1991

Equal Protection Minus Strict Scrutiny Plus Benign Classifications Equals? Equality of Opportunity

Johnny Parker

PACE LAW REVIEW

Volume 11 Winter 1991 Number 2

Articles

Equal Protection minus Strict Scrutiny plus Benign Classification Equals What? Equality of Opportunity

Johnny C. Parker†

I. Introduction

Since the signing of the Declaration of Independence no social issue has caused more concern and controversy than that of race.[1] Voluminous studies document the sociological and economic impact which ethnic and racial prejudices have played in

† Associate Professor of Law, University of Tulsa School of Law; B.A., 1982, University of Mississippi; J.D., 1984, University of Mississippi School of Law; LL.M., 1987, Columbia University School of Law.

1. Justice Taney in 1856 observed that the statement: "We hold these truths to be self evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among them are life, liberty, and the pursuit of happiness . . . ." was not intended by the drafters to include members of the African race. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 410 (1856).

"Race" as used in this Article refers to a population distinguished by genetically transmitted physical characteristics. It is to be contrasted with "ethnic" which has a broader connotation. "Ethnic" refers to a group of people united or classified together on the basis of common religion, culture, and history. AMERICAN HERITAGE DICTIONARY 467, 1020 (2d College ed. 1982).

the history of this country.[2] While most ethnic groups, to varying degrees, have assimilated into the traditional notion of a cultural melting pot, one racial group still flounders in its search for historical, cultural and legal identity.

The uniqueness of the African-American[3] experience cannot be fully understood by non African-Americans. Only by examining the historical methodology developed by our tripartite form of government, with its unique system of checks and balances, can non African-Americans understand the complexities which surround the African-American question: How do we assimilate a group of individuals with such distinct genetically transmitted physical characteristics into our capitalistic society?

There have been many suggested solutions to the African-American question. Politicians and private individuals alike have proposed solutions ranging from social welfare to reparation. Responses of this nature fail to consider the magnitude of the question, including such considerations as implementation costs and the effects of social stigmas.

The federal Congress and Supreme Court have attempted to address the African-American question of assimilation for more than 150 years. These co-equal branches have, at times, treated the inquiry as if it were two distinct questions. Early judicial interpretations of civil rights legislation demonstrate this fact.[4] This conduct is responsible, in part, for the transformation of the African-American question from a social issue into a social dilemma.

How do we assimilate a group of individuals with such distinct genetically transmitted physical characteristics? A logical starting point in answering this query is to define the question in simple, concise and comprehensible terms. To assimilate means to make similar, to absorb into the cultural identity.[5]

---

2. *See, e.g.*, R. CHERRY, DISCRIMINATION: ITS ECONOMIC IMPACT ON BLACKS, WOMEN AND JEWS 69-91 (1989); M. CLINARD, SOCIOLOGY OF DEVIANT BEHAVIOR 677-96 (3d ed. 1968).

3. This nomenclature was carefully selected from the many historical terms used to describe Americans of African descent.

4. "The Equal Protection Clause, however, was '[v]irtually strangled in infancy by post-civil-war judicial reactionism.' It was relegated to decades of relative desuetude . . . ." Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1977) (quoting Tusman & ten-Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 381 (1949)).

5. AMERICAN HERITAGE DICTIONARY 135 (2d. College ed. 1982).

This definition leads us to inquire whether assimilation is possible from a theoretical and practical perspective.

If we assume that "to make similar, to absorb into the cultural identity" requires similarities other than those common to all Homo sapiens, assimilation becomes theoretically and practically impossible. Logic alone demonstrates that African-Americans, in light of certain immutable characteristics, are not physically similar to other racial groups. Furthermore, history reflects that it is precisely these immutable characteristics that have served as the social justification for treating African-Americans differently from members of other cultures.[6]

If, however, we assume that "to make similar, to absorb into the cultural identity" means to make similar in terms of the opportunities, choices and rights that are available, then assimilation becomes at least theoretically possible. It is this notion of equality of opportunity that underscores the foundation of this country's culture.

How to transform the theoretical and practical into reality, however, becomes the next inquiry. This question has confounded both Congress and the Court. The African-American question has been posed time and time again. Although answers, like manna from heaven, are constantly forthcoming, no one has managed to resolve the problem.

This Article suggests that the solution to the African-American issue can be found within the distinct, yet interrelated, disciplines of education and employment. There is support for the view that directly attacking the inequalities in American society would be more advantageous than ameliorating these through affirmative programs in education and employment, which are only indirectly related to the causes of such inequalities.[7] I believe, however, that economic opportunities based on quality education can better ameliorate unfavorable environmental and social factors. It should be noted that although this approach is not novel, it has never been fully integrated into the African-

---

6. *See* O. HANDLIN, RACE AND NATIONALITY IN AMERICAN LIFE 1-28 (1957) ("Color then emerged as the token of the slave status; the trace of color became the trace of slavery."). *Id.* at 21.

7. *See, e.g.*, M.L. KING, JR., WHY WE CAN'T WAIT 1-38, 137-69 (1964); E. RUDWICK, W.E.B. DU BOIS: PROPAGANDIST OF THE NEGRO PROTEST 54-76, 184-207 (1968); *see also* R. WRIGHT, WHITE MAN, LISTEN! ix-xii (1957).

American experience.

This Article will examine the African-American question in light of the equal protection clause of the fourteenth amendment. Part II chronicles the historical development of the African-American question and equal protection. In addition, it documents both congressional and judicial responses to the African-American question between 1789 and 1945, and charts the transformation of the African-American question from a social to a constitutional issue. Part III focuses on the equal protection clause of the fourteenth amendment and judicial interpretations thereof. Part III also examines the various standards developed by the United States Supreme Court since 1948 to analyze the equal protection clause and documents the current status of equal protection as it relates to the education and employment of African-Americans. This Article concludes that the Supreme Court must reconsider traditional equal protection standards of review in the area of affirmative action.

II. Historical Development

The African-American question has its genesis in the institution commonly referred to as slavery. This issue, however, did not appear crucial in the first decade following the ratification of the Constitution. During that period, the question was simply: How should slaves be treated for purposes of political representation? This question became politically controversial only with regard to the admittance of new states into the Union.[8]

By 1820 the African-American question had been reformulated into the issue of whether slavery should be abolished. The question was catapulted to the forefront of national politics with the pending admission of Missouri as a slave state.[9] Missouri's

---

8. Article I of the Constitution provides:

> Representatives and direct Taxes shall be apportioned among the Several states which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

U.S. CONST. art. I § 2, cl. 3. This language was superseded by the fourteenth amendment. U.S. CONST. amend. XIV.

9. The political struggle over the spread of slavery into new territories was a dramatic manifestation of national division. 29 THE NEW ENCYCLOPAEDIA BRITANNICA 222

admission as a slave state would have tipped the balance of power in both houses of Congress in favor of slavery.[10] In an attempt to maintain political equilibrium, the Missouri Compromise of 1820 was adopted and a crisis averted.[11] The tension surrounding the African-American question increased during the period following the enactment of the Missouri Compromise.[12] However, it was not until California, a territory on the slave side of the Missouri Compromise line, applied for statehood in 1849 under a free soil constitution, that the controversy again rose to the level of a national crisis.[13] Congress reacted by delaying California's admission and enacting the Compromise of 1850. This enactment included the admission of California into the Union, the creation of a strict law enforcing the return of fugitive slaves to their masters and recognition of the principle of popular sovereignty for other territories.[14]

In 1854, four years after the Compromise of 1850, the Kansas-Nebraska Act[15] proposed to apply the principle of popular sovereignty to the Kansas-Nebraska territories. This Bill, for the first time, removed the African-American issue from the floors of Congress to the territorial conventions.[16]

The United States Supreme Court totally disregarded the African-American controversy between the years 1789 and 1854. During most of this period, the Court was preoccupied with solidifying its position in the American system of checks and bal-

---

(15th ed. 1987).

10. Prior to the Missouri Compromise, an eleven to eleven balance between free and slave states existed in the Senate. The free states consisted of Connecticut, Illinois, Indiana, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island and Vermont while the slave states included Alabama, Delaware, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, Tennessee and Virginia. In addition, Florida and Arkansas were slave territories. L. FILLER, THE CRUSADE AGAINST SLAVERY 11 (1960).

11. The Missouri Compromise preserved the balance between the states by admitting Missouri as a slave state and Maine as a free state and by confining the extension of slavery within the territory of the Louisiana Purchase to the area south of the 36° 30' line, with the exception of the Territory of Missouri. 29 THE NEW ENCYCLOPAEDIA BRITANNICA 222 (15th ed. 1987).

12. *Id.*

13. *See* J.M. MCPHERSON, ORDEAL BY FIRE 64 (1982).

14. *Id.* at 63-69.

15. Kansas-Nebraska Act, ch. 59, 10 Stat. 277 (1854).

16. MCPHERSON, *supra* note 13, at 86-89.

ances and, with only one exception, consistently upheld the power of the federal government over the states.[17]

However, in 1857 the Supreme Court launched itself into the controversy. In *Dred Scott v. Sandford*,[18] the Court addressed the substantive issue of whether the federal courts had jurisdiction to hear and determine cases brought by persons of African descent. The opinion is of historical importance because the Court upset the Missouri Compromise by denying that Congress had the power to prohibit slavery in the territories.[19] *Dred Scott* effectively marked the end of political compromise over the African-American question.

During the reconstruction period following the Civil War, Congress enacted numerous laws to combat legislative and other attempts by southern states to keep the newly freed blacks in involuntary servitude. For example, following the ratification of the thirteenth amendment,[20] Congress passed the Freedmen's Bureau Act[21] and the Civil Rights Act of 1866.[22]

---

17. *Compare* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (necessary and proper clause of the Constitution gives Congress wide scope of authority) *and* United States v. Fisher, 6 U.S. (2 Cranch) 358 (1805) (the Court upheld federal legislation giving the United States government priority as a creditor) *with* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (the Court held that Congress exceeded its constitutional powers in enacting the Judiciary Act of 1789).

18. 60 U.S. (19 How.) 393 (1856).

19. *Id.* at 446-48.

20. U.S. CONST. amend. XIII. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." *Id.* § 1.

21. Freedmen Bureau Act, ch. 90, §§ 1-5, 13 Stat. 507 (1865). The Bureau of Refugees, Freedmen, and Abandoned Lands was charged with "the control of all subjects relating to refugees and freedmen from rebel states . . . ." *Id.* § 1.

22. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866). Section 1 of the Civil Rights Act of 1866 provided:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary not withstanding.

Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866). Parts of the Civil Rights Act of

Opponents of these acts attacked them as beyond Congress' power under the thirteenth amendment. In an attempt to resolve questions related to the validity of these acts, Congress drafted and ratified the fourteenth[23] and fifteenth[24] amendments. Following ratification of these amendments, Congress enacted other legislation for the protection of African-Americans.[25]

Civil rights legislation enacted during reconstruction was uniformly ineffectual, due in significant part to the Supreme Court which severely limited Congress' power to protect civil rights. In cases such as *United States v. Reese*[26] and *James v. Bowman*,[27] the Court struck down portions of the Civil Rights Act of 1870. Similarly, in *United States v. Harris*[28] and *Baldwin*

1866 have been reenacted. 42 U.S.C. § 1981 was derived from section 1 of the Civil Rights Act of 1866 and sections 16 and 18 of the Civil Rights Act of 1870. *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866); Civil Rights Act of 1870, ch. 114, §§ 16, 18, 16 Stat. 140, 144 (1870). 42 U.S.C. § 1982 was derived from section 1 of the Civil Rights Act of 1866. *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866). 42 U.S.C. § 1983 was derived from section 1 of the Civil Rights Act of 1871 and section 2 of the Civil Rights Act of 1866. *See* Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (1871); Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27 (1866). 42 U.S.C. § 1988 was derived from section 3 of the 1866 Act and section 18 of the 1870 Act. *See* Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27 (1866); Civil Rights Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (1870).

23. U.S. CONST. amend. XIV.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. § 1.

24. U.S. CONST. amend. XV. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." *Id.* § 1.

25. *See* Blackmun, *Section 1983 and Federal Protection of Individual Rights — Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 5 (1985). This legislation included the Enforcement Act of 1870, which added additional criminal penalties and provided for jurisdiction in the federal courts over suits alleging racially inspired interference with the right to vote; the 1871 Civil Rights Act, aimed at the activities of the Ku Klux Klan and which added civil remedies; and the 1875 Civil Rights Act, which outlawed racial discrimination in places of public accommodation and provided civil and criminal penalties for violation of its provisions. *Id.* at 5.

26. 92 U.S. 214 (1875).

27. 190 U.S. 127 (1903).

28. 106 U.S. 629 (1882).

v. Franks,[29] the Court invalidated the criminal conspiracy section of the Civil Rights Act of 1871. Statutes which were not struck down as unconstitutional were subjected to a narrow construction that effectively crippled their impact.

In 1879 the African-American question was linked to the equal protection clause of the fourteenth amendment in *Strauder v. West Virginia*.[30] Justice Strong, writing for the Court observed:

> [The fourteenth amendment] ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race — the right to exemption from unfriendly legislation against them distinctively as colored — exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy . . . .[31]

This dicta was ignored by the Supreme Court a decade later in the *Civil Rights Cases*.[32] In the *Civil Rights Cases* the Court, relying on the plain meaning of the language of the fourteenth amendment, held that racial discrimination occurring as a result of private action did not involve a constitutional issue.[33] This holding effectively overturned the Civil Rights Act of 1875.[34]

---

29. 120 U.S. 678 (1887).

30. 100 U.S. 303 (1879).

31. *Id.* at 307-08.

32. 109 U.S. 3 (1883).

33. The Court noted that the explicit language of the fourteenth amendment provides that "no state" shall deny equal protection of the laws; it does not provide that "no person" shall deny equal protection and Congress in passing laws to enforce the amendment may not make it a crime to do what the amendment does not forbid. *Id.* at 11.

34. Civil Rights Act of 1875, ch. 114, § 2, 18 Stat. 336 (1875). The Civil Rights Act of 1875 provided in pertinent part:

> That any person who shall violate the foregoing section by denying to any citizen

In 1896, the Supreme Court was confronted with the question of whether segregation imposed by state law violated the equal protection clause. *Plessy v. Ferguson*[35] involved legislation passed by Louisiana in 1890 which mandated: "that all railway companies carrying passengers in their coaches in this State, shall provide equal but separate accomodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition . . . ."[36] A fine of twenty-five dollars or twenty days in jail was the penalty for sitting in the wrong compartment. Plessy, who was one-eighth black, refused to vacate a seat in the white compartment of a railway car and was arrested for violating the statute.[37]

Justice Brown, delivering the opinion of the Court, noted in part:

> The object of the [fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.[38]

The *Plessy* decision represents the low watermark with regard to both the African-American question of assimilation and

---

> . . . the full enjoyment of any of the accomodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred dollars nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year . . . .

Id.

35. 163 U.S. 537 (1896).
36. *Id.* at 540.
37. *Id.* at 541-42.
38. *Id.* at 544.

equal protection interpretation.[39] The Supreme Court, influenced by contemporary history and social conditions, effectively thwarted congressional attempts to provide equality of opportunity, rights and interests to African-Americans.

III. Equal Protection: An Analytical Framework

For nearly sixty years the doctrine of separate but equal was firmly entrenched. It was not until 1945 that the Supreme Court began to understand that *Plessy*[40] effectively denied equal opportunity, interests and rights. Between 1945 and 1972 the Supreme Court departed from its almost laissez faire attitude toward African-Americans and began enforcing civil rights laws and developing uniform standards of review for equal protection challenges.[41]

The first analytical standard developed by the Court was articulated in *F.S. Royster Guano Co. v. Virginia*.[42] This test, referred to as the rational basis test, required that the government have a rational basis for treating similarly situated people or activities differently and that the basis be related to a constitutionally permissible objective.[43]

F.S. Royster involved a Virginia law that taxed all the income of local corporations derived from business done within and without the state, while exempting from taxation those local corporations that derived income solely from outside the state.[44] The plaintiff argued that the classifications created by the legislation violated the equal protection clause of the fourteenth amendment.[45]

Justice Pitney, writing for the Court, noted that

---

39. Though the Court tended to water down the guarantees of the fourteenth amendment and civil rights legislation based thereon, it did, in that period, give meaning to the equal protection clause particularly in the area of the administration of justice. *See, e.g., Ex parte* Virginia, 100 U.S. 339 (1879) (Court upheld the conviction of a county judge for excluding blacks from the jury lists on the basis of race); Strauder v. West Virginia, 100 U.S. 303 (1879) (Court held that a black man was entitled to be tried by a jury from which blacks had not been excluded on the basis of race).

40. 163 U.S. 537 (1896).

41. *See generally* Blackmun, *supra* note 23, at 12-19.

42. 253 U.S. 412 (1920).

43. *Id.* at 415.

44. *Id.* at 414.

45. *Id.* at 413.

> the Fourteenth Amendment does not prevent the States from resorting to classification for the purposes of legislation . . . . But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.[46]

The Court considered the relationship between the classification and the state's objective fair and substantial. In examining this nexus, however, Justice Pitney concluded that the law was arbitrary and therefore unconstitutional.[47] The opinion intimated that the Court would examine carefully both the means and ends.[48]

Rather than developing along the lines suggested in *F.S. Royster*, the rational basis analysis evolved into a very lenient standard of review. In *McGowan v. Maryland*,[49] a case that addressed whether certain statutory classifications within Maryland's Sunday Closing Law constituted an abridgement of the equal protection clause, the Court observed:

> The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.[50]

The rational basis test creates a presumption that the legislature had a nondiscriminatory reason for enacting the law.[51] Consequently, the party asserting the unconstitutionality of legislation bears the burden of proving that no rational basis existed for its enactment.

---

46. *Id.* at 415.

47. *Id.* at 417.

48. *Id.* at 415-16.

49. 366 U.S. 420 (1961).

50. *Id.* at 425-26.

51. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) ("state legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality"); *see also* Dandridge v. Williams, 397 U.S. 471, 485 (1970) (a classification with a reasonable basis will not offend the Constitution despite some resulting inequality).

As early as 1880, the Supreme Court intimated that legislation having a racially discriminatory purpose or effect would be subjected to a higher standard of review.[52] However, this higher standard was not fully articulated by the Court until 1944 in *Korematsu v. United States*.[53] *Korematsu* challenged the constitutionality of the World War II Congressional Exclusion Order[54] that excluded individuals of Japanese ancestry from West Coast areas during certain hours. Justice Black, the author of the opinion, set forth the notion that legal restrictions which curtail the civil rights of a single racial group were "immediately suspect."[55] He further observed that legislation involving a suspect classification[56] would be subjected to "the most rigid scrutiny."[57]

Strict scrutiny, unlike rational basis review, poses an almost insurmountable barrier for the proponents of the legislation. Under strict scrutiny the defendant bears the burden of proof. He must first demonstrate the existence of a compelling interest or objective. Then he must demonstrate that the suspect classification at issue is necessary to accomplish a government objective which cannot be effectively carried out in a less discriminatory manner.[58]

The strict scrutiny analysis is limited to equal protection challenges involving a suspect classification[59] or a fundamental

---

52. *See supra* note 37.

53. 323 U.S. 214 (1944).

54. Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942).

55. *Id.* at 216.

56. The traditional criteria used to determine which groups fall into a suspect class are immutable characteristics determined solely by the accident of birth, or a class saddled with such disabilities, or subject to such a history of purposeful unequal treatment, or regulated to such a political powerlessness as to command extraordinary protection from the majoritarian political process. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) (where prejudice against discrete and insular minorities tends to seriously curtail the operation of protective political processes, statutes directed at particular religious, national, or racial minorities are subjected to more exacting judicial scrutiny).

57. *Korematsu*, 323 U.S. at 216.

58. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (school board policy of laying off senior, non-minority teachers to retain junior minority teachers is not narrowly tailored enough to survive strict scrutiny review); Dunn v. Blumstein, 405 U.S. 330 (1972) (one year residency requirement for voting franchise held unconstitutional where 30 day requirement would suffice).

59. *See San Antonio*, 411 U.S. 1 (poor families are not a suspect class); Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (childless, non-property owners are a sus-

right or interest implicitly or explicitly protected by the Constitution.[60] Thus, whether rational basis or strict scrutiny will be used as a standard of review is first determined by asking whether a suspect classification or fundamental right or interest is involved.

The proliferation of equal protection cases challenging classifications involving welfare benefits,[61] poverty,[62] education,[63] and sex[64] was responsible in part for a growing judicial disenchantment with the two tier approach. As early as 1973, Justice Marshall, dissenting in *San Antonio Independent School District v. Rodriguez*,[65] noted:

> The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review — strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal

---

pect class); *Korematsu*, 323 U.S. 214 (United States citizens of Japanese descent are a suspect class).

60. The Supreme Court has not clarified what makes a right fundamental, but it has observed that the appropriate question is not whether the right is considered important. To be fundamental, the right has to be implicitly or explicitly protected by the United States Constitution. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 221 (1982) (although education plays a fundamental role in society, it is not a fundamental right granted to individuals by the Constitution); Beal v. Doe, 432 U.S. 438, 445-46 (1977) (women do not have a constitutional right to receive Medicaid coverage for abortion).

61. *See* United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (Court invalidated some provisions of the Food Stamp Act); *Dandridge*, 397 U.S. 471 (financial aid statute does not violate equal protection clause merely because its effect is to provide fewer benefits to children born to large families).

62. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (Court held that conditioning the right to vote on the payment of a fee violates the equal protection clause); Douglas v. California, 372 U.S. 353 (1963) (denial of counsel to an indigent held to be invidious discrimination).

63. *See* Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982) (statute which allows the use of race to define the governmental decision-making structure violates the equal protection clause); *San Antonio*, 411 U.S. 1 (Court found it reasonable to use local property taxation to advance goals of local education).

64. *See* Craig v. Boren, 429 U.S. 190 (1976) (an Oklahoma statute prohibiting the sale of 3.2% beer to males under 21 and females under 18 violated equal protection clause); Reed v. Reed, 404 U.S. 71 (1971) (preference for men over women in the appointment of administrators of estates is an arbitrary denial of equal protection).

65. 411 U.S. 1, 98 (Marshall, J., dissenting).

Protection Clause.[66]

As Justice Marshall pointed out, the Court had already abandoned the two tier approach in practice, applying instead a spectrum of standards to analyze equal protection claims. He suggested that the Court also discard its semantical adherence to the two tier approach.[67]

Three years later in *Craig v. Boren*,[68] a licensed vendor of 3.2% beer and Craig, a male between eighteen and twenty-one years of age, challenged an Oklahoma statute that prohibited the sale of "nonintoxicating" 3.2% beer to males under the age of twenty-one and to females under the age of eighteen. They claimed the statute constituted a gender based discrimination violative of the equal protection clause of the fourteenth amendment. Justice Brennan, writing for the Court, observed that legislation which distinguished between males and females was "subject to scrutiny" under the equal protection clause.[69] He further noted that to withstand constitutional challenge a classification based on gender must serve an important governmental objective and be substantially related to the achievement of that objective.[70] This intermediate level of equal protection review is commonly referred to as the substantial factor test.

A. *Equal Protection, African-Americans and Education*

During the period between 1945 and 1972 the African-American question again took on constitutional significance. The Supreme Court, mindful of the not so distant past, first responded to the demand for social and constitutional equality by removing barriers to equality of education.[71]

---

66. *Id.* at 98-99.
67. *Id.* at 99.
68. *Craig*, 429 U.S. 190.
69. *Id.* at 197.
70. *Id.*
71. In a series of cases prior to *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), the Supreme Court upheld the right of African-Americans to equal education opportunities. *See, e.g.*, McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (Court held that the fourteenth amendment precludes differences in educational treatment by the state based upon race); Sweatt v. Painter, 339 U.S. 637 (1950) (a black student must receive the same treatment at the hands of the state as a white student; held that a newly established state law school for blacks was not substantially equal to white law school); Sipuel v. Bd. of Regents of the Univ. of Okla., 332 U.S. 631 (1948) (Court held that a Negro

Brown v. Board of Education[72] is beyond doubt the most significant decision about African-Americans and their right to a quality education. *Brown* addressed the issue of whether the segregation of white and black children in the public schools of a state, solely on the basis of race and pursuant to state law, denied African-American children the equal protection of the law.[73] Chief Justice Warren, noting the importance of a quality education, stated:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[74]

Brown is as important for what it did not do as it is for what it did. *Brown* does not stand for the proposition that African-American children are entitled to a quality education. Rather, it merely provides that they are entitled to an opportunity on terms equal to white children. How equal is equal, however, was not discussed. Another relevant point is that while the facts presented in the case included a suspect classification, state legislation and an equal protection challenge, the Court failed to refer to the traditional strict scrutiny test.[75]

As it relates to educational opportunities for African-Americans, the question of how equal is equal has never been expressly addressed by the United States Supreme Court. *San Antonio Independent School District v. Rodriguez*[76] does, however, shed some light on this question. The plaintiffs in this case brought a class action on behalf of school children who were members of poor families living in school districts having a low property tax base.[77] They claimed that the Texas system of

---

qualified to receive professional education offered by the state cannot be denied such education because of color); Missouri *ex rel* Gaines v. Canada, 305 U.S. 337 (1938) (holding that a state with an all-white state law school violated the equal protection clause despite existence of out of state law school that admitted blacks).

72. 347 U.S. 483 (1954).

73. *Id.*

74. *Id.* at 493.

75. *See supra* note 58 and accompanying text.

76. 411 U.S. 1 (1973).

77. *Id.* at 5.

funding public education, based on local property taxation, favored the more affluent and violated the equal protection clause because of substantial interdistrict disparities in per pupil expenditures that resulted primarily from differences in the value of assessable property among the districts.[78]

The case compared the educational expenditures of two school districts, Edgewood, where the plaintiffs lived, and Alamo Heights. Edgewood is situated in the core city sector of San Antonio in a residential neighborhood that had little commercial or industrial property. The residents were predominantly of Mexican-American descent. Approximately ninety percent of the student population were Mexican-American while approximately six percent were African-American. The average assessed property value per pupil was $5,960 — the lowest in the metropolitan area — and the median family income of $4,686 was also the lowest. Approximately 22,000 students were enrolled in its twenty-five elementary and secondary schools. The total per student contribution for Edgewood was $356 per student in 1967-1968.[79]

Alamo Heights was the most affluent school district in San Antonio. It was situated in a residential community "quite unlike the Edgewood District."[80] Its six schools housed approximately 5,000 students. The school's population was predominantly "anglo," having only eighteen percent Mexican-Americans and less than one percent African-Americans. The assessed property value per pupil exceeded $49,000 and the median family income was $8,001. The total per student contribution for Alamo Heights was $594 per pupil in 1967-1968.[81]

The district court, applying a strict scrutiny analysis, found that the Texas scheme violated the equal protection clause.[82] Justice Powell, however, reversed the lower court, observing that although education is important, it is not among the rights afforded implicit or explicit protection under the Constitution.[83] He further noted that:

---

78. *Id.* at 19-20.
79. *Id.* at 11-12.
80. *Id.* at 12.
81. *Id.* at 12-13.
82. *Id.* at 18.
83. *Id.* at 35.

> The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth. . . . [A] sufficient answer to appellee's argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.[84]

While the majority expressly reaffirmed the position taken in *Brown*,[85] *San Antonio* suggests that, with regard to education, equality exists under the equal protection clause so long as there is not an "absolute" deprivation of a meaningful opportunity to become educated.[86]

Since *Brown*, the Court has repeatedly recognized the crucial role that formal education plays in the life of every citizen.[87] An individual's ability to achieve a decent job and income and his ability to provide his children with these opportunities are all determined, in part, by the quality of his education.[88] It is as true today as it was prior to *Brown* that a person's birthplace, his race, his cultural background and his parents' income are the

---

84. *Id.* at 23-24.

85. 347 U.S. 483 (1954). It should be noted that the allegation in *Brown* was not that African-American children were being denied educational opportunity, but that the quality of the opportunity they were receiving was inferior to that provided to white children. *Id.* at 488.

86. *San Antonio*, 411 U.S. at 20. *See also* Lau v. Nichols, 414 U.S. 563, 568 (1974) (holding that a school that fails to provide non-English speaking students with supplemental courses in the English language denies such students a "meaningful opportunity to participate in the educational program . . . .").

87. *See San Antonio*, 411 U.S. at 29-31.

88. Disagreement exists about the effect of education on disadvantaged groups. One view is that schools have little effect independent of the child's background. Consequently, at least in terms of academic achievement, this view holds that schools generally fail to narrow the gaps between advantaged and disadvantaged students, and disadvantaged students are likely to leave school in a worse position, academically, relative to their peers than when they entered.

Another view holds that there is a clear and independent relationship between what schools do and the results they produce. This view is based on research which shows that disadvantaged children generally attend schools that have inadequate educational services and facilities and less experienced staffs. C. COLEMAN, E. CAMPBELL, C. HOBSON, J. MCPARTLAND, A. MOOD, F. WEINFELD & R. YORK, EQUALITY OF EDUCATIONAL OPPORTUNITIES 288-89 (1988). For a summary of the Coleman Report see F. CORDASCO, M. HILLSON & H. BULLOCK, THE SCHOOL IN THE SOCIAL ORDER: A SOCIOLOGICAL INTRODUCTION TO EDUCATIONAL UNDERSTANDING 107-49 (1970).

major determinants of the quality of his education. It is, therefore, not surprising to find that the educational process in this country has been described by the Senate Select Committee on Equal Educational Opportunity as being unequal in three interrelated ways:

> First, children from minority and economically disadvantaged families live their lives isolated from the rest of society. The fact is that education in this country is still — for the most part — segregated by race, economic and social class. Second, minority and disadvantaged children are often treated in unequal ways by schools themselves. Third, the financial resources for public elementary and secondary education are both raised and distributed inequitably so that the quality of a child's education is largely dependent upon the taxable wealth of each school district and its citizens.[89]

The segregation, unequal practices and treatment to which disadvantaged students are subjected and the inequality of educational resources often combine to produce an absolute deprivation of a meaningful opportunity to attain a quality education.[90] Nevertheless, the Supreme Court, even in light of these congressional findings,[91] narrowly interprets equal educational

---

89. *Toward Equal Educational Opportunity*, The Report of the Senate Select Comm. on Equal Educ. Opportunity, S. REP. No. 92-000, 92d Cong., 2d Sess. 11-12 (1972). The performance, aspirations and motivations of disadvantaged children are often adversely affected by the attitudes and expectations of their teachers, who often label them as inferior and destined to fail. The disadvantaged child is often tracked in a class or other group of "slow learners" or "underachievers." These children, in effect are subjected to a labeling process based on their background rather than their ability or potential. This virtually assures school failure and a life of unequal opportunity after school. *Id.* at 12. Poor children usually attend schools with poor educational services. *Id.*

90. The Senate Select Committee also noted:

> We have found neither uniformity in the enforcement of our Nation's civil rights laws as they affect education nor equality of educational opportunity in many of our Nation's schools. . . . [P]ublic education is failing millions of American children who are from racial and language minority groups, or who are simply poor.

Id. at 2.

91. The Senate Select Committee defined the term "equal educational opportunity":

> As we will use the term, equal educational opportunity refers both to the results of education and the way those results are produced.
>
> It is a fundamental goal of our democratic system that life's opportunities be distributed on the basis of each individual's capacity and choice and that no individual be denied the chance to succeed because of his membership in a racial, religious, social, economic, or other group in society. The extent to which this goal is met is the test of both equal opportunity in our society and equal educational

opportunity.

This conclusion is demonstrated by the *Regents of University of California v. Bakke*[92] opinion. In this case the Medical School of the University of California at Davis had developed two admissions programs for the entering class of 100 students. Under the regular admissions program, candidates with an undergraduate grade point average under 2.5 on a scale of 4.0 were rejected. Thereafter, select applicants were given an interview, following which they were rated on a scale of 1 to 100 by each member of the faculty committee. The rating was based on the interviewer's summaries, overall grade point average, science courses grade point average, medical college admissions test (MCAT) scores, letters of recommendation, extracurricular activities and other biographical data, all of which resulted in a total bench score. The full admissions committee then made offers of admission on the basis of its review of the applicant's file and score.[93]

A separate committee, a majority of whom were members of minority groups, operated the special admissions committee.[94] Special candidates, individuals who were economically and/or educationally disadvantaged or members of a minority group, did not have to meet the 2.5 grade point cutoff and were not ranked against candidates in the regular admissions process. Special candidates were otherwise rated in the same manner as employed in the regular program.[95] Generally, sixteen of the 100 seats were filled through the special program. No white applicant had ever been admitted through the special program.[96]

In 1973 and 1974, Bakke, a white male, applied to Davis. Although he had a score of 468 out of 500 in 1973, he was re-

---

opportunity. Thus, in terms of the outcomes of formal schooling, equal educational opportunity is achieved when representative individuals with similar abilities and making similar choices within each group in society have the same chance to participate and succeed in life's activities.

But equal educational opportunity must also be defined in terms of the absence of inequality in the process of schooling and its components.

Id. at 3.

92. 438 U.S. 265 (1978).

93. *Id.* at 273-74.

94. *Id.* at 274.

95. *Id.* at 275.

96. *Id.* at 276.

jected because no applicants with scores less than 470 were being accepted through the regular program and because his application was late.[97] In 1974, Bakke scored 549 out of 600 but was again rejected.[98] In both years, special applicants with scores lower than Bakke's were admitted. After his second rejection, Bakke filed suit claiming that the special admissions program operated to exclude him on the basis of race in violation of the equal protection clause of the United States Constitution, a provision of the California Constitution and section VI of the Civil Rights Act of 1964.[99]

The California Supreme Court, applying a strict scrutiny analysis, found that the special admissions program violated the equal protection clause; it also held that the University could not take race into account in future admissions decisions.[100] The United States Supreme Court affirmed the equal protection finding but reversed the holding that race could not be taken into account during the admissions process.[101]

Justice Powell, author of the opinion, noted that strict scrutiny was the proper standard because a suspect classification was involved.[102] In examining whether the classification was necessary to the accomplishment of its purpose, Justice Powell noted that:

> The special admissions program purports to serve the purposes of: (i) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession," (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.[103]

Justice Powell concluded that the University's objectives were neither necessary nor compelling in light of the absence of a judicial, legislative or administrative finding of some statutory

---

97. *Id.*
98. *Id.* at 277.
99. *Id.* at 279.
100. *Id.*
101. *Id.* at 319-20.
102. *Id.* at 305.
103. *Id.* at 305-06 (quoting Brief for Petitioner at 32, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811)).

or constitutional violation.[104]

The Supreme Court's holding in *Bakke* raises three constitutional issues. The first is whether racial classifications are invalid per se. The second is whether any classification based on race can withstand strict scrutiny. The third is whether a lesser standard of review may be applied in special circumstances, such as those involving benign racial classifications.

The school desegregation cases demonstrate that racial classifications are not per se illegal.[105] Thus, although the Supreme Court in *Korematsu v. United States*[106] noted that all legal restrictions which curtail the civil rights of a single racial group are suspect, this "is not to say that all such restrictions are unconstitutional."[107] The classification must, however, be necessary to promote a compelling government interest and be narrowly tailored to that end.[108]

With regard to whether any classification based on race can withstand strict scrutiny, *Korematsu* supports a positive response.[109] All that is necessary for benign racial classifications to withstand equal protection challenges is that the Court construe classifications which expand minority groups' access to opportunities in education and employment as being necessary and compelling. Such a suggestion is not unwarranted in light of congressional findings that discrimination on the basis of race still persists.[110] The suggestion is further strengthened by the fact that African-Americans were intended to be the primary beneficiaries of the reconstruction amendments, including, of course,

---

104. *Id.* at 306-07.

105. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (schools whose students are all or virtually all of the same race require close scrutiny, but their existence alone is not a sufficient indication of a segregated system); Green v. County School Bd., 391 U.S. 430 (1968) (a freedom of choice plan in desegregating a school system might be of use under appropriate circumstances; however, where there are reasonable alternatives available which would provide for a speedier desegregation, a freedom of choice plan is unacceptable).

106. 323 U.S. 214 (1944).

107. *Id.* at 216 (the Court announced the strict scrutiny test but nevertheless upheld the constitutionality of the Congressional Exclusion Order). *See also supra* note 52 and accompanying text.

108. *See supra* notes 54-57 and accompanying text.

109. *Id. See supra* notes 54-57 and accompanying text.

110. *See supra* note 90.

the equal protection clause.[111]

With regard to whether a lesser standard of review should be applied to benign classifications, the *Bakke* opinion supports a negative response.[112] The argument that a lesser standard of review should be utilized in circumstances where a benign classification is employed is not, however, without judicial precedent. For example, *Brown v. Board of Education*[113] involved all the prerequisites necessary for application of strict scrutiny, yet the Court reached a correct decision without reference to any of the equal protection standards. The various *Bakke* opinions seemingly advocate a common concern for benign classifications.[114] Furthermore, judicial discontent with the traditional equal protection matrices suggests that they are in need of serious reconsideration.[115]

B. *Equal Protection, African-Americans and Employment*

In the present high technology era, employment opportunities are often influenced by one's education. It is not uncommon to find job advertisements which require a college degree as a minimum education level. The same societal discrimination which exists in the educational process throughout this country also exists in the work place. Consequently, much of the previous discussion is also relevant to the African-American experience in the work place. Much has been corrected by legislation such as Title VII of the Civil Rights Act of 1964.[116] Much, however, remains to be done.[117]

---

111. *See supra* notes 23-25 and accompanying text.

112. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287-88 (1978).

113. 347 U.S. 483 (1954).

114. The opinion of Justices Brennan, White, Marshall, and Blackmun suggests that an intermediate level of review may be appropriate for benign classification. *Bakke*, 438 U.S. at 359. Justice Powell would apply strict scrutiny to benign classifications. *Id.* at 287-305. The opinion of Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist, concluded that benefits should be provided on a color-blind basis. *Id.* at 408-21.

115. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 62 (1973) (Marshall, J., dissenting); Craig v. Boren, 429 U.S. 190, 211 (1976) (Stevens, J., concurring).

116. 42 U.S.C. § 2000e (1988).

117. Title VII has been an effective tool in assisting African-Americans in gaining access to lower level jobs in businesses, crafts and industries traditionally closed to them. It has not, however, proven as useful to African-American executives. While the Supreme

Title VII has been the major weapon used to attack and remedy discrimination in the work place. The coverage of Title VII, as amended,[118] extends as far as Congress' reach under its authority to regulate commerce.[119] Since the enactment of Title VII, individuals have extensively relied on it to challenge allegedly discriminatory employment practices. Under Title VII, a claimant must meet certain procedural requirements to file charges and must also have pursued appropriate state and federal administrative remedies before initiating a federal lawsuit.[120] There is, however, no absolute right to a federal trial under Title VII.[121] Assuming that a plaintiff satisfies the procedural requisites, there still remains the difficult task of proving that specific employment practices have violated the statute. The plaintiff bears the burden of establishing an initial or prima facie case of discrimination.[122]

The courts have developed two theories for assessing the merits of employment discrimination cases. When a plaintiff asserts discriminatory treatment because of race, sex, national origin or religion, proof of the employer's discriminatory motive is required.[123] Where neutral policies with a "disparate impact" on

---

Court has not upheld a different standard for determining discrimination in upper level employment as opposed to lower level employment, lower federal court decisions reflect far greater leniency when confronted with cases alleging discrimination by executive or professional employers than by lower level employers. *See, e.g.*, Faro v. New York Univ., 502 F.2d 1229 (2d Cir. 1974) (concerning advancement of medical school professors); Townsend v. Nassau County Medical Center, 558 F.2d 117 (2d Cir. 1977) (court held that black female county blood bank technician failed to prove prima facie case of racial discrimination), *cert. denied*, 434 U.S. 1015 (1978); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

118. 42 U.S.C. §§ 2000e-2000e-17 (1988).

119. U.S. CONST. art. I, § 8, cl. 3. Since the early 19th Century the Supreme Court has defined and redefined Congress' power to regulate commerce. Presently, the power to regulate commerce is extremely broad, but it is not limitless.

120. 42 U.S.C. § 2000e-5(b) (1988).

121. Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982). Courts have relied on the doctrine of res judicata in holding that an individual cannot maintain a federal civil rights action when the claim has been reviewed by the state judiciary. *Id.* at 476-78; *see also* Gonsalves v. Alpine Country Club, 727 F.2d 27 (1st Cir. 1984) (the full faith and credit clause precludes de novo consideration of Title VII cases where the decision or question has been reached in state court).

122. A prima facie case raises an inference of discrimination, which if unexplained, is "more likely than not based on the consideration of impermissible factors." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

123. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

African-Americans are challenged, no proof of discriminatory intent is required.[124]

The Supreme Court in *Griggs v. Duke Power Co.*[125] ruled that employment policies having a disparate impact on African-Americans were unlawful unless the employer could show that those policies were job-related and justified by "business necessity."[126] Under *Griggs*, an employer may not rely on proof that the selection practices employed reflect a legitimate business purpose and are consistent with general practices within the industry.[127] The business necessity doctrine requires the employer to demonstrate "that the practice [is] necessary to the safe and efficient operation of the business."[128] Even if the employer satisfies the burden of demonstrating a compelling business necessity for the discriminatory practice, the plaintiff may still prevail by showing that the employer's legitimate interest could be served by less discriminatory means.[129]

A second approach used in Title VII litigation is a claim of "disparate treatment."[130] This approach differs substantially from disparate impact cases. In order to establish a prima facie case in connection with hiring under this approach, the plaintiff must first demonstrate that he is a member of a group protected under Title VII.[131] The plaintiff must then show that he applied

---

124. A "disparate impact" case is one in which the plaintiff alleges that a facially neutral test or employment criterion which disproportionately disqualifies a protected class from employment, promotion or other opportunity is not job-related. *See id.* at 432 (Congress was concerned not just with the motivation of employment practices but with the consequences).

125. 401 U.S. 424 (1971).

126. *Id.* at 431.

127. *Id.* at 429-33.

128. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.) (company seniority system that restricted African-Americans to the lowest paying departments without possibility of transfers, held to be unlawful employment practice), *cert. dismissed*, 404 U.S. 1006 (1971).

129. *See* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (height and weight requirements have an essential relationship to efficient job performance of a correctional counselor).

130. *See, e.g.*, Jones v. International Paper Co., 720 F.2d 496 (1983) ("disparate treatment" occurs when an employer treats some people less favorably than others solely because of their race); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973) ("[employer] may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.").

131. *McDonnell Douglas Corp.*, 411 U.S. at 802.

for a job for which he was qualified and that he was rejected despite such qualifications.[132] In addition, the plaintiff must show that the position remained open after his rejection and that the employer continued to seek applicants with the plaintiff's qualifications.[133]

Once a prima facie case of disparate treatment is established, the employer can rebut the inference of discrimination by specifying a nondiscriminatory reason for the action.[134] If the employer is successful in rebutting the inference of discrimination, the plaintiff will then be given an opportunity to prove that the asserted legitimate reason was a mere pretext for discrimination.[135]

In disparate treatment cases, the employer is not required to accord preference to minorities or women among equally qualified applicants.[136] The employer need only explain clearly and specifically the nondiscriminatory reasons for the action.[137] The plaintiff carries the burden of persuasion to prove intentional discrimination by a preponderance of the evidence.[138]

Under Title VII, courts have broad judicial latitude to formulate relief for identified discrimination. Such relief has included giving preference to members of minority groups as a remedy for past discrimination, even where there was no finding that the employer had acted with discriminatory intent.[139]

The Supreme Court has apparently divided race-conscious

---

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 804.

136. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981) (employer not required to show that male selected instead of female for a supervisory position has superior qualifications); *see also* Lee v. Washington County Bd. of Educ., 625 F.2d 1235 (5th Cir. 1980) (after plaintiff demonstrates purposeful discrimination, employer has opportunity to show individual minority job applicants would not have been hired absent the discrimination).

137. *McDonnell Douglas Corp.*, 411 U.S. at 802.

138. *Burdine*, 405 U.S. at 253.

139. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 332 (1977) (despite absence of specific evidence of discrimination or injury, the Court held that those who were likely to have been harmed could be afforded recovery); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). (executive, judicial and congressional action subsequent to the passage of Title VII conclusively establishes that Title VII does not bar the remedial use of race).

remedial plans into two classes. Where Congress has established a race-conscious remedial program, there seems to be a presumption of validity, if the program is based on a congressional finding of discrimination. For example, *Fullilove v. Klutznick*[140] involved a Congressional enactment implementing a race-conscious set-aside program as part of the Public Works Employment Act of 1977.[141] The Act contained the following requirement: "Except to the extent that the Secretary determines otherwise, no grant shall be made under this [Act] . . . unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises."[142] Minority business enterprises (MBEs) were defined as businesses effectively controlled by "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts."[143]

Writing for the majority, Chief Justice Burger did not employ strict scrutiny or any other traditional standard of equal protection review. Rather, the opinion addressed the issues of whether the objectives of the legislation were within the power of Congress and, whether the limited use of racial and ethnic criteria was a permissible means for Congress to carry out its objective.[144] The Court responded affirmatively to both questions. With regard to Congress' power, the Court noted that "Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct."[145] The opinion found the limited use of race to be permissible because Congress had substantial evidence that past discrimination had reduced minority participation in federal construction grants.[146] The Court also found the flexible nature of the ten percent set-aside to be

140. 448 U.S. 448 (1980).
141. Pub. L. No. 95-28, 91 Stat. 116 (1977) (codified at 42 U.S.C. § 6701 (1988)).
142. *Id.* at 117.
143. *Id.*
144. *Fullilove*, 448 U.S. at 473.
145. *Id.* at 483-84.
146. *Id.* at 477-78.

persuasive.[147]

All other race-conscious remedial programs have been subjected to the strict scrutiny test. The result of the application of this rigorous standard is a foregone conclusion. In two recent decisions, *Wygant v. Jackson Board of Education*[148] and *City of Richmond v. J.A. Croson Company*,[149] the Court, applying a strict scrutiny analysis, overturned affirmative action programs.

Croson is especially significant because the City of Richmond relied on the federal legislation that withstood challenge in *Fullilove* to develop its set-aside program.[150] The Supreme Court, however, was not convinced that state governmental bodies have the same power as Congress to remedy discrimination.[151] It also questioned the legitimacy of the city's finding of past discrimination.[152] The *Croson* decision adds a new twist to strict scrutiny as applied to race-conscious remedies. The requirement of a specific finding, based on empirical evidence, of discrimination on the part of the agency proposing the voluntary program, in essence makes strict scrutiny "stricter scrutiny."

The Supreme Court has failed to realize that under the equal protection clause, as under Title VII, discrimination can be based on disparate treatment and disparate impact. Consequently, race-conscious programs that purport to remove disparate racial impact need not be based on a finding of specific discrimination. Rather, race-conscious relief can be sufficiently supported by societal discrimination. For example, the serious and persistent underrepresentation of minorities in various fields of employment, as shown by statistics, demonstrates a background of deliberate, purposeful discrimination against minorities.[153]

A strong argument for affirmative action was made over thirteen years ago. It is worth noting that the statistics presented at that time have not improved in the intervening

147. *Id.* at 487-88.
148. 476 U.S. 267 (1986).
149. 488 U.S. 469 (1989).
150. *Id.* at 480.
151. *Id.* at 490.
152. *Id.* at 499.
153. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES tables 628 and 645 (110th ed. 1990).

years. That argument propounds:

> The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.
>
> A Negro child today has a life expectancy which is shorter by more than five years than that of a white child. The Negro child's mother is over three times more likely to die of complications in childbirth, and the infant mortality rate for Negroes is nearly twice that for whites. The median income of the Negro family is only 60% that of the median of a white family, and the percentage of Negroes who live in families with incomes below the poverty line is nearly four times greater than that of whites.
>
> When the Negro child reaches working age, he finds that America offers him significantly less than it offers his white counterpart. For Negro adults, the unemployment rate is twice that of whites, and the unemployment rate for Negro teenagers is nearly three times that of white teenagers. A Negro male who completes four years of college can expect a median annual income of merely $110 more than a white male who has only a high school diploma. Although Negroes represent 11.5% of the population, they are only 1.2% of the lawyers, and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors.
>
> The relationship between those figures and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death the impact of the past is reflected in the still disfavored position of the Negro.
>
> In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.
>
> I do not believe that the Fourteenth Amendment requires us to accept that fate.[154]

---

154. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 395-96 (1977) (Marshall, J., dissenting).

IV. Conclusion

The Supreme Court must reconsider traditional standards of equal protection review for race-conscious relief in education and employment. The different requirements for proving a statutory or constitutional violation and specifically identified discrimination severely undermine the notion of voluntary compliance with the law.

Not that long ago, the doors of collective advancement were simply closed to African-Americans. The removal of legal impediments to equality has not enabled African-Americans to achieve the social status, and the economic or political power necessary to gain parity in society. Race discrimination in education and employment is still the reality. Consequently, judicial assistance is still needed. In the words of Justice Blackmun:

> I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. . . . In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot — we dare not — let the Equal Protection Clause perpetuate racial supremacy.[155]

Advocates of equality of opportunity in education and employment have not gone unheard. Congress has determined that the recent decisions of the Supreme Court have drastically cut back the scope and effectiveness of civil rights legislation; consequently, existing protection and remedies under federal law are not adequate to deter unlawful discrimination.[156] This finding served as the catalyst for the Civil Rights Bill of 1990[157] which, had it been enacted,[158] would have effectively overturned numerous civil rights opinions rendered by the Supreme Court during the decade of the 1980s.[159]

---

155. *Bakke*, 438 U.S. at 407.

156. S. 2104, 101st Cong., 2d Sess. (1990).

157. *Id.*

158. On October 22, 1990, President Bush vetoed the Civil Rights Bill of 1990, thus becoming the third President to veto a civil rights bill and the first to have such a veto sustained. Proponents of the bill have said that reintroducing the bill early in the 102nd Congress will be their number one priority. *Civil Rights Monitor*, 5 LEADERSHIP CONFERENCE EDUC. FUND 2 (1990).

159. Supreme Court decisions which would have been affected by passage of the

More legislation will not resolve the African-American question. Federal legislation, if enacted, will most likely be subjected to constitutional challenges; thus, the likelihood exists that such legislation will be analyzed in accordance with already established legal standards. In essence, the Supreme Court will ultimately define the parameters of the legislation applying established standards.

Unfortunately, recent decisions rendered by the Court are too reminiscent of the laissez faire attitude which existed within the federal judiciary during the period following reconstruction.[160] These similarities in conduct are too great to be disregarded.

1990 Civil Rights Bill include: Patterson v. McLean Credit Union, 485 U.S. 617 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Martin v. Wilks, 490 U.S. 755 (1989); Lorance v. AT&T Technologies, 490 U.S. 900 (1989).

160. *See supra* notes 26-29 and accompanying text.