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## **The Rehnquist Court's Pragmatic Approach to Civil Rights**

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# **The Rehnquist Court's Pragmatic Approach to Civil Rights**

**Nelson Lund<sup>†</sup>**

## **I. Introduction**

The topic given to me for this symposium—civil rights and the Rehnquist Court—requires an immediate clarification, for the term “civil rights” can have a variety of meanings. In order to keep the topic manageable, I will limit myself to cases involving laws meant to limit or forbid discrimination on the basis of relatively fixed characteristics like race, sex, and disability. Within this field, I find a fairly consistent pattern of decisions since 1986, when William H. Rehnquist became Chief Justice, and I also see a fairly obvious explanation. Throughout this period, Justice Sandra Day O’Connor has frequently been the swing voter in the most important cases. She has consistently sought to move the law toward what she sees as a practical balance among competing goals reflected in the enactments the Court is called on to interpret, and her particular pragmatic vision has largely dominated the Court’s decisions throughout this period.

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In this paper, I use the term “pragmatic” in the same general sense as it is used by Judge Posner, the foremost contemporary exponent of what he calls legal pragmatism.<sup>1</sup> This approach can be understood in opposition to legal formalism, and to embody the everyday meaning of pragmatism: a mood or mindset that is “practical and business-like, ‘no-nonsense,’ disdainful of abstract theory and intellectual pretension, contemptuous of moralizers and utopian dreamers.”<sup>2</sup> Applied to adjudication, it means that judges “should try to make the decision that is reasonable in the circumstances, all things considered.”<sup>3</sup> As this formulation suggests, it “means that different judges, each with his own idea of the community’s needs and interests, will weigh consequences differently.”<sup>4</sup> My thesis is that the Rehnquist Court’s approach to antidiscrimination law has been driven very substantially (although of course not exclusively) by Justice O’Connor’s judgments about what is reasonable in the circumstances, all things considered, rather than by any abstract theory or allegiance to legal formalism. My hope is to shed some light on the nature of the pragmatic judgments reflected in the Court’s decisions by looking in some detail at the choices that have emerged in the face of contending legal arguments.

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Antidiscrimination laws always involve trade-offs among competing goods. Thus, for example, these laws never seek to prohibit *all* discrimination based on characteristics like race or sex, sometimes because such discrimination is considered tolerable or even desirable in certain contexts, but also because all antidiscrimination laws impose significant costs of various kinds. These can include such costs as restrictions on the freedom of those who would like to discriminate, reductions in economic efficiency, administrative costs (including the error costs

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<sup>1</sup> See generally Richard A. Posner, *Law, Pragmatism, and Democracy* (2003).

<sup>2</sup> *Id.* at 49-50.

<sup>3</sup> *Id.* at 73.

<sup>4</sup> *Id.* at 71.

entailed in any system of enforcement as well as institutional costs that may arise from assigning one government agency rather than another to makes choices among competing goals), and adverse effects on some of the intended beneficiaries of the government's protective measures.

Sometimes the right balance is a matter of unquestioned consensus. Nobody has yet advocated that the government forbid individuals to engage in racial discrimination when choosing whom to marry, and nobody any longer advocates that governments be freed to disenfranchise racial minorities. In a host of contexts, however, the right balance is a matter of intense controversy, partly because of difficulties in determining what the costs and benefits of an antidiscrimination rule will prove to be, and partly because of disagreements about what weight to assign to various costs and benefits.

A large number of antidiscrimination laws (both statutes and constitutional provisions) have been enacted, and these laws have generated a very large number of interpretive judicial decisions. Space constraints in this symposium preclude anything like a comprehensive survey. Accordingly, I will limit myself to three lines of case law. I find these cases representative of the Rehnquist Court's approach to antidiscrimination law, and I think they illuminate Justice O'Connor's preeminent role in fashioning that approach.

Part I looks at the Court's decisions interpreting the Americans with Disabilities Act (ADA). Enacted in 1990, this is a "mature" statute in the sense that Congress and the contending interest groups that took an interest in its drafting had access to a great deal of information about how similar statutes had operated and been interpreted in the past. For that reason, one should expect the ADA to contain relatively few examples of language with inadvertent implications. To the extent that the ADA contains language that is vague or ambiguous, or startling in its apparent effects, it is reasonable to presume that this was deliberately done or the result of deliberate compromises. Besides being "mature" in this sense, the ADA was brand new, which means that the Rehnquist Court has been unconstrained by prior interpretive decisions that might have come out differently

if this Court were considering them as an original matter.<sup>5</sup> Together, these two features of the ADA suggest that we will get to see the Rehnquist Court operating in a relatively “pure” interpretive mode.

Part II examines cases dealing with the related issues of disparate impact doctrine and affirmative action under Title VII of the Civil Rights Act of 1964. These cases illustrate the Rehnquist Court’s approach to managing tensions between interpretive fidelity and the precedential effect of decisions inherited from the Burger Court.

Part III considers the application of equal protection doctrine to affirmative action programs. Here, in contrast to what we will see in the ADA and Title VII cases, the Court for a long time followed a tentative and wavering course. Last year, however, saw a bold and decisive ruling in *Grutter v. Bollinger*.<sup>6</sup> With that decision, the nature of the Rehnquist Court’s pragmatic approach to civil rights stands fully revealed.

## II. Reading a New Slate: The ADA

Although all antidiscrimination laws entail tradeoffs and compromises among various goals, it is sometimes tempting to assume that Congress would have wanted the courts to put a stop to many more forms of discrimination than its statutory language actually forbids. This temptation is especially strong in cases involving racial discrimination, given our nation’s long history of morally repugnant policies in this area, and in cases involving sex discrimination, where public opinion about the appropriate role of women in society has shifted dramatically during the last few decades. With respect to the disabled, however, almost everyone will

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<sup>5</sup> The ADA incorporates by reference certain interpretations of language that is common to the ADA and the Rehabilitation Act of 1973. See 42 U.S.C. § 12201(a). In the ADA context, those interpretations are authoritative because they were adopted by Congress, not because of whatever precedential value they might otherwise have had.

<sup>6</sup> 123 S. Ct. 2325 (2003).

easily recognize that achieving “equality” will often be impossible or counterproductive, and that many forms of discrimination against the disabled are quite justifiable, and even salutary.<sup>7</sup>

Accordingly, the ADA tries in a variety of quite obvious ways to limit the costs of imposing antidiscrimination rules, and the Court has concluded that “[t]he statute seeks to *diminish* or to eliminate the *stereotypical* thought processes, the *thoughtless* actions, and the *hostile* reactions that far too often bar those with disabilities from participating fully in the Nation’s life, including the workplace. . . . [but does not] demand action beyond the realm of the reasonable.”<sup>8</sup> The Court has taken the modesty of the ADA’s goal quite seriously, and a significant fraction of the dozen-odd cases decided so far are unanimous rulings overturning decisions by the lower courts that would have expanded the protective reach of the ADA beyond what its terms allow.<sup>9</sup>

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<sup>7</sup> This is not to say, of course, that everyone will agree about how far the law should go in promoting equality. For arguments that the ADA goes too far, *see, e.g.*, Roger Clegg, *The Costly Compassion of the ADA*, 136 *Public Interest* (Summer 1999), at 100; Roger Clegg, *Bragdon v. Abbott, Asymptomatic Genetic Conditions, and Antidiscrimination Law: A Conservative Perspective*, 3 *J. Health Care L. & Pol’y* 409 (2000). Others think that the statute does not go far enough. *See, e.g.*, Michelle Parikh, Note, *Burning the Candle at Both Ends, And There is Nothing Left for Proof: The Americans with Disabilities Act’s Disservice to Persons with Mental Illness*, 9 *Cornell L. Rev.* 721 (2004).

<sup>8</sup> *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002) (emphasis added). The Court cites for this proposition the “Findings and Purposes” section of the statute, 42 U.S.C. §§ 12101, but some of the language in this section actually sweeps much more broadly. *See, e.g.*, § 12101(b)(1) (purpose of the statute is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”). A better argument for the Court’s conclusion would be based on the many substantive provisions of the statute that permit discrimination, as for example when accommodation of the disabled would not be “reasonable” or would impose an “undue hardship,” or where the discrimination is “job-related and consistent with business necessity,” or where removal of a barrier is not “easily accomplishable and able to be carried out without much difficulty or expense.”

<sup>9</sup> *Albertson’s Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (unanimously reversing a Ninth Circuit ruling that would have protected a commercial truck driver who was fired after he failed to meet basic vision standards established by a federal regulation); *Toyota Motor*

Most of the remaining cases involve genuine statutory ambiguities. What I find most striking in these cases is the relatively narrow range of the disagreements among the Justices. What is missing here is the deep conflict over basic principles that one sees in some other areas of the law during this period, including some other areas of civil rights law.

**A. *Bragdon v. Abbott***

A good illustration is the Court's first major ADA decision, *Bragdon v. Abbott*.<sup>10</sup> The defendant was a dentist who refused to treat an asymptomatic HIV patient in his office, although he was willing to treat her in a hospital. The threshold issue in the case was whether the plaintiff was disabled within the meaning of the statute. Writing for a majority of six, Justice Kennedy concluded that the plaintiff's asymptomatic HIV is a statutory disability because it "substantially limits [her] major life activity" of reproduction, by discouraging her from becoming pregnant. The Court interpreted the term "major" to mean important or significant, and concluded that reproduction obviously meets that definition. The majority found reinforcing support in the facts that a) Congress drew the relevant statutory language from the Rehabilitation Act of 1973, and that statute had consistently

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*Mfg v. Williams*, 534 U.S. 184 (2002) (unanimously reversing a Sixth Circuit ruling that would have treated a plaintiff as disabled based on her inability to perform manual tasks associated with a particular job); *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002) (unanimously reversing a Ninth Circuit ruling that misapplied the *expressio unius* canon of construction and gave insufficient deference to EEOC regulations); *Barnes v. Gorman*, 536 U.S. 181 (2002) (unanimously reversing an Eighth Circuit ruling that would have allowed punitive damages against public entities, with six Justices relying on a Spending Clause analysis and three Justices relying on the absence of a clear statement of congressional intent to subject municipalities to punitive damages); *Raytheon Co. v. Hernandez*, 124 S. Ct. 513 (2003) (unanimously reversing a Ninth Circuit ruling that improperly applied a disparate-impact analysis to a disparate-treatment claim). The Court has evenhandedly refused to *contract* the reach of the ADA in a case where the statutory language appeared to protect a state inmate with hypertension who sought admission to a prison boot camp. *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206 (1998) (unanimously applying a plain meaning analysis of the statute).

<sup>10</sup> 524 U.S. 624 (1998).

been interpreted to cover individuals with asymptomatic HIV, and b) the same position had been adopted by the Justice Department and other agencies authorized to administer the ADA.

Dissenting from this analysis, Chief Justice Rehnquist (joined by Justices Scalia and Thomas) objected on three independent grounds. First, the language of the statute requires an individualized inquiry into whether an impairment limits a major life activity of the individual plaintiff, and *this* plaintiff had produced no evidence that she engaged in reproductive activities prior to becoming infected with the HIV virus. Second, the term “major” should be interpreted to mean “greater in quantity, number, or extent” because that is the definition most consistent with the statute’s illustrative list of major life activities (“caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working”). Third, an asymptomatic HIV infection does not impair a patient’s physical ability to become pregnant, even though it may discourage a woman from doing so because of concern that the virus might be passed on to her sexual partner or to her child. Justice O’Connor agreed with Rehnquist that an individualized inquiry is required and that giving birth is not generally akin to the statute’s illustrative list of major life activities.<sup>11</sup>

Notice how narrow the interpretive disagreements are. Every member of the Court adopted an interpretation compatible with the statutory language, and each adopted a view that one could easily imagine being endorsed by the enacting Congress. The crucial disagreement turned on which of two canons of statutory

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<sup>11</sup> Having concluded that the plaintiff was disabled within the meaning of the statute, the Court went on to consider the defendant’s claim that his refusal to treat her in his office was lawful under a provision that allows discrimination where an individual would otherwise pose “a direct threat to the health or safety of others.” Kennedy, along with Souter and Ginsburg, concluded that summary judgment for the plaintiff would probably be appropriate given the scientific literature on the risk posed to the dentist by the patient. Stevens and Breyer concluded that summary judgment was surely appropriate, but joined Kennedy’s opinion in order to create a majority holding in the case. Rehnquist, O’Connor, Scalia, and Thomas objected that the majority improperly required special deference to the views of politically appointed health officials and that the defendant in this case had presented more than enough evidence to avoid summary judgment on the direct-threat issue.

construction should apply. The majority relied on the presumption that when administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute suggests an intent to incorporate those interpretations as well. The dissent invoked a competing canon of construction, namely *ejusdem generis*. Both canons create rebuttable presumptions, and neither the majority nor the dissent offered a compelling reason for rejecting the analysis adopted by the other side. I thought that the dissent, and especially O'Connor's narrow conclusion, won on points, but I cannot find anything that looks like a knockout blow.

**B. *Sutton v. United Airlines***

A somewhat stronger, but still relatively narrow, disagreement appears in the Court's next important decision. *Sutton v. United Airlines* involved two severely myopic individuals who were rejected for employment as global airline pilots because they did not meet the carrier's minimum requirements for uncorrected visual acuity.<sup>12</sup> The plaintiffs' vision was normal when they wore corrective lenses, and the main issue in the case was whether a determination about whether they were "disabled" should be made in their corrected or uncorrected condition.

Writing for a majority of seven, Justice O'Connor concluded that an individual whose impairment is fully corrected by a device such as eyeglasses is not disabled within the meaning of the statute. She offered three arguments. First, the statute applies only to an impairment that "substantially limits" a major life activity. The use of the present indicative verb means that impairment must actually and presently cause a substantial limitation, rather than that the impairment might, could, or would be limiting if corrective measures were not taken. Second, disability inquiries must be individualized. If employers and courts were required to speculate about what limitations an individual would suffer if corrective measures were not taken, decisions would necessarily have to be made on the basis of general information about the effects that such impairments usually have.

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<sup>12</sup> 527 U.S. 471 (1999).

Third, and in the Court's view most important, the statute includes congressional findings estimating the number of disabled individuals in the United States at 43 million. If people with corrected impairments like myopia were considered disabled, the statute would cover several times that number.

Writing in dissent for himself and Justice Breyer, Justice Stevens argued that the statute clearly implies that the proper approach is to look at individuals in their uncorrected state, and that even if there were some ambiguity it is resolved by the legislative history. Some of Stevens' arguments appeal to prejudice or common sense, as when he suggests that the majority's approach carries the odd implication that someone who lost a limb at Iwo Jima would not be considered disabled if he used an effective prosthetic. And some of his arguments amount to little more than nostrums about giving generous, rather than miserly, constructions to remedial statutes.

In addition, however, Stevens had a very powerful textual argument, to which the majority offered no response. Besides the definition of disability as an impairment that substantially limits a major life activity, the statute also defines disability to include "a record of such an impairment." According to Stevens, this plainly covers a person who had an impairment that is now completely cured, and it would be quite bizarre for the statute to protect those whose impairments are completely cured but not those whose impairments are merely treatable. Reinforcing this argument, as Stevens emphasized, is the fact that the statute contains numerous other hurdles for plaintiffs who are not suited for the positions they seek. The question here goes only to the composition of the class of individuals to which the statute applies, rather than to any questions about what kinds of discrimination are prohibited or permitted by the statute. It would hardly be more strange for the ADA to cover many individuals who will never qualify for relief than it is for the Age Discrimination in Employment Act to cover everyone who is at least 40 years old.

I find Stevens' textual argument quite strong, and significantly more persuasive than the majority's reliance on the congressional estimate of 43 million

Americans with disabilities.<sup>13</sup> Because the majority declined to address his argument, I would be inclined to award the dissent a TKO. More important, however, we should ask why the majority reached the result it did without responding to Stevens' most powerful legal argument. Stevens himself suggests that the majority's interpretation of the statute stemmed from fear of a tidal wave of lawsuits,<sup>14</sup> and from a reluctance to magnify the work of an overburdened judiciary by legalizing issues—such as how to treat the legions of people with myopia and other correctable impairments—that are best left to the private sphere.<sup>15</sup>

If Stevens is right about this, and if he is also right in suggesting that plaintiffs with corrected impairments will seldom be able to surmount the other statutory obstacles to relief, the majority's ruling may in practice primarily affect meritless claims. Many such claims, it appears, can now be dismissed under Rule 12(b)(6), as the claim in this case was, rather than after protracted and burdensome discovery proceedings. That, in turn, could be expected to reduce the number of meritless claims that defendants settle in order to avoid the costs of discovery. This result would appeal strongly to pragmatic judges, and it might explain why the legally better arguments in this case attracted only two votes.

### C. *Casey Martin*

The Court's pragmatism took a bad turn in *PGA Tour Inc. v. Martin*.<sup>16</sup> The plaintiff, Casey Martin, is a talented golfer who suffers from a disability that prevents him from walking significant distances. The defendant conducts golfing tournaments, which people pay to watch for their entertainment value, and the

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<sup>13</sup> Faced with a conflict between language in the operative part of a statute, and language in a non-operative findings or purposes section, there should be an extremely strong presumption in favor of giving effect to the former.

<sup>14</sup> *Id.* at 508.

<sup>15</sup> *Id.* at 513.

<sup>16</sup> 532 U.S. 661 (2001).

defendant compensates the golfers with prize money. One way for golfers to get admitted to these prize tournaments is to pay a substantial fee to enter a three-stage qualifying tournament. Many competitors are “cut” after the first and second stages. At the third stage, which will include only a small number of the very best golfers in the nation, competitors are required to walk the entire course.<sup>17</sup> The defendant justified this rule on the ground that fatigue can be a significant factor in the competition. Martin sought an exemption allowing him to ride in a cart during the third stage, and was denied on the ground that everybody should play by the same rules.

Writing for a majority of seven, Justice Stevens concluded that denying Martin the use of a golf cart violated the following provision from the ADA’s Title III (“Public Accommodations and Services Operated by Private Entities”):

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.<sup>18</sup>

The Court’s reasoning had three main steps. 1) The competitors in PGA’s tournaments are its clients or customers, so that participation constitutes “enjoyment” of its privileges under the provision quoted above. Stevens next turned to a provision that defines discrimination as a failure to make “reasonable modifications . . . unless the [operator of public accommodations] can demonstrate that making such modifications would fundamentally alter the nature of such accommodations.” Allowing Martin to use a golf cart was required under this provision, according to the Court, because such a modification of the rules would 2) neither alter an essential aspect of the game of golf nor 3) give Martin an

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<sup>17</sup> The top finishers in the third stage are admitted to the most prestigious tour of prize tournaments, and the others are admitted to a less selective tour. Both of these tours require competitors to walk the course.

<sup>18</sup> 42 U.S.C. § 12182(a).

advantage over his competitors.

Writing for himself and Justice Thomas, Justice Scalia issued a blistering dissent that challenged each of the three main elements in the Court's chain of reasoning. One's attention is understandably drawn to Scalia's especially colorful remarks about elements 2) and 3). With characteristic panache, he mocked the notion that judges are equipped to decide what are the essential and inessential rules of a game in which all the rules are arbitrary, and he caustically speculated about the consequences that may ensue when judges undertake to decide which rules can be altered for which competitors without giving anybody a competitive advantage.

The most serious difficulty with the majority's analysis, however, lies in its threshold conclusion that the competitors in the PGA's qualifying tournaments are clients or customers of a public accommodation. As Scalia points out, these tournaments constitute open tryouts for positions in which the competitors will serve as paid entertainers.<sup>19</sup> In other words, the tournaments operate like job interviews. The competitors are not like "customers" who pay to play for their own enjoyment on a public golf course, or like "clients" who pay for exercise lessons at a public gym. If the "privilege" of competing for a job is covered by the public accommodations provisions in Title III of the ADA, then the "privilege" of holding a job at a public accommodation must logically also be covered. Title I, however, already provides a separate and substantially different set of provisions to deal with employment. Thus, according to the Court's logic, the groundskeepers and hot dog vendors employed at these golf tournaments must be covered by Title III even if the statute excepts them from the coverage of the employment provisions of Title I. That makes no sense.

It is not clear why seven Justices adopted such a distorted reading of the statute. Perhaps the golfers and sports fans on the Court decided that they were just as qualified as the PGA officials to decide how the tournaments should be

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<sup>19</sup> Compensation is offered on a contingent basis, as it is in many jobs like insurance sales and real estate brokerage.

operated. And maybe it was unfair of the PGA to turn down Martin's request to use a golf cart. Congress, however, did not assign the Supreme Court to make this decision. Unlike the PGA officials responsible for running this business operation, the Justices run no risk of adverse personal consequences if they are wrong about what is "fair." To the extent that this case is an expression of the Court's judicial pragmatism, it illustrates how easily pragmatism can turn into self-indulgent and irresponsible meddling.<sup>20</sup>

#### D. *US Airways v. Barnett*

The appeal of pragmatic interpretation became unmistakably clear in *US Airways v. Barnett*.<sup>21</sup> The plaintiff was an airline cargo handler who injured his back, and then invoked his seniority rights to transfer to a less physically demanding position in the mailroom. When two employees with greater seniority indicated that they would bid for the mailroom position, the plaintiff asked the defendant airline to make an exception to the seniority rules. The defendant refused, and the plaintiff lost his job. The easiest way to understand what the Supreme Court did here is to begin with the two dissents, which offered clear and sharply opposed approaches to the case.

Writing for himself and Justice Thomas, Justice Scalia argued that exemption from the rules of a bona fide seniority system are never required by the ADA because the statute by its terms only forbids employers to "discriminate against a qualified individual with a disability *because of the disability* of such

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<sup>20</sup> So far, the Court has not seemed inclined to treat this case as a model for the future. As far as I can tell, *Martin* has never been cited by the Court in any subsequent case, and perhaps we can hope that this decision will turn out to be little more, or even less, than the *Federal Baseball* of golf. Cf. *Federal Baseball Club v. National League*, 259 U.S. 200 (1922) (antitrust statutes do not apply to professional baseball because there is an insufficient nexus with interstate commerce); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953) (reaffirming *Federal Baseball* without endorsing its rationale); *Flood v. Kuhn*, 407 U.S. 258 (1972) (reaffirming *Federal Baseball* and *Toolson* but declaring that the antitrust exemption for baseball does not extend to any other sports).

<sup>21</sup> 535 U.S. 391 (2002).

individual,’<sup>22</sup> or to refuse “reasonable accommodations *to the known physical or mental limitations* of an otherwise qualified individual with a disability.”<sup>23</sup> Because a seniority system burdens the disabled and the nondisabled alike, even-handed enforcement of such a system cannot constitute discrimination “because of the disability,” any more than such discrimination is entailed in a system that pays the same salary to a nondisabled person and to a more needy disabled coworker whose neediness is the result of his disability. Although the statute does include “reassignment to a vacant position” in an illustrative list of reasonable accommodations, Scalia argued that the nature of the other items in the list indicates that it is targeted at disability-related obstacles. Thus, a disabled employee who cannot perform his current job *must* be allowed to transfer to a vacant position, but *only if* he is qualified for that position and a better qualified applicant (such as an applicant with greater seniority rights) is not seeking it.

Writing for himself and Justice Ginsburg, Justice Souter began by noting that the legislative history shows that several of the ADA’s provisions were modeled on Title VII of the Civil Rights Act of 1964, which included a special exception for seniority systems established by collective-bargaining agreements. Because no such exception was included in the ADA, Souter concluded that the statute is at least ambiguous as to whether or to what extent any seniority system should be honored. Turning again to the legislative history, Souter found the ambiguity resolved by committee reports saying that even a seniority system contained in a collective-bargaining agreement should be treated as no more than “a factor” in deciding whether a violation of seniority rules is a required “reasonable accommodation.” Accordingly, Souter concluded that a plaintiff need only show that a violation of seniority rules is reasonable. In this case, he thought the plaintiff had done so, primarily because the defendant had taken pains to warn its employees that it reserved a right to change its seniority rules at any time and without advance notice.

I regard Scalia’s interpretation of the statute as far superior to Souter’s,

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<sup>22</sup> 42 U.S.C. § 12112(a) (emphasis added).

<sup>23</sup> 42 U.S.C. § 12112(b)(5)(A) (emphasis added).

primarily because it rests on the text of the statute. Nevertheless, Scalia and Souter have this in common: both of their interpretations are based on standard techniques of statutory construction and both of their interpretations yield a reasonably clear rule that courts could apply with considerable consistency and predictability. The same cannot be said of the majority's approach.

Writing for himself and three others, and reluctantly joined by Justice O'Connor, Justice Breyer recognized that seniority systems have considerable value, and consciously sought to take a "practical view of the statute."<sup>24</sup> This practical view is one that tries to reconcile Congress' desire to require "reasonable accommodation" of disabled employees with its desire to spare employers "undue hardship."<sup>25</sup> The scheme he came up with is as follows. When a disabled employee demands an assignment that would violate seniority rules, the seniority rules will "ordinarily" or "in the run of cases" prevail without proof on a case-by-case basis that the seniority system should prevail.<sup>26</sup> Put differently, when an employer relies on a seniority system, the employer will prevail unless the plaintiff can prove that there are "special circumstances" that make his demand for a violation of the seniority rules reasonable on the particular facts of the case.<sup>27</sup> Such "special circumstances" apparently might include situations where the seniority system has created so few reasonable expectations about adherence to its rules that one more exception "will not likely make a difference."<sup>28</sup> If such a showing is made, the employer will still have the opportunity to show that the requested accommodation would impose an undue hardship.

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<sup>24</sup> 535 U.S. at 402.

<sup>25</sup> See 42 U.S.C. 12112(b)(5)(A) (defining prohibited employment discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity").

<sup>26</sup> 535 U.S. at 402-403.

<sup>27</sup> *Id.* at 405.

<sup>28</sup> *Id.*

This scheme ignores the crucial “because of the disability” language in the statute, and the shifting burden of proof on the issue of whether a violation of seniority rules constitutes a reasonable accommodation has no discernable basis in the statute at all. Breyer’s opinion contains no arguments that undermine either Scalia’s dissent or Souter’s, and it seems to be entirely driven by a conviction that this is the “practical” way to interpret the ADA. The “special circumstances” test adopted in Breyer’s opinion is so vague, however, that it hardly seems practical in the sense of readily administrable or predictable in its outcomes. As Scalia stressed, moreover, the facts of this case seem to belie the notion that exceptions will not be required “in the run of cases.” The trial court found as a matter of fact that this seniority system had been in place for decades, that it was of a type common in the airline industry, and that employees were justified in relying on it. And yet the case was remanded to allow the plaintiff to show that “special circumstances” made the employer’s adherence to its seniority rules unreasonable.

Justice O’Connor disagreed with everyone else on the Court, and joined Breyer’s opinion solely in order to prevent a stalemate in a case where the Court was “merely interpreting a statute.”<sup>29</sup> O’Connor appears to have had two main objections to Breyer’s approach. First, she thought that the bifurcated inquiry into whether a violation of seniority rules was a reasonable accommodation did not make sense of the statutory language and structure, and that “special circumstances” should be considered only in connection with the statutory provision allowing employers to refuse reasonable accommodations if they would impose an “undue hardship.”<sup>30</sup> Second, I think she recognized that Breyer’s approach would create undesirable uncertainty, and thus implicitly agreed with this part of Scalia’s critique.

O’Connor’s own preferred approach elegantly responded to both of these problems. She began with the fact that the statute specifically lists “reassignment to a vacant position” as an example of a reasonable accommodation. In her view, an unfilled position is “vacant” unless someone has an enforceable contractual right

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<sup>29</sup> *Id.* at 408.

<sup>30</sup> *Id.* at 410-11.

to fill it. Thus, in order to decide whether a violation of seniority rules would constitute a reasonable accommodation, a court need only ask the relatively straightforward question whether somebody other than the plaintiff had a contractual right to the position he was demanding.<sup>31</sup>

O'Connor made no effort to rebut Scalia's analysis of the statutory text, and I remain convinced that he had the better legal argument. Still, O'Connor's approach is a more plausible interpretation of the statute than Breyer's, and it is inherently superior to Breyer's as a practical rule that could be applied in a consistent and predictable manner.<sup>32</sup> Although her view was not adopted by the Court in this case, the case does illustrate both the appeal that pragmatic approaches to interpretation have within the Rehnquist Court, and the way in which O'Connor in particular seems to view careful, and at least plausible, legal reasoning as an important component of pragmatic statutory construction.

### **III. Racial Preferences in Employment: Dealing with the Burger Court's Legacy**

The driving impulse behind the Civil Rights Act of 1964 was the desire to dismantle Jim Crow, which was the stubborn residue of slavery. By forbidding private employers to discriminate because of race, Title VII of that statute was expected to enhance the economic opportunities of those who had been oppressed for so long. And economic progress among southern blacks did in fact increase in the first few years after the Civil Rights Act was enacted.<sup>33</sup>

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<sup>31</sup> In this case, the defendant conceded that its seniority system did not give its employees legally enforceable rights. *See* 535 U.S. at 410.

<sup>32</sup> This does not mean, of course, that it will be *impossible* for courts to apply the approach adopted in Breyer's majority opinion in a reasonably consistent and predictable manner. O'Connor's preferred approach, however, would have lent itself much more readily to such a result.

<sup>33</sup> *See, e.g.,* Stephan Thernstrom & Abigail Thernstrom, *America in Black and White* 450 (1997).

Although the motivating force for the Civil Rights Act was opposition to the legalized oppression of Jim Crow, Congress did not target this system narrowly. Following a long American tradition that had been exemplified especially in the Reconstruction era, the legislature exhibited a preference for general categories of rights, which protect all citizens everywhere in the country.<sup>34</sup> Title VII contains no special provisions for blacks and no special provisions for the South. The crucial prohibition in the statute makes it unlawful to discriminate against any individual “because of such individual’s race, color, religion, sex, or national origin.”<sup>35</sup> To ensure that this prohibition was taken in its obvious and natural sense—as an unequivocal demand for colorblind treatment—the statute also warned those charged with its implementation not to misinterpret it as a device for promoting racial balancing and preferential treatment.<sup>36</sup>

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<sup>34</sup> In a different respect, Title VII was very different from the Reconstruction statutes and constitutional amendments. Whereas the Reconstruction laws were aimed primarily or exclusively at confining the power of governmental and quasi-governmental institutions, Title VII applied only in the private sector.

<sup>35</sup> It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). This provision originally applied to most private firms that employ at least 25 workers. Amendments to the statute in 1972 dropped the threshold to 15 workers, and extended the prohibition to state and local governments. The 1972 amendments also banned employment discrimination by the federal government.

<sup>36</sup> Nothing contained in [Title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race,

## A. The Birth of Disparate Impact Doctrine

Whether Congress was motivated by a considered commitment to colorblind constitutional principles, or by some less edified political calculus, the result was utterly clear. Nevertheless, the Supreme Court's very first decision about racial discrimination under Title VII, *Griggs v. Duke Power Co.*,<sup>37</sup> turned this unequivocally colorblind statute into a device for promoting racial balancing and preferential treatment.

The *Griggs* case involved the Duke Power Company, which for many years had used an internal promotion system based on seniority rules. In 1955, the company became concerned because the firm's business was becoming increasingly technical, and some employees were having difficulty mastering the skills needed in the jobs to which they were being promoted under the seniority rules. The company then instituted a policy requiring all new hires to have a high school degree or its equivalent, and imposing the same requirement for certain internal promotions and transfers. In 1965, the company adjusted this policy. Incumbent employees were now permitted to transfer out of the two departments that included the least skilled jobs (Labor and Coal Handling) if they had a high school degree or its equivalent, or if they achieved scores at least as high as the median high school graduate on two aptitude tests. Although this liberalization of the policy was apparently prompted by complaints from employees in Coal

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color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2(j).

<sup>37</sup> 401 U.S. 424 (1971).

Handling (all of whom were white at that time), the benefits of the new rule were extended without discrimination to those in the Labor Department (all of whom were black at that time).

Although the company was almost certainly practicing racial discrimination in other hiring and promotion practices in 1955, none of the requirements at issue in the case had been adopted with a discriminatory intent, and they were always applied in the same fashion to blacks and whites. But to the extent that blacks were less likely to have high school degrees, or to achieve the requisite score on the aptitude tests, the policies had a greater adverse effect on blacks as a group.

The Supreme Court expressly left undisturbed the lower courts' finding that Duke Power had not engaged in unlawful intentional discrimination,<sup>38</sup> but nonetheless held that the company's reliance on educational achievement and aptitude tests violated Title VII. More generally, the Court concluded that where a facially neutral employment practice has a disproportionately adverse effect on minorities ("disparate impact"), that practice cannot be used unless it is justified under a standard that came to be known as "business necessity."<sup>39</sup>

Chief Justice Burger's opinion for a unanimous Court did not include a single valid or even defensible legal argument to support the Court's conclusions, although it did present a number of unsubstantiated assertions and invalid arguments based on factual misstatements and illogical inferences. Space constraints in this symposium prevent me from defending this description of Burger's opinion, but I have done so elsewhere.<sup>40</sup>

Apart from having ignored the statute that Congress actually wrote, the

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<sup>38</sup> *See id.* at 432.

<sup>39</sup> *Id.* at 430-32.

<sup>40</sup> *See* Nelson Lund, *The Law of Affirmative Action in and after the Civil Rights Act of 1991: Congress Invites Judicial Reform*, 6 Geo. Mason L. Rev. 87, 91-100 (1997), which also includes a detailed discussion of the facts in the case and the Fourth Circuit decision that was reversed by the Supreme Court.

Court's opinion proceeded to write a new statute of its own, which was highly ambiguous and radically incomplete. Although Burger made the vague declaration that statistical disparities could lead to liability, he provided no intelligible test either for deciding what statistical comparisons should be used or for deciding how large the disparities must be.<sup>41</sup> Nor can anything very useful be gleaned from the Court's discussion of the facts that were before it.<sup>42</sup>

Having ruled that some (undefined) set of disparities could produce liability, the Court's opinion also concocted a defense that employers could use to avoid liability in these cases. Unfortunately, Burger's opinion contains an embarrassment of riches: he offered no less than eight different formulations of the standard that employment criteria must meet in order to prevent liability from arising.<sup>43</sup> Some of these formulations sound as though they might be quite difficult to meet, but others sound as though they would cover almost anything but the most arbitrary policies. And again, the facts of the *Griggs* case itself are unilluminating because the Court merely asserted that Duke Power had failed to show whatever it is that the firm was supposed to have tried to show.

The hopeless ambiguities and vagueness of *Griggs* set the Court on a long search for a manageable set of standards through which the new disparate impact theory could be implemented. In addition, *Griggs* created an immediate practical problem by setting up a kind of Catch-22 for employers. The only sure way to insulate themselves from liability under the vague standards of *Griggs* was to ensure that their workforces were racially balanced. But if they took steps to get

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<sup>41</sup> See Lund, *supra* note xx, at 99 n.60.

<sup>42</sup> See *id.* at 99-100.

<sup>43</sup> The eight formulations include: "shown to be significantly related to successful job performance," 401 U.S. at 426; "touchstone is business necessity," *id.* at 431; "shown to be related to job performance," *id.*; "shown to bear a demonstrable relationship to successful performance of the jobs for which it was used," *id.*; "fulfill a genuine business need," *id.* at 432; "unrelated to measuring job capability," *id.*; "must have a manifest relationship to the employment in question," *id.*; "demonstrably a reasonable measure of job performance," *id.* at 436.

their numbers “right,” they exposed themselves to lawsuits for intentional discrimination by whites who were injured by those prophylactic policies. This dilemma set the stage for the Court’s next move.

## **B. The Burger Court’s Endorsement of Racial Quotas and Preferences**

The Kaiser Aluminum & Chemical Corporation had once filled its positions in the skilled trades only with those who had prior experience. Presumably because of racial discrimination by the skilled-trades unions, those who filled these positions were overwhelmingly white.<sup>44</sup> In 1974, Kaiser and the United Steelworkers (which represented unskilled workers) negotiated a collective bargaining agreement under which the firm established a training program that would qualify unskilled Kaiser workers for jobs in various skilled trades.<sup>45</sup> Eligibility for the program was determined by seniority, but Kaiser succumbed to pressure from the federal Labor Department and imposed a fifty percent quota for black applicants.<sup>46</sup>

The racial quota was challenged by white employees who would have been admitted to the program on the basis of seniority but for their race. In *United Steelworkers v. Weber*,<sup>47</sup> the Burger Court held that this intentional and overt racial discrimination did not violate Title VII. More generally, the Court seemed to conclude that discriminatory affirmative action programs are permissible at least when they are “designed to break down old patterns of racial segregation and hierarchy” and do not “unnecessarily trammel the interests of the white

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<sup>44</sup> See *United Steelworkers v. Weber*, 443 U.S. 193, 198-99 & n.1 (1979).

<sup>45</sup> See *id.* at 197-98.

<sup>46</sup> See *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 226 (5th Cir. 1977) (“[T]he district court found that the 1974 collective bargaining agreement reflected less of a desire on Kaiser’s part to train black craft workers than a self-interest in satisfying the [Labor Department] in order to retain lucrative government contracts.”).

<sup>47</sup> 443 U.S. 193 (1979).

employees.’<sup>48</sup>

Like Chief Justice Burger’s opinion in *Griggs*, Justice Brennan’s majority opinion in *Weber* did not contain a single valid legal argument. Brennan acknowledged that his conclusion was inconsistent with the language of the statute, but he did not have a shred of evidence to support his claim that the “spirit” of the statute implied something different from its language. Justice Rehnquist’s dissent, however, showed that there was overwhelming evidence that the spirit of the statute was perfectly captured in its language. Once again, space constraints require that I refer the reader elsewhere for a detailed defense of my claim that the Court’s analysis was indefensible.<sup>49</sup>

### **C. The Rehnquist Court Reaffirms the Judicial Embrace of Quotas and Preferences**

The rationale, such as it was, for *Weber*’s rejection of Title VII’s colorblind language consisted primarily of inferences drawn from passages in the legislative history discussing the *specific* problem of “the plight of the Negro in our economy”<sup>50</sup> and from passages supposedly generated by the need to obtain votes “from legislators in both Houses who traditionally resisted federal regulation of *private* business.”<sup>51</sup> And its holding was apparently confined to “affirmative action plans designed to eliminate conspicuous *racial* imbalance in traditionally segregated job categories,”<sup>52</sup> where the segregation resulted from extremely well-

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<sup>48</sup> *Id.* at 208.

<sup>49</sup> See Nelson Lund, *The Law of Affirmative Action in and after the Civil Rights Act of 1991: Congress Invites Judicial Reform*, 6 Geo. Mason L. Rev. 87, 101-106 (1997).

<sup>50</sup> *Weber*, 433 U.S. at 202 (quoting 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey)) (emphasis added).

<sup>51</sup> *Id.* at 206 (emphasis added).

<sup>52</sup> *Id.* at 209 (emphasis added).

documented systems of deliberate racial exclusion.<sup>53</sup>

During Rehnquist's first term as Chief Justice, the Court decided *Johnson v. Santa Clara Transportation Agency*,<sup>54</sup> a case involving a public employer which promoted a white woman rather than a better-qualified man. There was no evidence that the employer or anyone else had ever excluded women from the job category at issue. Justice Brennan once again wrote for the Court, which upheld the challenged affirmative action plan entirely on the authority of *Weber*, which was now said to stand for the very broad proposition that Title VII should be read to favor voluntary efforts to further "the objectives of the law."<sup>55</sup>

To the extent that Brennan was suggesting that the Court's decision was based on stare decisis, the suggestion was implicit. Explicitly, Brennan did not invoke stare decisis, and he made no effort to rebut the dissent's elaborate argument against the application of stare decisis in this case.<sup>56</sup> Instead, he noted that Congress had not overruled *Weber*, and concluded that "we therefore may assume that our interpretation [of Title VII] was correct."<sup>57</sup> After citing a controversial book that urged courts to become bolder in revising statutes on policy grounds,<sup>58</sup> Brennan concluded that "[a]ny belief in the notion of a dialogue

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<sup>53</sup> See *id.* at 198 n.1.

<sup>54</sup> 480 U.S. 616 (1987).

<sup>55</sup> *Id.* at 640 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 290 (1986) (O'Connor, J., concurring in part and concurring in judgment) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 364 (1978))). One might think that the extension of *Weber* could be justified on the ground that the text of the statute treats public employers the same as private employers and sex discrimination the same as race discrimination. Invoking the text in this way, however, would have been an odd way to defend the broadening of a decision that was itself concededly inconsistent with the text.

<sup>56</sup> See *id.* at 672-73 (Scalia, J., dissenting).

<sup>57</sup> *Id.* at 629 n.7 (majority opinion).

<sup>58</sup> See *id.* at 629 (quoting Guido Calabresi, *A Common Law for the Age of Statutes* 31-32 (1982)).

between the judiciary and the legislature must acknowledge that on occasion an invitation [for the legislature to overrule a judicial decision] declined is as significant as one accepted.’<sup>59</sup>

*Johnson* extended the reach of *Weber*’s authorization of preferences to cover women (as well as racial minorities), to the public sector (as well as private employment), and to cases in which an employer is seeking to alter workforce imbalances caused by “societal attitudes” (as well as actual discrimination by employers and unions). None of these extensions was required, or even implied, by the rationale in *Weber*. It is nonetheless possible to see in this case a growing skepticism about the practice of remedial discrimination. Whereas only Rehnquist and Burger dissented in *Weber*,<sup>60</sup> White changed his mind in *Johnson* and agreed with Rehnquist and Scalia that *Weber* should be overruled. More important, O’Connor (who had not been on the Court when *Weber* was decided) concurred in the *Johnson* judgment, and wrote a detailed and interesting exposition of her own distinctive view of the issues.

O’Connor clearly recognized that *Weber* was at the very least an extremely dubious interpretation of the statute. She nonetheless rejected Scalia’s call for overruling it, on grounds of prudence and stare decisis.<sup>61</sup> She also believed, however, that the majority’s opinion gave “insufficient guidance to courts and litigants”<sup>62</sup> and she agreed with Scalia that Title VII would be violated by an affirmative action plan that “automatically and blindly” promoted marginally qualified candidates or constituted a permanent plan of “proportionate

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<sup>59</sup> *Id.*

<sup>60</sup> Powell and Stevens did not participate in the case.

<sup>61</sup> 480 U.S. at 648. O’Connor also suggested that Scalia’s was a merely “academic” discussion that failed to face up to what a majority of the Court had decided to do. *Id.* at 648-49. This may seem ironic in light of the fact that he had three votes for his position while she had only her own, but she could quite reasonably have believed that her position stood a better chance than Scalia’s of eventually attracting a majority of the Court.

<sup>62</sup> *Id.* at 648.

representation.’<sup>63</sup>

O’Connor’s proposed alternative was to permit race and sex preferences “only as a remedial device to eliminate actual or apparent discrimination or the lingering effects of this discrimination.”<sup>64</sup> She proposed to operationalize this standard by permitting employers to use preferences only when they have a “firm basis” for believing that remedial action is necessary, and that such a firm basis would be provided by “a statistical disparity sufficient to support a prima facie claim under Title VII by the employee beneficiaries of the affirmative action plan of a pattern or practice of discrimination.”<sup>65</sup> O’Connor had previously advanced this same standard in a partial concurrence in *Wygant v. Jackson Bd. of Educ.*,<sup>66</sup> which was a badly splintered equal protection decision invalidating preferential protection from layoffs for minority employees. She now argued that the Court should adopt this as the single standard in both the constitutional and statutory contexts, and she contended that her proposal was consistent with both *Weber* and *Wygant*.

O’Connor’s approach to this issue has a lot in common with her position in the *US Airways* ADA case. In both cases, she sought to strike a balance between the competing interests of different employee groups, and to do so with a rule that would provide consistency and predictability to lower courts and regulated parties. In both cases, moreover, she discounted powerful textual arguments against her position. In *US Airways*, she ignored Scalia’s textual argument and instead joined what she thought was Breyer’s legally incorrect interpretation, in order to create a majority holding in the case and because she believed that “the Court’s rule will often lead to the same outcome” as her

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<sup>63</sup> *Id.* at 656.

<sup>64</sup> *Id.* at 649.

<sup>65</sup> *Id.*

<sup>66</sup> 476 U.S. 267 (1986).

preferred rule.<sup>67</sup> In *Johnson*, she deflected consideration of the statutory text with a reference to “prudential restraints” and stare decisis,<sup>68</sup> without addressing the merits of Scalia’s detailed explanation of why he thought the Court’s doctrine of stare decisis could not protect *Weber*.

Nothing in these two cases, or in any of the others we have examined here, suggests that O’Connor would willfully distort and subvert a statute in a case of first impression, as the Burger Court did in *Griggs* and *Weber*. But while O’Connor consistently insists on having a respectable legal argument to support her position, she does not appear intent on adopting the *best* legal argument. Thus, legal analysis appears to be only a factor—although an important one—in a more broadly pragmatic approach to statutory adjudication.

In *Johnson*, as in *US Airways*, O’Connor’s preferred approach was not adopted by the Court. The difference between her approach and the *Johnson* majority’s, however, lay primarily in the somewhat more precise nature of her test for deciding when an employer has an adequate justification for engaging in remedial discrimination. Given this relatively small difference, it should not be surprising that she has since shown no inclination to push the Court to adopt her position.<sup>69</sup> O’Connor’s willingness to leave *Weber* in place, combined with her willingness to join Breyer’s opinion in *US Airways*, suggests a pragmatic reluctance to insist on what may be seen as marginal improvements in this area of statutory law. *Johnson* remains the law today, and that likely is a reflection of the extent to which O’Connor’s pragmatism is a decisive influence on the behavior of the Rehnquist Court.

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<sup>67</sup> 535 U.S. at 408.

<sup>68</sup> 480 U.S. at 648-49.

<sup>69</sup> After Powell was replaced by Kennedy, and Marshall by Thomas, it is easy to imagine that there might be at least five votes to revise the *Johnson* approach if O’Connor were willing to do so.

#### **D. The Rehnquist Court Uses Burger Court Precedent to Tame Disparate Impact**

Justice O'Connor's concurrence in *Johnson* could be read to reflect an easygoing attitude toward discrimination aimed at whites and men, as well as toward existing statutory precedents that improperly legalized such discrimination. The following year, in *Watson v. Fort Worth Bank & Trust*,<sup>70</sup> it became clear that O'Connor had a less than easygoing attitude toward the judicially created theory of disparate impact. And this time a majority of the Court ended up agreeing with her approach.

As one might have expected from the confused and confusing opinion in *Griggs*, the Burger Court produced a long series of cases dealing with issues and questions that had been left unresolved by that decision. Some of the opinions in those cases were quite strange.<sup>71</sup> Other decisions, especially those dealing with the use of statistics, clarified the law to some extent, but the most important development came in 1979 with *New York City Transit Authority v. Beazer*.<sup>72</sup>

In *Beazer*, the Court considered a challenge to the Transit Authority's rule

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<sup>70</sup> 487 U.S. 977 (1988).

<sup>71</sup> In *Albemarle Paper Co. v. Moody*, for example, the Court treated the law of disparate impact as though it were a tool for unearthing evidence of employer behavior that was a "pretext" for intentional discrimination. *See* 422 U.S. 405, 425 (1975) (conflating the *Griggs* analysis with the intentional-discrimination analysis in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). As the Court later recognized, this approach is completely wrong, for the whole point of *Griggs* was to create liability for unintentional discrimination. *See, e.g., Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988). And in *Connecticut v. Teal*, 457 U.S. 440 (1982), the Court relied on the literal language of Title VII to hold that the *Griggs* theory (which is itself irreconcilable with the statute's literal language) forbids the use of tests that have a disparate impact on minorities even when the tests are merely parts of a multi-step selection process that itself has no disparate impact. *See id.* at 445-49. Justice Powell's dissenting opinion in *Teal* was if anything even more confused than the majority's. *See* Lund, *supra* note xx, at 110 n.113.

<sup>72</sup> 440 U.S. 568 (1979).

against employing methadone users.<sup>73</sup> Much of the Court's opinion dealt with the plaintiff's claim that this rule had a strongly disproportionate effect on minority job seekers, a claim about which the majority was very dubious. Without definitely resolving that issue, the Court held that an employer cannot be liable, no matter what statistical disparities result from its employment criteria, so long as those criteria are "job related."<sup>74</sup> This "job related" standard was extremely favorable to employers, for it required only that legitimate employment goals such as safety and *efficiency* be "significantly served by—even if they do not require" the challenged employment criteria.<sup>75</sup> On its face, *Beazer* seems to mean that a successful disparate impact claim should have become an extremely rare event, for the decision appears to make it almost impossible for a plaintiff to prevail under that theory unless the defendant has adopted inexplicably whimsical employment criteria.<sup>76</sup>

*Beazer*, however, did not in fact have this effect. Perhaps because *Griggs* and other pre-*Beazer* decisions had produced so much confusion and uncertainty,

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<sup>73</sup> *See id.* at 570-71.

<sup>74</sup> *Id.* at 587 n.31. Although Justice Stevens' opinion belittled the plaintiffs' proof of disparate impact, Justice White's dissent convincingly refuted the majority's argument. Perhaps recognizing the weakness of its position, the majority did not hold the proof inadequate: "At best, [plaintiffs'] statistical showing is weak; even if it is capable of establishing a prima facie case of discrimination, it is assuredly rebutted by [the Transit Authority's] demonstration that its narcotics rule (and the rule's application to methadone users) is 'job related.'" *Id.* at 587 (citation omitted). The *Beazer* holding is therefore based on the "job related" test, not on the standard governing the prima facie case.

<sup>75</sup> *Id.* at 587 n.31.

<sup>76</sup> Since the goal of efficiency can cover almost anything, only the most palpably arbitrary employment practices could flunk this test, as *Beazer* itself illustrated. Methadone's effects are to suppress the symptoms of heroin withdrawal and to prevent heroin-induced euphoria, which together make it useful in treating heroin addiction. Despite the drug's salutary effects on the user's behavior, however, the *Beazer* Court held that methadone users could be excluded both from safety-sensitive jobs like driving subway trains and from such menial jobs, *in which safety is not an issue*, as cleaning out buses. *See* at 576 n.12, 587 n.31. *Beazer* therefore cannot be limited to cases where public safety is an issue.

*Beazer*'s clear holding was sometimes ignored by the lower courts.<sup>77</sup> *Watson*, in 1988, presented the Rehnquist Court with an opportunity to rethink the *Griggs* doctrine. Until that time, all of the Supreme Court cases dealing with disparate impact had involved objective employment criteria like diploma requirements and written tests.<sup>78</sup> In *Watson*, the Court was confronted with a conflict among the lower courts about the applicability of the disparate impact doctrine to subjective employment practices, such as arrangements under which decisions to hire and promote are left to the unguided discretion of individual supervisors. Justice O'Connor's opinion, for a unanimous eight-member Court,<sup>79</sup> found nothing in the disparate impact doctrine that would allow it be confined to objective practices like tests and diploma requirements.

Unsurprisingly, perhaps, the Court reached this conclusion without any meaningful analysis of the validity of the disparate impact theory itself.<sup>80</sup> In a

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<sup>77</sup> See, e.g., *EEOC v. Rath Packing Co.*, 787 F.2d 318, 331-32 (8th Cir. 1986); *Williams v. Colorado Sch. Dist. No. 11*, 641 F.2d 835, 842 (10th Cir. 1981).

<sup>78</sup> *Connecticut v. Teal*, 457 U.S. 440 (1982) (written test); *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (rule against employing narcotics users); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (height and weight requirements); *Washington v. Davis*, 426 U.S. 229 (1976) (written test); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (written test); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (diploma requirement and aptitude test).

<sup>79</sup> *Id.* at 982-91, 999-1000. *Watson* was argued after Justice Powell's retirement and before Justice Kennedy's appointment.

<sup>80</sup> In the course of her opinion for the Court, Justice O'Connor made the first genuine effort in the Court's history to suggest how disparate impact doctrine might be compatible with the statute. Subjective employment practices, she pointed out, may in some cases be infected with "subconscious stereotypes and prejudices." 487 U.S. at 990. Discrimination based on such prejudices is arguably within the reach of Title VII's language, which forbids discrimination "because of" an individual's race, color, religion, sex, or national origin. Conventional analysis, however, under which plaintiffs are required to prove intentional discrimination, might not capture discrimination that occurs when people act on the basis of prejudices that they are aware of only dimly, if at all. And that, in turn, may suggest the need to supplement conventional disparate treatment analysis. The Court's opinion seems to allude to an argument along these lines, but without pursuing its implications. See *id.* at 990-91. And it is easy to see why the implications were not pursued.

portion of her opinion written for a four-Justice plurality, however, O'Connor did recognize that the Court's decision could very well lead to enormous new pressures for employers to adopt surreptitious quota systems.<sup>81</sup> It is almost incredible, but true, that this was the very first time that any disparate impact opinion by any Supreme Court Justice had even mentioned Section 703(j) of the statute, which is the statutory provision that is most obviously relevant to the validity of disparate impact theory:

Nothing contained in [Title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.<sup>82</sup>

O'Connor observed that this provision of the statute clearly ruled out any theory making disparate impact as such illegal,<sup>83</sup> thus implicitly providing for the first time something like a legal explanation for the "business necessity" defense that had

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Such a theory provides virtually no support for the Court's previous disparate impact decisions, all of which involved *objective* employment criteria. In fact, it suggests that those decisions may actually have undermined the goal of the statute by encouraging employers to replace objective criteria with the kind of subjective standards that create opportunities for the operation of subconscious prejudices. Inducing employers to shift away from objective tests will, *ceteris paribus*, almost certainly increase the incidence of subconscious discrimination.

<sup>81</sup> *See, e.g., id.* at 993.

<sup>82</sup> 42 U.S.C. § 2000e-2(j) (1994).

<sup>83</sup> *See Watson*, 487 U.S. at 992.

appeared without any justification at all in *Griggs*. More important, O'Connor seemed to recognize that the judicially created theory of disparate impact might have to be scrapped, on legal grounds, unless it could be shown that it would not have the effect of inducing employers to grant preferential treatment in response to statistical imbalances in their workforces.<sup>84</sup> The plurality portion of her opinion contended that this result would not occur because the law provides employers with ample means to avoid liability when legitimate employment practices are challenged.<sup>85</sup> O'Connor supported this conclusion by pointing to three principal features of disparate impact doctrine.

First, a plaintiff is required to identify with specificity the practice that causes a disparate impact.<sup>86</sup> This principle had always been assumed and never challenged, even by implication, in the Court's previous opinions. It is important because it helps to prevent employers from being held liable for statistical disparities caused by factors that cannot be eliminated or even discovered. Second, O'Connor noted that a practice having a disparate impact is nonetheless permissible if it is based on a legitimate business reason.<sup>87</sup> This point was simply a restatement of *Beazer's* clear holding, and it was consistent with the language from *Griggs* that the Court had always treated as the holding in that case: a practice is permissible if it has a "manifest relationship to the employment in question."<sup>88</sup> O'Connor was on completely solid ground when she assumed that *Beazer* meant what it said and that *Beazer* was the law. Third, O'Connor declared that defendants seeking to defend their practice under the "manifest relationship"

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<sup>84</sup> *See id.* at 992-93.

<sup>85</sup> *See id.* at 991-99.

<sup>86</sup> *See id.* at 994-97.

<sup>87</sup> *See Watson*, 487 U.S. at 998.

<sup>88</sup> *See, e.g.,* General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 383 n.8 (1982); *Teal*, 457 U.S. at 446-47; *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 n.31 (1979); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *accord Jefferson v. Hackney*, 406 U.S. 535, 577 (1972) (Marshall, J., dissenting).

standard need only meet a burden-of-production standard, so that the ultimate burden of persuasion remains with the plaintiff at all times.<sup>89</sup> Although the case law had been ambiguous on this point, O'Connor's conclusion was not the most natural reading of the prior cases, and she did not pretend that it was. The plurality's willingness to adopt the interpretation more favorable to defendants thus suggested a deep discomfort with disparate impact theory itself. Such discomfort is a legitimate product of the warning that Congress itself gave to the courts in Section 703(j) of the statute.

A year later, by a 5-4 vote, the Court adopted O'Connor's approach in the *Wards Cove* case.<sup>90</sup> This marked the first time that a majority of the Supreme Court had begun to face up to the deep tension between its disparate impact jurisprudence and the statute that was supposedly being construed. The Court did not resolve that tension, which would have required overruling *Griggs*. As a practical matter, however, there was every reason to think that *Wards Cove* had reduced *Griggs* to an empty shell, and largely eliminated the incentives that the doctrine of disparate impact had created for employers to adopt surreptitious quotas.<sup>91</sup>

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<sup>89</sup> See *Watson*, 487 U.S. at 997-98.

<sup>90</sup> *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Justice Kennedy joined the four-Justice *Watson* plurality to create a majority in *Wards Cove*.

<sup>91</sup> *Wards Cove*, along with several other civil rights cases decided the same Term, set off a firestorm in Congress that eventually culminated in the Civil Rights Act of 1991. See, e.g., Roger Clegg, *A Brief Legislative History of the Civil Rights Act of 1991*, 54 La. L. Rev. 1459 (1994). Because space constraints preclude a detailed discussion of the effects of this statute, I will confine myself to the following remarks. The 1991 act codified the disparate impact theory, using ambiguous language that could be interpreted to reflect an approach very close to that adopted in *Beazer* and *Wards Cove* or an approach that would make it much easier for plaintiffs to prevail in these cases. At the same time, however, the 1991 statute amended Title VII to allow courts to award damages in disparate-treatment cases, but did not authorize damages in disparate-impact cases. This created very strong incentives for plaintiffs to frame cases based largely on statistics as disparate-treatment cases rather than as disparate-impact cases, and disparate-impact litigation may have been reduced in significance almost as much as it would have been had *Wards Cove* had simply been left untouched. See Glen D. Nager & Julia M. Broas, *Enforcement Issues: A Practical Overview*,

This outcome contrasts with what happened in *Johnson*. One reason for the difference may have been that Justice Powell (who had joined the majority in *Johnson*) was replaced by Justice Kennedy. I doubt that this is the most significant point, however, for Powell had previously made an effort of his own to restrict the operation of disparate-impact doctrine.<sup>92</sup> It is more revealing, I think, to focus on the similarity between the approach that Justice O'Connor took in *Johnson* and the one she advanced in *Watson*. In the remedial discrimination case, she expressly refused on prudential grounds to consider overruling *Weber*,<sup>93</sup> and instead tried to synthesize *Weber* and certain Fourteenth Amendment precedents in a way that might have pushed the law at least slightly in the direction of the colorblind command of Title VII. In *Watson*, she implicitly refused to consider overruling *Griggs*, and synthesized the precedents in a way that pushed the law, as a practical matter, very substantially in the direction commanded by the statute.

The difference between how far O'Connor was willing to push the law toward a faithful interpretation of the statute may have been a function largely of differences in the precedents with which she was working. In the remedial discrimination area, there was nothing like *Beazer* to rely on, and no plausible way to construe the existing precedents in a way that would produce anything like the results demanded by Title VII.

*Beazer* was a Burger Court precedent that had been lying unnoticed for many years, just waiting for someone to take it seriously. The Rehnquist Court finally did so, but that did not imply a willingness to break sharply with the Burger Court's tolerant approach toward racial favoritism. *Watson* and *Wards Cove* do

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54 La. L. Rev. 1473 (1994).

<sup>92</sup> See *Connecticut v. Teal*, 457 U.S. 440, 456 (1982) (Powell, J., dissenting).

<sup>93</sup> "None of the parties in this case have suggested that we overrule *Weber* and that question was not raised, briefed, or argued in this Court or in the courts below. If the Court is faithful to its normal prudential restraints and to the principle of stare decisis we must address once again the propriety of an affirmative action plan under Title VII in light of our precedents, precedents that have upheld affirmative action in a variety of circumstances." 480 U.S. at 648.

reflect a pragmatic recognition of the potentially sweeping consequences of extending disparate impact doctrine to subjective employment practices. But *Beazer* made it easy to cabin the doctrine without making any sharp legal break with the past. *Watson* and *Wards Cove* therefore do not say much more than that the Rehnquist Court was willing to push the law toward fidelity to the statute when it was very easy to do.

#### **IV. Back to the Burger Court, and Beyond: Fourteenth Amendment Discrimination**

In the area of employment discrimination, the Court's most important cases have involved interpretations of the Civil Rights Act of 1964. Outside that context, equal protection doctrine has generated more of the important cases. One reason for this is another landmark case from the Burger Court, *Regents of the Univ. of Calif. v. Bakke*,<sup>94</sup> which involved a minority quota for seats in a state medical school.

##### **A. Preferential Admissions to Higher Education**

In *Bakke*, four Justices concluded that Title VI of the Civil Rights Act of 1964 forbids such discrimination, relying on the following provision:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.<sup>95</sup>

Four other Justices broadly concluded that both the statute and the Constitution permit the use of "benign" racial quotas and preferences that do not stigmatize any group or impose the brunt of their adverse effects on those least well represented in the political process. Writing only for himself, Justice Powell

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<sup>94</sup> 438 U.S. 265 (1978).

<sup>95</sup> 42 U.S.C. § 2000d.

concluded that the statute and the Constitution forbid blatant quotas, like those at issue in the *Bakke* case itself, but allow more subtle systems of racial discrimination.

Using much the same technique that the Court would adopt the next year in *Weber*, Powell simply refused to accept the unmistakably clear terms of the statute. Instead, he claimed to find indications in the legislative history that it would sometimes be permissible to discriminate against whites in programs covered by the statute. Unfortunately for his position, there were repeated statements by the bill's major proponents, including Senator Hubert Humphrey, confirming the obvious proposition that the statute would forbid discrimination against persons of any race. Nor was Powell able to produce a single statement by anyone in Congress indicating that the bill would permit discrimination against any racial group.

Desperately, Powell pointed to statements which he thought meant that some members of Congress believed that "the bill enacted constitutional principles."<sup>96</sup> But this gambit, too, was analytically empty. First, none of the proponents said that constitutional principles permit discrimination against some racial groups. Second, the fact that some members of the enacting Congress believed that the language of the bill was consistent with *their* interpretation of the Constitution hardly implies that they believed the meaning of what they wrote could be changed if *somebody else* interpreted the Constitution differently. And even if one accepted the proposition that Congress meant to codify whatever the constitutional case law was in 1964, Powell himself acknowledged that even as of 1978 the Court had *never* "approved preferential classifications in the absence of proved constitutional or statutory violations."<sup>97</sup>

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<sup>96</sup> 438 U.S. at 285.

<sup>97</sup> *Id.* at 302. See also *id.* at 307 ("We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.")

Four other members of the Court joined Powell in rewriting Title VI to say that recipients of federal funds may discriminate on the ground of race, color, or national origin in cases whenever a majority of the Supreme Court concludes that the Constitution allows such discrimination. That holding has since been reaffirmed, making the text of the Civil Rights Act essentially irrelevant in subsequent cases.

While the Court held that only its own equal protection doctrine would determine what kinds of racial discrimination governments would be permitted to practice, the *Bakke* Court could not agree on what that doctrine was going to be. Writing for himself alone, Powell purported to apply traditional strict scrutiny, under which all racial discrimination is forbidden unless it is “precisely tailored to serve a compelling governmental interest.”<sup>98</sup> He then concluded that a medical school’s interest in assembling a racially diverse student body is a compelling interest because it serves the First Amendment goal of promoting the “robust exchange of ideas.”<sup>99</sup> Turning to the narrow tailoring prong of the test, Powell endorsed the Harvard admissions approach, which purports to treat race and ethnicity as one “factor” along with others, thus making it difficult to prove which whites are being rejected because they are white and which are being rejected for other reasons.

Because it is obviously meaningless to treat anything as a “factor” unless it will sometimes be the deciding factor, the Harvard/Powell approach unquestionably entails racial discrimination. Nor does it put any meaningful limits on this racial discrimination, as is clear once one actually thinks about the implications of Powell’s soothing comment that those who lose out to preferred minorities will not have been “foreclosed from *all* consideration” because of their race or ethnicity.<sup>100</sup> And lest there be any doubt that Powell thought that the narrow-tailoring requirement left schools with extraordinarily wide latitude to discriminate, he helpfully added that “a court would not assume that a university,

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<sup>98</sup> *Id.* at 299.

<sup>99</sup> *Id.* at 312-14.

<sup>100</sup> *Id.* at 318 (emphasis added).

professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system.”<sup>101</sup>

For at least two reasons, *Bakke* settled almost nothing as a matter of constitutional doctrine. First, Powell’s position was inconsistent with that of the four other Justices who had reached the constitutional issue, and it was highly debatable what the “narrowest grounds” for the Court’s judgment were under the *Marks* rule.<sup>102</sup> Second, Powell’s reliance on the First Amendment at the very least suggested that the reach of the *Bakke* holding did not extend beyond the realm of higher education.

## **B. Preferential Discrimination in Government Contracts and Licensing**

Outside the context of university admissions, which *Bakke* suggested might be uniquely affected by the First Amendment, the Burger and Rehnquist Courts produced a series of opinions that created as much uncertainty as *Bakke* produced in the field of education.

In *Fullilove v. Klutznick*, the Burger Court upheld a federal statute that set a 10% quota for minority-owned businesses competing for certain federally funded construction contracts, but the Court could not produce a majority opinion.<sup>103</sup> In the 5-4 *Wygant* decision in 1986, the Rehnquist Court invoked the Fourteenth Amendment to invalidate a school board’s use of racial preferences in deciding which employees to lay off, but it was also unable to produce a majority

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<sup>101</sup> *Id.* at 317.

<sup>102</sup> “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” *Marks v. United States*, 430 U.S. 188, 193 (1977) (quotation marks and citation omitted).

<sup>103</sup> 448 U.S. 448 (1980).

rationale for the result.<sup>104</sup> In 1989, in *City of Richmond v. J.A. Croson Co.*, the Court splintered again, this time in a case involving a municipality's use of a quota for minority-owned businesses competing for subcontracts on city construction projects.<sup>105</sup> In an opinion written by Justice O'Connor, a 5-Justice majority did agree both that strict scrutiny was the applicable constitutional standard and that the city had failed to meet that standard in this case. The Court, however, was unable to agree on what would be required for the strict scrutiny standard of review to be met.

Although *Wygant* and *Croson* suggested that the Rehnquist Court was more skeptical about racial preferences than the Burger Court had been, the next case went in the other direction. *Metro Broadcasting, Inc. v. FCC* narrowly upheld a federal program that sought to create "broadcast diversity" by using racial preferences in the award of broadcasting licenses.<sup>106</sup> The Court rejected the use of strict scrutiny in favor of the more relaxed standard of "intermediate scrutiny," and distinguished *Croson* as a case involving state rather than congressional action. Justice O'Connor's dissent for four Justices argued that strict scrutiny was required for state and federal programs alike, and that this federal program could not survive such review.

Finally, in *Adarand Constructors*,<sup>107</sup> the Court reviewed a federal preference program for minority contractors similar to the one upheld in *Fullilove*. By a vote of 5-4, the Court held that strict scrutiny applied, expressly overruled *Metro Broadcasting*, and appeared to deprive *Fullilove* of precedential force.<sup>108</sup>

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<sup>104</sup> 476 U.S. 267 (1986).

<sup>105</sup> 488 U.S. 469 (1989).

<sup>106</sup> 497 U.S. 547 (1990).

<sup>107</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

<sup>108</sup> 515 U.S. at 227 ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored

But once again the Court was unable to produce a majority opinion defining how strict scrutiny would operate. Justice O'Connor's plurality opinion seemed to interpret strict scrutiny as a highly fact-specific inquiry, and hinted that discrimination against certain racial groups is much more likely to survive review than discrimination against other racial groups.<sup>109</sup> Scalia and Thomas, however, made clear their view that discrimination in favor of certain minorities should not be treated differently than discrimination against other groups. The case was remanded so that the courts below could apply a standard of review that the Supreme Court had not been able to explain.

Throughout the Rehnquist Court period, the Court has been sharply divided between those who would almost never uphold the use of racial preferences except to remedy proven discrimination and those who would frequently uphold discrimination aimed at benefitting certain racial minorities. Justice O'Connor has taken a middle position in which she applies strict scrutiny on a case-by-case basis. What is most striking about this position, when compared with her approach to the ADA and Title VII, is how little concern she has shown to articulate clear rules that can be applied in a consistent and predictable manner. Although I do not believe she has ever said so directly, this may reflect a difference in her views of statutory and constitutional adjudication. In *US Airways*, she joined an opinion with which she disagreed in order to produce a majority, and commented that the Court was "merely interpreting a statute."<sup>110</sup> In the line of

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measures that further compelling governmental interests. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled."); *id.* at 235 ("[T]o the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard [than strict scrutiny], it is no longer controlling. But we need not decide today whether the program upheld in *Fullilove* would survive strict scrutiny as our more recent cases have defined it.").

<sup>109</sup> *See, e.g.*, 515 U.S. at 229-30 (the fact that a person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection "says *nothing* about the ultimate validity of any particular law") (emphasis added); *id.* at 237 (seeking to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact").

<sup>110</sup> 535 U.S. at 408.

cases discussed in this section, O'Connor has been pretty spectacularly unwilling to join anything with which she has the slightest disagreement, and the pragmatic interest in articulating clear rules for the lower courts and regulated parties seems to be entirely absent.

Such rules have just as much value in constitutional law as they do in statutory law. In addition, confusion in constitutional law, like the confusion produced by this series of racial preference decisions, cannot be cleared up by Congress. This would seem to suggest that O'Connor's stress on establishing clear and consistent rules may be a less important element of her general approach than it might seem to be if one looked only at statutory cases. An illustration of how much difference there can be between statutory and constitutional cases is provided by the Court's most recent decisions in the area of racial preferences.

### C. *Bakke and Grutter*

Last year, the Court finally put an end to a quarter century of uncertainty about the constitutionality of racial discrimination in university admissions. Responding to a circuit split about the implications of the splintered result in *Bakke*, the Court reviewed cases involving preferential admissions to the University of Michigan's undergraduate college and to its law school. These decisions can be summarized quite succinctly: the Court adopted Justice Powell's position in *Bakke* as the law of the land.

In *Gratz v. Bollinger*,<sup>111</sup> the undergraduate college had used a mechanical system that gave certain minorities a fixed number of bonus points in the admissions process. In a 5-4 opinion written by Chief Justice Rehnquist, the Court applied strict scrutiny and invalidated the system, much as Powell had rejected the mechanical quota in *Bakke*. In the more significant case involving the law school, *Grutter v. Bollinger*,<sup>112</sup> Justice O'Connor wrote a 5-4 majority opinion upholding a system in which certain minorities had their race treated as a "plus factor" in

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<sup>111</sup> 123 S. Ct. 2411 (2003).

<sup>112</sup> 123 S. Ct. 2325 (2003).

admissions.

The Court's opinion in *Grutter* summarized Powell's position in *Bakke*, and expressly adopted it. The crucial elements were as follows. First, the law school advanced its educational interest in a "diverse student body" as the compelling governmental interest that justified its policy of ensuring the admission of a "critical mass" of blacks, certain selected Hispanics, and American Indians. The Court deferred to this educational judgment, alluding to "a special niche in our constitutional tradition" occupied by universities and citing Powell's reliance on the First Amendment.<sup>113</sup> The Court added that it was also influenced by its view of the importance to society of producing a racially diverse cadre of future leaders. Second, the Court held that the law school's program was narrowly tailored because it entailed the "individualized consideration" of applicants, in which characteristics other than race were considered along with race and in which a rejected applicant from a disfavored race is not "foreclosed from *all* consideration for that seat simply because he was not the right color or had the wrong surname."<sup>114</sup>

The Court's opinion rejected the proposition that the school was required to begin by exhausting the use of race-neutral alternatives that might have achieved its racial diversity goals. One obvious and facially race-neutral alternative would have been to hold an admissions lottery among all applicants who had the minimum qualifications deemed necessary for successful law school performance; another alternative would have been to decrease the emphasis for all applicants on undergraduate GPA and LSAT scores. The Court specifically rejected the proposition that the school was required even to consider achieving the desired diversity by means that "would require a dramatic sacrifice of . . . the academic

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<sup>113</sup> *Id.* at 2339.

<sup>114</sup> *Id.* at 2345-46 (quoting Powell's opinion in *Bakke*, 438 U.S. at 318) (emphasis added).

quality of all admitted students.”<sup>115</sup>

Finally, the Court acknowledged that a “core purpose” of the Fourteenth Amendment was to eliminate governmentally imposed racial discrimination, and inferred from this that discriminatory programs like the one at issue in this case must be “limited in time” and must have a “logical end point.”<sup>116</sup> No time limits were imposed, however, and the Court seemed to imply that racial preferences

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<sup>115</sup> 123 S. Ct. at 2345. The “dramatic sacrifice” of what the Court calls “academic quality” that would result from decreasing the emphasis on undergraduate GPA and LSAT scores was illustrated by statistics based on the record in the case. For example:

From 1995 to 2000, the median LSAT score of the underrepresented minority groups has been lower than the median LSAT score of Caucasians by approximately seven to nine points.

*Grutter v. Bollinger*, 137 F. Supp. 2d 821, 864 (E.D. Mich. 2001) (footnote omitted). Similarly:

Majority applicants with an A average and LSAT over 164 enjoy admission rates over 40%. As their grades slide to a high B average and an LSAT over 164, their admission rates drop to around 20%. Below a 164, majority applicants are not admitted at a rate any more than 10%, regardless of their grade point average. . . . By comparison, designated minorities are not only considered, but admitted in rates over 60%, and usually over 80%, with LSAT scores down to 154 and grade point averages in the low B range.

*Grutter v. Bollinger*, 288 F.3d 732, 797 nn.22-23 (2002) (Boggs, J., dissenting).

The magnitude of the “plus factor” for race in the Michigan admissions process is also suggested by the following:

Taking a middle-range applicant with an LSAT score 164-66 and a GPA of 3.25-3.49, the chances of admission for a white or Asian applicant are around 22 percent. For an under-represented minority applicant, the chances of admission (100%) would be better called a guarantee of admission.

*Id.* at 797.

<sup>116</sup> 123 S. Ct. at 2346.

might be used forever if certain minorities continued to be disproportionately screened out by demanding standards of what the Court called “academic quality.” The Court did require “periodic reviews” to determine whether racial discrimination is still needed to achieve the desired diversity, but seemed to leave it completely up to the schools to determine how much diversity they want and whether racial discrimination is needed to achieve that much diversity.<sup>117</sup>

The *Grutter* opinion purports to apply a familiar constitutional test, but in fact radically transforms its meaning. “Strict scrutiny” now means virtually no scrutiny, at least as to university admissions policies that discriminate against certain races, such as whites and Asians. To put the point another way, *Grutter* creates a safe harbor for such discrimination that extends over the whole ocean, except for one little cove that contains strictly unbending quotas and absolutely mechanical preferences like those at issue in *Bakke* and *Gratz*.

Although the *Grutter* opinion plausibly contends that its holding is not in direct conflict with any previous holdings of the Court, this should not be allowed to obscure how radically it reshapes the constitutional standard of review. The Court’s response to a few of the objections raised in the dissenting opinions will illustrate how the doctrine has changed.

First, as Justice Thomas points out, the Court had previously approved governmental racial discrimination only in the service of two “compelling interests”: national security during wartime and providing a remedy for past discrimination by the government. In *Grutter*, the Court finds a compelling state interest in a public law school’s desire to effect marginal changes in the nature of classroom discussions and related educational activities. This is especially striking when

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<sup>117</sup> “We take the Law School at its word that it would ‘like nothing better than to find a race-neutral admissions formula’ and will terminate its race-conscious admissions program as soon as practicable.” *Id.* at 2346 (quoting Respondents’ Brief). The Court went on to say that it “expects” racial preferences to become unnecessary within 25 years. *Id.* at 2347. Contrary to Justice Thomas’ suggestion, *id.* at 2350-51, I do not think the Court “held” that preferences would become unconstitutional within that period. Rather, the Court seems to have indulged itself in a bit of speculation whose significance, if any, is a function of the Justices’ clairvoyance.

combined with the Court's refusal to require the Michigan law school even to consider relaxing the highly selective academic standards it applies to most applicants. The "compelling" state interest is only a desire to make marginal and speculative educational improvements without compromising the school's perceived status as an elite institution.

This is a strange and novel use of the term "compelling interest." Thomas notes that 10% of the nation's states have no public law school at all and only three other states maintain schools that are comparable to Michigan's in terms of perceived status and selectivity. How exactly is it that Michigan has a "compelling" interest in having any public law school at all, let alone a highly selective one, let alone a highly selective one that uses radically different admissions standards for different racial groups? We are never told. Furthermore, the supposedly compelling nature of the state's interest in maintaining an institution of this kind becomes even harder to imagine when one considers the facts a) that less than 6% of applicants to the Michigan bar are graduates of the Michigan Law School; b) that only 27% of the students at the law school are from Michigan; and c) that less than 16% of the school's students remain in the state after graduation. "Compelling state interest" now seems to mean a governmental desire of which the Court approves.

Second, the Court's refusal to require the law school to consider facially race-neutral methods of increasing racial diversity contrasts quite strikingly with its decision in *United States v. Virginia*.<sup>118</sup> In that case, the Court required an all-male military school to admit women despite the school's contention that doing so would require it to adopt less effective educational methods and would change the character of the institution. Although that case applied the supposedly *more relaxed* standard of "intermediate scrutiny," considerations of academic freedom and the First Amendment were given no apparent weight in the Court's analysis. The majority ignored Justice Thomas' discussion of *United States v. Virginia*, and certainly did not rebut the inference that strict scrutiny is now less strict than intermediate scrutiny was in that case.

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<sup>118</sup> 518 U.S. 515 (1996).

Third, the Court says that “outright racial balancing [ ] is patently unconstitutional,”<sup>119</sup> and accepts without question the law school’s claim that it was not engaged in such balancing. This would be less striking were it not for the fact that Chief Justice Rehnquist’s dissenting opinion proves beyond any reasonable doubt that the law school was in fact engaged in outright racial balancing. Over a period of several years, the school admitted the favored minorities in almost perfectly exact proportions to the proportion of each in the applicant pool. Furthermore, it was able to achieve this result only by treating some of these minorities very differently than others.

The Court made no effort to explain how the school’s “critical mass” rationale for its program could lead it to admit twice as many blacks as Hispanics, or why it chose to relax its admissions standards for blacks much more than for Hispanics.<sup>120</sup> The majority responded to Rehnquist by noting that the statistics on actual enrollment showed more variation than the statistics on admissions. But that is obviously a result of the fact that the school has little ability to control which admitted students actually enroll. What the school *could* completely control—who was admitted and who was rejected—was almost perfectly controlled to reflect the racial balance in the applicant pool. The Court’s response to Rehnquist contains nothing to undermine his conclusion that the school’s “alleged goal of

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<sup>119</sup> 123 S. Ct. at 2339 (citations omitted).

<sup>120</sup> For example, in 2000, 12 Hispanics who scored between a 159-160 on the LSAT and earned a GPA of 3.00 or higher applied for admission and only 2 were admitted. Meanwhile, 12 African-Americans in the same range of qualifications applied for admission and all 12 were admitted. Likewise, that same year, 16 Hispanics who scored between a 151-153 on the LSAT and earned a 3.00 or higher applied for admission and only 1 of those applicants was admitted. Twenty-three similarly qualified African-Americans applied for admission and 14 were admitted.

*Id.* at 2367 (Rehnquist, J., dissenting) (citations omitted).

‘critical mass’ is simply a sham.’<sup>121</sup>

The majority’s rejection of Rehnquist’s analysis—or more accurately, his un rebutted demonstration—together with its reshaped conception of a compelling governmental interest, effectively reduces strict scrutiny to something like rational basis review. So long as the Court can imagine or hypothesize some connection between a government’s decision and some purpose of which the Court approves, it can now be upheld. And this is so even in a case where it is proven that the government is actually engaged in a sham that conceals a practice that the Court itself says is “patently unconstitutional.”<sup>122</sup>

The precedent to which *Grutter* bears the greatest formal resemblance is *Plessy v. Ferguson*.<sup>123</sup> As in *Grutter*, the *Plessy* Court acknowledged that the object of the Fourteenth Amendment “was undoubtedly to enforce the absolute equality of the two races before the law.”<sup>124</sup> Notwithstanding this admission, however, *Plessy* held that racial segregation laws were constitutionally permissible if they pass the following test: “[E]very exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a

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<sup>121</sup> *Id.* at 2367 (majority opinion). *Cf. Johnson*, 480 U.S. 662-64 (Scalia, J., dissenting) (contending that the characterization of the facts in the case by the majority and by Justice O’Connor were inconsistent with factual findings by which the Court was bound under Fed. R. Civ. P. 52(a)).

<sup>122</sup> Justice Scalia suggests in his dissent that *Grutter* leaves the law so unclear as to invite a host of new lawsuits. 123 S. Ct. at 2349-50. For the short term, at least, this seems to me to be incorrect. The Court has made it quite clear that a school need do little more than say the word “diversity” and make sure that somebody purports to conduct at least a pro forma “holistic” review of every applicant’s file. In the longer term, the Court may indeed expect and desire new lawsuits, which will give it the opportunity to decide whether racial preferences continue to be a good policy for the nation or not.

<sup>123</sup> 163 U.S. 537 (1896).

<sup>124</sup> *Id.* at 544. Similarly, the *Grutter* Court acknowledged that a “core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.” 123 S. Ct. at 2346 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

particular class.”<sup>125</sup> This is essentially the same test deployed in *Grutter*, which treated the Michigan Law School’s diversity plan as a reasonable means toward the “important and laudable” goal of promoting classroom discussions that are “livelier, more spirited, and simply more enlightening and interesting.”<sup>126</sup>

The *Plessy* Court was also plainly concerned with the adverse effects that might flow from judicial interference with a practice that was highly valued by important elements of the citizenry.<sup>127</sup> Similarly, the *Grutter* Court emphasized its view that it is crucially important to our society—and especially to American business and the American military—to ensure that more people of certain racial backgrounds attend what are perceived to be elite schools.<sup>128</sup> And, like the *Plessy* Court, *Grutter* accepted the government’s utterly implausible and unsubstantiated claims about the purpose of the challenged practices.<sup>129</sup>

The *Plessy* decision, of course, included a lone dissent from Justice Harlan, disputing the majority’s legal analysis and eloquently challenging the majority’s view that enforced segregation would promote racial harmony. *Grutter*

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<sup>125</sup> 163 U.S. at 550.

<sup>126</sup> 123 S. Ct. at 2339 (quoting the District Court).

<sup>127</sup> “Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.” 163 U.S. at 551.

<sup>128</sup> See 123 S. Ct. at 2340-41.

<sup>129</sup> We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

163 U.S. at 546. Cf. *supra* notes xx and accompanying text (discussing the *Grutter* majority’s response to Chief Justice Rehnquist’s dissent).

provoked an equally eloquent, and much better reasoned, dissent from Justice Thomas.<sup>130</sup> Although I find myself in agreement with Thomas' views about the pernicious effects of programs like the one at issue in *Grutter*,<sup>131</sup> the majority opinion probably does reflect the dominant opinion in contemporary elite culture.

The extraordinary breadth of the elite consensus is illustrated by Richard Epstein's heroic effort to reconcile support for governmental racial preferences with libertarian principles.<sup>132</sup> Professor Epstein rightly calls his a "shaky" defense, for it requires him to contend that a government agency should be allowed to engage in racial discrimination, notwithstanding the obvious public choice objections and the obvious historical evidence that confirms these objections. Professor Epstein's response begins with the libertarian premise that racial discrimination by private actors ought to be allowed and with the analytical point that free markets will place significant constraints on irrational discrimination:

I have noted the close analytical connection between the antidiscrimination norm and the presence of monopoly power. The former should be used as an effort to limit the state as well as private use of monopoly power. On this view, however, the antidiscrimination principle has no role to play to the extent that it is invoked to limit the ordinary principle of freedom of association as it applies to those private individuals and firms that do not possess any monopoly power at all. . . . [O]nce any individual or

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<sup>130</sup> For a critique of the legal reasoning in both the majority and dissenting opinions in *Plessy*, see Nelson Lund, *The Constitution, the Supreme Court, and Racial Politics*, 12 Ga. St. U. L. Rev. 1129 (1996). For the reasons discussed above, I believe that Thomas' legal critique of the *Grutter* majority is sound. Thomas' analysis of the likely consequences of the majority's decision, moreover, is much more detailed than the conclusory statements in the analogous passages in Harlan's *Plessy* dissent.

<sup>131</sup> Space constraints preclude a discussion here of the effects of racial preference programs.

<sup>132</sup> Richard A. Epstein, *A Rational Basis for Affirmative Action: A Shaky but Classical Liberal Defense*, 100 Mich. L. Rev. 2036 (2002).

institution is stripped of that monopoly power, then everyone else finds their strongest protection in the power to go elsewhere if they do not like the terms and conditions on which any one provider chooses to offer some goods or services. Free entry thus becomes the low-cost antidote to discrimination and abuse in competitive settings.

Accepting these starting points, how can one justify discrimination by the greatest monopoly of all, the government? Professor Epstein's surprising answer is that government universities are adequately and appropriately disciplined by competition from private institutions, many of which have voluntarily decided to engage in such discrimination. In order to evaluate this argument, one ought to consider the fact that what we have here is competition between government agencies staffed by self-perpetuating groups of life-tenured professors on one side, and tax-exempt, nonprofit, government-subsidized institutions staffed by self-perpetuating groups of life-tenured professors on the other. To say the least, such competition does not curtail irrational and ill-motivated discrimination in the same way as competition among business firms whose owners suffer real economic consequences when they engage in irresponsible behavior. Indeed, a little glimpse of the reality underlying Michigan's professions of good faith was provided in the testimony of the former admissions director at the law school:

He testified that faculty members were "breathhtakingly cynical" in deciding who would qualify as a member of underrepresented minorities. An example he offered was faculty debate as to whether Cubans should be counted as Hispanics: One professor objected on the grounds that Cubans were Republicans.<sup>133</sup>

Sure enough, Cubans were excluded from this government-operated law school's diversity program.<sup>134</sup>

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<sup>133</sup> 123 S. Ct. at 2373 (Kennedy, J., dissenting).

<sup>134</sup> *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 824 n.1 (2001) ("African American, Native American, Mexican American and mainland Puerto Rican students . . . are identified

Even in the business world, the “voluntary” nature of racial preference programs is something of a myth, as the facts in *Weber* richly illustrate.<sup>135</sup> And in law schools, these programs are effectively mandatory. A school that refused to employ racial preferences would instantly be threatened with disaccreditation by the American Bar Association,<sup>136</sup> a government-

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in University of Michigan Law School documents as the groups which receive special attention in the admissions process.”).

<sup>135</sup> See *Weber v. Kaiser Aluminum & Chem. Corp.*, 415 F. Supp. 761, 765 (1976):

There is no evidence that Kaiser, in incorporating this quota system in the 1974 Labor Agreement, did so with a view toward correcting the effects of prior discrimination at any of the fifteen plants to which the system had application. To the contrary, it appears that satisfying the requirements of [the U.S. Department of Labor], and avoiding vexatious litigation by minority employees, were its prime motivations.

<sup>136</sup> The ABA would invoke procedural Rule 11(b), which provides:

If . . . the [Accreditation] Committee determines that the school has not demonstrated compliance with the [Accreditation] Standards, the school may be required to appear at a hearing before the Committee to be held at a specified time and place to show cause why the school should not be required to take appropriate remedial action, placed on probation, or removed from the list of law schools approved by the Association.

The applicable substantive rule would be Accreditation Standard 211, which provides:

Consistent with sound legal education policy and the Standards, a law school shall demonstrate, or have carried out and maintained, by concrete action, a commitment to providing full opportunities for the study of law and entry into the profession by qualified members of groups, notably racial and ethnic minorities, which have been victims of discrimination in various forms. This commitment typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, and a program that assists in meeting the unusual financial needs of many of these students, but a law school is not obligated to apply standards for the award of financial assistance different from those applied to other students.

designated *monopolist* whose approval is needed before a law school's graduates can be admitted to the bar in many states.<sup>137</sup> Given the severe adverse consequences that most schools would suffer if there were even a threat of disaccreditation, it is no surprise that everyone “voluntarily” does just what this government-designated accrediting monopolist wants done.<sup>138</sup> Thus, Professor Epstein's “classical liberal” defense of governmentally imposed racial preferences is even shakier than he acknowledges.

His conclusion, however, is one that enjoys nearly universal approbation among his professional peers. Indeed, our elite culture is almost monolithically in favor of racial preferences, at least in public. This apparent consensus may be

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Because of the large gaps in academic qualifications among various racial groups, which was dramatically illustrated in the record of the Michigan litigation, very few schools (if any) could satisfy the ABA that they had demonstrated a sufficient “commitment” without the use of racial preferences. Nor does the ABA ever seem to have considered that such preferences might be inconsistent with Accreditation Standard 210(a), which provides:

A law school shall foster and maintain equality of opportunity in legal education, including employment of faculty and staff, without discrimination or segregation on ground of race, color, religion, national origin, sex, or sexual orientation.

<sup>137</sup> See, e.g., Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 Colum. L. Rev. 60, 71 n.60 (2004) (noting that many states limit bar admission to graduates of school's accredited by the American Bar Association). See also <http://www.abanet.org/legaled/accreditation/abarole.html> (“The Council of the ABA Section of Legal Education and Admissions to the Bar is the United States Department of Education recognized accrediting agency for programs that lead to the first professional degree in law.”).

<sup>138</sup> See, e.g., Stewart E. Sterk, *Information Production and Rent-Seeking in Law School Administration: Rules and Discretion*, 83 B.U. L. Rev. 1141, 1145 n.9 (2003) (“Failure to become accredited is a serious handicap to a law school's ability to attract students.”). See also Ronald A. Cass, *The How and Why of Law School Accreditation*, 45 J. Legal Educ. 418 (1995) (arguing that ABA accreditation rules reduce competition among law schools); *id.* at 425 (suggesting that the actions of accreditors “will conform far more closely to conduct that increases the power, prestige, and perquisites of accreditors—and of professional groups with the greatest affinity to, access to, and control over the accreditors—at the expense of other actors, including those whose interests accreditation ostensibly serves.”).

somewhat misleading, inasmuch as opponents of racial preferences are routinely treated as racists or at best disgustingly insensitive moral dullards. Perhaps some who publicly acquiesce in the views of their rather domineering peers do not really share those views. In any event, the same elites who so strongly defend today's racial preferences are equally merciless in their condemnation of *Plessy*'s endorsement of enforced racial segregation. It is worth recalling, however, that enforced segregation was strongly supported by the dominant elites of the *Plessy* era, in both the South and the North and in both conservative and progressive circles.<sup>139</sup> Today's progressives support a different kind of racial discrimination than those of a century ago, and one that has surely been much less pernicious. Still, it remains to be seen whether our elite thinkers will eventually attract the same kind of contempt that they now express for the views of their predecessors.

## V. Conclusion

The Rehnquist Court's pragmatism has led to results that are generally conservative, in a special sense of the term. In the area of racial preferences, the Burger Court had established several radically questionable precedents. Although the Rehnquist Court has displayed an intense interest in this area, as measured by the number of cases and the hot rhetoric used by some of the Justices, the Court has not clearly overruled a single Burger Court decision. And despite signs of increased skepticism within the Court about the Burger Court's approach to this issue, only one Rehnquist Court decision actually put any significant curbs on this kind of racial discrimination. That occurred in the area of disparate impact doctrine, but the restrictions were based largely on the reaffirmation of a *Burger Court* decision that interpreted *Griggs* very narrowly.

This conservative approach to highly questionable precedents appears to be a reflection of a more generally pragmatic approach to civil rights law. In applying the ADA, for example, the Court has entirely avoided the kinds of

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<sup>139</sup> See, e.g., Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 *Tex. L. Rev.* 1, 258-62 (2002); William Forbath, *Caste, Class, and Equal Citizenship*, 98 *Mich. L. Rev.* 1, 49-53 (1999)

freewheeling interpretations that one finds in Burger Court cases like *Griggs* and *Weber*. When confronted with genuine ambiguities in the statute, however, the Court has seemed willing to choose the less well-reasoned legal analysis when it looks better in pragmatic terms, and has sometimes been pretty forthright about its willingness to devise its own practical way of balancing competing statutory goals.

The essentially pragmatic nature of the Court's version of conservatism is especially visible in its recent decision in *Grutter v. Bollinger*. Confronted with the controversial issue of racial preferences in university admissions, the Court adopted a position previously articulated by one Justice in the Burger Court's *Bakke* decision. Notwithstanding this link with the past, *Grutter* transformed the traditional strict scrutiny test for racial discrimination. At least in the context of admission to universities, the test now entails virtually no scrutiny at all if the Court believes that a particular form of racial discrimination is good for American society. That is an entirely pragmatic approach, and it is conservative chiefly in the rather specialized sense that the Court has not yet determined whether to adopt a similarly latitudinarian approach to racial preferences outside the context of higher education.