The Rehnquist Court's Pragmatic Approach to Civil Rights

Nelson Lund

Volume 99 Fall 2004 Number 1
THE REHNQUIST COURT’S PRAGMATIC APPROACH TO CIVIL RIGHTS

Nelson Land

1. INTRODUCTION

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

In this paper, I use the term “pragmatic” in the same general sense that it is used by Judge Posner, the foremost contemporary exponent of what he calls legal pragmatism. This approach, which can be understood in opposition to legal formalism, reflects the everyday meaning of pragmatism—a mood or mindset that is “practical and business-like, ‘no-nonsense,’ disdainful of abstract theory and intellectual pretension, contemptuous of moralizers and utopian dreamers.” Applied to adjudication, it means that judges “should try to make the decision that is reasonable in the circumstances, all things considered.” As this formulation suggests, it “means that different judges, each with his own idea of the community’s needs and interests, will weigh consequences differently.” Posner’s formulation also allows for the possibility that a pragmatic judge would give considerable

---

1. Patrick Henry Professor of Constitutional Law and the Second Amendment, George Mason University School of Law. For helpful conversations, I am grateful to Roger Clegg, Ross E. Davies, Stephen G. Gillers, Craig Lerner, Marc B. Lande, John G. McGinnis, Glen D. Nager, and David D. Pfeiffer. I am also thankful to the Legal and Economics Center at George Mason for financial assistance.
2. Id. at 49–50.
3. Id. at 73.
4. Id. at 73.
(though not dispositive) weight to formal considerations such as the text, structure, and history of written laws and to precedent. My thesis is that the Rehnquist Court’s approach to antidiscrimination law has been driven substantially (though of course not exclusively) by Justice O’Connor’s judgments about what is reasonable in the circumstances, all things considered, rather than by any abstract theory or allegiance to legal formalism. My hope is to shed some light on the nature of the pragmatic judgments reflected in the Court’s decisions by looking in some detail at the choices that have emerged in the face of contesting legal arguments.

Even apart from personal preferences, this field of law may seem to invite a pragmatic approach because antidiscrimination laws always involve trade-offs among competing goods. Thus, for example, these laws never seek to prohibit all discrimination based on characteristics like race or sex; sometimes because such discrimination is considered tolerable or even desirable in certain contexts, but also because all antidiscrimination laws impose significant costs of various kinds. These can include such costs as restrictions on the freedom of those who would like to discriminate, reductions in economic efficiency, administrative costs (including the error costs entailed in any system of enforcement as well as institutional costs that may arise from assigning to one government agency rather than another the task of making choices among competing goals), and adverse effects on some of the intended beneficiaries of the government’s protective measures.

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

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

Part II looks at the Court’s decisions interpreting the Americans with Disabilities Act (“ADA”). Enacted in 1990, this is a “mature” statute in the sense that Congress and the contending interest groups that influenced its drafting had access to a great deal of information about how similar statutes had operated and been interpreted in the past. For that reason, one should expect the ADA to contain relatively few examples of language with inadvertent implications. To the extent that the ADA contains language that is
vague or ambiguous, or startled in its apparent effects, it is reasonable to presume that this was deliberately done or the result of deliberate compromises. Besides being “mature” in this sense, the ADA was brand new, which means that the Rehnquist Court has been constrained by prior interpretive decisions that might have come out differently if this Court were considering them as an original matter. Together, these two features of the ADA suggest that we will get to see the Rehnquist Court operating in a relatively “pure” interpretative mode.

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

Part IV considers the application of equal protection doctrine to affirmative action programs. Here, in contrast to what we will see in the ADA and Title VII cases, the Court for a long time followed a tentative and wavering course. Last year, however, saw a bold and decisive ruling in Grutter v. Bollinger.

As we will see, the Rehnquist Court has usually given considerable, though not always dispositive, weight to the demands of legal formalism in statutory cases of first impression and a great deal of weight to precedent in Title VII cases. In Grutter, however, the Court’s pragmatic concern with results overpowered all such specifically legal considerations.

II. READING A NEW SLATE: THE ADA

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

5 The ADA incorporates by reference certain interpretations of language that is common to the ADA and the Rehabilitation Act of 1973. See 42 U.S.C. § 12101(c) (2000). In the ADA context, those interpretations are authoritative because they were adopted by Congress, not because of whatever precedential value they might otherwise have.


and that many forms of discrimination against the disabled are quite justifiable and even salutary. 8

Accordingly, the ADA tries in a variety of quite obvious ways to limit the impact of imposing antidiscrimination rules, and the Court has concluded that "[t]he statute seeks to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation's life, including the workplace... [b]ut does not demand action beyond the realm of the reasonable." 9 The Court has taken the modesty of the ADA's goal quite seriously, and a significant fraction of the dozen-odd cases decided so far are unanimous affirmances upholding decisions by the lower courts that would have expanded the protective reach of the ADA beyond what its terms allow. 10

Most of the remaining cases involve genuine statutory ambiguities. What I find most striking in those cases is the relatively narrow range of the disagreements among the Justices. What is missing here is the deep-Conflict

---

8 This is not to say, of course, that everyone will agree about how the law should go in proceeding equality. For arguments that the ADA was too far, see, for example, Rogers Cragg, The Candy Corporation of the ADA, Pub'N. Summer 1999; at 100; Roger Cragg, Landscape v. Alabama, Antidiscrimination Legal and Antidiscrimination Law: A Comprehensive Perspective, J. J. Health Care L. & Pol'y 409 (1999). Others think that the laws does not go far enough. See, e.g., Michelle Partida, Note, Reversing the Candi at Bad Ends, and There is Nothing Left for Proof: The Antidiscrimination Act's Disappearance in Persons With Mental Illness, 19 CORNELL L. REV. 721 (2004).

9 U.S. Airways, Inc. v. Barrett, 533 U.S. 391, 401 (2001) (emphasis added). The Court cites for this proposition the "findings and purpose" section of the statute, 42 U.S.C. § 12110 (2003), but some of the language in this section actually swaps much more broadly. See, e.g., 42 U.S.C. § 12101(1)(A) (identifying the purpose of the statute as "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"). A better argument for the Court's conclusion would be based on the many substantive provisions of the statute that permit discrimination, as for example when accommodation of the disabled would just be "unreasonable" or would impose an "undue burden" or when the discrimination is "job-related and consistent with business necessity," or where removal of a barrier is not "necessarily accomplished and able to be carried out without much difficulty or expense." Id. §§ 12111(9)(A), 12112(b)(4)(A), 12111(9).

10 Aherne's, Inc. v. Kalingbata, 537 U.S. 155 (1999) (reversing unanimously a Ninth Circuit ruling that would have protected a commercial truck driver who was fired after he failed to meet basic vision standards established by federal regulations); Toyota Motor Mfg., Inc. v. Williams, 514 U.S. 184 (2002) (reversing unanimously a Sixth Circuit ruling that would have created a plaintiff in disability based on his inability to perform manual tasks associated with a particular job); Clemons v. O.S.A. Inc., 536 U.S. 75 (2002) (reversing unanimously a Ninth Circuit ruling that recognized the express provision of workers compensation and gave insufficient deference to EEOC regulations); Iannone v. Germain, 556 U.S. 181 (2009) (reversing unanimously an Eighth Circuit ruling that would have allowed punitive damages against public entities, with six Justices relying on a Spending Clause analysis and three Justices relying on the absence of clear statement of congressional intent to subject municipalities to punitive damages); Roper v. Co. Hernandez, 540 U.S. 44 (2004) (reversing unanimously a Ninth Circuit ruling that improperly applied a disparate-impact analysis in a disparate-treatment case).

The Court has evermore rejected the reach of the ADA in a case where discrimination broader appeared to protect a state interest with hypocrisis who sought admission to a private, non-camp, Pa. Dept. of Corr. v. Venkey, 537 U.S. 206 (1998) (applying unanimously a plain meaning analysis of the statute).
over basic principles that one sees in some other areas of the law during this period, including some other areas of civil rights law.

A. Bragdon v. Abbott

A good illustration is the Court’s first major ADA decision, Bragdon v. Abbott. The defendant was a dentist who refused to treat an asymptomatic HIV patient in his office, although he was willing to treat her in a hospital. The threshold issue in the case was whether the plaintiff was disabled within the meaning of the statute. Writing for a majority of six, Justice Kennedy concluded that the plaintiff’s asymptomatic HIV is a statutory disability because it substantially limited her “major life activity” of reproduction by discouraging her from becoming pregnant. The Court interpreted the statutory term “major” to mean important or significant, and concluded that reproduction obviously meets that definition. The majority found reinforcing support in the facts that a) Congress drew the relevant statutory language from the Rehabilitation Act of 1973 and that this statute has consistently been interpreted to cover individuals with asymptomatic HIV, and b) the Justice Department and other agencies authorized to administer the ADA agreed that the ADA should be given the same interpretation that the Rehabilitation Act had been given.

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

12 The statute defines disability as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. 42 U.S.C. § 12102(2) (2005).
14 Having concluded that the plaintiff was disabled within the meaning of the statute, the Court went on to consider the defendant’s claim that his refusal to treat her in his office was lawful under a
Notice how narrow the interpretive disagreements are. Every member of the Court adopted an interpretation compatible with the statutory language, and each adopted a view that one could easily imagine being endorsed by the drafting Congress. The crucial disagreement turned on which of the two canons of statutory construction should apply. The majority relied on the presumption that when administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute suggests an intent to incorporate those interpretations as well. The dissent invoked a competing canon of construction, namely ejusdem generis. Both canons create rebuttable presumptions, and neither the majority nor the dissent offered a compelling reason for rejecting the analysis adopted by the other side. I thought that the dissent, and especially O'Connor's narrow conclusion, won on points, but I cannot find anything that looks like a knockout blow in any of the opinions.

B. Sutton v. United Air Lines, Inc.

A somewhat stronger, but still relatively narrow, disagreement appears in the Court's next important decision, *Sutton v. United Air Lines, Inc.*, which involved two severely myopic individuals who were rejected for employment as global airline pilots because they did not meet the carrier's minimum requirements for uncorrected visual acuity. The plaintiffs' vision was normal when they wore corrective lenses, and the main issue in the case was whether courts should look at plaintiffs in their corrected or uncorrected condition when determining whether they are legally "disabled."

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

---

\[\text{provision of the ADA that allows discrimination where an individual would otherwise pose "a direct threat to the health or safety of others."}\]

42 U.S.C. § 12112(b)(5). Justice Kennedy, along with Justices Souter and Ginsburg, concluded that summary judgment for the plaintiff would probably be appropriate given the scientific literature on the risk posed to the defendant by the patient. Brown, 524 U.S. at 648-55. Justices Stevens and Breyer concluded that summary judgment was rarely appropriate, but joined Kennedy's opinion in order to create a majority holding in the case. Id. at 655-56. Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas objected that the majority improperly required special deference to the views of politically appointed health officials and that the defendant in this case had presented more than enough evidence to avoid summary judgment on the direct-threat issue. Id. at 651-64.

---


16. See supra note 12 (providing the ADA's definition of disability).
what limitations an individual would suffer if corrective measures were not taken, decisions would necessarily have to be made on the basis of general information about the effects that such impairments usually have. Third, and in the Court's view most important, the statute includes congressional findings estimating the number of disabled individuals in the United States at 43 million. If people with corrected impairments like myopia were considered disabled, the statute would cover several times that number.

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

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

I find Stevens's textual argument quite strong and significantly more persuasive than the majority's reliance on the congressional estimate of 43 million Americans with disabilities. Because the majority declined to address his argument, I would be inclined to award the dissent a TKO. More importantly, however, we should ask why the majority reached the result it did without responding to Stevens's most powerful legal argument. Stevens himself suggests that the majority's interpretation of the statute stemmed

17 Facial with a conflict between language in the operative part of a statute and language in a non-operative findings or purpose section, there should be an extremely strong presumption in favor of giving effect to the former.
from fear of a tidal wave of lawsuits\textsuperscript{14} and from a reluctance to expand the workload of an overburdened judiciary by legalizing issues—such as how to treat the legions of people with myopia and other correctable impairments—that are best left to the private sphere.\textsuperscript{15}

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

C. PGA Tour, Inc. v. Martin

The Court’s pragmatism took a bad turn in \textit{PGA Tour, Inc. v. Martin}.\textsuperscript{20} The pinhitter, Casey Martin, is a talented golfer who suffers from a disability that prevents him from walking significant distances. The defendant conducts golfing tournaments, which people pay to watch for their entertainment value, and the defendant compensates the golfers with prize money. One way for golfers to get admitted to those prize tournaments is to pay a substantial fee to enter a three-stage qualifying tournament. Many competitors are "cut" after the first and second stages. At the third stage, which will include only a small number of the very best golfers in the nation, competitors are required to walk the entire course.\textsuperscript{21} The defendant justified this rule on the ground that fatigue can be a significant factor in the competition. Martin sought an exemption allowing him to ride in a cart during the third stage and was denied on the ground that everybody should play by the same rules.

Writing for a majority of seven, Justice Stevens concluded that denying Martin the use of a golf cart violated the following provision from the ADA’s Title III ("Public Accommodations and Services Operated by Private Entities"): "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public ac-

\textsuperscript{14} See Fuentes, 527 U.S. at 503 (Scalia, J., dissenting).
\textsuperscript{15} Id. at 513.
\textsuperscript{20} 532 U.S. 461 (2001).
\textsuperscript{21} The top finishers in the third stage are admitted to the most prestigious tour of prize tournaments, and the others are admitted to a less lucrative tour. Both of these tours require competitors to walk the course.
commodation by any person who owns, leases (or leases to), or operates a place of public accommodation.\footnote{12}

The Court's reasoning had two main steps. First, the competitors in the PGA's tournaments are its clients or customers, so that participation constitutes "enjoyment" of its privileges under the provision quoted above. Second, the ADA provision that defines discrimination—as a failure to make "reasonable modifications... unless the [operator of public accommodations] can demonstrate that making such modifications would fundamentally alter the nature of such... accommodations"—required the PGA to permit Martin to use a golf cart because such a modification of the rules would neither alter an essential aspect of the game of golf nor give Martin an advantage over his competitors.

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

The most serious difficulty with the majority's analysis, however, lies in its threshold conclusion that the competitors in the PGA's qualifying tournaments are clients or customers of a public accommodation. As Scalia points out, these tournaments constitute open tryouts for positions in which the competitors will serve as paid entertainers.\footnote{13} In other words, the tournaments operate like job interviews. The competitors are not like "customers" who pay to play for their own enjoyment on a public golf course or like "clients" who pay for exercise lessons at a public gym. If the "privilege" of competing for a job is covered by the public accommodations provisions in Title III of the ADA, then the "privilege" of holding a job at a public accommodation must logically also be covered. Title I, however, already provides a separate and substantially different set of provisions to deal with employment. Thus, according to the Court's logic, the groundkeepers and hot dog vendors employed at these golf tournaments must be covered by Title III even if the statute excepts them from the coverage of the employment provisions of Title I. That makes no sense.\footnote{14}

\footnote{12} 42 U.S.C. § 12182(a) (2000).
\footnote{13} id. § 12182(b)(7)(A)(i).
\footnote{14} Compensation is offered on a contingent basis, so it is in many jobs like insurance sales and real estate brokerage.
\footnote{15} See, e.g., Marvin, 532 U.S. at 694 (Scalia, J., dissenting).

Congress expressly excluded employees of fewer than 15 employees from Title I. The mom-and-pop grocery store or hardware store need not worry about altering the nonpublic areas of its place of business to accommodate handicapped employees—or about the litigation that failure to do so might entail.
It is not clear why seven Justices adopted such a distorted reading of the statute. Perhaps the golfers and sports fans on the Court decided that their superior sense of fairness made them better qualified than the PGA officials to decide how the tournaments should be operated. Whether or not it was fair to let Martin use a golf cart, however, Congress did not assign this decision to the Supreme Court. Moreover, unlike the PGA officials responsible for running this business operation, the Justices run no risk of adverse personal consequence if they are wrong about what is "fair." To the extent that this case is an expression of the Court's judicial pragmatism, it illustrates how easily pragmatism can turn into self-indulgent and irresponsible meddling.36

D. US Airways, Inc. v. Barnett

The appeal of pragmatic interpretation to this Court became unmistakably clear in US Airways, Inc. v. Barnett.37 The plaintiff was an airline cargo handler who injured his back and then invoked his seniority rights to transfer to a less physically demanding position in the mailroom. When two employees with greater seniority indicated that they would bid for the mailroom position, the plaintiff asked the defendant airline to make an exception to the seniority rules. The defendant refused, and the plaintiff lost his job.38 The easiest way to understand what the Supreme Court did here is

invade. Similarly, since independent contractors are not covered by Title I, the small business (or the large one, for that matter) need not worry about making special accommodations for the physically disabled, electrics, and other independent workers whose services are contracted for from week to week. It is an entirely unreasonable interpretation of the statute to say that those exemptions so carefully crafted in Title I are entirely eliminated by Title II (for the very legitimate reason that are places of public accommodation) because employers and independent contractors "enjoy" the employment and contracting that such places provide. The only distinctive feature of places of public accommodation is that they accommodate the public; and Congress could have no conceivable reason for requiring the employers and independent contractors of such businesses rexurrence that employers and independent contractors of other businesses are not enjoy.

36 So far, the Court has not accorded incline to treat this case as a model for the future. As far as I can tell, Martin's has not been cited in any subsequent majority opinion, and perhaps we can hope that this decision will turn out to be little more, or even less, than the Federal Baseball of golf. See Fed. Baseball Club of Balt., Inc. v. N.L.G. League of Pro's Baseball Clubs, 295 U.S. 104 (1935) (holding that antitrust statutes do not apply to professional baseball because there is no threat, direct or indirect, to interstate commerce); Touche v. N.Y. Yankees, Inc., 346 U.S. 556 (1953) (striking Federal Baseball without endorsing its rationale); Hazel v. Kuhn, 457 U.S. 218 (1972) (striking Federal Baseball and Touche but declaring that the antitrust exemption for baseball does not extend to any other sports).


38 42 U.S.C. 12112 provides in relevant part:
(a) General Rule
No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job applications procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
(b) Construction
As used in subsection (a), the term "discrimination" includes:

258
to begin with the two dissents, which offered clear and sharply opposed approaches to the case.

Writing for himself and Justice Thomas, Justice Scalia argued that exemption from the rules of a bona fide seniority system is never required by the ADA because the statute by its terms only forbids employers to "discriminate against a qualified individual with a disability because of the disability of such individual," or to refuse "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." Because a seniority system burdens the disabled and the non-disabled alike, even-handed enforcement of such a system cannot constitute discrimination "because of the disability" any more than such discrimination is entailed in a system that pays the same salary to a nondisabled person that it pays to a disabled coworker who is more needy as a result of his disability. Although the statute does include "reassignment to a vacant position" in an illustrative list of reasonable accommodations, Scalia argued that the nature of the other items in the list indicates that it is targeted at disability-related obstacles. Thus, argued Scalia, a disabled employee who cannot perform his current job must be allowed to transfer to a vacant position, but only if he is qualified for that position and a more qualified applicant (such as an applicant with greater seniority rights) is not seeking it.

Writing for himself and Justice Ginsburg, Justice Souter began by noting that the legislative history shows that several of the ADA's provisions were modeled on Title VII of the Civil Rights Act of 1964, which included a special exception for seniority systems established by collective-bargaining agreements. Because no such exception was included in the ADA, Souter concluded that the statute is at least ambiguous as to whether or to what extent any seniority system should be honored. Turning again to the legislative history, Souter found the ambiguity resolved by committee reports saying that even a seniority system contained in a collective-bargaining agreement should be treated as no more than "a factor" in deciding whether a violation of seniority rules is required "reasonable accom-

29 U.S.C. § 12112(b)(5) provides:

The term "reasonable accommodation" may include —

(a) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(b) job restructuring, part-time or modified-work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment of workstations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

259
Accordingly, Souter concluded, a plaintiff need only show that a violation of seniority rules is reasonable. In this case, he thought the plaintiff had done so, primarily because the defendant had taken pains to warn its employees that it reserved a right to change its seniority rules at any time and without advance notice.

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

Writing for himself and three others, and reluctantly joined by Justice O’Connor, Justice Breyer recognized that seniority systems have considerable value and consciously sought to take a “practical view of the statute.”

This practical view is one that tries to reconcile Congress’s desire to require “reasonable accommodation” of disabled employees with its desire to spare employers “undue hardship.” The scheme he came up with is as follows. When a disabled employee demands an assignment that would violate seniority rules, the seniority rules will “ordinarily” or “in the run of cases” prevail, without proof on a case-by-case basis that the seniority system should prevail. Put differently, when an employer relies on a seniority system, the employer will prevail unless the plaintiff can prove that there are “special circumstances” that make his demand for a violation of the seniority rules reasonable on the particular facts of the case.

Such “special circumstances” apparently might include situations where the seniority system has created so few reasonable expectations about adherence to its rules that one more exception “will not likely make a difference.” If such a showing is made, the employer will still have the opportunity to prove that the required accommodation would impose an undue hardship.

This scheme ignores the crucial “because of the disability” language in the statute, and the shifting burden of proof on the issue of whether a violation of seniority rules constitutes a reasonable accommodation has no discernible basis in the statute at all. Breyer’s opinion contains no arguments that undermine either Scalia’s dissent or Souter’s, and it seems to be entirely driven by a conviction that this is the “practical” way to administer

33 42 U.S.C. § 12112(a)(5)(A) (defining prohibited employment discrimination to include “not making reasonable accommodations to an known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can dem-  

strate that the accommodation would impose an undue hardship on the operation of the business of such covered entity”).


35 M. at 405.

36 Id. at 405.
the ADA. The "special circumstances" test adopted in Breyer's opinion is so vague, however, that it hardly seems practical in the sense of providing administrative case or predictability in its outcomes. As Scalia stressed, moreover, the facts of this case seem to belie the notion that exceptions will not be required "in the run of cases." The trial court found as a matter of fact that this seniority system had been in place for decades, that it was of a type common in the airline industry, and that employees were justified in relying on it. And yet the court was remanded to allow the plaintiff to show that "special circumstances" made the employer's adherence to its seniority rules unreasonable.

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

O'Connor's own preferred approach elegantly responded to both of these problems. She began with the fact that the statute specifically lists "reassignment to a vacant position" as an example of a reasonable accommodation. In her view, an unfilled position is "vacant" unless someone has an enforceable contractual right to fill it. Thus, in order to decide whether a violation of seniority rules would constitute a reasonable accommodation, a court need only ask the relatively straightforward question whether somebody other than the plaintiff had a contractual right to the position he was demanding.

O'Connor made no effort to rebut Scalia's analysis of the statutory text, and I remain convinced that he had the better legal argument. Still, O'Connor's approach is a more plausible interpretation of the statute than Breyer's, and it is inherently superior to Breyer's as a practical rule that could be applied in a consistent and predictable manner. Although her view was not adopted by the Court in this case, the case does illustrate both the appeal that pragmatic approaches to interpretation have within the

37 Id. at 408 (O'Connor, J., concurring).
38 Id. at 410-11.
39 In this case, the defendant conceded that its seniority system did not give the employer legally enforceable rights. See id. at 410.
40 This does not mean, of course, that it will be impossible for the courts to apply the approach adopted in Breyer's majority opinion in a reasonably consistent and predictable manner. O'Connor's preferred approach, however, would have test itself much more readily to such a result.

261
Rehnquist Court, and the way in which O'Connor in particular seems to view careful, and at least plausible, legal reasoning as an important component of pragmatic statutory construction.

III. RACIAL PREFERENCES IN EMPLOYMENT: DEALING WITH THE BURGER COURT'S LEGACY

The driving impulse behind the Civil Rights Act of 1964 was the desire to dismantle Jim Crow, which was the stubborn residue of slavery. By forbidding private employers to discriminate because of race, Title VII of that statute was expected to enhance the economic opportunities of those who had been oppressed for so long. And economic progress among southern blacks did in fact increase in the first few years after the Civil Rights Act was enacted.\(^{41}\)

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 especially conspicuous in the Reconstruction era, the legislature exhibited a preference for general categories of rights, which protect all citizens everywhere in the country.\(^{42}\) Title VII consists of no special provisions for blacks and no special provisions for the South. The crucial prohibition in the statute makes it unlawful to discriminate against any individual "because of such individual's race, color, religion, sex, or national origin."\(^{43}\) To ensure that this prohibition was taken in its obvious and natural sense—as an unequivocal demand for colorblind treatment—the statute also specifically warned those charged with its implementation not to misinterpret it as a device for promoting racial balancing and preferential treatment.\(^{44}\)

\(^{41}\) See, e.g., STEPHEN THIENSTROM & ARGEAL THIENSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIFFERENT 430 (1997).

\(^{42}\) In a different respect, Title VII was very different from the Reconstruction statutes and constitutional amendments. Whereas the Reconstruction laws were aimed primarily at subverting the power of governmental and quasi-governmental institutions, Title VII applied only in the private sector.

\(^{43}\) Title VII provides that:

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.

\(^{44}\) 42 U.S.C. § 2000e-2(a) (2000). This provision originally applied to most private firms that employed at least twenty-five workers. Amendments to the statute in 1972 dropped the threshold to fifteen workers, and extended the prohibition to state and local governments. Pub. L. 92-261, § 2 (1972). The 1972 amendment also imposed employment discrimination by the federal government. Id. § 11.

Title VII provides:

262
A. The Birth of Disparate Impact Doctrine

Whether Congress was motivated by a considered commitment to colorblind constitutional principles, or by some less edified political calculus, the result was utterly clear. Nevertheless, the Supreme Court’s very first decision about racial discrimination under Title VII, Griggs v. Duke Power Co.,47 turned this unequivocally colorblind statute into a device for promoting racial balancing and preferential treatment.

The Griggs case involved the Duke Power Company, which for many years had used an internal promotions system based on seniority rules.48 In 1955, the company became concerned because the firm’s business was becoming increasingly technical, and some employees were having difficulty mastering the skills needed in the jobs to which they were being promoted under the seniority rules. The company then instituted a policy requiring all new hires to have a high school degree or its equivalent and imposing the same requirement for certain internal promotions and transfers. In 1965, the company adjusted this policy. Incumbent employees were now permitted to transfer out of the two departments that included the least skilled jobs (Labor and Coal Handling) if they had a high school degree or its equivalent, or if they achieved scores at least as high as the median high school graduate on two aptitude tests. Although this liberalization of the policy was apparently prompted by complaints from employees in Coal Handling (all of whom were white at that time), the benefits of the new rule were extended without discrimination to those in the Labor Department (all of whom were black at that time).

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

The Supreme Court expressly left undisturbed the lower courts’ findings that Duke Power had not engaged in unlawful intentional discrimina-

ition," but nonetheless held that the company's reliance on educational achievement and aptitude tests violated Title VII. More generally, the Court concluded that where a facially neutral employment practice has a disproportionately adverse effect on minorities "(disparate impact),
that practice cannot be used unless it is justified under a standard that came to be known as "business necessity."

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

42. See Griggs, 401 U.S. at 432.
43. Id. at 430-32.
44. See Nelson Lund, The Law of Affirmative Action in and after the Civil Rights Act of 1978: Congress Unions Judicial Reform, 6 GEO. MARSH L. REV. 87, 91-100 (1977) (providing a detailed discussion of the status of the case and of the Fourth Circuit decision that was reversed by the Supreme Court).

For a small sample of the problems with Chief Justice Burger's opinion for the Court, consider the following:

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 the Dan River plant." This is not true. Although the district court did conclude that Duke Power had at one time engaged in racial discrimination, that court never said that the company had "openly discriminated," or in Burger's words in abacus; "followed a policy of overt racial discrimination." Indeed, it would be surprising if the district court could have found what Burger attributed to it, because as Duke Power maintained that it had never discriminated against blacks at all. Burger's misstatement is subtle, but its importance because he claims that Title VII forbids both overt discrimination and practices that are "discriminatory in operation." 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 locating the distinction between covert discrimination (which is clearly forbidden by Title VII) and unintentional discrimination (which is not clearly forbidden), Burger distains the worker from asking why Title VII is not limited to intentional discrimination (of the overt and covert variety). And for good reason. He has no answer. No one is better informed about the statutory language:

The objective of Congress in the enactment of Title VII is taken 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.

But if the statute has any "plain meaning" at all, it is that it prescribes only intentional discrimination, whether overt or covert. This is not the only kind of discrimination but the Fourteenth Amendment has been interpreted to proscribe, and this constitutional background provides for the most obvious possible source for Congress' concept of improper discrimination.

Giving Burger the benefit of the doubt, one could argue that the statutory language is still sufficiently ambiguous that it might embrace practices that "freeze" the status quo of prior discriminatory employment practices. But that is exactly the interpretation accepted by the Fourth Circuit, whose decision the Court was overturning in this case. Giving Burger the benefit of a different ambiguity, one might interpret the statutory term "discrimination" 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

264
Having ignored the statute that Congress actually wrote, the Court's opinion proceeded to write a new statute of its own, which was highly ambiguous and radically incomplete. Although Burger made the vague declaration that statistical disparities could lead to liability, he provided no intelligible test either for deciding what statistical comparisons should be used or for deciding how large the disparities must be.\textsuperscript{10} Nor can anything very useful be gleaned from the Court's discussion of the facts that were before it.\textsuperscript{11}

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.\textsuperscript{12} Some of these formulations sound as though they might be quite difficult to meet, but others sound as though they would cover almost anything but the most arbitrary policies. And again, the facts of the Griggs case itself are unilluminating because the Court merely asserted that Duke Power had failed to show whatever it was that the firm was supposed to have tried to show.

The hopeless ambiguities and vagueness of Griggs set the Court on a long search for a manageable set of standards through which the new disparate impact theory could be implemented. In addition, Griggs created an immediate practical problem by setting up a kind of Catch-22 for employers. The only sure way to insulate themselves from liability under the vague standards of Griggs was to ensure that their workforces were racially balanced. But if they took steps to get their numbers "right," they exposed themselves to lawsuit for intentional discrimination by whites who were injured by those prophylactic policies. This dilemma set the stage for the Court's next move.

\textsuperscript{10} See Land, supra note 40, at 89 n.60.

\textsuperscript{11} See id at 89-90.

\textsuperscript{12} The eight formulations include: "shows a relationship that is not justified by business necessity," Burger, however, pointed to no examples of the word "demonstrable" being used with this technical meaning anywhere by anyone prior to Griggs itself; id. at 93-94.
B. The Burger Court’s Endorsement of Racial Quotas and Preferences

The Kaiser Aluminum & Chemical Corporation had once filled its positions in the skilled trades only with those who had prior experience. Presumably because of racial discrimination by the skilled-trades unions, those who filled these positions were overwhelmingly white. 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. Eligibility for the program was determined by seniority, but Kaiser succumbed to pressure from the federal Labor Department and imposed a 97% quota for black applicants.

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 Burger Court held that this intentional and overt racial discrimination did not violate Title VII. More generally, the Court seemed to conclude that discriminatory affirmative action programs are permissible at least when they are “designed to break down old patterns of racial segregation and hierarchy” and do not “unnecessarily transmute the interests of . . . white employees.”

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

---

54 See id. at 197-98.
55 See *Weber v. Kaiser Aluminum & Chem. Corp.*, 363 F.2d 316, 226 (9th Cir. 1977) (“The district court found that the PMF collective bargaining agreement reflected law of a statute on Kaiser’s part to hire black craft workers as a substantial interest in satisfying the Labor Department in order to remain insensitive government contracts.”).
57 Id. at 201.
58 By “valid legal arguments,” I mean the kind of arguments that Justice Brennan himself purported to be making in his opinion. Logical inferences from the text, structure, and legislative history of the statute, or reliance on applicable precedent.
59 See Land, supra note 19, at 101-06. Once again, I offer a simple illustration of the insight referred to, which the Court sought to rely:

Justice Brennan cited a number of passages in the legislative history indicating that one of Congress’s chief objects in Title VII was “to open employment opportunities for Negroes in corporate which have been traditionally closed to them.” This is a fair characterization of the congressional purpose, but it hardly implies that Congress meant to authorize the kind of affirmative action.
C. The Rehnquist Court Reaffirms the Judicial Embrace of Quotations and Preferences

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

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

To the extent that Brennan was suggesting that the Court’s decision was based on stare decisis, the suggestion was implicit. Explicitly, Brennan did not invoke stare decisis, and he made no effort to rebut the dissent’s elaborate argument against the application of stare decisis in this case. Instead, he noted that Congress had not overruled Weber and concluded that

...
"we therefore may assume that our interpretation [of Title VII] was correct." After citing a book that urged courts to become bolder in reviving statutes on policy grounds, Brennan concluded that "[n]otwithstanding the notion of a dialogue between the judiciary and the legislature, the judiciary must acknowledge that on occasion an invitation [for the legislature to overrule a judicial decision] declined is as significant as one accepted." 71

Johnson extended the reach of Weber's authorization of preferences to cover women (as well as racial minorities), to the public sector (as well as private employment), and to cases in which an employer is seeking to alter workforce imbalances "caused by "societal attitudes" (as well as actual discrimination by employers and unions). None of these extensions were required, or even implied, by the rationale in Weber. It is nonetheless possible to see in this case a growing skepticism about the practice of remedial discrimination. Whereas only Rehnquist and Burger dissented in Weber, 72 White changed his mind in Johnson and agreed with Rehnquist and Scalia that Weber should be overruled. More importantly, O'Connor (who had not been on the Court when Weber was decided) concurred in the Johnson judgment and wrote a detailed and interesting exposition of her own distinctive view of the issues.

O'Connor clearly recognized that Weber was at the very least an extremely dubious interpretation of the statute. She nonetheless rejected Scalia's call for overruling it, on grounds of prudence and stare decisis. 73 She also "believed, however, that the majority's opinion gave "insufficient guidance to courts and litigants," and she agreed with Scalia that Title VII would be violated by an affirmative action plan that "automatically and broadly" promoted marginally qualified candidates or constituted a permanent plan of "proportionate representation." 74

O'Connor's proposed alternative was to permit race and sex preferences "only as a remedial device to eliminate actual or apparent discrimination or the lingering effects of this discrimination." 75 She proposed to operationalize this standard by permitting employers to use preferences only when they have a "firm basis" for believing that remedial action is

---

67 Id. at 629 n.7 (majority opinion).
68 See id. at 630 n.7 (quoting GUIDO CALABRESI, A COLOSSAL LAW FOR THE AGE OF STATUTES 21-32 (1987)).
69 Id.
70 Powell and Stevens did not participate in the case.
71 Johnson, 499 U.S. at 648 (O'Connor, J., concurring in judgment). O'Connor also suggested that Scalia's was a merely "academic" discussion that failed to face up to when a majority of the Court had decided on its id. at 646-49. This may seem ironic in light of the fact that he had three votes for his position while she had only two, but she could quite reasonably have believed that her position was a better chance than Scalia's of eventually winning a majority of the Court.
72 Id. at 648.
73 Id. at 648.
74 Id. at 649.
necessary, and she contended that such a firm basis would be provided by "a statistical disparity sufficient to support a prima facie claim under Title VII by the employee beneficiaries of the affirmative action plan of a plaintiff or practice claim of discrimination." 25 O'Connor had previously advanced this same standard in a partial concurrence in Wygant v. Jackson Board of Education, 26 which was a badly splintered equal protection decision invalidating preential protection from layoffs for minority employees. She now argued that the Court should adopt this as the single standard in both the constitutional and statutory contexts, and argued that her proposal was consistent with both Weber 27 and Wygant. 28

O'Connor's approach to this issue has a lot in common with her position in the US Airways ADA case. In both cases, she sought to strike a balance between the competing interests of different employee groups, and to do so with a rule that would provide consistency and predictability to lower courts and regulated parties. In both cases, moreover, she bristled aside powerful legal arguments against her position. In US Airways, she ignored Scalia's textual argument and instead joined what she thought was Breyer's legally defective interpretation, in order to create a majority holding in the case and because she believed that "the Court's rule will often lead to the same outcome" as her preferred rule. 29 In Johnson, she deflected consideration of the statutory text with a reference to "prudential restraints" and stare decisis, 30 without addressing the merits of Scalia's detailed explanation of why he thought the Court's doctrine of stare decisis could not protect Weber. 31 Noting in these two cases, or in any of the others we have examined here, suggests that O'Connor would willfully distort and subvert a statute in a case of at impression, as the Burger Court did in Griggs and Weber. But while O'Connor consistently insists on having a respectable legal argument to support her position, she does not appear intent on adopting what even she thinks is the best legal argument. Thus, legal analysts—understood as making logical inferences from the text, structure, and legislative history of the written law, and reliance on applicable precedent—appears to be only a factor, although an important one, in a more broadly pragmatic approach to statutory adjudication.

In Johnson, as in US Airways, O'Connor's preferred approach was not adopted by the Court. The difference between her approach and the Johnson majority's, however, lay primarily in the somewhat more precise nature of her test for deciding when an employer has an adequate justification for engaging in remedial discrimination. Given this relatively small difference,


269
it should not be surprising that she has since shown no inclination to push the Court to adopt her position.29 O'Connor's willingness to leave Weber in place, combined with her willingness to join Breyer's opinion in *US Airways*, suggests a pragmatic reluctance to insist on what may look like marginal improvements in this area of statutory law. Johnson remains the law today, and that likely is a reflection of the extent to which O'Connor's pragmatism is a decisive influence on the behavior of the Rehnquist Court.

D. The Rehnquist Court Uses Burger Court Precedent to Toward Disparate Impact

Justice O'Connor's concurrence in *Johnson* could be read to reflect an easygoing attitude toward discrimination aimed at whites and men, as well as toward existing statutory precedents that improperly legalized such discrimination. The following year, in *Watson v. Fort Worth Bank & Trust*,30 it became clear that O'Connor had a less than easygoing attitude toward the judicially created theory of disparate impact. And this time a majority of the Court seemed up against her approach.

As one might have expected from the confused and confusing *Griggs* opinion, the Burger Court produced a long series of cases dealing with issues and questions that had been left unresolved by that decision. Some of the opinions in those cases were quite strange.31 Other decisions, especially those dealing with the use of statistics, clarified the law to some extent, but the most important development came in 1979 with *New York City Transit Authority v. Beazer*.32

In *Beazer*, the Court considered a challenge to the Transit Authority's rule against employing methadone users.33 Much of the Court's opinion dealt with the plaintiff's claim that this rule had a strongly disproportionate effect on minority job seekers, a claim about which the majority was very dubious. Without definitely resolving that issue, the Court held that an em-

29 After Powell was replaced by Kavanagh, and Marshall by Thurgood, it is easy to imagine that there might be at least five votes to revive the Johnson principle if O'Connor were willing to do so.
31 In *Allmon v. Paper Co. v. Moodys*, for example, the Court treated the law of disparate impact as though it were a tool for examining evidence of employer behavior that was a "proxie" for intentional discrimination. See 422 U.S. 405, 425 (1975) (confusing the Griggs analysis with the intentional-discrimination analysis in *McDonald v. Board of Education*). As the Court later recognized, this approach is completely wrong, for the sole point of Griggs was to create liability for unintentional discrimination. See, e.g., *Watson v. Fort Worth Bank & Trust*, 414 U.S. 363 (1974).
ployer cannot be liable, no matter what statistical disparities result from its employment criteria, so long as those criteria are "job-related." This "job-related" standard was extremely favorable to employers, as 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. On its face, *Beer* seems to mean that a successful disparate impact claim should have become an extremely rare event, for the decision appears to make it almost impossible for a plaintiff to prevail under that theory unless the defendant has adopted inexplicably whimsical employment criteria.

*Beer*, however, did not in fact have this effect. Perhaps because *Griggs* and other pre-*Beer* decisions had produced so much confusion and uncertainty, *Beer*’s clear holding was sometimes ignored by the lower courts. *Watson*, in 1988, presented the Reliquant Court with an opportunity to rethink the *Griggs* doctrine. Until that time, all of the Supreme Court cases dealing with disparate impact had involved objective employment criteria like diploma requirements and written tests. In *Watson*, the Court was confronted with a conflict among the lower courts about the applicability of the disparate impact doctrine to subjective employment practices, such as arrangements under which decisions to hire and promote are left to the unguided discretion of individual supervisors, Justice

---

81 Id. at 587 n.33. Although Justice Stevens’ opinion rejected the plaintiffs’ proof of disparate impact, Justice White’s dissent concurred. Although the majority did not find the proof inadequate, “no court, [plaintiffs’] statistical showing is weak; even it incapable of establishing a prima facie case of discrimination, it is unusually refined by the [Transit Authority’s] demonstration that its negative ratio (and the rule’s application to mechanics unions) is ‘job related.’” Id. at 587 (plurality opinion). The *Beer* holding is therefore based on the “job-related” test not on the standard governing the prima facie case.

82 Id. at 587 n.34.

83 Since the goal of efficiency can never be achieved, any, the most palpable arbitrary employment practices could have this effect, as *Beer* itself illustrated. Methadone suppresses the symptoms of heroin withdrawal and prevents heroin-related mortality, which together make it useful in treating heroin addiction. Despite the drug’s medical efficacy on the user’s behavior, however, the *Beer* Court said that methadone users could be excluded both from safety-sensitive jobs like driving subway trains and from such mental jobs, or which refuse to be an issue, as choosing bus routes. See id. at 576 n.12, 587 n.34. *Beer* therefore cannot be limited to cases where plausibility is an issue.

84 See, e.g., EEOC v. Ruth Packing Co., 787 F.2d 318, 311-32 (8th Cir. 1986) ("[The proper standard ... is not whether the challenged practice is justified by routine business considerations but whether there is a compelling need for ... that practice."). (quoting *Kirby v. Colony Paving Co.*, 653 F.2d 486, 488 (1st Cir. 1981))). *Beer* v. Alcoa, 440 F. Supp. 482 (W.D. Mo. 1976) ("[A] disparate impact case, unlike a disparate treatment case, a rational or legitimate, nondiscriminatory reason is insufficient. The practice must be equal, the purpose compelling.").

O'Connor's opinion, for a unanimous eight-member Court, found nothing in the disparate impact doctrine that would allow it to be confined to objective practices like tests and diploma requirements.

Unsurprisingly, perhaps, the Court reached this conclusion without any meaningful analysis of the validity of the disparate impact theory itself. In a portion of her opinion written for a four-Justice plurality, however, O'Connor did recognize that the Court's decision could very well lead to-excessive new pressures for employers to adopt surreptitious quota systems. 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 each 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.

O'Connor observed that the provision of the statute clearly ruled out any theory making disparate impact as such illegal, thus implicitly providing for the first time an explanation based on legal analysis for the "business necessity" defense that had appeared without any justification in

---

80 Rison, 487 U.S. at 982-91. Rison was argued after Justice Powell's retirement and before Justice Kennedy's appointment.

81 In the context of her opinion for the Court, Justice O'Connor made the first genuine effort in the Court's history to suggest how disparate impact doctrine might be compatible with the statute. Subjective employment practices, she pointed out, may in some cases be inferred with "subconscious stereotypes and prejudices." Rison, 487 U.S. at 994. Discrimination based on such prejudices is squarely within the reach of Title VII's language, which forbids discrimination "because of" an individual's race, color, religion, sex, or national origin. Statistical analysis, however, under which plaintiffs are required to prove intentional discrimination, might not capture discrimination occurring when people act on the basis of prejudices for they are aware of only directly, if at all. And in these cases, it may suggest the need to supplement conventional disparate treatment analysis. The Court's opinion seems to allude to its approach along these lines, but without pursuing its implications. See id. at 988-91. And it is easy to see why the implications were not pursued. 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 these decisions may actually have undermined the goal of the statute by encouraging employers to replace objective criteria with the kind of subjective standards that create opportunities for the operation of subconscious prejudices, inducing employers to shift away from objective tests with certain persons, almost certainly increasing the evidence of conscious discrimination.

82 See, e.g., id. at 993.


84 See Rison, 487 U.S. at 982.
Griggs. More importantly, 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. 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. 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 adopted by the employer that causes a disparate impact. This principle had always been assumed and never challenged, even by implication, in the Court's previous opinions. It is important because it helps to prevent employers from being held liable for statistical disparities caused by factors that cannot be eliminated or even discovered. Second, O'Connor noted that a practice having a disparate impact is nonetheless permissible if it is based on a legitimate business reason. This point was simply a restatement of Brestor's clear holding, and it was consistent with the language from Griggs that the Court had always treated as the holding in that case: A practice is permissible if it has a "manifest relationship to the employment in question." O'Connor was on completely solid ground when she assumed that Brestor meant what it said and that Brestor was the law. Third, O'Connor declared that defendants willing to defend their practices 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. Although the case law had been ambiguous on this point, O'Connor's conclusion was not the most natural reading of the prior cases, and she did not pretend that it was. The plurality's willingness to adopt the interpretation more favorable to defendants thus suggested a deep discomfort with disparate impact theory itself. Such discomfort is a legitimate product of the warning that Congress itself gave to the courts in section 703(j) of the statute.

A year later, by a five-to-four vote, the Court adopted O'Connor's approach in the Wards Cove case. This marked the first time that a majority

94 See id. at 992-93.
95 See id. at 991-99.
96 See id. at 994-97.
97 See id. at 998.
99 See Watson, 491 U.S. at 897-98.
100 Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989). Justice Kennedy joined the four justices dissenting to create a majority in Wards Cove.
of the Supreme Court had begun to face up to the deep tension between its disparate impact jurisprudence and the statute from which it was purportedly derived. The Court did not resolve that tension, which would have required overruling Griggs. As a practical matter, however, there was every reason to think that *Wards Cove* had reduced *Griggs* to an empty shell and largely eliminated the incentives that the doctrine of disparate impact had created for employers to adopt surreptitious quotas.101

This outcome contrasts with what happened in *Johnson*. One reason for the difference may have been that Justice Powell (who had joined the majority in *Johnson*) was replaced by Justice Kennedy. I doubt that this is the most significant point, however, for Powell had previously made an effort of his own to restrict the operation of disparate impact doctrine.102 It is more revealing, I think, to focus on the similarity between the approach fast Justice O'Connor took in *Johnson* and the one she advanced in *Wattson*. In the remedial discrimination case, she expressly refused on prudential grounds to consider overruling *Weber* and instead tried to synthesize *Fisher* and certain Fourteenth Amendment precedents in a way that might have pushed the law at least slightly in the direction of the color-blind command of Title VII. In *Wattson*, she implicitly refused to consider overruling *Griggs*, and synthesized the precedents in a way that pushed the law, as a practical matter, very substantially in the direction commanded by the statute.

The difference between how fast O'Connor was willing to push the law toward a faithful interpretation of the statute in these two cases may have been a function largely of differences in the precedents with which she was working. In the remedial discrimination area, there was nothing like *Bouvier*

---

101 *Wards Cove*, along with several other civil rights cases decided the same term, set off a furor in Congress that eventually culminated in the Civil Rights Act of 1991. See, e.g., Roger C. Clegg, A Brief Legislative History of the Civil Rights Act of 1991, 34 U.C. L. Rev. 1435 (1995). Because space constraints preclude a detailed discussion of the effects of this statute, I will confine my remarks to the following remarks. The 1991 Act codified the disparate impact theory, using ambiguous language that could be interpreted to reflect an approach very close to that adopted in *Bouvier* and *Wards Cove* or an approach that would make it much easier for plaintiffs to prevail in these cases. At the same time, however, the 1991 statute amended Title VII to allow voters to award damages in disparate-treatment cases, but did not authorize damages in disparate-impact cases. This created varying incentives for plaintiffs. In some cases based largely on statistics as disparate-treatment cases rather than in disparate-impact cases, and disparate-impact litigation may have been reduced in significance almost as much as it would have been had *Wards Cove* simply been left untouched. See Glen D. Nzeru & John M. Brusa, 

102 See Part, 457 U.S. at 406 (Powell, J. dissenting).

103 Justice O'Connor wrote:

*Note of the panel in this case have suggested the we overrule *Weber* and that question was not raised. Indeed, it argued in this Court as we the Court below. If the Court is faithful to its normal prudential restraints and to the principle of *Missouri v. Jenkins* that we must address once again the propriety of an affirmative action plan under Title VII in light of precedents, precedents that have upheld affirmative actions in a variety of contexts.*


274
on which to rely and no plausible reading of the existing precedents that would produce anything like the results demanded by Title VII.

Bozer was a Burger Court precedent that had been lying almost unnoticed for many years, just waiting for someone to take it seriously. The Rehnquist Court finally did so, but that did not imply a willingness to break sharply with the Burger Court’s tolerant approach toward racial favoritism. Watson and Wards Cove do reflect a pragmatic recognition of the potentially sweeping consequences of extending disparate impact doctrine to subjective employment practices. But Bozer made it easy to cabin the doctrine without making any sharp legal break with the past. Watson and Wards Cove therefore do not say much more than that the Rehnquist Court was willing to push the law toward fidelity to the statute when it was very easy to do so.

IV. BACK TO THE BURGER COURT AND BEYOND: FOURTEENTH AMENDMENT DISCRIMINATION

In the area of employment discrimination, the Court’s most important cases have involved interpretations of the Civil Rights Act of 1964. Outside that context, equal protection doctrine has generated more of the important cases. One reason for this is another landmark case from the Burger Court, Regents of the University of California v. Bakke,104 which involved a minority quota for seats in a state medical school.

A. Preferential Admissions to Higher Education

In Bakke, four Justices concluded that Title VI of the Civil Rights Act of 1964 forbids such discrimination, relying on section 601 of the statute, which provides: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”105

Four other Justices broadly concluded that both the statute and the Constitution permit the use of “benign” racial quotas and preferences that do not stigmatize any group or impose the brute of their adverse effects on those least well represented in the political process.106 Writing only for himself, Justice Powell concluded that the statute and the Constitution forbid blatant quotas, like those a panel in the Bakke case itself, but allow more subtle systems of racial discrimination.107 Using much the same technique that the Court would adopt the next year in Weber, Powell simply refused to accept the unminimally clear terms of the statute. Instead, he

105 Id. at 418, 425-27 (Stevens, J., concurring in the judgment in part and dissenting in part).
106 Id. at 226-78 (Brennan, J., concurring in the judgment in part and dissenting in part).
107 Id. at 266-330 (opinion of Powell, J.).
claimed to find indications in the legislative history that it would sometimes be permissible to discriminate against whites in programs covered by the statute. Unfortunately for his position, there were repeated statements by the bill's major proponents, including Senator Hubert Humphrey, confirming the obvious proposition that the statute would forbid discrimination against persons of any race.\textsuperscript{88} Nor was Powell able to produce a single statement by anyone in Congress indicating that the bill would permit discrimination against any racial group.

Desperately, Powell pointed to statements that he thought meant some members of Congress believed that "the bill enacted constitutional principles."\textsuperscript{89} But this gambit, too, was analytically empty. First, none of the proponents said that constitutional principles permit discrimination against some racial groups. Second, the fact that some members of the enacting Congress believed that the language of the bill was consistent with their interpretation of the Constitution hardly implies that they believed the meaning of what they wrote could be changed if somebody else interpreted the Constitution differently. And even if one accepted the proposition that Congress meant to codify whatever the constitutional case law was in 1964, Powell himself acknowledged that even as of 1972 the Court had never "approved preferential classifications in the absence of proved constitutional or statutory violations."\textsuperscript{90}

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

While the Court held that only its own equal protection doctrine would determine what kinds of racial discrimination governments would be permitted to practice, the Buckley Court could not agree on what that doctrine was going to be. Writing for himself alone, Powell purported to apply traditional strict scrutiny, under which all racial discrimination is forbidden unless it is "precisely tailored to serve a compelling governmental interest."\textsuperscript{91} He then concluded that a medical school's interest in assembling a racially diverse student body is a compelling interest because it serves the First Amendment goal of promoting the "robust exchange of ideas."\textsuperscript{92} Turning to the narrow tailoring portion of the test, Powell endorsed the Har-

\textsuperscript{88} See, e.g., id. at 214-16 (Stevens, J., concurring in the judgment in part and dissenting in part).
\textsuperscript{89} Id. at 285.
\textsuperscript{90} Id. at 362; see also id. at 347 ("We have never approved a classification that gave persons perceived as members of relatively stigmatized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.").
\textsuperscript{91} Id. at 299.
\textsuperscript{92} Id. at 362-64.
vard admissions approach, which purports to treat race and ethnicity as one "factor" along with others, thus making it difficult to prove which whites are being rejected because they are white and which are being rejected for other reasons.

Because it is obviously meaningless to treat anything as a "factor" unless it will sometimes be the deciding factor, the Harvard/Powell approach unquestionably entails racial discrimination. Nor does it put any meaningful limits on this practice, as it is clear once one actually thinks about the implications of Powell's soothing comment that those who lose out so preferred minorities will not have been "foreclosed from all consideration" because of their race or ethnicity.112 And lest there be any doubt that Powell thought that the narrow-tailing requirement left schools with extraordinarily wide latitude to discriminate, he helpfully added that "a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system."113

For at least two reasons, Bakke settled almost nothing as a matter of constitutional doctrine. First, Powell's position was inconsistent with that of the four other Justices who had reached the constitutional issue, and it was highly debatable what the "narrowest grounds" for the Court's judgment were under the Marks rule.114 Second, Powell's reliance on the First Amendment at the very least suggested that the reach of the Bakke holding did not extend beyond the realm of higher education.

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

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

In *Faithlove v. Klutznick*, the Burger Court upheld a federal statute that set a 10% quota for minority-owned businesses competing for certain federally funded construction contracts, but the Court could not produce a majority opinion.115 In the five-to-four *Wygant* decision in 1986, the Rehnquist Court invoked the Fourteenth Amendment to invalidate a school board's use of racial preferences in deciding which employees to lay off, but it was also unable to produce a majority rationale for the result.116 In 1989, in *City

---

112 *Id.* at 318 (emphasis added).
113 *Id.*
114 *When a flagrant Court decides a case and no simple rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who constituted in the judgments on the narrower grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (quotation marks and <jargon omitted>.
115 448 U.S. 448 (1980).
of Richmond v. J.A. Crouch Co., the Court splintered again, this time in a case involving a municipality's use of a quota for minority-owned businesses competing for subcontracts on city construction projects.\(^{118}\) In an opinion written by Justice O'Connor, a five-Justice majority did agree both that strict scrutiny was the applicable constitutional standard and that the city had failed to meet that standard in this case. The Court, however, was unable to agree on what would be required for the strict scrutiny standard of review to be met.

Although Wygant and Croson suggested that the Rehnquist Court was more skeptical about racial preferences than the Burger Court had been, the next case went in the other direction. Metro Broadcasting, Inc. v. FCC narrowly upheld a federal program that sought to create "broadcast diversity" by using racial preferences in the award of broadcasting licenses.\(^{119}\) The Court rejected the use of strict scrutiny in favor of the more relaxed standard of "intermediate scrutiny" and distinguished Croson as a case involving state rather than congressional action. Justice O'Connor's dissent for four Justices argued that strict scrutiny was required for state and federal programs alike, and that this federal program could not survive such review.

Finally, in Adarand Constructors,\(^{120}\) the Court reviewed a federal preference program for minority contractors similar to the one upheld in Fulilove. By a vote of five to four, the Court held that strict scrutiny applied, expressly overruled Metro Broadcasting, and appeared to deplore Fulilove of precedential force.\(^{121}\) But once again the Court was unable to produce a majority opinion defining how strict scrutiny would operate. Justice O'Connor's plurality opinion seemed to interpret strict scrutiny as a highly fact-specific inquiry and hinted that discrimination against certain racial groups is much more likely to survive review than discrimination against other racial groups.\(^{122}\) Scalia and Thomas, however, made clear their view

\(^{118}\) 488 U.S. 469 (1989).


\(^{121}\) Id. at 227-28[4] racial classifications, imposed by whatever federal, state, or local governmental act, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that Metro Broadcasting is inconsistent with that holding, it is overruled.\(^{d}\) id. at 235 ("[T]he extent of \( d \) the Fulilove brief federal racial classifications are subject to a less rigorous standard \( d \) strict scrutiny, \) is no longer controlling. But we need not decide today whether the program upheld in Fulilove would survive strict scrutiny as our more recent cases have de-

\(^{122}\) See, e.g., id. at 229-30 (stating that the fact that a person has suffered an injury that is not squarely within the language and spirit of the Constitution's guarantee of equal protection "saves nothing about the ultimate validity of any particular law" (emphasis added)); id. at 237 (asking to enjoin the min-
tion strict scrutiny is "strict in theory, but fatal in fact."). In the context of a case involving a prefer-
cence program that would unquestionably have been invalid if its beneficiaries were white, these \( d \)institutions seem to have no purpose except to signal that a program designed to benefit members of cer-

272
that discrimination in favor of certain minorities should not be treated differently than discrimination against other groups. The case was remanded so that the courts below could apply a standard of review that the Supreme Court had not been able to explain.

Throughout the Rehnquist Court period, the Court has been sharply divided between those who would almost never uphold the use of racial preferences except to remedy proven discrimination and those who would frequently uphold discrimination aimed at benefiting certain racial minorities. Justice O'Connor has taken a middle position in which she applies strict scrutiny on a case-by-case basis. What is most striking about this position, when compared with her approach to the ADA and Title VII, is how little concern she has shown to insist that the Court articulate clear rules that can be applied in a consistent and predictable manner. Although I do not believe she has ever said so directly, this may reflect a difference in her views of stare decisis and constitutional adjudication. In *US Airways*, she joined an opinion with which she disagreed in order to produce a majority, and commented that the Court was "merely interpreting a statute." In the line of cases discussed in this section, O'Connor has been pretty predictably unwilling to join anything with which she disagrees, and the pragmatic interest in articulating clear rules for the lower courts and regulated parties seems to be entirely absent. This would seem to suggest that O'Connor's stress on establishing clear and consistent rules may be a less important element of her general approach than it might seem to be if one looked only at constitutional cases.

C. Bakke and Grutter v. Bollinger

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

In *Gratz v. Bollinger*, the undergraduate college had used a mechanical system that gave certain minorities a fixed number of bonus points in the admissions process. In a five-to-four opinion written by Chief Justice Rehnquist, the Court applied strict scrutiny and invalidated the system, much as Powell had rejected the mechanical quota in *Bakke*. In the more significant case involving the law school, *Grutter v. Bollinger*, Justice

O'Connor wrote a five-to-four majority opinion upholding a system in which certain minorities had their race treated as a "plus factor" in admissions.

The Court's opinion in Grutter summarized Powell's position in Bakke and expressly adopted it. The causal elements were as follows. First, the law school advanced its educational interest in a "diverse student body" as the compelling governmental interest that purportedly justified its policy of ensuring the admission of a "critical mass" of blacks, certain selected Hispanics, and American Indians. The Court deferred to what it accepted as the state's educational judgment, alluding to "a special niche in our constitutional traditions" occupied by universities and citing Powell's reliance on the First Amendment. The Court added that it was also influenced by its belief that America needs to produce a racially diverse cadre of future leaders. Second, the Court held that the law school's program was narrowly tailored because it entailed the "individualized consideration" of applicants, in which characteristics other than race were considered along with race and in which a rejected applicant from a disadvantaged race is not "foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname." The Court's opinion rejected the proposition that the school was required to begin by exhausting the use of race-neutral alternatives that might have achieved its racial diversity goals. One obvious and facially race-neutral alternative would have been to hold an admissions lottery among all applicants who had the minimum qualifications deemed necessary for successful law school performance; another alternative would have been to decrease the emphasis for all applicants on undergraduate GPA and LSAT scores. The Court specifically rejected the proposition that the school was required even to consider achieving the desired diversity by means that "would require a dramatic sacrifice of ... the academic quality of all admitted students."
Finally, the Court acknowledged that a “core purpose” of the Fourteenth Amendment was to eliminate governmental imposed racial discrimination, and inferred from this that discriminatory programs like the one at issue in this case must be “limited in time” and must have a “logical end point.” 108 No time limits were imposed, however, and the Court seemed to imply that racial preferences might be used forever if certain minorities continued to be disproportionately screened out by admissions standards that involve what the Court called “academic quality.” The Court did require “periodic reviews” to determine whether racial discrimination is still needed to achieve the desired diversity, but seemed to leave it completely up to the schools to determine how much diversity they want and how much racial discrimination is needed to achieve that much diversity. 109

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

First, as Justice Thomas points out, the Court had previously approved governmental racial discrimination only in the service of two “compelling interests”: national security during wartime and providing a remedy for past discrimination by the government. In Grutter, the Court finds a compelling state interest in a public school system’s desire to effect marginal changes in the nature of classroom discussions and related educational activities. This is especially striking when combined with the Court’s refusal to require the Michigan law school even to consider relaxing the highly selective admissions standards it applies to most applicants. The “compelling” state interest is only a desire to make marginal and speculative educational

Grutter v. Bollinger, 539 F.3d 732, 797 (6th Cir. 2002) (Boggs, J., dissenting). The magnitude of the “plot factor” for race in the Michigan admissions process is also suggested by the following: “Taking a middle-range applicant with an LSAT score of 164-66 and a GPA of 3.27-3.49, the chances of admission for a white or Asian applicant are around 22 percent. For an under-represented minority applicant, the chances of admission (1997-98) ‘could be better called a guarantee of admission.’” Id. at 797.

108 Grutter, 539 U.S. at 341-42.

109 See, e.g., Bakke, 438 U.S. at 266-67 (Stevens, J., dissenting). The Court seems only to have made a prediction whose significance, if any, is a function of the Justice’s convolution.

281
improvements without compromising the school’s perceived status as an elite institution.

This is a strange and novel use of the term “compelling interest.” Thomas notes that 10% of the nation’s states have no public law school at all and only three other states maintain schools that are comparable to Michigan’s in terms of perceived status and selectivity. How exactly is it that Michigan has a “compelling” interest in having any public law school at all, let alone a highly selective one, let alone a highly selective one that uses radically different admissions standards for different racial groups? We are never told. Furthermore, the supposedly compelling nature of the state’s interest in maintaining an institution of this kind becomes even harder to take seriously when one considers the facts: a) that less than 6% of applicants to the Michigan bar are graduates of the Michigan Law School; b) that only 27% of the students at the law school are from Michigan; and c) that less than 16% of the school’s students remain in the state after graduation.122 “Compelling state interest” now seems to mean a governmenal desire that the Court finds consistent with its own pragmatic judgments about what is good for American society.

Second, as Justice Thomas also points out, the Court’s refusal to require the law school to consider facially race-neutral methods of increasing racial diversity contrasts quite strikingly with its decision in United States v. Virginia.123 In that case, the Court required an all-male military school to admit women despite the school’s contention that doing so would require it to adopt less effective educational methods and would change the character of the institution. Although that case applied the supposedly more relaxed standard of “intermediate scrutiny,” considerations of academic freedom and the First Amendment were given no apparent weight in the Court’s analysis. The Grutter majority ignored Justice Thomas’s discussion of United States v. Virginia, and certainly did not rebut the inference that strict scrutiny is now less strict than intermediate scrutiny was in that case. It is very hard to resist the conclusion that what really drove the Court in both cases was its own assessment of the social value of the challenged practices.

Third, the Court says that “outright racial balancing...is patently unconstitutional.”124 and accepts without question the law school’s claim that it was not engaged in such balancing. This would be less striking were it not for the fact that Chief Justice Rehnquist’s dissenting opinion proves beyond any reasonable doubt that the law school was in fact engaged in outright racial balancing. Over a period of several years, the school admitted the favored minorities in almost perfectly exact proportions to the proportion of each in the applicant pool. Furthermore, it was able to achieve this

122 See Grutter, 539 U.S. at 339 (Thomas, J., concurring in part and dissenting in part).
124 Grutter, 539 U.S. at 330 (citations omitted).
result only by treating some of these minorities very differently than oth-
ers.\textsuperscript{113}

The Court made no effort to explain how the school’s "critical mass" rationale for its program could lead it to admit twice as many blacks as His-
picans, or why it chose to relax its admissions standards for blacks much
more than for Hispanics.\textsuperscript{114} The majority responded to Rehnquist by noting
that the statistics on actual enrollment showed more variation than the sta-
tistics on admissions. But that is obviously a result of the fact that the
school has little ability to control which admitted students actually enroll.
What the school could completely control—who was admitted and who was
rejected—was almost perfectly controlled to reflect the racial balance in the
applicant pool. The Court’s response to Rehnquist contains nothing to un-
dermine his conclusion that the school’s "alleged goal of "critical mass" is simply a sham.”\textsuperscript{115}

The majority’s rejection of Rehnquist’s analysis—or more accurately,
his unrebutted demonstration—together with its reshaped concept of a
compelling governmental interest, effectively reduces strict scrutiny to
something like rational basis review. So long as the Court can imagine or
hypothesize some connection between a government’s decision and some
purpose of which the Court approves on grounds of social policy, it can
now be upheld. And this is so even in a case where the facts show that the
government is actually engaged in a sham that conceals a practice that the
Court itself says is "patently unconstitutional."\textsuperscript{116}

The precedent to which Grutter bears the greatest formal resemblance
is Plessy v. Ferguson.\textsuperscript{117} Like the Grutter Court, the Plessy majority ac-
knowledged that the object of the Fourteenth Amendment was unde-

\textsuperscript{113} See id. at 451-63 (Rehnquist, C.J., dissenting).

\textsuperscript{114} Chief Justice Rehnquist stated in his dissent:

For example, in 2000, 12 Hispanics who scored between a 180-180 on the LSAT and earned a
GPA of 3.0 or higher applied for admission and only 2 were admitted. Meanwhile, 12 African-
Americans in the same range of qualifications applied for admission and all 12 were admitted.
Likewise, that same year, 16 Hispanics who scored between a 151-155 on the LSAT and earned a
3.00 or higher applied for admission and only 1 of those applications was admitted. Twenty-three
similarly qualified African-Americans applied for admission and 14 were admitted.

\textsuperscript{115} Id. at 282 (Rehnquist, C.J., dissenting) (citations omitted).

\textsuperscript{116} Id. at 281 (majority opinion) (citations omitted).

\textsuperscript{117} Id. at 313 (majority opinion) & n. 8 (Stevens, J., dissenting) (noting that the characteristics of the facts in the case by the majority and
by Justice O’Connor were inconsistent with facts findings by which the Court was bound under Fed. R. Civ. P. 57(b)).
edly to enforce the absolute equality of the two races before the law."

Notwithstanding this admission, however, *Plessy* held that racial segregation laws were constitutionally permissible if they pass the following test: "[T]he very exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class." This is essentially the same test deployed in *Grutter*, which treated the Michigan Law School's diversity plan as a reasonable means toward the "important and laudable" goal of promoting classroom discussions that are "livelier, more spirited, and simply more enlightening and interesting."

The *Plessy* Court was also plainly concerned with the adverse effects that might flow from judicial interference with a practice that was highly valued by important elements of the citizenry. Similarly, the *Grutter* Court emphasized its view that it is crucially important to our society—and especially to American business and the American military—to ensure that more people of certain racial backgrounds attend what are perceived to be elite schools. And, like the *Plessy* Court, *Grutter* accepted the government's utterly implausible and unsubstantiated claim that it had constitutionally permissible purposes in adopting the challenged practices.

The *Plessy* decision, of course, included a lone dissent from Justice Harlan, disputing the majority's legal analysis and eloquently challenging the majority's view that enforced segregation would promote racial harmony. *Grutter* provoked an equally eloquent, and much better reasoned, dissent from Justice Thomas. I find myself in agreement with Thomas's views about the pernicious effects of programs like the one at issue in *Grat-
ter,194 and these programs have always been quite unpopular with the general public.195 The Grutter majority opinion, however, probably does reflect the dominant opinion in contemporary elite culture.

The extraordinary breadth of the elite consensus is illustrated by Richard Epstein's heroic effort to reconcile support for governmental racial preferences with libertarian principles.196 Professor Epstein calls his a "halo but classical liberal" defense, which requires him to contend that a government agency should be allowed to engage in racial discrimination, notwithstanding the obvious public choice objections and the obvious historical evidence that confirms these objections. Professor Epstein's response begins with the libertarian premise that racial discrimination by private actors ought to be allowed and with the analytical point 'that free markets will place significant constraints on irrational discrimination:

I have noted the close analytical connection between the antidiscrimination norm and the presence of monopoly power. The former should be used at an effort 'o limit the state as well as private use of monopoly power. On this view, however, the antidiscrimination principle has no role to play to the extent that it is invoked to limit the ordinary principle of freedom of association as it applies to these private individuals and firms that do not possess any monopoly power at all. . . . [O]nce any individual or institution is stripped of the monopoly power, then everyone else finds their strongest protection in the power to go elsewhere if they do not like the terms and conditions on which any one provider chooses to offer some goods or services. Free entry thus becomes the low-cost antidote to discrimination and abuse in competitive settings.197

Accepting these starting points, how can one justify discrimination by the greatest monopoly of all, namely the government? Professor Epstein's surprising answer is that government universities are adequately and appropriately disciplined by competition from private institutions, many of which have voluntarily decided to engage in such discrimination. In order to evaluate this argument, one ought to consider the fact that what we have here is competition between government agencies staffed by self-perpetuating groups of life-tenured professors on one side, and tax-exempt, nonprofit, government-subsidized institutions staffed by self-perpetuating groups of life-tenured professors on the other. To say the least, such competition does not curtail irrational and ill-motivated discrimination in the same way as competition among business firms whose owners suffer real

194 Space constraints prevent a discussion here of the effects of racial preference programs.
197 Id. at 2016.
economic consequences when they engage in irresponsible behavior. Indeed, a little glimpse of the reality underlying Michigan’s professions of good faith was provided in the testimony of the former admissions director at the law school. “He testified that faculty members were ‘breathtakingly cynical’ in deciding who would qualify as a member of underrepresented minorities. An example he offered was faculty debate as to whether Cubans should be counted as Hispanics: One professor objected on the grounds that Cubans were Republicans.”

Sure enough, Cubans were excluded from this government-operated law school’s diversity program.

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

116 There is no evidence that Kaiser, in interpreting this quota system in the 1974 Labor Agreement, did so with a view toward countering the effects of prior discrimination at any of the fifteen plants to which the system had application. To the contrary, it appears that satisfying the requirements of the U.S. Department of Labor, and avoiding various litigation by minority employees, were its prime motivations.
117 The ABA would invoke procedural Rule 11(b), which provides:

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

American Bar Association, Rules of Procedure: Chapter 10: Evaluation of Provisionally or Fully Accredited Schools, available at www.abanet.org/legaled/accreditation/rulesprocedures/chap-10.html (last visited Nov. 16, 2004). The applicable substantive rule would be Accreditation Standard 211, which provides:

Consistent with the legal education policy and the Standards, a law school shall demonstrate that it has qualified minority students, but these results may not be considered, on their own, as a plan for complying with the requirements of the Standards. For example, a law school may demonstrate that it has qualified minority students, but these results may not be considered, on their own, as a plan for complying with the requirements of the Standards. A law school shall not be required to comply with the Standards for the amount of financial assistance different from that applied to other students.


Because of the large gaps in academic qualifications among various racial groups, which was dramatically illustrated in the record of the Michigan litigation, very few schools (if any) would satisfy the ABA’s requirements that they demonstrate a sufficient “commitment” without the use of racial preferences. The ABA evidently regards such discrimination as consistent with Accreditation Standard 211(a), which provides:

286
monopolist whose approval is needed before a law school’s graduates can be admitted to the bar in many states.109 Given the severe adverse consequences that most schools would suffer if there were even a threat of disaccreditation, it is no surprise that everyone “voluntarily” does just what this government-designated accrediting monopolist wants done.110 Thus, Professor Epstein’s defense of governmental imposition of racial preferences seems far more shaky than classically liberal.

His conclusion, however, is one that enjoys nearly universal approbation among his professional peers. Indeed, our elite culture is almost monolithically in favor of racial preferences, at least in public. This apparent consensus may be somewhat misleading, inasmuch as opponents of racial preferences are routinely treated as racists or at best disgustingly insensitive moral dullards. Perhaps some who publicly acquiesce in the views of their rather dominating peers do not really share those views. In any event, the same elites who so strongly defend today’s racial preferences are equally merciless in their condemnation of Plessy’s endorsement of enforced racial segregation. It is worth recalling, however, that enforced segregation was strongly supported by the dominant elites of the Plessy era, in both the South and the North and in both conservative and progressive circles.111 Today’s progressives support a different kind of racial discrimination than those of a century ago, and one that has surely been much less pernicious. Still, it remains to be seen whether our elite thinkers will eventually attract the same kind of contempt that they now express for the views of their predecessor elites.


110 See, e.g., Stewart E. tabs, Information Production and Rank-Seeking in Law School Administration: Roles and Discretion, 83 B.U. L. REV. 1541, 1541 n.6 (2003) (“Failure to become accredited is a serious handicap to a law school’s ability to attract students.”); see also Ronald A. Coase, The New and Old Way of Law School Accreditation, 43 J. LEGAL EDUC. 418, 422–23 (1995) (arguing that ABA accreditation rules reduce competition among law schools). id. at 425 (noting that the actions of accreditors “will conform far more closely to conduct that increases the power, prestige, and perceived attractiveness of accreditors—and of professional groups with the greatest affinity to, access to, and control over the accreditors—at the expense of other actors, including those whose interests accreditation necessarily serves.”).

V. CONCLUSION

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

This conservative approach to highly questionable precedents appears to be a reflection of a more generally pragmatic approach to civil rights law. In applying the ADA, for example, the Court has avoided outright inversions of statutory meaning, oft the kind that one finds in Burger Court cases like Griggs and Weber. When confronted with genuine ambiguities in the statute, however, the Court has seemed willing to choose the less well-reasoned legal analysis when it looks better in pragmatic terms, and has sometimes been pretty forthright about its willingness to devise its own pragmatic way of balancing competing statutory goals.

The essentially pragmatic nature of the Court’s version of conservatism is especially visible in its recent decision in Grutter v. Bollinger. Confronted with the controversial issue of racial preferences for certain minorities in university admissions, the Court adopted a position previously articulated by a single Justice in the Burger Court’s Bakke decision. Notwithstanding this link with the past, Grutter turned the traditional strict scrutiny test for racial discrimination upside down. At least in the context of admission to universities, the test now entails virtually no scrutiny at all if the Court believes that a particular form of racial discrimination is good for American society. That is an entirely pragmatic approach, and the Grutter decision was conservative chiefly in the very limited and rather specialized sense that the Court did not decide to adopt a similarly latitudinarian approach to those racial preferences outside the context of higher education. It thus remains possible that subsequent decisions will remove or weaken the conceptual underpinnings of this one, preventing its influence from spreading and preparing the way for its eventual overruling.

288