

THE LAW OF AFFIRMATIVE ACTION IN AND AFTER THE CIVIL RIGHTS ACT OF 1991: CONGRESS INVITES JUDICIAL REFORM

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INTRODUCTION

After a decade of avoiding direct confrontation with the subject, the Supreme Court has finally agreed, in the pending *Piscataway* case,¹ to address one of the most controversial questions in the law of employment discrimination: whether Title VII of the Civil Rights Act of 1964 permits employers to engage in "affirmative action" that entails racial discrimination in favor of minorities.² In 1979, this question was raised, and decided in the affirmative, by *United Steelworkers v. Weber*.³ Then-Justice Rehnquist wrote a strong and passionate dissent, but *Weber* was reaffirmed eight years later in *Johnson v. Santa Clara Transportation*

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¹ *Taxman v. Board of Educ. of Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, *Piscataway Township Bd. of Educ. v. Taxman*, 117 S. Ct. 2506 (1997). In this case, an employer with a racially balanced workforce decided for budgetary reasons to lay off one employee, and was required by state law to select that person on the basis of reverse seniority. In prior cases where choices had to be made between employees with identical seniority, a random process like drawing lots had been used. In order to promote "racial diversity," however, the employer chose in this case to retain a black employee and to lay off a white employee with identical seniority. See *Taxman v. Board of Educ. of Township of Piscataway*, 91 F.3d 1547, 1549-52 (3d Cir. 1996).

² With respect to the disparate impact and affirmative action issues discussed in this Article, both Title VII and the case law treat discrimination because of color, religion, sex, and national origin in the same way that they treat discrimination because of race. For convenience, this Article will often refer to racial discrimination without mentioning the other categories. It should be understood that, unless specifically noted or unless the context implies otherwise, statements made about racial discrimination and race-based affirmative action also apply to the other categories.

It should also be noted that there are several bodies of law relating to affirmative action that will not be addressed in this Article. The Supreme Court has, for example, recently addressed the constitutionality of affirmative action programs in the public sector. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Those decisions, however, do not control cases arising under Title VII. Similarly, there are a number of decisions dealing with the special problems associated with race-conscious remedies imposed by courts on employers under Title VII. See, e.g., *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986). These decisions do not bear directly on the issues considered in this Article.

³ 443 U.S. 193 (1979).

Agency.⁴ An even more passionate dissent, this time by Justice Scalia, advocated that *Weber* be overruled,⁵ but the Court is only now returning to the issue.

Weber and its progeny have been extremely controversial outside as well as within the Court. Despite this fact, or perhaps because of it, Congress has not unambiguously acted to resolve the controversy by exerting its undoubted authority either to codify or to overrule the Court's interpretation of Title VII. Congress has, however, given extensive attention to the underlying policy issue. Virtually all of the congressional debate that culminated in the Civil Rights Act of 1991 dealt with whether and to what extent the law of "disparate impact"⁶ under Title VII encouraged employers to implement quotas or other forms of discrimination in favor of minorities. In the end, Congress codified the judicially-created doctrine of disparate impact with minor modifications. The close connection between the questions raised in the disparate impact debate and the issue of affirmative action makes it especially striking that Congress avoided discussing *Weber* and *Johnson* during the debates that led up to the 1991 statute.

Those commentators who have addressed the legal status of affirmative action after the Civil Rights Act of 1991 fall into two main groups. One group claims that the new statute ratifies pre-existing law. Professor Blumrosen, for example, contends that the 1991 statute "approves the existing laws in support of affirmative action programs. The Act repudiates the elevation of the 'no preference' provision [of Title VII] as the primary concern in the interpretation of the statute, and restores the elimination of discrimination as the primary purpose."⁷ The other group essentially

⁴ 480 U.S. 616 (1987).

⁵ See *id.* at 657-77. Scalia's dissent was joined by Chief Justice Rehnquist and in part by Justice White, who agreed that *Weber* should be overruled. Justice O'Connor concurred only in the judgment and noted that "[n]one 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." *Id.* at 648.

⁶ "Disparate impact" is the name for a doctrine, discussed in detail later in this Article, under which liability can arise under Title VII for employment practices that result in the "underrepresentation" of certain groups even when the employer had no intent to screen out members of those groups.

⁷ Alfred W. Blumrosen, *Society in Transition III: Justice O'Connor and the Destabilization of the Griggs Principle of Employment Discrimination*, 13 WOMEN'S RTS. L. REP. 53, 69-70 (1991) (footnotes omitted); see also Alfred W. Blumrosen, *Society in Transition IV: Affirmation of Affirmative Action under the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 903 (1993) (arguing at length that the 1991 statute promotes affirmative action); Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog that Didn't Bark*, 39 WAYNE L. REV. 1093, 1122-23 (1993) (1991 Act did not alter Title VII case law addressing affirmative action); Robert A. Sedler, *Employment Equality, Affirmative Action, and the Constitutional Political Consensus*, 90 MICH. L. REV. 1315, 1332-34 (1992) (a constitutional consensus favoring race- and gender-conscious affirmative action in employment "has been confirmed anew by the enactment of the Civil Rights Act of 1991. . . . On race- and gender-conscious affirmative action, [Congress and the President] simply let everything stand as it was." (footnote omitted)).

argues that Congress ducked the affirmative action issue, leaving all questions raised by *Weber* and its progeny untouched or in some state of continuing uncertainty. Thus, for example, Professor Belton contends that the new statute restored some of the underpinnings of affirmative action, but argues that “[t]he future of the continued vitality of affirmation [sic] action, however, is not free from doubt because Congress refused or was unable to reach a consensus on whether *Weber* and *Johnson* are still good law.”⁸ The difference between these two positions is fairly small, and all commentators appear to be united in their unwillingness to assert that Congress disapproved or overruled any significant aspect of the law of affirmative action under Title VII.⁹

If the commentators are right, the Civil Rights Act of 1991 should be irrelevant to the Supreme Court’s coming decision in *Piscataway*. The commentators, however, have overlooked the strongest arguments in favor of construing the 1991 statute as a legislative overruling of the Court’s affirmative-action decisions. These arguments are textual arguments, and they are undercut to some extent by the legislative history, which strongly suggests that Congress did not intend to overrule *Weber* and *Johnson*. This Article contends, however, that even if one construes the 1991 statute in light of the legislative history, the commentators are correct only in a rather narrow and technical sense, namely, that Congress did not directly overrule *Weber* or *Johnson*. In a more important sense, however, Congress did speak to the most important issue raised by *Piscataway*: whether the Court itself should overrule *Weber* and *Johnson*. I argue that the Civil Rights Act of 1991 should be interpreted as encouragement from Congress for the Court to overrule these decisions, and that the Court itself has invited Congress to provide exactly this sort of guidance.

⁸ Robert Belton, *The Civil Rights Act of 1991 and the Future of Affirmative Action: A Preliminary Assessment*, 41 DEPAUL L. REV. 1085, 1115 (1992); see also Kingsley R. Browne, *The Civil Rights Act of 1991: A “Quota Bill,” A Codification of Griggs, A Partial Return to Wards Cove, or All of the Above?*, 43 CASE W. RES. L. REV. 287, 309 (1993) (“the only substantive change in the law of affirmative action effected by the Act was to outlaw a particular form of affirmative action—race norming”); Lino A. Graglia, *Racial Preferences, Quotas, and the Civil Rights Act of 1991*, 41 DEPAUL L. REV. 1117, 1137 (1992) (“the 1991 Act is a statute at war with itself”); Donald R. Livingston, *The Civil Rights Act of 1991 and EEOC Enforcement*, 23 STETSON L. REV. 53, 79-80 (1993) (expressing doubt that the 1991 Act will be construed to outlaw voluntary affirmative action); Frederick A. Morton, Jr., *Class-Based Affirmative Action: Another Illustration of America Denying the Impact of Race*, 45 RUTGERS L. REV. 1089, 1096 (“The impact of the 1991 Act on affirmative action is still best categorized as uncertain.” (footnote omitted)).

⁹ The 1991 Act does prohibit the practice of “race norming,” in which test scores are manipulated so that all groups appear to have performed similarly. Thus, for example, the raw scores on a test might be adjusted so that a black test taker whose score put him in the 75th percentile among other black test takers receives the same adjusted score as a white whose score put him in the 75th percentile among other white test takers. This particular affirmative action device was outlawed by Section 106 of the 1991 Act. Civil Rights Act of 1991 § 106, 42 U.S.C. § 2000e-2(l) (1994).

The argument, briefly stated, is as follows. Congress adopted an unambiguously colorblind statute in 1964, which the Supreme Court subsequently abrogated in a series of disparate impact and affirmative action decisions. In 1987, the Court reaffirmed its endorsement of racially discriminatory affirmative action on the ground that this interpretation of the statute enjoyed *implicit congressional approval*. In 1991, however, Congress removed whatever implicit approval it had previously extended to the Court's interpretation. It did so in the following way. First, Congress chose not to alter the unambiguous language that the Court had previously refused to honor. Instead, the 1991 statute amended Title VII by adding new and even *more* unambiguously colorblind language. Simultaneously, however, Congress directed that the 1991 amendments *not* be construed to affect "court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law."¹⁰ So long as "the law" is deemed to permit the racially discriminatory affirmative action authorized by *Weber* and *Johnson*, the 1991 statute becomes hopelessly self-contradictory. If, however, *Weber* and *Johnson* are overruled by the Supreme Court, this contradiction will disappear. This provides an important reason, and one recognized in the legislative history of the 1991 Act, that can and should be added to the other powerful arguments in favor of restoring the original, colorblind standard of conduct adopted by Congress in 1964. The *Piscataway* case offers the Court an opportunity to take this step.¹¹

I. THE JUDICIAL ABROGATION OF CONGRESS' COLORBLIND LAW

The Civil Rights Act of 1991 is a peculiar statute in many ways. For our purposes here, two related peculiarities are particularly important. First, the legislative process leading to the statute's enactment was consumed largely with dueling interpretations of a long series of Supreme Court decisions. The policy question underlying this highly legalistic debate was whether and to what extent the judicially-created doctrine of "disparate impact" should be modified in ways that might increase employers' incentives to adopt quotas and other forms of racial preferences. Second, the legislative debate was remarkably barren of discussion about a closely related policy question: whether the statute ought to permit employers to

¹⁰ Civil Rights Act of 1991, Pub. L. No. 102-166, § 116, 105 Stat. 1071, 1079 (1991).

¹¹ Because the Supreme Court has never endorsed a racial diversity rationale for affirmative action in the employment context and because *Piscataway* presents the unusual factual situation of two employees with indistinguishable qualifications, the Court could simply decline to extend *Weber* so as to authorize the kind of affirmative action that occurred in this case. It is, however, within the Court's discretion to reconsider *Weber* rather than to apply it to this case. Even Justice O'Connor, who refused to reconsider *Weber* when *Johnson* was decided, did not claim that the Court was barred from doing so.

employ such preferential devices. In order to appreciate what happened and did not happen in 1991, one must begin with a fairly detailed examination of the case law that set the stage for congressional action.

A. *"Discrimination" Redefined: Griggs v. Duke Power Co.*

The driving impulse behind the Civil Rights Act of 1964 was the desire to dismantle Jim Crow, which was the stubborn residue of slavery.¹² The leading goal of the statute was soon accomplished, for Jim Crow was quickly destroyed. By forbidding 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 dramatically in the first few years after the Civil Rights Act was enacted.¹³

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.¹⁴ Title VII contains no special provisions for blacks and no special provisions for the South. The crucial prohibition in the statute declares:

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 individual's 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.¹⁵

¹² For a concise review of Jim Crow, see C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (2d ed. 1966).

¹³ See, e.g., FARRELL BLOCH, *ANTIDISCRIMINATION LAW AND MINORITY EMPLOYMENT* 89-91 (1994); James J. Heckman & J. Hoult Verkerke, *Racial Disparity and Employment Law: An Economic Perspective*, 8 YALE L. & POL'Y REV. 276 (1990). As these and other sources emphasize, it is not nearly so clear whether Title VII has enhanced the economic well-being of blacks as a group beyond this narrow geographic and temporal context.

¹⁴ In a different respect, the original version of Title VII was very different from the reconstruction statutes and constitutional amendments. Whereas the reconstruction statutes were aimed primarily or exclusively at confining the power of governmental and quasi-governmental institutions, Title VII applied only in the private sector.

¹⁵ 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 employ-

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:

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.¹⁶

Whether Congress was motivated by a considered commitment to the sort of colorblind constitutional principles articulated by Justices Harlan and Scalia,¹⁷ 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.*,¹⁸ turned this unequivocally colorblind statute into a device that enshrined the principles of racial balancing and preferential treatment.¹⁹

The *Griggs* case involved the Duke Power Company, which employed ninety-five people at its Dan River facility, of whom fourteen were black.²⁰ The workforce was organized into several departments: Operations, Maintenance, and Laboratory and Testing (the three "inside departments"); Coal Handling and Labor (the two "outside departments"); and a miscellaneous category. Until just before the litigation began, all of the black employees worked in the Labor Department, where the highest paid workers earned less than the lowest paid workers in any other department.²¹ Duke Power

ment discrimination by the federal government. I leave aside questions about the constitutional validity of these various applications of the statute. The most questionable applications of the Civil Rights Act, to purely private firms, have been upheld by the Supreme Court. See *Katzbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

¹⁶ 42 U.S.C. § 2000e-2(j).

¹⁷ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520-28 (1989) (Scalia, J., concurring in the judgment); *Plessy v. Ferguson*, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting). For a critique of the Harlan-Scalia vision of the colorblind Constitution, see Nelson Lund, *The Constitution, the Supreme Court, and Racial Politics*, 12 GA. ST. U. L. REV. 1129 (1996).

¹⁸ 401 U.S. 424 (1971).

¹⁹ This is not to say that Title VII could not or would not have been twisted in this direction without the *Griggs* decision. In fact, however, the evolution of the law has been shaped in large part by this seminal case.

²⁰ *Griggs*, 401 U.S. at 426.

²¹ One black employee was promoted out of Labor just before the case was filed. See *Griggs v. Duke Power Co.*, 292 F. Supp. 243, 247 (M.D.N.C. 1968).

at one time engaged in deliberate discrimination against blacks, but the plaintiffs did not claim that this practice had persisted after Title VII came into effect.²²

For many years, Duke Power had used an internal promotion system under which vacancies were ordinarily filled by the next most senior worker in the department where the vacancy occurred. Employees were also permitted to transfer among departments, usually coming in at the bottom of their new department. In 1955, the company apparently became concerned about the effects of the internal promotion system 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 system.²³ The company then instituted a policy requiring all new hires to have a high school degree or its equivalent. The same requirement was also put in place for transfers from Labor to Coal Handling, and from Coal Handling to any of the "inside departments."²⁴

In 1965, the company adjusted this policy. Incumbent employees were now permitted to transfer out of Labor or 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.²⁵ Although this liberalization of the policy was apparently prompted by complaints from employees in Coal 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.²⁶

Duke Power's policy was challenged under Title VII by the black employees in the Labor Department. Recognizing that Title VII was not retroactive, and believing that the statute forbade only intentional discrimination, the Fourth Circuit nevertheless concluded that "relief may be granted to remedy present and continuing effects of past discrimination."²⁷ Accordingly, it crafted a remedy for the six plaintiffs who lacked high school educations and were hired before 1955. These six were frozen into the Labor Department by the challenged policy, while whites without high school educations hired during the same period were free to advance pursuant to the company's normal promotion and transfer policy.²⁸ The plaintiffs hired after 1955, however, were denied relief on the ground that the challenged policy was treating them exactly the same as it would if they

²² See *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1229-30 (4th Cir. 1970).

²³ See *id.* at 1229.

²⁴ *Id.*

²⁵ See *id.*

²⁶ See *id.*

²⁷ *Id.* at 1230.

²⁸ See *id.* at 1230-31.

were white.²⁹

The reasoning by which the Fourth Circuit justified granting relief to those plaintiffs hired before 1955 was not indisputably correct, but it was certainly a reasonable application of the statute to a problem on which Congress had not focused its attention. The same cannot be said of the Supreme Court's decision to reverse the Fourth Circuit.

Although the Supreme Court left undisturbed the lower courts' finding that Duke Power had not engaged in unlawful intentional discrimination,³⁰ it 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."³¹

Amazingly, Chief Justice Burger's opinion for a unanimous Court does not include a single valid or even defensible argument to support this conclusion. But it does contain a great many fascinating substitutes for valid arguments, beginning with its characterization of the facts in the case. By craftily and selectively recounting those facts, Burger creates the impression that there was something deeply wrong with Duke Power's personnel practices. Twice, for example, Burger asserts that white employees who were not affected by the 1955 educational achievement policy continued to perform "satisfactorily."³² This assertion suggests that the firm had no good reason for maintaining the policy. But while it is no doubt true that *some* employees without high school educations performed "satisfactorily," that is in no way inconsistent with the company's contention that it introduced the policy because some did *not*, and because it feared that this problem would increase in the future.³³ Burger did not rest content with technically correct but misleading formulations. In at least two instances, he actually misstated crucial facts. He says, for example, that Duke Power abandoned its policy of restricting blacks to the Labor Department in 1965, and then notes that the policy of using aptitude tests for new hires was instituted on July 2, 1965 (the effective date of Title VII).³⁴ This creates the impression that the testing requirement was put into place as a substitute for the prior deliberately discriminatory policy. And so it tends to raise a suspicion in our minds about what the company was up to. But in fact, the

²⁹ See *id.* at 1235-36. Relief was also denied to those plaintiffs who had been promoted or had become eligible for promotion during the course of the litigation. See *id.* at 1237.

³⁰ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

³¹ *Id.* at 430-32.

³² See *id.* at 427, 431.

³³ *Griggs*, 420 F.2d at 1229.

³⁴ See *Griggs*, 401 U.S. at 427.

district court never said that the discriminatory policies survived until 1965. Burger apparently just made this fact up. The challenged policy with respect to aptitude tests for incumbent employees, moreover, was adopted in September, 1965 (not July) in response to requests from employees for a more flexible system of estimating their capabilities.³⁵

Perhaps most important, Burger says: "The District Court found that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, the Company *openly* discriminated on the basis of race in the hiring and assigning of employees at its Dan River plant."³⁶ This is not true. Although the district court did conclude that Duke Power had at one time engaged in racial discrimination,³⁷ that court never said that the company had "*openly* discriminated," or as Burger puts in elsewhere, "followed a policy of *overt* racial discrimination."³⁸ Indeed, it would be surprising if the district court could have found what Burger attributed to it, inasmuch as Duke Power maintained that it had never discriminated against blacks at all.³⁹ Burger's misstatement is subtle, but it is important because he claims that Title VII forbids both overt discrimination and practices that are "discriminatory in operation."⁴⁰ But this is a false dichotomy. There are at least *three* phenomena that might be called "discrimination": overt discrimination, covert discrimination, and unintentional discrimination. By blurring the distinction between covert discrimination (which is clearly forbidden by Title VII) and unintentional discrimination (which is not clearly forbidden), Burger distracts the reader from asking why Title VII is not limited to intentional discrimination (of both the overt and covert varieties). And for good reason: he has no answer. To see why this is so, consider Burger's solitary statement about the statutory language:

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and *even neutral in terms of intent*, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.⁴¹

But if the statute has any "plain meaning" at all, it is that it proscribes only

³⁵ See *Griggs v. Duke Power Co.*, 292 F. Supp. 243, 246 (M.D.N.C. 1968).

³⁶ 401 U.S. at 426-27 (emphasis added).

³⁷ See *Griggs*, 292 F. Supp. at 247 ("evidence is sufficient to conclude that at some time prior to July 2, 1965, Negroes were relegated to the labor department and prevented access to other departments by reason of their race.").

³⁸ *Griggs*, 401 U.S. at 428 (emphasis added).

³⁹ See *Griggs*, 292 F. Supp. at 247.

⁴⁰ *Griggs*, 401 U.S. at 431.

⁴¹ *Id.* at 429-30 (emphasis added).

intentional discrimination, whether overt or covert. This is the only kind of discrimination that the Fourteenth Amendment had ever been understood to proscribe, and this constitutional background provides by far the most obvious possible source for Congress' concept of improper discrimination.⁴²

Giving Burger the benefit of the doubt, one could argue that the statutory language is still sufficiently ambiguous that it might invalidate practices that "'freeze' the status quo of prior discriminatory employment practices."⁴³ But that is exactly the interpretation accepted by the Fourth Circuit, whose decision the Court was *reversing* in this case. Giving Burger the benefit of a different ambiguity, one might interpret the statutory term "discriminate" to include practices that have the unintended effect of causing a disparate impact. But if that interpretation were correct, the statutory language would require the invalidation of *all* such practices, with no exceptions for practices justified by "business necessity."⁴⁴ The only possible way to save Burger's argument is to suppose that the language of the statute plainly incorporates a *technical* meaning according to which "discriminate" can mean "act without discriminatory intent in a way that produces a disparate impact that is not justified by business necessity." Burger, however, pointed to no examples of the word "discriminate" being used with this technical meaning anywhere by anyone prior to *Griggs* itself.

Thus, no matter which way one turns the argument, the Supreme Court's holding in *Griggs* is inconsistent with the language of the statute that is ostensibly being interpreted. And this is true completely apart from the specific provision—unmentioned in *Griggs*—warning against interpretations requiring employers to grant preferential treatment on the basis of numerical imbalances (i.e., disparate impact).⁴⁵

One might suppose that Burger's conclusion could be justified, or at least defended, on the basis of legislative history demonstrating that Congress intended something different from what it said in the statute. But Burger cites no such legislative history. Instead, in what looks like yet another attempt to distract attention from the real issues, Burger launched into an extended discussion of Title VII's special savings clause authorizing the use of "any professionally developed ability test" that is not "designed,

⁴² See, e.g., *McLaughlin v. Florida*, 379 U.S. 184, 194, 196 (1964); *Akins v. Texas*, 325 U.S. 398, 403-04 (1945); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

⁴³ *Griggs*, 401 U.S. at 430.

⁴⁴ The statute does include some exceptions from its general ban on discriminatory practices. See, e.g., 42 U.S.C. § 2000e-2(e)(1) (1994) (exception for "bona fide occupational qualifications" based on religion, sex, or national origin). But the statute makes no mention of any exception for racial discrimination justified by "business necessity," or for anything that could be so interpreted.

⁴⁵ See *id.* § 2000e-2(j).

intended or used to discriminate because of race . . . ”⁴⁶ This is a sideshow with respect to the *Griggs* case itself because it has no bearing on the core of the challenged practice, which was the high school education requirement. But it turns out to be a very revealing sideshow.

At the time of the trial, Duke Power was using two professionally developed ability tests, and the plaintiffs did not even claim that this was being done with any discriminatory intent.⁴⁷ This would seem to bring the case squarely within the savings clause. In an effort to avoid this conclusion, Burger engaged in a detailed examination of the legislative history of the savings clause, which is known as the Tower Amendment after its principal sponsor. The basic argument is that the Tower Amendment was adopted in response to concerns raised by a then-recent Illinois administrative decision that had interpreted that state’s fair employment law to ban all standardized tests that had a disparate impact on minorities; the Tower Amendment, according to Burger, was a narrow provision meant to prevent that extreme outcome under Title VII by making it clear that some tests—those that actually predicted job performance—would be permissible.⁴⁸

Burger’s principal evidence consists of citations to the remarks of several Senators who were said to have feared that Title VII would outlaw all standardized tests on which whites as a group performed better than blacks as a group.⁴⁹ But this is a complete misstatement of what those Senators were saying.⁵⁰ On the contrary, they said that what they feared was that the Government would start deciding what job qualifications employers would be allowed to establish. Which is *exactly* what *Griggs* does.⁵¹ So the most direct evidence cited by Burger for his claim proves just the opposite.

He did, however, offer some other evidence. The most important single piece of legislative history about the meaning of Title VII is the so-called Clark-Case Memorandum, which was the Senate managers’ substitute for a committee report.⁵² This document discussed job qualifications, saying that

⁴⁶ *Id.* § 2000e-2(h). Burger’s discussion is at *Griggs*, 401 U.S. at 434-36.

⁴⁷ See *Griggs*, 401 U.S. at 432; *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1232 (4th Cir. 1970).

⁴⁸ See *Griggs*, 401 U.S. at 434-36.

⁴⁹ See *id.* at 434 n.10.

⁵⁰ My discussion of Burger’s treatment of the Tower Amendment relies heavily on Michael E. Gold, *Griggs’ Folly: An Essay on the Theory, Problems and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429 (1985), whose analysis of *Griggs* is similar to mine on several other points as well.

⁵¹ The fact that the *Griggs* Court fulfilled the fears of these Senators becomes especially clear if one takes seriously Burger’s claim that his interpretation of the Tower Amendment is based in part on deference to the Equal Employment Opportunity Commission (“EEOC”) (a deference that seems particularly inapt in light of the fact that Congress took special precautions to deny substantive rulemaking authority to the EEOC). See *id.* at 485-86.

⁵² In order to avoid the Judiciary Committee, which was chaired by James O. Eastland (D-Miss.),

Title VII:

expressly protects the employer's right to insist that any prospective applicant, Negro or white, *must meet the applicable job qualifications*. Indeed, the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.⁵³

This does not prove what Burger needs for his argument because it does not address the question of who gets to decide what the qualifications for the job are. Besides the fact that the Clark-Case Memorandum does not establish what Burger's argument requires, there is another problem. Burger acknowledged that there is an earlier memorandum by Clark and Case that says exactly the opposite of what Burger interpreted Title VII to mean:

There is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.⁵⁴

As a general matter, one might suppose that this specific discussion is entitled to greater weight than the more general and vague discussion on which Burger relied. But Burger suggested two reasons for disregarding the earlier memorandum. First, he suggests that it dealt with the constitutionality of the legislation, so maybe the discussion of testing was incidental to its main point.⁵⁵ Second, he suggests that it was written earlier, and maybe Clark and Case had changed their minds.⁵⁶ Both suggestions are facially plausible. Unfortunately, the facts yet again turn out to be inconsistent with what Burger said.

First, the "Clark-Case Memorandum" that Burger relies on is not by Clark and Case at all.⁵⁷ Second, the *real* Clark-Case Memorandum, which contains the language that Burger chose to disregard because it directly contradicted his conclusions, was not written before the document relied on

the Civil Rights bill was brought directly to the Senate floor. The Senate leadership chose Hubert H. Humphrey (D-Minn.) and Thomas Kuchel (R-Cal.) as floor managers. Joseph Clark (D-Pa.) and Clifford Case (R-N.J.), in turn, were chosen as the "captains" for Title VII of the bill; their job was to acquire detailed expertise about that title and to produce the kind of detailed explanatory material that would normally be found in a committee report. See CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 132-38 (Seven Locks Press 1985); Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COMM. L. REV. 431, 444-45 (1966).

⁵³ *Griggs*, 401 U.S. at 434 (quoting 110 CONG. REC. 7247 (1964)) (emphasis added by the Court).

⁵⁴ *Id.* at 435 n.11 (quoting 110 CONG. REC. 7213 (1964)).

⁵⁵ *See id.* at 434 n.11.

⁵⁶ *See id.*

⁵⁷ *See Gold, supra* note 50, at 487.

by Burger, but afterwards. So the timing argument actually goes *against* Burger instead of supporting him.⁵⁸ Third, the real Clark-Case Memorandum does not deal with the constitutionality of Title VII; it is a comprehensive analysis of the bill on almost every issue *except* its constitutionality.⁵⁹ The conclusion is inescapable: the legislative history of the Tower Amendment strongly reinforces its plain meaning, which is exactly the opposite of the Supreme Court's violent misinterpretation.

It is bad enough that the *Griggs* opinion constituted an exercise of legislative rather than judicial power. What is worse is that the Court, having usurped the legislature's function, proceeded to engage in legislative draftsmanship that was highly ambiguous and radically incomplete. Although Burger made the vague declaration that statistical disparities could lead to liability, he failed to provide any intelligible test either for deciding what statistical comparisons should be used or for deciding how large the disparities must be.⁶⁰ Nor can anything very useful be gleaned from the Court's discussion of the facts that were before it. With respect to the high school education policy, the Court appears to have relied entirely and without further inquiry on 1960 census data showing that thirty-four percent of white males and twelve percent of black males in North Carolina had completed high school.⁶¹ These statistics, which may have been out of date and which applied only to men rather than to the labor pool in general, made no distinction between urban and rural areas, or between different age cohorts. Nor were state-wide data for North Carolina obviously a good proxy for the labor pool available at the Dan River plant, which is near the Virginia border.⁶² Whatever defense might be made of the Court's conclusion, obvious objections were not answered in Burger's opinion.

As for the aptitude tests, the Court in fact cited no evidence at all for the conclusion that they had a disparate impact. Burger did mention that a battery of tests, which included the tests used by Duke Power along with

⁵⁸ See *id.* at 487-88.

⁵⁹ See *id.* at 488 & n.199.

⁶⁰ In the first paragraph of the opinion, the Court refers to requirements that "operate[d] to disqualify Negroes at a substantially higher rate than white applicants." *Griggs*, 401 U.S. at 426. This may be the best formulation in the opinion, but it is a characterization of the question presented and is not used in any part of the opinion that could be characterized as the holding. (If the question presented determined the holding in this case, disparate impact theory would be limited to cases where the employer had a history of overt discrimination, which is not so.) Similarly, Burger mentions that the plaintiffs had claimed in the court of appeals that Duke Power's policies "operated to render ineligible a markedly disproportionate number of Negroes" and quoted the Fourth Circuit dissent for the proposition that "'whites register far better on the Company's alternative requirements' [i.e. the aptitude tests] than Negroes." *Id.* at 429, 430. The closest Burger comes to offering a general rule occurs when he denounces employment practices that are "discriminatory in operation," which is totally unilluminating. *Id.* at 431.

⁶¹ See *id.* at 430 n.6.

⁶² See Gold, *supra* note 50, at 440-41.

other tests, produced a much higher pass rate among whites than among blacks.⁶³ Although the Court seemed oblivious to it, the obvious fact is that this disproportionate pass rate could, for all the Court knew, have been caused by the *other* tests in the battery. One hesitates to imagine why the Court did not feel the need for evidence of the proposition that blacks do far worse than whites on standardized aptitude tests.

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.⁶⁴ Some of these formulations sound as though they might be quite difficult to meet, such as the reference to "business necessity."⁶⁵ But others sound as though they would cover almost anything but the most arbitrary policies, such as the references to policies filling a "genuine business need" or having a "manifest relationship to the employment in question."⁶⁶ 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.⁶⁷

The hopeless ambiguities and vagueness of *Griggs* set the Court on a long and difficult search for a manageable set of standards through which the new disparate impact theory could be implemented. Because that journey culminated in a decision that ignited the process that produced the Civil Rights Act of 1991, we will have to revisit it below. The more immediate effect of *Griggs*, however, was to set up a kind of Catch-22 for employers. The only sure way to insulate themselves from liability under the vague and evolving standards of disparate impact was to ensure that their workforces were racially balanced. But if they took steps to get their numbers "right," they exposed themselves to lawsuits for intentional discrimination by whites who were injured by those prophylactic policies.

⁶³ See *Griggs*, 401 U.S. at 430 n.6.

⁶⁴ The eight formulations include: "shown to be significantly related to successful job performance" *id.* 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.

⁶⁵ *Id.* at 431.

⁶⁶ *Id.* at 432.

⁶⁷ See *id.* ("In the context of this case, it is unnecessary to reach the question whether testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon a showing that such longrange [sic] requirements fulfill a genuine business need. In the present case the Company has made no such showing.").

This dilemma set the stage for the next move in the abrogation of Congress' colorblind statute.

B. United Steelworkers v. Weber

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.⁶⁸ 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.⁶⁹ 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.⁷⁰

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*, the Supreme Court held that this intentional and overt racial discrimination did not violate Title VII.⁷¹ 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 employees."⁷²

Justice Brennan's majority opinion began by acknowledging that the challenged practice violated the "literal" language of the statute.⁷³ He

⁶⁸ See *United Steelworkers v. Weber*, 443 U.S. 193, 198-99 & n.1 (1979).

⁶⁹ See *id.* at 197-98.

⁷⁰ 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.").

⁷¹ *Weber*, 443 U.S. at 193. Title VII contains a special provision dealing with training programs like the one at issue in this case. It provides:

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

42 U.S.C. § 2000e-2(d) (1994).

In *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), the Court had held that Title VII as a general matter gives whites the same rights not to be discriminated against as it gives members of minority groups. In a footnote, however, the Court reserved the question whether there might be an exception from this rule for "affirmative action" programs. *Id.* at 280 n.8. It was that issue that *Weber* considered and resolved.

⁷² *Weber*, 443 U.S. at 208.

⁷³ *Id.* at 201.

asserted, nonetheless, that such affirmative action devices were consistent with the "spirit" of the law.⁷⁴ As we shall see, however, Brennan was unable to produce a shred of evidence for the existence of any such "spirit." This is particularly significant because then-Justice Rehnquist's dissenting opinion brought to light truly overwhelming evidence to the contrary.

Brennan's vain search for evidence to support his conclusion began with the legislative history. He found a number of passages indicating that one of Congress' chief objects in Title VII was "to open employment opportunities for Negroes in occupations which have been traditionally closed to them."⁷⁵ This is a fair characterization of the congressional purpose, but it hardly implies that Congress meant to authorize the kind of affirmative action at issue in this case. The simple rule of nondiscrimination actually adopted by Congress could reasonably have been expected to "open employment opportunities" in previously closed occupations. Brennan, however, seemed to suggest the following syllogism: Title VII was meant to open employment opportunities for blacks in previously closed occupations; Kaiser's affirmative action program opened such opportunities; therefore Kaiser's program is legitimate under Title VII. The mistake in this reasoning is plain as soon as the syllogism is made explicit. And of course even Brennan did not really interpret the legislative history this way, for it is inconsistent with his own conclusion that an affirmative action program may be invalid if it "unnecessarily trammels" the interests of white employees.

Implicitly acknowledging the insufficiency of this evidence, Brennan then reproduced a passage from the House committee report that he seemed to think was directly on point:

No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems *will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.*⁷⁶

This passage has nothing to do with the issue in the case, which is obvious as soon as one asks what the "other forms of discrimination" are. The quoted passage itself makes it unmistakably clear that this is a reference to forms of discrimination *not* dealt with in the Civil Rights Act bill, which addressed only selected matters such as public accommodations, voting

⁷⁴ *Id.*

⁷⁵ *Id.* at 203 (quoting Sen. Humphrey).

⁷⁶ *Id.* at 203-04 (quoting H.R. REP. NO. 88-914, pt. 1 at 18 (1963)) (emphasis added by the Court).

rights, segregated schools, and employment.⁷⁷ But Kaiser's affirmative action program implicated a form of discrimination that *was* dealt with in the bill, namely employment discrimination.⁷⁸ The passage simply cannot be read as a reference to some kind of unstated exception to Title VII's "literal" prohibitions.

Brennan offered no other evidence at all, so his legislative history argument turns out to be utterly without support.⁷⁹ This absence of evidence does not mean, however, that the question addressed in *Weber* never came up in the legislative history. On the contrary, as Rehnquist demonstrated in great detail, the issue came up over and over and over again, with proponents of the bill repeatedly and forcefully denying that it could be interpreted to mean what Brennan claimed it meant. No mere summary can do justice to the power of the evidence amassed in the Rehnquist dissent, but one can get some sense of it from the following example:

As if directing their comments at Brian Weber, the Senators said [in the Clark-Case Memorandum]:

"Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or *indeed permitted*—to fire whites in order to hire Negroes, *or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.*"⁸⁰

Having failed to find any legislative history to support his decision to ignore the statute's text, and having resolved to ignore the overwhelming mass of legislative history confirming that the text means exactly what it

⁷⁷ See Civil Rights Act, Pub. L. 88-352, 78 Stat. 241 (1964).

⁷⁸ As Rehnquist's dissent pointed out, any doubts about this reading of the passage are removed when it is read in its full context in the committee report. See *Weber*, 443 U.S. at 229 n.11.

⁷⁹ In a footnote, Brennan also quoted the following floor statement by one Representative MacGregor:

Important as the scope and extent of this bill is, it is also vitally important that all Americans understand what this bill does not cover. . . . Your mail and mine, your contacts and mine with our constituents, indicates a great degree of misunderstanding about this bill. People complain about . . . preferential treatment or quotas in employment. There is a mistaken belief that Congress is legislating in these areas in this bill. When we drafted this bill we excluded these issues largely because the problems raised by these controversial questions are more properly handled at a governmental level closer to the American people and by communities and individuals themselves.

Id. at 207-08 n.7 (quoting 110 CONG. REC. 15,893 (1964)). This stray statement by one legislator is as inconsistent with Brennan's own conclusion, which entailed restrictions on discriminatory affirmative action, as it is with Rehnquist's. It therefore lends Brennan no support.

⁸⁰ *Id.* at 240 (emphasis added by Justice Rehnquist).

says, Brennan next tried to argue that his conclusion is “reinforced” by a negative-pregnant.⁸¹ He contended that the express statutory warning that Title VII must not be “interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . , of such individual or group on account of an imbalance” in the employer’s workforce actually implies that Congress meant to permit just such preferential treatment.⁸² That inference, suggested Brennan, is justified by the fact that Congress used the term “require” rather than the phrase “require or permit.”⁸³

The illegitimacy of this inference becomes plain when one recognizes that this provision of the statute does not create any exception from the general prohibition against discrimination, but only states a warning against one possible misinterpretation of the general language.⁸⁴ If a decision to include a warning against one misinterpretation could constitute an implied authorization for all other misinterpretations, statutory language would become totally meaningless. Congress, after all, omitted any warning against interpreting Title VII to apply to discrimination on the basis of age or disability. Does that mean that we may infer that it does so apply?

Brennan seems to have hoped that the reader will confuse this sort of illegitimate inference with a legitimate negative inference: the inclusion of one exception from a general rule implies that other exceptions are excluded. Once again, the confusion sowed by Brennan is critical because Congress in fact did include a specific affirmative-action exception in Title VII:

Nothing contained in [Title VII] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.⁸⁵

Thus, the one legitimate negative inference that one could make is that Congress specifically considered whether to authorize preferential treatment for any disadvantaged group and decided to do so for Indians living on or near reservations, and for no one else. Once again, the legitimate form of the argument suggested by Brennan actually refutes him.

In a last desperate effort to rescue his negative-pregnant argument, Brennan noted that the provision warning against interpretations that require preferential treatment was adopted as an amendment in the Senate, and that

⁸¹ *Id.* at 204-07.

⁸² *Id.* at 205-06.

⁸³ *Id.* at 206.

⁸⁴ See 42 U.S.C. § 2000e-2(j) (1994).

⁸⁵ *Id.* § 2000e-2(i). Justice Brennan was fully aware of this provision and of its implications, for Justice Rehnquist pointed them out in his dissent. See *Weber*, 443 U.S. at 253.

its apparent purpose was to preserve a sphere of employer and union freedom in the private sector.⁸⁶ According to Brennan, the legislative history shows that there was concern about two potential problems: a legal requirement of preferential treatment for minorities and an asymmetrical rule permitting employers to give preferential treatment to minorities but not to whites; on Brennan's theory, the amendment forbade the first and thus implicitly authorized the second.⁸⁷

This theory is not inherently absurd. Unfortunately, the *only* evidence that Brennan had to support it is yet another negative inference: "There was no suggestion after the adoption of [the amendment] that wholly voluntary, race-conscious, affirmative action efforts would in themselves constitute a violation of Title VII."⁸⁸ Apart from the preposterous suggestion that Kaiser's quota system was "wholly voluntary," this hardly does much to establish Brennan's case, for he has no evidence that anyone in Congress had focused on this category of discrimination as a special case. What is worse, however, Brennan's statement about the legislative record is untrue. And Brennan knew it. As Rehnquist's dissent pointed out, Senator Saltonstall (who participated in drafting the substitute bill that contained the amendment in question) specifically said that the bill "provides no preferential treatment for any group of citizens. In fact, *it specifically prohibits such treatment.*"⁸⁹

Justice Rehnquist began his dissent by comparing the majority opinion in *Weber* to a speech by the spokesman for the nightmare government of Oceania in Orwell's *1984*,⁹⁰ and concluded with a reference to Hosea's

⁸⁶ See *Weber*, 443 U.S. at 206-07.

⁸⁷ See *id.*

⁸⁸ *Id.* at 207 n.7.

⁸⁹ *Id.* at 248 (quoting 110 CONG. REC. 12691 (1964) (emphasis added by Justice Rehnquist)). Senator Humphrey, moreover, who was the leading proponent of the Civil Rights Act, similarly said that the bill containing the amendment "state[s] clearly and accurately what we have maintained all along about the bill's intent and meaning," which was that it neither requires nor permits preferential treatment. *Id.* at 249 n.28 (quoting 110 CONG. REC. 12723 (1964)).

What is more, two opponents of the bill thereafter held an extended colloquy in which they agreed, without being contradicted by anyone, that the bill outlawed wholly voluntary, race-conscious affirmative action efforts. See *id.* at 249-50 & n.29 (Rehnquist, J., dissenting).

⁹⁰ *Id.* at 219-20:

In a very real sense, the Court's opinion is ahead of its time: it could more appropriately have been handed down five years from now, in 1984, a year coinciding with the title of a book from which the Court's opinion borrows, perhaps subconsciously, at least one idea. Orwell describes in his book a governmental official of Oceania, one of the three great world powers, denouncing the current enemy, Eurasia, to an assembled crowd:

It was almost impossible to listen to him without being first convinced and then maddened. . . . The speech had been proceeding for perhaps twenty minutes when a messenger hurried onto the platform and a scrap of paper was slipped into the speaker's hand. He unrolled and read it without pausing in his speech. Nothing altered in his voice or manner, or in the content of what he was saying, but suddenly the names were different. Without words said, a wave of under-

famous prophecy about the idolaters.⁹¹ Ordinarily this might seem rather strident, but in this case Rehnquist seems to have been exercising judicious self-restraint. The Court's next decision about the validity of affirmative action under Title VII managed the quite remarkable feat of carrying *Weber's* legally indefensible approach to the law a step further.

C. *Johnson v. Santa Clara Transportation Agency*

The rationale, such as it was, for *Weber's* rejection of Title VII's colorblind language consisted of inferences drawn from passages in the legislative history discussing the specific problem of "the plight of the Negro in our economy"⁹² and from passages supposedly generated by the need to obtain votes "from legislators in both Houses who traditionally resisted federal regulation of *private* business."⁹³ And its holding was apparently confined to "affirmative action plans designed to eliminate conspicuous *racial* imbalance in traditionally segregated job categories,"⁹⁴ where the segregation resulted from extremely well-documented systems of deliberate *racial* exclusion.⁹⁵

Eight years after *Weber*, the Supreme Court decided *Johnson v. Santa Clara Transportation Agency*,⁹⁶ a case involving a *public* employer which discriminated in favor of a *white woman* without any evidence that the employer or anyone else had ever excluded women from the job category at issue. Justice Brennan once again wrote for the majority, and he once again proved to have little respect for the facts of the case, as Justice Scalia demonstrated in his dissenting opinion.⁹⁷ What is rather more surprising is that Brennan purported to uphold 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."⁹⁸

standing rippled through the crowd. Oceania was at war with Eastasia! . . . The banners and posters with which the square was decorated were all wrong! . . .

[T]he speaker had switched from one line to the other actually in mid-sentence, not only without a pause, but without even breaking the syntax.

G. Orwell, *Nineteen Eighty-Four* 181-82 (1949). Today's decision represents an equally dramatic and equally unremarked switch in this Court's interpretation of Title VII.

⁹¹ See *Weber*, 433 U.S. at 255 ("By going not merely beyond, but directly against Title VII's language and legislative history, the Court has sown the wind. Later courts will face the impossible task of reaping the whirlwind.").

⁹² *Id.* at 202 (quoting 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey)) (emphasis added).

⁹³ *Id.* at 206 (emphasis added).

⁹⁴ *Id.* at 209 (emphasis added).

⁹⁵ See *id.* at 198 n.1.

⁹⁶ 480 U.S. 616 (1987).

⁹⁷ See *id.* at 658-64 (discussing factual distortions in majority opinion).

⁹⁸ *Id.* at 640 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 290 (1986) (O'Connor, J.,

To the extent that Justice Brennan was suggesting that the Court's decision was based on stare decisis, the suggestion was implicit, which is quite telling in light of the fact that Justice Scalia's dissent contains an elaborate explanation for why the Court's principles of stare decisis should not save *Weber*.⁹⁹ Explicitly, however, Brennan did not invoke stare decisis. Instead, he noted that Congress had not overruled *Weber*, and concluded that "we therefore may assume that our interpretation [of Title VII] was correct."¹⁰⁰ After citing a controversial book that urged courts to become bolder in revising statutes on policy grounds,¹⁰¹ Brennan concluded that "[a]ny belief in the notion of a dialogue 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."¹⁰²

As a theoretical matter, this sort of argument is extremely vulnerable, for it supposes that Congress can make new law without complying with the procedural requirements of the Constitution.¹⁰³ And as a practical matter, the argument seems to be based on a wilfully naïve theory of the legislative process.¹⁰⁴ But for present purposes, it is more important to

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 be an odd way to defend the broadening of a decision that was itself concededly inconsistent with the text.

⁹⁹ See *id.* at 672-73 (Scalia, J., dissenting). In his concurring opinion, Justice Stevens took a truly strange position according to which *Weber* was wrongly decided *and* should now be extended even beyond the limits suggested by the *Johnson* majority.

¹⁰⁰ *Id.* at 629 n.7.

¹⁰¹ See *id.* at 629 (quoting GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 31-32 (1982)).

¹⁰² *Id.*

¹⁰³ But see U.S. CONST. art I, § 7; *INS v. Chadha*, 462 U.S. 919 (1983). Brennan's argument might be saved from this objection if it were taken to mean only that the (unarticulated) views of Congresses that met after 1979 are reliable *evidence* of what the Congress intended in 1964. Given the carefully and repeatedly articulated statements in 1964 of a contrary intent, however, such an argument would be simply risible.

¹⁰⁴ See, e.g., *Helvering v. Hallock*, 309 U.S. 106, 119-21 (1940) ("To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities. . . . Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction . . . of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." (citation omitted)). To similar effect, see *Johnson v. Transportation Agency*, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting):

[E]ven accepting the flawed premise that the intent of the current Congress, with respect to the provision in isolation, is determinative, one must ignore rudimentary principles of political science to draw any conclusions regarding that intent from the failure to enact legislation. The "complicated check on legislation," erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the

observe that the vitality of the *Weber/Johnson* exception to Title VII's prohibition against discrimination now rests—to the extent that it rests on any reasons articulated by the Court—entirely on the proposition that the exception enjoys an implicit congressional endorsement. If that is so, then congressional behavior after *Johnson* should be scrutinized for evidence one way or the other as to whether that endorsement actually exists. The most important subsequent congressional action so far has been the enactment of the Civil Rights Act of 1991. As the next section shows, the 1991 statute kicks the legs out from under *Weber* and *Johnson* even if one accepts the only articulated theory on which *Johnson* based its claim to legitimacy.

II. THE CONGRESSIONAL REFUSAL TO RATIFY *WEBER* AND *JOHNSON*

This section of the Article presents a legal analysis showing how the Civil Rights Act of 1991 supports the proposition that *Weber* and *Johnson* should be overruled by the Supreme Court. The argument is somewhat complex, and it requires some further explication of Supreme Court decisions that preceded the 1991 statute. In barest outline, the argument is as follows. Most of the legislative debate leading up to the enactment of the new statute focused on *Griggs* and its progeny, and specifically on what disparate impact rules could most effectively contribute to discouraging discrimination against minorities without encouraging employers to adopt racial quotas or similar preferential devices. As enacted, however, the statute addressed a number of other issues as well. One provision, not directly related to the disparate impact issues, includes language unmistakably outlawing the sort of discriminatory affirmative action permitted by *Weber* and *Johnson*, but another “savings” provision appears to declare that the pre-existing law of affirmative action is to remain unaffected by the 1991 statute.

There is a strong textual argument for construing the 1991 statute to overrule *Weber* and *Johnson* (notwithstanding the savings provision), but the legislative history suggests that Congress did not have the intent to overrule these cases. The legislative history also makes it clear, however, that Congress did not intend to ratify *Weber* and *Johnson*, and perhaps intended to refrain from ratifying those decisions. Because the *Johnson* Court reaffirmed *Weber* entirely on the presumption that Congress had implicitly endorsed *Weber*, Congress' refusal to give such an endorsement in 1991 should require the Court to reconsider *Weber* on the merits. For the reasons set out in the Rehnquist and Scalia dissents in *Weber* and *Johnson*

status quo, or even (5) political cowardice.
(citation omitted).

respectively, such reconsideration should lead the Court to overrule both these decisions. That outcome would have the additional benefit of avoiding the dilemma created by the fact that leaving *Weber* and *Johnson* as good law renders the 1991 Act hopelessly self-contradictory.

A. *The Controversy over Wards Cove*

The 1991 Act was provoked by seven Supreme Court decisions in 1989, six of which involved interpretations of federal statutes dealing with employment discrimination.¹⁰⁵ The first congressional response to these decisions was a bill proposed by Senator Edward M. Kennedy and Representative Augustus F. Hawkins in 1990, which would have overruled each of these six statutory decisions and made a number of other significant legal changes as well.¹⁰⁶ But one of the decisions, *Wards Cove Packing Co. v. Atonio*,¹⁰⁷ became the focus of almost all the controversy that arose during the ensuing legislative battle.¹⁰⁸

Wards Cove was the latest in a long series of cases dealing with issues and questions that had been left unresolved in *Griggs*.¹⁰⁹ Some of the opinions in those cases were remarkably confused. 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.¹¹⁰ As the Court later recognized, this approach is completely wrong, for the whole point of the disparate impact theory is to create liability for *unintentional* discrimination.¹¹¹ And in *Connecticut v. Teal*,¹¹² the Court relied on the literal language of Title

¹⁰⁵ See *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989) (attorney fee awards against losing intervenors in Title VII cases); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (scope of 42 U.S.C. § 1981); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989) (application of Title VII limitations period to challenges to seniority systems); *Martin v. Wilks*, 490 U.S. 755 (1989) (joinder rules in Title VII litigation); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (evidentiary rules in disparate impact cases under Title VII); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (evidentiary rules in "mixed motives" cases under Title VII). A seventh decision held that some racial quotas in the awarding of government contracts are unconstitutional. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

¹⁰⁶ The text of the bill, as reported out of committee in the Senate 1990, can be found in S. REP. NO. 101-315, at 1-5 (1990).

¹⁰⁷ 490 U.S. 642 (1989).

¹⁰⁸ The following discussion of the background to the Civil Rights Act of 1991 is drawn in part from Nelson Lund, *Retroactivity, Institutional Incentives, and the Politics of Civil Rights*, 1995 PUB. INTEREST L. REV. 87, 100-110.

¹⁰⁹ See *supra* notes 60-63 and accompanying text.

¹¹⁰ 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)).

¹¹¹ See, e.g., *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988).

¹¹² 457 U.S. 440 (1982).

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.¹¹³ Other decisions, especially those dealing with the use of statistics, clarified the law to some extent, but the most important developments began in 1979 with *New York City Transit Authority v. Beazer*.¹¹⁴

In *Beazer*, the Court considered a challenge to the Transit Authority's rule against employing methadone users.¹¹⁵ 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.¹¹⁶ 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."¹¹⁷ 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.¹¹⁸ On its face, *Beazer* seems to mean that a success-

¹¹³ See *id.* at 445-49. Justice Powell's dissenting opinion in this case was if anything even more confused than the majority's. Powell argued that the disparate impact theory is defined by the method of proof it employs—*viz.* that the plaintiff carries his burden of proof by using statistics to raise an inference of discrimination—in contradistinction to standard disparate treatment cases "involving direct proof of discriminatory intent." *Id.* at 458-59. This is totally wrong. There is no requirement of direct proof in disparate treatment cases, and plaintiffs may prove such a case through the use of statistics alone. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 (1977). Powell's mistake is exactly the mistake that Burger's opinion in *Griggs* fostered when it submerged the distinction between covert discrimination and unintentional discrimination.

¹¹⁴ 440 U.S. 568 (1979).

¹¹⁵ See *id.* at 570-71.

¹¹⁶ As Justice White's dissent convincingly showed, the Court's critique of the plaintiff's *prima facie* case was seriously flawed, not least because the critique depended on a mischaracterization of the facts. See *id.* at 598-602. The manifest weakness of this portion of the Court's analysis may help explain why it was not used as the basis for the Court's holding.

¹¹⁷ *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.

¹¹⁸ *Id.* at 587 n.31. 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 *id.*; *id.* at 576 n.12. *Beazer* therefore cannot be limited to cases where public safety is an issue.

ful 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.

Beazer, however, did not in fact have this effect. Perhaps because *Griggs* and other pre-*Beazer* decisions had produced so much confusion and uncertainty, *Beazer*'s clear holding was sometimes ignored by the lower courts.¹¹⁹ In 1988, the Supreme Court was presented with a new 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.¹²⁰ In *Watson v. Fort Worth Bank & Trust*,¹²¹ 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,¹²² decided to extend disparate impact analysis to cover subjective employment practices.

Unfortunately, but also unsurprisingly, the Court adopted this extension of the doctrine without any meaningful analysis of the validity of the disparate impact theory itself.¹²³ In a portion of her opinion written for a

¹¹⁹ See, e.g., *EEOC v. Rath Packing Co.*, 787 F.2d 318, 331-32 (8th Cir. 1986) ("[T]he proper standard . . . is not whether [the challenged practice] is justified by routine business considerations but whether there is a *compelling need* for . . . that practice." (emphasis in original)); *Williams v. Colorado Sch. Dist. No. 11*, 641 F.2d 835, 842 (10th Cir. 1981) ("[I]n a disparate impact case, unlike a disparate treatment case, a rational or legitimate, nondiscriminatory reason is insufficient. The practice must be essential, the purpose compelling.").

¹²⁰ *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).

¹²¹ 487 U.S. 977 (1988).

¹²² *Id.* at 982-91, 999-1000.

¹²³ In the course of her opinion for the Court, Justice O'Connor suggested for the first time in the Court's history 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." *Id.* 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 well 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. 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 criteria that create opportunities for the operation of subconscious

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.¹²⁴ 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.¹²⁵

O'Connor observed that this provision of the statute clearly ruled out any theory making disparate impact as such illegal,¹²⁶ thus implicitly providing for the first time something like a legal explanation for the "business necessity" defense that had 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.¹²⁷ 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.¹²⁸ 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.¹²⁹ 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.¹³⁰ Second, O'Connor noted that a practice having a disparate

prejudices. Inducing employers to shift away from objective tests will, *ceteris paribus*, almost certainly increase the incidence of subconscious discrimination.

¹²⁴ See, e.g., *id.* at 993.

¹²⁵ 42 U.S.C. § 2000e-2(j) (1994).

¹²⁶ See *Watson*, 487 U.S. at 992.

¹²⁷ See *id.* at 992-93.

¹²⁸ See *id.* at 991-99.

¹²⁹ See *id.* at 994-97.

¹³⁰ The principle is also consistent with *Connecticut v. Teal*, 457 U.S. 440 (1982), in which the

impact is nonetheless permissible if it is based on a legitimate business reason.¹³¹ 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 regarded as the holding in that case: a practice is permissible if it has a "manifest relationship to the employment in question."¹³² 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" standard need only meet a burden-of-production standard, so that the ultimate burden of persuasion remains with the plaintiff at all times.¹³³ Although the law had been ambiguous on this point, O'Connor's conclusion would not have been 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, it should be emphasized, 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.¹³⁴ This result was an important and unusual event for it 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*. But it did at least move its own doctrine slightly in the direction of the underlying statute, and thus reduced the tension.

This very cautious and restrained doctrinal adjustment was not greeted with the approbation it deserved. Although the burden-of-proof issue was the only issue in which the Court could reasonably be thought to have departed from its prior decisions, *Wards Cove* was immediately caricatured as a dangerous exercise in judicial activism. The Kennedy-Hawkins Bill, formulated the year following the Court's decision in *Wards Cove*, purported to "restore" prior law by codifying a radical approach to disparate impact

Court held that employers cannot justify the use, as part of a multistage selection process, of a test that has a disparate impact on minorities by including "compensating" components at later points in the process. Thus, even though a multistage selection process has no adverse impact on a minority group, *Teal* holds that it can violate Title VII if an identifiable part of the process does have such an impact.

¹³¹ See *Watson*, 487 U.S. at 998.

¹³² 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).

¹³³ See *Watson*, 487 U.S. at 997-98.

¹³⁴ Justice Kennedy, who was appointed after *Watson* was argued, joined the four-Justice *Watson* plurality to create a majority in *Wards Cove*.

that had never been adopted by the Court, and was certainly not compatible with the statute the Court had been applying.

Under Kennedy-Hawkins, plaintiffs would have been able to challenge any group of employment practices that results in a disparate impact, without any requirement that the plaintiff demonstrate which of those practices (if any) caused the statistical disparity.¹³⁵ There is no case in which the Supreme Court had ever allowed such a challenge, or suggested that such a challenge could succeed. Besides placing the burden of persuasion on defendants who raised the business necessity defense, Kennedy-Hawkins would also have redefined the substantive standard itself.¹³⁶ Rejecting the *Beazer-Watson-Wards Cove* criterion—whether legitimate employment goals are served by the challenged practice—Kennedy-Hawkins would have imposed a requirement that the challenged practice be “essential to effective job performance.”¹³⁷ This standard had no basis in Supreme Court precedent.¹³⁸ Quite to the contrary, the Court’s pre-*Wards Cove* descriptions had consistently used the vague and broad phrase “manifest relationship to the employment in question.”¹³⁹ This formulation is quite consistent on its face with the *Beazer* and *Wards Cove* language, and utterly different from the new standard that Kennedy-Hawkins would have put in its place.¹⁴⁰

The Kennedy-Hawkins Bill might have been pushed through Congress—under the appealing if misleading claim that the legislature was “restoring the law”—except that the Bush administration was strongly opposed.¹⁴¹ The administration adopted the Supreme Court’s reasoning, which held that the disparate impact doctrine could easily induce employers to violate Title VII by adopting surreptitious quotas. Consistent with that

¹³⁵ See S. REP. NO. 101-315, at 2 (1990) (noting language of §§ 3-4 of S. 2104, proposed amendments to the Civil Rights Act of 1964).

¹³⁶ See *id.*

¹³⁷ *Id.* (quoting the proposed language to be added in § 3(o)).

¹³⁸ The phrase “essential to effective job performance” can be found in *Dothard*, 433 U.S. at 331, where the Court was merely reporting how the *defendant* characterized the challenged practice.

¹³⁹ *Teal*, 457 U.S. at 446-47; *Beazer*, 440 U.S. at 487 n.31; *Dothard*, 433 U.S. at 329; *Albemarle*, 422 U.S. at 425; *Griggs*, 401 U.S. at 432.

¹⁴⁰ The phrase “manifest relationship to the employment in question” is, of course, ambiguous. The use of the word “manifest,” for example, might be taken to imply that the usefulness of a practice to a defendant must be completely self-evident, or it might mean only that the defendant can make a relationship appear by presenting evidence and argument. Similarly, the word “employment” could refer to a particular job or position, or it could refer to the employment relation as a whole.

¹⁴¹ This is not to say that the administration was alone in opposing the bill. Some members of Congress, some distinguished legal experts, and some lobbyists, raised serious objections to many aspects of the proposal. See, e.g., *Hearings Before the Labor and Human Resources Comm. of the U.S. Senate on S. 2104*, 136 CONG. REC. 142 (daily ed. Feb. 23, 1990); 136 CONG. REC. 154 (daily ed. Feb. 27, 1990); 136 CONG. REC. 180 (daily ed. Mar. 1, 1990); 136 CONG. REC. 219 (daily ed. Mar. 7, 1990). Without the administration’s support, however, these objections would almost certainly have had little or no effect on the actual course of events.

analysis, the administration argued that Kennedy-Hawkins was a “quota bill.”¹⁴² The administration objected to several other features in the bill as well, but the ensuing debate focused overwhelmingly on disparate impact. That debate was extremely bitter, but also very arcane and technical. Much of it comprised dueling interpretations of a complex body of case law, with proponents of Kennedy-Hawkins claiming that they were merely restoring pre-*Wards Cove* law, while the administration contended that the bill would create a powerful new engine of discrimination. The debate must have looked almost surrealistic to many observers, but only if they failed to recognize how unintelligible the *Griggs* opinion was, and how much confusion and contradiction that unintelligibility had created in subsequent judicial opinions.

The summer of 1990 was taken up with negotiations among a frequently changing set of public officials and private lobbyists. Several proposed compromises were publicly aired, but the differences among the interested parties appeared to be irreconcilable. The negotiations had been punctuated by recriminations and mutual accusations of bad faith, but the issues were so legalistic that hardly anyone except a few of the lawyers involved could really have appreciated exactly what all the fighting was about. When autumn came, a slightly modified version of Kennedy-Hawkins passed both houses of Congress by near veto-proof margins.¹⁴³ Although clearly reluctant to do so, President Bush rejected the bill,¹⁴⁴ and a veto override attempt in the Senate failed by one vote.¹⁴⁵

Within the next year came more negotiations, more recriminations, and a new array of compromise proposals from interested parties and would-be mediators. An agreement, however, seemed no closer than ever. Late in the spring, the House of Representatives passed a bill that was essentially identical to the one Bush had vetoed, but the vote tally showed that

¹⁴² See, e.g., Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 1990 PUB. PAPERS 1437, 1438 (Oct. 22, 1990) (“[T]he bill actually employs a maze of highly legalistic language to introduce the destructive force of quotas into our Nation’s employment system.”). The bulk of the Washington business lobby, which objected primarily to provisions in the bill making compensatory and punitive damages available under Title VII, formed a tactical alliance with the Bush administration in opposition to Kennedy-Hawkins. See David Louter, *Civil Rights Bill Vetoed By Bush*, L.A. TIMES, Oct. 23, 1990, at A1 (“White House opponents of the bill, bolstered by business lobbyists, waged a determined and ultimately successful rear-guard action.”).

¹⁴³ 136 CONG. REC. S15,399, S15,407 (daily ed. Oct. 16, 1990); 136 CONG. REC. H9975, H9994-95 (daily ed. Oct. 17, 1990).

¹⁴⁴ See Message Returning Without Approval, *supra* note 140, at 1437 (“I am today returning without my approval S. 2104, the ‘Civil Rights Act of 1990.’ I deeply regret having to take this action with respect to a bill bearing such a title . . .”). The President outlined his objections to the bill in his veto message, which Attorney General Thornburgh supplemented with a more detailed legal analysis. See Memorandum of the Attorney General Accompanying the President’s Veto Message (Copy on file with the GEORGE MASON LAW REVIEW).

¹⁴⁵ See 136 CONG. REC. S16,562, S16,589 (daily ed. Oct. 24, 1990).

opposition had grown since the previous year.¹⁴⁶ As the first session came to a close, it seemed that Congress would once again pass a bill that the President would once again veto.

Unexpectedly, just before the House bill was set for floor consideration in the Senate, Minority Leader Robert J. Dole negotiated a compromise between the administration and Senator John Danforth, who represented a group of liberal Republicans who had supported Kennedy-Hawkins in 1990.¹⁴⁷ Senator Kennedy, who represented the core Democratic supporters of his bill, accepted this compromise, probably because he calculated that the Danforth group's defection would eliminate any hope of overriding a presidential veto. The compromise bill negotiated by Senator Dole passed the Senate and then the House with only token opposition, and the President happily signed it into law as the Civil Rights Act of 1991.¹⁴⁸

The disparate impact provisions of the 1991 Act largely codify *Wards Cove*, though the new statute is sufficiently ambiguous that courts could easily read into it some of the rejected elements of the Kennedy-Hawkins alternative.¹⁴⁹ Thus, the long and bloody battle over disparate impact

¹⁴⁶ In 1990, 154 members of the House voted against the final bill. 136 CONG. REC. H9975, H9995 (daily ed. Oct. 17, 1990). The next year, 158 members voted against a bill that was essentially identical. 137 CONG. REC. H3959 (daily ed. June 5, 1991). The shift in sentiment in the House may have been affected by the fact that the quota issue had played an important part in two well-publicized election campaigns in 1990: the Senate race in North Carolina and the gubernatorial race in California. In both cases, the anti-quota candidate had prevailed.

¹⁴⁷ See 137 CONG. REC. S15,220, S15,220 (daily ed. Oct. 25, 1991) (statement of Sen. Dole).

¹⁴⁸ For more detailed discussions of the events leading up to the enactment of the 1991 Act, see Roger Clegg, *A Brief Legislative History of the Civil Rights Act of 1991*, 54 LA. L. REV. 1459 (1994) (analysis by former Bush administration official); Neal Devins, *Reagan Redux: Civil Rights Under Bush*, 68 NOTRE DAME L. REV. 955 (1993). For an extremely detailed discussion, see Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1 (1993) (analysis by House Democrat staffer).

¹⁴⁹ The statute overrules *Wards Cove* on one relatively minor point involving the distinction between the burden of production and the burden of persuasion. On the more important issues involving the nature of the plaintiff's initial burden and the nature of the defendant's rebuttal burden, the *Wards Cove* approach appears to have been written into law. See Michael Carvin, *Disparate Impact Claims under the New Title VII*, 68 NOTRE DAME L. REV. 1153 (1993) (arguing that the new statute clearly codifies *Wards Cove*); Nelson Lund, *Retroactivity, Institutional Incentives, and the Politics of Civil Rights*, 1995 PUB. INTEREST L. REV. 87, 109-10 (arguing that the best interpretation of ambiguous provisions is that they codify *Wards Cove*); cf. Lino A. Graglia, *Racial Preferences, Quotas, and the Civil Rights Act of 1991*, 41 DE PAUL L. REV. 1117, 1134-40 (1992) (arguing that the new statute is ambiguous and concluding that judges should probably continue to promote "work force racial balance more or less as they have done ever since the Supreme Court's wrongful and misguided decision in *Griggs*").

Contrary to what I believe is the correct view, the courts have so far tended to read the new statute as a sharp departure from *Wards Cove*. See, e.g., *Bradley v. Pizzaco of Nebraska, Inc.*, 7 F.3d 795, 797-99 (8th Cir. 1993) (holding that the 1991 Act restores pre-*Wards Cove* Eighth Circuit precedent under which defendant can meet business-necessity requirement only by showing a "compelling need" for the practice); *Fitzpatrick v. Atlanta*, 2 F.3d 1112, 1117 n.5 (11th Cir. 1993) (finding that the 1991 Act "statutorily reversed" the *Wards Cove* definition of business necessity); Nash

resulted in something that looked like a draw. Proponents of Kennedy-Hawkins achieved the codification of the previously illegitimate *Griggs* theory of discrimination, while opponents salvaged some of *Wards Cove*'s safeguards against extravagant applications of disparate impact theory. And the new statute contained enough ambiguity to prevent anyone from knowing for sure exactly how much of the *Wards Cove* approach would survive.

B. *The Price Waterhouse Override and Affirmative Action*

Although the most intensely fought battles in 1990 and 1991 concerned disparate impact and questions about its capacity for inducing employers to resort to quotas and preferential treatment, the Kennedy-Hawkins Bill also proposed many other changes in Title VII. Some of these proposed changes were extremely significant, and most of them were incorporated with very little public discussion in the final compromise.

Among the most interesting elements of the compromise was a provision designed primarily to overrule the Supreme Court's decision in *Price Waterhouse v. Hopkins*.¹⁵⁰ This case had arisen when a female senior manager at a large accounting firm was denied promotion to partner. The evidence showed that there were some undeniably legitimate grounds for the firm's decision, mainly involving the plaintiff's excessive aggressiveness and other deficiencies in her interpersonal skills.¹⁵¹ At the same time, however, there was evidence that some of those involved in making the decision had made comments about the plaintiff that reflected what the Court regarded as an impermissible reliance on "sex stereotypes."¹⁵² A sharply divided Court agreed that Title VII would be violated only if the employer's adverse personnel decision was made "because of" an illegiti-

v. Jacksonville, 895 F. Supp. 1536, 1545 (M.D. Fla. 1995) (finding that the 1991 Act restored "pre-*Wards Cove* law in which, inter alia, 'business necessity' is an affirmative defense on which the defendant bears the burden of persuasion and 'business necessity' really means 'necessity'"), *aff'd*, 85 F.3d 643 (11th Cir. 1996) (unpublished table decision).

¹⁵⁰ 490 U.S. 228 (1989).

¹⁵¹ See *id.* at 234-35.

¹⁵² The plaintiff, for example, was described by one reviewer as "macho," while another suggested that she "overcompensated for being a woman." *Id.* at 235. At one point, she was told that her prospects at the firm would be better if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* The Justices assumed without analysis that such "sex stereotyping" would constitute illegal discrimination if it caused an adverse employment decision. See, e.g., *id.* at 250-51. The Court did not explain how to distinguish such sex stereotyping from demands that employees abide by ordinary conventions about appropriate deportment in the business world. It is therefore unclear from *Price Waterhouse* whether men, for example, can be discouraged from dressing or acting in a manner considered effeminate, or indeed whether men can be discouraged from behaving in a "macho" or excessively masculine fashion. Nor is it clear whether Title VII now includes a ban on discriminating against homosexuals.

mate reason, but could not agree on the evidentiary standards that should be used to address the issue of causation.¹⁵³ Writing for a plurality of four, Justice Brennan concluded that plaintiffs who prove that an illegitimate factor played a “motivating part” in a decision should prevail unless the defendant proves that it would have made the same decision in the absence of the unlawful motive.¹⁵⁴ Justices White and O’Connor, who concurred only in the judgment, offered rules that resembled the plurality’s in general structure, but they differed from the plurality and from each other about the rationale and about some of the details.¹⁵⁵

The Civil Rights Act of 1991 overrules *Price Waterhouse* to the extent that it conflicts with Section 107 of that statute, which provides in part:

(a) IN GENERAL.—Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by sections 105 and 106) is further amended by adding at the end the following new subsection:

“(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”¹⁵⁶

Whatever one thinks of the wisdom of this provision, which imports into Title VII a standard of liability that was too radical even for Justice Brennan,¹⁵⁷ its language unambiguously applies to affirmative action as it is customarily practiced. Thus, for example, any decision making process that entails consideration of an applicant’s race or sex is unequivocally declared illegal, even if the employer also gives significant and perhaps even dispositive weight to neutral factors such as relative qualifications. The statutory language makes no distinction between the way this extremely stringent rule should be applied to different races or different sexes. Nor does it make any distinction between “benign” and “malignant” motivating factors. If Congress meant what it said here, the practices upheld in *Weber* and *Johnson* are now unlawful.

¹⁵³ See *id.* at 275-76 (O’Connor, J., concurring in the judgment).

¹⁵⁴ *Id.* at 258.

¹⁵⁵ See *id.* at 275-76 (O’Connor, J., concurring in the judgment); *id.* at 259-61 (White, J., concurring in the judgment). Justice Kennedy’s dissent, which was joined by Chief Justice Rehnquist and Justice Scalia, objected to the creation of a special evidentiary rule for so-called “mixed motives” cases. See *id.* at 287 (Kennedy, J., dissenting).

¹⁵⁶ 42 U.S.C. § 2000e-2(m) (1994).

¹⁵⁷ See *Price Waterhouse*, 490 U.S. at 242-45.

1. The Textual Argument for Invoking Section 107 to Repudiate *Weber* and *Johnson*

If Section 107 means what it says, *Weber* and *Johnson* have been overruled by statute. There, however, is one very obvious reason to doubt that Section 107 means what it says. Section 116 of the 1991 statute provides:

Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law.¹⁵⁸

If the phrase “in accordance with the law” refers to the law as it exists apart from the 1991 Act (as it must if Section 116 is to have any possible effect at all), this provision could be interpreted to carve a “*Weber/Johnson* exception” to the general rule set forth in Section 107.¹⁵⁹ Though this interpretation may seem quite strong at first glance,¹⁶⁰ closer scrutiny exposes some real weaknesses.

First, it assumes that “the law” includes *Weber* and *Johnson*. In one sense of the word “law” that is colloquial among lawyers, it certainly did.¹⁶¹ But in a stricter sense, only the statute itself is law, while judicial opinions are merely interpretations of the law.¹⁶² Just as it makes sense to

¹⁵⁸ 42 U.S.C. § 1981 note.

¹⁵⁹ It has been suggested that Section 116 should be interpreted only to mean that Section 107 should not be applied *retroactively* to affirmative action programs. See Michael Stokes Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 TEX. L. REV. 993, 1006 & n.4 (1993). This interpretation, however, seems far-fetched in light of the fact that the 1991 Act contains several provisions dealing expressly with the issue of retroactivity. For the Supreme Court’s interpretation of the retroactivity provisions, see *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994) and *Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510 (1994).

¹⁶⁰ This interpretation would be especially strong if, as one commentator has said, “the text of section 107 purports to subordinate itself to other provisions of the Act—including section 116.” See Glen D. Nager, *Affirmative Action after the Civil Rights Act of 1991: The Effects of a “Neutral” Statute*, 68 NOTRE DAME L. REV. 1057, 1074 (1993). This would be true if the phrase “Except as otherwise provided in this title” in Section 107 referred to Title I of the 1991 Act. But it cannot. Because Section 107 of the 1991 Act creates a new subsection (703(m)) in the Civil Rights Act of 1964, the term “this title” can refer *only* to Title VII of the Civil Rights Act of 1964, as amended, or to Title 42 of the United States Code (where Title VII is codified). The official codification of the statute chooses the former possibility. See 42 U.S.C. § 2000e-2(m) (Supp. V 1993) (substituting the word “subchapter” for the word “title”). Under either interpretation, however, Section 703(m) does not expressly subordinate itself to Section 116 of the 1991 Act because Section 116 is not part of Title VII of the 1964 Act or of Title 42 of the United States Code. (The 1993 supplement to the U.S. Code quotes Section 116 in an explanatory *note* to 42 U.S.C. § 1981, but it is not part of § 1981 or any other provision of Title 42. See 42 U.S.C. § 1981 note at 177 (Supp. V 1993)).

¹⁶¹ This sense of the word was implicitly imputed to the statute in *Officers for Justice v. Civil Service Comm’n of San Francisco*, 979 F.2d 721, 725 (9th Cir. 1992).

¹⁶² The Supreme Court has recognized an analogous distinction, at least with respect to the opinions of courts other than itself. In the context of its retroactivity jurisprudence, for example, the

suppose that courts would generally adopt the looser usage that includes their own decisions within the term "law,"¹⁶³ it would make some sense to presume that Congress would use the term in the stricter sense that comprehends only Congress' own acts. While it would probably be reckless to assume that the drafters of the 1991 Act gave any actual thought to the various meanings that the word "law" may have, it would be appealingly modest for the courts to impute to Congress, in a doubtful case like this one, a rightful institutional jealousy according to which "law" means only the statutes themselves. Just as the courts take the easily defensible view that otherwise authoritative judicial interpretations can be deprived of their status as law by later and more authoritative judicial interpretations,¹⁶⁴ so Congress could sensibly take the view that only the statute itself, not "what the courts have said about it," is truly the law.¹⁶⁵ On this view, Section 116 would protect the forms of affirmative action authorized by *Weber* and *Johnson* only if the Supreme Court can *now* conclude that those cases were correctly decided. But, for the reasons summarized earlier in this Article, the Court would be wrong to conclude that *Weber* and *Johnson* were correct interpretations of the statute.¹⁶⁶

Even if one assumes, as one reasonably might, that the word "law" was used in Section 116 in a sense that could include the *Weber* and *Johnson* opinions, there are other difficulties with interpreting the savings clause to limit the reach of Section 107. Section 116, for example, applies

Court has said that the governing precedent in a federal court of appeals can no longer be said ever to have been the law if it is later overruled by the Supreme Court:

[The Supreme Court] held and therefore established that the prior decisions of the Courts of Appeals which read § 1981 to cover discriminatory contract termination were incorrect. They were not wrong according to some abstract standard of interpretive validity, but by the rules that necessarily govern our hierarchical federal court system. *Cf. Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result). It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.

Rivers, 114 S. Ct. at 1519 (footnote omitted).

¹⁶³ *Cf. James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment):

I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense "make" law. But they make it as judges make it, which is to say as though they were "finding" it—discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be.

¹⁶⁴ *See Ruppert v. Ruppert*, 134 F.2d 497, 500 (D.C. Cir. 1942) ("[T]he general principle is that a decision of a court of appellate jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law but that it never was the law.").

¹⁶⁵ *Cf. Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491-92 (Frankfurter, J., concurring) ("[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.").

¹⁶⁶ *See supra* notes 68-104 and accompanying text.

only when another provision of the statute needs to be “construed.” Unless this term is superfluous, it cannot have been meant to refer to all applications of the statute.¹⁶⁷ Or, to put the point another way, Section 116 does not by its terms create an *exception* to any of the general rules in the 1991 Act, but rather provides a rule of *interpretation* that can only be invoked to resolve ambiguities elsewhere in the Act. As applied to quotas and preferences like those at issue in *Weber* and *Johnson*, however, Section 107 is not ambiguous; rather, its plain language simply declares them unlawful.

The distinction between provisions that create exceptions and provisions that create rules of interpretation is a genuine and meaningful distinction,¹⁶⁸ and it is also one that is reflected in the 1991 Act itself. Section 105, for example, establishes general disparate impact rules and then creates an exception from those rules for certain practices dealing with users of illegal drugs.¹⁶⁹ The provision creating the exception does not purport to dictate how the general rules shall be “construed.” Instead, it uses the standard formulation for creating exceptions: “Notwithstanding any other provision of this title, [certain practices] shall be considered an unlawful employment practice only if”¹⁷⁰ The distinction between provisions that create exceptions and provisions that create rules of construction—a distinction which Justice Rehnquist emphasized in his *Weber* dissent when he contrasted Section 703(i) with Section 703(j) and which is plainly visible in the contrast between Sections 105 and 116 of the 1991 Act—thus suggests that Section 116 should not be construed to apply to the unambiguous language of Section 107.

Finally, it is not clear that the language of Section 116 extends beyond *court-ordered* affirmative action. The provision refers to “court-ordered remedies, affirmative action, or conciliation agreements,” and the structure of the sentence thus leaves an ambiguity as to whether the term “court-ordered” modifies all three of the following terms, or only the first. There are two reasons that support the narrower interpretation. First, application of the *ejusdem generis* canon favors this conclusion because the term “affirmative action” is sandwiched between two terms that clearly refer to Title VII’s enforcement scheme.¹⁷¹ Second, and even more strikingly, the only

¹⁶⁷ In one sense, of course, one is always “construing” or “interpreting” words when one reads or hears them because they require some kind of context to have any meaning at all. In ordinary usage, however, “construing” usually means resolving an uncertainty about meaning.

¹⁶⁸ This is not to deny that a provision might be drafted ambiguously, so that it would be difficult to determine which category it fell into. Nor can it be denied that a draftsman might inadvertently create one type of provision while trying to create the other. That might have occurred in this case, but one would have to repair to the legislative history for evidence that this happened.

¹⁶⁹ 42 U.S.C. § 2000e-2(k) (1994).

¹⁷⁰ *Id.* § 2000e-2(k)(3).

¹⁷¹ Under Title VII, the term “conciliation agreements” refers to agreements entered into by the EEOC with an employer as an alternative to litigation. *Id.* § 2000e-5(f)(1). These agreements, however,

general reference in Title VII to "affirmative action" occurs in connection with this enforcement scheme, and it is used there to refer *only* to judicially ordered relief.¹⁷²

An interpretation of Section 116 that confined its reach to court-ordered affirmative action, moreover, would make sense, for the controversies that have arisen in connection with this kind of affirmative action have been quite different from the controversies that have arisen in connection with the sort of affirmative action at issue in *Weber* and *Johnson*. In the former case, the issues have to do with the exact extent of the courts' unquestioned power to fashion appropriate remedies for proven violations of Title VII.¹⁷³ These issues have not been the source of anything like the fundamental disputes that engaged the Court in *Weber* and *Johnson*. Thus it would not be surprising if Congress chose to emphasize that it wished to avoid inadvertently intervening in the delicate line-drawing exercises that courts must inevitably engage in when exercising the equitable powers expressly conferred on them by Title VII. The sort of affirmative action at issue in *Weber* and *Johnson*, by contrast, involves a form of *employer* conduct, which is quite different from the judicial "affirmative action" authorized by Title VII and which has been subject to a different sort of dispute.

None of these arguments is necessarily dispositive. Together, however, I believe that they create a formidable textual argument in favor of concluding that Section 116 does not forbid Section 107 from being applied according to its plain terms when employers make race, color, religion, sex, or national origin a "motivating factor for any employment practice." The legislative history does suggest that the textual ambiguities should be resolved the other way,¹⁷⁴ and that *may* be a sufficient reason for concluding that *Weber* and *Johnson* were "saved" by Section 116 from a literal application of Section 107. But it is not at all obvious that the textual ambiguities are sufficient to justify consulting the legislative history at all. Without rehearsing the complex and well-known debates about the proper

are enforceable in court, at which point it would make sense to call them "court-ordered conciliation agreements." See, e.g., *Eatmon v. Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503 (11th Cir. 1985); *EEOC v. Safeway Stores, Inc.*, 714 F.2d 567 (5th Cir. 1983); *EEOC v. Liberty Trucking Co.*, 695 F.2d 1038 (7th Cir. 1982).

¹⁷² See 42 U.S.C. § 2000e-5(g) ("court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate . . ."). Section 718 creates a special procedural rule for the benefit of government contractors who have had affirmative action plans approved by the government. *Id.* § 2000e-17. Outside these two contexts, the term "affirmative action" is not used in Title VII.

¹⁷³ See, e.g., *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986) (holding that courts may in appropriate cases order "affirmative race-conscious relief," which need not necessarily be limited to actual victims of discrimination).

¹⁷⁴ The relevant legislative history is discussed in the next subsection of this Article.

use of legislative history, I would suggest that those who are reluctant to rely on such extrinsic sources of meaning would be faced here with what is at the very least a difficult interpretive problem. That problem, however, arises *if and only if* Section 703(a) of the 1964 Act means what *Weber* and *Johnson* said it means. That difficulty, in turn, would be avoided if the Court were to reconsider and reject the interpretation of Section 703(a) adopted in these two decisions, thus effectuating what the Court itself has said is its duty "to make sense rather than nonsense out of the *corpus juris*."¹⁷⁵

The Court should have little hesitation in overruling *Weber*, for it is simply indefensible as an exercise in statutory construction. Overruling the decision, moreover, would be justified by the precedents that require the Court to respond to subsequent legislative developments (such as the 1991 Act) and to avoid inconsistencies in the law (like the one that would otherwise be created between *Weber* and Section 107 of the 1991 Act).¹⁷⁶ *Weber* has also proved to be an extremely and persistently controversial and disruptive decision, which has produced neither a settled and intelligible body of legal doctrine nor a satisfied populace.¹⁷⁷ For all these reasons, the most traditional standards require that the Supreme Court repudiate these gravely mistaken precedents and restore the colorblind rule that Congress adopted in 1964. Refusing to do so would not constitute judicial restraint, but activism through inertia.

¹⁷⁵ *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 100-01 (1991). Correcting the *Weber/Johnson* misinterpretation of Section 703(a), rather than simply applying Section 107 of the 1991 Act to invalidate affirmative action practices, would also avoid an anomaly that would otherwise be created by virtue of the differences in the remedial schemes available under these two provisions of the law. See 42 U.S.C. § 2000e-5(g)(2)(B).

¹⁷⁶ See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (citations omitted): In cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress. Where such changes have removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, the Court has not hesitated to overrule an earlier decision Another traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision, or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws.

¹⁷⁷ The *Patterson* Court noted that "it has sometimes been said that a precedent becomes more vulnerable as it becomes outdated and after being 'tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare.'" *Patterson*, 491 U.S. at 174 (citations and internal quotation marks omitted). The Court does not seem to have meant to endorse this test, and I do not believe that it need be invoked to justify overruling *Weber*. Were it necessary to do so, I think it could be shown persuasively, if not incontrovertibly, that *Weber* is not just vulnerable, it is comminuted.

2. The Legislative History Argument for Overruling *Weber* and *Johnson*

I believe that the preceding arguments constitute a legally sufficient, though not irresistible, basis to conclude that the 1991 Act provides an important reason for overruling *Weber* and *Johnson*. These arguments, however, ignore what many would consider the most important factor pointing in the opposite direction: the legislative history of the 1991 Act contains little or no indication that Congress believed it was overruling *Weber* and *Johnson*. This last portion of the Article shows why the legislative history, when examined carefully, nonetheless supports overruling these decisions.

It is quite true that the target of Section 107 was *Price Waterhouse*, not the affirmative action cases, and that its potential implications in that area could well have been invisible to the overwhelming majority of legislators. If one applies the “watchdog that didn’t bark” maxim—according to which courts should presume that Congress does not mean to make sweeping legal changes without announcing such an intent in the legislative history—one might conclude that Congress’ presumed lack of intent is more significant than the words it used.¹⁷⁸ And there are some obvious reasons for applying the presumption here.

First, the text of the 1991 Act itself could be read to authorize the courts to consult the legislative history. Section 105(b) expressly specifies what portions of the legislative history may be used in interpreting the disparate impact provisions of the statute,¹⁷⁹ and this might be taken to imply that it is permissible to use legislative history freely in interpreting other provisions of the statute.¹⁸⁰

Second, the silent-watchdog maxim seems, at least at first glance, about as apt in this case as it could ever be. The Civil Rights Act of 1991 revised several very significant aspects of Title VII, along with quite a few rather small details. This suggests that Congress was providing Title VII

¹⁷⁸ This presumption has been likened to the inference drawn in the famous Sherlock Holmes story. See ARTHUR CONAN DOYLE, *Silver Blaze*, in THE COMPLETE SHERLOCK HOLMES 335 (1927); see also *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting). The Court has applied the presumption despite pointed criticism. See, e.g., *Chisom*, 501 U.S. at 406 (Scalia, J., dissenting) (“We are here to apply the statute, not legislative history, and certainly not the absence of legislative history. Statutes are the law though sleeping dogs lie.” (citations omitted)).

¹⁷⁹ See 42 U.S.C. § 2000e-2(k) (“No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to *Wards Cove*—Business necessity/cumulation/alternative business practice.”).

¹⁸⁰ This is, of course, not a necessary implication. Even if it were, indeed even if a statute directed the courts to consult legislative history, it would not necessarily follow that they should do so.

with a comprehensive reevaluation. Most of the changes made in 1991, moreover, were meant to overrule Supreme Court decisions that had generated opposition in Congress, some of which had (like *Weber* and *Johnson*) been decided several years earlier. Furthermore, much of the very extensive debate in 1990 and 1991 focused on quotas and preferences in the context of disparate impact theory, which as we have seen is closely related to affirmative action. Finally, the new statute expressly outlaws one narrow form of affirmative action involving the manipulation of test scores.¹⁸¹ In light of all these facts, the virtual absence of discussion about affirmative action is quite striking: it is as though there were a kind of unstated agreement among the legislation's proponents and opponents alike to avoid addressing this politically charged issue.¹⁸²

This last formulation, however, suggests why the silent-watchdog maxim is actually rather out of place here. The maxim has its greatest force when a statute seems on its face to make significant changes in a *settled* body of law, for then one may suspect that the apparent effect of the statutory language was inadvertent. In 1990 and 1991, however, *Weber* and *Johnson* were not truly settled. The 1987 decision in *Johnson* was fairly recent, and that decision had left the continued vitality of *Weber* very much in doubt: the three *Johnson* dissenters had expressly called for overruling *Weber*, and Justice O'Connor had suggested that she might be willing to do so in an appropriate case.¹⁸³ By 1991, moreover, one member of the *Johnson* majority (Justice Powell) had retired from the Court, and the *Johnson* dissenters, with one very minor exception, voted with his successor (Justice Kennedy) in each of the controversial 1989 employment discrimination cases.¹⁸⁴ Nor does it make any sense to suppose that interested members of Congress were inattentive to the completely obvious fact that

¹⁸¹ See 42 U.S.C. § 2000e-2(f) ("It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise to alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.").

¹⁸² See, e.g., Nager, *supra* note 160, at 1057 ("[T]he debate about [the 1991 Act's] passage is almost deafeningly silent on the subject of affirmative action in employment.").

¹⁸³ Justice O'Connor concurred only in the judgment of the Court, and apparently only because of existing precedent combined with the fact that "[n]one 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." *Johnson v. Transport Agency*, 480 U.S. 616, 648 (1987) (O'Connor, J., concurring in the judgment). In explaining why she did not accept Scalia's arguments, moreover, she said that his approach "serves as a useful point of academic discussion, but fails to reckon with the reality of the course that the majority of the Court has determined to follow." *Id.* at 648-49. This cryptic statement could easily mean that O'Connor might have a different response to Scalia's arguments if her own vote would affect the outcome of the case.

¹⁸⁴ The exception was *Price Waterhouse*, where Justice White concurred in the judgment, while Justice Kennedy dissented. Even here, however, Kennedy was joined by the other two *Johnson* dissenters. It is noteworthy, moreover, that in each of the other 1989 decisions, there was a single opinion in which Kennedy and all the *Johnson* dissenters joined. See cases cited *supra* note 105.

Section 107 by its terms applied to affirmative action. Rather, it seems much more likely that opponents and proponents of affirmative action both recognized that Section 116 was ambiguous, and that both sides hoped eventually to have the courts resolve the ambiguity in their favor. If that is true, however, the courts might be well-advised to resolve the ambiguity on the basis of *textual* arguments (like those discussed in the previous subsection of this Article) because the “silent watchdog” is in this instance really more akin to a *gagged* watchdog.

This conclusion is by far preferable to a mechanical application of the silent-watchdog maxim.¹⁸⁵ A closer examination of the legislative history, however, suggests a more direct and telling conclusion about its implications. In order to appreciate those implications, we must return briefly to the arguments in *Johnson*. Scalia’s dissent made an extremely strong case for overruling *Weber*, and the most important element in his argument was that there is simply no doubt that *Weber* was wrongly decided.¹⁸⁶ Even Justice Brennan has acknowledged that overruling is appropriate in such a case,¹⁸⁷ and Brennan’s opinion for the Court in *Johnson*, like his opinion for the Court in *Weber* itself, made no effort to answer the absolutely compelling criticisms in Justice Rehnquist’s *Weber* dissent. What Brennan did offer in *Johnson* was a new argument seemingly designed to escape the necessity of answering those criticisms: “Congress has not amended the statute to reject our construction [of Title VII in *Weber*], nor have any such amendments even been proposed, and we therefore may assume that our interpretation was correct.”¹⁸⁸

This is the only reason the Court has actually offered for preserving *Weber*. If one takes this “implicit legislative endorsement” seriously, however, one would have to acknowledge that Congress must be able to withdraw the endorsement in the same way that it conferred it. And that, as it happens, actually occurred in the legislative history of the 1991 Act.

An implicit refusal to endorse *Weber* and *Johnson* is suggested in the first place by the almost eerie absence of any serious or extended discussion

¹⁸⁵ For a particularly thoughtless and sloppy application of this maxim, see *Officers for Justice v. Civil Service Comm’n of San Francisco*, 979 F.2d 721, 725 (9th Cir. 1992) (refusing to apply Section 107 to an affirmative action case, in part because of the absence of a “clear manifestation” of congressional intent to require such applications).

¹⁸⁶ See *Johnson*, 480 U.S. 616 at 669-77 (Scalia, J., dissenting).

¹⁸⁷ “[E]ven under the most stringent test for the propriety of overruling a statutory decision . . . —that it appear beyond doubt . . . “that [the decision] misapprehended the meaning of the controlling provision,” *Weber* should be overruled.” *Id.* at 673 (Scalia, J., dissenting) (quoting *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 700 (1978) and *Monroe v. Pope*, 365 U.S. 167, 192 (1961) (Harlan, J., concurring)). Although Scalia did not point it out, Justice Brennan was the author of the Court’s opinion in *Monell*.

¹⁸⁸ *Id.* at 629 n.7. The Court has subsequently expressed concern about placing “undue” reliance on congressional inaction, but it has not specifically indicated whether it now believes that *Johnson*’s reliance was undue. See *Patterson v. McLean Credit Union*, 490 U.S. 164, 175 n.1 (1989).

of affirmative action during the long and bitter fight about quotas and preferences in the context of disparate impact. And the inference is strengthened by the ambiguities of the reference to affirmative action in Section 116. But we need not rest entirely on negative inferences. In fact, there is specific legislative history directly on point. In a memorandum placed in the Congressional Record by Senator Dole on behalf of himself, thirteen other Senators, and the Bush administration, Section 116 was described as having no effect on Section 703(a) of Title VII, which is the basic prohibition on discrimination by employers.¹⁸⁹ Now this was a rather odd thing to say inasmuch as the 1991 Act made no amendments to Section 703(a), while Section 116 by its terms applies only to amendments made by the 1991 Act. The memorandum then went on to say:

This legislation does not purport to resolve the question of the legality under Title VII of affirmative action programs that grant preferential treatment to some on the basis of race, color, religion, sex or national origin, and thus "tend to deprive" other "individual[s] of employment opportunities . . . on the basis of race, color, religion, sex, or national origin." In particular, this legislation should in no way be seen as expressing approval or disapproval of *United Steelworkers v. Weber*, 443 U.S. 193 (1979), or *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), or any other judicial decision affecting court-ordered remedies, affirmative action, or conciliation agreements.¹⁹⁰

Although final passage of the Civil Rights Act of 1991 did not occur for almost a week after the Dole Memorandum was placed into the Congressional Record, no one in the Senate ever contradicted this statement by the architect of the compromise bill.¹⁹¹ If Congress can be understood to have

¹⁸⁹ 137 CONG. REC. S15,477-78 (daily ed. Oct. 30, 1991) (memorandum submitted by Sen. Dole).

¹⁹⁰ *Id.* The Dole Memorandum also stressed that Section 107 would be "equally applicable to cases involving challenges to unlawful affirmative action plans, quotas, and other preferences." *Id.* at S15,476. In light of the Memorandum's claim that the legislation did not purport to resolve the legality of affirmative action plans involving preferential treatment, this statement is probably best understood to mean that defendants, rather than plaintiffs, now have the burden of proof on the issue of whether a challenged form of discrimination qualifies for any exception that may continue to be recognized under *Weber* and *Johnson*. This would confirm a suggestion made by four Justices in *Price Waterhouse*, according to which the reasoning of that case displaced *Johnson*'s bizarre rule that a facially discriminatory affirmative action program provides a "nondiscriminatory rationale" for an employment decision. See *Price Waterhouse*, 491 U.S. at 279 (O'Connor, J., concurring in the judgment); *id.* at 293 n.4 (Kennedy, J., dissenting); cf. Nager, *supra* note 160, at 1075-76 (offering this interpretation of Section 107 without reference to the Dole Memorandum).

¹⁹¹ Although the Senate voted on the bill the same day that Senator Dole placed his document in the Congressional Record (Oct. 30), the Senate had to vote again on a corrected version of the bill six days later, at which time controversies about the bill re-erupted. See 137 CONG. REC. S15,950-68 (daily ed. Nov. 5, 1991). Section 116 first appeared, in the exact form in which it was incorporated in the final bill (S. 1745), in a bill introduced by Senator Danforth which became the starting point for the negotiations that led to the final bill. Although Senator Danforth offered his own interpretive memorandum discussing several provisions of the final bill (disagreeing with Senator Dole on some points), he never commented on Section 116 and he never disputed Dole's interpretation of it. See 137 CONG. REC. S15,483-85 (daily ed. Oct. 30, 1991) (memorandum submitted by Sen. Danforth). A few

"endorsed" *Weber* and *Johnson* by its inaction prior to 1991, certainly the Senate must also be understood to have endorsed Senator Dole's claim that the 1991 statute did *not* constitute an endorsement of those decisions. Dole's claim, which was also formally ratified by the President,¹⁹² was not contradicted by anyone in the House during that body's consideration of the Senate bill.¹⁹³ It therefore appears to be much more clear from actual evidence that Congress agreed in 1991 *not* to endorse *Weber* and *Johnson* than that Congress had ever implicitly agreed to endorse those decisions in the first place. It follows, inexorably, that the sole argument offered by the Supreme Court for treating *Weber* as a binding precedent has now been removed.

This understanding clears the way for the Court to reconsider and overrule *Weber* and *Johnson*, not as an incidental corollary to applying Section 107 of the 1991 Act, but rather on their own terms as interpretations of Section 703(a) of the original 1964 statute. Doing so would have the important effect of making it possible to apply Section 107 according to its plain terms, and thus avoiding the embarrassing difficulties created by the ambiguities in Section 116. Thus, the legislative history of the 1991 Act, properly understood, leads to the conclusion that *Weber* and *Johnson* are solely the responsibility of the Supreme Court, not Congress. The Court should take on its responsibility to correct its own past mistakes, and it should do it now in the *Piscataway* case.

CONCLUSION

The Supreme Court has established something of a reputation as our nation's leading institutional opponent of racial discrimination. That reputation has been acquired despite the fact, and in part because of the

days earlier, Senator Kennedy had said that "the bill is intended not to change the law regarding what constitutes lawful affirmative action and what constitutes impermissible reverse discrimination." 137 CONG. REC. S15,235 (daily ed. Oct. 25, 1991). This statement implies at most that *Weber* and *Johnson* would not be overruled by the bill, and it is therefore not inconsistent with the statement in the Dole Memorandum (which Kennedy never disputed after the Memorandum was put in the record).

¹⁹² See President Bush's Statement on Signing the Civil Rights Act of 1991, 1991 PUB. PAPERS 1502 (Nov. 21, 1991).

¹⁹³ One member of the House submitted an interpretive memorandum that repeated the Dole Memorandum verbatim. See 137 CONG. REC. H9547, H9548 (daily ed. Nov. 7, 1991) (memorandum submitted by Rep. Hyde). Another member of the House submitted a memorandum saying that Section 116 meant that "the legislation is not intended to change in any way what constitutes lawful affirmative action or what constitutes impermissible reverse discrimination from what the law was prior to this legislation." 137 CONG. REC. H9530 (daily ed. Nov. 7, 1991) (memorandum submitted by Rep. Don Edwards). This is a near perfect echo of Senator Kennedy's statement on October 25, see *supra* note 191, and it implies at most that Section 107 should not be interpreted to overrule *Weber* or *Johnson*. It does not imply an endorsement of those decisions, and thus does not contradict the Dole Memorandum.

fact, that the Court has persistently assumed the power to decide for itself and for the rest of us what *kinds* of racial discrimination should be practiced in our country. The Court has not been forced to take on this function, which has had a simple cause: the itch to play political overseer to a nation that has not adopted the Constitution and laws that the Justices think we need.¹⁹⁴

This impulse, which manifested itself at least as early as *Dred Scott* and at least as recently as *Johnson*, can be resisted. And the politicized judging of the past can be replaced if the Justices are willing to start applying legal analysis to the statutes and constitutional provisions that are, after all, supposed to be the law. The *Piscataway* case provides an opportunity to begin the revival of legal analysis. If the Justices disdain to seize this moment, they may find that they have sown the wind one too many times.¹⁹⁵

¹⁹⁴ For a discussion of this point in the context of constitutional law, see Lund, *supra* note 17, at 1129.

¹⁹⁵ "By going not merely beyond, but directly against Title VII's language and legislative history, the Court has sown the wind. Later courts will face the impossible task of reaping the whirlwind." *United Steelworkers v. Weber*, 443 U.S. 193, 255 (1979) (Rehnquist, J., dissenting).

