

Spring 1991

# Employment Discrimination Cases: Something's Blowing in the Wind

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## Recommended Citation

Ronald C. Griffin, Employment Discrimination Cases: Something's Blowing in the Wind, 30 Washburn L.J. 458 (1991)

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# Employment Discrimination Cases: Something's Blowing in the Wind

Ronald C. Griffin\*

## ABSTRACT

America's refitting its businesses for global competition. The nation's views on affirmative action (how much it should cost) is a part of the process. This article examines and critiques recent cases decided by the United States Supreme Court. The views of the justices highlight shifting attitudes about affirmative action policy in labor relations, building construction, and employee-employer relationships.

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White men control most of the money and property in the world. In a global economy, they are losing control to the Japanese. To protect what they own, they've formed international confederations. On the national scene, they've reinterpreted their laws to both (a) cut their losses and (b) identify people who can help them. The cases that follow symbolize what has happened.

## I. INTRODUCTION

In the beginning the world was a wilderness. Scarcity was a fact of life. Liberty was freedom from scarcity. Civilization described mankind's experiment with government (the promises entombed in constitutions ennobling government guarantees to provide everyone with food and personal security). The Constitution of the United States epitomized what was promised to Americans. We African-Americans, for example, were anointed with the right to participate in American economic life. Last session, the Supreme Court proclaimed that your rights, as fashioned by cities and states, are what I will recognize or I will select the moment when you can realize those rights.

As incredible as it might seem, knowing what reputable scholars have written about American history, the Court believes that blacks can discriminate against whites (that is absurd).<sup>1</sup> The Court believes that the 1866 Civil Rights Act was written for white people (that is absurd).<sup>2</sup> The

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I wish to thank Mahmud Noormohamed, a May 1990 graduate of Washburn University of Topeka School of Law, for his assistance in the preparation of this article and Teresa Machicao, a third-year student at Washburn University of Topeka School of Law, for her invaluable assistance.

1. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495-97 (1989).

2. *Jett v. Dallas Indep. School Dist.*, 109 S. Ct. 2702, 2711, 2713 (1989).

Court has decided that the states cannot police racism (that is madness).<sup>3</sup> It has hinted that black employers should not punish white employees.<sup>4</sup> It has decided that white people, if they are race conscious, can overturn settlement contracts in employment discrimination cases.<sup>5</sup>

This is hate speech.<sup>6</sup> A dominant group (through an interpretation of its own laws) has told a subordinate group what to expect from contracts.<sup>7</sup> It has created a psychic cage. To get free from it, as my elders would say, one must use something like art or protest literature to pound out reality. Once reality is recast, there are questions to be answered. First, to what indignities have African-Americans quietly submitted?<sup>8</sup> Second, what is their injury?<sup>9</sup> Third, is it coercion or a loss of first-class citizenship?<sup>10</sup>

There is a taste for discrimination in America.<sup>11</sup> African-Americans have been told that their political leadership is suspect.<sup>12</sup> They have been told that statistical evidence of segregation is not enough to overturn an

3. See *City of Richmond*, 488 U.S. at 490-93 (fourteenth amendment constraint on state power and use of race as criterion for legislative acts).

4. *Jett*, 109 S. Ct. at 2708-10.

5. *Martin v. Wilks*, 490 U.S. 755, 761-69 (1989); see Spitz, *Erosion of Efforts to Stem Job Bias Grows*, CIV. LIBERTIES 7, col. 1 (Spring 1990).

6. Why did the court decontextualize the 1866 Civil Rights Act? *E.g.*, *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2388 (1989)(Brennan, J., dissenting). Why did the Court go out of its way to describe the race of the disputants in a first amendment case? *E.g.*, *Jett*, 109 S. Ct. at 2706-08. Why did the Court say the states (cities) were anointed with the power to promulgate legislation addressing past discrimination and, in the next breath, overturn a city ordinance on the subject? *City of Richmond*, 480 U.S. at 490-93. On some level, these opinions exhibit an indifference or an active dislike, for historically oppressed groups. Some might call it hate speech. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2332-34 (1989)[hereinafter Matsuda]. A dominant group has interpreted the laws as disrupting the flow of equal rights that Congress promised oppressed groups. *Id.*

7. Matsuda, *supra* note 6, at 2332, 2334.

8. See *id.* at 2337-38. First, black businesses get marginalized. Second, there's a lowering of status. Third, people surmise that these decisions ridicule them. Fourth, people feel powerless. *Id.*

9. See *id.* at 2336. The victims have to shoulder emotional distress. They must cope with displaced aggression, fear, anger, nightmares and psychosis. *Id.* This type of speech erodes freedom of association. *Id.* at 2337. It forces the victims to change their outward behavior and public demeanor. When the working environment is charged against them, they are likely to do what is necessary to avoid a barrage of hate speech. *Id.* at 2338. The Court's negative determinations signal a loss of civil rights. *E.g.*, *Jett*, 109 S. Ct. at 2729 (Brennan, J., dissenting)(remedial scheme of § 1983 preempts otherwise available statutory remedies); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 662-63 (1989)(Stevens, J., dissenting)(Court turns "blind eye" to Title VII's purpose and meaning).

10. See Matsuda, *supra* note 6, at 2337 n.88. Hate speech forces victims to behave in ways prescribed by the dominant group. That is coercion. When hate speech assumes legal forms, including legislation or judicial decrees, it tells the victims they are powerless. They are told that their legal concerns are less worthy or that they cannot exercise rights to protect themselves like the dominant group. *Id.* at 2338. This is second class citizenship.

11. See E. BALTZELL, *THE PROTESTANT ESTABLISHMENT: ARISTOCRACY AND CASTE IN AMERICA* 104-08, 170-74 (1966)[hereinafter E. BALTZELL] (Americans used science and statistics "proving" Anglo-Saxons at "top of evolutionary tree").

12. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 484, 495-96 (1989); see *id.* at 529 (Marshall, J., dissenting)(notes majority's opinion will keep states and local governments from trying to change past discrimination).

employment practice.<sup>13</sup> They have been told that a Civil Rights Act does not cover subjects previously considered by Congress.<sup>14</sup> They have been told that "they will have to wait for their remedies" or "act quickly to preserve them."<sup>15</sup>

In the pages that follow, we will examine the cases which give rise to these observations. We will use a contracts analysis.<sup>16</sup> There are the petitioners' stories, the holdings of the Court and the contract's critique. At the end, we will revisit the question, "Were these cases written from a narrow cultural perspective?"

13. *Wards Cove Packing*, 490 U.S. at 650-52. Since the case restructures *Griggs v. Duke Power Co.*, 401 U.S. 424, 430, a civil rights case prosecuted by African-Americans, it admonishes them to produce better evidence in employment discrimination cases.

14. *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2379, 2381-82, 2388 (1989).

15. *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989). A collective bargaining agreement governed the contract between Lorance and AT&T. Lorance earned competitive seniority points by working in an AT&T plant. Her seniority was deemed permanent after promotion to a higher paying job as a tester. On July 23, 1979, with the assent of management, the union modified the collective bargaining agreement. Thereafter, the time a person spent in a promoted position determined permanent seniority. *Id.* at 901-02.

A down turn in the economy forced AT&T to demote some of its employees. The demotions were made in accordance with the modified collective bargaining agreement. As fate would have it, Lorance was a demotion victim. Because she lost four years of seniority, which had been permanent under the old collective bargaining agreement, she brought an action against AT&T. She claimed that the collective bargaining agreement discriminated against women. The district court dismissed her case, holding that her action was barred by a statute of limitations. The Seventh Circuit Court of Appeals, and subsequently the United States Supreme Court, affirmed the district court decision. *Lorance v. AT&T Technologies, Inc.*, 827 F.2d 163 (1987).

Under 42 U.S.C. § 2000e-5(e), Lorance had 300 days to file a complaint regarding the collective bargaining agreement. *Lorance*, 490 U.S. at 903 n.2. The time ran from the date the agreement was adopted by labor and management. *Id.* at 913 (Marshall, J., dissenting). If the complaint was not filed in the allotted time, the agreement was void. The plaintiff was saddled with a double burden. She had to show an intent to discriminate and that the defendants used the collective bargaining agreement to that end. *Id.* at 908-09. The 300 days had run. Because the plaintiff did not prove an intent to discriminate, the Court could not say that the agreement was invalid. *Id.*

What is stunning about this opinion is Justice Scalia's omissions. He did not use or note legislative history to interpret the 1964 Civil Rights Act. *See id.* at 901-12 (recent cases used by Scalia in broadening court's scope, diminishing Title VII's impact); *see also id.* at 913-19 (Marshall, J., dissenting)(Title VII goal never included conferring absolute immunity on discriminatorily adopted seniority systems surviving first 300 days). Scalia did not follow his cited cases. *Id.* at 915-19 (Marshall, J., dissenting). Finally, the cases Scalia cited were inapposite. *Id.*

16. *See* FRIED, CONTRACTS AS PROMISE 1-43, 71 (1981). If the parties agree to burden sharing and the agreement is legal, a contract is the sum of promise and acceptance. A promise is a declaration to do something or to do nothing. Acceptance is an acknowledgement of the promise and some communication signifying acceptance. *Id.* Contracts are composed of mutual and dependent promises. The parties must act in good faith and spend best efforts. *See La Shelle v. Armstrong*, 188 N.E. 163, 166-67, 263 N.Y. 79, 84 (1933)(duty to act in good faith and follow wording of the contract); Goetz & Scott, Principles of Relational Contracts, 67 VA. L. REV. 1089, 1119-1120 (1981)(parent-best efforts)[hereinafter Goetz & Scott]. Some are obliged to make an event happen, that is, to labor mightily when they can make a condition happen.

A defending party may use contract principles or provisions in contracts when performance breaks down. The prosecuting or injured party may be entitled to damages in expectation, reliance, or restitution. If the subject matter is unique, the injured party may be entitled to specific performance or injunctive relief.

There are other ways to depict contract formation. GILMORE, DEATH OF CONTRACTS 87-90 (1974). The lawyer's modern day preoccupation is defining good faith — doing the opposite of ruining the other parties expectation — and ignoring the wording of contracts and appropriate statutes. *See, e.g., Jett v. Dallas Indep. School Dist.*, 109 S. Ct. 2702, 2720, 2722 (1989)(one must do nothing in an employment contract that amounts to racial harassment); E. FARNSWORTH, CONTRACTS 526, 527 (1981)[hereinafter E. FARNSWORTH]; Patterson, *Constructive Conditions in Contracts*, 42 COLUM. L. REV. 903, 932 (1942)[hereinafter *Constructive Conditions*].

## II. CASES

### A. *City of Richmond v. J.A. Croson Co.*

There is a Louis Brandeis saying: "Dissents are educational devices."<sup>17</sup> In a dissent mode that isn't fashionable in the 1990s, these cases marginalized black businesses and black employees. The United States Supreme Court mangled the strict scrutiny test and recast the fourteenth amendment to retrench white dominance.

Let us begin with the *City of Richmond v. Croson Co.* On April 11, 1983, the city council adopted a Minority Business Utilization Plan. The Plan required prime contractors (to whom the city awarded construction contracts) to spend thirty percent of the dollar amount of their agreements on Minority Business Enterprises (MBE).<sup>18</sup> "The Plan defined an MBE as a business at least 51% of which is owned or controlled . . . [by] Blacks, Spanish speaking, Orientals, Indians, Eskimos, or Aleuts."<sup>19</sup> The Plan was free of geographic limitations.<sup>20</sup> A MBE, anywhere, could qualify for a set-aside.

The Plan was remedial. It promoted wider minority participation in the construction of public projects. The Plan authorized the Director of the Department of General Services to fashion a rule allowing waivers in situations where the minority requirement could not be met. To that end, the Director promulgated something called "Contract Clauses, Minority Business Utilization Plan."<sup>21</sup> Section D carried the following language:

No partial or complete waiver of the foregoing (30% set-aside) requirement shall be granted by the city other than in exceptional circumstances to justify a waiver. It must be shown that every feasible attempt has been made to comply, and it must be demonstrated that sufficient, relevant, qualified Minority Business Enterprises . . . are unavailable or unwilling to participate in the contract to enable meeting the 30% MBE goal.<sup>22</sup>

The Director published procedures to be followed in letting city contracts under the Plan. Bidders were given a "Minority Business Utilization Commitment Form."<sup>23</sup> The winning bidder "was required to sub-

17. E. BALTZELL, *supra* note 11, at 195.

18. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477 (1989). The Court said: Legislation bearing a racial classification is suspect. It is subject to the strict scrutiny test. *Id.* at 493; *cf.* *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 360 (D.C. Cir. 1989)(Williams, J., dissenting)(FCC's goal in giving minorities licensing preferences inescapable of placement in non-racial terms). Strict scrutiny personifies the Court's low tolerance for state-sponsored racial classifications. The government must present compelling reasons to overcome the Court's inclination to overturn the legislation. *See Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3008 (1990)(O'Connor, J., dissenting). Overturning segregation, overturning discrimination, addressing the effects of past discrimination, and integrating the academy are (all) compelling reasons. *Id.*

19. *City of Richmond*, 488 U.S. at 478.

20. *Id.* at 469.

21. *Id.* at 478.

22. *Id.*

23. *Id.* at 479.

mit a commitment form naming the MBEs to be used on the contract and the percentage of the total contract price awarded [to MBE]."<sup>24</sup> The contractor's commitment form or request for waiver was processed by the City Human Relations Commission (HRC). The HRC verified the MBEs' names or made a recommendation regarding the prime contractor's waiver request. Thereafter, the Director of General Services made a determination from which there was no appeal.<sup>25</sup>

At a hearing before the City Council to determine whether the plan ought to be adopted, the Council considered the following:

- (1) A statement by Councilperson Marsh that "the general conduct of the construction industry in this area [Richmond], and the State, and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread;"
- (2) A statement that "while the general population of Richmond was 50% black, only .67% of the city's prime construction contracts had been awarded to minority businesses (between 1978 and 1983);" and
- (3) Evidence that "4.7% of all construction firms in the United States were minority owned businesses and that 47% of these were located in California, New York, Illinois, Florida, and Hawaii."<sup>26</sup>

There was no direct evidence, at least the council collected no evidence, of racial discrimination on the part of the city in letting contracts or any evidence that the city's contractors had discriminated against minority-owned subcontractors. The public witnesses indicated that the minority contractors were simply unavailable.<sup>27</sup>

On September 6, 1983, the city published an invitation for bids on a project. Croson Company, a mechanical plumbing and heating contractor, received a bid form. The job involved the installation of water closets and urinals for the city jail. Croson contacted several MBEs. None expressed interest in the project or the tendered quotes.<sup>28</sup>

On October 12, 1983, Croson contacted another group of MBEs. Melvin Brown, the president of a local MBE at that time, expressed an interest in the project. Brown, however, ran into difficulty. Area white vendors would not supply him with needed fixtures or price quotations.<sup>29</sup>

On October 19, 1983, Croson submitted a request for a waiver of the 30% set-aside. Croson's request indicated that Brown was not a qualified subcontractor and that the other MBEs had shown no interest. Having been told that Croson had submitted a waiver request, Brown pursued talks with a vendor who promised to supply fixtures at competi-

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24. *Id.*

25. *Id.*

26. *Id.* at 479-80.

27. *Id.*

28. *Id.* at 482.

29. *Id.* One of the vendors was not a minority business enterprise (MBE) and refused to give a price quote. An MBE is defined as "a business [in which] at least fifty-one (51) percent is owned and controlled . . . by minority group numbers." *Id.* at 478. Another area vendor would not give Brown a price quote indicating that a credit check would need to be done first. *Id.* at 482.

tive prices.<sup>30</sup> This information was communicated to the city before it acted on Croson's request. The city told Croson that it had decided to re-bid the project.<sup>31</sup> Croson appealed the decision. The city said that there was no appeal. Croson filed an action under 42 U.S.C. 1983, the Civil Rights Act. He said that the Richmond Plan was unconstitutional.<sup>32</sup>

Can a government impair a person's freedom to contract? The answer is *yes* when it is the federal government and it is legislation produced under the commerce clause or the fifth section of the fourteenth amendment.<sup>33</sup> Sadly, state governments are anointed with a weak power to limit a person's freedom to contract.<sup>34</sup> The vehicle must be legislation.<sup>35</sup> The subject matter must be racial discrimination.<sup>36</sup> The racial discrimination must be something that is policed by the federal government.<sup>37</sup> The discrimination must be something in which the state is actively (passively) participating.<sup>38</sup>

*City of Richmond*, I'm sad to say, is a cruel decision. It was written by a justice who should have known better. Madame Justice O'Connor hides behinds Justice Powell's plurality opinions in *Regents of the University of California v. Bakke*<sup>39</sup> and *Wygant v. Jackson Board of Education*,<sup>40</sup> as if they were majority opinions, to saddle racism with a new definition. History is rewritten in a way that seems pleasing. She orders states and cities to do nothing (except what they are told to do by higher authorities) to respond to racism. She has made nonsense of the strict scrutiny test. She has trivialized the evidence compiled by the city for enacting the ordinance. She has given racism another day to poison our consciousness. In her haste to champion individual rights, she has affirmed the role that Social Darwinism plays in American life.

To commit oneself to the elimination of a race conscious society is a laudable societal goal. Regrettably, the goal is unachievable if a majority of the white middle class or the middle class of all groups is not committed to it.<sup>41</sup> It is pointless (if you think about the situation from the vic-

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30. *Id.*

31. *Id.*

32. *Id.* at 483.

33. *Id.* at 487.

34. *Id.* at 489-90.

35. *Id.* at 491.

36. *Id.* at 492.

37. *Id.*

38. *Id.*; see *id.* at 556 (Marshall, J., dissenting)(meaning of "identified discrimination" requirement of proof discussed).

39. 438 U.S. 265 (1978).

40. 476 U.S. 267 (1986).

41. See E. BALTZELL, *supra* note 11, at 183-86, 198-200, 353-62 (discussion of minorities' exclusion from country clubs); AUTOBIOGRAPHY OF MALCOLM X 246-47, 284-86 (4th ed. 1978)[hereinafter MALCOLM X]. In the twentieth century, civil rights mean assimilation on the basis of culture — not genes. If one can parrot the white man's values and solve his problems, one can participate in his public life. *Id.* at 285-86. The individual can achieve this. E. BALTZELL, *supra* note 11, at 188-

tim's perspective) to be free of the burdens of race if you are unhealthy, uneducated, and operating without skills that attract money, employment, and opportunities. The Richmond Plan tried to correct that.

Justice Marshall's dissent is uplifting.<sup>42</sup> States, he said, have an obligation to eradicate the effects of past discrimination.<sup>43</sup> They are obliged to do nothing to perpetuate the effects of past discrimination.<sup>44</sup> States should not spend money on industries that profited from private discrimination.<sup>45</sup> It is disingenuous for a court to critique evidence piece-by-piece.<sup>46</sup> Evidence has never stood in alien juxtaposition.<sup>47</sup> It's the body of evidence that counts. If states and cities are sovereign within their own domain, it was hypocritical for the Supreme Court to trivialize what local officials said about a problem and how they wished to address it.<sup>48</sup>

When government sponsored racism is an issue, the strict scrutiny test makes sense when the government has used power to give aid to racial hatred or the oppression of non-European groups.<sup>49</sup> Racism is not any group's effort to use public office to promote the group's interest. Using the strict scrutiny test in that way (blocking government action to address the effects of past discrimination in Virginia) makes no sense.

Finally, telling a city to adopt an urban business plan that has been discredited by Congress was disingenuous.<sup>50</sup> The Richmond Plan operated prospectively. It was innovative. It did not disrupt settled expectations of innocent parties.<sup>51</sup> The plan got entangled in the fears provoked by race, and the Court wouldn't free it.

### B. *Jett v. Dallas Independent School District*

*Jett v. Dallas Independent School District* is a good faith case.<sup>52</sup> Justice O'Connor wrote the majority opinion. Once again, Madame Justice hid in a maze of reconstruction history.<sup>53</sup> She redefined racism.<sup>54</sup> She

96. A person's colleagues and associates will determine the heights he will climb on society's social ladder. *Id.* at 206, 209, 316. Civil rights opportunities, in this sense, have not been offered to African-Americans. *Id.* at x (preface).

42. *City of Richmond*, 488 U.S. at 528-62.

43. *Id.* at 536-37.

44. *Id.* at 537.

45. *Id.* at 537-39.

46. *Id.* at 541.

47. *Id.*

48. *Id.* at 546.

49. *See id.* at 537; see also L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1530-31 (1988)[hereinafter L. TRIBE](discussion of Justices' positions on affirmative action).

50. *City of Richmond*, 488 U.S. at 550.

51. *Id.* at 549.

52. *Jett v. Dallas Indep. School Dist.*, 109 S. Ct. 2702, 2711, 2713 (1989). The Court said that the 1866 Civil Rights Act was bereft of language authorizing a damage remedy. The plaintiff would have to use 42 U.S.C. § 1983 to obtain damages. When a public official punishes an employee because the employee has exercised a federal citizenship right, like the first amendment, the official is liable to the injured party. *Id.* at 2713.

53. *Id.* at 2710-20 (O'Connor, J., majority).

54. *See id.* at 2727-30 (Brennan, J., dissenting)(Brennan affirms idea that § 1981 also applies to white people); Bogen, *The Transformation of the Fourteenth Amendment: Reflections from the Ad-*



sent a false signal about employment relations when African-Americans fire European-Americans from jobs.<sup>55</sup> She misinterpreted Congressional intent concerning the scope of the 1866 Civil Rights Act.<sup>56</sup> She wrote an opinion (subscribed to by four associates) depriving injured citizens of a damage remedy.

Jett was employed by the Dallas Independent School District. He was a teacher and a football coach at South Oak High School. Jett was white. His immediate supervisor, the principal, was black. As the school's population changed from white to black, Jett found himself fighting the principal over school policy. Their differences reached a climax after a high school football game. The coach stormed into a referee's locker room to announce to the referees present, that he would block black officiation of his football games. In a state of rage, shortly after this scene, Jett told the press that "his black players could not pass NCAA academic requirements for collegiate athletes."<sup>57</sup>

The coach's actions upset the school principal. The principal told Coach Jett that South Oak could do without his services. After a meeting with the district's superintendent, Jett was assigned to a school that did not have a football program. At the new school, after his work quality had slipped, he was relieved of his teaching responsibilities and assigned to school security.<sup>58</sup>

Thereafter, Jett filed a lawsuit against the South Oak principal and the Dallas School District. He characterized himself as white. He sought damages under the 1866 Civil Rights Act. He said that (a) his immediate supervisor was black; (b) his supervisor disliked him; (c) his supervisor, with the approval of the district's superintendent, relieved him of his job because he had exercised his first amendment right.

The Court examined the language in the 1866 Civil Rights Act. It discovered the language did not cover the first amendment right the complainant sought to protect. In the majority opinion, the Court proclaimed that the 1866 Civil Rights Act affirmed the rights of white people while anointing freedman with the same rights.<sup>59</sup> The Act did not provide a citizen with a damage remedy. Congress, the Court proclaimed, did not create an "original federal jurisdiction" to support a damage remedy against state actors.<sup>60</sup>

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*mission of Maryland's First Black Lawyers*, 44 MD. L. REV. 939 (1985). The Civil Rights Act confirms the rights of white people while anointing blacks with the same rights as white people. *Id.* at 944-47.

55. *Jett*, 109 S. Ct. at 2708, 2710. The black supervisor's reaction to a racist comment ending in discharge of employee may be suspect or racist. *Id.* at 2708.

56. *Id.* at 2729-30 (Brennan, J., dissenting).

57. *Id.* at 2707.

58. *Id.*

59. *Id.* at 2710, 2713.

60. *Id.* at 2712, 2714-15.

Since Congress contemplated a penal provision under the old statute, the complainant had to use an amendment to the Civil Rights Act, 42 U.S.C. § 1983 to get damages from the state. Any person who uses his office to deprive a citizen of his United States citizenship rights is liable to the injured party.<sup>61</sup> When a municipality (pursuant to a policy) tramples upon citizenship rights by punishing a person for the exercise of free speech, it's liable to the injured party. The person invested with the authority to make final decisions is obliged to pay damages.<sup>62</sup>

Aside from the criticism paraded in a previous case, which is also applicable to this one, the court has sent a strange signal about good faith. In employment contracts cases, good faith is embodied in § 1983. In the midst of performance, you cannot punish an employee for exercising his first amendment right. Although the original Civil Rights Act, 42 U.S.C. § 1981, covers contracts, you can neither proclaim nor use it as a standard for appraising a person's performance.<sup>63</sup>

### C. *Patterson v. McLean Credit Union*

*Patterson v. McLean Credit Union*<sup>64</sup> is the next case. The plaintiff, Patterson, was an African-American. The defendant was a business. The plaintiff made a contract with the defendant. During performance complainant's compatriots, the white employees similarly situated, were accorded better treatment.<sup>65</sup> Patterson sought a promotion from her employer, McLean Credit Union, which was refused. Thereafter, she brought an action under the 1866 Civil Rights Act. The plaintiff stated the following:

[Her supervisor] periodically stared at her for several minutes at a time; that he gave her too many tasks, causing her to complain that she was under too much pressure; that among the tasks given her were sweeping and dusting, jobs not given to white employees. On one occasion, she testified, [her supervisor] told [her] that blacks are known to work slower than whites. According to the petitioner, her supervisor also criticized her in staff meetings while not similarly criticizing white employees.<sup>66</sup>

After the case wound its way through the federal courts, the Supreme Court announced that an employer can't use race to bar contract formation.<sup>67</sup> It resisted the temptation to construe the *right clause* in the 1866 Civil Rights Act as an order to look at state laws devoted to

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61. *Id.* at 2722.

62. *Id.* at 2723, 2724.

63. *Id.* at 2720.

64. 109 S. Ct. 2363 (1989). The Court blocked the use of the 1866 Civil Rights Act, 42 U.S.C. § 1981, to evaluate the employer's performance for breach of contract and the employee's pursuit of damages. The Court said the employee had to use 42 U.S.C. § 1983. *Id.* at 2374, 2375.

65. *Id.* at 2369, 2373.

66. *Id.* at 2373.

67. *Id.* at 2372-74.

contracts.<sup>68</sup> Because there was not a state statute on white employees harassing black employees during performance, succumbing to the temptation to look at state law would have made the 1866 Civil Rights Act meaningless.<sup>69</sup> Undaunted and armed with words like “logic” and “semantics,” the Court narrowed the Act. It said that the statute covered only contract formation. It did not cover the conduct of an employer after a relationship had been established. The Court intimated that good faith issues, like harassing an employee because he’s black, were governed by the 1964 Civil Rights Act.<sup>70</sup> It said that promotions could be both new and distinct contractual opportunities. If a person was denied a promotion because of her race, she would have a 1866 Civil Rights action.<sup>71</sup>

What can one say about this opinion? First, it is dismaying. The Court’s use of the word “logic” conveyed no meaning. Logic means analysis. If analysis means recounting pertinent legal history regarding the statute, there was none in this opinion. As regards “semantics,” the Court rejected the opportunity to contextualize the statute. Facts about words (after all) determine their meaning. Giving words a contemporary meaning while ignoring the historical fact that the Act was passed to address both racial harassment and white brutality during performance was misleading.<sup>72</sup>

Second, riveting good faith to the 1964 Civil Rights Act guaranteed that a breach of duty to act in good faith would cost the plaintiff a lot of time (spent on administrative remedies), money, and effort (overcoming burden of proof and persuasion obstacles). Depicting a promotion as an opportunity to make a new contract saddled the plaintiff with the duty to scour the landscape for credible evidence to establish the intentions of the parties which, one might imagine, costs additional time and money.

If “racial harassment” during performance demeans a person’s opportunity to contract, there should be a civil rights action.<sup>73</sup> This was a relationist contract.<sup>74</sup> The parties were under a duty to act in good faith.<sup>75</sup> That meant that employers could not use race to block a promotion. They could not take liberties with an employee — saddle an African-American with more duties than whites. They could not use race to

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68. *Id.* at 2375 (emphasis added).

69. *Id.* at 2376.

70. *Id.* at 2374.

71. *Id.* at 2377.

72. *Id.* at 2388 (Brennan, J., dissenting).

73. *Id.* at 2389.

74. Goetz & Scott, *supra* note 16, at 1090-92.

75. *See id.* at 1139. At a minimum, good faith arrests cheating on the terms, or opportunistic behavior that redistributes risks already allocated by a contract. *Id.*; *see also Constructive Conditions*, *supra* note 16, at 928-42. Good faith is broad enough to encompass doing what you’re told by a statute. In *Jett*, an employer is bound to do nothing that ruins a federal citizenship right. *Id.*; E. FARNSWORTH, *supra* note 16, at 527.

block a person's access to a legal process or a legal remedy.<sup>76</sup> Finally, they could not harass an African-American, hoping to fluster her, in the midst of performance.<sup>77</sup>

Since there was evidence of harassment and a scheme for presenting that evidence under the 1866 Civil Rights Act, the Court should have approved the plaintiff's instruction to the jury on the application of this Act to contract performance. In this case, the 1866 Act and the 1964 Act were alternative remedies.

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76. *Patterson*, 109 S. Ct. at 2373.

77. Such behavior amounts to prevention. Prevention is implementing a decision that makes the other parties performance more difficult. See *Shear v. National Rifle Ass'n of Am.*, 606 F.2d 1251 (D.C. Cir. 1979). In *Shear*, prevention is linked with the notion of *good faith*. *Id.* at 1245-56. Shear, a real estate agent, executed a real estate contract with the National Rifle Association (NRA). The agent promised the NRA that he would generate offers for the purchase of the building. The NRA promised to pay the agent for his services. Shear generated two offers. The management team recommended the NRA accept the highest of the two bids. The offeror and the President of the NRA signed a purchase contract, subject to the approval of the NRA's board of directors. On May 6, 1977, the parties modified their contract. The NRA promised to pay Shear \$750 thousand after the purchase contract was submitted to the board of directors for approval. Before the board could take action on the contract, control of the NRA passed to a disgruntled group. Members of the group, who objected to the sale of the NRA's land, passed a bylaw stripping the board of its power to approve the purchase contract. Thereafter, the old board (operating without power) rejected the purchase contract approved by the management team. Shear brought an action to recover contract damages for his services. The NRA hid behind a true condition — the board's failure to approve the purchase contract. The NRA said that the nonoccurrence of the condition excused payment.

The District of Columbia Circuit Court had to decide whether the condition was a valid defense. Shear claimed that the condition was invalid because the owner prevented it from occurring. The court of appeals wrote a decision favoring Shear. The nature of the true condition (getting a management committee to recommend an offer and submitting the same to the board), thus the owner's action (which created confusion about the scope and operation of the conditions namely, board approval), bolstered Shear's depiction of NRA's action as preventative. *Id.* at 1256. The court of appeals denied the defendant's motion to dismiss. *Id.* at 1254, 1259.

In *Patterson v. Meyerhoff*, Meyerhoff contracted to buy land from Patterson after Patterson acquired title to the land at a foreclosure sale. Subsequent to contract formation, Meyerhoff announced that she was going to bid and hopefully buy the disputed property at the foreclosure sale. Meyerhoff acquired the property at the sale, outbidding Patterson in the auction process. Patterson brought an action in equity to establish his lien on the property and, if the proceeding permitted it, a claim for damages which equated with the sum he would have received from the contract. *Meyerhoff*, 204 N.Y. 96, 98, 97 N.E. 472, 475 (1912).

On the damages issue, which plunged the court into a discussion about prevention, the court's opinion favored Patterson. Each contracting party promises that the party "will not intentionally and purposely do anything to prevent the other party from carrying out the agreement." *Id.* at 473. Because Meyerhoff prevented the seller (Patterson) from offering the land to the buyer, Meyerhoff breached the contract. *Id.*

In *Iron Trade Products Co. v. Wilkoff Co.*, the judge was presented with a contract for the sale of goods. Wilkoff was the seller. Iron Trade Products (ITP) was the buyer. The goods were rails. They were both fungible and scarce. Wilkoff could acquire them from two sources. After ITP purchased rails from one source, the price for the remaining rails increased. Because the prices were more than Wilkoff could afford to pay, Wilkoff did not purchase and deliver the rails he had promised ITP. ITP brought an action to recover damages. Wilkoff hid behind prevention. He claimed that ITP's purchase prevented him from purchasing rails at a reasonable price. The court sided with the plaintiff. "[M]ere difficulty," which goes into performance, will not excuse performance. Adding to a burden that a seller already has to shoulder to bring about performance, should not be treated as prevention. *Iron Trade Prods.*, 272 Pa. 172, 175, 116 A. 150, 151 (1922).

#### D. *Wards Cove Packing Co. v. Atonio*

*Wards Cove Packing Co. v. Atonio*<sup>78</sup> was a freedom of contract case. The defendants were fish canneries that provided people with seasonal work in Alaska. There were cannery and non-cannery jobs. The cannery jobs were primarily filled by Alaskan natives and Filipino-Americans. The non-cannery jobs were predominantly filled by whites (European-Americans hired by the defendants at their home offices in Washington and Oregon).

These employees lived hierarchical, segregated existences. The cannery jobs were low wage work.<sup>79</sup> The non-cannery jobs were high wage. Cannery and non-cannery employees resided in separate quarters. They took their meals in separate diners.<sup>80</sup> Cannery employees brought an action under the 1964 Civil Rights Act to invalidate and enjoin the administration of the defendant's hiring and promotion practices.<sup>81</sup> They claimed that certain hiring and promotion practices were responsible for racial stratification of the work force; that some practices denied non-white employees an opportunity to secure positions as non-cannery employees. They cited nepotism, a rehire preference, the absence of objective hiring criteria, separate hiring channels, and a practice of not promoting from within as the offensive practices. They produced statistical evidence of disparate treatment. Most of the European-Americans, they said, were in non-cannery positions. Most of the Alaskan natives and Filipino-Americans were in low wage cannery jobs.<sup>82</sup>

The Court decided the case under the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a).<sup>83</sup> Employees can't use the 1964 Civil Rights Act to impose racial quotas on employers or force them to assemble a work force that resembles the racial composition of the surrounding community.<sup>84</sup> They can't use gross statistics (because they are meaningless) to establish disparate treatment.<sup>85</sup> Petitioners must isolate the employment practice that is responsible for the disparity.<sup>86</sup> They must present an alarming percentage signifying the difference between hired and qualified minority applicants in the pertinent employment pool. They must prove causality—produce evidence disclosing the impact a practice has upon

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78. 490 U.S. 642, 650-51 (1989). The Court said that it would accept ratios between qualified minority applicants in the pertinent job pool and qualified minority applicants (hired by an employer) as evidence in employment discrimination cases. The higher the ratio the more alarming the evidence that an employment practice (being scrutinized by a court) was discriminatory. *Id.*

79. *Id.* at 646-47.

80. *Id.* at 648.

81. *Id.* at 647-48.

82. *Id.*

83. *Id.* at 650.

84. *Id.* at 652-53.

85. *Id.* at 653-54.

86. *Id.* at 656-57; *see id.* at 662 (Stevens, J., dissenting). The racial make-up of workers in disputed jobs should be compared to the racial composition of qualified workers in the relevant labor market to produce statistical evidence of discrimination. *Id.* at 673-78.

employment opportunities.<sup>87</sup> If the percentage difference between hired and qualified applicants is insignificant within the pertinent employment pool, the employment practice is valid.<sup>88</sup> Assuming the petitioner has shouldered his burden, the employer is given a trivial one. He must show that his practice furthered an employment goal that is legitimate.<sup>89</sup>

In less than nine pages, the Court mangled a decade of cases and loaded employees with a heavier evidence burden. Prior to this opinion, a correlation between a promotional practice and a hurt endured by an identifiable class of workers was enough to establish disparate treatment.<sup>90</sup> When employers had to prove that their practice was essential in the past, they merely had to prove (henceforth) that the practice was legitimate.<sup>91</sup> The Court diluted *Griggs v. Duke Power Co.*<sup>92</sup> and barred the use of undifferentiated statistical evidence depicting a work force stratified by race.<sup>93</sup> It branded the evidence as useless.<sup>94</sup> It saddled petitioners with a duty to prove causality which weakened the prospects that an employee would recover anything.

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87. *Id.* at 656-57.

88. *Id.* at 650-51, 656-57.

89. *Id.* at 654-55.

90. *Id.* at 672-73.

91. *Id.* at 657-58.

92. 401 U.S. 424 (1971). If a state has a history of racial discrimination; if people have projected their cultural feelings upon someone else, or said, manual labor is the only thing African-Americans are fit to do; if you see it in the job assignments in an industrial plant in the state; if the plant has discriminated against African-American workers in the past, justice requires the plant to do nothing to perpetuate this situation. *Id.* at 430. This is the warning entombed in *Griggs v. Duke Power Co.*

In *Griggs*, company employees challenged the job criteria — a high school diploma or passage of two written tests — limiting a person's entry into higher paying positions in the power company's plant. Despite evidence that "these two requirements operated to render ineligible a markedly disproportionate number of Negroes," the Court of Appeals held that: (a) there was no showing of an intent to discriminate on account of race and (b) there was no Title VII violation. *Id.* at 429. The Supreme Court trumpeted a different tune. An employer may violate Title VII even when acting in good faith and without invidious intent. *Id.* at 432. If there is a positive correlation between a criterion in a job description and the exclusion of a large number of blacks, the job criterion is suspect. The Court held that tests and diplomas (certificating work) must illuminate job related skills and ability as well as predict the test taker's performance. *Id.* at 431.

Under the guise of following the law, the Supreme Court changed the law established in *Griggs*. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 661-65, 669-73 (1989)(Stevens, J., dissenting). Using a plurality opinion — which shouldn't carry much weight — the Court jettisoned the notion that an employment practice illuminates and measures job-related skills and practices. *Id.* at 672. The notion that the practice be essential to job performance was replaced with the notion that the practice had to promote, or somehow enhance, an employer's goal. *Id.* at 671 (emphasis added). Using the same plurality opinion, the Court added a requirement to the burden of proof shouldered by employees. *Id.* Now, employees must "isolate and identify the specific employment practices that are allegedly responsible for any observed statistical disparities." *Id.* at 656.

*Wards Cove Packing* is a tragic and shameful decision. The change wrought by the Court creates a daunting task for employees. The addition tips the judicial scale in favor of the employer. *Id.* at 673. The change and the addition — read into *Griggs* — make a sham of the goal that Congress and a unanimous Court reached — razing employment schemes preserving the consequences of past discrimination. *Griggs*, 401 U.S. at 429.

93. *Wards Cove Packing*, 490 U.S. at 661 (Stevens, J., dissenting).

94. *Id.* at 652.

E. *Martin v. Wilks*

The last case is *Martin v. Wilks*.<sup>95</sup> Plaintiffs, two groups of African-Americans, filed lawsuits against the city of Birmingham and the Jefferson County personnel board. They claimed that both entities discriminated in their hiring and promotion practices.<sup>96</sup> After the district court reached a decision on the hiring issue, but before a decision was reached on promotions, the parties made settlements in the form of consent decrees.<sup>97</sup>

These agreements set forth an extensive remedial scheme, including long-term and interim annual goals for hiring and promoting black employees.<sup>98</sup> They were trumpeted as consent decrees after the Court heard complaints about their scope and operation.<sup>99</sup> At the hearing convened by the district court, the Birmingham Fire Fighters Association (representing white employees) portrayed these agreements as illegal, claiming they amounted to reverse discrimination.<sup>100</sup> The compacts clashed with Title VII of the 1964 Civil Rights Act.<sup>101</sup> The Association requested injunctive relief. On a civil procedure ground, the rule on intervention, the Court gave them nothing.<sup>102</sup>

Thereafter, a new set of complainants (Wilks) brought an action to challenge the implementation of the consent decrees. The district court said the complainants could not collaterally attack the consent decrees. The Eleventh Circuit Court of Appeals, siding with the complainants, reversed that decision.<sup>103</sup> The Supreme Court sided with the Eleventh Circuit.<sup>104</sup> Because the complainants were neither parties nor privies to the consent decrees, the complainants' independent claim for unlawful discrimination was not precluded.<sup>105</sup>

The Court used Rules 19 and 24 of the Federal Rules of Civil Procedure.<sup>106</sup> A plaintiff should join other people in a lawsuit when there's a possibility that a judgment or a consent decree will conflict. A plaintiff cannot use a third-party complainant's "knowledge of a lawsuit" and

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95. 490 U.S. 755 (1989). The Court said the litigants must include everyone who might be affected negatively in the settlement agreement. Defenders of the settlement can't use the federal rule of intervention to fortify the agreement against third party complaints about validity. *Id.* at 765.

96. *Id.* at 759; *see id.* at 774-75 (Stevens, J., dissenting)(noting that other officials were in the original suit).

97. *Id.* at 759 (Stevens, J., dissenting).

98. *Id.*

99. *Id.* at 774-75.

100. *Id.* at 758-59, 776; *see id.* at 775-76 (Stevens, J., dissenting)(decision approving consent decrees had no suggestion that agreements were collusive or fraudulent).

101. *Id.* at 758-59.

102. *Id.* at 759; *see id.* at 777-78 (Stevens, J., dissenting)(Court found white firefighters' motion to intervene untimely).

103. *Id.* at 782 (Stevens, J., dissenting).

104. *Id.* at 761.

105. *Id.*

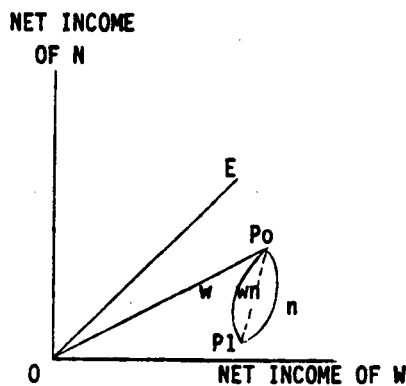
106. *Id.* at 763-68.

"his opportunity to intervene," which he never exercises, to either correct a mistake in joinder or block another lawsuit.<sup>107</sup>

What can one say about this decision? It is stunning. The Supreme Court hid in a thicket of civil procedure to cast aspersions upon affirmative action. This is, in a sense, a legality case.<sup>108</sup> It dealt with a contract arising from a dispute being processed by a court. If a contract is race conscious, and it denies a person a contractual opportunity because of his race, the contract is (now) invalid. In short, the Court has used Wilks to arm disaffected white people with the power to challenge court-approved affirmative action plans. It has encouraged litigation and drained minorities of their resources. It has signaled that there's an open season on *Negroes*.

### III. PERSPECTIVE

Fifteen years ago America was a melting pot.<sup>109</sup> Today it is five tribes held together by their loyalty to the Constitution. The tribes trade ideas, labor, and capital. Some secure better bargains than others because they are large and powerful. When trade is free, one can plot an equilibrium for the group's net income. When there is a taste for discrimination, there is an absolute drop in net income of the whole group and a relative drop in the net income of the group that's the focus of discrimination (see figure).<sup>110</sup>



The effect of discrimination on incomes

107. *Id.* at 765-68.

108. *See id.* at 790-91 (Stevens, J., dissenting)(agreement conflicts with public policy); E. FARNSWORTH, *supra* note 16, at 327-30 (1982).

109. E. BALTZELL, *supra* note 11, at x (preface).

110. G. BECKER, *THE ECONOMICS OF DISCRIMINATION* 22-25 (2d ed. 1971). The OE curve is the group's income equilibrium. OPO represents a change in the equilibrium when there's some segregation. The lines connecting P0 and P1 signify tastes for discrimination against African-Americans. The curve POWP1 represents the different amounts of discrimination. *Id.* at 22-25.



You must be a numerical and an economic minority to become a victim of discrimination.<sup>111</sup> Sadly, that is the fate of African-Americans.

In 1982 while America's industrial base sputtered and shrank, 99.7 million Americans went to work.<sup>112</sup> At one point, three million claimed unemployment. In a quiet way, America changed the way it used people and materials, capital, and manufacturing processes.<sup>113</sup> Having downsized traditional industries and the industrial bases that supported them, the country created higher unemployment.<sup>114</sup> Blacks fell into surplus labor pools.<sup>115</sup> Being, for the most part, unskilled workers in a world of technology, blacks had difficulty in finding work.<sup>116</sup> Education became a necessity.<sup>117</sup> Life was (once again) mean and brutish. The recent Supreme Court decisions made the situation worse.

A contracts analysis of the Court's opinions would be a charitable critique. The opinions were elitist in the sense that justices conversed in language that excluded minority perspectives.<sup>118</sup> They reflected mainstream values.<sup>119</sup> Government, for example, can't force a business to contract with certain groups (liberty). People can't force a business to contract with certain persons (freedom). A business may do what it wishes provided it does not hurt anybody. It can self-actualize at the community's expense (individualism). Government is obliged to eradicate race consciousness by making all race conscious contracts illegal.<sup>120</sup>

Upon deeper reflection, these cases communicate a somber message. A branch of government is saying, there's a new game in town. This Court will dismantle federalism as we know it. It will revive and broaden the scope of state rights.<sup>121</sup> The banner will be the tenth amendment.

111. *Id.* at 27-30.

112. Cook, *The Molting of America*, FORBES, Nov. 22, 1982, at 161, col. 1 [hereinafter Cook].

113. *Id.*

114. *Id.* at 161, col. 2.

115. See M. HARRINGTON, *THE NEW AMERICAN POVERTY* 129 (1984)[hereinafter M. HARRINGTON]. Blacks, rural people for much of United States history, migrated to cities after traditional industries, like steel, stopped expanding. *Id.* Jobs drew blacks north. *Id.* at 133. The mechanization of agriculture and the destruction of many of the structures of black rural life forced them out of the fields. Blacks, who settled in urban labor markets long after economic restructuring was underway, lost a chance to climb America's social ladder. *Id.* at 125-26. These workers and their progeny were knotted to down-sized or phased out industries. Their economic prospects were poor. *Id.* at 11, 126; see also Cook, *supra* note 112, at 163, 167.

116. Cook, *supra* note 112, at 167, col. 2; M. HARRINGTON, *supra* note 115, at 139.

117. See M. HARRINGTON, *supra* note 115 at 128-32, 134.

118. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491 (1989)(Justice O'Connor referred to a minority scholar at Yale); Delgado, *The Imperial Scholar: Reflection on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 563 (1984)(minority scholarly writings not acknowledged); see also Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in a Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1, 2-4 (1988)(importance of different perspectives in legal scholarship discussed).

119. See BELLAH, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 23-25, 32, 83, 142-44, 253-55 (1985). Those values are freedom, liberty, equality, and the accommodation of contending entrepreneurial interests. *Id.*; see also REEVES, *AMERICAN JOURNEY: TRAVELING WITH TOCQUEVILLE IN SEARCH OF DEMOCRACY IN AMERICA* 114-18 (1982).

120. *City of Richmond*, 488 U.S. at 494-95.

121. Kleven, *The Constitutional Philosophy of Justice William H. Rehnquist*, 8 VT. L. REV. 1, 9, 31-37, 46-53 (1983)[hereinafter Kleven].

It's a check upon federal power and a barricade behind which local democracy can operate.<sup>122</sup>

At this time in our history, there is no right or correct answer to the nation's social ills.<sup>123</sup> Given all of the ways known to humankind for dealing with social ills, democratic decision-making, at the state level, will produce the most peaceful results.<sup>124</sup> If blacks must be sacrificed, it is the tribute we will pay for democracy. Federal statutes shall be given the narrowest interpretation.<sup>125</sup> Some statutes should be given broad interpretations when, to do otherwise, would leave obvious constitutional wrongs uncorrected.<sup>126</sup>

There are responses to this. The first is legislation.<sup>127</sup> The second is a compelling legal vision.<sup>128</sup> The Constitution is a check upon states' rights.<sup>129</sup> The framers invested the central government with more power than the states.<sup>130</sup> There was some erosion of state's rights after the Civil War. One can see it in the thirteenth, fourteenth, and fifteenth amendments. Congress promulgated laws to protect freedmen, who were the targets of public and private discrimination. We are ninety years re-

122. *Id.* at 36-37.

123. *Id.* at 3.

124. *Id.*

125. *Id.*

126. *Id.* at 46.

127. See 136 CONG. REC. S,1522 (daily ed. Feb. 22, 1990)(statement of Sen. Hatch). Senator Hatch, Utah, would broaden the scope of the 1866 Civil Rights Act. He would have it cover "racial discrimination in performance, terms, and conditions of a contract." *Id.* Senator Kennedy, Massachusetts, would impose Rules of Construction for Civil Rights Laws. Under his bill, S.B. 2104, "No federal law protecting the civil rights of persons shall be construed to restrict or limit the rights, procedures, or remedies available under any other federal law protecting such rights." 136 CONG. REC. S,1018, S,1020 (daily ed. Feb. 7, 1990)(statement of Sen. Kennedy). Senator Dole, Kansas, would overturn the *Lorance* case. The statute of limitations would run from "the date a discriminatory seniority system was adopted" or "the date on which an employee suffered an injury." 136 CONG. REC. S,1522, S,1523 (daily ed. Feb. 22, 1990)(statement of Sen. Dole). Senator Kennedy would overturn *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989). Any reliance upon prejudice to make employment decisions would be illegal. 139 CONG. REC. S,1021 (daily ed. Feb. 7, 1990)(statement of Sen. Kennedy).

128. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Analysis might begin with Justice Brennan's perspective in *Price Waterhouse*. It's a good faith case. It addressed decision-making that affected an employee's promotion. The Supreme Court overturned the evidentiary standard the employer was obliged to carry in his defense. *Id.* at 237, 249-50. An employer must show that he has done something to disavow reliance upon sex-based comments (it could be race) when: (1) the job environment is hostile to a woman (African-American); and (2) a personnel report has been characterized by an expert as a cabined view of proper behavior for women (African-Americans). *Id.* at 236-37, 251-52. The 1964 Civil Rights Act orders the court to look at the moment of the discriminatory event. *Id.* at 239-41. Thereafter, the employer must present credible evidence that he would have arrived at the same decision without the sex-based comments. *Id.* at 249-50. In another context, the next step would be prevention. When an employer implements a decision which makes an employee's performance burdensome, that's a breach of contract, provided, the employer was aware of the result. See E. FARNSWORTH, *supra* note 16, at 526, 527 nn.7-8, 610-11.

129. See Bogan, *The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland's First Black Lawyers*, 44 MD. L. REV. 939, 985-1008 (1985). The Constitution was erected to give the central government power over the states. That sentiment is reflected in provisions (commerce and spending powers) and clauses (supremacy) in the Constitution. The Civil War Amendments eroded states' rights. You can see it in their wording and their legislative histories. *Id.*

130. Kleven, *supra* note 121, at 48.

moved from slavery. If we use 1954 as an historic moment, we are barely thirty-six years removed from a segregated society (a scheme people now fight to preserve).<sup>131</sup> When the protection of a freedman or his progeny vie with individualism, the *freed man* should win.

131. See *Ayers v. Allian*, 893 F.2d 732, 745-49 (1990)(development from *Plessy to Brown*). In American literature (perhaps in life) blacks are depicted as wretched people. See C. ERIC LINCOLN, *THE AVENUE, CLAYTON CITY* 109-110, 267 (1988). Hunger, violence and death are their companions. *Id.* at 208. In a sea of uncertainty some swim to security. *Id.* at 208-09. Those who have overcome travail — and there are precious few — fight for dignity, personal integrity, and a better future for their children. *Id.* at 207-52. Coping with life isn't made easy when the federal judiciary sides with people who are opposed to African-American self-improvement, or the improvement of other oppressed people. See, e.g., G. PARKS, *THE LEARNING TREE* 24-40, 90-106 (1963).

*Shurberg Broadcasting of Hartford v. Federal Communications Commission* is an example of judicial speech-making that creates despair. Faith Center, a Hartford broadcaster, purchased a license from the Federal Communications Commission. It told the Commission that it would follow federal rules and regulations. It breached its promise. The Federal Communications Commission (FCC) launched a revocation proceeding, that would culminate with a hearing, against the licensee. Before the hearing the FCC told the licensee that it could sell its license to a minority enterprise pursuant to a Commission policy, and, recoup up to 70% of its capital investment. Shurberg was a licensee applicant who wanted to fill the medial vacuum created by Faith Center's exit from the market. It saw the minority business (to whom the license was sold) as a rival. It challenged the FCC policy, endorsed by Congress, which authorized such sales. An administrative law judge affirmed the sale. The United States Court of Appeals, rejecting the option to affirm the FCC decision on valid grounds, grabbed an opportunity to read restrictions into the fifth amendment's tolerance for race-conscious measures. *Shurberg*, 876 F.2d 902, 914-15, 922, 930, 953 (D.C. Cir. 1989). Congress may enhance the economic opportunities of historically oppressed groups provided: (1) the enhancement takes the form of legislation; (2) the legislation is accompanied by some evidence of past societal discrimination; (3) the legislation imposes a light economic burden upon innocent third parties; (4) the legislation overturns the effects of past discrimination; (5) there's a finding that the government tried a race neutral policy first; (6) there's evidence that the legislation helps someone hurt by discrimination.

The dissenting opinion in *Winter Park Communications, Inc. v. FCC* thickens the despair. The FCC solicited offers for a new broadcast license. Four offerors submitted bids. The Commission accepted a bid from an offeror because of his ethnicity (Hispanic), community involvement and broadcast experience. A disappointed rival challenged the validity of the grant. Any policy enhancing the economic opportunities of one race, he quipped, denies the others equal protection of the laws.

Judge Williams saw this as a reverse discrimination case. He said: race conscious legislation, unsettling the hopes and business aspirations of white people, is subject to the strict scrutiny test. *Winter Park Communications*, 873 F.2d 347, 357 (D.C. Cir. 1989). He insisted, and I might add incorrectly, that the Supreme Court mandated strict scrutiny in *City of Richmond*. *Id.* at 360; cf. L. TRIBE, *supra* note 49, at 1530 (four-part test for classification subject to intermediate review). By quibbling over the terminology in a federal report, challenging the methodology by which the report was assembled, and the data, the judge showed the public how to overturn evidence supporting affirmative action. *Winter Park Communications*, 873 F.2d at 359.

These cases were appealed to the Supreme Court and consolidated into one case. See *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3001 (1990). Justice Brennan wrote the majority opinion. Congress, he said, may use the first amendment and the Communications Act to fortify race-conscious legislation against equal protection attacks. Race relations legislation — enhancing the economic opportunities of historically oppressed groups — will withstand constitutional scrutiny if it enhances broadcast diversity.

Justice O'Connor wrote a bitter dissent. *Id.* at 3028-47 (O'Connor, J., dissenting). The opinion fuels stereotypes. *Id.* at 3048. It sweeps aside the Court's duty to scrutinize all race-conscious legislation (ignoring for the moment its benign nature) with the strict scrutiny test. *Id.* at 3012-13. It expresses a tolerance for reverse discrimination. It undercuts individualism. *Id.* at 3011.

How does the Justice know that the opinion nourishes or fuels public stereotypes? Her opinion is bereft of evidence. She intimates that reverse discrimination encompasses unsettling hopes and business aspirations as well as settled expectations. Where are the cases for that? See L. TRIBE, *supra* note 49, at 1534-37 (discussion of affirmative action cases: *Bakke* and *Wygant*). She has misstated the Court's duty to scrutinize race-conscious legislation with the strict scrutiny test. See L. TRIBE, *CONSTITUTIONAL CHOICES* 222-23 (1985)(*Bakke* not signal "radical departure in the direction of broadened equal protection review"). Four, not five Justices, subscribed to her view in the *City of Richmond*. *Winter Park Communications*, 873 F.2d at 357, 360 (Williams, J., dissenting).

## IV. CONCLUSION

In America, all people aspire to do justice. The trouble with the aspiration is that the term is seldom defined by its pursuers. If justice is the religious application of procedural and substantive rules to facts,<sup>132</sup> the recent civil rights cases represent injustice. Borrowing a notion subscribed to by four Justices in a plurality decision to dim the promise in *Griggs* — end schemes that perpetuate the consequences of past discrimination — is unjust.<sup>133</sup> Using an interlocutory appeal, a totally inappropriate procedural vehicle, to address issues such as placing a heavier burden of proof on plaintiffs in Title VII cases, is unjust.<sup>134</sup> Using a rule of procedure, knowing that it would overturn the promise in *Griggs*, is unjust.

The alarmist cries, where do we go from here? If we have erected a temple of injustice, in which rules are what a few people make of them, maybe we should go away from this place. A person representing calmer folk would say — justice is entombed in understanding.<sup>135</sup> If the country's leaders have a model of society, buttressed by scientific and customary knowledge, decisions which tract with that model are just; decisions which clash with that model are unjust. If the Justices have signed onto decisions which clash with the model, the opinions should be called nonsense. We don't have to abandon the temple; we don't have to "go away from this place." We have to remind the Justices of their duty. In a nation that aspires to do so much, we, the guardians of justice, cannot afford to do less.<sup>136</sup>

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132. See L. THEBAUD, JUST GAMING 39, 41-42 (1989)[hereinafter L. THEBAUD].

133. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 671 n.18 (1989)(Stevens, J., dissenting); see *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 1007-08 (1988)(Blackman, J., concurring in part and concurring in judgment)(normal business practices perpetuating "racially disparate status quo," unless necessary business practices violate Title VII); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Facially neutral business practices, or those "neutral in terms of intent," violate Title VII if the practices maintain past discriminatory actions. *Id.* at 430.

134. *Wards Cove Packing*, 490 U.S. at 663 n.3 (Stevens, J., dissenting).

135. L. THEBAUD, *supra* note 132, at 38.

136. "You know," the calm person might say, "justice is the dim vision (what our intuition tells us about our surroundings) we see after we have gorged ourselves on facts. We have got to find words for what's illuminated by intuition and broadcast it everywhere." *Id.*