

PERSONALITIES AND PARTISANSHIP:
HOW THE REHNQUIST COURT REACHED ITS CIVIL RIGHTS DECISIONS

by

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(Under the Direction of Peter Hoffer)

ABSTRACT

This work focuses on four major areas where the Rehnquist Court affected civil rights: the death penalty, race-based affirmative action, gender-based affirmative action, and minorities' voting rights. Each of these areas will feature one key case – *McCleskey v. Kemp* (1987), *City of Richmond v. J.A. Croson* (1989), *Johnson v. Transportation Agency* (1987), and *Shaw v. Reno* (1993) – and the impact that American politics and the justices' relationships, personalities, and political leanings had on these opinions. These four paradigm cases demonstrate that in the Rehnquist Court's civil rights rulings, the justices narrowly interpreted the Equal Protection Clause and Title VII to issue conservative rulings in racial discrimination cases; yet largely because of Sandra Day O'Connor's different responses to discrimination that women and minorities faced, the Court issued more moderate rulings in gender discrimination cases. In all of these decisions, partisanship played a larger role than the justices' schools of jurisprudence.

INDEX WORDS: Supreme Court, Civil Rights, Death Penalty, Affirmative Action, Voting Rights, William Rehnquist, William Brennan, Byron White, Thurgood Marshall, Harry Blackmun, Lewis Powell, John Paul Stevens, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, David Souter, Clarence Thomas

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Introduction

On March 22, 1988, Justice Sandra Day O'Connor circulated her first draft of the Supreme Court's opinion in *Watson v. Fort Worth Bank & Trust*. In *Watson*, a black woman named Clara Watson sued her employer after her white supervisors had four times denied her a promotion in favor of white employees. There was no irrefutable piece of evidence that, by itself, proved that Fort Worth Bank & Trust had snubbed Watson because of her race. Still, a unanimous Court had concluded in *Griggs v. Duke Power Company* (1971) that if statistical evidence indicated that strong racial disparities existed in employers' hiring and promotion practices, it established *prima facie* evidence that racial prejudice had motivated the employers' decisions.¹ No matter how harmless the employers' practices appeared to be, the Court ruled that this *prima facie* evidence left the burden of proof on the employer to show that he or she had not violated Title VII of the 1964 Civil Rights Act's prohibition of employer discrimination based on "race, color, religion, sex, or national origin."²

Since *Griggs*, the Supreme Court had left the burden of proof on the employer to refute *prima facie* evidence that suggested that he or she had illegally discriminated against his or her employees. Yet in O'Connor's *Watson* draft she argued that in cases like *Griggs* "plaintiffs must demonstrate the functional equivalent of intentional discrimination" to prove that they had

¹ *Griggs v. Duke Power Company*, 401 U.S. 424 (1971).

² The U.S. Equal Employment Opportunity Commission, "Title VII of the Civil Rights Act of 1964," The U.S. Equal Employment Opportunity Commission, <http://www.eeoc.gov/policy/vii.html> (accessed April 1, 2007). FindLaw For Legal Professionals, "U.S. Constitution: Eighth Amendment," FindLaw For Legal Professionals, <http://caselaw.lp.findlaw.com/data/constitution/amendment08/> (accessed March 25, 2007).

suffered unlawful prejudice in the workplace.³ Despite this obvious mischaracterization of precedent, Justices Byron White – who had joined the *Griggs* opinion in 1971 – and Antonin Scalia quickly announced that they agreed with O’Connor and signed onto her opinion.⁴ Among the Court’s conservative bloc, only Chief Justice William Rehnquist told O’Connor to change her error before he joined.⁵ Still, Rehnquist left no doubt that he wanted to scale back *Griggs*’ requirements.⁶ Over the liberals’ objections, *Watson* established an important precedent for future Supreme Court rulings that demolished numerous race-based affirmative action plans and made it almost impossible for petitioners to prove that they had experienced racial discrimination.

Though few historians, lawyers, and political scientists have discussed *Watson*, they have written a great deal about the impact of the United States Supreme Court on America’s race relations both during and after the civil rights movement. Many of these scholars, such as Richard Kluger and Michael Klarman, have argued that the Warren Court employed broad interpretations of the Fourteenth Amendment’s Equal Protection Clause and Title VII of Congress’ 1964 Civil Right Act to root out state-mandated segregation in America.⁷ Others,

³ Box 502, File 4, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C, 22 March 1988.

⁴ Box 502, File 4, Blackmun Papers, 25 March 1988; 30 March 1988.

⁵ Admittedly, labels such as liberal, moderate, and conservative can be inadequate for justices. For the purposes of this writing, a “liberal” justice will be one whose votes favor the beliefs traditionally found in the Democratic Party, such as anti-death penalty, pro-affirmative action, pro-minority opportunity districts, and pro-choice. A “conservative” justice will be one whose votes tend to support views that are pro-death penalty, anti-affirmative action, anti-minority opportunity districts, and pro-life. A “moderate” justice will be one who falls in between “liberal” and “conservative.”

⁶ Box 502, File 4, Blackmun Papers, 1 April 1988.

⁷ Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality*, (New York: Alfred A. Knopf, 1976).

Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*, (New York: Oxford University Press, 2004).

such as James Patterson and Charles Ogletree, Jr., have examined the Burger Court and concluded that its justices issued moderate rulings in civil rights cases.⁸

Yet fewer historians have examined the impact of the Rehnquist Court on civil rights in America. Those who have examined the Rehnquist Court have concluded that its justices narrowly interpreted the Equal Protection Clause and Title VII in race discrimination cases.⁹ Simply put, the Rehnquist Court limited minorities' access to race-conscious remedies. On the other hand, these historians have concluded that the Rehnquist Court reached different conclusions in gender discrimination cases. In these decisions, the justices issued more moderate opinions and allowed women greater access to gender-conscious remedies.

Yet since each of these scholars published his work, the papers of Justice Harry Blackmun, who served on the Court with Rehnquist from 1971 until 1994, became available to the public. Blackmun's papers contain a wealth of information. He saved everything, from his notes on every case he heard as a Justice to a memo that Potter Stewart wrote where he told Blackmun about both Spiro Agnew's resignation and the score of a baseball game.¹⁰ By examining this rich resource – as well as the Papers of Justices William Douglas, Robert Jackson, William Brennan, Thurgood Marshall, and Lewis Powell, the briefs and published opinions from several cases, and outside writings that justices have published – it becomes easier

⁸ James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy*, (Oxford: Oxford University Press, 2001).

Charles J. Ogletree, Jr., *All Deliberate Speed: Reflections of the First Half Century of Brown v. Board of Education*, (New York: Norton, 2004).

⁹ Edward P. Lazarus, *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court*, (New York: Times Books, 1998).

Tinsley E. Yarbrough, *Race and Redistricting: The Shaw-Cromartie Cases*, (Lawrence: University of Kansas Press, 2002).

Peter Irons, *Brennan v. Rehnquist: The Battle for the Constitution*, (New York: Alfred A. Knopf, 1994).

Patterson, *Brown v. Board of Education*.

¹⁰ Box 116, File 2, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C.

to demonstrate why each justice ruled the way he or she did in the Rehnquist Court's major civil rights cases, as well as the importance, impact, and rationale of these decisions.

Thus, these sources explain why in 1971 the Supreme Court had agreed on a unanimous ruling in an important civil rights case, but by 1988 three justices were willing to publish an opinion that grossly distorted what that unanimous ruling had declared. This change occurred in large part because during the 1970s and 80s the Court's liberal and conservative wings had developed an angry and contentious relationship.

Chapter one of this work will demonstrate that this divide developed through the justices' death penalty deliberations. Though the Court had narrowly placed a moratorium on the death penalty in America with its ruling in *Furman v. Georgia* (1972), four years later in *Gregg v. Georgia* (1976) a seven-to-two Court allowed states to reinstitute the death penalty so long as the states did so in a fair and consistent manner. Yet Thurgood Marshall and William Brennan – the two dissenters in *Gregg* – maintained that all forms of the death penalty violated the Eighth Amendment's prohibition of "cruel and unusual punishment."¹¹

Marshall and Brennan adamantly opposed the death penalty. They tried to force the Court to hear every death penalty appeal possible, and with the help of John Paul Stevens and Harry Blackmun, often succeeded. Yet the other members of the Court viewed many of these cases as a waste of time. They became angry with what they felt were Marshall and Brennan's frivolous votes to end the death penalty, and so the Court engaged in little debate in these cases. In short, Marshall and Brennan caused a backlash within the Court. As a result, when the justices heard *McCleskey v. Kemp* during William Rehnquist's first term as Chief Justice, the

¹¹ FindLaw For Legal Professionals, "U.S. Constitution: Eighth Amendment," FindLaw For Legal Professionals, <http://caselaw.lp.findlaw.com/data/constitution/amendment08/> (accessed March 25, 2007).

conservatives were unwilling to place any restrictions on the state of Georgia's application of the death penalty even though they issued an opinion inconsistent with *Griggs*.

Chapter two demonstrates that *McCleskey v. Kemp* established a precedent and divide among the justices that the Court applied to race-based affirmative action and discrimination cases, in particular *Watson* and *City of Richmond v. J.A. Croson Company* (1989). In *Croson* both the majority and dissenters issued votes based on their political beliefs and not their normal methods of Constitutional interpretation. This ruling placed almost impossible burdens on states' abilities to create and enact affirmative action plans. In later terms, the Court applied these same standards to federal affirmative action plans.

Chapter three examines the Court's approach to gender-based discrimination and affirmative action cases. In these cases, the justices also voted in accordance with their political beliefs more so than their normal methods of jurisprudence. Yet the Court proved far more willing to approve gender-based affirmative action plans than race-based ones, and in *Johnson v. Transportation Agency* (1987), the Court produced an opinion incompatible with its ruling in *McCleskey* that same term. Sandra Day O'Connor was the main reason for these wildly inconsistent rulings. The gender discrimination she experienced throughout her life allowed her to empathize with women more easily than she could with minorities. As a result, she proved more willing to approve rulings that helped and protected women than ones that did so for minorities.

The Court's voting rights cases, however, followed the same pattern as its death penalty and race-based affirmative action cases, as chapter four demonstrates. As exemplified by the justices' deliberations and opinions in *Shaw v. Reno* (1993), the justices departed from

established precedents and their typical styles of Constitutional interpretation in voting rights cases. Once again, partisanship dominated a Rehnquist Court civil rights ruling.

This work makes no claims about the Rehnquist Courts rulings as a whole. Abortion, the environment, property rights, and many other key subjects that the Supreme Court examines have almost no place in this writing. However, this work focuses on four major areas where the Rehnquist Court affected civil rights: the death penalty, race-based affirmative action, gender-based affirmative action, and minorities' voting rights. Each of these areas will feature one key case – *McCleskey v. Kemp* (1987), *City of Richmond v. J.A. Croson* (1989), *Johnson v. Transportation Agency* (1987), and *Shaw v. Reno* (1993) – and the impact that American politics and the justices' relationships, personalities, and political leanings had on these opinions. These four paradigm cases demonstrate that in the Rehnquist Court's civil rights rulings, the justices narrowly interpreted the Equal Protection Clause and Title VII to issue conservative rulings in racial discrimination cases; yet largely because of Sandra Day O'Connor's different responses to discrimination that women and minorities faced, the Court issued more moderate rulings in gender discrimination cases. In all of these decisions, partisanship played a larger role than the justices' schools of jurisprudence.

Chapter 1

“A Fear of Too Much Justice” :

McCleskey v. Kemp and the Death Penalty

On September 21, 1991, the state of Georgia executed an African American man named Warren McCleskey. This punishment was a response to his murder of Frank Schlatt, a white police officer, who McCleskey had murdered thirteen years earlier during an armed robbery of an Atlanta Winn-Dixie with three other men. During the robbery, on May 13, 1978, McCleskey's accomplices entered the store through its back entrance while he guarded the front door and made the store's customers lie on the floor. Shortly afterward, Schlatt entered through the front door. McCleskey shot and killed him.

On October 12, 1978, an Atlanta trial court sentenced McCleskey to death. He appealed his death sentence, and on October 15, 1986, the United States Supreme Court heard the appeal in *McCleskey v. Kemp*. McCleskey's lawyers based their appeal on a sophisticated study of Georgia murder trials that David Baldus, a University of Iowa law professor, had conducted to argue that the death penalty was racially discriminatory. Baldus' comprehensive study showed that a certain range of defendants who killed a white person were more likely to die for their crime than those who had murdered a black one. Numerous statisticians accepted the validity of the study, and since 1971 the Court had demanded that statistical evidence that a petitioner experienced racial discrimination require the defendant to show that he had not discriminated against the petitioner. On April 22, 1987, however, the justices rejected McCleskey's appeal in a five-to-four decision.

From 1953 until 1969, Chief Justice Earl Warren guided several rulings in which the Supreme Court employed broad interpretations of the Equal Protection clause and Title VII of the 1964 Civil Rights Act to eliminate state-mandated segregation in America. Then through 1986 under Warren Burger, the Court limited some remedies that minorities could seek in response to racial discrimination that they experienced. But they also issued several opinions in which they continued the Warren Court's commitment to racial justice. Less than a month before the Court heard *McCleskey*, William Rehnquist became the sixteenth Chief Justice of the Supreme Court. During Rehnquist's tenure as Chief Justice, he led the Court into a conservative era and delivered several decisions that departed from Warren and Burger Court precedents.¹² Scholars have argued that, by the end of Rehnquist's second term as Chief Justice, decisions like *Wards Cove Packing v. Atonio* (1989) and *City of Richmond v. J.A. Croson Co.* (1989) marked the end of the Court's commitment to racial equality.¹³

But evidence indicates that the Supreme Court's active support of civil rights actually ended during Rehnquist's first term as Chief Justice with the Court's ruling in *McCleskey v. Kemp*. When the Court ruled against *McCleskey*, the justices argued that the Baldus study could not prove that racial discrimination had led to *McCleskey*'s death sentence. In doing so, the Court placed a heavy burden on future petitioners that required them to prove that statistical evidence of a racially discriminatory system applied specifically to them. The Court's opinions in *Wards Cove* and *Croson* also put a challenging responsibility on petitioners to show that they

¹² Edward P Lazarus, *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court*, (New York: Times Books, 1998), 7-8.

Peter Irons, *Brennan v. Rehnquist: The Battle for the Constitution*, (New York: Alfred A. Knopf, 1994), ix. Patterson, *Brown v. Board of Education*, xxviii.

But see James F. Simon, *The Center Holds: The Power Struggle Inside the Rehnquist Court*, (New York: Simon & Schuster, 1995), 12, 14-15 for a more moderate depiction of the Rehnquist Court's civil rights rulings.

¹³ Theodore Y. Blumoff and Harold S. Lewis, Jr., "The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task," *North Carolina Law Review*, 69, no. 1 (1989), 3.

Michel Rosenfeld, "Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality," *Michigan Law Review*, 87, no. 7 (1989), 1731.

suffered racial prejudice, this time in cases dealing with affirmative action and workplace discrimination. *Wards Cove* and *Croson* directly overruled older civil rights precedents that the Court had upheld through Burger's final term as Chief Justice.

Legal analysis did influence this departure from precedent and the Court's opinion in *McCleskey*. Yet statistics, previous Court rulings, and in-depth profiles of each justice demonstrate that, more than anything else, the justices' political and personal views led to the *McCleskey* ruling that overruled *Griggs v. Duke Power Company* (1971) – an important civil rights precedent that the Burger Court issued – and that *McCleskey* established precedent and rationale for later rulings on civil rights issues.

* * *

Almost fifty years before *McCleskey*, the Supreme Court began to play a major role in civil rights initiatives. In *United States v. Carolene Products* (1938), Justice Harlan Fiske Stone noted in the famous Footnote 4 of the decision that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”¹⁴ In other words, Stone recognized that the Supreme Court might have to act without mandate from the Legislature in order to protect the rights of minorities.

Gradually, the Court began to follow Stone's suggestion. While the Executive and Legislative Branches did little, in several landmark cases during the 1940s and 50s the Supreme Court took an active role in granting blacks the freedoms that the Constitution promised them.¹⁵

¹⁴ *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

¹⁵ In 1944, the Justices ruled in *Smith v. Allwright* that the Democratic Party could not exclude blacks from its primary elections. Then in 1950, Chief Justice Frederick Vinson announced the Court's unanimous rulings in *Sweatt v. Painter* and *McLaurin v. Oklahoma State Regents for Higher Education*. In *Sweatt*, the Justices stated that

Then on May 17, 1954, the Court issued its landmark, unanimous ruling in *Brown v. Board of Education*. In part because of evidence from psychological studies that suggested that segregated schools harmed black children, newly appointed Chief Justice Earl Warren announced that segregated public schools were unconstitutional.¹⁶ This would be the first of many rulings in which the Warren Court would use a broad definition of the Equal Protection clause to root out state mandated segregation in America. In cases like *Cooper v. Aaron* (1958), *Boydton v. Virginia* (1960), and *Green v. New Kent County School Board* (1968), Earl Warren and his Court unanimously demonstrated a strong commitment to racial justice when they saw minorities experiencing intentional discrimination like exclusion from schools, stores, or seats on a bus.

In 1969, President Richard Nixon appointed Warren Burger to replace Earl Warren as Chief Justice. Burger and Nixon had long criticized the “judicial activism” behind Warren’s rulings and argued the Supreme Court should issue opinions based on the literal text of the Constitution and Congressional Acts and show greater deference to Congress. Over the next two years, the Senate confirmed three more Nixon appointees to the Court. Harry Blackmun, William Rehnquist, and Lewis Powell replaced Abe Fortas, John Marshall Harlan, and Hugo Black. As a result, most observers at that time expected the Burger Court to depart from the Warren Court’s active pursuit of racial justice. In some cases, the Court did so.¹⁷ But Burger often proved unable to lead his Court in a new direction, and so in several other decisions, the

a separate law school for blacks located in the basement of the University of Texas Law School was a poor substitute for the main law school itself. In *McLaurin*, the Court ruled that the University of Oklahoma could not require a black graduate student to sit in a roped off seat in the cafeteria or in a desk located outside his classroom. With these cases, the Court began enforcing its requirement that separate facilities be equal.

¹⁶ Scholars such as James Patterson have noted the flawed methodology behind these studies. Still, Patterson and others recognize that segregation had harmful intangible effects on blacks.

¹⁷ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

Milliken v. Bradley, 418 U.S. 717 (1974).

Washington v. Davis, 426 U.S. 229 (1976).

Burger Court used an expanded interpretation of the Equal Protection clause and Title VII to protect the rights of minorities.

For instance, in *Griggs v. Duke Power Co.*, the Duke Power Company argued that its company policy that required new hires to have high school diplomas and perform well on certain intelligence tests did not discriminate against blacks even though few blacks met these requirements. The company claimed that it would hire more blacks if it found more who satisfied these standards. But Burger authored the Court's unanimous opinion and declared that Title VII of the 1964 Civil Rights Act required that "because a disproportionate number of Negroes was rendered ineligible for promotion, transfer, or employment, the requirements were unlawful unless shown to be job related."¹⁸ That few blacks met these requirements placed the burden of proof on the Duke Power Company to show that it not discriminate against potential black employees. The Court felt that the company did not meet its burden of proof and thus declared the job requirements to be unconstitutional. Thus, beginning with *Griggs*, the Supreme Court declared that if a petitioner presented aggregate statistical evidence that indicated that he or she had suffered racial discrimination as part of a pattern of such discrimination, the defendant bore the burden of proving that this discrimination had not occurred. The petitioner did not have to show a specific instance of intentional discrimination.

The Court continued to enforce *Griggs* throughout Burger's tenure as Chief Justice. In his final term, the justices unanimously declared in *Bazemore v. Friday* that multiple regression statistics showed that racial discrimination had caused the North Carolina Agricultural Extension Service to pay black employees less than whites.¹⁹ And with only Burger and Rehnquist dissenting, they ruled in *Batson v. Kentucky* that since no contrary proof existed, racial prejudice

¹⁸ *Griggs v. Duke Power Company*, 401 U.S. 424 (1971).

¹⁹ *Bazemore v. Friday*, 478 U.S. 385 (1986).

motivated the prosecutor to exclude all the eligible blacks from James Batson's jury.²⁰ This, the Court determined, was unconstitutional.

Yet the Burger Court did not just issue key civil rights rulings – it also delivered several important death penalty decisions. *Furman v. Georgia* (1972) placed a moratorium on the death penalty in the United States, as the Court felt that states did not execute prisoners through a fair or reliable method. As Potter Stewart noted in his opinion, the petitioners in *Furman* were “among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”²¹ In other words, the Court's majority refused to allow such a harsh form of punishment to exist without any consistency behind its application. Yet most of the justices deliberated long and hard before reaching their decisions. Larry Hammond, one of Lewis Powell's clerks that term, noted that Harry Blackmun agonized between what he saw as “the sure knowledge that capital punishment does not offend the constitution...and the nonjudicial instinct that tells us that overruling the death penalty might be one of the great humanitarian acts of this Century.”²² Byron White felt so stressed that he could not carry out his decision to quit smoking.²³ And Potter Stewart voted in favor of the moratorium in part because the idea of casting the deciding vote to kill hundreds of death row prisoners terrified him.²⁴

Then in 1976, the Court lifted that moratorium in its five “Death Penalty Cases,” most notably *Gregg v. Georgia*, and declared that states could sentence defendants to death as long as the states used a consistent and reasonable method of doing so.²⁵ While most of the justices

²⁰ *Batson v. Kentucky*, 476 U.S. 79 (1986).

²¹ *Furman v. Georgia*, 408 U.S. 238, 257 (1972).

²² 69-5003 *Furman v. Georgia*, Supreme Court Case Files, Lewis F. Powell, Jr. Papers, Powell Archives, Washington and Lee University School of Law,

²³ Dennis J. Hutchinson, *The Man Who Was Whizzer White: A Portrait of Justice Byron R. White*, (New York: The Free Press, 1998), 381.

²⁴ Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court*, (New York: Simon and Schuster, 1979), 209, 216.

²⁵ *Gregg v. Georgia*, 428 U.S. 153 (1976).

vowed that they would “never change [their] 1972 view[s]” on the death penalty, Potter Stewart, Lewis Powell, and John Paul Stevens worked to reach common ground.²⁶ The three centrists controlled these rulings, as Powell noted that “The development of the analysis for all five opinions...was a joint effort of the Powell, Stewart, and Stevens chambers.”²⁷ Together they determined that Georgia, Florida, and Texas had instituted adequate safeguards to impose the death penalty. They felt that North Carolina and Louisiana had not, however, and so the moratorium should remain in those states. Only Marshall and Brennan concluded that the death penalty would always violate the Eighth Amendment’s prohibition of cruel and unusual punishment and be unconstitutional in every form.

The following year, the Court continued to push for the safeguards that it demanded in *Furman*. In a seven-to-two decision, the justices declared in *Coker v. Georgia* (1977) that although rape was a heinous crime, death was a “grossly disproportionate and excessive punishment” for rapists.²⁸ Then in *Gardner v. Florida* (1977), the justices “recognized that death is a different kind of punishment from any other and that the sentencing process, as well as the trial itself, must satisfy due process.”²⁹ Thus, the Court invalidated a death sentence that a trial judge reached based on confidential information that the defendant had no chance to counter. And in *Zant v. Stephens* (1983), the justices declared that if the defendant or victim’s race in any way led to a death sentence, that death sentence would be unconstitutional.³⁰ In these and other cases, the Court took care to insure that states did not apply the death penalty “wantonly and...freakishly,” as Potter Stewart demanded in *Furman*.³¹

²⁶ 74-6257 *Gregg v. Georgia*, Supreme Court Case Files, Lewis F. Powell, Jr. Papers, Powell Archives, 2 April 1976.

²⁷ 74-6257 *Gregg v. Georgia*, Lewis F. Powell, Jr. Papers, 12 July 1976.

²⁸ *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

²⁹ *Gardner v. Florida*, 430 U.S. 349 (1977).

³⁰ *Zant v. Stephens*, 462 U.S. 862 (1983).

³¹ *Furman v. Georgia*, 408 U.S. 238, 310 (1972).

Yet while the justices appeared to be working together to ensure that states imposed the death penalty in a fair and reasonable manner, the centrists' efforts to form a lasting consensus for death penalty cases collapsed almost immediately after *Gregg*. Shortly after the decision, Powell allowed the petitioners from Georgia, Florida, and Texas to delay their executions so they could pursue the appeals they filed in lower courts. When Powell told Burger that he might allow this delay, "Burger's reaction was instant and explosive. He professed astonishment that [Powell] had given even a second thought to the mandate."³²

Then in *Gardner*, Marshall refused to compromise with the other justices. Everyone but Rehnquist agreed that the petitioner in *Gardner* had received an unconstitutional death sentence. Because they opposed the death penalty in all circumstances, Marshall and Brennan planned to dissent from the majority's decision to remand the case to the Florida Supreme Court. But in an effort to build consensus among the justices, Stevens sent Brennan and Marshall a letter in which he asked them to join his opinion and promised to make the two liberals' complete opposition to the death penalty clear. Stevens wrote to Marshall and Brennan that while "this suggestion may be wholly unacceptable. I put it forth only because I think it is important to obtain a Court opinion on the procedural issue if at all possible."³³ After all, Brennan and Marshall agreed that the death sentence was unconstitutional. If they joined, they could give the Court a larger majority in judgment and still assert their views.³⁴ Brennan compromised and issued an opinion where he concurred in judgment, but Marshall stubbornly stuck with his dissent and refused to join his brethren.

³² 74-6257 *Gregg v. Georgia*, Lewis F. Powell, Jr. Papers, 26 July 1976.

³³ Box 193, File 8, Thurgood Marshall Papers, Manuscript Division, Library of Congress, Washington, D.C., 14 March 1977.

³⁴ Most scholars agree that larger majorities are good for the Court, as they make the rulings more authoritative and easier to enforce.

Marshall did not just separate himself from the other justices in *Gardner* – in every death penalty case after *Gregg*, he and Brennan took turns issuing powerful writings where they announced their belief that any application of the death penalty would be unconstitutional. They also voted to hear appeals in almost every death penalty case that a petitioner presented to the Court. As Blackmun and Stevens slid to the left, they often joined Marshall and Brennan. But while Brennan served as a key consensus builder who won victories for the liberal bloc in many of the Burger Court’s civil rights cases, he rarely could persuade any of the conservatives to side with the liberal stalwarts in death penalty cases. Marshall and Brennan’s uncompromising abolitionist views angered the conservatives too much for Brennan’s affable personality to win many majorities there.

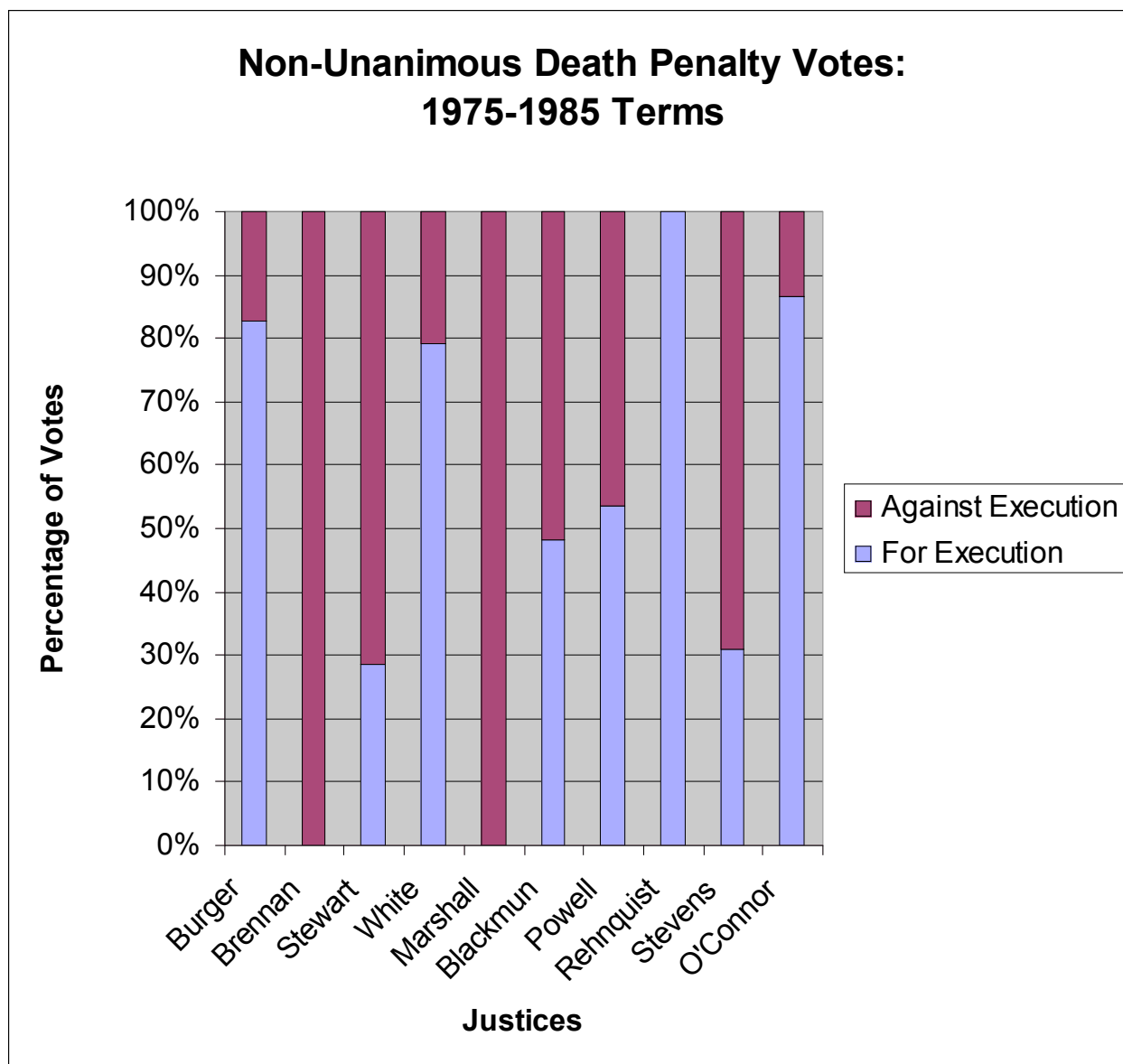
And while the Court must hear a case when four justices vote to do so, five justices determine the Court’s final ruling. For this reason, the Supreme Court heard many death penalty cases where the liberals hoped for a ruling that the conservatives had no intention of granting. For instance, during Burger’s final term as Chief Justice, Lewis Powell reluctantly sided with the liberal bloc to delay Willie Darden’s execution until the Court heard his appeal.³⁵ Powell voted to stay even though he saw “no merit whatever in any of the claims advanced in the petition” and noted that Darden had exhausted numerous appeals. In a rare public display of frustration over the Court’s decision to issue a stay, Burger issued an angry dissent. As expected, the Court denied Darden’s appeal by a five-to-four vote.³⁶ This frustrated the conservatives, as they felt that death penalty cases like *Darden* clogged the Court’s docket and wasted the justices’ time. In short, beginning with *Gregg*, the Court’s death penalty cases divided the justices. For the most

³⁵ *Darden v. Wainwright*, 473 U.S. 928 (1985).

³⁶ *Darden v. Wainwright*, 477 U.S. 168 (1986).

part, they were unwilling to compromise and voted almost completely in line with their political views on the death penalty, as the chart below indicates:

Table 1.1



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³⁷ The Oyez Project, Oyez: Cruel and Unusual Punishment, Death Penalty, available at: http://www.oyez.org/issues/index_html?group=criminal-procedure&term=cruel-death (last visited November 24, 2006).

Brennan, Marshall, and Rehnquist – and to a lesser extent Burger, White, and O’Connor – had almost always voted in accordance with their political ideologies from the moment the Court heard *Gregg*, Stewart, Powell, Blackmun, and Stevens proved more willing to deliberate their votes. Yet by the 1986 term, each justice established him or herself as consistently opposed to or in favor of the death penalty, as the tables below show:

Votes In Favor of Execution

Table 1.2

	Burger	Brennan	Stewart	White	Marshall
1975	5/5	0/5	3/5	5/5	0/5
1976	3/4	0/4	1/4	2/4	0/4
1977	0/2	0/0	0/2	0/2	0/2
1978	0/0	0/0	0/0	0/0	0/0
1979	1/3	0/3	0/3	2/3	0/3
1980	0/0	0/0	0/0	0/0	0/0
1981	4/4	0/4	N/A	3/4	0/4
1982	4/4	0/4	N/A	4/4	0/4
1983	2/2	0/2	N/A	2/2	0/2
1984	2/2	0/2	N/A	2/2	0/2
1985	3/4	0/4	N/A	3/4	0/4
Total	24/30	0/28	4/14	23/30	0/30
Percentage	80.00%	0.00%	28.57%	76.67%	0.00%
Total Without Unanimous Cases	24/29	0/27	4/14	23/29	0/29
Percentage Without Unanimous Cases	82.76%	0.00%	28.57%	79.31%	0.00%

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³⁸ Ibid.

Votes In Favor of Execution

Table 1.3

	Blackmun	Powell	Rehnquist	Stevens	O'Connor
1975	5/5	3/5	5/5	3/5	N/A
1976	2/4	1/4	4/4	0/4	N/A
1977	0/2	0/2	2/2	0/2	N/A
1978	0/0	0/0	0/0	0/0	N/A
1979	0/3	0/3	3/3	0/3	N/A
1980	0/0	0/0	0/0	0/0	N/A
1981	3/4	2/4	4/4	2/4	3/4
1982	1/4	4/4	4/4	3/4	4/4
1983	2/2	2/2	2/2	1/2	2/2
1984	1/2	1/1	2/2	0/2	1/2
1985	0/4	2/4	3/4	0/4	3/4
Total	14/30	15/29	29/30	9/30	13/16
Percentage	46.67%	51.72%	96.67%	30.00%	81.25%
Total Without Unanimous Cases	14/29	15/28	29/29	29-Sep	13/15
Percentage Without Unanimous Cases	48.28%	51.72%	100.00%	31.03%	86.67%

³⁹

Yet to the public, the Court's rulings as steps that might lead to a ruling in which the justices abolished the death penalty once and for all.⁴⁰ So in 1980, the NAACP Legal Defense Fund (LDF) began its effort to eliminate the death penalty in the United States. That year, the organization approached David Baldus, George Woodworth, and Charles Pulaski, Jr. and asked them to conduct a study that the LDF could use in their efforts. Baldus was a law professor at the University of Iowa, Woodworth was a statistics professor there, and Pulaski was a law professor at Arizona State University College of Law. The professors agreed to undertake the study. They examined the state of Georgia's death penalty system, and by 1982, they had found

³⁹ Ibid.

⁴⁰ David C. Baldus, George Woodworth, and Charles A. Pulaski, Jr., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis*, (Boston: Northeastern University, 1990), 308.
Brief for Petitioner at 76-77, *McCleskey v. Kemp*, 481 U.S. 279 (1987).

enough data to suggest that Georgia applied the death penalty in an arbitrary and racially discriminatory manner.⁴¹

In the study, Baldus and his team examined the 2,484 murder trials that took place in Georgia between 1973 and 1979. Using multiple regression analysis, the researchers examined the effects of 39 variables on whether or not a prosecutor sought the death penalty in a case and if a jury voted to execute a defendant.⁴² Baldus and the others provided extensive training to law students so the law students could use a detailed questionnaire to code each sentence for the level of aggravation that had occurred during the murder.⁴³ They set low levels of aggravation for murders where, for example, a woman killed her abusive husband. A high level of aggravation, on the other hand, would occur in instances such as a murderer raping his victim before he killed her.⁴⁴ The Baldus study impressed numerous statisticians, including Professor Richard Berk, who examined the study for National Academy of Sciences. Berk wrote that the Baldus study had:

[V]ery high credibility, especially compared to the studies that [the National Academy of Sciences] reviewed. We reviewed hundreds of studies on sentencing...and there's no doubt that at this moment, this is far and away the most complete and thorough analysis of sentencing that's been done. I mean there's nothing even close.⁴⁵

Through his impressive study, Baldus found that the race of the murderer did not determine whether or not a state executed the criminal. And at instances of low or high aggravation, the race of the victim had no real effect as to whether or not a defendant received the death penalty. But at a mid-range of aggravation, the victim's race mattered. As Baldus

⁴¹ The researchers chose Georgia in part because other key death penalty cases like *Furman v. Georgia* (1972), *Gregg v. Georgia* (1976), and *Coker v. Georgia* (1977) had originated there.

⁴² They examined over 230 but published the 39 most relevant ones.

Baldus, Woodworth, and Pulaski, *Equal Justice and the Death Penalty*, 457-8.

⁴³ Baldus and the coding supervisor often double-checked the law students' coding.

Baldus, Woodworth, and Pulaski, *Equal Justice and the Death Penalty*, 452.

⁴⁴ Baldus, Woodworth, and Pulaski, *Equal Justice and the Death Penalty*, 314-326.

⁴⁵ As quoted in Baldus, Woodworth, and Pulaski, *Equal Justice and the Death Penalty*, 452.

explained, “[I]n the midrange of cases, where McCleskey’s case is located, there was a concentration of race-of-victim disparities on the order of from 11 to 29 percentage points, the best estimate being 17.”⁴⁶ In other words, someone who had killed a white person was significantly more likely to die for his crime than someone who had killed a black person, especially if the murderer were black, as the table below demonstrates:

Georgia’s Death Penalty Post-*Furman*

Table 1.4

Unadjusted race-of-victim and race-of-defendant disparities in death-sentencing rates, among all murder and voluntary manslaughter cases, post- <i>Furman</i> Georgia.		
		Death-sentencing rates and disparities
I.	<i>Race of victim effects</i>	
	White-victim cases (WV)	.11 (108/981)
	Black-victim cases (BV)	.0133 (20/1503)
	Difference (WV-BV)	10 points
	Ratio (WV/BV)	8.3
II.	<i>Rate-of-defendant effects</i>	
	Black-defendant cases (BD)	.04 (68/1676)
	White-defendant cases (WD)	.07 (60/808)
	Difference (BD-WD)	-3 points
	Ratio (BD/WD)	.57
III.	<i>Defendant/victim racial composition</i>	
	Black defendant/white victim (B/W)	.21 (50/233)
	White defendant/white victim (W/W)	.08 (58/748)
	Black defendant/black victim (B/B)	.01 (18/1443)
	White defendant/black victim (W/B)	.03 (2/60)
	All cases	.05 (128/2484)

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To put this data in perspective, the LDF’s brief to the Supreme Court in *McCleskey* noted that “[S]moking cigarettes increases the risk of death from heart disease greatly, but by a considerably smaller account than the race-of-victim effect” that Baldus found.⁴⁸

⁴⁶ Baldus, Woodworth, and Pulaski, *Equal Justice and the Death Penalty*, 321.

⁴⁷ David C. Baldus, George Woodworth, and Charles A. Pulaski, Jr., “Law and Statistics in Conflict: Reflections on *McCleskey v. Kemp*” in *Handbook of Psychology and Law*, ed. Dorothy K. Kagehiro and William S. Laufer. (New York: Springer-Verlag, 1992), 258.

The LDF used the data from Baldus' study to appeal several death sentences. And on October 8, 1982, the District Court in Atlanta agreed to hear the appeal in one of these cases. In that appeal, the LDF would try to save Warren McCleskey's life and eliminate the death penalty in America. But while previous petitioners tended to base their death penalty appeals on the Fourteenth Amendment's Due Process clause, the LDF claimed that the racism behind Georgia's application of the death penalty violated McCleskey's rights as guaranteed by the Equal Protection clause. In doing so, the organization framed *McCleskey* as a civil rights case and hoped that this would persuade the judges to abolish the death penalty.

But in 1984, the District Court rejected McCleskey's appeal, as Judge J. Owen Forrester refused to accept the validity of Baldus' study. Thus, Forrester argued that McCleskey did not show that racial discrimination led to his death sentence.⁴⁹ And while in 1985, the Eleventh Circuit Court of Appeals did accept Baldus' results, in a nine-to-three ruling the judges still denied McCleskey's appeal. As far as they were concerned, statistics could not *prove* that race was the reason that McCleskey received the death penalty. After all, statistics can just guarantee that a strong correlation, not causation, exists. Thus, the Court of Appeals declared that "based on the data there was only a *possibility* that a racial factor existed in McCleskey's case."⁵⁰ The judges affirmed the lower court's ruling.

Then on June 26, 1986, Brennan, Marshall, Blackmun, and Stevens voted to hear Warren McCleskey's appeal over Burger, White, Powell, Rehnquist, and O'Connor's objections. Since by that time the justices' positions on the death penalty had hardened, the voting breakdown

⁴⁸ Brief for Petitioner at 65, *McCleskey v. Kemp*.

⁴⁹ *McCleskey v. Zant*, 580 F. Supp. 338 (1984).

For a strong critique of this ruling see Baldus, Woodworth, and Pulaski, *Equal Justice and the Death Penalty*, 450-478.

⁵⁰ *McCleskey v. Kemp*, 753 F.2d 877, 887 (1985).

surprised no one, and Powell noted “As predicted!” in his private papers.⁵¹ But since four justices can force the Court to hear any case, on October 15, 1986, the United States Supreme Court heard Warren McCleskey’s appeal. As Justice William Brennan would later write, “At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die.”⁵² Brennan noted that “A candid reply to this question would have been disturbing.”⁵³ After all, Baldus’ study demonstrated that, out of all the aspects of McCleskey’s crime, none mattered more than the race of his victim. If McCleskey had killed a black man, he might have lived. But Warren McCleskey had shot a white man, and for that, he would likely die.

Surely a jury should punish a murderer for his crime. Few people would argue otherwise. But Baldus’ study showed that “When flexible juries use their discretion to impose the ultimate penalty, the lives of victims who happen to be black are simply worth less.”⁵⁴ The LDF asked the Supreme Court to acknowledge this gross violation of the Equal Protection Clause in an attempt to save Warren McCleskey’s life.

Yet *McCleskey* concerned much more than the life of one man. It provided a chance for the Legal Defense Fund to end or at least severely limit the application of the death penalty because of its discriminatory nature. As one clerk from the 1986 term observed, “Around the building, I think everyone saw *McCleskey* as the biggest case of the year...It was an all-or-nothing case.”⁵⁵

⁵¹ 84-6811 *McCleskey v. Kemp*, Powell Papers, 26 June 1986.

⁵² *McCleskey v. Kemp*, 481 U.S. 279, 321 (1987).

⁵³ *Ibid.*

⁵⁴ Stephen Carter, “When Victims Happen to Be Black,” *The Yale Law Journal*, 97, no. 3 (1988), 444.

⁵⁵ David G. Savage, *Turning Right: The Making of the Rehnquist Supreme Court*, (New York: John Wiley & Sons, 1992), 83.

McCleskey would have a profound impact on both the death penalty and the Rehnquist Court's future decisions regarding race, as the justices might have abolished the death penalty in America if they found that racial prejudice affected its application in Georgia. The Warren Court almost certainly would not have let the state of Georgia execute Warren McCleskey. The Burger Court might have agreed. But how would the Rehnquist Court apply its legal interpretations to issues of racial justice?

With this question in mind, John Charles Boger of the LDF stood before the Court on October 15 to offer his argument. During oral arguments, the petitioner and the defense each have thirty minutes to speak. The justices may interrupt and ask questions at any time, and these questions count as part of the lawyers' time limit. At 10:01 AM, Rehnquist announced, "Mr. Boger, you may proceed when you are ready."⁵⁶ The most important case of Rehnquist's first term as Chief Justice had begun – Boger had thirty minutes to persuade the justices that racial discrimination made Georgia's application of the death penalty unacceptable.

Boger noted that *Furman* and other cases required that race have no relevance as to whether or not a defendant received the death penalty. Yet he pointed out that under Georgia's current death penalty system, a black defendant accused of killing a white person "goes through as serious a handicap against him on racial grounds alone as if the prosecutor had hard evidence that he had been tried and convicted previously of another murder."⁵⁷ The Baldus study showed that race played an important role in determining whether or not Georgia executed a person, and the Constitution prohibited this.

Justices tend to ask questions within a minute or two after a lawyer begins his or her argument. But in this case the justices remained silent and listened to Boger speak for more than

⁵⁶ The Oyez Project, Oyez: *McCleskey v. Kemp*, 481 U.S. 279 (1987), available at: <<http://www.oyez.org/oyez/resource/case/233/>> (Last visited May 01, 2006)

⁵⁷ *Ibid.*

six-and-a-half minutes until Justice Byron White asked, “Who took the information from those sources [for the study]?”⁵⁸ After a series of exchanges between the Boger and the justice, White noted that law students, not actual lawyers, obtained the information on which Baldus based his statistics. In response to White’s concerns about the reliability of the evidence that the students collected, Boger pointed out that the students received extensive guidance in gathering this information. He also reminded White that Baldus had added several variables to his study based on the concerns of the District Court, and these changes still showed that the race of the murder victim played an important role in a defendant’s death sentence. Thus, Baldus had produced a reliable and objective study that supported Boger’s argument.

A bit past the twelve minute mark, Justice Sandra Day O’Connor asked Boger whether the Constitution prohibited discrimination that was unintentional. Boger agreed that the Court could only outlaw intentional discrimination, but he noted that *Washington v. Davis* allowed for statistics to serve as evidence that a person had experienced intentional prejudice. He also argued that the Baldus study showed “evidence of discrimination against black defendants who’ve murdered whites.”⁵⁹ Still, O’Connor questioned whether or not the study proved that McCleskey had personally experienced discrimination. Boger responded that the flaws in Georgia’s death penalty system made it likely that McCleskey and others who killed whites had faced prejudice. This, he argued, was unconstitutional.

O’Connor then asked Boger how he wanted to resolve this disparity. Did he want the Court “to execute more people” or “to provide abolition of the death penalty altogether?”⁶⁰ Boger responded that the Court did not have to do either of these things, but could instead bar the state of Georgia from executing anyone until evidence showed that the state could do this fairly.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

Rehnquist then returned to the question of whether or not McCleskey had experienced prejudice. Boger noted that the Baldus study showed that the jury that sentenced McCleskey to death had likely discriminated against him. And he pointed out that, less than a year ago, the Court had accepted in *Bazemore v. Friday* and *Batson v. Kentucky* a statistical likelihood of prejudice as sufficient evidence that discrimination had occurred.⁶¹ Furthermore, Boger told Rehnquist, “Of the seventeen defendants in Fulton County who killed police officers or were involved in police officer killings...in the 1973 to 1979 period, only two even went to a sentencing jury. And of those two one went before a jury having killed a black police officer, and he received a life sentence.”⁶² In his study, Baldus explained that seven of defendants were black. Two of the criminals had killed black victims, and one of them was the defendant who a court sentenced to life in prison. While Baldus admitted that the sample size of these statistics was tiny, when combined with his other findings they showed that prejudice played a role in McCleskey’s death sentence.

White then challenged this finding. He argued that since McCleskey had declined a plea-bargain, it was “hard to claim discrimination against McCleskey at the plea-bargaining state in this case.”⁶³ But Boger corrected White and informed the justices that the defense counsel had only encouraged McCleskey to accept a plea-bargain. No one had offered him one.

On the other side of the bench, Justice Lewis Powell remarked to the LDF attorney that McCleskey had killed a police officer and committed an armed robbery. Could these factors have contributed to the death sentence? Boger reminded the Court that none of the other defendants who had murdered police officers received the death penalty for their crime. Yet

⁶¹ *Bazemore v. Friday*, 478 U.S. 385 (1986).

Batson v. Kentucky, 476 U.S. 79 (1986).

⁶² The Oyez Project, Oyez: McCleskey v. Kemp

⁶³ *Ibid.*

Justice Antonin Scalia also wondered whether other factors might have led to the death sentence in this case. He remarked that McCleskey had shot a police officer “in the head... at very close range, indicating that there was a conscious attempt to kill the man.”⁶⁴ But Boger informed the justices that McCleskey had shot from about twelve feet away and that “It was not an execution style slaying in that sense.”⁶⁵ Furthermore, while he noted that “there’s no doubt that the crime was a serious one...the evidence shows...it’s not the kind of crime that gets death in Fulton County, or, indeed, statewide, on any regular basis. That’s what’s remarkable.”⁶⁶ Race played a prominent role in Warren McCleskey’s death sentence, and for that reason, Boger argued, the Court must rule that Georgia’s had applied the death penalty unconstitutionally.

Mary Beth Westmoreland, Georgia’s Assistant Attorney General, then spoke before the Court. She reminded the justices of the brutal nature of McCleskey’s crime and questioned how, when considering this brutality, Baldus could have placed it in the middle level of aggression.⁶⁷ “Based on those facts alone,” Westmoreland argued, “we would submit that the study itself certainly causes great questions to be raised about its validity.”⁶⁸ She saw no evidence that juries had not issued death sentences for comparable crimes since “each case is unique on its own individual facts.” Thus, Westmoreland doubted the persuasiveness of Baldus’ study.⁶⁹ Finally, she claimed that the Baldus study did not prove that McCleskey had experienced intentional discrimination. For these reasons, Mary Beth Westmoreland urged the justices not to overturn McCleskey’s death sentence.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Baldus ranked McCleskey’s crime at the higher end of mid-range aggression. He placed it there because he believed that, as severe as the murder was, he should rate more violent acts such as the murder of a small child as even more brutal than McCleskey’s actions.

⁶⁸ The Oyez Project, Oyez: McCleskey v. Kemp

⁶⁹ Ibid.

How would the Rehnquist Court rule in *McCleskey*? Supreme Court justices reach their decisions and interpret the law in many different ways. Some believe in the idea of a living Constitution that changes over time, and others try their best to follow its authors' original intentions. Politics and personality influence the justices' rulings too. Jerome Frank has written "that the personality of the judge is the pivotal factor" behind decisions.⁷⁰ As Michael Klarman has noted, "In its crudest form, this perspective attributes judicial decision making to what the judge ate for breakfast."⁷¹ Of course, legal analysis, political views, and personality all influence Supreme Court rulings to various degrees, and all three affected the Court's decision in *McCleskey*. Still, unlike the president or Congress, the Supreme Court's role is not to respond to the will of the people, but to follow and interpret the law. And in their conference room, the justices debate what the law requires.

In keeping with the closed-off nature of the Court, the justices' conference room "has the look of an exclusive club."⁷² It is a large room with a massive crystal chandelier in the center and hundreds of law volumes in surrounding bookcases. A marble fireplace and an 1830 portrait of former Chief Justice John Marshall sit at the North end of the room. Few people may enter the conference room even when the justices are not there. And when the justices hold conference, they are the only nine people under John Marshall's gaze.

On Friday, October 17, 1986, two days after the justices had listened to the oral arguments in *McCleskey*, the Rehnquist Court entered its conference room to decide the case. As always, the justices wore business attire and shook hands with one another before they began their discussion. The justices intended to show their unity and mutual respect with their

⁷⁰ Jerome Frank, *Law and the Modern Mind*, (New York, Brentano's Publishers, 1931), 133.

⁷¹ Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*, (New York: Oxford University, 2004), 4.

⁷² John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.*, (New York: Charles Scribner's Sons, 1994), 243.

handshakes. But former Justice James Byrnes always saw the handshakes as reminiscent of “nine boxers preparing to go to their corners and come out fighting.”⁷³ And so, with the formalities out of the way, the justices sat at their long, mahogany table to begin their fight over Warren McCleskey’s life and the legality of the death penalty in the state of Georgia.

But even before oral argument, Byron White had sent a memo to William Rehnquist, Lewis Powell, Sandra Day O’Connor, and Antonin Scalia in which he argued that the Court should affirm McCleskey’s death sentence.⁷⁴ The justices’ fights over the death penalty since *Gregg* had left White frustrated and angry. He and the other conservatives wanted to stop hearing cases that they saw as a waste of time, and so Rehnquist, White, Powell, O’Connor, and Scalia entered the conference ready to vote against McCleskey and affirm Georgia’s application of the death penalty, no matter how persuasive the Baldus study and the Court’s precedents in *Griggs*, *Bazemore*, and *Batson* might have been.

When in conference, unless any of the justices pass on their turn to address the others, the Chief Justice speaks first. The Senior Associate Justice follows him, and the justices share their views on the case at hand in order of rank. In accordance with this rule, Chief Justice William Rehnquist, who sat at the head of the table, spoke first.

Rehnquist subscribed to a judicial philosophy called “legal positivism.” This meant that, above all, Rehnquist believed that “there is no appeal to any higher forum or court than a forum which properly and accurately reflects [the people’s] will.”⁷⁵ In other words, he saw the state’s demands as a better source of law for Georgia than the federal courts.⁷⁶ Rehnquist felt that

⁷³ Del Dickson, ed., *The Supreme Court in Conference (1940 – 1985): The Private Discussions Behind Nearly 300 Supreme Court Decisions*, (New York: Oxford University, 2001), 5.

⁷⁴ 84-6811 *McCleskey v. Kemp*, Powell Papers, 15 October 1986, 9:00 AM. Lazarus, *Closed Chambers*, 202.

⁷⁵ As quoted in Sue Davis, “Federalism and Property Rights: An Examination of Justice Rehnquist’s Legal Positivism,” *The Western Political Quarterly*, 39, no. 2 (1986), 254.

⁷⁶ See Davis, “Federalism and Property Rights” for further discussion.

“Justices have a great deal of authority, but it is not an authority to weave into the Constitution their own ideas of what is good and what is bad.”⁷⁷ He believed that, whenever possible, the Court should defer to the will of the state. Since Georgia’s government strongly supported the death penalty, Rehnquist seemed certain to vote against McCleskey.

Not only did Rehnquist’s legal views not bode well for McCleskey, but his past was checkered with questionable behavior towards minorities. In 1952, he had clerked for Justice Robert Jackson while the Court deliberated whether or not to desegregate public schools in *Brown*. During that time, Rehnquist wrote a memorandum in which he argued: “I think *Plessy v. Ferguson* was right and should be re-affirmed.”⁷⁸ Rehnquist would later claim that he had written the memo on Jackson’s behalf. But strong evidence indicates that Rehnquist believed what he wrote in the memo – the Court should have followed *Plessy*’s precedent and allowed schools to remain segregated.⁷⁹

That same term, Rehnquist wrote a memo to Jackson for *Terry v. Adams*. In *Terry*, black petitioners challenged white Texas Democrats’ attempts to exclude them from the primary elections. Since Democrats dominated the general elections in Texas at this time, the Democratic primary elections all but determined the winner of the November elections. The Court had determined in *Smith v. Allwright* (1944) that the Democratic Party was a public, not a private organization, and thus could not exclude blacks from its elections.⁸⁰ White Democrats attempted to circumvent this requirement by excluding blacks from participating in the Jaybird Primary, an election held before the Democratic Primary. The Jaybirds claimed that their

⁷⁷ William H. Rehnquist, *The Supreme Court*, (New York: Alfred A. Knopf, 2001), 275.

⁷⁸ Box 184, File 5, Robert Houghwout Jackson Papers, Manuscript Division, Library of Congress, Washington, D.C., October 1952 term.

⁷⁹ See Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality*, (New York: Alfred A. Knopf, 1976), 609-615, for further discussion.

⁸⁰ *Smith v. Allwright*, 321 U.S. 649 (1944).

organization was a private organization, yet the winner of the Jaybird Primary always won the Democratic Primary. Only Sherman Minton would conclude that the Court could not rule the Jaybird Primary to be unconstitutional, yet Rehnquist suggested that Jackson dissent as well. He wrote:

It is about time the Court faced the fact that the white people on (Sic.) the South don't like the colored people; the constitution restrains them from effecting (Sic.) this dislike thru state action, but it most assuredly did not appoint the Court as a sociological watchdog to rear up every time private discrimination raises its admittedly ugly head.⁸¹

In short, Rehnquist's memos in *Brown* and *Terry* indicated that he felt the Court should not interfere with what he saw as the rights of the majority, even if that meant that the Court sanctioned racial segregation and excluded blacks from fundamental rights that the vast majority of the Supreme Court believed to be constitutional.

Then in the summer of 1986, during Rehnquist's confirmation hearings to be Chief Justice, Senator Pat Leahy announced that the deed to Rehnquist's summer home contained a provision that stated: "No fee to the herein conveyed property shall be leased or sold to any member of the Hebrew race."⁸² Senator Ted Kennedy questioned Rehnquist about the deed to the Phoenix home he had owned from 1961 until 1969. That deed required that:

No lot nor any part thereof within a period of 99 years from the date of filing of the record on the plot of Palmcroft shall ever be sold, transferred or leased to, nor shall any lot be a part thereof, within said period be inhabited by or occupied by any person not of the white or Caucasian race.⁸³

And Kennedy also noted that several Phoenix residents reported that in either 1962 or 1964, Rehnquist "challenged black, elderly working class voters for literacy by having them read the

⁸¹ Box 179, File 9, Jackson Papers, October 1952 term.

⁸² U.S. Congress 1986a, 180.

⁸³ U.S. Congress 1986a, 229.

Constitution out loud.”⁸⁴ Rehnquist denied this accusation, but Leahy and Kennedy made their point clear – they feared that if Rehnquist became Chief Justice, he would lead a Court that showed no sympathy towards the rights of minorities. In 1964, when explaining why he disputed an Arizona public accommodations ordinance, Rehnquist had even said, “I am opposed to all civil rights laws.”⁸⁵ And his friends from his college days at Stanford felt certain that Rehnquist had not changed his views since he graduated in 1948.⁸⁶ Since he had discriminated in his past and his views remained constant, Rehnquist would be unlikely to see McCleskey as a victim of racism. And even if he did, his belief that the Supreme Court’s should defer to the state’s wishes prevented him from intervening.

But most of all, Rehnquist’s exasperation with the liberal justices’ attempts to eliminate the death penalty made him unlikely to side with McCleskey. Even as Jackson’s clerk in 1952, Rehnquist showed his firm support for the death penalty and anger towards those who tried to challenge it. When Julius and Ethel Rosenberg appealed their death sentences to the Supreme Court in *Rosenberg v. United States* (1952), Rehnquist insisted that their death sentences would not violate the Eighth Amendment’s prohibition of “cruel and unusual punishment.” He wrote: “Again, I just don’t get it. Apparently, [the petitioner’s] idea is that although the death sentence may be imposed for some crimes, it should not be for others....It too bad that drawing and quartering has been abolished.”⁸⁷ Rehnquist’s anger towards Marshall and Brennan’s attempts to abolish the death penalty continued throughout his term on the Court, and no one thought that he would change his views as Chief Justice.

⁸⁴ U.S. Congress 1986a, 145.

⁸⁵ U.S. Congress 1971a, 320.

⁸⁶ Savage, *Turning Right*, 10.

⁸⁷ Box 183, File 6, Robert H. Jackson Papers, October 1952 term.

Rehnquist held true to these expectations when he spoke to the conference. He began by reminding the other justice that if they sided with McCleskey, “Georgia [would] have to dismantle its [capital punishment] system.”⁸⁸ And he feared this would mean that “statistics could be relied on w[ith] respect to other crimes.”⁸⁹ He also argued that while he accepted the validity of Baldus’ study, he did not know whether or not the study applied to McCleskey. In other words, Rehnquist felt that the study did not prove that the sentencing jury had discriminated against McCleskey or that race was a factor at all in McCleskey’s death sentence.

Finally, Rehnquist insisted that Boger had not presented adequate constitutional claims to overturn McCleskey’s sentence. After all, Rehnquist noted, the Court had ruled ten years earlier in *Washington v. Davis* that under the Equal Protection Clause, discrimination had to be intentional.⁹⁰ It did not matter if the jury had not meant to discriminate against McCleskey. To Rehnquist, the Baldus Study did not establish a *prima facie* case that the jury had sentenced McCleskey to death because of his race or his victim’s. And Rehnquist believed that McCleskey had no legitimate defense under the Eighth Amendment, which forbade “cruel and unusual punishments.”⁹¹ As a result, to no one’s surprise, Rehnquist voted to affirm the Court of Appeals’ opinion.⁹²

At the opposite end of the table sat William Brennan, Jr., the Court’s Senior Associate Justice. In 1956, President Dwight Eisenhower had appointed Brennan to the Court, at least in part to gain Democrats’ support for Eisenhower’s re-election campaign.⁹³ Eisenhower, who had disagreed with the Court’s ruling in *Brown*, would later say that he made an enormous mistake

⁸⁸ Box 462, File 6, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C., 17 October 1986.

⁸⁹ 84-6811 *McCleskey v. Kemp*, Powell Papers, 17 October 1986.

⁹⁰ *Washington v. Davis*, 426 U.S. 229 (1976).

⁹¹ FindLaw For Legal Professionals, “U.S. Constitution: Eighth Amendment,” FindLaw For Legal Professionals, <http://caselaw.lp.findlaw.com/data/constitution/amendment08/> (accessed April 5, 2006).

⁹² Box 462, File 6, Blackmun Papers, 17 October 1986.

⁹³ Jefferies, *Justice Lewis F. Powell, Jr.*, 257.

when he appointed Brennan to the Court.⁹⁴ But few of Brennan's admirers or detractors agreed with Eisenhower. Stephen Markman and Alfred Regnery once wrote in the conservative publication *National Review* that “no individual in this country, on or off the Court, has had a more profound and sustained impact upon public policy in the United States than Justice Brennan.”⁹⁵ Brennan championed civil rights causes and because of his strong opposition to the death penalty in all instances, he had dissented in every case where the Court had allowed capital punishment to stand.

When he spoke at the *McCleskey* conference, Brennan noted that Boger had presented “a [powerful] case under the Fourteenth Amendment.”⁹⁶ He argued that Baldus had shown “a strong inference of discrimination by prosecutors and jurors (Sic.)”⁹⁷ To Brennan, the study showed “a disparate impact” that showed that the racism behind Georgia's application of the death penalty violated the Equal Protection Clause.⁹⁸ But because of the strong precedent that the Court had established in *Washington v. Davis*, a Fourteenth Amendment defense would require proof that intentional discrimination had led to *McCleskey*'s sentence. Since Rehnquist had argued that no intentional discrimination had occurred in this case, Brennan felt that it might be difficult to convince his colleagues to save *McCleskey* through a Fourteenth Amendment defense. Thus, when he spoke, Brennan focused on the importance of the Eighth Amendment.

He reminded the justice that the Baldus study showed the enormous influence of race on the death penalty. The Eighth Amendment did not just forbid intentional cruel and unusual punishment, Brennan asserted; it forbade all cruel and unusual punishment. The Court had

⁹⁴ Charles G. Curtis, Jr., and Shirley S. Abrahamson, “Brennan, William Joseph, Jr.” in *The Oxford Companion to the Supreme Court of the United States*, ed. Kermit L. Hall, 87. (New York: Oxford University, 1992).

⁹⁵ Jeffries, *Justice Lewis F. Powell, Jr.*, 256.

⁹⁶ Box 462, File 6, Blackmun Papers, 17 October 1986.

⁹⁷ 84-6811 *McCleskey v. Kemp*, Powell Papers, 17 October 1986.

⁹⁸ *Ibid.*

declared in *Furman v. Georgia* (1972) that a state could not impose the death penalty in an “arbitrary and discriminatory” manner, yet the Baldus study showed that Georgia had done just that.⁹⁹ If the justice were to affirm the Court of Appeals’ ruling, they would ignore the inconsistencies in Georgia’s death penalty system. This would “insulate...Georgia from [the] jud[icial] review” that *Furman* required.¹⁰⁰ They would be allowing a jury to execute a man because of the race of his murder victim. What could be more “cruel and unusual” than that? Brennan saw the death penalty as immoral and unconstitutional, and he urged his colleagues to recognize that the racism behind Georgia’s application of the death penalty made the state’s capital punishment system unconstitutional. He voted to overturn the Court of Appeals’ decision.

The other seven justices sat on the sides of the table. To the right of Rehnquist sat Byron White, Thurgood Marshall, and Harry Blackmun, all of whom were fairly comfortable. On his left was a cramped quartet of justices – Lewis Powell, Jr., John Paul Stevens, Sandra Day O’Connor, and Antonin Scalia. White was next in line to speak.

Byron White was easily the most complex justice at the conference and maybe even in the history of the Court. Before he sat on the Court, White had played in the National Football League, graduated from Yale Law School, clerked for Chief Justice Frederick Vinson, and served as Deputy Attorney General of the United States.¹⁰¹ Justice Powell and others have argued that White, who President Kennedy had appointed to the Court in 1962, was a former liberal who became more conservative during his years on the bench.¹⁰²

⁹⁹ *Furman v. Georgia*, 408 U.S. 238, 242, 464, (1972).

¹⁰⁰ Box 462, File 6, Blackmun Papers, 17 October 1986.

¹⁰¹ See Dennis J. Hutchinson, *The Man Who Was Whizzer White: A Portrait of Justice Byron R. White*, (New York: The Free Press, 1998) for a comprehensive picture of White.

¹⁰² Jeffries, *Justice Lewis F. Powell, Jr.*, 541.
Hutchinson, *The Man Who Was Whizzer White*, 445.

But people such as Kate Stith, who clerked for White during the 1978 term, felt differently. When White announced his retirement in 1993, Stith remarked that “Civil rights, federal power, those were the salient issues [in 1962]...Eventually, the Court changed, society changed, the issues changed. Byron White didn’t change.”¹⁰³ Whatever his transformations over time, White’s previous rulings showed that he leaned, for the most part, liberal on civil rights issues but conservative on criminal punishment ones. But *McCleskey* dealt with both racial discrimination and criminal rights. Where would White stand?

Of course, White had told the conservative bloc how he felt before oral argument, but the day before the conference he made his views clear to the liberals. He circulated a memorandum to the justices in which, as he did at the argument, White claimed that McCleskey had turned down a plea bargain. He had based his memorandum on testimony by McCleskey’s trial counsel who said that he had tried to get McCleskey to plead guilty because the state of Georgia “had almost an air tight case against him.”¹⁰⁴ But Boger had told the Court that no one had offered McCleskey a plea bargain. Technically, Boger was correct. Yet White felt that this testimony compromised Boger’s argument. As a result, he wrote to the conference that “it would be difficult to conclude that McCleskey suffered racial discrimination at the plea-bargaining state, and there is a reduced chance that racial considerations influenced the prosecutor to proceed to a sentencing hearing.”¹⁰⁵ In short, White remained unconvinced that racism had led to McCleskey’s conviction.

White expanded on these views at the conference. He argued that, for various reasons, Baldus’ study did not prove that a jury had discriminated against McCleskey. Unlike Brennan,

¹⁰³ As quoted in Hutchinson, *The Man Who Was Whizzer White*, 445.

¹⁰⁴ Box 462, File 1, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C., 16 October 1986

¹⁰⁵ *Ibid.*

he did not see “a facial violation of [the Equal Protection Clause] or 8th [Amendment].”¹⁰⁶ And even if McCleskey had experienced prejudice, White saw no proof that intentional racism led to his sentence. At most, White believed that race correlated with the conviction. Based on these views, White decided that he could not overturn the death sentence under the Eighth or Fourteenth Amendment. The man who had once agonized over his vote during *Furman* had grown tired of hearing what he felt were frivolous death penalty appeals. As a result, Byron White voted against Warren McCleskey.¹⁰⁷

Thurgood Marshall was the first, and as of 1986 the only, black justice to serve on the Supreme Court. Marshall had argued marvelously before the Court for the NAACP during *Brown* and other key civil rights cases. But since 1967, he had sat on the justices’ bench. More than any other justice, Thurgood Marshall displayed a firm commitment to racial equality. As a result, it pained Marshall to see the Court reverse and limit so many of the achievements that he helped blacks reach while serving as the NAACP’s lead counsel and as an Associate Justice on the Warren Court. By the time the Court held its conference for *McCleskey*, Marshall had suffered serious health problems. Every twenty minutes he had to get up from the Justice’ conferences and use the bathroom, yet he refused to leave the Court and allow a Republican appointee to take his place.¹⁰⁸ The same year that the Court heard *McCleskey*, Marshall even announced at the Second Circuit U.S. Court of Appeals conference: “For all those people who wish very dearly for me to give up and quit and what-have-you, I hope you will pardon me for saying it, but, don’t worry, I’m going to outlive those bastards.”¹⁰⁹ Marshall felt that if he remained on the Court, he could fight the conservatives and protect the causes that he

¹⁰⁶ 84-6811 *McCleskey v. Kemp*, Powell Papers, 17 October 1986.

¹⁰⁷ Box 462, File 6, Blackmun Papers, 17 October 1986.

¹⁰⁸ Dickson, *The Supreme Court in Conference*, 6.

¹⁰⁹ As quoted in Howard Ball, *A Defiant Life: Thurgood Marshall and the Persistence of Racism in America*, (New York: Crown Publishers, Inc., 1998), 378.

championed. The abolition of the death penalty ranked near the top of these causes, a fact that many Americans knew quite well. The day before the Court heard the oral argument in *McCleskey*, Marshall received a letter in which a professor asked Marshall to write a foreword to a book called *Death Penalty for Juveniles* because of the excellent defense Marshall had provided in 1947 for two fifteen-year-old blacks named James Lewis and Charles Trudell.¹¹⁰ One can only imagine the effects that this letter had on Marshall as he sat in the conference room.

Marshall and Brennan agreed in their opinions so often “that their clerks referred to them behind their backs as Justice Brennanmarshall.”¹¹¹ *McCleskey* would be no exception to this trend. And since their views were so similar, Marshall saw no point in repeating Brennan’s argument. That would not persuade the conference to save Warren McCleskey’s life. Instead, Marshall told a story from his days as a civil rights attorney – back when Jim Crow was still the law of the land. He rose his eyebrows, paused for a moment, and said to the conference:

You know...I had an innocent man once. He was accused of raping a white woman. The government told me if he would plead guilty, he’d only get life. I said I couldn’t make that decision; I’d have to ask my client. So I told him that if he pleaded guilty, he wouldn’t get the death sentence.

He said, ‘Plead guilty to what?’

I said, ‘Plead guilty to rape.’

He said, ‘Raping that woman? You gotta be kidding. I won’t do it.’

That’s when I knew I had an innocent man.

When the judge sent the jurors out, he told them that they had three choices: not guilty, guilty, or guilty with mercy. ‘You understand those are the three different possible choices,’ he instructed. But after the jury left, the judge told the people in the courtroom that they were not to move before the bailiff took the defendant away [after the jury announced its verdict].

I said, ‘What happened to ‘not guilty’?’

The judge looked at me, and said, ‘Are you kidding?’ Just like that. And he was the *judge*.

¹¹⁰ Box 35, Folder 5, Thurgood Marshall Papers, Manuscript Division, Library of Congress, Washington, D.C., 14 October 1986

¹¹¹ Dickson, *The Supreme Court in Conference*, 10.

At that point, Marshall extended his finger and stated, “E-e-e-nd of the story: The guy was found guilty and sentenced to death. But he never raped that woman.” After a final pause, he concluded, “Oh, well...he was just a Negro.”¹¹²

Sandra Day O’Connor once said that Marshall’s stories “made clear what legal briefs often obscure: the impact of legal rules on human lives.”¹¹³ And Anthony Kennedy, who would share the bench with Marshall from 1988 until 1991, later wrote that Marshall’s stories reminded the justices that “The law is the story of human history.”¹¹⁴ In short, Marshall helped the other justices remember, as O’Connor explained, that “the law is not an abstract concept removed from the society it serves, and that judges, as safeguarders of the Constitution, must constantly strive to narrow the gap between the ideal of equal justice and the reality of social inequality.”¹¹⁵ With strong emotion, Marshall voted to overturn *McCleskey*’s death sentence.¹¹⁶

Yet while Lewis Powell wrote in his conference notes that Marshall “Understandably...talked about the discrimination historically imposed on blacks,” the conservatives ignored Marshall’s message at the *McCleskey* conference. Of course, they had grown frustrated with both Marshall and Brennan’s refusal to budge from their abolitionist positions. But they also saw Marshall putting little effort into his deliberations. He spent lots of time watching television in his chambers and left many of his responsibilities for his clerks to

¹¹² Sandra Day O’Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice*, (New York: Random House, 2003), 133, 135.

O’Connor never said that this story came from the *McCleskey* conference, but she explained that Marshall shared it when a black petitioner claimed that racial prejudice led to his death sentence. *McCleskey* was the only case where this description would apply. See Lazarus, *Closed Chambers*, 530 n. 34.

¹¹³ Sandra Day O’Connor, “Thurgood Marshall: The Influence of a Raconteur,” *Stanford Law Review* 44, A Tribute to Justice Thurgood Marshall (1992), 1218.

¹¹⁴ Anthony Kennedy, “The Voice of Thurgood Marshall,” *Stanford Law Review* 44, A Tribute to Justice Thurgood Marshall (1992), 1222.

¹¹⁵ O’Connor, “Thurgood Marshall,” 1218.

¹¹⁶ Box 462, File 6, Blackmun Papers, 17 October 1986.
84-6811 *McCleskey v. Kemp*, Powell Papers, 17 October 1986.

handle.¹¹⁷ As Marshall grew older, he would often turn to Harry Blackmun at conferences and say, “Harry, how did Brennan vote?” Marshall would then announce to the conference that he shared Brennan’s view.¹¹⁸ And William Douglas, who shared the bench with Marshall from 1967 until 1975, believed that Lyndon Johnson appointed Marshall to the Court “simply because he was black.”¹¹⁹ To several justices, it appeared that Marshall applied little legal analysis to his decisions. Thus, as powerfully as Marshall spoke at the *McCleskey* conference, his words no longer carried weight with his colleagues, even the Court’s most cautious and deliberate swing vote – Lewis Powell.

Since he had joined the Court in 1972, Powell had served as the deciding vote in many of the Burger Court’s toughest cases. Now, in what would be his last year on the bench, Powell had an opportunity to cast a definitive vote for the Rehnquist Court. The day before the conference, Beth Brinkmann, one of Justice Blackmun’s clerks in the 1986 term, wrote that a discussion with Powell’s clerk gave Brinkmann “the impression that Justice Powell was not inclined to [side with *McCleskey*] but was giving the case a significant amount of attention.”¹²⁰ The liberals held onto a vague hope that Powell would hear the desperation in Marshall’s voice, consider the results of the Baldus study, and reverse the Court of Appeals’ ruling on the grounds that racial discrimination affected Georgia’s application of the death penalty.

But Powell informed the conference that he agreed with Rehnquist’s assessment of the case. Though Baldus’ study seemed valid to him, Powell believed that the justices could not

¹¹⁷ Patterson, *Brown v. Board of Education*, 151.

Jefferies, *Justice Lewis F. Powell, Jr.*, 260.

Woodward and Armstrong, *The Brethren*, 197, 317.

But see Ball, *A Defiant Life*, 203-204.

¹¹⁸ Jefferies, *Justice Lewis F. Powell, Jr.*, 260.

Many of the notes in Justice Powell’s papers confirm this, as Powell often wrote in his conference notes that Marshall “Agrees with WJB.”

¹¹⁹ William O. Douglas, *The Court Years, 1939-1975: The Autobiography of William O. Douglas*, (New York: Random House, 1980), 251.

¹²⁰ Box 462, File 6, Blackmun Papers, 16 October 1986.

“decide a crim[inal] case solely on stats.”¹²¹ If they did, they would have to overturn Georgia’s death penalty system. Plus, Powell argued, the absence of intentional discrimination made McCleskey’s Equal Protection defense impossible. He felt that McCleskey’s only reasonable defense rested on Boger’s claim that a racial disparity in executions made McCleskey the victim of cruel and unusual punishment.

Yet Powell felt that the Court had approved adequate safeguards to Georgia’s death penalty system in *Gregg* (1976).¹²² And as he had once said, “[m]y understanding of statistical analysis...ranges from limited to zero.”¹²³ Without a proper understanding of Baldus’ study and no proof that the jury had discriminated against McCleskey, Powell felt uncomfortable overturning McCleskey’s sentence and Georgia’s death penalty statute. He voted to affirm the lower court’s ruling.

After Powell, two justices whose ideologies did not match those of their Republican appointers spoke. Richard Nixon had sent Harry Blackmun to the bench, while Gerald Ford had appointed John Paul Stevens. When Ford had to choose someone to replace William Douglas on the Court in 1975, he wanted someone who the Senate would confirm in the midst of the partisan divide that arose after Watergate. Stevens looked like an outstanding candidate who “seemed to have no partisan politics, no strict ideology.”¹²⁴ The Senate unanimously confirmed Stevens, who continued to defy political labels during his time on the Court. He had at times opposed affirmative action but leaned left in other racial discrimination cases. In other words, Boger could not be certain that Stevens would vote to overturn McCleskey’s sentence.

¹²¹ Ibid.

¹²² *Gregg v. Georgia*, 429 U.S. 1301 (1976).

¹²³ As quoted in Jefferies, *Justice Lewis F. Powell, Jr.*, 439.

¹²⁴ Woodward and Armstrong, *The Brethren*, 401.

But Stevens did. He noted that the Court faced a “diffi[cult] problem.” The South had a long history of racial prejudice, and that was something that would take a “long [time to] overcome.”¹²⁵ And while he recognized that the Baldus study could not “prove intent to discriminate in a particular case,” as far as Stevens was concerned, it did show that juries and prosecutors still let racism affect many death penalty decisions.¹²⁶ After all, though Scalia and Powell had noted at the oral argument that McCleskey might have received his death sentence for killing a police officer, none of the other sixteen Fulton County cop killers in Baldus’ study had died for their crime.¹²⁷ Seven of these police officers were black, but since McCleskey had been the only convict to receive the death penalty for killing a police officer, this suggested to Stevens that racism played a role in McCleskey’s conviction.¹²⁸ He felt that such racism alone should overturn the death sentence, whether or not that McCleskey experienced intentional discrimination. Furthermore, Stevens argued, the Court would not have to eliminate Georgia’s death penalty system altogether if the justices accepted McCleskey’s claim. He argued that “the Court could avoid a sweeping ruling by remanding the case to the lower appellate court for review.”¹²⁹ Stevens voted to overturn McCleskey’s sentence.

Even more so than Stevens, Harry Blackmun surprised his appointer. Blackmun had been a childhood friend of former Chief Justice Burger and the best man at Burger’s wedding. Nixon had hoped that Blackmun would join Burger in shifting the Court in a more conservative direction. He based this hope on Burger’s recommendation and Blackmun’s rulings as a lower

¹²⁵ Box 462, File 6, Blackmun Papers, 17 October 1986.

¹²⁶ 84-6811 *McCleskey v. Kemp*, Powell Papers, 17 October 1986.

¹²⁷ Simon, *The Center Holds*, 177.

Box 462, File 6, Blackmun Papers, 17 October 1986.

¹²⁸ Baldus, Woodworth, and Pulaski, *Equal Justice and the Death Penalty*, 334.

¹²⁹ Simon, *The Center Holds*, 180.

Although the Justices normally speak in order of seniority, sometimes a Senior Justice will pass and let a Junior Justice speak before he or she goes. Justice Blackmun and Powell’s conference notes indicate that Blackmun passed on his turn until after Stevens spoke.

court judge. In 1968, for instance, Blackmun heard a case for the Eighth Circuit Court of Appeals in which a petitioner used statistical evidence to show that a court was much more likely to execute a black man who raped a white woman than one who raped a black woman. In Blackmun's opinion, he wrote: "We are not yet ready to condemn and upset the result reached in every case of a negro (Sic.) rape defendant in the State of Arkansas on the basis of broad theories of social and statistical injustice."¹³⁰ If the 1968 version of Blackmun had voted in *McCleskey*, he probably would have rejected McCleskey's appeal. But Blackmun disappointed Nixon and slid to the left during his years on the Court. By 1986, he was the most liberal justice at the conference after Marshall and Brennan. Blackmun announced that he shared Stevens' sentiments and voted to overturn the Court of Appeals' ruling.¹³¹

With the vote at four to three in favor of McCleskey, just one more justice needed to overturn the death sentence to save McCleskey's life. Sandra Day O'Connor would be his best hope. In 1981, President Ronald Reagan appointed O'Connor to be the first female justice on the Supreme Court. Reagan was a staunch conservative, and his supporters hoped that O'Connor would be too. But over time, O'Connor proved to be somewhat moderate and, after Powell retired, would become famous as one of the Rehnquist Court's swing votes. In a letter to Justice Blackmun, Brinkmann observed that O'Connor's concern with *McCleskey* was how "this case would be limited to the capital punishment context and how the case could be resolved without invalidating the entire Georgia capital punishment system."¹³² In other words, O'Connor might side with McCleskey if that opinion would not have any far reaching implications.

¹³⁰ *Maxwell v. Bishop*, 398 F.2d 138, 147 (1968).

¹³¹ Box 462, File 6, Blackmun Papers, 17 October 1986.
84-6811 *McCleskey v. Kemp*, Powell Papers, 17 October 1986.

In his final term on the Court, Blackmun declared in his dissent in *Callins v. Collins* (1994) that he believed the death penalty to be unconstitutional in all instances because of its arbitrary application.

¹³² Box 462, File 6, Blackmun Papers, 16 October 1986.

But as most of the justices had made clear in their arguments, the Court could not overturn McCleskey's sentence and also keep Georgia's death penalty system intact. After all, the Baldus study showed that racism played a role in whether or not a person received a death sentence for his crime. Thus, little legal justification existed that would let the Court claim that race impacted McCleskey's conviction but not others. And while O'Connor accepted the validity of Baldus' study and found its results "disturbing," she also recognized that if the Court accepted McCleskey's argument, the justices would, at the minimum, have to lessen the jury's discretion in sentencing.¹³³ "[T]hat bothers me," O'Connor told the conference.¹³⁴ However, O'Connor felt that the justices could make a case for reversing McCleskey's sentence under the Eighth Amendment, as she felt that that argument was "more open-ended" than a Fourteenth Amendment defense.¹³⁵ But in the end, she decided that McCleskey "lack[ed] standing" under the Equal Protection clause and feared that if the Court used the Equal Protection clause to overturn McCleskey's sentence, it "would open up a wide area" where the Court might have to side with petitioners under similar reasoning.¹³⁶ O'Connor saw no way to decide *McCleskey* under narrow grounds. As a result, she sided with the more conservative justices and tied the conference's vote at four.

Antonin Scalia, the Court's newest member and Junior Justice, broke the deadlock. Soon after his appointment, Scalia established himself as a witty and outspoken conservative who had no qualms about writing harsh criticisms of his colleagues when he disagreed with their decisions. Right-wingers across the country loved him for this, as they saw Scalia as a justice who helped fulfill Ronald Reagan's promise to appoint staunch conservatives to the Court. One

¹³³ Ibid.

¹³⁴ Simon, *The Center Holds*, 181.

¹³⁵ Box 462, File 6, Blackmun Papers, 17 October 1986.

¹³⁶ 84-6811 *McCleskey v. Kemp*, Powell Papers, 17 October 1986.

law student from Louisiana State University even called his pet fish “Justice Scalia.” And when a professor asked this student if he had named other fish after Supreme Court justices, the student responded, “No...Justice Scalia ate all the others.”¹³⁷

But in October 1986, America’s radical right had yet to fall in love with this combative conservative. At that time, most observers just knew that Antonin Scalia had once taught at the University of Chicago and did not hear any major death penalty cases while he sat on the Court of Appeals for the District of Columbia Circuit. As a result, Boger had some hope that Scalia might understand the Baldus study and side with McCleskey.¹³⁸ But Scalia’s judicial philosophy and conservative political views made it impossible for him to do so. Three years later, Scalia would articulate this philosophy in *Pennsylvania v. Union Gas Co.* He wrote: “It is our task, as I see it, not to enter the minds of the Members of Congress - who need have nothing in mind in order for their votes to be both lawful and effective - but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times.”¹³⁹ Scalia believed that the best way to understand the Constitution was to consider how people might have interpreted its meaning in the time that the framers and Congress wrote the document and its Amendments. And as far as Scalia could tell, no one would have interpreted the Eighth or Fourteenth Amendments to bar executions because of statistical correlations. Based on this rationale, Brinkmann observed that Scalia saw “no standing [for McCleskey] to bring his race-of-victim claim under the Equal Protection Clause and [that McCleskey] failed to carry his burden of proof under the Eighth Amendment.”¹⁴⁰

¹³⁷ As quoted in Joan Biskupic, *Sandra Day O’Connor: How the First Woman on the Supreme Court Became Its Most Influential Justice*, (New York: Harper Collins, 2005), 281.

¹³⁸ Simon, *The Center Holds*, 178.

¹³⁹ *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 30 (1989).

¹⁴⁰ Box 462, File 6, Blackmun Papers, 16 October 1986.

In fact, Scalia did not care whether or not Baldus produced an accurate study. The rest of the justices either sided with McCleskey or agreed that if McCleskey could prove that he had experienced real discrimination, they would have overturned McCleskey's conviction. But on January 6, 1987, Scalia wrote in a memorandum to the conference: "Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledges in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof."¹⁴¹ Scalia believed that no matter what the statistics demonstrated, juries did not sentence people to death who did not deserve the sentence. Of course, if Baldus' study were correct, Scalia's rationale should have led him to conclude that Georgia was not executing enough people who had murdered blacks.

Why didn't Scalia reach this conclusion? Perhaps Scalia wanted to provide a fifth vote for Powell's opinion. This would give the Court a majority opinion that established precedent that would make it difficult for petitioners to challenge their death penalty sentences. If Scalia had written his own concurrence instead, Powell's opinion would have issued a plurality opinion that would not have carried the same precedential weight as a majority. Whatever his reasoning, Scalia issued one of many votes that would place him on the far right of the Rehnquist Court. And with Scalia's vote, in a five-to-four ruling, Warren McCleskey had lost his appeal for his life, and the Court affirmed Georgia's application of the death penalty.

Still, Rehnquist knew that the Court had just barely upheld McCleskey's sentence. And in the past, he had seen justices change their votes after the conference. For instance, in Rehnquist's first term as an associate justice, White wrote such a strong dissent in *United States*

¹⁴¹ Box 462, File 1, Blackmun Papers, 6 January 1987.

No documents in Justice Marshall, Justice Blackmun, or Justice Powell's private papers indicate why Justice Scalia took so long to tell all the Justices that he would write a separate opinion.

v. Bidwell that he changed that dissent into an eight-to-one majority in judgment.¹⁴² Marshall and Brennan vehemently opposed the death penalty. Perhaps one of them would write a dissent so powerful that Powell or O'Connor might join them in judgment. Or maybe Blackmun or Stevens would write a moderate ruling that pulled Powell or O'Connor over to the liberal bloc. So to ensure that he would not lose his majority, Rehnquist assigned the opinion to Powell even though White had hoped to write it.¹⁴³ Rehnquist knew that Powell would write an opinion that would satisfy O'Connor. After all, O'Connor respected Powell's careful deliberation and saw him as a model justice. She even sent Powell a handwritten note after he circulated the first draft of his *McCleskey* opinion in which she told Powell that he wrote "a splendid opinion" and that "No one could have done better."¹⁴⁴ O'Connor's deep admiration for Powell might have even caused her to reconsider her position and give the liberal bloc a six-to-three majority if Powell changed his vote. Therefore, Rehnquist guaranteed his victory when he assigned the opinion to Powell, as the more conservative justices would be certain to join Powell in judgment.

After he left the Court, Powell made some statements that indicated that Rehnquist might have lost his majority if he had assigned the opinion to White. In 1990, Powell announced his opposition to the death penalty when he told an interviewer: "[I]f I were in the state legislature, I would vote against capital punishment."¹⁴⁵ Then in 1991, John Jeffries, Jr., a former clerk of Powell's, asked Powell whether he wished he had voted differently in any cases. "Yes," he replied, "*McCleskey v. Kemp*."¹⁴⁶ When asked why, Powell answered, "I have come to think that

¹⁴² *United States v. Biswell*, 406 U.S. 311 (1972).

Hutchinson, *The Man Who Once Was Whizzer White*, 370.

¹⁴³ Lazarus, *Closed Chambers*, 205.

¹⁴⁴ 84-6811 *McCleskey v. Kemp*, Powell Papers, 13 November 1986.

¹⁴⁵ Don J. DeBenedictis, "The Reasonable Man: A Conversation with Justice Lewis F. Powell, Jr.," *American Bar Association Journal* (Oct. 1990), 69.

¹⁴⁶ Jeffries, *Justice Lewis F. Powell, Jr.*, 451.

capital punishment should be abolished.”¹⁴⁷ As far as he was concerned, states applied the death penalty too arbitrarily. And if Rehnquist had assigned one of the more conservative justices the opinion in *McCleskey v. Kemp*, Powell might have changed his mind when he still could have saved McCleskey’s life and applied *Griggs*’ requirements to death penalty cases.

But in the end, Powell wrote an opinion where he argued that McCleskey could not prove that racism had led to his death sentence. By November 24, 1986, Rehnquist, O’Connor, and White had agreed to join the opinion. After nearly writing a separate concurrence, Scalia joined on February 27, 1987.¹⁴⁸ Stevens, Blackmun, Marshall, and Brennan dissented. Brennan even argued that his colleagues refused to overturn McCleskey’s death sentence because of “a fear of too much justice,” as Powell had noted in his opinion that “McCleskey’s claim...throws into serious question the principles that underlie our entire criminal justice system.”¹⁴⁹ After all, as the justices had noted in their conference, if they had overturned McCleskey’s sentence, they might have had to outlaw Georgia’s death penalty statute. And the justices declined to do so when they announced their decision on April 22, 1987.

McCleskey had several important consequences. For one, petitioners could no longer use statistics as proof of discrimination in death penalty appeals. Thus, when McCleskey once again appealed to the Court to overturn his death penalty sentence, Boger based that appeal on other legal claims. He argued in *McCleskey v. Zant* (1991) that the sentencing jury based part of its sentence on evidence that the state had acquired illegally. McCleskey had told another prisoner about the murder, and Georgia used this evidence in its attempt to persuade the jury. But evidence suggested that the state had arranged for this prisoner to serve as an informant against

¹⁴⁷ Ibid.

¹⁴⁸ Box 462, File 1, Blackmun Papers, 27 February 1987.

No documents in Justice Blackmun, Justice Marshall, or Justice Powell’s private papers indicate why Justice Scalia decided to join the Court’s opinion.

¹⁴⁹ *McCleskey v. Kemp*, 481 U.S. 279, 315, 339 (1987).

McCleskey, and in doing so denied McCleskey a lawyer while persuading him to make incriminating claims. When that appeal failed, he appealed once again, this time on the grounds that the Georgia clemency board had displayed prejudice towards him.¹⁵⁰ The Court refused to grant him a stay of execution, and the state of Georgia executed McCleskey on September 25, 1991.

McCleskey also elicited angry and disappointed reactions from liberals, as they accused the Court of ignoring the racism that existed in America. After the ruling, one woman from Takoma Park, Maryland, wrote to Justice Powell: “Your bottom line statement, when it comes right down to it, is that black people don’t have as much of a right to live as white people do; it’s permissible to kill blacks. Such was the state of affairs before the civil war. It doesn’t look like much has changed since then, does it?”¹⁵¹

Conservatives, on the other hand, applauded the move. In a letter to Justice Blackmun, a woman from Chicago expressed this view on behalf of murder victims: “[H]ad your vote won, no one’s life would be considered sacred anymore, and that is a huge problem in today’s society.... You make me question the morality of America and contemplate discarding my citizenship.”¹⁵² This woman and other supporters of the Court’s ruling wanted to keep the death penalty as a form of punishment, despite the racism behind many death penalty decisions.

Warren McCleskey was no saint. He was a murderer who committed multiple acts of armed robbery. Without a doubt, the state of Georgia should have punished him for these crimes. But the Baldus study strongly suggested that race was a key factor that led to

¹⁵⁰ Mark Tushnet, *Making Constitutional Law: Thurgood Marshall and the Supreme Court, 1961-1991*, (New York: Oxford University Press, 1997), 162.

McCleskey v. Bowers, 501 U.S. 1282 (1991).

¹⁵¹ Box 462, File 8, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C., 24 April 1987.

¹⁵² *Ibid.*

McCleskey's death, and as a result, his execution upset a number of people. Verdell Lockwood, a woman from Columbus, Georgia, twice wrote to Justice Blackmun and begged him to save her friend Warren McCleskey.¹⁵³ And after McCleskey's final appeal, Thurgood Marshall chastised the other justices in a memo when he wrote: "Repeatedly denying Warren McCleskey his constitutional rights is unacceptable. Executing him is inexcusable."¹⁵⁴

Yet McCleskey sat in prison, awaiting his inevitable death. In the process, he became a new man. Peter Irons has noted that "Prison officials had described him as a peacemaker among the violent inmates."¹⁵⁵ And when McCleskey sat on the electric chair on September 25, 1991, to die for his crime, he uttered these final words: "I pray that one day this country, supposedly a civilized society, will abolish barbaric acts such as the death penalty."¹⁵⁶ The Warren and Burger Courts might not have ended the death penalty altogether in America, but they may well have found McCleskey's execution and Georgia's death penalty system unacceptable because of the racial discrimination behind both. But the Rehnquist Court disagreed and ruled in *McCleskey v. Kemp* that prejudice did not lead to Warren McCleskey's death sentence. With this ruling the Supreme Court made it almost impossible for petitioners to use statistical evidence to show that they experienced racial discrimination. In doing so, William Rehnquist and his associate justices pushed the Court in a new direction in which they did little to root out racial discrimination behind the death penalty in America.

¹⁵³ Box 462, File 8, Blackmun Papers, 8 June 1987; 14 June 1987.

¹⁵⁴ As quoted in Simon, *The Center Holds*, 169.

¹⁵⁵ Peter Irons, *Brennan v. Rehnquist: The Battle for the Constitution*, (New York: Alfred A. Knopf, 1994), 237.

¹⁵⁶ As quoted in Irons, *Brennan v. Rehnquist*, 238.

Chapter 2

“A Deliberate and Giant Step Backward” :

City of Richmond v. J.A. Croson Co. and Race-Based Affirmative Action

McCleskey v. Kemp set an important precedent and showed that statistical evidence would rarely persuade the Rehnquist Court that death penalty petitioners had experienced racial discrimination. But *McCleskey* also began a new trend in the Supreme Court’s race-based affirmative action rulings. After years of allowing statistics to establish a *prima facie* case for petitioners who claimed that they had suffered racial discrimination, the justices soon abandoned this policy that the Burger Court had established in 1971 with *Griggs*.

In *Watson v. Fort Worth Bank & Trust* (1988) the Court unanimously declared that petitioners could use statistics to prove they had experienced racial discrimination. But while most historians have seen *Watson* as a decision lending support to affirmative action, in this case Court first showed that it had retreated from *Griggs*.¹⁵⁷ O’Connor inaccurately wrote in the first draft of her *Watson* opinion that *Griggs* required that “plaintiffs must demonstrate the functional equivalent of intentional discrimination” to use statistics as evidence that they had suffered racial prejudice. She did not remove this mischaracterization of *Griggs* until Rehnquist informed her that she was wrong.¹⁵⁸ Yet Scalia and White agreed to join O’Connor’s opinion before

¹⁵⁷ See Melvin Urofsky. *Affirmative Action on Trial: Sex Discrimination in Johnson v. Santa Clara*. (Lawrence: University Press of Kansas, 1997), 172.

¹⁵⁸ Box 502, File 4, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C, 1 April 1988.

Rehnquist caught this error, which suggests that Scalia, White, and O'Connor felt that, after *McCleskey*, the burden of proof that *Griggs* required no longer existed.¹⁵⁹

Then in *Wards Cove Packing v. Atonio* (1989), the Rehnquist Court completed the steps it began in *McCleskey* and overruled *Griggs*. The justices declared in a five-to-four decision that major statistical discrepancies in the racial breakdown of job positions were not reason enough to rule that a company had discriminated against its minority employees.¹⁶⁰ Also, the Court required that the employees had to prove that their employers had discriminated against them. This ruling departed from *Griggs*' requirement that the employers had to prove that they had not engaged in racially discriminatory practices. Of course, employees do not have the same access to hiring information that employers do, so to shift the burden of proof to employees would lessen the instances where the Court found racial discrimination in hiring practices.¹⁶¹ *Wards Cove* thus created a difficult standard for plaintiffs to prove that they suffered racial discrimination in the workplace.

And while one might argue that *McCleskey* did not lead to *Watson* and *Wards Cove* because the Court found *McCleskey* to be consistent the Equal Protection Clause and *Watson* and *Wards Cove* in accordance Title VII of the 1964 Civil Rights Act's requirements, O'Connor claimed in *Johnson v. Transportation Agency* (1987) – a case dealing with gender-based affirmative action – that there should be no difference in Title VII and the Equal Protection Clause's definitions of discrimination.¹⁶² By this reasoning, O'Connor should have reached the same conclusion in *Watson* and *Wards Cove* that she did in *Johnson* – that statistics could serve

¹⁵⁹ Box 502, File 5, Blackmun Papers, 30 March 1988.

¹⁶⁰ The breakdown of the Justices' voting was the same as in *McCleskey*, with new Justice Anthony Kennedy replacing the retired Powell's vote.

Wards Cove Packing v. Atonio, 490 U.S. 642 (1989).

¹⁶¹ *Wards Cove* so repulsed Congress that it returned the burden of proof to the employers in the Civil Rights Act of 1991.

¹⁶² *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).

as *prima facie* evidence of racial discrimination. Thus, O'Connor's interpretation of *Griggs*' requirements during *Watson* indicates that she, White, and Scalia felt that the Court's ruling in *McCleskey* meant that the Court had shifted the burden of proof from employers to employees when statistics suggested that employers had discriminated against their employees.

The same term the Court decided *Wards Cove*, the Court declared in *City of Richmond v. J.A. Croson Co.* that a state could not designate a fixed percentage of contracts to go to minority-owned businesses.¹⁶³ At that time blacks made up 50 percent of Richmond's population, yet the city gave just one percent of its contracts to minority business enterprises (MBE's). To resolve this disparity, the city devised a plan where it guaranteed that minority businesses would receive 30 percent of Richmond's contracts. But the Court found this policy to be unconstitutional. In the Court's opinion, O'Connor maintained that affirmative action policies would help lift minorities from the position where past discrimination had left them. But like other cases after *McCleskey*, *Croson* made it almost impossible for minorities to prove that employers had discriminated against them and thus receive affirmative action benefits.¹⁶⁴ Once again, the Rehnquist Court closed its eyes to the racism that statistical disparities indicated when the justices announced their ruling in *Croson*.

Of course, multiple factors led to the Court's decision in *Croson* – the more conservative Anthony Kennedy replaced swing vote Lewis Powell on the bench, the Reagan administration initiated a strong effort to eliminate affirmative action programs, and several justices' clerks looked to make the Court more conservative after the Senate denied arch-conservative Robert Bork a seat on the Court. Still, until *McCleskey* the Supreme Court repeatedly upheld the precedent it established in *Griggs*. Only after the ruling did O'Connor, White, and Scalia claim

¹⁶³ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

¹⁶⁴ For an explanation of the economic failure of *Croson*, see Martin J. Katz, "The Economics of Determinism: The Three Fallacies of Croson," *The Yale Law Journal*, 100, no. 4 (1991).

in *Watson* that the petitioners held the burden of proving that they experienced racial discrimination even after presenting statistical evidence that indicated that this had occurred. Thus, the Court's ruling in *McCleskey* allowed the justices to take, as Thurgood Marshall would later write in his dissent, "a deliberate and giant step backward" in eradicating racial discrimination with their decision in *Croson* where once again, politics and personalities affected this ruling more than any other factors.¹⁶⁵

* * *

When the Supreme Court considers whether or not a law is constitutional, the justices subject the law to one of three standards of scrutiny – rational basis, strict scrutiny, or intermediate scrutiny. The Court developed its rational basis standard in *Nation Securities v. United States* (1904), though the next year in *Lochner v. New York* (1905) the Court pulled away from this standard until its ruling in *United States v. Carolene Products* (1938). In *Carolene Products*, Justice Harlan Fiske Stone wrote that "the existence of facts supporting the legislative judgment is to be presumed...[and] that [a law] rests upon some rational basis within the knowledge and experience of the legislators."¹⁶⁶ In other words, barring irrefutable evidence that showed that a legislature had committed some gross error, the rational basis standard required the Court to defer to the legislature.

Of course, if the Court applied the rational basis standard to laws that sanctioned racial discrimination, the justices would have to affirm legislation that assigned blacks and whites to separate schools or seats on buses because of their race. Stone recognized that several states had and would continue to pass racially discriminatory laws that violated the Fourteenth Amendment's Equal Protection Clause. To prevent the Court from approving these laws, Stone

¹⁶⁵ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 529 (1989).

¹⁶⁶ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

included a now famous footnote and asserted that the Court could not use a rational basis standard in cases that dealt with minorities' rights.

In 1944, the Court developed a standard of "strict scrutiny" for cases that addressed racial discrimination. Hugo Black wrote in the Court's six-to-three opinion in *Korematsu v. United States* "that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."¹⁶⁷ Black's *Korematsu* opinion approved Franklin Roosevelt's executive order that required anyone of Japanese ancestry to abandon their homes and possessions and live in internment camps because of the supposed danger anyone of Japanese ancestry posed to America's safety and security during World War II. Most contemporary scholars have condemned *Korematsu*, and except for one other ruling almost 60 years later, the Court would never again allow a law to stand after subjecting it to the strict scrutiny standard.¹⁶⁸

Beginning with its momentous ruling in *Brown*, the Warren Court applied the strict scrutiny standard to any decision that dealt with racial discrimination. In mostly unanimous rulings, the justices found any racial categorization to be suspect and accepted the NAACP's arguments that the Equal Protection Clause required a color blind society.¹⁶⁹

But in *Regents of the University of California v. Bakke* (1978), four justices established a third standard of consideration called "intermediate scrutiny."¹⁷⁰ A law could survive under immediate scrutiny if the justices determined that the law accomplished important objectives through classifications that appeared suspect. For instance, these justices concluded in *Bakke*

¹⁶⁷ *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

¹⁶⁸ The other ruling was *Grutter v. Bollinger* (2003), a case that will be discussed at the end of this chapter.

¹⁶⁹ See, among other cases, *Brown v. Board of Education*, 347 U.S. 483 (1954); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Boynton v. Virginia*, 364 U.S. 454 (1960); *Green v. County School Board*, 391 U.S. 430 (1968).

¹⁷⁰ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

that the University of California could consider the race of applicants during admissions decisions to increase the number of minorities who attended.

To which of these three standards should the Supreme Court subject race-based affirmative action? Beginning with *Bakke*, the Burger Court departed from the Warren Court's precedents and determined that they would consider race's role in hirings, university admissions, and other instances under intermediate scrutiny. Yet *Bakke* was a contentious case. Four justices asserted that the universities could have a minimum quota of reserved spots for minorities while another four argued that Title VI of the Civil Rights Act prohibited racial classifications from playing any role in universities' admissions policies. Justice Lewis Powell attempted to find a balance between the two sides and wrote a judgment in which he essentially stated, as *Time* would explain on its cover: "Quotas, No; Race, Yes."¹⁷¹

Bakke was the first of many Supreme Court decisions in which the justices determined that even though race-based affirmative action policies hurt whites, they were legal because they helped counter the effects of years of discrimination that minorities had experienced. Thus, the Burger Court subjected race-based affirmative action plans to intermediate scrutiny and tended to allow those policies to stand. However, almost all the justices maintained the positions they established in *Bakke*, and Powell provided the decisive vote in most cases.

In addition to frequently relying on Powell to cast the fifth and final vote, the Court never produced a majority opinion in race-based affirmative action cases. At most four justices would sign onto an opinion while others would just concur in judgment. But after Powell departed, William Rehnquist and four associate justices produced a majority opinion in *Croson*.

¹⁷¹ As quoted in Howard Ball, *The Bakke Case: Race, Education, & Affirmative Action*. (Lawrence: University Press of Kansas, 2000), 141.

The first steps towards *Croson* began in 1983. That year, the majority-black City Council of Richmond passed a law that required any business that agreed on construction contracts with the city to subcontract at least 30 percent of the contract for minority business enterprise (MBE's). The Council defined an MBE as "a business from anywhere in the country at least 51% of which is owned and controlled by black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut citizens."¹⁷² The law would expire five years later and included a waiver provision that would allow a contractor to opt out of the provision if the contractor could not locate MBE in a relevant area. The City Council pointed to Richmond's long history of legal and societal prejudice as the reason why just 0.67 percent of the city's construction contracts were with minority owned businesses even though Richmond had a population that was 50 percent black. Setting aside a fixed percentage of construction work for minorities, the Council argued, would help them overcome the still lingering effects of Richmond's long history of racial discrimination.

The Council's lawyers assumed that set-aside would be constitutional in accordance with the Supreme Court's ruling in *Fullilove v. Klutznick* (1980). Though *Bakke* had found quotas to be impermissible in affirmative action policies, *Fullilove* allowed fixed numbers for set-asides. In *Fullilove*, Burger, White, Powell, Brennan, Stewart, and Marshall concluded that Congress could reserve 10 percent of a public works bill for minorities. Congress did not pass this set-aside to help minorities overcome any specific instance of discrimination, but it felt that the years of societal discrimination that minorities had experienced had prevented minorities from finding many jobs. The Court agreed and approved the law. The Council's lawyers saw no reason that the federal government could grant set-asides for minorities but a city government could not. As

¹⁷² *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

a result, they told the Council that *Fullilove*'s precedent made the 30 percent set-aside constitutional.

Later that year, the J.A. Croson Company, a white-owned business, received one of the city's construction contracts. The company could not agree on a deal with an MBE subcontractor, and Richmond decided to put the contract up for re-bidding. In response, Croson sued the city and claimed that the mandatory set-aside violated its rights under the Equal Protection Clause. In 1984, the District Court found the law to be constitutional. The following year, the Fourth Circuit Court of Appeals agreed in a two-to-one decision that the city's plan was consistent with *Fullilove* and constitutional under the Equal Protection Clause.

But in 1986, the Supreme Court told the Court of Appeals to reconsider its decision in light of the precedent it had established in *Wygant v. Jackson Board of Education* (1986). In *Wygant* five justices, with Powell once again providing the decisive vote, concluded that a school could not fire a white teacher who had less seniority than a black one in an effort to maintain the already low number of black teachers at a school with a fairly large black student population. To Powell, race-based affirmative action policies were fine for hiring plans but not for firing ones. After reconsidering the case, in 1987 the Court of Appeals sided two-to-one with the J.A. Croson Company. The entire Fourth Circuit affirmed that decision six-to-five.

The City Council appealed that decision to the Supreme Court and on October 5, 1988, the Court heard the oral argument in *Croson*. Going into the case, Richmond's City Council could count on Brennan, Marshall, and Blackmun to support its set-aside, while Rehnquist and Scalia would be certain to find that the law discriminated against non-minorities. The other justices' positions did not seem guaranteed. Stevens was often unpredictable, O'Connor and White tended to oppose affirmative action plans but did not always do so, and Kennedy was

somewhat of an unknown since he had just joined the Court. As a result, when John Payton and Walter H. Ryland argued before the Court, they focused on trying to persuade these justices to side with them.

John Payton began his argument on behalf of the city of Richmond by explaining the provisions of the set-aside and noting that “Aware of findings of the Congress regarding discrimination nationwide in the construction industry, and of this Court's decision in *Fullilove*, upholding Federal legislation remedying that discrimination, Richmond examined its own construction industry.”¹⁷³ This, he explained, caused the Council to enact the set-aside with the goal of eradicating the effects of racism in construction. He then started detailing the enormous racial disparities in the city’s construction industry when Justice Stevens asked if the city had any information regarding percentage of Richmond’s MBE subcontractors.

Payton informed the justices that “there is nothing in the record that says exactly what the racial breakup of subcontracting is, but the evidence with regard to prime contracting is stark and dramatic, and there is no reason, as the trial court found, to expect it to be any different” than the numbers for prime contracting.¹⁷⁴ He and Stevens continued their exchange, and Payton cited evidence that suggested that if the city increased the number of MBE subcontractors, the number of Richmond’s minority contractors would also increase. He also told the justices that Richmond had attempted to help targeted minorities in the construction industry through a process that was “both modest and narrow.”¹⁷⁵ Since it would be easier to help subcontractors enter the construction industry than prime contractors, Payton explained, the city had chosen this route.

¹⁷³ The Oyez Project, *Oyez: City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), available at: <http://www.oyez.org/media/item?type=audio&id=argument&parent=cases/1980-1989/1988/1988_87_998> (Last visited February 18, 2007)

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

Justice O'Connor then asked if the Council had "considered any race-neutral alternatives before enacting a percentage set-aside requirement."¹⁷⁶ Payton responded that while the city had done so, the virtual absence of minorities in the construction industry made other methods unlikely to succeed. Still, O'Connor seemed troubled that the Council had passed the set-aside without any exact figures regarding Richmond's MBE subcontractors.

O'Connor then wondered why the Council had also included "Orientals, Indians and Aleut persons" in the set-aside.¹⁷⁷ Did any evidence exist that showed that these groups had suffered racial discrimination in Richmond? Payton explained that while this evidence did not exist, the ordinance included "the same description of minorities that exists in the Federal program in *Fullilove*, and in fact, it's the same description of minorities that exists in the Virginia code that defines what a minority business enterprise is."¹⁷⁸ In other words, Payton argued the Council had copied *Fullilove* and thus had passed a Constitutional law.

As the exchange between Payton and O'Connor continued, the justice asked Payton if "state and local government (Sic.) have as much authority and power to act in this area as Congress does, with its express grant of authority under the Fourteenth Amendment."¹⁷⁹ Payton responded that he did not "think that it's...possible for Congress to come up with remedies that affect various localities in ways that will actually deal with these problems."¹⁸⁰ He claimed that local governments were in a better position to pose solutions to racism in their cities and states than the federal government. This argument meshed well with Rehnquist and O'Connor's beliefs in federalism and deference to local and state governments whenever possible.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

Soon afterward, O'Connor piggybacked off of one of Scalia's questions and remarked, "Although in a sense, the Fourteenth Amendment was precisely designed to prohibit States from taking action on the basis of race, wasn't it?"¹⁸¹ Payton disagreed and noted that the Court had long interpreted the Fourteenth Amendment as being "designed in a way to require States to treat people fairly."¹⁸² Still, O'Connor's question showed that she had real concerns with the set-aside, and Payton had to have been worried about the way she would vote.

During the rest of Payton's argument, he defended most of his earlier points. Though *Fullilove* and *Croson* were not identical, he maintained, they were similar enough that the Court should approve the set-aside. He felt that the law would help resolve racial prejudice in Richmond's construction industry and the Court should approve it. But Payton stuttered and stumbled at times during his argument. And when Blackmun asked if "the 30 percent figure [came] from out of the air," Payton noted that it fell between Richmond's minority population and the percentage of minorities working in the construction industry but could offer no stronger support for the figure.¹⁸³ Though he raised some good points, Payton did not seem to persuade many of the justices who sat on the fence in *Croson*.

Walter Ryland then spoke on behalf of the J.A. Croson Company. Throughout his argument, he insisted that "if City Council wanted to attack societal discrimination, they could do it by adopting various means, race-neutral means on their face."¹⁸⁴ Little of Ryland's oral argument proved noteworthy. Yet at one point, Justice Kennedy posed the following question: "Well, if this ordinance had been enacted in the year 1870, would the chances for its being

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

sustained be any greater than now?”¹⁸⁵ A stumped Ryland answered that he did not “feel competent to answer that.”¹⁸⁶ But Kennedy pushed the attorney, and Ryland admitted that in 1870 “You had the Freedman's Bureau, which was established at that time specifically to provide aid to former slaves. Nobody has ever suggested that that was unconstitutional or some sort of unlawful preference.”¹⁸⁷ But he argued that based on precedent from *Brown* onward, the Court would have sided with the Croson Company even in 1870. Kennedy again challenged Ryland and asked “And you think it's unlikely that this ordinance could have been sustained in 1870, when Blacks had been emancipated for simply, approximately six years?” but Ryland ducked the issue and said that he felt uncomfortable answering such an “abstract” question.¹⁸⁸

No one would again raise the issue of original intent or meaning during oral argument, but both attorneys must have wondered if Kennedy’s originalist views would cause him to side with the City Council. The rest of the oral argument, however, continued in much of the same way – Ryland argued that the city should have pursued a facially color-blind method to help minorities break into the construction industry.

Two days after oral argument, the justices gathered in their conference room to discuss and vote on *Croson*. To no one’s surprise, Rehnquist began by announcing that the Court needed to adopt a strict scrutiny standard for race-based affirmative action plans. He argued that the Court of Appeals had ruled correctly the second time and the 30 percent quota in the set-aside seemed to come “out of the air.”¹⁸⁹ Rehnquist felt that overruling the Court of Appeals would leave “too many warts on [the Court]” and sided with the J.A. Croson Company.¹⁹⁰ Scalia also

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Box 517, File 4, Blackmun Papers, 7 October 1988.

¹⁹⁰ Ibid.

condemned the law and insisted that the majority-black City Council was “lining [its race’s] own pockets,” just like the whites did when they held the majority on the Council.¹⁹¹ Brennan, Marshall, and Blackmun of course disagreed and insisted that Richmond had passed a law consistent with *Fullilove*. They felt that the justices should reserve the Court of Appeals’ decision.¹⁹²

But Payton and Ryland had not focused on persuading those five justices to vote with either of them. The lawyers knew that the justices’ voting patterns made their votes guaranteed ahead of time. But no one could say for sure how the other four justices would decide. Their votes would set an important precedent for future race-based affirmative action initiatives in America. Byron White was the first of these justices to speak at the conference.

Many observers saw White as becoming increasingly conservative over the years. Others, however, remained perplexed about the former pro football player’s legal and political views. Part of this confusion came from White’s voting record in race discrimination cases. He had voted with the Warren and Burger Court’s liberals in the school desegregation cases and had even dissented with them in the controversial case in which legislators proposed busing students across districts to achieve specific proportions of black and white students.¹⁹³ In affirmative action cases, White had voted, if a bit hesitantly, alongside the liberals in *Bakke*, *Fullilove*, and other cases.¹⁹⁴ But as time went on, he began to side with the conservatives. By the time the Court heard *Wygant*, he seemed to have changed his views on affirmative action.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ *Milliken v. Bradley*, 418 U.S. 717 (1974).

¹⁹⁴ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).
Fullilove v. Klutznick, 448 U.S. 448 (1980).

In general, White was an “unnervingly harsh” justice who liked to issue consistent and strong opinions.¹⁹⁵ He frightened many of the clerks, and they exchanged stories about White’s intensity. Some claimed that White “once pinioned another Justice’s clerk against a wall for drafting a particularly biting dissent from one of White’s opinions.”¹⁹⁶ White hated to be wrong or inconsistent, yet even he once remarked: “I wish I had been more consistent in the employment discrimination area.”¹⁹⁷ Why did a justice who remained so committed to his opinions change his views on affirmative action?

White had had reservations about affirmative action since the Court heard *Bakke*. Though he ultimately sided with the liberals, White noted at that conference that the “leg[islative] history of Title VII indicates that [a] quota [system] would be invalid.”¹⁹⁸ A major reason White decided to support the plan was because “Congressional views have changed since the ‘60s” and pointed to the 10 percent set-aside plan that the Court would approve two years later in *Fullilove* as evidence of this.¹⁹⁹ White continued to support affirmative action plans because he felt they helped minorities overcome past discrimination. Still, he feared that affirmative action might lead to policies that granted people jobs and admission to schools solely because of race instead of helping qualified individuals surpass the boundaries that racial prejudice had erected.

As the Court became more divided during the justices’ death penalty disputes, White began to demand a larger standard of proof that the petitioners had suffered from discrimination. In 1986, White helped a split Court deal a heavy blow to affirmative action in *Wygant*. He

¹⁹⁵ Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court*, (New York: Simon and Schuster, 1979), 442.

¹⁹⁶ Edward P Lazarus. *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court*. (New York: Times Books, 1998), 37.

¹⁹⁷ Dennis J. Hutchinson, *The Man Who Was Whizzer White: A Portrait of Justice Byron R. White*, (New York: The Free Press, 1998), 423.

¹⁹⁸ 76-811 *Regents of the University of California v. Bakke*, Powell Papers, 9 December 1977.

¹⁹⁹ *Ibid.*

concluded that there “has to be more” than evidence of societal discrimination to affirm a policy that allowed a school board to fire white teachers with more seniority than less experienced black teachers even though the school had a far greater percentage of black students than black teachers.²⁰⁰ And the following term in *Johnson v. Transportation Agency* and *McCleskey*, White determined in his dissent that compelling statistics that indicated that a petitioner had suffered racial discrimination still left the burden of proving this on the petitioner. For White, “There must be some finding of prior discrimination” for an affirmative action plan to be constitutional.²⁰¹ While the Byron White of *Bakke* and *Fullilove* accepted societal discrimination as meeting this burden, the White of *McCleskey* and *Wygant* needed to see a smoking gun that showed that a specific instance of racial discrimination had led to the statistical imbalances that John Payton had presented to the Court.

No matter what standard of proof White demanded, he would not have denied that blacks in Richmond had long experienced discrimination. After all, “The broad causal pattern of generations of economic exclusions of minorities was indisputable: African-Americans who wished to move out of the ranks of laborer and craftsman into the entrepreneurial mainstream were barred by collusion of both the City and non-minority business people.”²⁰² As whites formally and informally excluded minorities from positions of power, blacks had little opportunity to rise out of low social ranks.

At the *Crosby* conference, White claimed that he could not see any specific incident that had excluded blacks from the construction industry. But in their scholarship, many historians rely on a “humanistic” interpretation of history that “is flexible and probes behind fixed

²⁰⁰ Box 441, File 5, Blackmun Papers, 8 November 1985.

²⁰¹ 84-1340 *Wygant v. Jackson Board of Education*, Powell Papers, 8 November 1985.

²⁰² Peter Charles Hoffer, “‘Blind to History’: The Use of History in Affirmative Action Suits,” *Rutgers Law Journal* 23 (1992), 274.

categories to find actual relationships.”²⁰³ Thus, most historians would have concluded that the tiny percentage of blacks who worked in Richmond’s construction industry indicated that the city’s long history of legal and societal prejudice against blacks had kept them from working in that industry.

Using the model that a unanimous Burger Court had established in *Griggs* (1971), a humanistic interpretation of history would have required the justices to place the burden on the J.A. Croson Company of proving that the Council had discriminated against non-MBE’s when it enacted the set-aside. In several cases, both the Burger and Rehnquist Courts applied a humanistic view of history to determine whether or not racial prejudice had hurt minorities’ opportunities for success.²⁰⁴ Though White sided with the conservatives in these cases, in *Bakke*, *Fullilove*, and other earlier rulings he interpreted history humanistically and sided with the Court’s liberals. Why did White change the way he deciphered history?

Some of this change may have occurred through a combination of the Court’s divisiveness, Rehnquist’s management style as Chief Justice, and White’s competitive personality.²⁰⁵ White was so competitive that as a Rhodes scholar at Oxford in 1938, he and a classmate competed to see who could arrive earlier in the morning to set the dining room’s tables and carry more plates at a time when clearing the table.²⁰⁶ His NFL teammates noted that White “[takes] losses pretty hard” and “hates to lose.”²⁰⁷ And he delighted in beating the younger clerks during games of basketball on “the highest court in the land.”²⁰⁸ By 1988 White had

²⁰³ Hoffer, “Blind to History,” 278.

²⁰⁴ *Local 28 v. EEOC*, 478 U.S. 421 (1986).

Firefighters v. Cleveland, 478 U.S. 501 (1986).

United States v. Paradise, 480 U.S. 149 (1987).

Hoffer, “Blind to History,” 282.

²⁰⁵ As noted in Chapter 1, former clerk Dennis Hutchinson felt that White had not changed.

²⁰⁶ Hutchinson, *The Man Who Was Whizzer White*, 89.

²⁰⁷ As quoted in Hutchinson, *The Man Who Was Whizzer White*, 108.

²⁰⁸ Woodward and Armstrong, *The Brethren*, 66.

become too old to play, but a locker remained that had White's name written on an old strip of tape, and he retained the competitive streak that he had carried with him throughout his life.²⁰⁹

White's competitiveness meshed well with Rehnquist's management style. As Chief Justice, Rehnquist assigned opinions to the justices who had completed the largest percentage of the opinions in their docket. He became angry at justices when they took too long to release opinions. For instance, in February of 1987 a furious Rehnquist told Blackmun that he was "concerned about getting *McCleskey* down" and wondered if Blackmun might be "holding [his dissent] back for any purpose."²¹⁰ White liked Rehnquist's demands for efficiency and made a competition out of trying to complete his opinions quicker than the other justices could.

Stevens protested to Rehnquist that this policy had an "adverse effect on [the] quality" of the Court's work.²¹¹ He felt the quick publication of opinions lessened the communication between the justices over points that they raised in their opinions and dissents. Of course, Marshall and Brennan's unbending opposition to the death penalty after 1976 had caused a bitter divide within the Court and also limited the discussion between the justices. As White became irritated with the Court's stalwart liberals and shifted to the conservative bloc in death penalty cases, this animosity pushed White to vote differently in affirmative action cases as well. In part, this caused White to refuse to accept humanistic interpretations of history as proof of racism.

And so at the *Croson* conference, White argued that the plurality opinion in *Wygant* supported the Court of Appeals' ruling in *Croson*.²¹² He argued that the Council did not have enough evidence of the relationship between Richmond's racial discrimination and the need for the set-aside. White criticized several aspects of the program and complained that some of the

²⁰⁹ Lazarus, *Closed Chambers*, 37.

²¹⁰ Box 462, File 1, Blackmun Papers, 25 February 1987.

²¹¹ As quoted in Lazarus, *Closed Chambers*, 286.

²¹² Box 517, File 4, Blackmun Papers, 7 October 1988.

program's beneficiaries "have never been discriminated against" and noted that the "30% figure [was] poor."²¹³ He concluded by telling the other justices that a vote against *Croson* would not be inconsistent with *Fullilove* because he felt that sufficient evidence of public discrimination had existed in that case.²¹⁴ Apparently, White still stood by his past humanistic interpretations of history – he just refused to apply the same logic in *Croson*. And he never explained why he accepted the 10 percent figure in *Fullilove* but not the 30 percent in *Croson* when both numbers seemed to have little basis behind them. Regardless, White did not approve of the Richmond City Council's set-aside and voted against it.

White did not like the way his colleague John Paul Stevens, who was probably the most unpredictable justice in 1989, issued his votes. While he respected Stevens' confidence, White felt that Stevens "was not the imaginative...Justice he was depicted to be, but rather a man with a limited regard for precedent, a judge willing to start each issue from scratch."²¹⁵ Most of the other justices and court observers disagreed with White. They respected Stevens' creativity and refusal to limit himself to a particular ideology.²¹⁶

Still, White had a fair point. While few critics would support unblinking agreement with colleagues and deference to precedent, Stevens' insistence on reinventing the wheel in every decision at times hurt the Court. Greater consensus in Court decisions encourages the public to support them. As a result, many justices have put aside their personal beliefs to join an opinion they did not fully support. Perhaps the most famous example occurred when Stanley Reed joined his brethren in *Brown* to give the Court a unanimous opinion in its landmark opinion. And in *McCleskey v. Kemp*, the combative Scalia joined Powell's opinion even though he

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ Woodward and Armstrong, *The Brethren*, 428.

²¹⁶ Ibid.

disagreed with Powell's logic. To Scalia, it mattered more that the Court produce a majority opinion that would keep the death penalty legal in Georgia.

Yet Stevens often insisted on issuing his own opinions even when he agreed with the judgment of the other justices. After Powell joined Brennan's opinion in *United States v. Paradise* (1987), Powell wrote to Brennan "I send congratulations" for producing the Court's first majority opinion in a race-based affirmative action case.²¹⁷ Powell had often declined to join an opinion that four other justices had, so he and Brennan assumed that Powell's decision "should give...the first Court decision in which five of us have agreed in an affirmative action case."²¹⁸ But Stevens decided to concur in judgment, and the Court would have to wait until *Croson* to produce a majority opinion regarding affirmative action.

Years before at the *Fullilove* conference, Stevens had told the justices that he did not feel "wholly at rest" with the case because he could not "agree with either 'extreme' position."²¹⁹ But he concluded that he saw "no proof" that past discrimination had left "anyone a victim" and thus offered a "tentative" vote against the federal set-aside.²²⁰ In his published dissent, Stevens condemned the law but announced that he did not feel "convinced that the Clause contains an absolute prohibition against any statutory classification based on race."²²¹ Would the unpredictable Stevens again conclude that he could not connect past discrimination to the need for a set-aside? Or would he determine that Richmond's City Council had been correct to pass the law?

²¹⁷ 85-999, *United States v. Paradise*, Powell Papers, 19 December 1986.

²¹⁸ *Ibid.*

²¹⁹ 78-1007, *Fullilove v. Klutznick*, Powell Papers, 30 November 1979.

²²⁰ *Ibid.*

²²¹ *Fullilove v. Klutznick*, 448 U.S. 448, 548 (1980).

At the *Croson* conference, Stevens told the other justices that he had problems with the set-aside because he could not see benefits developing from it “in t[he] future.”²²² He argued that the Court must be careful about deferring to racial preferences or harms that legislatures enacted and reminded the Court about its terrible ruling in *Korematsu*, though he recognized that Richmond’s set-aside plan was different from the Japanese internment camps. And as in *Fullilove*, he noted that “no one testi[fied] that he was a victim” of past discrimination, and thus he could not find proof of the need for Richmond’s racial quotas.²²³ Stevens argued that the set-aside was “N[ot] t[he] right way to go about” helping those who needed it and voted against Richmond’s City Council.²²⁴

Sandra Day O’Connor’s position was also uncertain. Lewis Powell had served as a mentor of sorts for O’Connor when they sat on the Court together. When she and her husband first moved to Washington, Powell helped them find a home and let one of his secretaries work for O’Connor. In her book *The Majesty of the Law*, O’Connor said of Powell: “Most important, he was willing to talk about cases and the issues. His door was always open.”²²⁵ O’Connor found Powell helpful and missed his guidance after he left.²²⁶

After Powell’s departure, O’Connor became more of a swing vote on the Court. In later years this occurred because O’Connor became somewhat more sympathetic to traditional liberal positions, especially cases that dealt with abortion. But an even bigger reason for O’Connor becoming a swing vote was that the Court moved further right once Powell left. In 1989, the more conservative Kennedy sat in place of the more moderate Powell. When a likely opponent

²²² Box 517, File 4, Blackmun Papers, 7 October 1988.

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ Sandra Day O’Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice*, (New York: Random House, 2003), 150.

²²⁶ *Ibid.*

to affirmative action replaced the man who had tried to balance the issue for so long, O'Connor's vote mattered more.

O'Connor had trouble supporting the set-aside, however. Like White, she refused to interpret Richmond's history in a humanistic way. Despite Richmond's long history of legal prejudice against blacks, she saw no evidence that discrimination had prevented minorities from working in Richmond's construction industry.²²⁷ Instead, she believed that the city council had engaged in "pernicious race-based practices" when it legalized the set-aside.²²⁸ To her, the set-aside discriminated against the J.A. Croson Company and other non-MBE's. Thus, O'Connor declared the set-aside to be unconstitutional and voted against Richmond's City Council.

Five justices had already deemed the set-aside to be unconstitutional, but because Scalia would later decide not to join the Court's opinion, Anthony Kennedy ended up casting an important vote. Former President Ronald Reagan had appointed Kennedy to the Court for the same reason he chose Rehnquist to become Chief Justice and O'Connor and Scalia to be Associate Justices. Reagan and his administration hoped they would overturn many of the Warren and Burger Court rulings they despised – most notably affirmative action. Charles Fried, who served in various capacities in the Reagan administration including as Solicitor General from 1985 until 1989, wrote that "affirmative action dangerously aggrandizes government [and] is a threat to liberty and the basic right of every person."²²⁹ In one brief to the Court, he and future Roberts Court Justice Samuel Alito wrote a controversial brief in which they equated affirmative action with the segregation policies in place before *Brown* and quoted one of Thurgood Marshall's briefs to argue against affirmative action.

²²⁷ Box 517, File 4, Blackmun Papers, 7 October 1988.

²²⁸ Ibid.

²²⁹ Charles Fried, *Order and Law: Arguing the Reagan Revolution – A Firsthand Account*, 90.

Yet while Reagan and Fried hoped that Kennedy would help eliminate affirmative action, Kennedy had not been President Reagan's first choice to replace Powell. First, Reagan attempted to appoint arch-conservative Robert Bork to the Court. But Bork was a controversial figure. He fired Special Prosecutor Archibald Cox when Cox asked then-President Richard Nixon to give him the Watergate tapes, he criticized many Warren Court decisions that had eliminated legal segregation, and he only offered limited support for *Brown*. Bork terrified liberals, and as a result, the Senate denied his nomination by a vote of 58-to-42.

The Senate's rejection of Bork infuriated the conservatives and exacerbated the Court's divisions that the death penalty disputes had initiated. Andrew McBride, a former Bork clerk on the Court of Appeals of the District of Columbia and an O'Connor clerk during *Croson*, demonstrated this anger. In September of 1988, McBride emailed the other conservatives: "Everytime (Sic.) I draw blood I'll think of what they did to Robert H. Bork."²³⁰ And Edward Lazarus, Blackmun's clerk that term, wrote to Blackmun that [Anthony Kennedy's clerk] Paul Cappuccio "boasted that he frequently suggests to Justice Kennedy that Justice Brennan has been 'sticking it to him (Justice Kennedy)' all year long, and that Justice Kennedy would be wise to return the favor."²³¹ While Lazarus did not know for certain if Cappuccio manipulated Kennedy as successfully as he claimed, he noted that "such behavior is in keeping with both my assessment of Mr. Cappuccio's character, and with the deep and sometimes bitter political divisions among this Term's clerks."²³² The failed Bork nomination helped exacerbate divisions that were a far cry from the unanimity the Warren Court had displayed in so many race discrimination cases.

²³⁰ Lazarus, *Closed Chambers*, 265.

²³¹ Box 513, File 8, Blackmun Papers, 14 March 1989.

²³² *Ibid.*

Reagan's next choice to replace Powell, Douglas Ginsburg, had to withdraw from the nomination after many Americans became outraged when they learned that Ginsburg had smoked marijuana as a law student at Harvard and later as a member of the school's law faculty. Finally, the Senate confirmed Anthony Kennedy, and he became the Court's junior justice.

Though many Americans today see Kennedy as the Roberts Court's swing vote, when he first joined the Court he was far from a moderate. Kennedy seemed like a likely choice to advance Reagan's agenda, and in his first term on the Court, Kennedy did not disappoint his appointee. In that term, Kennedy and Scalia reached the same judgment in almost 90 percent of the cases in which they both participated.²³³ The main reason that Payton and Ryland could not be sure of Kennedy's position was because he was new to the Court, not because of his ideology.

At the *Croson* conference, Kennedy agreed with the other conservatives. Though Kennedy had discussed the South's history of discrimination against blacks at oral argument, he declined to include a humanistic interpretation of history in his analysis. He thus concluded that "no e[vidence]" existed that linked "the city's own past discrimination" to the city council's set-aside.²³⁴ Kennedy feared that the set-aside would "impose unfair [burdens] on t[he] innocent" white-owned businesses.²³⁵ As a result, he voted to affirm the Court of Appeals' ruling and declare the set-aside unconstitutional.

Kennedy's vote left the final tally six justices in favor of the J.A. Croson Company with only three supporting the City of Richmond. As he did in *McCleskey*, Rehnquist assigned the opinion to a justice who would write a strong enough opinion to persuade at least four justices to join yet not so strong that it would drive the others away. Scalia and, as far as Rehnquist knew,

²³³ The Oyez Project, Oyez: 1987 Term, available at: <http://www.oyez.org/cases/?group=1980-1989&term=1987> (last visited February 10, 2007).

²³⁴ Box 517, File 4, Blackmun Papers, 7 October 1988.

²³⁵ *Ibid.*

Kennedy felt that race-based affirmative action would be unconstitutional in almost every circumstance. O'Connor and Stevens would never sign onto an opinion that claimed this. Stevens, however, tended to write opinions that matched his own views above everyone else's. Rehnquist wanted a stronger opinion that condemned race-based affirmative action as much as possible, and so he turned to O'Connor.

In her opinion for the Court, O'Connor repeated the sentiments that many of the justices had emphasized at the conference. She wrote that "There is absolutely no evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry" and so the city should not have included these groups in the set-aside.²³⁶ O'Connor even seemed to ridicule the council's attempt to include some of these minorities, as she noted that "It may well be that Richmond has never had an Aleut or Eskimo citizen."²³⁷ She wondered if the city's "random inclusion" of these racial groups in the set-aside indicated that the majority black city council had goals in mind beyond helping minorities recover from the damages that past discrimination had left behind.²³⁸

O'Connor also continued the trend that the Court began in *McCleskey*. She concluded that the enormous statistical disparity between Richmond's minority population and the percentage of minorities who worked in the construction industry did not place the burden on the J.A. Croson Company of proving that the intention of the set-aside was not to remedy the effects of racial discrimination. Instead, O'Connor wrote that "the proper statistical evaluation would compare the percentage of MBE's in the relevant market that are qualified to undertake city

²³⁶ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989).

²³⁷ *Ibid.*

²³⁸ *Ibid.*

subcontracting work with the percentage of total city construction dollars that are presently awarded to minority subcontractors.”²³⁹

Of course, even O’Connor recognized that the low percentage of MBE’s working in construction when compared with population arose in large part due to “past societal discrimination.”²⁴⁰ But as she and the justices who voted with her said so many times at the conference, they would not accept Richmond’s long history of racial discrimination as evidence of the set-aside’s necessity. While historians often apply humanistic interpretations to their analysis of the past, O’Connor and the other justices refused to do so. A non-humanistic interpretation of the set-aside could not survive strict scrutiny. O’Connor concluded that while the Court would continue to apply intermediate scrutiny to federal set-asides, the justices would hold local affirmative action plans to a standard of strict scrutiny. She reached this conclusion because, as she explained in her opinion, “Section 1 of the Fourteenth Amendment is an explicit constraint on state power, and the States must undertake any remedial efforts in accordance with that provision. To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions.”²⁴¹ In other words, O’Connor claimed that the federal government should have more power than the states in legalizing affirmative action plans.

When Blackmun read this section of O’Connor’s opinion, he sarcastically noted “our Sts (Sic.) rights SOC” in the margin.²⁴² O’Connor had long subscribed to Rehnquist’s federalist views, yet in *Croson* she ignored the legal rationale she had advocated for so long. Three possibilities exist behind O’Connor’s apparent change of heart – her tendency to view cases as

²³⁹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 470-471 (1989).

²⁴⁰ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 471 (1989).

²⁴¹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989).

²⁴² Box 517, File 3, Blackmun Papers, October 1988 term.

narrowly as possible, the influence of *Wygant* on *Croson*, and O'Connor's views on affirmative action.

Like her mentor Lewis Powell, O'Connor tended to view cases in as limited a scope as possible. O'Connor may have felt that while the federal government should generally defer to state governments whenever possible, race-based affirmative action policies were an exception to this rule. Yet the following term O'Connor would write in a dissenting opinion that the Court should subject federal race-based affirmative action plans to strict scrutiny, so this explanation appears to be incorrect.²⁴³

Another possibility behind O'Connor's rationale is that she felt that her opinion would be consistent with Powell's plurality opinion in *Wygant*. After all, as one former Blackmun clerk noted, that decision "invalidates all affirmative action layoff provisions" and cast such doubt on affirmative action plans that the justices had asked the Court of Appeals to reconsider its original ruling that approved the set-aside once they issued their decision in *Wygant*.²⁴⁴ Yet the same term that the Court issued its ruling in *Wygant*, Powell voted to allow a union to set a minimum quota of black members because, as he explained, "unlike *Wygant*, there is nothing before us to suggest that individual members will have to be laid off."²⁴⁵ Powell could not accept affirmative action plans that caused innocent whites to lose their jobs, but he approved of plans that helped minorities get jobs. As a result, Powell's plurality opinion in *Wygant* would appear to be consistent with the dissenters' views in *Croson*.

²⁴³ *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547 (1990).

²⁴⁴ Box 441, File 5, Blackmun Papers, 14 December 1985.

²⁴⁵ As quoted in Mark Tushnet, *Making Constitutional Law: Thurgood Marshall and the Supreme Court, 1961-1991*, (New York: Oxford University Press, 1997), 138.

Perhaps the most plausible explanation for this inconsistency is that O'Connor despised race-based affirmative action plans.²⁴⁶ O'Connor may have been uncomfortable invalidating policies that the Court had approved for so long, but she wanted to limit the extent to which Richmond and other cities could issue these types of policies. And so O'Connor and four other justices claimed that they saw no evidence that racial discrimination resulted in the tiny number of minorities working in Richmond's construction industry.

Scalia did not sign onto the opinion and wrote a concurrence arguing that any race-based preferences were unconstitutional. Like O'Connor, Scalia reached a conclusion that seemed to contradict his legal views. Scalia believed that the Court should interpret the Constitution in accordance with the original meaning of the document. Yet the Founding Fathers had no problem with racial classifications, as they owned black slaves and allowed them to count as 3/5 of a white man in determining states' populations. And as Kennedy noted at oral argument, the framers of the Fourteenth Amendment created a Freedmen's Bureau to help blacks recover from the harms of racial discrimination. As a result, Scalia's concurrence proved inconsistent with the originalism he advocated.

Marshall and Blackmun wrote powerful dissents in which they chronicled Richmond's long history of racial discrimination. Yet they also proved unwilling to scrutinize the 30 percent figure that Blackmun and others had questioned at the conference. O'Connor dismissed Marshall's objections, claiming that "The 'evidence' relied upon by the dissent, the history of school desegregation in Richmond and numerous congressional reports, does little to define the

²⁴⁶ O'Connor would later cast the deciding vote that allowed race-based affirmative action plans to survive in *Grutter v. Bollinger* (2005). For O'Connor, the difference between *Croson* and *Grutter* may have been that *Grutter* had no quotas in its plan. Another possibility is that *Croson* did not declare state-enacted set-asides unconstitutional – it just set a difficult standard for them to survive. O'Connor's ruling in *Grutter* maintained that tough standard, which may have left her comfortable with that ruling.

scope of any injury to minority contractors in Richmond or the necessary remedy.”²⁴⁷ And so on January 20, 1989, the Supreme Court announced that the Richmond set-aside was unconstitutional and determined that they would subject all state-imposed affirmative action plans to a strict scrutiny standard.

The justices communicated little during *Croson*. The liberals approved a set-aside that appeared to have no real basis behind its 30 percent quota. And in a dubious claim at best, the conservatives argued that they could not approve the plan because they saw no relationship between Richmond’s history of racial discrimination and the limited number of minorities who worked in construction in the city. What stopped the conservatives from applying a humanistic interpretation of history to see the relationship between these areas? Why did the liberals insist on approving all aspects of a set-aside that appeared to have no quantitative basis? And why did both sides apply legal views that contradicted the beliefs they supported so often? As David Savage has noted, “If you were unaware of the parties and the issue in this case, you would assume that the liberal justices would be on the side of the individual claiming to be a victim of government discrimination (*Croson*), while the conservatives would line up in defense of the city and its officials’ exercise of their government powers.”²⁴⁸ But, as the justices’ voting trends in race-based affirmative action cases indicated, “No issue turned the table as much as affirmative action.”²⁴⁹

The justices’ strong personal views on affirmative action made it difficult for them to reconcile those beliefs with their traditional legal views. This, the bitter divide that had developed in the Court over the death penalty, and the *McCleskey* precedent that prevented the statistics that Payton presented from creating *prima facie* support for the city appeared again

²⁴⁷ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989).

²⁴⁸ Savage, *Turning Right*, 217.

²⁴⁹ *Ibid.*

during the Court's ruling in *Croson*. The decision left race-based affirmative action alive in America, but only barely, as the new strict scrutiny standard would make it almost impossible for the Court to approve many affirmative action plans.

* * *

In 1990 Byron White joined the liberal bloc in *Metro Broadcasting Inc. v. FCC* to affirm *Fullilove* and declare that the federal government could establish fixed set-asides for MBE's, but William Brennan left the Court after that term.²⁵⁰ The following year, Thurgood Marshall announced his retirement. Though David Souter, Brennan's replacement, surprised conservatives and liberals when he aligned himself with the Court's left wing, Marshall's departure pushed the Court even further to the right when President George H.W. Bush appointed Clarence Thomas, a man who Blackmun described as a "follower of A[ntonin] S[calia]," to replace Marshall in 1991.²⁵¹ Shortly thereafter, Ruth Bader Ginsburg and Stephen Breyer, two moderates who leaned left, replaced Byron White and Harry Blackmun. After these four changes on the bench, the justices continued the trend they began in *McCleskey* and established tougher standards for petitioners to show that they experienced racial discrimination. In doing so, they continued to wipe out affirmative action policies.

In 1995, the Court overturned *Fullilove* and *Metro Broadcasting* with its ruling in *Adarand Constructors v. Pena*. In *Adarand*, the Court declared that only in "narrowly tailored measures that further [compel] governmental interests" would the Court approve affirmative action policies.²⁵² The Court allowed affirmative action to remain legal, but it would now evaluate all future plans under a strict scrutiny standard. And affirmative action advocates could

²⁵⁰ *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547 (1990).

²⁵¹ Box 116, File 2, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C., 15 January 1993.

²⁵² *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995).

not find even four Justices willing to hear an appeal of the Fifth U.S. Circuit Court of Appeals' 1994 ruling in *Hopwood v. State of Texas*.²⁵³ In *Hopwood*, the Court of Appeals had declared that the University of Texas Law School could not use affirmative action policies to increase its racial diversity.²⁵⁴

Then in 2003, the Supreme Court announced its rulings in *Gratz v. Bollinger* and *Grutter v. Bollinger*. In *Gratz*, the Court invalidated the University of Michigan's undergraduate affirmative action plan. Under the university's admissions policy, the admissions committee ranked applicants on a 150-point scale. The committee accepted most students who earned 100 or more points. According to the Court, the students could receive points for a number of non-merit based reasons such as "in-state residency" or "alumni relationships."²⁵⁵ But the justices would not allow the university to award points to students for being members of disadvantaged minority groups.

In *Grutter*, the Court did accept the affirmative action policies of Michigan's law school in which the admissions committee "used [race] in a flexible, nonmechanical way."²⁵⁶ But O'Connor also argued in her opinion that "25 years from now, the use of racial preferences will no longer be necessary to further" a need for racial diversity.²⁵⁷ Although affirmative action remained alive, the Court had become conservative enough to rule that the policy could soon end. A difficult burden of proof now lay with petitioners to show that they had suffered racial discrimination. *Grutter* marked the first time in almost 60 years that the Supreme Court approved a legal racial classification after evaluating it under a strict scrutiny standard. And if

²⁵³ Four Justices must vote to hear a case for the case to go to the Supreme Court.

²⁵⁴ *Hopwood v. State of Texas*, 21 F.3d 603 (1994).

²⁵⁵ *Gratz v. Bollinger*, 539 U.S. 244, 257, 260, 261 (2003).

²⁵⁶ *Grutter v. Bollinger*, 539 U.S. 306, 336 (2003).

²⁵⁷ *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003).

the justices continue the trends the Rehnquist Court began in *McCleskey* and *Croson*, they will be unlikely to do so in the years to come.

Chapter 3

“Squarely Inconsistent” :

Johnson v. Transportation Agency and Gender-Based Affirmative Action

In *McCleskey v. Kemp* (1987) and *Wards Cove Packing v. Atonio* (1989) the Rehnquist Court determined that statistics could no longer establish *prima facie* evidence of racial discrimination. In *City of Richmond v. J.A. Croson Co.* (1989) and *Adarand Constructors v. Peña* (1995) the justices ruled that they would hold all racial classifications to a standard of strict scrutiny. But in *Johnson v. Santa Clara Transportation Agency* (1987), the Rehnquist Court showed that it would not hold gender classifications to these same standards.

In *Johnson*, a case that the Court decided the same term as *McCleskey*, the justices concluded that the absence of women in the 238 skilled worker positions in the Santa Clara County Transportation Agency served as grounds for the company to institute an affirmative action policy that helped women fill these positions. The Court ruled that in Title VII cases that dealt with gender discrimination, the justices would allow statistics to serve as *prima facie* evidence of gender discrimination. And the justices subjected gender classifications to intermediate – not strict – scrutiny. This made *Johnson* consistent with *Griggs* but contrary to the decisions in the *McCleskey* and *Croson*. Simply put, the Rehnquist Court placed much tougher restrictions on racial affirmative action plans than on gender ones. Perhaps because of the discrimination she experienced due to her gender, Sandra Day O’Connor – the Court’s swing vote – contributed significantly to these different standards. O’Connor’s experiences helped her empathize with women who faced similar setbacks. As a result, she voiced support for women

who faced discrimination even though she did not issue support for blacks in similar instances. Thus, as in other civil rights cases, personalities and political views were central to the Court's ruling in *Johnson v. Transportation Agency*. This led to a decision that was, as Antonin Scalia would note in his dissent, "squarely inconsistent" with the Rehnquist Court's rulings in racial discrimination cases.²⁵⁸

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Until Burger's final term as Chief Justice, the Burger Court never determined whether or not sexual discrimination was as invidious as racial discrimination. In *Reed v. Reed* (1971), a unanimous Court declared an Idaho law unconstitutional that required that "males must be preferred to females" in determining who would administer an estate.²⁵⁹ In his notes on the case, Justice Blackmun wrote: "I am inclined to feel that sex can be considered a suspect classification just as race."²⁶⁰ Blackmun recognized that the authors of the Fourteenth Amendment had not attempted to root out any sex discrimination in America. Yet he noted that "my own feeling is that these constitutional provisions must have some flexibility and expansiveness in them as, in theory, we ourselves progress and expand in our concepts of equality."²⁶¹ In other words, Blackmun foreshadowed his future alignment with the left by issuing some support for Brennan's belief in a living constitution that evolved with changing times.

Still, Blackmun felt more comfortable with a ruling that did little more than invalidate the Idaho law. Most of the other justices agreed, and so, in his opinion for the Court, Burger emphasized that "this Court has consistently recognized that the Fourteenth Amendment does not

²⁵⁸ *Johnson v. Transportation Agency*, 480 U.S. 616, 665 (1987).

²⁵⁹ *Reed v. Reed*, 404 U.S. 71, 73 (1971).

²⁶⁰ Box 135, File 10, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C., 18 October 1971.

²⁶¹ *Ibid.*

deny to States the power to treat different classes of persons in different ways.”²⁶² He argued that the law was unconstitutional because “The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.”²⁶³ The Court thus found the law unconstitutional but issued no broad ruling on women’s rights in general.

In 1973, however, William Brennan attempted to require the same legal standards for sexual and racial discrimination in *Frontiero v. Richardson*. In that case, Sharon Frontiero had challenged a federal law that allowed all men in the Air Force to classify their wives as dependents. The problem with this law, Frontiero argued, was that servicewomen could claim their husbands as dependents only if the women earned more than half the spouses’ combined incomes. Burger waffled on the issue, but all the other justices besides Rehnquist insisted that the law was “on its face grossly discrim[inatory].”²⁶⁴ Burger ultimately joined the majority and assigned the case to Brennan.

After first circulating a draft in which he argued on narrow grounds that the law was unconstitutional, Brennan made a bold move. He argued in a new draft that, as Marshall privately noted, “this case would provide an appropriate vehicle for recognizing sex as a suspect creiterion (sic.) calling for stricter review of the challenged class.”²⁶⁵ Douglas, White, and Marshall agreed with Brennan and signed onto the draft almost immediately. Brennan often reminded his clerks, “With five votes around here you can do anything.”²⁶⁶ But in *Frontiero* just

²⁶² *Reed v. Reed*, 404 U.S. 71, 75 (1971).

²⁶³ *Reed v. Reed*, 404 U.S. 71, 75-76 (1971).

²⁶⁴ Box 163, File 9, Blackmun Papers, 19 January 1973.

²⁶⁵ Box 109, File 8, Thurgood Marshall Papers, Manuscript Division, Library of Congress, Washington, D.C., October 1972 term.

²⁶⁶ As quoted in Kim Isaac Eisler, *A Justice For All: William J. Brennan, Jr., and the Decisions That Transformed America*. (New York: Simon & Schuster, 1993), 178.

four justices felt that, as Brennan wrote in his final opinion, “classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.”²⁶⁷ Without five justices in support of Brennan’s position, the Court could not issue binding precedent on sex discrimination.

Part of this refusal came from a belief in judicial deference to the legislature, as Stewart, Blackmun, and Powell noted in their memos to the other justices.²⁶⁸ Many observers felt that Congress would soon ratify the Equal Rights Amendment and declare men and women truly equal under the Constitution. As a result, these justices had legitimate legal reasons not to issue a broad ruling that equated race and sex discrimination, though Brennan did point out in a memo that it appeared unlikely that enough states would ratify the Amendment for it to become part of the Constitution.²⁶⁹

Still, some of this hesitancy may have sprouted from the all-male justices’ views on gender rather than law. The Court had a long history of excluding women. When Virginia Minor insisted in 1875 that the Equal Protection Clause required Missouri to allow women to vote, a unanimous Court laughed at the idea.²⁷⁰ Though over time the Court to some degree followed the line of thinking that Blackmun privately noted in *Reed* and extended the Equal Protection Clause to women, the all-male justices still did not treat men and women the same. During his first term as Chief Justice, Burger vowed “I will never hire a woman clerk.”²⁷¹ He worried that a woman’s task of arriving home in time to cook her husband’s dinner would interfere with her clerking responsibilities. Other justices had serious reservations about hiring

²⁶⁷ *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973).

²⁶⁸ Box 163, File 9, Blackmun Papers, 2 March 1973, 5 March 1973.

²⁶⁹ Box 163, File 9, Blackmun Papers, 6 March 1973.

²⁷⁰ *Minor v. Happersett*, 88 U.S. 162 (1874).

²⁷¹ As quoted in Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court*, (New York: Simon and Schuster, 1979), 123.

women. After William Douglas employed Lucile Lomen as the Court's first female clerk in 1944, Hugo Black did not hire the second until 1966.²⁷² Even William Brennan, one of the most progressive justices in the Court's history, showed little interest in hiring female clerks. A former Stevens clerk felt that "Brennan believed his chambers worked better when it was just him and the 'boys.'" ²⁷³ As a result, Brennan – as well as Blackmun and Powell – did not employ a female clerk until the 1974 term.²⁷⁴

In many ways, the justices' timidity regarding women's rights came as no surprise. In addition to their discomfort with hiring female clerks, some justices indicated in memos that they saw certain inequalities between men and women. After writing that "Women certainly have not been treated as being fungible with men" Powell added "thank god!" in parentheses.²⁷⁵ And Burger dismissed the women's rights movement when he added that "With or without my puny effort to mute the outrage of 'Womens (sic.) Lib,' I will join" Powell's concurrence that refused to rule on the issue of sex discrimination.²⁷⁶ With the Court's ruling in *Frontiero* and the Equal Rights Amendment's failure to become part of the Constitution, no legal grounds existed that made gender discrimination in any way suspect.

In 1975, future Supreme Court Justice Ruth Bader Ginsburg summed up the Court's rulings on gender discrimination to that point: "The Court's performance in sex discrimination cases since 1971, compared to the record of the previous century, may be legitimately

²⁷² Linda Greenhouse, "Women Suddenly Scarce Among Justices' Clerks," *New York Times*, August 30, 2006, final edition, <http://www.nytimes.com/2006/08/30/washington/30scotus.html?ex=1314590400&en=a512be2b621e74ca&ei=5088&partner=rssnyt&emc=rss> – cite properly

²⁷³ Joan Biskupic, *Sandra Day O'Connor: How the First Woman on the Supreme Court Became Its Most Influential Justice*. (New York: Harper Collins, 2005), 140.

²⁷⁴ Woodward and Armstrong, *The Brethren*, 355.

²⁷⁵ Box 163, File 9, Blackmun Papers, 2 March 1973.

²⁷⁶ Box 163, File 9, Blackmun Papers, 8 May 1973.

characterized as a dramatic shift, ‘a smashing success for the proponents of equal treatment.’²⁷⁷ Yet while Ginsburg felt glad that the Burger Court showed more empathy towards victims of gender discrimination than previous Courts, she expressed her disappointment “that the Court does not yet fully perceive, or is unwilling to confront, particular discrimination cases presented to it as part of a pervasive design of sex-role allocation shored up by laws that impede social change. Rather, the tendency has been to deal with each case in its own frame, and to write an opinion for that case and that day alone.”²⁷⁸

Ginsburg appreciated the justices’ willingness to declare much of the discrimination that female petitioners presented to be unconstitutional. Yet while she understood why the Court was unwilling to do so, she knew that as long as the law did not determine gender and racial discrimination to be equally invidious, these rulings would not help many women beyond the ones who brought their complaints before the Court. Ginsburg hoped that the Equal Rights Amendment would become part of the Constitution and help all American women fight the discrimination they faced. When the Amendment did not become part of the Constitution she must have felt greatly disappointed, as a fifth justice had yet to indicate that he planned on joining an opinion similar to Brennan’s *Frontiero* plurality. Until a fifth justice proved willing to do so, gender discrimination in America would remain widespread and hard to combat.

The following term in *Craig v. Boren* (1976), Brennan authored a majority opinion that struck down an Oklahoma law that prohibited men from buying 3.2 percent ABV beer until they turned 21 but allowed women to do so once they turned 18. Over Rehnquist and Burger’s dissent, Brennan’s opinion concluded that “Oklahoma’s gender-based differential constitutes an invidious discrimination against males 18-20 years of age in violation of the Equal Protection

²⁷⁷ Ruth Bader Ginsburg, “Gender in the Supreme Court: The 1973 and 1974 Terms,” *The Supreme Court Review*, 1975 (1975), 22.

²⁷⁸ *Ibid.*

Clause.”²⁷⁹ In doing so, the Court established that gender discrimination against both men and women could be invalid. Still, the Court had yet to issue a broad ruling that equated gender and racial discrimination.

Then in Burger’s final term as Chief Justice, the Court issued a ruling that addressed the legal status of sex discrimination. In *Meritor Savings Bank v. Vinson* (1986), the justices easily and unanimously concluded that the Court had “applied [the same] principle to harassment based on race, . . . religion, . . . and national origin” and that “Nothing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited.”²⁸⁰ As a result, *Meritor Savings Bank* left the Burger Court with a moderate gender-based discrimination legacy. Before *Meritor*, the justices had not been unsympathetic to instances of gender discrimination, but a long time passed before the justices held it to the same standards as racial prejudice. Still, by the end of Burger’s tenure as Chief Justice the entire Court agreed that sex and race discrimination were equally invidious. But in *Johnson v. Transportation Agency* (1987), the Rehnquist Court would not show the same consistency towards these standards on which the Court had settled just one term earlier.

The beginnings of *Johnson* took place in 1980 when Bert Di Basilio, the general superintendent of the Santa Clara County Transportation Agency, told Paul Johnson that Johnson had received a promotion to the position of dispatcher within the Transportation Agency. Johnson had grown up poor in Texas and always believed that if he worked hard he would receive the rewards he deserved. He started working with the Transportation Agency in 1967 and applied for the dispatcher position in 1974 before being rejected. But because of his hard work and dedication he believed that this time he would receive the promotion.

²⁷⁹ *Craig v. Boren*, 429 U.S. 190 (1976).

²⁸⁰ *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66 (1986).

Candidates had to take a test before being promoted, and Johnson did well on that test, placing second out of the seven finalists. As a result, by 1979 Johnson felt that, as he put it, “I had almost twenty years of experience...and I knew that there was no one else taking the test that was anywhere near as qualified as I was.”²⁸¹ In addition to Johnson’s stellar qualifications, he had worked as the acting dispatcher since the previous one had moved to a higher position. Informal Transportation Agency policy allowed people to move from acting to full-time holders of a position as long as they did the job well. This policy that allowed for smooth transitions between promotions and ensured that qualified people who worked well with others held important positions in the Transportation Agency.

But at the same time, this policy prevented outsiders from holding important jobs within the Transportation Agency. Paul Johnson was a good employee and no doubt deserved a promotion. Still, his status as “one of the boys” helped him succeed at the Agency.²⁸² Diane Joyce, on the other hand, did not have this advantage. Joyce attended the University of Illinois, after which she applied for a position as a computer programmer trainee. Joyce had solid qualifications, but the employers told her that the company would not hire a woman for that position. In 1958, she began working as an account clerk at the Triner Scale Company. After seven years, the company hired a male employee to perform part of Joyce’s job for \$35 more per week than she made. The salary discrepancy existed because, as the firm explained to Joyce, her husband could earn enough money to support her and her family. Diane Joyce worked as hard as Paul Johnson, but her gender prevented her from receiving many of the rewards that men received for comparable work.

²⁸¹ Melvin Urofsky. *Affirmative Action on Trial: Sex Discrimination in Johnson v. Santa Clara*. (Lawrence: University Press of Kansas, 1997), 5.

²⁸² Urofsky, *Affirmative Action on Trial*, 4.

After Joyce's husband died in 1969, she moved to Santa Clara. In 1972 she applied for a position as senior account clerk with the Transportation Agency. The company told her that they would rather hire a man, but when no man applied the Agency offered Joyce the job. Joyce performed well but noticed that most women at the Agency worked in clerical positions while men did the higher paying roadwork. She felt she could do the dispatcher's job and applied when a vacancy opened in 1974. The Agency, however, told Joyce that she could not apply because she did not have road crew experience even though the company had allowed Johnson to apply for that job when he did not have the same experience.

Still, Joyce applied for a road crew position in the hopes that she could become a dispatcher. As she completed the application, her supervisor yelled "Don't you realize that you're taking a man's job away?"²⁸³ Yet Joyce persisted. After taking night classes on the subject to increase her chances of finding road crew work, she found a job. The discrimination Joyce had faced beforehand continued during her new job, as she did not receive much of the same equipment that her male co-workers did. Joyce's male supervisor also gave her a written warning for a safety violation even though he did not even yell at the men on his road crew for their first violations. The supervisor withdrew Joyce's written reprimand only when she vowed to raise a complaint with her union, in which she held the position of shop steward.

Like Johnson, Joyce decided to apply again to become a dispatcher in 1979. She took the test with Johnson in 1980 and earned the fourth highest score. The supervisor could choose anyone who finished in the top seven to be the new dispatcher, so Joyce felt she had a good chance of receiving the job. But she heard rumors that the Agency had already promised Johnson the job and felt suspicious when the Agency arranged to hold her interview in the middle of a safety class she had to take as part of her job responsibilities. Joyce became angry

²⁸³ Urofsky, *Affirmative Action on Trial*, 7.

and later remarked, “It’s hard for me to believe that’s just coincidental.”²⁸⁴ Sick of being excluded from the Transportation Agency’s boys club, she called Helena Lee, the affirmative action officer for Santa Clara County to see if Lee could help Joyce get the job.

Almost immediately, the county affirmative action office started trying to help Joyce. They contacted Victor Morton, the affirmative action coordinator for the Transportation Agency, to tell him about Joyce’s situation. Morton encouraged James Graebner, the Agency’s director, to hire Joyce as the new dispatcher. As Graebner would later explain, “[Morton] felt that this was an opportunity for us to take a step towards meeting our affirmative action goals, and because there was only one person on the list who was one of the protected groups, he felt that this afforded us an opportunity to meet those goals through the appointment of that member of a protected group.”²⁸⁵ In other words, Morton felt that since Joyce met the qualifications to become a dispatcher, the Agency should give her the promotion because it would make the company look good to promote a woman to a position that only men had held to that point.

Santa Clara County had an affirmative action plan designed to help women and minorities gain jobs that discrimination had long kept them from earning. Because of this program and the Agency’s right to promote any of the seven finalists, Graebner assumed that the law supported his selection of Joyce as the new dispatcher.

Graebner would have to approve whoever Ron Shields, the supervisor of the Agency’s road operations, chose to be the dispatcher. Shields liked Johnson and got along well with him and had fought several times with Joyce. To him, Johnson was the logical choice. But when Shields called Graebner to get the approval to promote Johnson, Graebner insisted that Joyce receive the job. Shields argued on Johnson’s behalf, but Graebner refused. As a result, Bert Di

²⁸⁴ Urofsky, *Affirmative Action on Trial*, 9.

²⁸⁵ Urofsky, *Affirmative Action on Trial*, 10.

Basilio brought Johnson to his office and told Johnson that he would not be the Agency's new dispatcher. Di Basilio explained to Johnson that while he had put forth a strong argument for him, "Diane Joyce was appointed. You had already been appointed, and affirmative action got it reversed."²⁸⁶ An angry Johnson tried to reason with Morton and Graebner, but when that failed he hired an attorney who sued Santa Clara County on Johnson's behalf. The attorney argued that the promotion of Joyce over Johnson defied Title VII of the 1964 Civil Rights Act, which forbade all gender discrimination.

William Ingram, a Ford appointee, served as the presiding judge when the District Court for Santa Clara and three other California counties heard *Johnson v. Transportation Agency* in 1982. In his ruling, Ingram sided with Paul Johnson. He did not focus on the statistical imbalance of men and women who held skilled worker positions at the Agency. Instead, Ingram felt that the plan had too many defects, such as the lack of a defined end-date. Thus, he declared that the policy did not meet the requirements of *United Steelworkers of America v. Weber* (1979), a case in which the Supreme Court concluded that Title VII of the 1964 Civil Rights Act allowed affirmative action plans. Ingram announced that Paul Johnson should receive the dispatcher promotion, the amount of pay he had missed because of the delay in his promotion, and compensation for his attorney fees.²⁸⁷ In 1984, however, two judges on the Ninth Circuit Court of Appeals overturned Ingram's ruling while the third concurred in part and dissented in part. The majority concluded that Ingram had misunderstood *Weber* and Title VII and sided with Diane Joyce.²⁸⁸

Johnson's attorneys appealed the decision, and on February 24, 1986, the Supreme Court gathered to determine whether or not they would hear *Johnson* and several other cases. Brennan,

²⁸⁶ Urofsky, *Affirmative Action on Trial*, 11.

²⁸⁷ Urofsky, *Affirmative Action on Trial*, 75-77.

²⁸⁸ *Johnson v. Transportation Agency*, 770 F.2d 752 (1984).

Marshall, Blackmun, and Stevens voted to let the Court of Appeals' ruling stand. Powell felt that the Court should grant *certiorari* but then remand the case back to the Court of Appeals so the Court could consider *Johnson* in the context of the *Wygant* decision the Supreme Court would soon announce to the public. But White, Rehnquist, O'Connor, and the soon-to-be retired Burger voted to hear Paul Johnson's appeal. Since the Court must hear any case that four justices vote to grant *certiorari* for, the next term the Rehnquist Court would hear the Supreme Court's first case that dealt with gender-based affirmative action.²⁸⁹

On November 12, 1986, the Supreme Court heard oral argument in *Johnson v. Transportation Agency*. Constance E. Brooks began her argument on behalf of Paul Johnson by claiming that the Court should defer to the precedent the justices had established in *Wygant*. Brooks insisted "that before embarking upon a voluntary affirmative action program a public employer must have convincing evidence that remedial action is warranted and, finding that convincing evidence, develop a remedy which is narrowly tailored."²⁹⁰ And she claimed that while the Transportation Agency had found a statistical imbalance between the number of men and women who held skilled worker positions, the Agency had not proven that discrimination caused that imbalance.

About two minutes into Brooks' oral argument, John Paul Stevens wondered "Well, if a statistical imbalance in the work force is evident and they adopt an affirmative action plan, isn't it apparent on its face that it's remedial in the sense they're trying to remedy the imbalance?"²⁹¹

²⁸⁹ 85-1129 *Johnson v. Transportation Agency*, Supreme Court Case Files, Lewis F. Powell, Jr. Papers, Powell Archives, Washington and Lee University School of Law, 2 July 1986. Powell marked Burger as voting both "Grant" and "Deny," so the Chief Justice may have initially voted not to hear *Johnson*.

²⁹⁰ The Oyez Project, Oyez: *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), available at: <http://www.oyez.org/media/item?type=audio&id=argument&parent=cases/1980-1989/1986/1986_85_1129> (Last visited February 17, 2007)

²⁹¹ *Ibid.*

Brooks responded by insisting that a statistical imbalance could not by itself be reason enough for an affirmative action policy.

Byron White then asked Brooks if *Weber*'s precedent demanded more than a statistical imbalance as a reason to implement affirmative action. Brooks insisted that the Court had more evidence in *Weber* that past discrimination had occurred in that case. But Sandra Day O'Connor did not seem satisfied with that explanation. She noted that the Agency had 238 skilled worker positions and women held none of them. Brooks agreed that those facts were correct, and O'Connor then asked, "And you think that is not enough for the employer to think that there might be a firm basis here?"²⁹² Brooks said that the complete absence of women in these positions did not establish *prima facie* evidence of discrimination because, as she explained, the District Court had concluded that "the reason you had zero there was societal and attitudinal, and not necessarily discrimination."²⁹³

As Brooks continued her oral argument, she raised many of the same points she had made earlier. Barring evidence of past discrimination, an affirmative action plan under Title VII would be unconstitutional. After a while, Antonin Scalia raised the question of what kind of evidence would be acceptable as proof that an employer had engaged in discrimination. It seemed to Scalia like Brooks was saying that an employer "has to come in and put in that evidence, leaving himself open to later suits by people who say: Well, he didn't say he was, but he said he may have been, and to prove that he may have been he confessed this, this, and this, right?"²⁹⁴ Scalia saw this as unlikely to occur and then wondered if an employer had to prove "just that he may have been discriminating."²⁹⁵ Brooks said that would be sufficient, but Scalia noted that "no

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ Ibid.

²⁹⁵ Ibid.

employer's going to like to do that....In order to validate his plan, he has to show that there is, what, a likelihood, a potentiality, what, something that he's discriminated in the past.”²⁹⁶ Brooks demanded a difficult burden for employers to justify their affirmative action plans.

Later, White wondered if based on the burden of proof that Brooks requested, “Should I also ask you what are the chances of the plaintiff winning? You look around, and do you think that I might lose a Title VII case?”²⁹⁷ Brooks responded by saying that “having the employer consider statistical imbalances and look for explanations and then take a remedy before he gets sued would solve the problem.”²⁹⁸ The Transportation Agency had done just that before instituting its affirmative action plan, so when Brooks then tried to end her oral argument, White asked her “Did you just give away your case or not?”²⁹⁹ Brooks countered, “No, I don't think we gave away our case at all, because here the agency never did that kind of a process.”³⁰⁰ Still, White’s question must have made Brooks uneasy as she stepped away from the lectern in front of the justices’ bench and reserved her remaining time until after Woodside’s turn.

Steven Woodside began his oral argument by noting that “With those statistics of no women in the skilled craft work force and only one woman out of 110 road workers, I think there would clearly be a *prima facie* case” of discrimination.³⁰¹ To Woodside, this meant that barring convincing evidence otherwise, the enormous disparity would be sufficient evidence of past discrimination. So, Rehnquist asked, this case “boils down to the burden of proof in a sense, doesn't it?”³⁰² Woodside agreed.

²⁹⁶ Ibid.

²⁹⁷ Ibid.

²⁹⁸ Ibid.

²⁹⁹ Ibid.

³⁰⁰ Ibid.

³⁰¹ Ibid.

³⁰² Ibid.

Lewis Powell then noted: “I was under the impression that the district court found that there had never been any discrimination against women by the agency and that none was occurring at the time of trial.”³⁰³ After Powell pointed out that the Court of Appeals had not overturned this finding, Woodside responded, “The relevant inquiry, it seems to me, should be whether or not the employer believed and had a firm basis to conclude that it may have discriminated against women, based on its own knowledge of the statistics.”³⁰⁴ As Woodside continued to stress how the statistics created a *prima facie* case of discrimination, Scalia wondered if Woodside might be relying too heavily on the statistics. After all, perhaps no women held skilled worker positions with the Transportation Agency because they had no interest in pursuing them. When Woodside announced, “I think women do seek these jobs,” Scalia responded, “In this country?”³⁰⁵ The Court’s junior justice did not let inexperience prevent him from posing serious challenges to attorneys’ claims.

Near the end of Woodside’s oral argument, Stevens wondered if a man who ran a business and hired no women yet never discriminated in doing so could institute an affirmative action plan. Woodside started to say that that employer would not be able to do so when Scalia interrupted to ask if this was true “even though that would make out a *prima facie* case of employment discrimination?”³⁰⁶ Woodside then tried to explain that “Under the hypothetical that Justice Stevens has asked, he’s suggesting there is no *prima facie* case.”³⁰⁷ But Scalia reminded Woodside that the attorney had been arguing that statistical disparities served as *prima facie* evidence of discrimination and rationale for an affirmative action plan. Woodside admitted this was correct, and Scalia had him trapped. “So maybe you should have given a different

³⁰³ Ibid.

³⁰⁴ Ibid.

³⁰⁵ Ibid.

³⁰⁶ Ibid.

³⁰⁷ Ibid.

answer to Justice Stevens,” Scalia remarked, pointing out the flaws in Woodside’s reliance on statistics to create a *prima facie* case.³⁰⁸ “I’m sorry,” Woodside responded, and the courtroom filled with laughter.³⁰⁹ Stevens then added: “Me too. I should have asked Justice Scalia,” and the laughter increased.³¹⁰ With his time almost up, Woodside decided to end his oral argument and hope for the best when the justices voted. Constance Brooks then spoke with the time she had reserved earlier in the argument but added little to what she had said earlier. The oral argument in *Johnson v. Transportation Agency* had ended.

On November 19, 1986, the justices entered their conference to issue their votes in *Johnson v. Transportation Agency*. Rehnquist began the conference by stating that “The female was qualified but the male was better qualified.”³¹¹ And while he remarked the Transportation Agency might have produced an acceptable affirmative action plan, he felt that the Court of Appeals had released a poor opinion.³¹² Rehnquist claimed that “statistical ev[idence] can be OK in Title VII” cases to create a *prima facie* case of discrimination, but in this case he felt that the “stat[istical] imbal[ance] [was not] enough alone” to prove that the Transportation Agency had long discriminated against women.³¹³ In other words, Rehnquist stayed true to the beliefs he had expounded a month earlier at the *McCleskey* conference and argued statistical evidence of discrimination by itself did not create *prima facie* evidence of past discrimination. As a result, Rehnquist urged that the Court remand the case to a lower court to determine whether or not the Transportation Agency had discriminated enough to justify its affirmative action plan. Of course, he did not mention that shifting the burden of proof to the Transportation Agency would

³⁰⁸ Ibid.

³⁰⁹ Ibid.

³¹⁰ Ibid.

³¹¹ 85-1129, *Johnson v. Transportation Agency*, Lewis F. Powell, Jr. Papers, 14 November 1986.

³¹² Box 469, File 2, Blackmun Papers, 14 November 1986.

³¹³ 85-1129, *Johnson v. Transportation Agency*, Lewis F. Powell, Jr. Papers, 14 November 1986. Box 469, File 2, Blackmun Papers, 14 November 1986.

make it almost certain that a lower court would side with Paul Johnson and invalidate the plan because it would be almost impossible for the Agency to satisfy that burden of proof.

William Brennan spoke next. Undoubtedly, Brennan remembered the crushing defeat the liberals had suffered at the *McCleskey* conference, and he knew that because of that decision he could no longer argue that a gross statistical imbalance always served as *prima facie* evidence of discrimination. Brennan did, however, note that *Johnson* was “a [Title] VII case, n[ot] a const[itutional] one.”³¹⁴ Since the “[Equal Protection] issue [was not] here,” Brennan argued, the Court’s precedent in *United Steelworkers of America v. Weber* (1979) bound the justices to side with the Transportation Agency.³¹⁵ In *Weber*, the Court had determined that an “Employee need show only a manifest imbalance by statistics to create a prima facie case” of racial discrimination.³¹⁶ *Weber* dealt with racial discrimination, but the Court had decided in *Meritor Savings Bank* (1986) that it would hold racial and sexual discrimination to the same standards under Title VII. By that logic, the *Weber* precedent applied to *Johnson*. Finally, Brennan noted that the Transportation Agency had created a temporary affirmative action program – women would not benefit from the plan once the Agency had remedied the effects of its past discrimination. As a result, Brennan surprised no one and voted in support of the Transportation Agency.

Byron White followed by sticking to the rationale he had reached in *McCleskey* – the statistical “imbal[ance] is n[ot] suff[icient]” to by itself indicate that the Transportation Agency had discriminated against women and thus needed an affirmative action plan.³¹⁷ He agreed with Rehnquist that the Agency had to show evidence of “egregious discrim[ination]” to justify its

³¹⁴ Box 469, File 2, Blackmun Papers, 14 November 1986.

³¹⁵ 85-1129, *Johnson v. Transportation Agency*, Lewis F. Powell, Jr. Papers, 14 November 1986.

³¹⁶ 85-1129, *Johnson v. Transportation Agency*, Lewis F. Powell, Jr. Papers, 14 November 1986.

³¹⁷ Box 469, File 2, Blackmun Papers, 14 November 1986.

plan.³¹⁸ To White, Diane Joyce had not shown that she had suffered this discrimination, and he felt that Johnson “was better qual[ified]” for the dispatcher position.³¹⁹ White felt that the Transportation Agency still held the burden of proving that its plan was justified and had not met that burden. Thus, he voted to reverse the Court of Appeals’ ruling.

Thurgood Marshall then said little before casting his vote alongside Brennan. With the conference’s vote now tied at two, Harry Blackmun broke the deadlock by supporting the Transportation Agency’s affirmative action plan. Blackmun agreed with Brennan and Marshall and noted that since *Weber* was the “the only [affirmative action] case we have decided involving only [Title] VII,” the Court should defer to its precedent in that decision.³²⁰

Blackmun’s vote gave the Transportation Agency a 3-2 lead over Paul Johnson, and Lewis Powell expanded that lead. Powell distinguished *Johnson* from *Wygant* and *McCleskey* because the Court had decided *Wygant* and *McCleskey* on an Equal Protection basis – Paul Johnson claimed the Transportation Agency had violated Title VII of the Civil Rights Act, not the Constitution’s guarantees. Powell noted the gross disparity between the number of men and women who held skilled worker positions at the Agency served as real evidence of discrimination even though “few [women] apply” for those positions.³²¹ He argued that even though the Equal Protection Clause did not do so, Title VII allowed statistics to create *prima facie* evidence of discrimination.

And as he did in *Bakke* and so many other race-based affirmative action cases, Powell argued that “a flex[ible] goal” through affirmative action would be legal while “and unflex[ible]

³¹⁸ Box 469, File 2, Blackmun Papers, 14 November 1986.

³¹⁹ Box 469, File 2, Blackmun Papers, 14 November 1986.

³²⁰ 85-1129, *Johnson v. Transportation Agency*, Lewis F. Powell, Jr. Papers, 14 November 1986.

³²¹ Box 469, File 2, Blackmun Papers, 14 November 1986.

quota” would not.³²² He noted that the Agency had created an affirmative action “plan like [thousands] in t[he] U.S.” that helped “only qualified persons” through a “goal not a quota.”³²³ As a result, he offered a vote in support of the Transportation Agency’s policy.

John Paul Stevens addressed the conference next. He felt that even though he had not liked the Court’s rulings in *Bakke* and *Weber*, it would “b[e] fruitful to” follow those rulings’ precedents.³²⁴ As he had believed in *McCleskey*, Stevens felt that statistics created a *prima facie* case for the Transportation Agency even though few women had pursued skilled worker positions there. He saw “no need [for the Agency] to prove past discrimination” and argued that “When statistics are as dramatic as these an employer reasonably could adopt a plan like this.”³²⁵ The persuasive statistics left Paul Johnson with the burden of proving that he had suffered unfair discrimination. Because of this strong statistical evidence and the Court’s precedent in *Weber*, Stevens voted to affirm the Court of Appeals’ ruling.

Sandra Day O’Connor then noted that Ronald Reagan had used affirmative action when he nominated her to become an Associate Justice.³²⁶ She emphatically argued that “this case [was] close to that sit[uation].”³²⁷ After all, in both situations “There were qualified women in the available work force” – the women just needed a boost from affirmative action to overcome discrimination and get the job.³²⁸

O’Connor said little about the legal rationale behind her differing conclusions in *McCleskey* and *Johnson*. In fact, she offered inconsistent legal analysis in the two cases when

³²² Box 469, File 2, Blackmun Papers, 14 November 1986.

³²³ Box 469, File 2, Blackmun Papers, 14 November 1986.

85-1129, *Johnson v. Transportation Agency*, Lewis F. Powell, Jr. Papers, 14 November 1986.

³²⁴ Box 469, File 2, Blackmun Papers, 14 November 1986.

85-1129, *Johnson v. Transportation Agency*, Lewis F. Powell, Jr. Papers, 14 November 1986.

³²⁵ 85-1129, *Johnson v. Transportation Agency*, Lewis F. Powell, Jr. Papers, 14 November 1986.

³²⁶ Box 469, File 2, Blackmun Papers, 14 November 1986.

³²⁷ Box 469, File 2, Blackmun Papers, 14 November 1986.

³²⁸ 85-1129, *Johnson v. Transportation Agency*, Lewis F. Powell, Jr. Papers, 14 November 1986.

she published a concurrence in judgment in *Johnson* in which she argued, “I see little justification for the adoption of different standards for affirmative action under Title VII and the Equal Protection Clause.”³²⁹ O’Connor would write in her concurrence that though she felt the Court tended to be too lenient in its approval of affirmative action plans, “Evidence sufficient for a *prima facie* Title VII pattern or practice claim against the employer itself suggests that the absence of women or minorities in a work force cannot be explained by general societal discrimination alone and that remedial action is appropriate.”³³⁰ In other words, she argued that in both Title VII and Equal Protection cases, compelling statistical evidence of past discrimination created a *prima facie* case that this discrimination had occurred. In *Johnson*, O’Connor believed that “the statistical disparity would have been sufficient for a *prima facie* Title VII case brought by unsuccessful women job applicants.” Since Paul Johnson could not prove otherwise, O’Connor issued a vote in support of the Transportation Agency’s policy.³³¹

The legal rationale behind O’Connor’s vote makes little sense when compared with her decision in *McCleskey*. Other than White, the majority in *McCleskey* believed that the Baldus study produced compelling statistical evidence that Georgia applied the death penalty in a racially discriminatory manner. And except for Scalia, the other justices argued that they could not overturn *McCleskey*’s conviction, however, because he could not prove that the statistics applied to him. In other words, they did not feel that the statistical evidence lifted Warren *McCleskey*’s burden of proving that racial prejudice had led to his death sentence. Yet the majority in *Johnson* felt that the enormous disparity between the number of men and women who held skilled worker positions with the Transportation Agency created a *prima facie* justification for the Agency’s affirmative action policy and placed the burden on Paul Johnson to

³²⁹ *Johnson v. Transportation Agency*, 480 U.S. 616, 652 (1987).

³³⁰ *Johnson v. Transportation Agency*, 480 U.S. 616, 653 (1987).

³³¹ *Johnson v. Transportation Agency*, 480 U.S. 616, 656 (1987).

prove otherwise. Then in later cases involving racial discrimination, such as *Watson*, *Wards Cove*, and *Croson*, a divided Court returned to the logic it demonstrated in *McCleskey*.

Powell, who was not on the Court when it heard those later cases, explained that he reached different conclusions in *McCleskey* and *Johnson* because he did not apply the same standards of proof to Equal Protection and Title VII cases. Stevens inexplicably demanded a tougher standard of proof in *Croson* than all the other cases, but he remained consistent in all the other cases, showing that he held race and gender discrimination to the same standard of proof. Rehnquist, Brennan, White, Marshall, Blackmun, and Scalia issued consistent rulings in all these cases. Kennedy sided with the conservatives in both *Wards Cove* and *Croson* after he joined the Court. Yet while O'Connor claimed in *Johnson* that she supported a consistent standard of proof in all discrimination cases, her support for Diane Joyce but not Warren McCleskey and other minorities in these cases suggests otherwise. Why did O'Connor side with Joyce but not McCleskey?

Randall Kennedy has argued that "Thousands of people die every day, yet most of us grieve only for those few with whom we most identify."³³² Perhaps O'Connor could not empathize with blacks like Warren McCleskey and thus issued a vote against him. But O'Connor's initial comment at the *Johnson* conference indicates that she felt real empathy for Diane Joyce and the other women who had experienced the Transportation Agency's discrimination. After all, O'Connor had noted that when Reagan nominated her to the Court, he had done so under similar circumstances to those in which Diane Joyce received her promotion.

³³² Randall L. Kennedy, "*McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court," *The Harvard Law Review*, 101, no. 7 (1988), 1441.

Both O'Connor and Joyce were qualified for their new job, but their gender had been a “‘plus’ factor” that helped them break the sex barrier and join a once all-male workforce.³³³

As O'Connor deliberated her vote in *Johnson*, she likely remembered the years of discrimination she had faced because of gender. O'Connor and Rehnquist had attended Stanford Law School together – they even dated each other for a bit – and graduated in 1952.³³⁴ Both excelled at the school, as Rehnquist finished first in his class and O'Connor third. But while Rehnquist parlayed his performance into a clerkship at the Supreme Court with the renowned Justice Robert Jackson, O'Connor faced intense discrimination when she applied for jobs. As she explained in an interview in 2003, the law firms where she applied told her “We have never hired a woman as a lawyer, and we don't see the day that we will.”³³⁵ One firm offered O'Connor a position as a legal secretary, but O'Connor had no interest in that. As one of the most impressive graduates from one of the nation's top law schools, she must have felt so angry and frustrated with the men who excluded her from the positions that she deserved.

O'Connor was not alone in her exclusion – so many of the nation's top women lawyers could not find work because the men who ran law firms wanted to hire other men.³³⁶ She was qualified for most or all of the positions she applied for, but as she had noted at conference, if Ronald Reagan had not been determined to appoint a woman to the Supreme Court she could never have joined Rehnquist on the bench. O'Connor recognized that Diane Joyce faced similar circumstances – she was at the least almost as qualified as Paul Johnson but discrimination long kept her from matching his achievements. Joyce just needed a boost to help her overcome this discrimination. O'Connor's inconsistent analysis in *McCleskey* and *Johnson* and the similar

³³³ *Johnson v. Transportation Agency*, 480 U.S. 616, 656 (1987).

³³⁴ James Rosen, “Transcript: O'Connor on FOX,” FOX News, <http://www.foxnews.com/story/0,2933,161325,00.html> (accessed February 19, 2007).

³³⁵ Rosen, “O'Connor on Fox,” FOX News.

³³⁶ Biskupic, *Sandra Day O'Connor*, 28.

situations she and Joyce had faced meant that, almost certainly, the blatant discrimination that Sandra Day O'Connor faced had caused her to feel real empathy for Diane Joyce and thus support the Transportation Agency's policy.

By the time Antonin Scalia had his turn to speak, the Court had already established a strong majority in support of the Transportation Agency. Still, Scalia gave an impassioned argument against the affirmative action plan. He began by telling the other justices that he agreed with Rehnquist and White and criticized O'Connor's comparison between herself and Joyce. Scalia argued that the "Const[itution] doesn't require a balanced work-force."³³⁷ He worried that every industry with a statistically imbalanced workforce would have to institute an affirmative action plan. This would be "terrible," insisted Scalia.³³⁸

Like most of his colleagues, Scalia had issued a vote consistent with his conclusion in *McCleskey*. Scalia had argued at that conference that all criminals who received the death penalty for their crimes deserved that punishment. As a result, no statistical evidence would have persuaded him to reverse Warren McCleskey's death sentence or any others that the state of Georgia had enacted. In *Johnson*, no statistical evidence that discrimination had kept women from receiving dispatcher positions would persuade Scalia to approve the Agency's affirmative action plan. Scalia felt that the most qualified applicants deserved the jobs they applied for and he would not allow a plan that permitted anything besides merit to influence job hirings.

With six justices supporting the Transportation Agency's affirmative action plan, Brennan assigned the opinion to himself. Brennan's decision to write the opinion came as no surprise to the other justices. During his tenure on the Warren and Burger Courts, Brennan wrote a number of landmark opinions. Earl Warren had said of Brennan's role on the Warren Court:

³³⁷ 85-1129, *Johnson v. Transportation Agency*, Lewis F. Powell, Jr. Papers, 14 November 1986.

³³⁸ Box 469, File 2, Blackmun Papers, 14 November 1986.

“he is a unifying influence on the bench and in the conference room.”³³⁹ This was an accurate depiction of Brennan – the affable Irishman backslapped and cajoled other justices into joining many of his landmark opinions.

In 1957, he had persuaded all the justices to join his anonymously authored opinion that required Arkansas’ high schools to desegregate immediately.³⁴⁰ And Warren showered praise on Brennan for his majority opinion in *Baker v. Carr* (1962). Of all Brennan’s opinions for the Warren Court, the Chief Justice believed that *Baker* would “most affect the lives of all the people” as it was “the foundation upon which rest all subsequent decisions guaranteeing equal weight to the vote of every American citizen for representation in state and federal government.”³⁴¹ Warren felt this way because he and Brennan believed the law should protect the “the dignity of all human beings.”³⁴² Thus, when Warren saw an important case that dealt with people’s dignity, he often assigned the case to Brennan, asking him to find the legal rationale for what both justices deemed to be a fair ruling.

As Warren and other staunch liberals left the Court, Brennan still advanced much of his liberal agenda on the Burger Court. Though Burger officially authored the opinion in *United States v. Nixon* (1974) that ultimately led to Nixon’s resignation, Brennan played an instrumental role in bringing the associate justices together to strengthen the opinion and eliminate the leeway that Burger’s original draft might have left Nixon.³⁴³ After William Douglas retired following his stroke in 1975, Brennan became the Court’s Senior Associate Justice and ran circles around Burger to persuade centrists like Potter Stewart and Lewis Powell to join many of his opinions that did not deal with the death penalty. Brennan found it easy to do so because Burger lacked

³³⁹ Earl Warren, “Mr. Justice Brennan,” *Harvard Law Review*, 80, no. 1 (Nov., 1966), 2.

³⁴⁰ *Cooper v. Aaron*, 358 U.S. 1 (1958).

³⁴¹ Warren, “Mr. Justice Brennan,” 2.

³⁴² Warren, “Mr. Justice Brennan,” 2.

³⁴³ See Woodward and Armstrong, *The Brethren*, 285-347.

the leadership and analytical skills that Brennan possessed. As Keith Whittington has noted, “In chambers, Burger frequently frustrated his colleagues with his relatively weak understanding of the cases. In public, he was unable to provide deeply reasoned defenses of conservative constitutional understandings.”³⁴⁴ Burger often switched his votes and passed on his turn in conference in an attempt to cast the deciding vote in key cases and control the Court’s opinion assignments. This irritated the associate justices, and as a result, they often turned to Brennan when forced to choose between the two.

With such a weak Chief Justice opposing him, Brennan remained a successful liberal leader on the Burger Court. He authored the opinion for the liberal bloc in *Bakke*, the majority opinion for the Court in *Weber*, and the lead opinions in several key affirmative action cases. Brennan accommodated the other justices’ suggestions to ensure victory and invested a great deal of time working with Blackmun in an ultimately successful effort to help Blackmun move to the liberal bloc.

On the Rehnquist Court, however, Brennan lost much of his persuasiveness. Rehnquist did not share Burger’s weak managerial skills. Instead, Rehnquist ran his conferences with efficiency and effectiveness. Even Marshall called Rehnquist “a great chief justice,” and Brennan felt that Rehnquist was “the most all-around successful” Chief Justice when compared with Warren and Burger.³⁴⁵ Against Rehnquist’s leadership and an increased number of conservatives on the Court, Brennan could do little to prevent the Court from turning back many of the Warren Court’s landmark rulings in cases dealing with racial discrimination, voting rights,

³⁴⁴ Keith E. Whittington, “William H. Rehnquist: Nixon’s Strict Constructionist, Reagan’s Chief Justice” in *Rehnquist Justice: Understanding the Court Dynamic*, ed. Earl M. Maltz. (Lawrence: University Press of Kansas, 2003), 10.

³⁴⁵ Whittington, “William H. Rehnquist,” 14.

As quoted in Henry J. Abraham, *Justices, President, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton*. (Lanham: Rowman & Littlefield Publishers, 1999), 293.

and the rights of the accused. And when Brennan did find that the liberal bloc had achieved a narrow majority, he did not follow the strategy Rehnquist took in *McCleskey* and *Crosby* of assigning the opinion to the justice most likely to change sides. Instead, Brennan continued to keep those opinions for himself. As a result, many of the Court's clerks referred to the opinion hog as "Piggy" behind his back.³⁴⁶

Brennan's tendency to keep the best opinions for himself hurt his cause in several later cases. For instance, the liberals thought they had achieved a civil rights victory in *Patterson v. McLean Credit Union* (1989), but at the last minute Anthony Kennedy defected from Brennan's opinion, causing an angry Thurgood Marshall to write "NO!" on the first draft of Kennedy's new opinion for the conservative bloc.³⁴⁷ And in *Price Waterhouse v. Hopkins* (1989), a case that dealt with gender discrimination in the workplace, Brennan declined to assign the opinion to O'Connor. In the end, O'Connor issued her own concurrence, and Brennan wrote a plurality opinion instead of a majority one.³⁴⁸ In both of these cases, Brennan could have preserved his majority by assigning the opinion to Kennedy and O'Connor, respectively.

In *Johnson*, however, Brennan was able to hold a majority for the liberal bloc. Marshall, Blackmun, and Stevens quickly joined Brennan's opinion. After Brennan made several changes in the opinion, Powell joined too, giving the Court a majority opinion in a gender affirmative action case.³⁴⁹ O'Connor ended up writing a concurrence in judgment, but with five justices signed onto one opinion, Brennan had helped the Court establish a strong precedent in gender affirmative action cases.

³⁴⁶ Lazarus, *Closed Chambers*, 310.

³⁴⁷ Box 467, File 2, Marshall Papers, 22 May 1989.

³⁴⁸ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

³⁴⁹ Box 469, File 1, Blackmun Papers, 9 December 1986.

Still, one cannot help but wonder if Brennan might have achieved a stronger majority if he had assigned the opinion to Powell or O'Connor. Powell and O'Connor held deep respect for one another and likely would have signed onto an opinion that the other authored. Even White may have joined the liberal bloc if Powell or O'Connor had written the opinion, as he announced after Brennan's first circulation that he would "await the dissent" before making a final commitment in *Johnson*.³⁵⁰ White's willingness to wait suggests that he may have been open to persuasion, and an opinion from one of the Court's moderates instead of Brennan might have been more successful in doing so. It is possible, then, that a Powell or O'Connor opinion might have been a seven-to-two victory for gender-based affirmative action.

Nonetheless, in *Johnson* the Court established a victory for gender-based affirmative action. The justices established a precedent that allowed *Griggs*' burden of proof requirements to stand for gender discrimination. Conservatives criticized the decision. Wilbur Devereux Jones, a Professor Emeritus of History at the University of Georgia, wrote a letter to Blackmun after *Johnson* in which he derided affirmative action and the 1964 Civil Rights Act. Jones acknowledged that the Act and affirmative action had done a lot to help women, but he argued that "the Civil Rights Act of 1964 has done little or nothing to enable black males to form stable marriages. On the other hand, it has degraded large numbers of white males to the status previously occupied only by the black males – they are unable to form stable marriages."³⁵¹ Jones worried that "court decisions [like *Johnson*] have alienated the sexes...and virtually destroyed the prestige of the homemaker in our society."³⁵²

While Jones worried that the Court had caused upheaval in society, a college student from New Mexico named Tom Grosvenor wondered "Why doesn't the 1964 Civil Rights Act bar

³⁵⁰ Box 469, File 1, Blackmun Papers, 1 December 1986.

³⁵¹ Box 469, File 3, Blackmun Papers, 12 April 1987.

³⁵² Box 469, File 3, Blackmun Papers, 12 April 1987.

discrimination for ALL Americans? Why don't white males deserve equal protection under the law?"³⁵³ Like Scalia, Grosvenor and other conservatives believed that race and gender should not be relevant factors in hiring or promoting processes.

Liberals, on the other hand, praised the ruling. Michelle Shugart, a woman from Gainesville, Georgia, noted that "This is mostly a man's world where women need a little help sometimes."³⁵⁴ And Shirley Harris, a health aide from Flushing, New York, argued that "Sometimes it takes Supreme Court rulings such as this to help women come into their own or to be treated fairly in the work place."³⁵⁵ Like the majority, these women believed that *Johnson* would help women overcome the effects of past discrimination.

And though Powell had provided the fifth vote for the majority in *Johnson*, after he retired Sandra Day O'Connor remained on the bench and ensured that the Rehnquist Court's rollbacks regarding race-based discrimination and affirmative action did not extend to gender. In *Price Waterhouse v. Hopkins* (1989), O'Connor agreed with the liberal bloc that Price Waterhouse held the burden of proving that Ann Hopkins' gender had not been the reason they denied her a promotion so many times. In 1994, O'Connor provided the fifth vote for the majority opinion in *J.E.B. v. Alabama* to declare that the Equal Protection Clause forbade states from using gender alone as a reason for excluding someone from a jury.

Though she did not always cast the deciding vote, in these and other cases that dealt with women's rights, O'Connor provided a key vote that helped the Court maintain intermediate scrutiny for gender classifications while the justices moved the standard for race towards strict scrutiny. As a result, the Rehnquist Court issued far more support for gender-based affirmative action than race-based affirmative action and overturned *Griggs*' burden of proof requirement for

³⁵³ Box 469, File 3, Blackmun Papers, 29 March 1987.

³⁵⁴ Box 469, File 3, Blackmun Papers, 6 April 1987.

³⁵⁵ Box 469, File 3, Blackmun Papers, 6 April 1987.

race but not gender. More than any other justice, Sandra Day O'Connor led the Court in these divergent directions.

Chapter 4

“A Fiction and a Departure” :

Shaw v. Reno and Minorities’ Voting Rights

In *City of Richmond v. J.A. Croson* (1989), the Rehnquist Court determined that it would hold state-enacted, race-based set-asides to a standard of strict scrutiny. This standard made it unlikely that the Court would approve most states’ race-based affirmative action plans. The following term in *Metro Broadcasting Inc. v. FCC* (1990), a five-to-four Court declined to hold federal, race-based set-asides to the same standard. But after *Metro Broadcasting* the Rehnquist Court gained two Republican appointees to replace the Court’s two most liberal members. As a result, Rehnquist and other conservatives used the Court’s new makeup to ignore established precedent and apply *Croson*’s standards to voting rights cases that dealt with majority-minority districts designed to help minorities gain representation in Congress.

Perhaps no case illustrates the Rehnquist Court’s departure from *stare decisis* in voting rights cases better than *Shaw v. Reno*.³⁵⁶ In *Shaw*, five white North Carolinians challenged the validity of two majority-black districts in North Carolina. The state legislature had created these districts after the United States Justice Department encouraged the state to do so as a means of complying with the 1965 Voting Rights Act. The Burger and Rehnquist Courts had issued several rulings that approved of majority-minority districts and showed great deference to the individual states’ rights to create districts. Yet when the Supreme Court heard *Shaw*, in a five-to-four decision the justices refused to approve one of the North Carolina districts. Instead, they

³⁵⁶ *Shaw v. Reno*, 509 U.S. 630 (1993).

remanded the case to the District Court to determine if a compelling reason mandated the district's existence. Yet in doing so, the Rehnquist Court applied the same strict scrutiny standards to minority-opportunity districts as it did to race-based affirmative action programs. Thus, *Shaw* all but required lower courts to declare the districts unconstitutional in a ruling that Justice Byron White described in his dissent as “both a fiction and a departure from settled equal protection principles.”³⁵⁷ The conservatives issued votes in *Shaw* inconsistent with those in other voting rights cases in large part because most of them saw any race-conscious policy as suspect. Thus, they applied *Crosby*'s standards to majority-minority districts. As in *McCleskey*, *Crosby*, and *Johnson*, the Rehnquist Court issued a civil rights ruling in *Shaw* that arose more from personal and political views than legal ones.

* * *

The Warren Court issued several important rulings to protect the voting rights of minorities and the poor. In *Gomillion v. Lightfoot* (1960), a unanimous Warren Court found an Alabama act that shifted a district in Tuskegee from a square to a figure with 28 sides unconstitutional. Since the act excluded almost every black voter from Tuskegee, the law made blacks ineligible to vote in Tuskegee but did not affect the white population. Thus, the Court concluded that “its effect was to deprive Negroes of their right to vote in Tuskegee elections on account of their race.”³⁵⁸ Justice Felix Frankfurter had long urged that the Court not involve itself in “political questions” like congressional districting.³⁵⁹ Yet even he argued in a memo to Justice Charles Whittaker that “Displacing [voters] takes away, deprives [citizens] of...existing

³⁵⁷ *Shaw v. Reno*, 509 U.S. 630, 660 (1993).

³⁵⁸ *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

³⁵⁹ *Colegrove v. Green*, 328 U.S. 549, 572 (1946).

rights. To do so on the basis of race is explicitly prohibited by the Fifteenth Amendment.”³⁶⁰ As in its other racial discrimination rulings, the Warren Court advocated for colorblind laws when the justices declared in *Gomillion* that legislatures must not take race into account when creating districts.

But other than the egregious gerrymandering in *Gomillion*, the Supreme Court tended to follow Frankfurter’s plurality opinion in *Colegrove v. Green* (1946). In *Colegrove*, Frankfurter declared that voter districting was a political issue and that “Courts ought not to enter this political thicket.”³⁶¹ In *Baker v. Carr* (1962), however, the Warren Court overturned *Colegrove*. The Court deliberated for a year and heard oral argument twice in the case. Yet in the end, Warren and Brennan convinced a majority that blind deference to *Colegrove* would be “an equal protection problem,” and Justice William Douglas concluded that their argument was consistent with *Gomillion*.³⁶² After all, as Douglas noted at conference, “Negroes have no greater right under equal protection than whites.”³⁶³ If a gerrymandering caused some districts to have larger populations than others, then the votes of people who lived in heavily populated districts would not be worth as much as the votes of those who lived in districts with smaller populations. Regardless of the districts’ racial breakdowns, this would violate the Equal Protection Clause. As a result, *Baker* allowed the Court to intervene when legislatures politically gerrymandered districts.

The Court expanded its *Baker* ruling the next two years in *Gray v. Sanders* (1963) and *Reynolds v. Sims* (1964). In *Gray*, an eight-to-one Court declared under the maxim of “one

³⁶⁰ Box I: 50, File 3, William J. Brennan, Jr. Papers, Manuscript Division, Library of Congress, Washington, D.C., 4 November 1960.

³⁶¹ *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

³⁶² Box 1267, File 8, William O. Douglas Papers, Manuscript Division, Library of Congress, Washington, D.C., 13 October 1961.

³⁶³ Box 1267, File 8, Douglas Papers, 13 October 1961.

person, one vote” that to ensure that each citizen had an opportunity to cast an equally meaningful vote, the Equal Protection Clause required that districts have proportional populations.³⁶⁴ Then in *Reynolds*, Warren announced that an eight-to-one Court had concluded that “Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.”³⁶⁵ In doing so, the Court again declared that it would strike down districts that had disproportionate populations and thus made some citizens’ votes worth more than others. In *Baker, Gray*, and *Reynolds*, the Warren Court initiated the Supreme Court’s commitment to policing political gerrymanders.

President Lyndon Johnson and Congress then built upon the Court’s determination to allow all Americans to cast equal votes by enacting the 1965 Voting Rights Act. The Act added about six million new voters in the South and made the Fifteenth Amendment’s guarantee that “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” a reality.³⁶⁶

The Burger Court, however, granted legislatures far more discretion in their districting plans than the Warren Court did. In *Mahan v. Howell* (1973), a five-to-three Court determined that a 16.4 percent variance in the populations of Virginia’s districts “complied with the Equal Protection Clause of the Fourteenth Amendment” even though the Warren Court had not accepted even a three percent variance. During *Mahan*, the Burger Court even considered allowing districts to vary by 23.6 percent.³⁶⁷ The Court could have used *Griggs’ prima facie* standard and placed the burden on legislatures to show that they had not gerrymandered such

³⁶⁴ *Gray v. Sanders*, 372 U.S. 368, 369 (1963).

³⁶⁵ *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

³⁶⁶ Numan V. Bartley and Hugh D. Graham, *Southern Politics and the Second Reconstruction*. (Baltimore: Johns Hopkins University Press, 1975), 109.

FindLaw For Legal Professionals, “U.S. Constitution: Fifteenth Amendment,” FindLaw For Legal Professionals, <http://caselaw.lp.findlaw.com/data/constitution/amendment15/> (accessed March 1, 2007).

³⁶⁷ Box 154, File 2, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C., 5 January 1973.

disproportional districts. Instead, the justices to some extent departed from *Baker*. A despondent Brennan “returned to his chambers near tears” after the justices’ conference, as the ruling in *Mahan* showed that the Burger Court would not conclude that many politically gerrymandered districts violated voters’ rights under the Equal Protection Clause.³⁶⁸

But in two important cases the Burger Court also extended this deference towards districts that legislators had created to give minorities a larger voice in politics. The legislators designed these districts in part to meet the Voting Rights Act’s requirement that minorities receive fair opportunities to cast meaningful votes. The Court heard *United Jewish Organizations of Williamsburgh, Inc. v. Carey (UJO)*, the first of these cases, in 1977. In *UJO*, all the justices except Burger agreed with the Court’s judgment that the creation of districts that were at least 65 percent white did not violate the rights of a Hassidic Jewish group in New York even though the redistricting split the Jews into two districts. The Court concluded that because the redistricting still left whites at a higher voting proportion than their population in the county, the Jewish group did not suffer a constitutional violation. With this ruling, the Court established that “Compliance with the [Voting Rights] Act in reapportionment cases will often necessitate the use of racial considerations in drawing district lines, and the Constitution does not prevent a State subject to the Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with [Section] 5” of the VRA.³⁶⁹ In other words, much like in its affirmative action rulings, the Burger Court allowed legislators to consider the racial makeup of districts that they felt would help minorities receive political representation that they would not have otherwise obtained.

³⁶⁸ Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court*, (New York: Simon and Schuster, 1979), 271.

³⁶⁹ *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 145 (1977).

Then during Burger's final term as Chief Justice, a unanimous Court in *Thornburg v. Gingles* (1986) offered support for revisions Congress had added to Section 2 of the Voting Rights Act in 1982. The new Section 2 banned any redistricting in which race prevented people from voting and determined that violations of this provision occurred when "election processes were not equally open to all races, and minorities had less opportunity than other voters to participate and elect representatives 'of their choice.'"³⁷⁰ Brennan's opinion for the Court determined that majority-minority districts would be legal under Section 2 under the following conditions:

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district....Second, the minority group must be able to show that it is politically cohesive....Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it...usually to defeat the minority's preferred candidate...Finally, we observe that the usual predictability of the majority's success distinguishes structural dilution from the mere loss of an occasional election.³⁷¹

Provided these conditions existed, the Court declared it would continue to defer to legislatures when they created majority-minority districts.

In 1993, a unanimous Rehnquist Court declared in two cases that it would follow the Burger Court's approach to state redistricting.³⁷² Whenever possible, the justices believed they should not police redistricting and instead stay out of the matter. Yet that same term the Rehnquist Court departed from those two cases as well as *UJO* and *Gingles* with its ruling in *Shaw v. Reno*.

³⁷⁰ Tinsley E. Yarbrough, *Race and Redistricting: The Shaw-Cromartie Cases*. (Lawrence: University of Kansas Press, 2002), 7.

³⁷¹ *Thornburg v. Gingles*, 478 U.S. 30, 50, 51 (1986).

³⁷² *Voinovich v. Quilter*, 507 U.S. 146 (1993).
Grove v. Emison, 507 U.S. 25 (1993).

Shaw began when the 1990 census determined that North Carolina would gain an additional congressional district. The Bush administration and many members of the North Carolina NAACP preferred that the state create a majority-black district. This would guarantee that blacks would have representation in Congress. Some groups, however, felt that the Bush administration supported a majority-minority district because it would benefit Republicans. Since blacks tended to vote Democratic, if one district had several blacks then the surrounding districts would have fewer Democrats and be more likely to go Republican in future elections.

Regardless of the Bush administration's motivations, North Carolina began creating a new majority-minority district to comply with the Justice Department's demands. The state's General Assembly designed a computer program that would divide the state into proportionally populated districts with one district that was majority black. Of course, no incumbent Congressman would accept losing his seat during the state's reapportionment, so the Assembly had to split thirty-four counties through its redistricting, when the old plan had just split four. The majority-minority district consisted of eleven full counties and parts of fourteen others.

Because of North Carolina's long history of minority vote suppression, Section 5 of the 1965 Voting Rights Act required that the state gain approval for its new districting plan from the Justice Department. The Bush administration, as well as the ACLU and North Carolina's Republicans, recommended that the state implement a second majority-minority district. The state's Democratic Party resisted at first because its members feared that a second majority-minority district would reduce Democratic opportunities in other districts, but they eventually supported the second district.

In January 1992, the state legislature created a new districting plan. This plan included a narrow Twelfth District that ran along I-85 from Charlotte to Durham. The district was majority-

black but also did not dilute the vote of white Democrats in nearby districts. To accomplish this, the district had a bizarre and narrow shape, as the diagram below demonstrates:

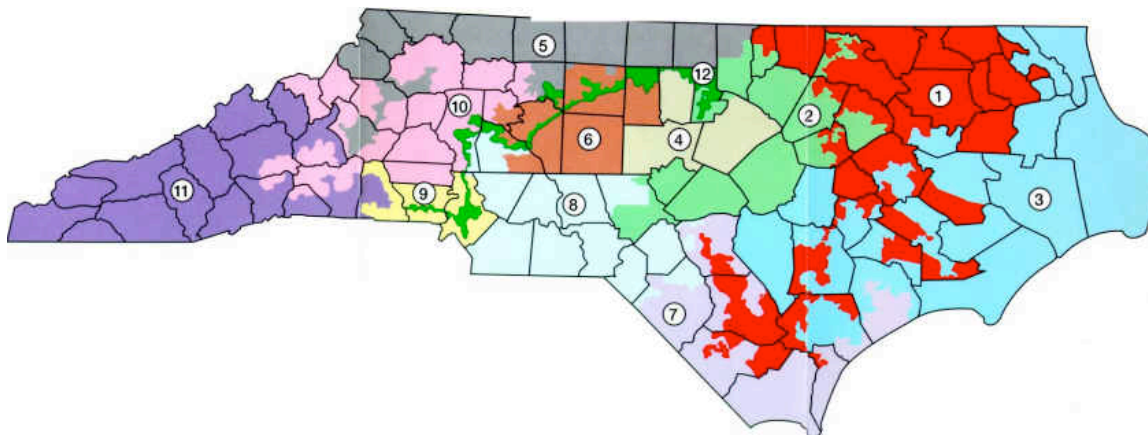


Figure 4.1
North Carolina’s Voting Districts After the 1992 Redistricting³⁷³

Republicans responded angrily to the gerrymandered district, and the *Wall Street Journal* described it as “political pornography.”³⁷⁴ North Carolina Republicans attempted to challenge the districts as political gerrymanders, but a lower court denied the challenge in accordance with the Burger Court’s precedents that kept the Supreme Court from involving itself in such cases.³⁷⁵ In *Pope v. Blue* (1992) the Supreme Court affirmed the rulings without hearing an argument.³⁷⁶

On March 12, 1992, a white North Carolinian named Robinson Everett led another lawsuit against the districting plan. Everett noted that the Supreme Court had declared in *Batson v. Kentucky* (1986) that an attorney could not exclude jurors because of their race.³⁷⁷ He “could see no difference between the exclusion of jurors based on their race or sex and the exclusion of voters from a particular district – or their inclusion in a district – on racial grounds.”³⁷⁸ Everett, a Democrat who lived in the Twelfth District, included himself and four other white North

³⁷³ *Shaw v. Reno*, 509 U.S. 630, 659 (1993).

³⁷⁴ As quoted in Yarbrough, *Race and Redistricting*, 21.

³⁷⁵ *Pope v. Blue*, 809 F. Supp. 392 (1992).

³⁷⁶ *Pope v. Blue*, 506 U.S. 801 (1992).

³⁷⁷ *Batson v. Kentucky*, 476 U.S. 79 (1986).

³⁷⁸ Yarbrough, *Race and Redistricting*, 33.

Carolínians as plaintiffs in the case. The lead plaintiff was a woman named Ruth Shaw, and Everett named several individuals as defendants including Attorney General William Barr.

A three-judge court heard *Shaw v. Barr* on April 27, 1992. One judge on a district court normally hears the first level of federal cases, but three judges will decide cases that deal with national election legislation. As a result, a Jimmy Carter appointee from the Fourth Circuit Court of Appeals, another Carter appointee from a North Carolina district court, and a Ronald Reagan appointee from a different North Carolina district court heard the *Shaw*. Everett argued that the districting violated several of his and his clients' Constitutional rights, most notably the Fifth Amendment's Due Process Clause, the Fourteenth Amendment's Equal Protection Clause, the Fifteenth Amendment's prohibition on denial to vote "on account of race."³⁷⁹ H. Jefferson Powell, who would later defend the districting plan in front of the Supreme Court, noted in a memo that the Supreme Court's ruling in *UJO* (1977) established precedent for the legality of the districts and the lack of discrimination against whites.³⁸⁰

North Carolina would be holding its primary elections on May 5, so the Court announced its ruling a little over a half-hour after it had heard oral argument. In a 2-1 ruling, the Carter appointees allowed the districts to stand. The judges released a written opinion on August 7, and they declared that the petitioners had not suffered a Constitutional violation and deferred to the Court's precedent in *UJO*. The Reagan appointee agreed with the majority that Everett had been wrong to argue "that race-conscious districting was per se unconstitutional."³⁸¹ He did, however, have problems with the district's odd shape and thus dissented from the Court's ruling.

³⁷⁹ FindLaw For Legal Professionals, "U.S. Constitution: Fifteenth Amendment," FindLaw For Legal Professionals, <http://caselaw.lp.findlaw.com/data/constitution/amendment15/> (accessed March 1, 2007).

³⁸⁰ Yarbrough, *Race and Redistricting*, 37.

³⁸¹ Yarbrough, *Race and Redistricting*, 50.

Everett appealed the ruling to the Supreme Court. Though official rules required the Court to accept any voting rights appeals, the Court could have chosen not to hear *Shaw* through various loopholes that would have allowed the lower court's ruling to stand. But the Rehnquist Court granted *certiorari*, and on April 20, 1993, the justices heard oral argument in *Shaw v. Reno*, as the case was now called because Janet Reno had replaced William Barr as the U.S. Attorney General.

Robinson Everett began his oral argument by presenting the justices a map of the district to emphasize its lack of compactness.³⁸² Everett noted that “Most of the black population is concentrated in the east and in the Piedmont, that is to say, along the coast and in the center of the State. Interestingly, there are only five counties in the State and those, with one exception – and that's not a major exception – are relatively small counties, only five counties in which there is a majority of black persons.”³⁸³ As Everett continued he argued that because of these circumstances, “The only way to [create these districts] was to violate every one of the principles of redistricting and reapportionment which have heretofore been accepted by the Court, or at least as we understand it, which have been accepted by the Court.”³⁸⁴

At this point, John Paul Stevens wondered, “Well, it doesn't violate the one person/one vote principle, does it?”³⁸⁵ Everett admitted that the district did not violate this key Warren Court precedent, but as Stevens pressed him the attorney argued that “it violates the principles of compactness.”³⁸⁶ Everett also claimed that the district lacked “contiguousness” even though

³⁸² Yarbrough, *Race and Redistricting*, 63.

³⁸³ The Oyez Project, Oyez: *Shaw v. Reno*, 509 U.S. 630 (1993), available at: <http://www.oyez.org/media/item?type=audio&id=argument&parent=cases/1990-1999/1992/1992_92_357> (Last visited February 28, 2007)

³⁸⁴ *Ibid.*

³⁸⁵ *Ibid.*

³⁸⁶ *Ibid.*

Stevens pointed out that “this district is entirely contiguous, isn't it?”³⁸⁷ The attorney responded that because the district was so narrow at some points it effectively was not contiguous, but Stevens seemed unconvinced.

When Everett continued to emphasize the district's lack of compactness, Justice O'Connor referred to *Pope v. Blue* and reminded him that “this Court summarily affirmed in a previous case that came before us raising just these points.”³⁸⁸ Everett agreed but argued that “That was a case in which the assertion was predicated on political gerrymandering.”³⁸⁹ He continued, “There was no assertion that [the legislature created the districts] for the...purpose of targeting two seats for persons of a particular race. That we think is the fatal flaw.”³⁹⁰ To Everett, the legislature could not create non-compact districts with the intention of increasing representation for people of a particular race.

Another justice then rhetorically asked, “Isn't a State free to reject the idea of compactness if it chooses?”³⁹¹ Everett responded that “perhaps they can reject compactness, but not do so in the context of seeking to assure the election of a person of a particular race, whatever that race may be.”³⁹² Chief Justice Rehnquist then wondered if Everett felt that “that sort of intent or motivation on the part of the legislature is subject to strict scrutiny.”³⁹³ Everett agreed, and so David Souter noted, “Your case really rests simply on the motivation by which this particular configuration supposedly was justified.”³⁹⁴ Everett concurred.

As Everett continued his argument, he insisted that, as Antonin Scalia put it, “race could be taken into consideration [to create a district] if race had previously been taken into

³⁸⁷ Ibid.

³⁸⁸ Ibid.

³⁸⁹ Ibid.

³⁹⁰ Ibid.

³⁹¹ Ibid.

³⁹² Ibid.

³⁹³ Ibid.

³⁹⁴ Ibid.

consideration in an adverse way.”³⁹⁵ But Scalia continued, “I wonder if you're wise in conceding that race should be taken into...consideration in any further extent.”³⁹⁶ After all, North Carolina’s legislature had prevented blacks from voting in the past. How would a race-conscious district that gave them the representation that the state had denied them for so long be unconstitutional under this standard? Everett replied that he “misspoke.”³⁹⁷ Souter then tried to clarify Everett’s position. He questioned if the attorney saw a problem with “assuming that all black people will vote for a black representative, and therefore drawing a district with a certain number of blacks in it on the assumption that since they're black, they will vote for a black representative. That's using race not for community, but for the stereotypical conclusion that if you are white, you will vote for a white, and if you're black, you'll vote for a black, which is not very good for our society I assume.”³⁹⁸

Everett agreed but Byron White asked, “Well, is that any different from an assumption that an Irish Catholic will vote like another Irish Catholic and they're more apt to vote Democratic than Republican, say?”³⁹⁹ Eventually, Everett responded to White’s question by arguing that “You can have interests...which can be taken into account within the parameters of the one person/one vote line of cases. There are a line of opinions of this Court which in one way or the other have inveighed against racial classifications. We take that very seriously. We take the color-blind Constitution to be more than an idle aspiration, particularly under present conditions.”⁴⁰⁰ In other words, the attorney felt that a legislator could take several other factors but not race into consideration when it created a district. This assertion shocked Souter, and he

³⁹⁵ Ibid.

³⁹⁶ Ibid.

³⁹⁷ Ibid.

³⁹⁸ Ibid.

³⁹⁹ Ibid.

⁴⁰⁰ Ibid.

asked Everett, “You're not resting on the principle of the color-blind Constitution, are you? I mean, you accept, for example, the *Gingles* analysis, and whatever that is, it isn't color-blind. I mean, you accept that...[*Gingles* is] not a principle of a color-blind constitution, is it?”⁴⁰¹

Everett responded “Well, that may not be in one sense...[as] the basic concept of ignoring racial stereotypes...[is] essential to the color-blind Constitution, and that we think is the principle that has been violated here.”⁴⁰² Souter seemed unconvinced, however, and Everett asked to hold the rest of his time for rebuttal.

H. Jefferson Powell then presented his argument on behalf of the state of North Carolina. Powell maintained that though according to the Voting Rights Act just 40 of North Carolina's 100 counties needed preclearance from the federal government when involved in redistricting, “given the distribution of the counties, it was necessary to preclear the entire plan and that, in fact, the proper focus in this case with the statewide redistricting plan is statewide.”⁴⁰³ Rehnquist then wondered if there existed “any authority in the act itself for that,” but Souter intervened and explained, “I had just assumed that as long as any one covered county was going to be affected by the plan, that that would be enough to trigger the right to review.”⁴⁰⁴ Powell agreed.

Powell also reminded the justices that North Carolina had created District 12 after the Justice Department had urged the state to create a second majority-minority district. This did not convince Scalia, however, as he informed Powell that “You could have gone to the district court in the District of Columbia to say this is wrong...But you chose not to...I don't think you should rely on the Justice Department. You chose to [design the district].”⁴⁰⁵ Still, Powell argued that the Voting Rights Act prohibited dilution of minorities' votes, and these districts

⁴⁰¹ Ibid.

⁴⁰² Ibid.

⁴⁰³ Ibid.

⁴⁰⁴ Ibid.

⁴⁰⁵ Ibid.

gave minorities' adequate representation in North Carolina. Thus, the state had done nothing unconstitutional when it created these districts.

Later, Rehnquist noted that *Croson* and other cases had established “that an intent to classify on the basis of race...is subject to strict scrutiny.”⁴⁰⁶ Did this standard apply to the creation of majority-minority districts? Powell acknowledged that the Court had decided these cases before *Croson*, but he maintained that “the *Croson* line of decisions is distinct from this Court's own vote dilution, race-based vote dilution, cases....Those cases, which set out the test to be applied in this context, instruct the trier of fact to look for invidious intent.”⁴⁰⁷ O'Connor wondered if the district's strange shape “could be in and of itself some evidence of an invidious intent.”⁴⁰⁸ Powell acknowledged that “it could be” but reminded O'Connor that “There's no dispute here over what the state's purpose is. There's a dispute over how to characterize it legally, but we're not in disagreement over what the state legislature was trying to do.”⁴⁰⁹ The state had created the district in an attempt to comply with the Voting Rights Act, and Powell believed that previous Court precedent had determined such actions constitutional.

Edwin Kneedler, the United States' Assistant Solicitor General, then stood to argue before the Court on behalf of the federal government. Kneedler felt that *UJO* and *Gingles* served as adequate precedent for the creation of the districts. And he argued that “the existence of the Voting Rights Act in this case and Congress' thorough examination of the need for the Voting Rights Act periodically that distinguishes this setting from the cases in which the Court has required strict scrutiny.”⁴¹⁰ Thus, Kneedler believed the Voting Rights Act prevented *Croson*'s standards from applying to *Shaw*. Kneedler concluded his argument, Everett emphasized his

⁴⁰⁶ Ibid.

⁴⁰⁷ Ibid.

⁴⁰⁸ Ibid.

⁴⁰⁹ Ibid.

⁴¹⁰ Ibid.

earlier point that race-conscious districting discriminated against and insulted blacks, and with that, the oral argument in *Shaw v. Reno* came to an end.

Three days later the justices held conference to determine their decision in *Shaw*. Though as an associate justice Rehnquist had concluded in *UJO* and *Gingles* that legislatures could take race into account to create majority-minority districts, he began the conference by backing away from those precedents. He announced that *Croson* had been “a watershed” and that “discrimination only under strict scrutiny [would] apply here.”⁴¹¹

The justices had declared in *Croson* that the Court would subject race-conscious measures that states enacted to strict scrutiny. But the following term in *Metro Broadcasting* the Court narrowly determined that it would not subject the same type of federal laws to strict scrutiny and would not apply *Croson*'s standards to the federal government.⁴¹² For Rehnquist to have a valid Constitutional argument, he would have to show that the state legislature – not the federal government – had led to the district's creation even though Everett had named the U.S. Attorney General as a defendant. As a result, Rehnquist de-emphasized the role the federal government had played when the Bush Administration requested that the North Carolina legislature create a second majority-minority district. And he argued that the “V[oting] R[ights] A[ct] cann[ot] b[e] relied on in a case like this.”⁴¹³ Thus, although the district's bizarre shape did not concern the Chief Justice, he voted to declare the district unconstitutional.

Since William Brennan had retired in 1990, Byron White had become the Court's new Senior Associate Justice. He spoke next. Over thirty years had passed since John F. Kennedy nominated White to join the Court, and this would be his final term on the bench. Though during

⁴¹¹ Box 624, File 5, Blackmun Papers, 23 April 1993.

⁴¹² The Rehnquist Court would overrule *Metro Broadcasting* in *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) and subject federal race-conscious policies to strict scrutiny.

⁴¹³ Box 624, File 5, Blackmun Papers, 23 April 1993.

his long tenure White had appeared to drift more towards the right, he had always supported majority-minority districts as means of complying with the Voting Rights Act's requirement that minorities receive fair opportunities to vote. As a result, in his usual succinct way, White pointed out that the "V[oting] R[ights] A[ct] did n[ot] change" since *Gingles* and that he had no problem with the intentions behind the district's creation.⁴¹⁴ To White, the case seemed simple, and so he voted to allow the district to stand.

After Harry Blackmun issued another vote in support of the district, John Paul Stevens addressed the conference. Stevens argued that the Court had been "dead right" in *UJO* and that the Court should defer to that ruling.⁴¹⁵ To him, "*Croson* did n[ot] change t[he] rules" of race-conscious districting.⁴¹⁶ Stevens noted that the district's strange shape showed that race had led to its creation, but he felt that *UJO* established that there was nothing "invidious" about that, so long as race did not motivate the new district "to a terrible extreme."⁴¹⁷ As a result, Stevens cast a third vote in support of the North Carolina district.

Sandra Day O'Connor sat next in line to speak. The day before the conference, one of Blackmun's clerks had predicted that O'Connor, who had "consistently distinguished the voting rights area in cases like *Wygant* and *Croson*" would be the "swing vote" in *Shaw*.⁴¹⁸ The clerk, however, did not expect O'Connor to again hold majority-minority districts to different standards than race-based affirmative action and approve the district. He reported that O'Connor's clerk felt that the justice "thinks race-conscious redistricting that the federal government has not actually compelled (particularly when the goal looks like a quota) is a lot like *Croson*'s set-

⁴¹⁴ Ibid.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

⁴¹⁷ Ibid.

⁴¹⁸ Ibid.

asides.”⁴¹⁹ O’Connor felt that “[t]his particular district was not actually compelled by the federal government because the State had other options to gain preclearance under [Section] 5” of the Voting Rights Act.⁴²⁰ By echoing the concerns Scalia had raised at oral argument, O’Connor showed that she seemed inclined to side with Everett.

Blackmun’s clerk seemed skeptical about this reasoning. After all, the legislature had added District 12 because the Bush Administration had strongly encouraged it to add a second majority-minority district. But the Court’s ruling in *Metro Broadcasting* (1990) did not allow the justices to subject federal race-conscious policies to more than intermediate scrutiny. *Croson*, however, allowed the Court to judge all state race-conscious policies under a strict scrutiny standard. Blackmun’s clerk probably thought that O’Connor – and also Rehnquist – was using some spurious logic to argue that the district was in no way a federal creation and that *Croson*’s standards applied to *Shaw*.

At the conference, O’Connor emphasized the points that her clerk had predicted she would raise. She felt that the district was both “troublesome [and] basic.” At the same time, she felt that “St[ate] action is reviewed here” and the Court’s strict scrutiny standards thus applied to *Shaw*. As in *Croson*, she and Rehnquist cast aside their normal deference to states’ rights and applied the Warren Court’s strict scrutiny standard to race-conscious remedies and the creation of voting districts. Still, O’Connor did not want to go as far as Rehnquist did and declare the district unconstitutional. She voted for the Court to remand the case to a lower court to determine if “the plan is narrowly tailored to further a compelling governmental interest” beyond a racial gerrymander intended to comply with the Voting Rights Act.⁴²¹

⁴¹⁹ Ibid.

⁴²⁰ Ibid.

⁴²¹ *Shaw v. Reno*, 509 U.S. 630, 632 (1993).

Antonin Scalia then followed by saying that while he felt comfortable following O'Connor's suggestion to remand the case, he believed that the district was unconstitutional. And while he agreed that the Court should follow *Croson*'s model of strict scrutiny, Scalia believed that "this dis[trict] on its face has no rational basis" because of its odd shape.⁴²² He felt that this was reason enough to either remand the case or invalidate the district and issued a vote against the district.

Anthony Kennedy spoke next. Kennedy had started his tenure on the Court as a reliable conservative. However, the previous term in *Planned Parenthood v. Casey* (1992) he had worked with Reagan and Bush appointees O'Connor and David Souter to create a plurality opinion that allowed *Roe v. Wade* to stand. Kennedy's work in *Casey* led some observers to believe that he might become an important swing vote on the Rehnquist Court, especially since the recent departures of William Brennan and Thurgood Marshall had added shifted the Court further right.

But while Kennedy would in fact become a key swing vote on the Rehnquist Court, Blackmun's clerk noted before the conference that Kennedy "feels pretty strongly that some sort of remand is in order."⁴²³ As a result, Kennedy stuck with the conservative bloc at conference. He felt that while the Court should not "say [the] use of race per se invalidates" a district, the legislature had created this district using "race for its own sake."⁴²⁴ Kennedy felt okay with some race-consciousness behind a district's creation but not with a racial gerrymander of *Shaw*'s magnitude. Thus, he supported the Court's ruling in *UJO* but distinguished the district in *Shaw* because the one in "*UJO* had compactness."⁴²⁵ Kennedy also felt that the legislature's reliance

⁴²² Box 624, File 5, Blackmun Papers, 23 April 1993.

⁴²³ Ibid.

⁴²⁴ Ibid.

⁴²⁵ Ibid.

on the Voting Rights Act as justification for the district did not “help much.”⁴²⁶ Kennedy saw the district as unacceptable, and he cast a fourth vote for the conservative bloc.

If William Brennan and Thurgood Marshall had still been on the Court, Kennedy’s vote almost certainly would have been in the minority. By a five-to-four vote the Court would have affirmed the district’s constitutionality and not tied *Crosby*’s strict scrutiny standards to race-conscious districts. But a few days after Brennan announced *Metro Broadcasting* – one of his many victories for the Court’s liberal bloc – the 84 year old justice suffered a stroke. His doctors insisted that he retire immediately. And so, on July 20, 1990, arguably the most influential liberal in the Court’s history shocked the world and announced that he would step down from the bench.

Brennan had few achievements like *Metro Broadcasting* on the Rehnquist Court, but that ruling had reminded the liberal clerks that their hero could still protect some of the Warren and Burger Court’s civil rights precedents. His departure frightened them. As former Blackmun clerk Edward Lazarus recalled, “Hearing the news, I became light-headed. It was as though the physics of the legal world had suddenly changed, a source of gravity vanished, the whole calculus of law upended. A profound sense of mourning descended over the liberals, and behind that mourning, fear. Without Brennan, how much more would the Court’s balance shift? And without his soul mate and support, how much longer could Marshall hold on? And what of Blackmun beyond that? Such questions danced in our heads, though we dared not answer them.”⁴²⁷ To the liberal clerks, Brennan had kept hope alive that Rehnquist and Scalia would not lead a conservative revolution that erased many of the Warren and Burger Courts’ civil rights

⁴²⁶ Ibid.

⁴²⁷ Edward P Lazarus, *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court*. (New York: Times Books, 1998), 437.

precedents. They worried that Brennan's departure would mean the end of a long line of liberal achievements for the Court.

The following year, Lazarus and other liberals' fears increased when Marshall announced that he too would leave the Court. Marshall had been ill for years, and he sorely missed his best friend and ideological counterpart on the Court. With Brennan gone, the death penalty abolitionist even accidentally cast the deciding vote at a conference to allow a death sentence to stand. An embarrassed Marshall had to send a memo to the other justices and cast the vote he had intended.⁴²⁸ In the past Marshall had vowed, "I have a lifetime appointment and I intend to serve it. I expect to die at 110, shot by a jealous husband."⁴²⁹ But as the always frank justice put it, by 1991 he was "falling apart."⁴³⁰ And so just a year-and-a-half before he would succumb to heart failure, Marshall announced that he would step down from the Court.

Brennan and Marshall's departures gave President George H.W. Bush the opportunity to appoint successors to two of the most liberal justices in the Court's history. Bush remembered the contentious Bork hearings and had no desire to spend political capital on such difficult hearings. As a result, he chose the unknown David Souter to replace Brennan. Since Souter did not have Bork's concrete record of conservatism, Bush reasoned, the Senate would have little reason to reject him.

Before the nomination, Souter had lived in New Hampshire and been the state's Attorney General, a superior court judge, and a justice on the state's Supreme Court. He had also served a brief term on the U.S. First Circuit Court of Appeals. In all of these positions, Souter accumulated a quiet record that would make it difficult for the Senate's Democrats to deny his

⁴²⁸ Lazarus, *Closed Chambers*, 447.

⁴²⁹ Supreme Court History: Expanding Civil Rights, "Thurgood Marshall," Biographies of the Robes, http://www.pbs.org/wnet/supremecourt/rights/robes_marshall.html (accessed March 1, 2007).

⁴³⁰ As quoted in Lazarus, *Closed Chambers*, 449.

nomination. Some Republicans feared that the lack of evidence meant that Souter would not be a reliable conservative vote on the Court. However, John Sununu – Bush’s Chief of Staff – had appointed Souter to his position on New Hampshire’s Supreme Court. As Ohio Senator Howard Metzenbaum noted at Souter’s confirmation hearings, Sununu had assured conservatives that Souter was “a home run that is just about to leave Earth (sic.) orbit.”⁴³¹ Metzenbaum wondered, “does John Sununu know something which we, on the committee, do not know and I think we are entitled to try to learn?”⁴³² Souter assuaged some of the liberals’ fears by assuring them that he believed that a constitutional right to privacy existed and offered praise for the retired Brennan. As a result, the Senate confirmed him by a vote of 90-9. Still, Souter had refused to clarify his positions on several issues, including whether or not he would affirm *Roe v. Wade*’s guarantee that a woman had a right to an abortion during the early stages of her pregnancy. Thus, few liberals expected that Souter would become part of their voting bloc.

In his first term on the Court, Souter held true to Sununu’s prediction. He provided the conservatives with the decisive vote in several key cases, approved federal abortion restrictions, and denied Warren McCleskey’s final appeals for his life in a decision that Thurgood Marshall described as “lawless.”⁴³³ Souter agreed with Marshall less than any other justice that term and voted alongside Rehnquist 86 percent of the time.⁴³⁴ By comparison, during his final term on the Court, Brennan had sided with the Chief Justice just 38 percent of the time.⁴³⁵ Souter had issued

⁴³¹ Hearings before the Committee on the Judiciary on the Nomination of David Hackett Souter, to Be Associate Justice of the Supreme Court, (13 September 1990) at 21.

⁴³² Ibid.

⁴³³ Box 538, Folder 4, Marshall Papers, 3 April 1991.

⁴³⁴ Nicholas S. Zeppos, “Souter, David” in *The Oxford Companion to the Supreme Court of the United States*, ed. Kermit L. Hall, 804.

⁴³⁵ Zeppos, “Souter, David,” 804.

some more moderate rulings between his first term and *Shaw*, but in 1993 the public still viewed him as a conservative.⁴³⁶

At the *Shaw* conference, Souter seemed to still lean towards siding with the conservatives. He began by acknowledging that the Voting Rights Act required that “race has t[o] b[e] taken into” account when creating voter districts.⁴³⁷ But he still had problems with racial gerrymandering and the district’s lack of “compactness.”⁴³⁸ Souter did not share Rehnquist and Scalia’s belief that the Court should hold race-conscious districts to a level of strict scrutiny. Instead, he felt the Court should issue a decision that would “deal wi[th] [the] harm” the district caused whites and wanted to “define t[he] intent” behind this harm.⁴³⁹ Souter’s uncertainty caused him to issue a tentative vote in support of O’Connor’s position – he wanted to remand the case to have a lower court clarify his questions.

Yet while the Senate had easily confirmed Souter, Bush had a much more difficult time getting his choice to replace Marshall onto the Court. At a press conference just after he had announced his retirement, Marshall declared that Bush should not choose “the wrong kind of negro” to fill his spot on the bench.⁴⁴⁰ As Marshall explained, “My dad told me way back...that there’s no difference between a white snake and a black snake. They both bite.”⁴⁴¹ Marshall never said which African American he did not want anywhere near his seat, but Court observers knew that he referred to Clarence Thomas, a judge who had recently replaced Robert Bork on the DC Circuit of the U.S. Court of Appeals.

⁴³⁶ Box 624, File 5, Blackmun Papers, 30 June 1993.

⁴³⁷ Box 624, File 5, Blackmun Papers, 23 April 1993.

⁴³⁸ Ibid.

⁴³⁹ Ibid.

⁴⁴⁰ As quoted in Lazarus, *Closed Chambers*, 449.

⁴⁴¹ Ibid.

Thomas had held key civil rights roles in the Reagan administration and helped move his divisions in far more conservative directions. For instance, while chairing the Equal Employment Opportunity Commission, he moved the organization away from lawsuits that used statistical evidence to show that corporations had discriminated against several employees. Instead, he pursued the more infrequent cases that occurred when indisputable evidence existed that a person had experienced unconstitutional discrimination. In this way, Thomas' actions mirrored the turn the Rehnquist Court would take in *McCleskey*, *Crosby*, and *Wards Cove* in imposing difficult burdens of proof on plaintiffs who felt they had experienced racial prejudice.

Thomas complained about civil rights advocates who, as he put it, felt the need to “bitch, bitch, bitch, moan and moan, whine and whine” about the Reagan administration’s policies. He insisted that through hard work a man could overcome any discrimination regardless of the color of his skin.⁴⁴² After all, he had experienced extreme racism while growing up dirt poor in Pin Point and Savannah, Georgia, and had risen above his circumstances. But A. Leon Higginbotham, Jr., a prominent African American judge on the Third Circuit U.S. Court of Appeals, chastised Thomas for these comments in an open letter to the Supreme Court appointee. Higginbotham noted that Thomas stood on the shoulders of civil rights advocates like Thurgood Marshall and wondered if Thomas would have accused Marshall and others of “bitching and moaning and whining” when they challenged state-mandated segregation in *Brown v. Board of Education* and other monumental civil rights rulings.⁴⁴³

Higginbotham also pointed out that Thomas had benefited from the connections he made at Yale Law School. At Yale, Thomas met Missouri Senator John Danforth. Before the future justice joined the Reagan administration, Danforth had hired him and helped him get his start in

⁴⁴² A. Leon Higginbotham, Jr., “An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague,” *University of Pennsylvania Law Review*, 140, no. 3 (1992), 1015.

⁴⁴³ Higginbotham, “An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague,” 1015.

politics. Later, Danforth would prove invaluable to Thomas' confirmation as a Supreme Court justice. Higginbotham reminded the American public and Thomas that Holy Cross – his undergraduate alma mater – and Yale “were influenced by the milieu created by *Brown* and thus became more sensitive to the need to create programs for the recruitment of competent minority students.”⁴⁴⁴ He wondered if Holy Cross would have accepted Thomas without many of the Warren Court's landmark rulings and the work of civil rights advocates like Martin Luther King, Jr. Higginbotham asked Thomas: “And if you had not gone to Holy Cross and instead gone to some underfunded state college for Negroes in Georgia, would you have been admitted to Yale Law School, and would you have met the alumni who played such a prominent role in maximizing your professional options?”⁴⁴⁵ Even without considering the racism and poverty from which Thomas had risen, his achievements were impressive. But no one could deny that affirmative action programs had helped Thomas along the way and that without them he might still be living in poverty in Georgia. Thomas' criticisms of affirmative action policies seemed inconsistent with the benefits that he had accepted from these programs.

Nonetheless, Thomas had derided affirmative action as unconstitutional and insulting to blacks, criticized the rationale behind the Court's ruling in *Brown*, and condemned the abortions that *Roe v. Wade* led to as a “holocaust.”⁴⁴⁶ Bush announced to the nation on July 1, 1991, that Clarence Thomas was “the best qualified” candidate to replace Marshall and that Thomas would have been the “best person” for the vacancy regardless of his race.⁴⁴⁷ But Thomas' legal views made him one of the few blacks who could be a reliable vote for conservatives. As a result, Bush's comments did not fool anyone. When the members of the American Bar Association's

⁴⁴⁴ Ibid.

⁴⁴⁵ Ibid.

⁴⁴⁶ Yarbrough, *The Rehnquist Court and the Constitution*, 24.

⁴⁴⁷ Lazarus, *Closed Chambers*, 451.

judiciary committee rated Thomas as “qualified” and “not qualified,” it confirmed suspicions that Bush had used “the best qualified” as code for “black conservative.” Most Supreme Court nominees receive ratings of “well-qualified,” and so Thomas’ rating indicated that race played a much larger role than merit when Bush nominated him to the Court.

Thomas endured a difficult confirmation hearing. The Senate Judiciary Committee split 7-7 in their initial vote, but Danforth predicted he had at least 60 votes in the Senate to confirm Thomas. However, before the entire Senate voted on Thomas, a black, Republican law professor named Anita Hill reported that Thomas had sexually harassed her for years while they both worked at the EEOC. Since the Bush Administration had focused on Thomas’ outstanding character as the reason he would make a good justice, Republicans feared this revelation could prove damaging. But Thomas denied the accusations and derided the Judiciary Committee’s additional hearings to discuss the matter as “a circus. It is a national disgrace. And from my standpoint, as a black American, as far as I am concerned, it is a high-tech lynching for uppity-blacks who in any way deign to think for themselves, to do for themselves, to have different ideas, and it is a message that, unless you kow-tow to an old order, this is what will happen to you, you will be lynched, destroyed, caricatured by a committee of the U.S. Senate, rather than hung from a tree.”⁴⁴⁸

Thomas’ depictions of the hearing as a lynching frightened the Senate’s Southern Democrats. They counted on blacks as a major part of their voting bloc and feared that if the Senate rejected Thomas, Bush would appoint a well-qualified, white conservative to the Court. This might have hurt the Senators’ chances of re-election. Liberals may have been able to deny Thomas confirmation if they had focused on Thomas’ ideology and questionable qualifications.

⁴⁴⁸ Hearings before the Committee on the Judiciary on the Nomination of Clarence Thomas, to Be Associate Justice of the Supreme Court, (11 October 1991) at 157-158.

But instead, they centered their argument on whether or not Thomas had harassed Hill. Without any conclusive proof of this and Southern Democrats' fears of losing black votes, Danforth marshaled enough support for Thomas to gain a 52-48 vote in favor of confirmation, the narrowest margin for a confirmed justice in the history of the 100 person Senate.

During his tenure on the Court, Thomas proved to be the reliable conservative that Republicans had hoped. Marshall's replacement has long claimed that his jurisprudence followed the intentions of the Constitution's framers, yet he quickly established a voting record that looked more like one belonging to a partisan Republican than a justice following a particular Constitutional interpretation.

Thomas displayed this partisanship at the *Shaw* conference. Many historians have demonstrated that the Framers of the Fourteenth Amendment approved of institutions like the Freedman's Bureau to initiate race-conscious remedies for blacks. Yet Thomas stuck to his firm belief that the Constitution forbade race-conscious remedies, insisting that the legislator did not "[have] t[o] take race into [account]" when creating the state's districts. Furthermore, Thomas believed that such districts insulted blacks by assuming that they voted in blocs. The Court's *Gingles* opinion had determined that race-conscious districting would be unconstitutional if the legislation grouped minorities who did not vote in blocs. Thus, if Thomas could prove that North Carolina's blacks were unlikely to vote together, he would have a legitimate Constitutional argument for invalidating the district. As evidence for this, he mentioned that blacks "voted Rep[ublican] to B[arry] Goldwater" during the 1964 Presidential election.⁴⁴⁹ But by making this claim, Thomas ignored the overwhelming evidence from *Gingles* that showed that – anecdotal

⁴⁴⁹ Box 434, File 6, Blackmun Papers, 23 April 1993.

exceptions aside – the vast majority of North Carolina’s blacks voted together and preferred for black Democrats to represent them.⁴⁵⁰

Clarence Thomas cast a strong vote in favor of declaring the district unconstitutional, but the vote did not mesh with the originalist jurisprudence that he claimed to follow, as the Voting Rights Act had allowed for race-conscious districting as a way to increase black representation in Congress. Furthermore, by claiming that race-conscious remedies insulted blacks, he ignored evidence that showed that years of racial prejudice had left many blacks – including himself – in a position where they needed such remedies to match the achievements of whites who had not faced this discrimination.

Nonetheless, Thomas’ vote gave the conservatives a six-to-three majority. But both Souter and O’Connor had wanted to remand the case to a lower court instead of just striking down the district. Rehnquist knew that he would have to assign one of them to write an opinion that would marshal five votes. Souter had been a bit more uncertain than O’Connor, so Rehnquist assigned the opinion to O’Connor. This would allow the strongest possible opinion that could command at least five votes and all but require the lower court to strike down the district as unconstitutional. Also, Souter seemed likely to join O’Connor’s opinion, as the two of them had joined together in all but two of the Court’s divided decisions during Souter’s first term.⁴⁵¹

O’Connor circulated a draft of her opinion in June. The opinion remanded the case to a District Court to determine if a compelling reason besides race mandated the district. It also applied *Crosby*’s strict scrutiny standard to race-conscious districting. After she had made some changes to accommodate Kennedy, Rehnquist, and Scalia, the three of them and Thomas joined

⁴⁵⁰ Box 624, File 5, Blackmun Papers, 14 February 1986.
See Kousser, *Colorblind Injustice*, 243-276 for further discussion.

⁴⁵¹ Abraham, *Justices, Presidents, and Senators*, 307.

O'Connor's opinion, giving the Court a majority in *Shaw*.⁴⁵² Souter planned to issue a concurrence rather than join the majority's opinion.

But on June 25, Blackmun's clerk wrote him a memo that informed him that "Justice Souter has changed his vote from conference and circulated a separate dissenting opinion."⁴⁵³ Souter's vote did not change the outcome of the case, as the conservatives would now have a five-to-four majority instead of a six-to-three majority in judgment. Since his change of heart would do no more than somewhat weaken the support for the Court's precedent, Souter must have felt strongly that the law required the Court to affirm the district. What caused Souter to reach this conclusion?

Souter's change of heart in *Shaw* – and his overall slide to the left – appears to have resulted from his desire to emulate the jurisprudence of both William Brennan and John Marshall Harlan II. In doing so, Souter has displayed a firm commitment to upholding Court precedent whenever possible yet also following *Carolene Products*' footnote that declared that the Court should intervene to protect the Constitutional rights of minorities.

At Souter's confirmation hearings, he cited Harlan's pivotal dissent in *Poe v. Ullman* (1961) and concurrence in *Griswold v. Connecticut* (1965) as landmark constitutional interpretations that he would follow. In *Poe*, the Court declined to invalidate a statute that made it illegal for all individuals, including married couples, to use contraceptives. But in his dissent, Harlan noted that "Due process has not been reduced to any formula; its content cannot be determined by reference to any code."⁴⁵⁴ To Harlan, the Fourteenth Amendment's Due Process Clause was "a living thing."⁴⁵⁵ Because Harlan believed that "the intimacy of husband and wife

⁴⁵² Box 624, File 3, Blackmun Papers, 4 June 1993, 8 June 1993, 18 June 1993.

⁴⁵³ Box 624, File 5, Blackmun Papers, 25 June 1993.

⁴⁵⁴ *Poe v. Ullman*, 367 U.S. 497, 542 (1961).

⁴⁵⁵ *Ibid.*

is necessarily an essential and accepted feature of the institution of marriage,” he felt that the Court should expand the Due Process Clause to protect a husband and wife’s right to privacy.⁴⁵⁶ In *Griswold*, Harlan echoed these statements in his concurrence that struck down the Connecticut’s ban on married couples’ right to use contraceptives.

Harlan was a cautious justice who tended to avoid joining the Warren Court’s landmark opinions. But he recognized that the Constitution must evolve with changing times, and to Harlan, it seemed more than reasonable to depart from the text of the Constitution to protect a married couple’s right to privacy. Souter idolized Harlan and noted at his confirmation hearings that the justice’s work in *Poe* and *Griswold* had established “that the due process clause of the 14th amendment does recognize and does protect an unenumerated right of privacy.”⁴⁵⁷

Harlan had also displayed a firm commitment to *stare decisis*. For instance, he had dissented from the Warren Court’s controversial ruling in *Miranda v. Arizona* (1966) that determined that police officers could interrogate suspects without informing them that they had several rights, including the “right to remain silent.”⁴⁵⁸ But he persuaded Burger and other conservatives not to overrule many of *Miranda*’s guarantees when they had the opportunity to do so in *Harris v. New York* (1971).⁴⁵⁹ Harlan believed that the Court should not be a political institution that changed the law to suit the justices’ political leanings. He felt so strongly that the justices should not show any partisanship that he refused to vote in elections.⁴⁶⁰

⁴⁵⁶ *Poe v. Ullman*, 367 U.S. 497, 553 (1961).

⁴⁵⁷ Hearings before the Committee on the Judiciary on the Nomination of David Hackett Souter, to Be Associate Justice of the Supreme Court, (13 September 1990) at 54.

Hearings before the Committee on the Judiciary on the Nomination of David Hackett Souter, to Be Associate Justice of the Supreme Court, (17 September 1990) at 232.

⁴⁵⁸ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁴⁵⁹ *Harris v. New York* 401 U.S. 222 (1971).

Woodward and Armstrong, *The Brethren*, 113.

⁴⁶⁰ Woodward and Armstrong, *The Brethren*, 127n.

Souter demonstrated in *Planned Parenthood v. Casey* (1992) that he shared Harlan's views on the importance of *stare decisis* and limited partisanship on the Court. Though at the *Casey* conference the Court seemed ready to overrule *Roe v. Wade*, Souter followed Brennan's collaborative approach and worked with O'Connor and Kennedy to allow the basic premise of *Roe* – “a recognition of a woman's right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State” – to remain constitutional.⁴⁶¹ A clerk from the previous term had written Souter a memo urging that the justice affirm *Roe* when the Court heard *Casey*. The clerk argued that *Roe* had not been a political ruling but instead the result of Harlan's living Due Process Clause. Souter accepted the clerk's rationale and conveyed his commitment to Harlan's belief in *stare decisis* and nonpartisan rulings in the section of the plurality opinion that he wrote with Kennedy and O'Connor. Souter noted that the Court had faced important political decisions in *Brown* and *Roe*, and after both rulings the Court faced real pressure to overturn or minimize the rulings. But as he explained:

[O]nly the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.⁴⁶²

In *Casey*, Souter took the approach that he felt Harlan would have chosen. Since Souter saw no compelling legal basis for overruling *Roe*, he believed that *stare decisis* compelled the Court to affirm the decision.

⁴⁶¹ N.E.H. Hull and Peter Hoffer, *Roe v. Wade: The Abortion Rights Controversy in American History*, (Lawrence: University Press of Kansas, 2001), 251-252.
Lazarus, *Closed Chambers*, 467-474.

Planned Parenthood v. Casey 505 U.S. 833, 834 (1992).

⁴⁶² *Planned Parenthood v. Casey* 505 U.S. 833, 867 (1992).

But John Marshall Harlan II was not alone in influencing Souter – William Brennan did as well. Until Brennan died in 1997, Souter often met with the justice to seek his advice.⁴⁶³ While he was on the Court, Brennan had long complied with Harlan Fiske Stone’s famous footnote in *Carolene Products* and allowed the Court to intervene to protect the rights of the political minority. Souter followed Brennan’s example and joined the Court’s five-to-four opinion in *Lee v. Weisman* (1992) that forbade religious officials from leading prayers at public school graduation. He believed that the First Amendment’s guarantee of freedom of religion protected students who might be uncomfortable with a principal and school district’s desire to have religious leaders lead prayers. Souter also supported Brennan’s belief that the Constitution protected the dignity and rights of individuals. In *Washington v. Glucksberg* (1997), Souter would declare that the living due process clause might some day establish a Constitutional right to assisted suicide.⁴⁶⁴

Souter followed these principles in his *Shaw* dissent. He argued that the Court had established in cases like *Gingles* that “If a cognizable harm like dilution or the abridgment of the right to participate in the electoral process is shown, the districting plan violates the Fourteenth Amendment. If not, it does not.”⁴⁶⁵ To Souter, the race-conscious district did not appear to harm North Carolina’s whites. And he objected to the majority’s conclusion that in effect said that “African-Americans may now be the only group to which it is unconstitutional to offer specific benefits from redistricting.”⁴⁶⁶ As a result, he saw no reason to overturn the Court’s precedents and hold race-conscious districting to a different standard than the justices once had.

⁴⁶³ Abraham, *Justices, Presidents, and Senators*, 307, 309.

⁴⁶⁴ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

⁴⁶⁵ *Shaw v. Reno*, 509 U.S. 630, 685 (1993).

⁴⁶⁶ *Shaw v. Reno*, 509 U.S. 630, 680 (1993).

Souter's dissent in *Shaw* foreshadowed his eventual alignment with the Rehnquist Court's liberal bloc. Yet partisanship did not motivate his decisions that disappointed the Republicans who helped him join the Court. Instead, as his opinions in cases like *Casey*, *Weisman*, and *Glucksberg* suggest, Souter combined Harlan's commitment to *stare decisis* and non-partisanship with Brennan's belief that the Constitution should protect the rights of minorities to reach his decision in *Shaw*. On a Court with staunch conservatives like Rehnquist, Scalia, and Thomas, Souter's calls for judicial restraint and the protection of minorities' rights made him look like a liberal to many Court observers. But in reality, he was a principled justice who on the Warren Court might have appeared to be a centrist or even a conservative dissenter.

Souter's well-reasoned dissent did not, however, change the ultimate outcome of *Shaw v. Reno*. The Court imposed its strict scrutiny standards for affirmative action on race-conscious districts. After *Shaw*, legal challenges to the district jumped between the District Court and the Supreme Court several times until 2001. Though White and Blackmun retired not long after *Shaw*, their replacements – Ruth Bader Ginsburg and Stephen Breyer – shared their predecessors' views on race-conscious districting and left the same five-to-four split among the justices. Thus, each time, the Court cast doubt on the validity of North Carolina's Twelfth District or declared it to be unconstitutional.⁴⁶⁷ Then in *Hunt v. Cromartie* (2001), Sandra Day O'Connor switched her vote and sided with the liberal bloc.⁴⁶⁸ In *Hunt*, the majority ruled that the district could stand because they saw political affiliations, not race, as the primary motivation for its creation.

The Court's final decision made some sense on its face. After all, beginning in *Mahan* the Court had extended quite a bit of deference to states' political districting decisions so long as

⁴⁶⁷ *Shaw v. Hunt*, 517 U.S. 899 (1996).

Hunt v. Cromartie, 526 U.S. 541 (1999).

⁴⁶⁸ *Hunt v. Cromartie*, 532 U.S. 234 (2001).

the legislators did not engage in racial gerrymanders. And in 2004 a four justice plurality would even determine in *Veith v. Jubelirer* that the justices would not intervene to overturn political gerrymandering so long as the districts were relatively proportional in population.⁴⁶⁹

Yet North Carolina kept District Twelve essentially the same between the Court's rulings in *Shaw* and *Hunt*. As a result, many observers questioned the logic behind O'Connor's switch and have even described her voting as little more than "postmodern politics."⁴⁷⁰ Since to this point no justice has made his or her papers from the *Hunt* decision available to the public, we can only guess as to why O'Connor decided to join the liberal bloc. Perhaps she determined that the Court's demands in *Shaw* were unworkable, as legislators had long considered race to avoid separating ethnic communities through redistricting. Or maybe she felt that because African-Americans tended to vote in blocs, it would be impossible to separate race from politics in North Carolina's Twelfth District. Whatever the rationale behind her switch, O'Connor reached one of her many inconsistent decisions when the Court announced its ruling in *Hunt*.

Regardless of the Court's final ruling in *Hunt*, the majority in *Shaw* appears to have used little legal backing to apply strict scrutiny to race-conscious districting. Instead, the justices seem to have felt the same antipathy towards majority-minority districts as they did towards race-based affirmative action that relied on quotas. In this way, *Shaw v. Reno* demonstrated that personalities and politics had more influence than the majority's jurisprudence on the Rehnquist Court's rulings that dealt with minorities' voting rights.

⁴⁶⁹ *Veith v. Jubelirer*, 541 U.S. 267 (2004).

⁴⁷⁰ Kousser, *Colorblind Injustice*, 422-423.

Conclusion

The Rehnquist Court's decisions in *McCleskey v. Kemp*, *City of Richmond v. J.A. Croson Co.*, *Johnson v. Transportation Agency*, and *Shaw v. Reno* paint a picture of a partisan Court more interested in political outcomes than legal analysis in civil rights cases. Yet while the Court issued a landmark ruling in each of these decisions, legal scholars and laymen alike will remember the Rehnquist Court's ruling in *Bush v. Gore* (2000) as being far more significant than any of these rulings. In that decision, a five-to-four Court halted Florida's recounts of ballots from the 2000 Presidential election between Al Gore and George W. Bush. While some observers claimed that *Bush v. Gore* did not give Bush the Presidency, Sandra Day O'Connor has written that the Court's decision "determined the outcome of the election."⁴⁷¹ The enormous impact of this ruling will make *Bush v. Gore* as famous as *Brown v. Board of Education* (1954) or *Roe v. Wade* (1973) for generations to come.

Comedian Jon Stewart expressed most people's views of the decision that effectively made Bush the President when he sarcastically observed: "In a remarkable coincidence, each justice's decision aligns exactly with his or her party affiliation."⁴⁷² Stewart and so many others saw the decision as a partisan ruling with little legal analysis behind it. Their observation was not unfair. The Court's conservatives, particularly Rehnquist and O'Connor, have long advocated jurisprudence based on federalism and deference to states' rights. Nonetheless, they

⁴⁷¹ Sandra Day O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice*, (New York: Random House, 2003), 244.

⁴⁷² Jon Stewart, Ben Karlin, and David Javerbaum, *America (The Book): A Citizen's Guide to Democracy Inaction*, (New York: Warner Books, 2004), 90.

joined a *per curiam* opinion that argued that there was “no recount procedure in place under the state court's order that comports with minimal constitutional standards” that would be ready in time for the December 12 “‘safe-harbor’ date” that 3 U.S.C. Section 5 set.⁴⁷³ Yet that section of the United States Code did not establish a firm deadline by which a state had to finish an election recount, and the Florida Supreme Court had determined that the state could continue its recount past that date. A true deference to federalism and states’ rights would have required the Supreme Court to defer to the state court’s interpretation of 3 U.S.C. Section 5, but the Rehnquist Court overruled the Florida Supreme Court’s decision and determined that the recount would have to conclude by December 12. Since the Supreme Court issued its opinion on that exact date, the recount ended and Bush effectively won the election.

However, the Court refused to issue any broad precedents through *Bush v. Gore*. The *per curiam* opinion stated that “Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”⁴⁷⁴ The majority’s unwillingness to establish any real precedent suggested a lack of confidence in the Constitutional correctness of their opinion. Instead, it made their ruling look like a rushed and embarrassing act of partisanship.

Rehnquist added a concurring opinion in which he argued that the Florida Supreme Court had violated the Constitution when it determined that the state could continue to count votes after the “safe harbor” date. The Chief Justice claimed that “the general coherence of the legislative scheme may not be altered by judicial interpretation so as to wholly change the statutorily provided apportionment of responsibility among these various bodies. In any election but a Presidential election, the Florida Supreme Court can give as little or as much deference to

⁴⁷³ *Bush v. Gore*, 531 U.S. 98 (2000).

⁴⁷⁴ *Bush v. Gore*, 531 U.S. 98, 109 (2000).

Florida's executives as it chooses, so far as Article II is concerned, and this Court will have no cause to question the court's actions."⁴⁷⁵ In other words, Rehnquist insisted that the Supreme Court would have deferred to the state court's decision *if it had ruled on any election except a Presidential one*. He then unconvincingly argued that he found this inconsistency with federalism acceptable because "there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government."⁴⁷⁶ In short, Rehnquist claimed that *Bush v. Gore* was so important that he could not apply his normal method of Constitutional interpretation. To observers like Jon Stewart, this argument seemed spurious at best and more like an excuse to cast a vote that gave Bush the Presidency.

Antonin Scalia and Clarence Thomas, on the other hand, spent their tenure on the Rehnquist Court chastising their colleagues for not subscribing to originalist jurisprudences. Yet they joined both the *per curiam* opinion and Rehnquist's concurrence even though these opinions were inconsistent with their methods of Constitutional interpretation.

As Stephen Breyer pointed out in his dissent, 3 U.S.C. Section 5 allowed states to settle "controversy or contest concerning the appointment of ... electors ... by *judicial* or other methods."⁴⁷⁷ This made the Florida Supreme Court's ruling consistent with federal election law through an originalist interpretation of 3 U.S.C. Section 5. Yet while that section of the United States Code allowed state judiciaries to settle electoral disputes, past Congresses did not envision federal judges playing the same role. As Breyer noted, the Twelfth Amendment to the United States Constitution required Congress – not the judiciary – to calculate electoral vote totals. And in 1887, in part to respond to the controversial 1876 Presidential election between Rutherford Hayes and Samuel Tilden, Congress passed the Electoral Count Act that specified that Congress

⁴⁷⁵ *Bush v. Gore*, 531 U.S. 98, 114 (2000).

⁴⁷⁶ *Bush v. Gore*, 531 U.S. 98, 112 (2000).

⁴⁷⁷ As quoted in *Bush v. Gore*, 531 U.S. 98, 153 (2000).

would settle electoral disputes once states had attempted to do so. As the Representative who presented the Act before Congress explained, “The power to judge of the legality of the votes is a necessary consequent of the power to count.”⁴⁷⁸ Thus, the framers of the Electoral Count Act intended for Congress rather than the federal judiciary to determine the legality of a state’s electoral total.

3 U.S.C. Section 5, the Twelfth Amendment, and the Electoral Count Act demonstrate that their authors meant for state courts to settle disputes regarding a state’s electoral vote total but not for federal courts to do so. The authors’ contemporaries would almost certainly have understood the laws to mean just that. Thus, a true originalist interpretation would have prohibited the Court from even hearing the case let alone siding with Bush and overturning the Florida Supreme Court’s decision. Yet as they did in so many other civil rights cases, Scalia and Thomas cast their traditional jurisprudences aside and voted in accordance with their political views. Politics trumped the law as Scalia and Thomas ordered the recount to end.

Partisanship did not stop with the majority. Ruth Bader Ginsburg and John Paul Stevens correctly pointed out in their dissents that the decision was inconsistent with the majority’s regular reliance on federalism. Yet Ginsburg and Stevens’ approval of different vote counting standards for different counties departed from their normal interpretations of the Equal Protection Clause that allowed the federal judiciary to intervene when states unfairly and inconsistently applied different criteria for counting its residents votes. Thus, seven of the Court’s justices voted in *Bush v. Gore* more because of their political beliefs than their schools of Constitutional interpretation.

On the other hand, David Souter and Stephen Breyer issued principled, well-reasoned dissents that acknowledged that the recounts made sense yet needed to be done fairly. In his

⁴⁷⁸ As quoted in *Bush v. Gore*, 531 U.S. 98, 154 (2000).

dissent, Souter proposed that the Court “remand the case to the courts of Florida with instructions to establish uniform standards for evaluating the several types of ballots that have prompted differing treatments, to be applied within and among counties when passing on such identical ballots in any further recounting (or successive recounting) that the courts might order.”⁴⁷⁹ Souter had tried hard to create an opinion that could command a majority, and according to some reports he believed that had he had just one additional day he could have convinced Anthony Kennedy to join this act of compromise.⁴⁸⁰ Yet while Souter failed to create a majority opinion, both he and Breyer showed great courage when their colleagues buckled to partisan pressures. Though it may have been tempting for the two justices to wholly approve the Florida Supreme Court’s decision, they recognized that the state court’s approval of inconsistent vote counting methods within the state violated the Equal Protection Clause. As a result, Souter and Breyer determined this part of the lower court’s ruling had been unconstitutional.

While personalities and partisanship dominated the Rehnquist Court’s civil rights decisions, Souter and Breyer’s dissents in *Bush v. Gore* were not isolated instances of excellent jurisprudence. Nearly all of the Rehnquist Court’s civil rights cases featured at least one justice demonstrating strong and consistent Constitutional interpretation. Although Harry Blackmun hated the death penalty, he did not demand in his *McCleskey v. Kemp* (1987) dissent that Georgia abolish the death penalty. Because statistical evidence had only indicated that racism influenced the state’s use of the death penalty for crimes of mid-level aggravation, Blackmun proposed that the Court still allow the death penalty as punishment for crimes of high-level aggravation. Both he and John Paul Stevens felt it would be irresponsible for the Court to abolish the death penalty in instances where no evidence existed that racism contributed to its application.

⁴⁷⁹ *Bush v. Gore*, 531 U.S. 98, 134-135 (2000).

⁴⁸⁰ Thomas M. Keck, “David H. Souter: Liberal Constitutionalism and the Brennan Seat” in *Rehnquist Justice: Understanding the Court Dynamic*, ed. Earl M. Maltz. (Lawrence: University Press of Kansas, 2003), 208.

That same term when the Court heard *Johnson*, a case that presented statistical evidence of gender discrimination, eight of the justices issued votes consistent with their vote in *McCleskey*. In the 1992 term, Republican appointees Sandra Day O'Connor, Anthony Kennedy, and David Souter disregarded any moral qualms they may have felt toward abortion to uphold the basic principles that *Roe v. Wade* established because they saw no legitimate Constitutional reason to overrule *Roe*. In doing so, O'Connor, Kennedy, and Souter displayed first-rate jurisprudence in *Planned Parenthood v. Casey* in the face of intense political pressure. Then the next term in *Shaw v. Reno*, Byron White and David Souter continued their belief in deference towards states' discretion of drawing their own districts when the two dissented from the conservative majority.

These and other examples indicate that while *Bush v. Gore* represented the most egregious of the Rehnquist Court's many partisan civil rights rulings, Breyer and Souter continued the Court's tradition of casting at least one vote based on consistent jurisprudence instead of partisan ideology in even the most politically charged cases. Still, whether the outcomes favor liberal or conservative interests, politically motivated rulings discourage legal scholars. In theory, the Court is supposed to cast aside biases to issue whatever ruling the law demands. Of course the many legitimate methods of Constitutional interpretation can result in disagreements between the justices, but so long as each justice applies consistent Constitutional interpretation to every case, they satisfy the majority of legal scholars.

Thus, when William Rehnquist passed away on September 3, 2005, he left behind a civil rights legacy as Chief Justice that disappointed many observers. Rehnquist led the Court to issue several partisan and inconsistent rulings that departed from established precedent. Nonetheless, in many of those rulings, some justices stuck to their traditional method of interpreting the

Constitution. These justices showed that while the Supreme Court is not immune to committing acts of partisanship, it can also be an outstanding arbiter of law. So while the Rehnquist Court's civil rights legacy will be one of bitter, politically motivated rulings, it also included many instances in which justices stuck to their schools of jurisprudence even in the face of intense pressure to cast their methodology aside. These votes offer hope that though current and future Supreme Court justices may never completely discard their political beliefs, consistent Constitutional interpretation – not partisan ideology – will one day find its way into majority opinions.

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