification and that the classification did not stigmatize or punish any identifiable racial group.<sup>485</sup>

Justice O'Connor wrote a dissenting opinion in *Metro Broadcasting* that was joined by Chief Justice Rehnquist and Justices Scalia and Kennedy.<sup>486</sup> She found no basis for using standards of review under the implied equal protection guarantee of the Fifth Amendment Due Process Clause that differed from the standards used under the Equal Protection Clause.<sup>487</sup> According to Justice O'Connor: "Under the appropriate standard, strict scrutiny, only a compelling interest may support the Government's use of racial classifications. Modern equal protection doctrine has recognized only one such interest: remedying the affects of racial discrimination."<sup>488</sup>

Will *Metro Broadcasting* be overruled? Only one of the five

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484. *Id.* at 564-65.

485. *Id.* at 566. Justice Stevens wrote a concurring opinion in *Metro Broadcasting* in which he stated his belief that the majority opinion was consistent with the views he had expressed in earlier cases regarding the benign use of racial classifications by both the state and federal governments. *Id.* at 601-02 (Stevens, J., concurring). Justice Stevens also joined the majority opinion by Justice Brennan, which explicitly adopted the substantial relationship to an important interest standard. *Id.* at 564.

486. *Id.* at 602 (O'Connor, J., dissenting, joined by Rehnquist, C.J., Scalia and Kennedy, J.J.).

487. *Id.* at 604.

488. *Id.* at 612. Justice O'Connor took the position that the *Fullilove* decision did not have to be overruled because the program at issue in that case was a narrow use of Congress' power under § 5 of the Fourteenth Amendment to correct identified racial discrimination in the construction industry and to avoid the awarding of federal government construction contracts in a way that would exacerbate prior acts of illegal or unconstitutional discrimination against minority owned businesses. *Id.* at 606-07. The dissenting Justices found that the creation of diversity of ownership or operation of radio and television stations was neither a compelling nor an important interest. *Id.* at 612-13. The dissenters believed that the FCC policies constituted racial stereotyping and should not be upheld under any standard of review, although the four dissenting Justices were clear in advocating the use of a very strict standard. *Id.* at 603-04. Justice Kennedy also wrote a dissent in *Metro Broadcasting* that mirrored his opinion in *Croson*. *Id.* at 631 (Kennedy, J., dissenting, joined by Scalia, J.).

Justices who voted in the majority in *Metro Broadcasting* remains on the Supreme Court in the fall of 1994. Justice Stevens, the remaining member of the *Metro Broadcasting* majority, has a voting pattern in racial affirmative action cases that is not easily explainable by anyone other than Justice Stevens himself. Justice Blackmun had been committed to using the intermediate standard in racial affirmative action cases and to allowing the state or federal governments to correct societal discrimination against racial minorities, but he retired from the Court in 1994. All four of the Justices who dissented in *Metro Broadcasting* remain on the Court.

In contrast with *Metro Broadcasting*, the Court's decision in *Croson* seems to be in little or no danger of being overruled or modified in the near future. Five of the six Justices who voted to invalidate the affirmative action program in *Croson* remain on the Court. Of those five, Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy remain committed to the use of the strict scrutiny test and the invalidation of such programs. Whether they continue to have the majority view on the Supreme Court might depend on the positions taken in such cases by the Bush and Clinton appointees—Justices Souter, Thomas, Ginsburg, and Breyer—or on the case-by-case approach of Justice Stevens.

We do not know how the Clinton and Bush appointees will approach racial affirmative action issues in the future. Although then Judge Ginsburg issued an opinion in the court of appeals in which she indicated some agreement with Justice Stevens' ad hoc approach to racial affirmative action issues,<sup>489</sup> she has not had the opportunity to vote on such issues in the Supreme Court. Furthermore, recently appointed Justice Breyer, who replaced Justice Blackmun, is unlikely to be more supportive of racial affirmative action than Justice Blackmun.

The Supreme Court's 1993 decision in *Shaw v. Reno*<sup>490</sup> may give us some indication as to how Justices Souter and Thomas will approach the review of benign racial classifications. Al-

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489. O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 429 (D.C. Cir. 1992) (Ginsburg, J., concurring).

490. 113 S. Ct. 2816 (1993).

though the majority in *Shaw* did not reach the ultimate question concerning the constitutionality of using race conscious redistricting to help strengthen or protect the voting power of racial minorities, the dissenters did reach that issue. Justice Souter found that the affirmative use of race to enhance the position of minority voters did not violate the Voting Rights Act, the Fourteenth Amendment, or the Fifteenth Amendment.<sup>491</sup> In some statements during his confirmation hearings, Justice Souter indicated agreement with the position that Congress had been given special power to correct racial discrimination in our society with the adoption of the Civil War Amendments.<sup>492</sup> Those statements along with his vote in *Shaw*, may indicate that he will follow in Justice White's footsteps and vote to uphold federal racial affirmative action programs even if he believes that state or local affirmative action programs should be subject to strict judicial scrutiny.

Justice Thomas cast the deciding vote in *Shaw*, although he did not write an opinion in that case. The fact that he joined with the four strongest opponents of racial affirmative action on the Supreme Court—Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy—in finding that race conscious districting had to be subject to strict judicial scrutiny, may not mean that he will vote with those Justices to invalidate all forms of racial affirmative action. However, the fact that he joined Justice O'Connor's opinion seems to leave little hope that he believes that the federal or state governments may use race-conscious programs to correct societal discrimination against members of racial minorities.<sup>493</sup> Justice O'Connor's majority

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491. *Id.* at 2845 (Souter, J., dissenting). Justice Souter wrote a separate dissent in *Shaw* in which he found that the Court's prior cases had established an approach to analyzing the use of race in electoral districting that was different from the Court's approach to other equal protection problems. *Id.* Thus, Justice Souter's dissent in this case may not indicate how he will vote in other types of affirmative action cases.

Justices White, Blackmun, and Stevens dissented in *Shaw*, arguing that the case was indistinguishable from *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977). *Shaw*, 113 S. Ct. at 2834 (White, J., dissenting, joined by Blackmun and Stevens, JJ.); *cf. id.* at 2843 (Blackmun, J., dissenting), 2843 (Stevens, J., dissenting).

492. See 16 HEARINGS AND REPORTS, 1916-1990 *supra* note 25.

493. Justice Thomas may not vote to totally foreclose the government from using

opinion in *Shaw* formally held that the Court would not reach the question of whether race-conscious districting could meet the strict scrutiny test because the lower federal courts had not considered whether the districts drawn by North Carolina to protect minority race voting power were narrowly tailored to promote a compelling interest.<sup>494</sup> However, she discussed North Carolina's arguments in favor of upholding its final districting plan without a remand to the lower courts. Nothing in the O'Connor opinion seemed to leave much hope that the Court would uphold the districting plan if the lower courts found that it served any purpose other than to correct proven racial discrimination in the precise area of the state in which the new minority race districts were created.<sup>495</sup>

North Carolina first claimed that it created the two new districts in order to ensure that the voting power of racial minorities would not be diminished by the creation of the new congressional districts after the census. The State claimed to take this action in order to comply with the "nonretrogression" principle under the federal Voting Rights Act.<sup>496</sup> Justice O'Connor re-

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race conscious methods of assisting minorities. In *United States v. Fordice*, 112 S. Ct. 2727 (1992), the Court found that the State of Mississippi had not integrated its state university system, but it avoided ruling on whether the state could continue to provide support for historically black state colleges. Justice Thomas wrote a concurring opinion stating that, although he would require complete integration of the state university system, he wanted to emphasize that the Court was not eliminating the possibility that there might be some way to provide for aid to historically black state institutions if these schools had race-neutral admissions policies and merely provided some types of programs or maintained some types of traditions that might appeal to minority students. *Id.* at 2744 (Thomas J., concurring). However, Justice Thomas was not clear on how he might approach such a subject in the future or whether he considered that case to involve any issues concerning the benign use of a racial classification. *Id.* The Court's recent decisions concerning the desegregation of schools, including the *Fordice* decision, are discussed in the next section of this Article.

494. *Shaw*, 113 S. Ct. at 2816.

495. There is already some indication that lower court judges outside of North Carolina are taking the *Shaw* decision as an indication that they should invalidate other redistricting plans that have created districts for the purpose of protecting or increasing minority voting power. See *Hays v. Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993) (three-judge district court panel held that redistricting plan was not narrowly tailored to further a compelling governmental interest).

496. The cases concerning the power of the Attorney General under § 5 of the Voting Rights Act and the standards for determining whether there has been illegal

sponded by stating that a "reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression."<sup>497</sup> Even if the districting plan was necessary to meet the preclearance requirements of the Voting Rights Act, according to the majority, there was still the possibility that a plan adopted to satisfy section 5 of the Act "may be enjoined as unconstitutional."<sup>498</sup>

The State also claimed that it needed to use racial criteria for creating voting districts that would have a majority of minority voters in order to avoid violating section 2 of the Voting Rights Act, which prohibits the dilution of minority race voting power.<sup>499</sup> Justice O'Connor noted that the lower court had not examined the question of whether the minority population in the state was so geographically dispersed that the creation of voting districts controlled by minority race voters could not possibly be narrowly tailored to avoiding racial discrimination.<sup>500</sup> She noted further that the lower court had not considered the question of whether "if § 2 [of the Voting Rights Act] did require adoption of North Carolina's revised plan, § 2 is to that extent unconstitutional."<sup>501</sup>

Finally, North Carolina claimed that its law creating the minority race districts was "the most precise way—indeed the only effective way—to overcome the effects of racially polarized voting" that had existed throughout North Carolina's history.<sup>502</sup> Justice O'Connor stated that this argument "need not be decided at this stage of the litigation. We note, however, that only three Justices [in the *UJO* case] were prepared to say that states have a significant interest in minimizing the consequences of racial bloc voting apart from the requirements of the Voting Rights

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vote discrimination under § 2 of the Act were examined at *supra* notes 91-164 and accompanying text.

497. *Shaw*, 113 S. Ct. at 2831.

498. *Id.*

499. *Id.*

500. *Id.*

501. *Id.*

502. *Id.* at 2832.

Act.<sup>503</sup> In that response to the state's argument, Justice O'Connor blatantly mischaracterized the *UJO* decision. A majority of the Justices in *UJO* found that the use of racial criteria in redistricting for the purpose of strengthening the ability of minority voters to control elections did not violate any constitutional standard established by the Fourteenth Amendment, the Fifteenth Amendment, or the Voting Rights Act.<sup>504</sup>

It may well be that the *Shaw* majority will prevent Congress and the states from using racial criteria to help strengthen the ability of minority voters to elect persons to legislative bodies. We know from their votes in *Croson* and *Metro Broadcasting* that Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy are committed to eliminating the use of racial criteria in government programs that are designed to assist minority racial groups unless the government is using racial criteria to correct a specific act of illegal or unconstitutional racial discrimination. In other words, these Justices will not allow any governmental entity to use racial criteria to help minority groups except in circumstances where the government entity was in fact required to do so in order to remedy prior illegal actions. Justice Thomas' vote in *Shaw* may mean that the Supreme Court currently has a majority of Justices that will invalidate all voluntary actions of government that are designed to assist minority race persons.

#### IX. THE EQUAL PROTECTION CLAUSE AND THE DESEGREGATION OF SCHOOLS

In this section of the Article, I will examine the post-1960 Supreme Court cases regarding school desegregation. Once again, I refer my readers and audience to Mark Tushnet's analysis of the Supreme Court decisions and lower court litigation that led to the 1954 *Brown* decision.<sup>505</sup> But I cannot resist

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503. *Id.*

504. Three of the four Justices who voted in the majority in *UJO*, and who remained on the Court for the *Shaw* decision, disagreed with Justice O'Connor's description of the *UJO* case. *Id.* at 2834 (White, J., dissenting, joined by Blackmun and Stevens, JJ.).

505. See *supra* note 2.

the temptation to note that the changes in the Supreme Court's rulings mirrored the Roosevelt and Truman changes in the membership of the Court.<sup>506</sup> After noting some of the Warren and Burger Courts' desegregation decisions in the 1960s and 1970s, I will focus on decisions of the Supreme Court in recent years that call into question the current Justices' commitment to enforcement of *Brown*.

For most of the 1950s, the Supreme Court did little to enforce

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506. See generally Cynthia Burns, *The Fading of the Brown Objective: A Historical Perspective of the Marshall Legacy in Education*, 35 HOW. L.J. 95 (1991) (discussing the Supreme Court's decisions after *Brown*); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1 (1979) (tracing the role of unanimity and the Court's internal decision-making process in the 1950s); J. Harvie Wilkinson, III, *The Supreme Court and Southern School Desegregation, 1955-1970: A History and Analysis*, 64 VA. L. REV. 485 (1978) (examining the Court's policy on segregation as a series of stages).

In 1938, in *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), the Supreme Court, by a six to two vote of the Justices, found that a state violated the Equal Protection Clause when it denied admission to the state law school to racial minorities, even though the state offered to pay the tuition of a minority law student at an out-of-state law school. The six member majority in *Gaines* was composed of three Democratic Justices and three Republican Justices. The three Democratic appointees were Justice Brandeis (appointed by President Wilson) and Justices Black and Reed (who were appointed by President Franklin Roosevelt). The three Republicans were Chief Justice Hughes (who was the leader of the Court's "switch" in positions concerning the scope of federal power at the time of President Roosevelt's Court Packing Plan), Justice Stone (who would later be appointed Chief Justice by FDR) and Justice Owen Roberts (who in 1937 had completed his "about face" on commerce clause, due process, and equal protection issues).

On June 5, 1950 a Supreme Court that consisted of nine Justices who had been appointed by Presidents Roosevelt and Truman would begin to move away from the separate but equal concept. On that date, Chief Justice Vinson delivered the opinions for a unanimous Court in *Sweatt v. Painter*, 339 U.S. 629 (1950), and *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950). Chief Justice Vinson reserved the question of the continuing vitality of the separate but equal doctrine in *Sweatt* as he held that the State of Texas violated the Equal Protection Clause by denying Sweatt admission to the University of Texas Law School, even if it offered him admission to a new state supported law school for minority race students in Texas. The Justices were unanimous in ruling that there was no real equality between the law school established for minority race students and the long established state university law school. In *McLaurin*, the Chief Justice found that the Equal Protection Clause was violated by a state university that admitted a black graduate student to its program but provided him services only on a racially segregated basis. Chief Justice Warren and eight Democratic appointees to the Court issued the May 17, 1954 rulings in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), and *Bolling v. Sharpe*, 347 U.S. 497 (1954).



the desegregation principle it established in 1954. In *Brown II*, the Supreme Court refused to grant any realistic relief to minority students who did not benefit from equal protection of the law following the *Brown I* ruling.<sup>507</sup> Instead, the Court required only a "prompt and reasonable start towards full compliance" with the equal protection principle and the now infamous requirement of "all deliberate speed."<sup>508</sup>

By 1958, the Justices should have realized that there would be little, if any, voluntary compliance with *Brown I*. In that year, in *Cooper v. Aaron*,<sup>509</sup> the Justices unanimously reaffirmed the holding of *Brown* and ruled that a school district should not be allowed to delay the integration of its schools based upon the public hostility to integration that had been fostered by actions of the state governor and legislature.<sup>510</sup> This ringing endorsement of the *Brown* principle seemed hollow, however, as the Court did nothing more in the 1950s to desegregate schools.<sup>511</sup>

Numerous factors may have contributed to the 1960s emergence of the Warren Court that championed civil rights. Perhaps, as the late Professor Bickel remarked, the fact that the *Brown* desegregation principle was endorsed by both major party candidates in the 1960 presidential election influenced the Supreme Court.<sup>512</sup> Perhaps the Supreme Court's dedication to desegregation in the 1960s was reinforced by the crude tactics employed by some public school officials to deny education opportunity to minority students in the decade immediately following *Brown*. In 1963 and 1968, the Court ruled that a school district that had enforced racial segregation in its schools could not claim to have integrated its schools by simply adopting "voluntary transfer" policies or so-called "freedom of choice" plans because these policies would perpetually maintain racial segregation.<sup>513</sup>

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507. *Brown v. Board of Educ.*, 349 U.S. 294, 299-301 (1955) (*Brown II*).

508. *Id.* at 299-300.

509. 358 U.S. 1 (1958).

510. *Id.*

511. *See supra* note 293.

512. ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 93 (Yale paperback ed. 1978).

513. In *Goss v. Board of Educ.*, 373 U.S. 683 (1963), the Court held invalid a

One of the most blatant attempts to disregard *Brown* came from Prince Edward County, Virginia, which closed its public schools rather than integrate those schools. But the government continued to financially support private, racially discriminatory schools in the county. In *Griffin v. County School Board*,<sup>514</sup> the Supreme Court upheld a district court order preventing the government from providing support for the racially discriminatory private schools. The Court endorsed the position that a district court could order appropriate authorities to reopen and financially support the public schools.<sup>515</sup> In this 1964 decision, the Court stated that "the time for mere 'deliberate speed' has run out."<sup>516</sup>

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transfer policy that allowed students assigned to a school in which their race was in a minority to transfer to a school in which their race was a majority because the inevitable effect of this would be to maintain the racial segregation in the school district that previously had de jure segregation. Five years later in *Greene v. County Sch. Bd.*, 391 U.S. 430 (1968), the Court found that a school board's adoption of a so-called freedom of choice plan that allowed each student to choose his or her own school would not result in compliance with the requirement that a segregated school system eliminate the effects of the prior de jure segregation.

The 1990s may see an increase in racial segregation in the school systems through the use of a new type of "school choice" programs. Unlike the schemes in the 1950s or 1960s, the new plans may involve tax deductions or voucher programs.

Professor Marilyn V. Yarbrough has addressed the difficult problem of school choice and resegregation in this Symposium. See Marilyn V. Yarbrough, *Still Separate and Still Unequal*, 36 WM. & MARY L. REV. 685 (1995). As I normally agree with Professor Yarbrough (including decisions we made as members of the NCAA Committee on Infractions) I will probably agree with her conclusions in her article. However, I cannot go on record in this Article as agreeing with Professor Yarbrough because I have not yet read her article at the time that I am writing this Article. In 1976, I went on record as believing that the use of tuition vouchers could be structured in a way that did not violate the free exercise clause, a position which I still hold. See John E. Nowak, *The Supreme Court, the Religion Clauses, and the Nationalization of Education*, 70 NW U. L. REV. 883 (1976). However, I would not want that position to indicate that I believe that school choice programs are advisable in a society in which the growing separation of rich and poor has resulted in greater segregation of the schools. On the general subject of the increasing separation of students by race due to the patterns of poverty in America see, GARY ORFIELD, *THE GROWTH OF SEGREGATION IN AMERICAN SCHOOLS: CHANGING PATTERNS OF SEPARATION AND POVERTY SINCE 1968: A REPORT OF THE HARVARD PROJECT ON SCHOOL DESEGREGATION TO THE NATIONAL SCHOOL BOARDS* (1993).

514. 377 U.S. 218 (1964).

515. *Id.* at 229-34.

516. *Id.* at 234.

In *Rogers v. Paul*,<sup>517</sup> the Supreme Court refused to allow a segregated school system to claim compliance with the desegregation principle through a "grade-a-year" plan, under which one school grade was to be desegregated each year. Any school district that had been operating a racially segregated educational system had known of its duty to comply with the desegregation principle since 1954. The Supreme Court of the mid 1960s would not tolerate more delay in the implementation of the *Brown* desegregation principle.

The 1970s were a time in which the Supreme Court sent conflicting signals regarding the dedication of the Justices to enforcing *Brown*. Perhaps the lack of clarity regarding the position of the Court in the 1970s was attributable to the fact that local school districts that had operated racially segregated schools were becoming more clever in their attempts to avoid desegregation. The 1970s cases involved more complex fact situations than had been present in the 1960s desegregation cases.

In June 1971, the Justices strongly endorsed the *Brown* desegregation principle. The Supreme Court invalidated a state statute prohibiting the assignment of any student to a school on the basis of race for the purpose of creating racial balance in the public schools.<sup>518</sup> In *Swann v. Charlotte-Mecklenburg Board of Education*,<sup>519</sup> the Court emphasized the need for school districts that had operated racially segregated school systems to eliminate the effects of prior segregation.<sup>520</sup> The Justices reaffirmed the authority of federal courts, when faced with the failure of such a school district, to (1) create a truly desegregated school system, (2) fashion a desegregation remedy that could involve reassignment of students, faculty, and staff within the district, and (3) supervise expenditures within the district.<sup>521</sup>

Some public school authorities recognized that they had run racially segregated schools in the past and attempted to subdi-

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517. 382 U.S. 198 (1965).

518. *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, *appeal dismissed sub nom. Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47 (1971).

519. 402 U.S. 1 (1971).

520. *Id.* at 15.

521. *See id.* (stating that "[o]nce a right and a violation have been shown, the scope of a district courts equitable powers to remedy past wrongs is broad").

vide their racially segregated school district into multiple, independent districts so that they could be in formal compliance with *Brown* while maintaining the racially segregated systems. In 1972, the Supreme Court examined two attempts to subdivide segregated school systems in decisions that hinted that the times might be changing in terms of the Supreme Court's dedication to the desegregation principle. In *United States v. Scotland Neck City Board of Education*,<sup>522</sup> the Justices unanimously upheld a federal district court decision prohibiting the creation of new school districts from a larger district that had been ordered to desegregate its admittedly racially segregated schools. All nine Justices found that the attempt to subdivide the school district was nothing but an attempt to avoid desegregation.<sup>523</sup> In *Wright v. Council of Emporia*,<sup>524</sup> only a bare majority of the Supreme Court voted to uphold a district court ruling that prevented a similar action by a school district subject to a desegregation decree. The City of Emporia, Virginia had, by contractual agreement, been part of a county-wide school district that was found by the district court to have engaged in de jure segregation.<sup>525</sup> After the issuance of a court desegregation decree against the county, the city decided to withdraw from the county school district and create its own district.<sup>526</sup> The Supreme Court upheld the district court order by a five to four vote of the Justices. The four dissenting Justices in *Wright* were all appointed by President Nixon.<sup>527</sup>

In 1974, the Justices once again divided along political lines when they examined whether a federal court had the authority to find that a state government was responsible for the racial segregation in local school districts. In *Milliken v. Bradley*,<sup>528</sup> by a five to four vote, the Court held that federal courts could

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522. 407 U.S. 484 (1972).

523. See *id.* at 490-91.

524. 407 U.S. 451 (1972).

525. *Wright v. County Sch. Bd.*, 309 F. Supp. 671 (E.D. Va. 1970), *rev'd*, 442 F.2d 570 (4th Cir. 1971), *rev'd*, 407 U.S. 451 (1972).

526. *Id.* at 673 (decree issued June 25, 1969).

527. *Wright*, 407 U.S. at 471 (Burger, C.J., dissenting, joined by Blackmun, Powell, and Rehnquist, JJ.).

528. 418 U.S. 717 (1974).

not create school attendance zones that would combine suburban and metropolitan schools as a means of eliminating the effects of racial segregation in the city schools. The five member majority overturned the district court order despite the fact that the district court had found that the effects of admitted racial segregation in the Detroit schools could not be remedied without an interdistrict remedial plan. The *Milliken* majority was composed of five Republicans; the four Democrats dissented.<sup>529</sup>

The Republican appointees would not attempt to invalidate all forms of interdistrict relief in desegregation cases.<sup>530</sup> In 1977, the Supreme Court revisited the problems faced by the lower courts in remedying the de jure segregation in the Detroit schools. The district court desegregation plan had required new educational components for the Detroit schools that were de-

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529. See *id.* at 757 (Douglas, J., dissenting); *id.* at 762 (White, J., dissenting, joined by Douglas, Brennan, and Marshall, JJ.).

530. The Burger Court was willing to use a form of "interdistrict" remedy to enforce the anti-segregation principle outside of the school desegregation setting. In *Hills v. Gautreaux*, 425 U.S. 284, 297-300 (1976), the Supreme Court found that the lower federal courts had the authority to order the United States Department of Housing and Urban Development to create a comprehensive plan for the placing of low income, racially integrated housing in both the City of Chicago and its suburbs. The court's authority would depend both on a factual demonstration that the Chicago Housing Authority and the federal authorities had engaged in the intentional segregation of public housing units and that the new housing plan that disregarded city and suburban boundaries was narrowly tailored to correct the past racial discrimination in the public housing program. *Id.* at 297-300. The Court in the early 1970s was not willing to allow the state and local governments to subvert the *Brown* principle through funnelling specialized aid to private schools. In 1973, the Court ruled that a state could not lend textbooks to students at racially discriminatory private schools, even though the textbook lending program was identical to one that the Court had ruled could constitutionally be used to give textbooks to students who attended racially nondiscriminatory religious schools. *Norwood v. Harrison*, 413 U.S. 455 (1973). The state could not channel specialized assistance to racially discriminatory schools in any form. For example, although students who attended racially discriminatory schools could use public parks and facilities just like any other persons in society, the Court in *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974), found that the government could not reserve public park recreational facilities for the temporary, exclusive use of classes operated by a racially discriminatory private school. The Court in the 1970s was supportive of congressional efforts to end private sector racial discrimination. In 1976, the Supreme Court found that § 1981 of the Civil Rights Act, which declares that all persons shall have the same right to contract as white persons, prohibited a private school from discriminating between applicants on the basis of race. *Runyon v. McCrary*, 427 U.S. 160 (1976).

signed to eliminate the vestiges of the prior de jure segregation by raising the quality of the city schools. In *Milliken II*<sup>531</sup> the Justices unanimously ruled that the district court that created and supervised the desegregation plan for the Detroit school system had the authority to require the state government to pay one-half of the additional costs incurred by the school district as it implemented the desegregation plan.<sup>532</sup>

Any lower court judge in the mid-1970s should have been excused for failing to understand the degree to which she was empowered to issue an order to correct the effects of de jure racial segregation in a school district. In addition to the two *Milliken* cases, other 1970s Supreme Court decisions would show the Justices wavering in their support for lower federal court orders designed to remedy racially segregated school systems.

In 1973, in *Keys v. School District No. 1*,<sup>533</sup> the Supreme Court considered for the first time the scope of a federal judge's authority to make a finding of de jure discrimination and to issue a desegregation order in a metropolitan school district outside of the southern states. In *Keys*, the lower court had found that the Denver school district had intentionally taken steps to isolate African Americans and Hispanic Americans in some schools.<sup>534</sup> The Supreme Court ruled that a finding of the intentional discrimination in part of the school system shifted the burden to the school authorities to prove that other schools within the district that were primarily one-race schools were not the result of deliberate racial discrimination and that the school board, to avoid a district-wide desegregation order, must offer proof to support a finding that the effects of segregation were limited to specific parts of the district.<sup>535</sup>

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531. *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*).

532. *Id.* at 288-90.

533. 413 U.S. 189 (1973).

534. *Id.* at 192.

535. *Id.* at 211. Justice Douglas and Justice Powell each filed a separate opinion. Justice Douglas would have required a remedy for de facto segregation in recognition of the fact that state policies can contribute to school segregation even though no purposeful discrimination in the drawing of boundary lines can be proven in a specific case. *Id.* at 214-17 (Douglas, J.). Justice Powell argued that the Court should not be concerned with the subjective intent of government officials but, rather, with the objective nature of the segregation in the schools. However, his focus on objec-

The *Keys* decision appeared to be a strong endorsement of the power of district courts to eliminate the effects of past racial discrimination. Only two years later, however, the Supreme Court overturned a part of a desegregation plan ordered by a lower court. In *Pasadena City Board of Education v. Spangler*,<sup>536</sup> the Court ruled that the district court's desegregation plan should be terminated if, following years in which the plan had been in effect, the school district had become racially integrated.<sup>537</sup>

The 1970s ended with two Supreme Court rulings concerning school systems in Ohio that demonstrated the severe division among the Justices concerning the meaning of the desegregation principle. The Sixth Circuit Court of Appeals had made an unchallenged ruling that the public schools in Columbus, Ohio and Dayton, Ohio had been purposely operated in a racially discriminatory manner through the early 1950s.<sup>538</sup> The Sixth Circuit also found that no actions had been taken to dismantle either segregated school system after the Supreme Court rulings in *Brown* and that court-supervised desegregation plans were needed for each of the school districts.<sup>539</sup> Because the majority believed that the district court had eliminated the effects of the prior discrimination, the Justices required the district court to terminate the desegregation order. The *Spangler* decision took a limited view of district court authority in desegregation cases.

In *Columbus Board of Education v. Penick*,<sup>540</sup> by a vote of

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tive criteria did not seem to eliminate the view that there would have to be proof of intentional de jure segregation. *Id.* at 224 (Powell, J., concurring in part and dissenting in part).

536. 427 U.S. 424 (1976).

537. *Id.* at 436-37.

538. *Penick v. Columbus Bd. of Educ.*, 583 F.2d 787 (6th Cir. 1978), *aff'd*, 443 U.S. 449 (1979).

539. *Id.* at 818.

540. 443 U.S. 449 (1979). Justice White wrote the majority opinion in *Penick*, which was joined by Justices Brennan, Marshall, Blackmun, and Stevens. Chief Justice Burger concurred only in the judgment of the Court. *Id.* at 468 (Burger, C.J., concurring in the judgment). Justices Rehnquist and Powell were the only two dissenters in *Penick*. *Id.* at 489 (Rehnquist, J., dissenting, joined by Powell, J.). Justice Stewart filed an opinion that applied to both *Penick* and *Brinkman* that was joined by the Chief Justice. They concurred in the decision concerning the Columbus School Board and dissented in the companion case regarding Dayton. *Id.* at 469 (opinion of

seven to two, the Justices found that lower court orders requiring Columbus to take affirmative steps to create a truly integrated school system were justified by the fact that actions taken by the school board after 1954 had increased racial segregation within the school district. In *Dayton Board of Education v. Brinkman*,<sup>541</sup> the Court upheld the desegregation order for the Dayton schools by a five to four vote. Justices Blackmun and Stevens joined Justices Brennan, Marshall, and White in ruling that the Equal Protection Clause required affirmative steps to desegregate that school system because the Dayton school district had never taken affirmative steps to dismantle the de jure racially segregated school system it operated in 1954.<sup>542</sup> However, Chief Justice Burger and Justices Stewart, Powell, and Rehnquist dissented in *Brinkman* because they believed that the federal courts did not have the authority to desegregate a school system in the absence of proof of intentional racial segregation after the *Brown* decision.<sup>543</sup>

As the composition of the Supreme Court changed during the 1980s and 1990s, so did the interest of the Justices in the desegregation of our nation's schools. The Supreme Court has not issued many opinions in school desegregation cases in these decades. The small number of Supreme Court desegregation cases from the 1980s and 1990s, however, indicates that the Court may no longer be committed to enforcing the *Brown* desegregation principle.

Some local school boards and state courts in the 1960s and 1970s were taking voluntary steps to racially integrate their schools even though there had been no finding of de jure segregation in their school districts. In June 1982, the Supreme Court decided two cases regarding the ability of state and local govern-

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Stewart, J., joined by Burger, C.J., concurring in this case, but dissenting as to *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979)).

541. 443 U.S. 526 (1979).

542. *Id.* at 534-42.

543. *Id.* at 542 (Rehnquist, J., dissenting, joined by Powell, J.). The dissenting opinion of Chief Justice Burger and Justice Stewart was an opinion concurring as to *Penick* and dissenting as to *Brinkman*. *Id.* at 469 (Stewart, J., joined by Burger, C.J., concurring in the result in case number 78-610 and dissenting in case number 78-627).



ments to restrict such actions by state courts or school boards.<sup>544</sup> In 1982, these cases seemed to be no more than technical rulings regarding the presence or absence of racial discrimination in government actions taken to restrict the integration of one-race schools within districts that never had violated the Equal Protection Clause. A dozen years later, given the current membership of the Supreme Court, these cases look like an open invitation to cities and states to take affirmative steps to continue racial segregation in their public schools.

In *Crawford v. Board of Education*,<sup>545</sup> the Supreme Court upheld the constitutionality of an amendment to the California Constitution that prohibited the state courts from altering the school attendance zones or the school assignment of individual students unless a federal court would have been able to do so to remedy a proven violation of the Equal Protection Clause. Eight members of the Court ruled that the state was not required to go beyond the requirements of the Fourteenth Amendment Equal Protection Clause in racially integrating its school system.<sup>546</sup> On the same day that *Crawford* was decided, the Supreme Court in *Washington v. Seattle School District No. 1*<sup>547</sup> invalidated a law, which was adopted through a state-wide initiative, that provided that "no school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest to the student's place of residence . . . and which offers the course of study pursued by such a student . . . ."<sup>548</sup> This law set out a wide number of exceptions to the requirement that a student be assigned to the closest school to his residence.<sup>549</sup> Local school

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544. See *infra* notes 546-53 and accompanying text.

545. 458 U.S. 527 (1982).

546. Justice Marshall was the only dissenter in *Crawford* although Justices Blackmun and Brennan wrote a concurring opinion in *Crawford* to explain the reasons why they joined the majority in this case whereas they voted to invalidate the State of Washington's restriction on school transfers that would be invalidated on the same day. *Id.* at 547 (Marshall, J., dissenting), 545 (Blackmun, J., concurring, joined by Brennan, J.). The Seattle case is discussed in the next paragraph of this Article.

547. 458 U.S. 457 (1982).

548. *Id.* at 462.

549. *Id.*

boards would remain free to transfer some students to schools away from their homes for special education, special care, or guidance programs, whenever the school board thought it appropriate for health, safety, school overcrowding, or other reasons.<sup>550</sup> A five member majority of the Supreme Court found that the Washington law constituted a racial classification on its face because the law gave school boards the power to change attendance policies and assignments in response to requests from any group of parents who wanted their children transferred to schools away from their local districts.<sup>551</sup> The only group of parents and students who were clearly deprived of going to the school board to have attendance policies changed were those parents who were interested in racial integration.<sup>552</sup>

If *Seattle School District* were reversed, states would be free to require school boards to maintain de facto racial segregation under the mask of protecting "neighborhood schools." Let us assume that a state has school districts with schools that are in fact racially segregated but that there is insufficient proof of purposeful discrimination for a federal court to order desegregation of the schools. If persons in the state desired to maintain the segregated character of the schools they would want to prevent local school boards from voluntarily taking steps to integrate. It might be difficult for these persons to have state legislation passed that prohibited all school boards from allowing students to attend a school other than the one closest to their home. The state might pass a law that allowed school boards to use student assignment policies to develop schools with good extracurricular programs or to promote other goals except integration. That type of law would provide flexibility for school boards, while guaranteeing that the de facto segregation would continue. Would the Supreme Court disregard the racism inher-

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550. *Id.*

551. *Id.* at 470-74.

552. *Id.* *Seattle School District* was a five to four decision of the Court. Justice Powell, who had written the majority opinion in *Crawford*, believed that the two decisions were incompatible. The four dissenters did not believe that the Washington statute created racial segregation or eliminated the ability of those persons interested in integration to seek the help of governmental processes. *Id.* at 487 (Powell, J., dissenting, joined by Burger, C.J., Rehnquist and O'Connor, JJ.).

ent in such a system? If we knew that the *Seattle School District* case was "good law" today, we might safely assert that the Supreme Court commitment to desegregation was as strong as ever. But *Seattle School District* was a five to four decision. Only one Justice from the five member majority (Justice Stevens), and two of the dissenting Justices (Chief Justice Rehnquist and Justice O'Connor) in that case, remain on the Court.

The Supreme Court of the 1980s seemed at times to tease the proponents of racial integration by raising their hopes with one case and dashing those hopes in the next.<sup>553</sup> In *Bob Jones Uni-*

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553. The conflicting attitudes of the Justices on the Court in the mid-1980s toward the desegregation principle are well exemplified by *Bazemore v. Friday*, 478 U.S. 385 (1986), a case that did not involve school desegregation. The Supreme Court in *Bazemore* used multiple majority opinions in order to deal with a racial desegregation issue. African American employees of a state agricultural service alleged racial discrimination in the employment and salary policies of their employer. The plaintiffs in *Bazemore* also sought to have the federal courts take action to integrate the "4-H" and "Homemaker Clubs," which the agricultural extension service had operated in a racially segregated manner until the 1960s. The Supreme Court's per curiam opinion found that salary disparities between minority and white workers were the result of nominally neutral practices that maintained racial disparities between workers that existed prior to the passage of Title VII of the Civil Rights Act. *Id.* at 407. The Court ruled that these employment practices might constitute a violation of Title VII and that the lower federal courts had erred in totally disregarding some of the evidence presented by the minority race employees. *Id.* at 387. A majority of the Court also held that neither the Equal Protection Clause nor Department of Agriculture regulations required the lower federal courts to take any action designed to truly integrate the 4-H and Homemaker Clubs.

In addition to the per curiam opinion, Justices Brennan and White wrote opinions that could both be described as majority opinions. Justice White wrote for five members of the Court in finding that the agricultural service needed to do no more than formally eliminate all racial barriers to its local 4-H and Homemaker Clubs, which it did in the mid-1960s after the passage of the Civil Rights Act of 1964, in order to comply with the Equal Protection Clause. *Id.* at 407 (White, J., concurring, joined by Burger, C.J., and Powell, Rehnquist, and O'Connor, JJ.). These five Justices found that no evidence existed that recent governmental action caused racial imbalance in any of these clubs, and the majority refused to order the government to take affirmative steps to integrate these clubs, even though the clubs had been kept racially segregated by the state prior to the mid-1960s. *Id.*

Justice Brennan wrote an opinion "joined by all other Members of the Court, concurring in part" in explaining the basis for finding that the continuation of past racial discrimination by the employer's facially neutral practices might violate Title VII, *id.* at 395, and how the lower courts should have used statistical analysis. *Id.* at 397. The Brennan opinion also dealt with some jurisdictional issues regarding the formation of a class action. *Id.* at 406. Justice Brennan was joined by Justices Marshall, Blackmun, and Stevens dissenting to the aspect of the Court's ruling concern-

*versity v. United States*,<sup>554</sup> the Supreme Court held that the Internal Revenue Service was acting within its congressional mandate when it established regulations that denied tax-exempt status to schools that discriminated on the basis of race. The next year, however, in *Allen v. Wright*,<sup>555</sup> the Court, by a five to three vote of the Justices, ruled that the parents of African-American children who were attending public schools in districts that were undergoing desegregation did not have standing to bring a class action to examine whether the Internal Revenue Service was fulfilling its obligation to deny tax-exempt status to private schools that discriminated by race. The majority opinion in *Allen* was written by Justice O'Connor, who was joined by Chief Justice Burger and Justices White, Powell, and Rehnquist.<sup>556</sup> Justices Brennan, Blackmun, and Stevens dissented in *Allen*,<sup>557</sup> Justice Marshall did not participate in the case. It is hard to believe that Chief Justice Rehnquist and Justice O'Connor would not be joined by at least three of the other Reagan-Bush appointees in upholding *Allen* today.

At the close of the 1980s, a core group of four Justices demonstrated more interest in limiting the powers of lower courts to create or enforce desegregation decrees than in promoting racial equality. This core group was composed of Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Scalia. Their ability to control the outcome of the cases at the turn of the decade, prior to the Bush appointments, depended on their ability

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ing the desegregation of the 4-H and Homemaker Clubs. *Id.* at 409 (Brennan, J., dissenting, joined by Marshall, Blackmun, and Stevens, JJ.). These four Justices would have required that affirmative steps be taken to remedy the effects of the past segregation in these types of government services. The dissenting Justices believed that equal protection principles required lower federal courts to integrate these state operated clubs, just as the courts must dismantle a racially segregated educational system that only nominally ended its racially segregated status. Although the majority of the Court in the mid-1980s was willing to enforce the antidiscrimination principles clearly set out in federal statutes such as Title VII, there was no longer a majority interested in truly eliminating the effects of past governmental racial discrimination.

554. 461 U.S. 574 (1983).

555. 468 U.S. 737 (1984).

556. *Id.* at 739-66.

557. *Id.* at 783 (Stevens, J., dissenting, joined by Blackmun, J.); *id.* at 766 (Brennan, J., dissenting).

to secure the agreement of Justice White with their positions. This point is demonstrated by contrasting a case involving Title VIII, which prohibits racial discrimination in housing, with a school desegregation case. Both cases were decided during the October 1989 Term of the United States Supreme Court.

In *Spallone v. United States*,<sup>558</sup> Chief Justice Rehnquist wrote for five Justices in ruling that federal courts could not impose contempt of court sanctions against individual members of a city council for their refusal to vote in favor of legislation to implement a consent decree that had been approved by the city in a Title VIII case. The city council refused to take legislative steps necessary to implement the remedial order, despite a district court order that posed the threat of substantial monetary sanctions against the city. The district court then ordered members of the city council who cast the negative votes that prevented implementation of the desegregation decree to show cause why they should not be subject to a contempt of court finding and monetary sanctions. Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, Kennedy, and White, held that the district court contempt sanctions were invalid insofar as the district court had failed to wait for a "reasonable time" to determine whether monetary sanctions against the city itself would force compliance with the decree.<sup>559</sup> The Chief Justice's opinion did not establish any formal legal barriers to implementing racial desegregation decrees, but the overturning of the lower court's actions could only be understood as a way of putting practical roadblocks in the paths of judges who sought to force recalcitrant local governments to comply with the desegregation principle.

Justice Brennan wrote a dissent in *Spallone* that was joined by Justices Marshall, Blackmun, and Stevens.<sup>560</sup> Justice Brennan was willing to give his colleagues in the majority the benefit of the doubt concerning their intentions while he simultaneously recognized how the lower federal courts would likely

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558. 493 U.S. 265 (1990).

559. *Id.* at 273-80.

560. *Id.* at 281 (Brennan, J., dissenting, joined by Marshall, Blackmun, and Stevens, JJ.).

interpret the decision:

[The majority] directs a message to district judges that, despite their repeated and close contact with the various parties and issues, even the most delicate remedial choices by the most conscientious and deliberate judges are subject to being second-guessed by this Court. I hope such a message will not daunt the courage of district courts . . . . But I worry that the Court's message will have the unintended effect of emboldening recalcitrant officials continually to test the ultimate reach of the remedial authority of the federal courts

. . . .<sup>561</sup>

In *Missouri v. Jenkins*,<sup>562</sup> the Court made two rulings concerning the authority of lower federal courts to force state and local governments to pay the costs of school desegregation remedies. Justice White wrote for a unanimous Supreme Court in *Jenkins* insofar as the Court ruled that a federal district court had acted improperly by directly ordering a property tax increase to fund the remedy for racial segregation in the district's public schools.<sup>563</sup> Justice White's majority opinion was joined by Justices Brennan, Marshall, Blackmun, and Stevens only insofar as the opinion found that the district court acted within its authority in finding that the city school district should be responsible for funding the desegregation decree.<sup>564</sup> That portion of Justice White's opinion stated that the district court could order the appropriate state or local governmental units to take steps to increase taxes in order to fund the decree regardless of the fact that certain state laws might otherwise prohibit those governmental units from increasing their tax rates.<sup>565</sup>

Justice Kennedy, joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Scalia, concurred in the judgment of the Court in *Jenkins* insofar as it overturned the lower court's ordering of a tax increase.<sup>566</sup> These four Justices disagreed with the

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561. *Id.* at 306.

562. 495 U.S. 33 (1990).

563. *Id.* at 37.

564. *Id.* at 54.

565. *Id.* at 51.

566. *Id.* at 58 (Kennedy, J., concurring in part and concurring in the judgment, joined by Rehnquist, C.J., O'Connor, and Scalia, JJ.).

portion of Justice White's opinion that allowed lower federal courts to order local governments to increase tax revenues in order to comply with remedial orders. Although Justice Kennedy said that "[f]ew ends are more important than enforcing the guarantee of equal educational opportunity," he warned that the Court's pursuit of racial equality required the "assertion of judicial power in one of the most sensitive of policy areas, that involving taxation, begins a process that over time could threaten fundamental alteration of the form of government our Constitution embodies."<sup>567</sup>

The *Jenkins* ruling concerning the ability of district courts to order tax increases may be overturned by the current members of the Court. Justices Brennan and Marshall have been replaced by Justices Souter and Thomas. Even if we assume that Justices Ginsburg and Breyer will vote to uphold all aspects of the *Jenkins* rulings, the continuing authority of lower federal courts to order state and local governments to take effective measures to fund remedial orders in desegregation cases is in doubt.

Cases decided in consecutive terms of the Supreme Court at the start of the 1990s and concerning the termination of district court ordered remedial plans in desegregation cases can be described as "leaving us guessing" as to the vitality of the *Brown* desegregation principle four decades after its birth. In *Board of Education v. Dowell*,<sup>568</sup> the Court, by a five to three vote, facilitated and encouraged a district court order terminating the desegregation plan for the public schools of Oklahoma City. The district court in 1963 had found that Oklahoma City had intentionally engaged in racial segregation of the public schools.<sup>569</sup> In 1965 and 1972, the district court had issued remedial orders establishing plans for the integration of those schools. Several years later, the school board made a motion to close the case and terminate the remedial order; the school board asserted that it had eliminated the effects of prior discrimination. In 1985, the district court found that the school system was in fact a unitary one; the court ordered an end to the court supervised desegre-

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567. *Id.* at 80-81.

568. 498 U.S. 237 (1991).

569. *Dowell v. School Bd.*, 219 F. Supp. 427 (W.D. Okla. 1963).

gation plan despite continued racial imbalance in the schools.<sup>570</sup> The court of appeals found ending the desegregation remedial order would result in a number of city schools becoming primarily one-race schools and that continuing the court ordered desegregation plan would not impose "oppressive hardships" on the school district or students.<sup>571</sup> The Supreme Court overturned the Court of Appeals decision by a five to three vote. Justice Souter, having recently taken the place of Justice Brennan on the Court, did not participate in this case.

Chief Justice Rehnquist wrote for five Justices in *Dowell* and ruled that the court of appeals had been too stringent in its supervision of the district court and the school district.<sup>572</sup> The majority believed that the lower federal courts, after a remand of the case, should determine whether the school district had complied in good faith with the desegregation decree.<sup>573</sup> The Chief Justice's opinion directed the lower courts to terminate the district court's desegregation decree and remedial orders if the direct effects of the de jure segregation had been eliminated.<sup>574</sup> The Court endorsed lifting the decree even though it might result in a lessening of the integrated nature of the public schools in the city.

Justice Marshall, joined by Justices Blackmun and Stevens, dissented from the Court's ruling in *Dowell*, even though he agreed with the majority's formal statements regarding the review of lower court desegregation orders.<sup>575</sup> Justice Marshall stated that "the proper standard for determining whether a school desegregation decree should be dissolved is whether the purposes of the desegregation litigation, as incorporated in the decree, have been fully achieved."<sup>576</sup> But Justice Marshall disagreed with what he saw as the majority's lenient approach to

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570. *Dowell v. Board of Educ.*, 606 F. Supp. 1548 (W.D. Okla. 1985), *rev'd*, 795 F.2d 1516 (10th Cir.), *cert. denied*, 479 U.S. 938 (1986).

571. *Dowell v. Board of Educ.*, 890 F.2d 1483 (10th Cir. 1989), *rev'd*, 498 U.S. 237 (1991).

572. *Dowell*, 498 U.S. at 240.

573. *Id.* at 249-50.

574. *Id.*

575. *Id.* at 256 (Marshall, J., joined by Blackmun and Stevens, JJ., dissenting).

576. *Id.* at 256.



applying that standard. The dissenting Justices believed that, to be true to the *Brown* principle, "a standard for dissolution of a desegregation decree must take into account the unique harm associated with a system of racially identifiable schools and must expressly demand the elimination of such schools."<sup>577</sup>

The battle lines concerning the implementation of *Brown* became blurred the next year in *Freeman v. Pitts*.<sup>578</sup> Justice Thomas did not participate in *Freeman*; the eight Justices who voted in the case unanimously ruled that a district court, which had imposed a remedial plan on a school district that had been found guilty of intentional racial segregation, could dissolve its remedial order in stages by relinquishing supervision of aspects of the school district operations as they came in full compliance with the desegregation principle.<sup>579</sup> Although there was a unanimous vote in this case, the concurring opinions written by Justices Scalia, Souter, and Blackmun interpreted the Court's ruling differently from each other.

*Freeman* involved a school district in DeKalb County, Georgia, which had operated a racially segregated public school system into the 1960s. In 1969, the district court entered a consent decree that implemented a desegregation program.<sup>580</sup> By 1986, the district court found that the school district had become a racially desegregated, unitary system with regard to some, but not all, aspects of its operations.<sup>581</sup> The district court rescinded the remedial plan relating to those aspects of the school system that included transportation, physical facilities, extra curricular activities, and some aspects of student assignments. But the district court refused to dismiss the entire case, as that court found that it should retain jurisdiction over some aspects of the school system, such as teacher assignments. The court of appeals prevented the district court from dissolving any part of the remedial order until all aspects of the school system had been integrated.<sup>582</sup>

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577. *Id.* at 257.

578. 112 S. Ct. 1430 (1992).

579. *Id.* at 1436.

580. *See id.*

581. *See id.*

582. *See id.*

The Justices were unanimous in *Freeman* in ruling that the court of appeals should not have prohibited the district court from relinquishing control of the school system desegregation plans in incremental stages.<sup>583</sup> The Supreme Court remanded the case to the lower federal courts for a determination as to which portions of the remedial order should be dissolved and which portions needed to be maintained to eliminate the vestiges of past racial segregation.<sup>584</sup>

Two Justices who concurred in both the judgment and opinion of the Court in *Freeman* took different views of the need for continuing court supervision of previously segregated school systems. Justice Scalia wrote an opinion concurring in both the judgment and opinion of the Court. A fair description of this opinion is that it encourages the dissolution of a court ordered desegregation plan at the earliest possible time at which a school district might be declared to have achieved a racially unitary status.<sup>585</sup> Justice Souter also concurred in the opinion and judgment of the Court, but his view of the Supreme Court's ruling was different from Scalia's.<sup>586</sup> Justice Souter believed that the district court should engage in a wide-ranging review of all aspects of the school system before it ended its supervision of each aspect of the remedial plan.<sup>587</sup> Justice Souter wanted to ensure that lower court orders controlling the assignments of students would be dissolved only after a finding that there was "no immediate threat"<sup>588</sup> that dissolution of any aspect of the court ordered desegregation plan would result in continuing racial segregation. Justice Souter interpreted the Court's ruling as requiring the lower courts to retain jurisdiction over the case so that the district court could "reassert control over student assignments if it finds that this [re-establishment of racial segregation in the schools] does happen."<sup>589</sup>

Justice Blackmun, joined by Justices Stevens and O'Connor,

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583. *Id.*

584. *Id.* at 1450.

585. *Id.* at 1450 (Scalia, J., concurring).

586. *Id.* at 1454 (Souter, J., concurring).

587. *Id.*

588. *Id.* at 1455.

589. *Id.*

wrote an opinion concurring only in the judgment of the Court in *Freeman*.<sup>590</sup> They agreed with the majority that a district court could dissolve a court ordered desegregation in stages.<sup>591</sup> However, these Justices did not believe the majority had clearly stated that the lower court should retain jurisdiction over the school system and that the lower court must take special care in examining all factors to ensure that any continuing racial imbalance in the schools was not in any way traceable to school board actions or prior de jure segregation.<sup>592</sup>

Following the *Brown* decisions, the Supreme Court ruled that the "all deliberate speed" concept could not be used to delay the desegregation of public universities and professional schools.<sup>593</sup> In 1992, the Supreme Court first confronted a situation in which desegregation of a state university system might mean the destruction of one of the "historically black colleges." In *United States v. Fordice*,<sup>594</sup> the Court was able to both reaffirm the desegregation principle and to avoid making a final ruling on whether states could maintain the provision of aid to historically black colleges that were designed to provide an atmosphere conducive to aiding the education of minority students.

In *Fordice*, the Court examined desegregation problems pre-

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590. *Id.* at 1455 (Blackmun, J., concurring in the judgment, joined by Stevens and O'Connor, JJ.).

591. *Id.*

592. *Id.*

593. The Supreme Court never applied the "all deliberate speed" aspect of the *Brown* rulings to the integration of colleges or graduate or professional schools that states had operated in a segregated manner. See *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413 (1956) (per curiam). Even prior to 1954, states should have been on notice that they would be required to desegregate their institutions of higher education. The pre-*Brown* rulings that began to erode the separate but equal doctrine involved state institutions of higher education. See *Sweatt v. Painter*, 339 U.S. 629 (1950) (ruling that exclusion of minority students from the primary state law school violated the Equal Protection Clause even if the state attempted to provide minority students with a legal education at a new state-supported law school); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (holding the state could not exclude racial minorities from the state law school by offering to provide them with financial support at other institutions); *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950) (holding that institution violated the Equal Protection Clause by providing a minority race graduate student with only racially segregated services and treatment at the previously all-white state university).

594. 112 S. Ct. 2727 (1992).

sented by the State of Mississippi's public university system.<sup>595</sup> Mississippi had operated a racially segregated university system for many years. The racial discrimination of this system had been evidenced by statutes and openly discriminatory administrative actions that continued through most, if not all, of the 1960s. In response to actions of the United States Department of Health, Education, and Welfare, the board that controlled the state university system implemented plans for desegregating its university system. In 1975, the plaintiffs brought suit against the state authorities claiming that the state, in fact, had done little, if anything, to correct the effects of the prior *de jure* segregation in the university system. The state universities that had once been reserved for white students continued to have very few minority students; the historically black state colleges continued to serve primarily minority students and continued to receive inadequate funding from the state. In the late 1980s, the lower federal courts ruled that Mississippi's financial aid and admissions policies for state institutions of higher education had been facially neutral since the 1970s, and, therefore, that the state had met its obligation to dismantle its racially segregated school system.

The United States Supreme Court disagreed with the lower courts. Justice White, in an opinion for eight Justices, ruled that the state had not met its obligation to eliminate the effects of the *de jure* segregation in the state university system.<sup>596</sup> Justice O'Connor and Justice Thomas each filed a separate opinion concurring in the opinion and judgment of the Court in *Fordice*.<sup>597</sup> Justice Scalia was the only Justice who could not bring himself to join the majority opinion; he filed an opinion concurring in the judgment in part and dissenting in part.<sup>598</sup> The O'Connor, Thomas, and Scalia opinions took different positions on whether states could continue to provide aid for historically black colleges.

Justice White's majority opinion in *Fordice* did not resolve the

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595. *Id.* at 2732-34. The facts cited in this paragraph are all taken from the referenced pages of *Fordice*.

596. *Id.* at 2743.

597. *Id.* at 2743-46.

598. *Id.* at 2746-53.

question of whether the State of Mississippi would be able to meet its obligation under the *Brown* desegregation principle while maintaining a historically black college within its state university system.<sup>599</sup> Justice White found that Mississippi's facially neutral university admissions policies, which required higher standardized test scores for admission to state universities that had been the white institutions than for admission to the historically black institutions, and the widespread duplication of educational programs at historically white colleges and historically black colleges, appeared to perpetuate the racially segregated system.<sup>600</sup> The majority opinion merely remanded the case to the lower courts so that those courts could determine whether the desegregation order must require the merging of some educational programs between the schools and, perhaps, the closure of some of the smaller state universities, including the historically black colleges.<sup>601</sup>

Justice O'Connor wrote a concurring opinion in *Fordice* to emphasize that "the courts below must carefully examine Mississippi's proffered justifications for maintaining a remnant of de jure segregation to ensure that such rationales [the desire to maintain the historic character of universities serving minority race students] do not merely mask the perpetuation of discriminatory practices."<sup>602</sup> Her opinion indicates that there is little, if any, possibility that she will vote to uphold any state aid to a school that was primarily designed to provide a special educational environment for minority students, even if the state eliminated all barriers to the admission of minority students to the historically white institutions.

Justice Scalia wrote a separate opinion in *Fordice* that could be interpreted as either an opinion that would help states maintain programs that would serve minority students or an opinion that sought to undercut the *Brown* desegregation principle.<sup>603</sup> Like the majority, Justice Scalia found that Mississippi must

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599. *Id.* at 2737.

600. *Id.* at 2738-40.

601. *Id.* at 2743.

602. *Id.* at 2744 (O'Connor, J., concurring).

603. *Id.* at 2746 (Scalia, J., concurring in the judgment in part and dissenting in part).

demonstrate that it had removed all racially discriminatory barriers to the admission of minority students to its state universities. Justice Scalia wrote separately to reject any requirement that state universities demonstrate racial balance in the student bodies at each state school; he left open the possibility that historically black state colleges might continue to exist.<sup>604</sup> Justice Scalia's opinion might allow the state to preserve the character of historically black colleges by finding that the voluntary choice of minority students to attend such a college was permissible.

Justice Thomas, who concurred in the opinion and judgment of the Court, seemed to walk a line between the O'Connor and the Scalia positions.<sup>605</sup> He noted that the Supreme Court was not confronting the question of whether a state could maintain part of a university system that was designed to promote an educational atmosphere conducive to attracting and retaining minority students. Justice Thomas said:

[W]e do not foreclose the possibility that there exists 'sound educational justification' for maintaining historically black colleges as such. Despite the shameful history of state-enforced segregation, these institutions have survived and flourished [it is] indisputable that these institutions have succeeded in part because of their distinctive histories and traditions . . . . Obviously, a State cannot maintain such traditions by closing particular institutions, historically white or historically black, to particular racial groups. Nonetheless, it hardly follows that a State cannot operate a diverse assortment of institutions—including historically black institutions—open to all on a race-neutral basis, but with established traditions

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604. *Id.* at 2751 (Scalia, J., concurring in part and dissenting in part). Justice Scalia's separate opinion was written, in his words, to reject "the effectively unsustainable burden the Court imposes on Mississippi, and all states that formerly operated segregated universities, to demonstrate compliance with *Brown I.*" *Id.* at 2746. Justice Scalia would require that the prior discriminatory system be eliminated through the use of nondiscriminatory admission standards. *Id.* at 2750. He would not, however, require further steps to eliminate the effects of prior discrimination in a state university system. His opinion thus might allow for aid to historically black colleges, but it might not allow for the true end to the effects of segregation that harmed minority students in the continuing system in Mississippi.

605. *Id.* at 2744 (Thomas, J., concurring).

and programs that might disproportionately appeal to one race or another.<sup>606</sup>

If the Court again reviews a case concerning the provision of state aid to historically black colleges, we may learn much more about the attitudes the Justices hold regarding educational opportunities for racial minorities. Will the Court allow a state to provide aid to educational programs specifically designed to help minority students if the state has otherwise eliminated the effects of de jure racial discrimination in state educational systems? Only time will tell. Perhaps Justice Thomas will look for a way to require states to end the effects of racial segregation in their university systems while upholding some educational programs specifically designed to help minority students. The most recent rulings of the Supreme Court concerning affirmative action make it doubtful that the current Justices would uphold government aid to minority race students.

In 1994, the dedication of the Justices of the Supreme Court to enforcing the *Brown* principle is not clear. It is hard to identify five Justices currently on the Court who would endorse the use of the remedial powers of district courts to force state and local school entities to fund programs that advance educational programs for minority students on a desegregated basis, or who would oppose the ending of desegregation orders issued by lower courts in previous decades even though the ending of the orders might in fact result in one-race schools reappearing in those districts, or who would attempt to integrate state university systems while allowing some historically black colleges to serve the interests of minority race students.

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606. *Id.* at 2746.

## X. CONCLUSION

In this Article, I admittedly have been quite selective in the areas of civil rights decisions that I have chosen to examine. Nevertheless, I believe that my selection of topics gives a fair overview of the attitude of the Supreme Court Justices toward the protection of racial minorities during this century. When we look at the Court's enforcement of federal civil rights statutes, the uncovering and invalidation of laws that harm racial minorities through seemingly race-neutral language, the use of affirmative action programs designed to correct the harm our society has imposed on racial minorities in many areas, and the approach to the desegregation of schools, it is difficult to say that we have not seen both the rise and fall of Supreme Court dedication to civil rights during the past half-century.

The Supreme Court's history indicates that legal theories are of far less importance than the political affiliation of the Justices of the Court in determining the outcome of the Supreme Court decisions concerning racial minorities. In the pre-New Deal era, the Court had absolutely no sympathy for racial minorities and was often an active participant in the oppression of racial minorities. Fifty years ago, a Court composed of Democrats became increasingly concerned with racial equality. Forty years ago the Court took a bold step toward the protection of racial minorities in the *Brown* decision. In the 1960s the Court that was dominated by Democratic appointees attempted to protect minority race persons as it decided a wide variety of issues. The Nixon appointees brought a wavering approach to civil rights. The Reagan appointees to the Supreme Court have been able to narrow the Court rulings on civil rights cases.

Perhaps the current Court will change direction once again. Justice Ginsburg might prove to be more of a consistent protector of civil rights of racial minorities than was Justice White toward the end of his career. But it would be unrealistic to expect that Justice Breyer will be more supportive of the causes and interests of racial minorities than his predecessor, Justice Blackmun.<sup>607</sup> Some hope might lie with the fact that President

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607. See *supra* introductory note regarding the appointment of Steven G. Breyer to



Bush may have had more in common with President Ford than with President Reagan and that at least one of his appointees (Justice Souter) will have more in common with President Ford's appointee (Justice Stevens) than with the Reagan appointees. However, expecting the current Justices to reverse their course and return to the 1960s approach to protecting racial minorities is more of a dream than a hope.

The lesson that the Supreme Court has taught us in the past quarter century is that the Justices cannot be counted on to protect racial minorities from oppression in our society. Perhaps President Clinton, and future Presidents, will make appointments that will lead the Court to once again protect the civil rights of racial minorities. Perhaps not. In any event, Congress is likely to remain a stronger defender of racial minorities than the Supreme Court in the foreseeable future.