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THE SUPREME COURT, CIVIL RIGHTS LITIGATION, AND DÉJÀ VU

Constance Baker Motley†

INTRODUCTION

Since at least 1950, civil rights litigation has occupied much of the time of the Supreme Court, as well as the lower federal courts, as the drive for racial equality in the American community moved forward. When the Supreme Court in 1950 ordered the admission of a black law student in Texas to the all-white University of Texas Law School,² civil rights lawyers knew that a new day had dawned for black Americans. Soon thereafter, in the decade 1954 to 1964, the Supreme Court, in an unprecedented series of civil rights cases, declared unconstitutional all state statutes, policies, customs, usages, and city ordinances requiring or sanctioning racial segregation in the public life of the American community.

When the civil rights fight then turned to private racial discrimination which interfered with the liberty of black and white Americans in the public domain, clear-cut Supreme Court victories for civil rights litigators became more difficult. However, the grassroots revolution sparked by the High Court’s decisions caused the Congress, beginning in 1964, to rewrite and strengthen civil rights laws. These laws had been enacted by the Reconstruction Congress in the last century to guarantee equality for black Americans after the Civil War. Since 1964, interpretation of the newly enacted civil rights laws has increasingly occupied the Supreme Court’s time. Recently, much to the dismay of the civil rights community, the Court’s new majority has evidenced a growing weariness with “the race issue.” This discernible weariness parallels the turn of events in the last century after years of struggle for freedom and equality in the new American community following the abolition of slavery and the end of the Civil War.

When the Supreme Court’s majority in 1896 bestowed its blessing on the Southerners’ argument that the Constitution’s guarantee

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of equality for blacks was not violated by providing them with "separate but equal" public facilities and services, it was as much an expression of a nationwide weariness with the decades old race struggle as it was legal machinations to obscure this fact. Now, after forty years of civil rights litigation, a weariness has again begun to pall on the land and the High Court's new majority appears to be struggling to cover this reality.

THE EBB AND THE FLOW

During the last century, civil rights advocates merged with Abolitionists in the effort to abolish slavery. Although the anti-slavery movement had started at least as early as the eighteenth century, it was not really successful until the thirteenth amendment to the Constitution in 1865. Thereafter, it became clear that the national charter would have to be amended yet again to ensure that the newly freed slaves (as well as those who had been earlier freed) would have meaningful freedom. This need was particularly pressing in the South where state action was being used to maintain African-Americans in a second-class position in society. The constitutional lawyers of that day realized that another amendment to the Constitution, the basic law of the land, was required to address the problem of state-enforced racial discrimination and segregation. These lawyers proposed such an amendment and, together with the civil rights advocates of that day, succeeded in having the Constitution amended once again.

The fourteenth amendment of 1868 was designed to confer citizenship status on African-Americans and to prevent the states from depriving them of their rights as citizens. The amendment provided that Congress should enact laws designed to enforce its purpose and intent. The Reconstruction Congress did so by enacting a number of laws, many of which are still on the books. The constitutional lawyers who led the Congress during the Reconstruction era were also convinced that if African-Americans were to enjoy equal citizenship rights in the future, they would have to have political clout guaranteed them by the basic law of the land. Toward this end, the Congress proposed the adoption of the fifteenth amendment to the Constitution, which protected former slaves' right to vote and thus to participate in government in the same way as white citizens. National leadership thus provided the necessary political leverage for constitutional change.

Notwithstanding the three post-Civil War constitutional amendments which were designed to bring the newly freed slaves into the

3 Plessy v. Ferguson, 163 U.S. 537 (1896).
family of this Nation, and despite the Congress’s efforts to enforce the fourteenth amendment, the Supreme Court’s Plessy decision in 1896 effectively nullified that amendment by permitting the Southern states to provide separate but equal public facilities. When the student “sit-ins” began in 1960, this country learned that the Supreme Court in 1883 had declared one of Congress’s most important enactments to enforce the fourteenth amendment unconstitutional—that was the Civil Rights Act of 1875, which sought to guarantee former slaves equal treatment in privately owned places of public accommodation.

Following the Supreme Court’s decisions in 1883 and 1896, the dawn of the twentieth century found former slaves effectively stripped of their citizenship rights. This nullification was also accomplished by laws enacted by the Southern states designed to segregate former slaves from the cradle to the grave. As a result, the United States entered World War I with white soldiers and black soldiers in separate units, despite our proclamations to other nations that we were making the world safe for democracy.

When World War II broke out, African-Americans had been emancipated for almost three-quarters of a century. Many former slaves and their descendants had migrated from the South to northern industrial centers like New York, Chicago, and Philadelphia. As a consequence, what was once largely a southern problem arising from slavery and emancipation became a national problem with segregated housing, schools, and other facilities in northern urban centers. Nothing significant had been done about the problem of racial segregation on a national level in this century until it became apparent that our effort to win World War II would require the utilization of African-Americans in the armed forces and defense industries. President Roosevelt issued Executive Order 8803 so that blacks would be hired in defense plants. Roosevelt, however, did not abolish segregation in the armed forces. Most Americans have already forgotten, if they were alive at that time, the real societal stress which World War II placed upon this Nation’s physical, psychological, and work force resources. One area of deep-seated anxiety was the fact that racial segregation was pervasive; indeed, segregation in the armed forces was the foremost symbol of our home-grown racism. It proved impossible for this country to escape the national and international embarrassment which flowed from the fact that African-American citizens were being asked to go abroad to die for this Country when at home they were still wearing the badges of their former servitude.

Segregation in the armed forces subjected black servicemen to a particularly galling humiliation which, when combined with the
knowledge that they were being asked to die for their racist country, gave them new insight into their status as American citizens. This provided the basis for an emergent militancy on the part of African-Americans, evidenced by the fact that African-American servicemen enrolled in the NAACP in unprecedented numbers during World War II. The new militancy planted the seeds of grassroots support for the civil rights revolution which was to come.

President Truman eventually abolished segregation in the armed forces in 1948 as a direct result of the efforts of the NAACP, thus striking the first major, national-level blow to segregation in American society. The next such blow came from the Supreme Court in 1954 when it declared segregation in the public schools unconstitutional. In the decade which followed, the Supreme Court ruled unconstitutional segregation in all other public facilities and services, including segregation in Southern courthouses. This was accompanied by the enactment of the Civil Rights Act of 1964, another congressional attempt to enforce the fourteenth amendment. This attempt was successful; legal segregation was dead by 1964.

Many of the Burger Court's decisions approved potent weapons for federal judges, civil rights attorneys, and the government to combat racial and other forms of segregation. This arsenal included the bussing of school children, disparate impact suits under Title VII of the Civil Rights Act, the use of 42 U.S.C. § 1981 to challenge race discrimination by private parties, certain types of race-conscious methods such as contract set-asides (at least when mandated by Congress), and voluntary affirmative action by public and private parties to remedy past discrimination. The Burger Court also decided that governmental distinctions based on gender required heightened scrutiny under the equal protection clause of the fourteenth amendment. Further, the Burger Court held (as I had argued before it years earlier) that a defendant in a criminal

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proceeding could attack the use of peremptory challenges by the prosecution to exclude members of the defendant's racial group from the petit jury.\textsuperscript{14}

During the Burger Court years, Congress extended the coverage of Title VII to public employees.\textsuperscript{15} It enacted Title IX of the Education Amendments of 1972,\textsuperscript{16} the Rehabilitation Act of 1973,\textsuperscript{17} the Age Discrimination in Employment Act of 1978,\textsuperscript{18} and the Pregnancy Discrimination Act of 1978.\textsuperscript{19} It extended the provisions of the Voting Rights Act.\textsuperscript{20} And in 1987, Congress overruled the Court's decision in \textit{Grove City College v. Bell},\textsuperscript{21} thereby giving a broad reach to federal statutes which prohibit discrimination by recipients of federal funds.\textsuperscript{22}

At the same time, the Burger Court also set limits on relief for civil rights claimants under the equal protection clause. In a series of cases involving school desegregation,\textsuperscript{23} public employment practices,\textsuperscript{24} and housing practices,\textsuperscript{25} the Court clarified that it would recognize only claims of intentional (i.e., de jure and not de facto) discrimination under the Constitution.

It also found that the Constitution prohibited certain kinds of remedial actions by government agents. In what is probably the most famous civil rights decision of the Burger Court, \textit{Regents of the University of California v. Bakke},\textsuperscript{26} the Court found that an affirmative action admissions policy that reserved a certain number of places to nonwhites in a state-supported medical school illegally discriminated against a white applicant.\textsuperscript{27} Although the Court approved the use of race-conscious admissions methods as long as they reserved some sort of individual consideration for all otherwise qualified applicants,\textsuperscript{28} the Court has since extended the use of the equal protec-

\textsuperscript{17} 29 U.S.C. §§ 701-796i (1988).
\textsuperscript{18} Id. §§ 621-634.
\textsuperscript{20} Id. § 1973.
\textsuperscript{21} 465 U.S. 555, 573 (1984) (receipt of federal aid by college students does not trigger institution-wide coverage under Title IX).
\textsuperscript{24} Washington v. Davis, 426 U.S. 229 (1976).
\textsuperscript{26} 438 U.S. 265 (1978).
\textsuperscript{27} Id. at 271-72.
\textsuperscript{28} Id. at 316-17.
tion clause to limit remedial governmental conduct in the context of employment relations\(^\text{29}\) and contracting.\(^\text{30}\)

The first terms of the Rehnquist Court showed little change in its ambivalence toward civil rights claimants. The Court approved some voluntary remedial actions by private employers,\(^\text{31}\) and a federal court order requiring the temporary use of racial quotas to remedy a long history of discriminatory conduct by a public employer.\(^\text{32}\) The Court also approved the use of 42 U.S.C. § 1981 to challenge discrimination against Jews\(^\text{33}\) and Arabs,\(^\text{34}\) and the use of a disparate impact theory under Title VII to challenge subjective decision-making practices of an employer.\(^\text{35}\)

The Rehnquist Court, however, showed early signs of hostility to broad challenges to governmental conduct where an individualized showing of discriminatory intent was lacking. In *McCleskey v. Kemp*,\(^\text{36}\) the Court rejected a challenge to the Georgia death penalty based on overwhelming statistical evidence that the killers of whites were 4.3 times more likely to receive the death penalty than killers of blacks.\(^\text{37}\) The evidence also showed that blacks who killed whites were nearly three times more likely to be sentenced to death than were whites who killed other whites.\(^\text{38}\) The Court nevertheless rejected the challenge, stating that McCleskey (a black defendant convicted of murdering a white and sentenced to death) had failed to show that the decision of any juror in his case was racially motivated.\(^\text{39}\) This is extremely difficult, if not impossible, to do. In *Bakke*, Justice Powell had indicated that a concern for individual treatment required the Court to protect individual whites from governmental action designed to correct the effects of racism.\(^\text{40}\) In *McCleskey*, however, that concern for individual treatment became a justification for rejecting challenges to governmental conduct pervaded by racism where the challenge lacked individualized forms of evidence.\(^\text{41}\)

In the Supreme Court's 1988-89 Term, one can see what is per-


\(^{37}\) Id. at 287.

\(^{38}\) Id.

\(^{39}\) Id. at 292-93.

\(^{40}\) *Bakke*, 488 U.S. at 290-91.

\(^{41}\) *McCleskey*, 481 U.S. at 297.
haps only the beginning of a new effort by the Court to stem the tide of civil rights litigation which has occupied so much of the federal courts' time since 1950. A hostility toward challenges to systemic inequality, together with a desire to protect "innocent" members of dominant groups, pervaded the Court's decisions in that Term.

ANOTHER EBB?

In a series of civil rights decisions, beginning with the Richmond case concerning municipal set-asides for minority contractors, the Court established new limits on remedial programs and on the use of the most potent statutory weapons against discrimination. In one Term, the Court subjected voluntary governmental efforts to readdress systemic racism to a far more restrictive standard of review and increased the burdens of proof of past racism. It severely limited the ability of Title VII claimants to challenge employment practices by showing discriminatory effect. While expanding the opportunity for non-parties to bring reverse discrimination challenges against affirmative action schemes, the Court limited the time within which potential victims of certain types of discriminatory practices may challenge those practices. And, finally, the Court read the post-Civil War statutes narrowly so as to limit severely their application to both private and public conduct. In short, the Court's signals are no longer mixed.

To demonstrate the parallels between this century and the last, I will examine more closely three decisions of the 1988-89 Term. The Richmond case gives some indication of the Court's current understanding of the equal protection clause—specifically, the extent and ways it protects dominant groups (like whites) from voluntary remedial actions of local governments. The other two cases, Wards Cove Packing Co. v. Atonio and Patterson v. McLean Credit Union, provide some indication of how the current majority intends to treat congressional schemes designed to combat discrimination and the Court decisions interpreting them.

of Richmond which required that contractors awarded city contracts subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises" ("MBE's"). 51 Under the plan, the city could waive this requirement upon proof that sufficient qualified MBE's were unavailable to participate. 52 Although the plan claimed to be "remedial," it was adopted after a public hearing at which the majority of the city council found no direct evidence that the city had discriminated on the basis of race in awarding contracts, or that prime contractors had discriminated against minority subcontractors. 53 However, the evidence that was presented included the following: a study showing that while 50% of the population of the city was black, only 0.67% of its prime construction contracts had been awarded to minority businesses in recent years; figures showing that many of the local contractors' associations had virtually no MBE members; and testimony that there had been widespread racial discrimination in the local, state, and national construction industries. 54

Writing for the Court, Justice O'Connor held that all racial classifications, even those considered "benign" or "remedial," should be subjected to strict scrutiny, the most demanding scrutiny under equal protection analysis. Significantly, the Court announced that local governments did not have the same authority as Congress (acting under section 5 of the fourteenth amendment) to use such remedial methods. 55 The Court then held that a generalized claim of past discrimination in the construction industry did not justify the use of a racial quota, because such a claim provides no guidance or limit on the appropriate scope or duration of the remedy. 56 Against this backdrop, the Court found that the city had failed to demonstrate a compelling interest to justify the plan and that the plan was not narrowly tailored to remedy the effects of past discrimination. 57 The inclusion of minority groups other than blacks, regardless of their geographic location within the United States, was particularly damning in the eyes of the Court. 58 The Court found that the inclusion of these groups undermined the claim that the plan was designed to remedy the effects of past wrongs. 59

Justice Marshall, one of the leaders of the battle for desegrega-

51 Richmond, 488 U.S. at 477-78.
52 Id. at 478-79.
53 Id. at 480.
54 Id.
55 Id. at 504-05.
56 Id. at 505.
57 Id.
58 Id. at 506.
59 Id.
tion in the post-World War II era, wrote a strong dissent, which was joined by Justices Brennan, Blackmun, and Stevens. Objecting to the Court's application of strict scrutiny, Marshall attested to the "profound difference" that "separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism."\(^{60}\) By failing to make this distinction, Marshall charged, the majority "signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice."\(^{61}\) Marshall also took issue with the Court's analysis of the evidence of discrimination on which the City of Richmond based its decision to conduct its remedial program. He expressed alarm that the "daunting standard" of proof placed on states and localities by the Court would discourage the battle against racial discrimination and its effects.\(^{62}\)

In any event, it seems clear from the *Richmond* decision that the conservative understanding of the equal protection clause as promoting formalistic neutrality has found support in a solid majority of the Court. The dissent's conception of equal protection as an instrument to protect and advance the interests of those historically victimized has suffered a serious attack.

The *Wards Cove* case involved a disparate impact challenge under Title VII of the Civil Rights Act of 1964 to a set of employment practices by a private company that ran a canning operation in Alaska.\(^{63}\) Disparate impact cases are those in which the plaintiff does not allege discriminatory intent but instead claims that some employment practice (such as requiring that all employees have a high school diploma) has a disproportionately adverse effect on a protected group (e.g., black job applicants). The theory behind disparate impact cases is that apparently nondiscriminatory practices can needlessly perpetuate past discrimination. If such a practice is not necessary for business reasons, it should not be used.

The Court approved the use of disparate impact challenges under Title VII in the 1971 case of *Griggs v. Duke Power Co.*\(^{64}\) But the Court has held that the Constitution alone, more specifically the equal protection clause, requires a showing of discriminatory intent. Disparate impact theories offer civil rights claimants a powerful tool in the fight against discrimination in situations where the effect of

\(^{60}\) *Id.* at 551-52 (Marshall, J., dissenting).
\(^{61}\) *Id.* at 552.
\(^{62}\) *Id.* at 555.
\(^{64}\) 401 U.S. 424 (1971).
discrimination is persistent, yet discriminatory intent is lacking or evidence of intent is difficult to uncover.

Although several legal issues were in dispute in *Wards Cove*, the most prominent was the question of burdens of proof. Since the Court first approved disparate impact challenges under Title VII in *Griggs*, judges, lawyers, and federal agencies responsible for enforcing Title VII commonly assumed that once a plaintiff established that an employer was engaging in some practice with a disparate impact on a protected group, the employer had the burden of proving that the practice was a "business necessity." The Court's decision in *Wards Cove* has turned this assumption on its head.65

In reviewing a disparate impact challenge to a canning operation in which virtually all of the "unskilled" cannery workers were nonwhite and virtually all of the "skilled" non-cannery workers where white, the Court, per Justice White, held that the burden remained at all times with the plaintiff to show that the challenged hiring practices were not justified by legitimate business interests.66 Only the burden of coming forward with some evidence of business justification (i.e., the burden of production) shifted to the employer after the employee showed a disparate impact, but never the burden of persuading that the challenged practice was justified.

In addition, the Court held that while "a mere insubstantial justification" would not be sufficient to relieve the employer of liability, "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster."67 The Court found that that "degree of scrutiny would be almost impossible for most employers to meet," and that it would result in a "host of evils" (particularly employers using racial hiring quotas) to avoid liability.68

Finally, the Court held that if the plaintiff cannot persuade the trier of fact (in a Title VII case, the judge) that the employer's practices lacked business justification, the employee can still show that alternative, nondiscriminatory practices are available. These practices, however, must be "equally effective" as the employer's chosen method in achieving legitimate business goals, taking cost and other burdens to the employer into account.69

In dissent, Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, challenged the majority's understanding of disparate impact suits. Stevens accused the majority of departing

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65 *Wards Cove*, 109 S. Ct. at 2126.
66 *Id.*
67 *Id.* (citations omitted).
68 *Id.* (citations omitted).
69 *Id.* (citations omitted).
from the body of law on disparate impact and "reformulating" the burdens of proof.70 Calling this change in the law "unwise," Stevens characterized the burden of showing business necessity as an "affirmative defense."71 Traditionally, the defendant has the burden of proving such a defense. Justice Stevens also expressed astonishment that the majority found no requirement that the challenged practice be "essential," calling that departure from traditional disparate impact analysis "most disturbing."72

As the majority would have it, the Wards Cove decision broke no new ground; it merely clarified various principles of Title VII law. The civil rights community, however, saw the decision as an assault on an established and powerful weapon against illicit discrimination and its effects in the sphere of employment. The shift in burdens of proof and the reduced scrutiny of employment practices, together with other requirements and limitations on plaintiffs announced in Wards Cove, make it much more difficult and costly for employees to challenge practices based on their effect. Employees claiming discrimination will now have to bear those burdens or undertake the often more burdensome, if not impossible, task of proving discriminatory intent.

The "evil" perceived by the majority of the Court in Wards Cove was the undue burdening of those not found to have intentionally discriminated. To prevent that evil, the Court chose to subject conduct perpetuating the effects of discrimination to reduced scrutiny. In contrast, the dissenting Justices expressed concern that fair tools in the fight against discrimination and its legacy had been needlessly blunted.

The Patterson decision,73 written by Justice Kennedy, followed a similar pattern. In that case, a black woman, Brenda Patterson, brought suit under 42 U.S.C. § 1981, claiming that her employer had subjected her to racial harassment.74 Section 1981, which prohibits racial discrimination in the "making and enforcement of contracts," was one of a series of measures enacted by the Reconstruction Congress to combat racist restrictions on blacks in post-Civil War society. In Patterson, the Court initially created a stir when it sua sponte requested reargument on the question of whether section 1981 reached private contractual (in this case, employment) relations. The Court had decided that issue in Runyon v. McCrary when it approved the use of section 1981 to challenge the exclusion

70 Id. at 2136 (Stevens, J., dissenting).
71 Id. at 2131 (citations omitted).
72 Id. at 2132.
74 Id. at 2368-69.
of blacks from a private school. 75 In the end, the Court refrained from overruling Runyon but instead read section 1981 narrowly, so as to prevent its application to conduct following the formation of a contract. 76 In Brenda Patterson’s case, that meant that she could not use section 1981 to challenge the racial harassment she endured at the hands of her employer. 77

Once again, the Court did not claim to be upsetting the expectations of the legal community. Paying homage to stare decisis, the Court indicated its reluctance to overrule statutory interpretations where Congress has let them stand. It then found that a “sound construction” of section 1981 yields an interpretation which does not frustrate the objectives of Title VII. 78 This construction, however, eviscerated section 1981.

What is particularly noteworthy about Patterson is the Court’s use of Title VII to limit the scope of section 1981. Rather than reading both statutes as instruments created by Congress to fight discrimination in different but complementary ways, the Court read the administrative requirements of Title VII and the limits of the remedies it offers as creating a special balance of interests which should not be disturbed. The Court reasoned that the relief available under section 1981 should be limited accordingly. 79 In reaching this result, the majority ignored the problem raised by Justice Brennan’s dissent, that section 1981 is not limited to employment contracts. 80 The Court thus used Title VII to limit both the availability of relief offered by section 1981 81 but not offered by Title VII in employment discrimination suits, and access to other remedies in areas where no other congressional scheme serves even plausibly as a substitute.

The Patterson decision, like that in Wards Cove, reflects a strong concern not to burden those accused of civil rights violations. To avoid giving civil rights claimants overlapping tools to combat intentional racial discrimination, the Court employed a strained, ahistorical, and counter-intuitive reading of section 1981. In the same month that the Court issued those two decisions, it issued several others further limiting the ability of civil rights claimants to seek relief under Title VII and the Reconstruction-era civil rights statutes. It also expanded opportunities to bring reverse discrimination suits

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76 Patterson, 109 S. Ct. at 2372.
77 Id. at 2373.
78 Id. at 2371.
79 Id. at 2374-75.
80 Id. at 2390.
81 Section 1981, in contrast to Title VII, offers remedial relief in the form of punitive damages and compensatory damages beyond back pay.
to challenge consent decrees entered long ago to settle discrimination claims. Although the Court in each of these cases modestly claimed only to be following precedent, history, or the plain language of the statutes before it, the Court succeeded in the course of less than one month, in reshaping the civil rights landscape for those already facing a steep incline in the road to fairness.

**Conclusion**

The Court’s response in each of these civil rights cases reflects a weariness in this country with civil rights issues that parallels that of the last century. This weariness is perhaps best demonstrated in its political context by the failure to mention civil rights, except in fleeting terms, in recent State of the Union and Inaugural addresses. When President Bush vetoed the Civil Rights Act of 1990\(^2\) and the Senate failed by one vote to override that veto, Congress’s attempt to remedy the Supreme Court’s restrictive interpretations of prior civil rights acts met with at least temporary defeat. It remains now with Congress to determine if this Nation will have to litigate basic issues of racial discrimination into the next century.

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