Michigan Law Review

Volume 90 | Issue 6

1992

Employment Equality, Affirmative Action, and the Constitutional Political Consensus

Robert A. Sedler
Wayne State University

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Civil Rights and Discrimination Commons](#), [Labor and Employment Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

Robert A. Sedler, *Employment Equality, Affirmative Action, and the Constitutional Political Consensus*, 90 MICH. L. REV. 1315 (1992).

Available at: <https://repository.law.umich.edu/mlr/vol90/iss6/12>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

EMPLOYMENT EQUALITY, AFFIRMATIVE ACTION, AND THE CONSTITUTIONAL POLITICAL CONSENSUS

*Robert A. Sedler**

EQUALITY TRANSFORMED: A QUARTER-CENTURY OF AFFIRMATIVE ACTION. By *Herman Belz*. New Brunswick, N.J.: Transaction Publishers. 1991. Pp. 313. Cloth, \$32.95; paper, \$19.95.

A CONFLICT OF RIGHTS: THE SUPREME COURT AND AFFIRMATIVE ACTION. By *Melvin I. Urofsky*. New York: Charles Scribner's Sons. 1991. Pp. xii, 270. \$22.95.

It has now been a quarter century since the arrival of Title VII of the Civil Rights Act of 1964 and its promise of employment equality for racial minorities and women in the American economic system. A quarter century's experience with Title VII has done little to diminish the strong disagreement in American society over the fundamental meaning of employment equality, a concept that has become inextricably linked to the use of affirmative action as a means of achieving it.¹ In two very different books, two historians have explored the meaning of employment equality under Title VII and its relationship to affirmative action. In this review, I will discuss both books in some detail, and, drawing especially on the excellent historical analysis of the development of Title VII law and federal civil rights policy in *Equality Transformed*, I will relate the meaning of employment equality in American society to what I call the constitutional political consensus, which has very recently been reaffirmed with the enactment of the Civil Rights Act of 1991.

* Professor of Law, Wayne State University. A.B. 1956, J.D. 1959, University of Pittsburgh. — Ed. During the preparation of this review and otherwise I have profited greatly from my discussions — and ongoing disagreement — with my colleague, Professor Kingsley Browne, about the meaning of Title VII, and I acknowledge our collegial interchange with much appreciation.

1. In the employment context *affirmative action* means the deliberate use of race and gender criteria by employers in making hiring and promotional decisions, and in this sense, the giving of a *preference* to minority persons and women over white males in the workplace. The preference may take the form of "paying attention to the numbers" in hiring and promotional decisions, or of using race or gender as a "plus factor" in the decisional process, or of establishing a quota for minority and female representation in the employer's workforce.

I

In *Equality Transformed*, Herman Belz² analyzes and strongly criticizes what he sees as the transformation of the anti-discrimination principles of Title VII from an individual right to equal opportunity in employment to a group right on the part of racial minorities to equality of result and proportional representation in an employer's workforce.³ Belz writes both as a social philosopher and as an historian. As a social philosopher, he sets out (in some places rather polemically) the now-familiar arguments against race-conscious affirmative action.⁴ He calls it a "theory of equality that requires comprehensive and systematic social engineering in order to eliminate or negate the natural differences between individuals" (p. 10), and finds it inconsistent with the "principles of individual natural rights and equality before the law on which natural civil rights policy rests" (p. 26). It "lacks democratic legitimacy [and] makes the exercise of civil rights, as in the era of segregation, contingent on expedient political considerations and interests" (p. 40). It has resulted in a repudiation of the fundamental consensus on which the Civil Rights Act of 1964 was based, and "allocate[s] and redistribute[s] private resources according to racial criteria as a means of eliminating societal discrimination" (p. 205).

Moreover, says Belz, the central argument for racial preference "posits the ideal of a racially balanced society organized on the principles of group rights and equality of result, regulated by government policies aimed at proportional racial representation," whereas opponents of racial preference "argue for color-blind individual rights and equality of opportunity as sound principles of civil rights policy that enable individuals to pursue their diverse interests within a framework of law that promotes the common good" (p. 234). In the employment context, racial preference fails to recognize that causes other than discrimination produce racial disparities in employment (pp. 246-47), it obscures the accomplishments of the minority persons who receive

2. Professor of American Constitutional History, University of Maryland.

3. Belz writes:

The Civil Rights Act of 1964 was intended to establish color-blind equal employment opportunity through a combination of voluntary compliance, agency conciliation, and judicial enforcement in civil litigation of the personal right of individuals not to be discriminated against because of race. . . . [F]ederal courts and the civil rights bureaucracy . . . [instead] fashioned an administrative-judicial enforcement scheme that forced employers to give preferential treatment to racial and ethnic minorities under a new theory of discrimination based on the concepts of group rights and equality of result.

P. 17.

4. Most of these arguments would also logically apply to gender-conscious affirmative action. Belz, however, focuses almost entirely on race and makes only passing reference to gender, despite the fact that Title VII deals with both race and gender discrimination and that the "transformation," which he so strongly criticizes, benefits both racial minorities and women at the expense of white males. Thus, a reader of Belz' book would hardly think that Title VII also covers gender discrimination or that affirmative action includes gender preference as well.

preferential treatment (p. 247), it benefits primarily advantaged blacks, and it does not deal with the problems of poor education and lack of skills in the minority community (pp. 246, 254). Finally, it reinforces racial consciousness and encourages an attitude of victimization (p. 252).

Carrying the now-familiar arguments against race-conscious affirmative action somewhat further, Belz describes a backdoor effort by "radical egalitarians" to achieve a redistributive equality of condition for racial minorities:

The chief historical significance of affirmative action has therefore been to promote statist intervention into the free market and weaken political and social institutions based on individual rights. In an era when proposals of social reform based on the rationale of class conflict have been rejected by the electorate, affirmative action attempts to achieve the redistributive and anti-capitalist purposes of contemporary liberalism by other means. Instead of promising liberty through social welfare and security, it promises substantial racial equality. To carry out its promise, it attacks individual liberty. . . .

Ultimately, then, the struggle to define American equality will determine whether the United States will remain a free society. [p. 265]

Even if one does not agree with Belz' cataclysmic view of the impact of race-conscious affirmative action on the future of the United States as a "free society" — as I do not — it cannot be doubted that in this book Belz has effectively presented the litany of arguments against race-conscious affirmative action. Since my position on this matter has been fully developed elsewhere,⁵ there would be no utility in my

5. I am an unabashed supporter of race- and gender-conscious affirmative action in the workplace and otherwise. I have justified racial preferences, both constitutionally and as a matter of public policy, in terms of realization of the *equal participation objective*: overcoming the present consequences of the social history of racism and bringing about the equal participation of blacks and other racial minorities in all important aspects of American life. See generally Robert A. Sedler, *The Constitution, Racial Preference, and the Equal Participation Objective*, in *SLAVERY AND ITS CONSEQUENCES: THE CONSTITUTION, EQUALITY, AND RACE* 123 (Robert A. Goldwin & Art Kaufman eds., 1988) [hereinafter Sedler, *Equal Participation*]. The social history of racism in the United States has produced a condition of racial inequality between blacks and whites today, and the consequences of that history — a racial economic gap, a racial education gap, and a racial power gap — are so pervasive and so self-perpetuating and self-reinforcing that they cannot be overcome except by the positive intervention of appropriate racial preference. *Id.* at 126-27.

I have justified the use of racial preference to implement the equal participation objective both in terms of the interest of blacks as a group in achieving equal participation in important aspects of American life, see Robert A. Sedler, *Beyond Bakke: The Constitution and Redressing the Social History of Racism*, 14 HARV. C.R.-C.L. L. REV. 133, 170-71 (1979), and in terms of the societal interest in the equal participation objective — the interest of the society itself in the benefits that result from the equal participation of blacks. See Sedler, *Equal Participation*, *supra*, at 128-35; see also Robert A. Sedler, *Racial Preference and the Constitution: The Societal Interest in the Equal Participation Objective*, 26 WAYNE L. REV. 1227 (1980) [hereinafter Sedler, *Racial Preference*]. Similarly, I have maintained that the use of gender preference is necessary in certain circumstances to advance the societal interest in the equal participation of women in important areas of American life. *Affirmative Action and Equal Protection: Hearings on S.J. Res. 41 Before the Subcomm. on the Constitution of the Comm. on the Judiciary, U.S. Senate, 97th Cong., 1st Sess.* 24-26 (statement of Robert Sedler).

reiterating it in response to Belz' trenchant attack on affirmative action in *Equality Transformed*.

Moreover, I am much more interested in Professor Belz' analysis as an historian of the transformation of equality that he says has occurred in the administration and operation of federal civil rights policy⁶ over the past quarter century. I will return to this analysis and relate it to what I call the constitutional political consensus in Part IV of this review. But first I want to discuss the different approach to the question of employment equality taken in *A Conflict of Rights*.

II

In comparison to *Equality Transformed*, Professor Melvin I. Urofsky's *A Conflict of Rights*⁷ is relatively light reading. While the Belz book is directed toward academic scholars, lawyers, and policymakers, Urofsky has written a very readable book for the general public about an important Supreme Court affirmative action case, *Johnson v. Transportation Agency, Santa Clara County*,⁸ and about the "real people" who were involved in it. Urofsky explains very clearly how the *Johnson* case arose, how it was decided in the district court and was reversed by the Ninth Circuit, and how the Supreme Court came to hear the case and ultimately to resolve it.⁹ He also summarizes the different opinions in *Johnson* carefully and succinctly, so as to make them fully comprehensible for the lay reader (pp. 159-73).

Urofsky paints a sympathetic picture of the protagonists in *Johnson* — Paul Johnson, a long-time employee in the Santa Clara highway department who was confident that he would be promoted to the dispatcher's job, and Diane Joyce, a widow and the mother of four children, who was trying to work her way up in the highway department, who had worked as a "road maintenance man" as a step to getting the dispatcher's job, and who became the first woman to get that job when the appointing authority chose her under the agency's affirmative ac-

6. Principally, Title VII and the affirmative action requirements imposed on federal contractors by the Office of Federal Contract Compliance Programs.

7. Melvin I. Urofsky is Professor of History and Constitutional Law, Virginia Commonwealth University.

8. 480 U.S. 616 (1987).

9. Urofsky was helped very much in this regard by now-retired Justice William Brennan's permission to examine Brennan's files on the *Johnson* case. Pp. xi-xii. This access enables Urofsky to discuss how the individual Justices voted on the petition to grant certiorari in *Johnson*: Chief Justice Burger and Justices White, Rehnquist, and O'Connor voted to grant certiorari; Justices Brennan, Marshall, Blackmun, and Stevens voted to deny certiorari; and Justice Powell voted to vacate the case for reconsideration in light of the yet unannounced decision in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) (holding violative of equal protection a school board's race-based seniority layoff plan designed to preserve hiring gains under an affirmative action plan). Pp. 101-02. More interestingly, Urofsky can analyze in detail the Court's conference discussion of *Johnson* and the Justices' initial vote, the minor changes that Brennan made in his opinion in order to secure Powell's vote, and the points of difference between Brennan and O'Connor that led O'Connor to write a separate opinion. Pp. 156-67.

tion plan precisely because of her gender.¹⁰

The protagonists both believed they were right. And in a sense they both were, if we account for their understandably different perceptions about their entitlement to the job — perceptions almost inevitably implicated by the use of race- or gender-conscious affirmative action in employment. As Paul Johnson saw it, he had earned the position and had been discriminated against (p. x). His wife “felt as outraged as her husband. Paul had . . . played by the rules — and now they had unfairly changed the rules” (p. 12).

But what were the rules by which Paul Johnson had played, and were they also rules by which Diane Joyce could play? According to Urofsky, the dispatcher's job was located in a road unit with a “‘good ole boy’ network almost impenetrable to outsiders,” and “Paul Johnson was, in the best sense of the term, one of the boys” (p. 4). Diane Joyce was most unwelcome precisely because she was a woman,¹¹ and it is likewise doubtful that a minority person would have penetrated this network. As Joyce saw it, she had qualified for the job, but believed she “would be frozen out by the old boy network in the agency.”¹² In fact, the male decisionmakers did recommend that Johnson be hired, and it was only through affirmative action intervention that Joyce became the first woman ever to be appointed as a dispatcher in the road department.

As the facts of *Johnson* indicate, with respect to the entry of racial minorities and women into traditionally white male jobs, affirmative action will sometimes have a prophylactic effect. It will ensure that minorities and women can crack a selection process that, because of the outlook of those who control it, is likely to favor a white male like Johnson over a “rebel-rousing, skirt-wearing” person like Joyce,¹³ or a

10. Pp. 1-11. After Johnson prevailed in the district court, the Transportation Agency gave him Joyce's job in the East Yard, pursuant to the court's order, but it created another dispatcher's job in the South Yard by upgrading a position there, and gave that job to Joyce. P. 91.

11. When she had applied for a job as a “road maintenance man” in order to get road crew experience that she considered necessary for a dispatcher's job, her supervisor shouted at her, “Don't you realize that you're taking a man's job away?” P. 7. A road superintendent, who was a member of one of the panels interviewing candidates for the dispatcher's job, referred to Joyce as “a rebel-rousing, skirt-wearing person,” and said that “she's not a lady,” because when working in the yard, she had used the same kind of “vulgar-type profanity” that men used. Pp. 68-69.

12. P. x. In looking at the question from Joyce's perspective, Urofsky quotes University of Chicago law professor Mary Becker, who contends that the *Johnson* case did not really involve a question of affirmative action, because Joyce started out with a gender-based disadvantage in comparison to Johnson.

The notion that they might have been similarly situated is fanciful. Their prior employment experiences were not similar even when they had identical titles. For Joyce, work as the only female road maintenance worker would have involved a constant struggle, including dealing with hazing and harassment. Johnson was one of the boys. It is, however, likely that many male decision makers would neither see what Joyce went through nor appreciate that her unique experiences might be qualifications for promotion.

Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201, 206, quoted at p. 177.

13. See *supra* note 11.

"pushy black."¹⁴

Had Johnson won the job over Joyce, Joyce would have had a difficult time in establishing a disparate treatment claim under Title VII.¹⁵ Although there were no women in the dispatcher's job or in any of the 238 skilled craft positions in the agency, the agency could have proffered a neutral explanation for the decision: based on Johnson's higher interview score¹⁶ and other factors, the decisionmaker considered Johnson more qualified for the job. There was no "smoking gun" evidence by which Joyce could show that the proffered neutral reason was a pretext for sex discrimination, and, as stated above, the male decisionmakers may well have subjectively believed that Johnson was more qualified.¹⁷ By contrast, affirmative action obviates the need for racial minorities and women to establish a disparate treatment or disparate impact discrimination claim in order to break into traditional white male jobs, and so is an important step toward ending "conspicuous racial imbalance in traditionally segregated job categories."¹⁸

However, the fact remains that the gains made by racial minorities and women through affirmative action will come at the expense of white males like Johnson, who but for affirmative action would have received the job in question. The degree of "qualification disparity," if any, between the white male denied the job and the minority person or woman who gets it is irrelevant. Affirmative action means that purportedly neutral criteria are ignored, at least to some extent, and that racial minorities and women are explicitly preferred over white males. For the adversely affected white male, it does not matter whether or not the race or gender preference takes the form of a quota that reserves a specified number of jobs for minorities or women, or the form of a race or gender "plus factor" for the particular hiring or promotional decision. In either event, as in *Johnson*, the result is that

14. Those controlling the process may subjectively believe that the white male candidate is more qualified for the job, without necessarily being aware of the bias that leads them to that conclusion. Indeed, as Professor Becker pointed out, men would probably have seen Johnson as more qualified than Joyce because, as a road dispatcher, Joyce would continue to have problems operating in a male world. See Becker, *supra* note 12, at 206.

15. For the requirements for establishing a disparate treatment case for an individual worker claiming to have been discriminated against on the basis of race or gender, see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

16. Each candidate was given an interview score by the first panel. Johnson's score was 75, Joyce's score was 73. *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 624 (1987). Seven applicants, including Joyce and Johnson, received the requisite 70 score, so as to be eligible for further consideration. 480 U.S. at 623.

17. Now that the Court has held that a subjective evaluation process may be challenged under the disparate impact theory of discrimination, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), it is possible that Joyce could now assert a successful disparate impact claim, given "the inexorable zero" number of women in the dispatcher's job or the skilled craft positions — but this is not at all clear either.

18. *United Steelworkers v. Weber*, 443 U.S. 193, 209 (1979).

a minority person or a woman, *because of race or gender*, gets the job over the white male.

As Urofsky notes, the debate over the legitimacy of affirmative action in employment is a debate over social philosophy and over what the nation as a whole should do to eradicate discrimination (p. 23). He very fairly sets out the philosophical and policy arguments of the proponents and critics of affirmative action, and makes these arguments very meaningful for the lay person (pp. 23-29). Affirmative action poses hard questions, he says, because it implicates conflicting individual and group interests and values.¹⁹

My own resolution of this dilemma relates to my view of the societal interest in the achievement of the equal participation objective that I have discussed previously.²⁰ I do not dispute that the use of racial and gender preferences may be unfair to individual whites. But in light of the strong societal interest in achieving racial and gender equality and the full and equal participation of minorities and women in all important areas of American life, I find properly tailored racial and gender preferences to be *justifiable*. Racial and gender preferences then *may be unfair, but they are not unjustifiable*.²¹ This being so, racial and gender preferences are a *legitimate* policy for a democratic society to pursue as a means of bringing about a condition of employment equality in that society.

III

Even though, as Urofsky demonstrates, no public consensus exists on the affirmative action controversy, I will contend that a constitutional political consensus on the meaning of employment equality does exist in American society. In this Part, I will discuss what I mean by a

19. Pp. 29-38. See the further discussion of this point in Robert A. Sedler, *The Constitution, Racial Preference, and the Supreme Court's Institutional Ambivalence: Reflections on Metro Broadcasting*, 36 WAYNE L. REV. 1187, 1187-90 (1990) [hereinafter Sedler, *Ambivalence*]. Urofsky frames the questions this way:

Admitting that women, blacks, and other minorities suffered and still suffer discrimination at the hands of a white-male-dominated society, what is fair? Should the government impose a policy that benefits women and minorities at the expense of white males? Is race- and gender-conscious affirmative action the proper policy to achieve a truly race-blind and gender-blind society? Can women and minorities ever achieve true equal opportunity in education and employment without such programs? Does affirmative action work to benefit large numbers of women and minorities, or does it help only the few who would succeed in any event? Is a practice that discriminates against one group, even to compensate victims of past discrimination, the right policy for a democratic society pledged to the equal protection of the laws for all its citizens?

P. 38. It is precisely because these questions cannot be easily answered that both Paul Johnson and Diane Joyce believed that they were "right" — and, as Urofsky says: "As one looks at the social and legal aspects of affirmative action in general and of the *Johnson* case in particular, one . . . [wants] to shout, 'You are both right'" (p. ix).

20. *Supra* note 5.

21. See the further discussion of this point in Sedler, *Racial Preference*, *supra* note 5, at 1240-44.

constitutional political consensus, and in the next Part, I will explain how Belz' thesis in *Equality Transformed* relates to it. In the final Part, I will discuss how the enactment of the Civil Rights Act of 1991 confirms the current constitutional political consensus on the meaning of employment equality in American society.

A constitutional political consensus, as I am using the term, refers to a measure of *agreement* between the electorally accountable branches of the federal government — Congress and the President — as determined by the *actions* that these political branches have taken or have failed to take with respect to a particular matter of public policy. Regardless of how things may be in practice, the Constitution envisages legislation and the creation of federal policy as primarily a collaborative and cooperative effort between Congress and the President.²² Our system of representative democracy looks to the actions taken by the political branches to determine popular will, and it is constitutionally irrelevant whether those actions in fact reflect the wishes of a majority of the electorate at the time when they are taken.²³

The role of the federal judiciary with respect to the policies established by the political branches of the federal government is, as a matter of constitutional theory, fairly limited. Assuming that the policy established by the political branches, either by law or presidential ac-

22. It is interesting to note that the presentment provisions of Article I, Section 7 do not refer to the President's vetoing legislation. Rather, they provide that if the President does not "approve and sign" the bill, the President must return it to the House where it originated with his "objections." That House is directed to "proceed to reconsider" the bill in light of the President's "objections." Only after "reconsideration" of the President's "objections" and approval by two-thirds of each house can the bill become law over the President's "objections." U.S. CONST. art. I, § 7.

A constitutional degree of interaction between Congress and the President also exists with respect to the administration of legislation. While Congress can delegate broad discretion to the President in deciding how a law shall be administered, if Congress disagrees with how the President has been administering a law, it can amend the law — again subject to the role of the President during the legislative process — to require that it be administered in a different way. Finally, even as regards the exercise of the President's independent powers under Article II, Congress can use its appropriations power under Article I, Section 8 to control presidential action. So, to the extent that Congress does not take any action to interfere with the way that the President is administering a law or exercising independent presidential powers, it has, for constitutional purposes, acquiesced in the actions taken by the President.

23. There is currently a measure of agreement between Congress and the President that, under Title VII, employment equality means that racial minorities and women should have a fair share of the jobs in an employer's workforce and that, in order to bring this about, employers may utilize race- and gender-conscious affirmative action in hiring and promotional decisions. See *infra* notes 43-57 and accompanying text. This being so, there is what I have called a constitutional political consensus on this controversial question of public policy, and it is of no moment, from a constitutional standpoint, that a majority of the electorate may disagree with this proposition. In constitutional theory, if a majority of the electorate disagrees with this proposition strongly enough, it will vote for members of Congress and for presidential candidates who will oppose race- and gender-conscious affirmative action, and in time the policy will be changed. Again, this only refers to constitutional theory, and not to practical political realities. A candidate's position on affirmative action, even if clear, is only one of a large number of factors that a voter may take into account in deciding whether or not to vote for that candidate.

tion or both, does not violate constitutional norms, the judiciary merely interprets and applies the law in actual litigation, or, if executive action is challenged, determines whether that action is congressionally authorized or otherwise within executive power. Conversely, if the political branches disagree with how the courts have interpreted or applied a law, then, in constitutional theory, it is a simple matter for them to get together and amend the law — as they did recently with the enactment of the Civil Rights Act of 1991. Justice Blackmun has put it well: “[I]f the Court has misperceived the political will, it has the assurance that because the question is statutory Congress may set a different course if it so chooses.”²⁴

It should also be made clear, however, that the fact that the Court has interpreted or applied a law in a particular way and that Congress has not amended the law to overturn that interpretation or application does not mean that Congress has thereby “amended the law by its silence,” so as to incorporate the Court’s interpretation or application into the text of the law. Congress simply has not acted. By failing to act it has acquiesced in the Court’s interpretation or application of the law, but it has not thereby *approved* it. This being so, it would be perfectly legitimate for the Court in the future to change its mind on the question of interpretation or application, and it could not be contended that the Court is foreclosed from doing so by congressional acceptance of its prior interpretation or application.

The point that I want to emphasize for present purposes, however, is that congressional inaction in response to the Court’s interpretation or application of a law is highly relevant in determining the existence of a constitutional political consensus. Precisely because the political branches can come together and amend a law so as to overturn the Court’s decision interpreting or applying it, their failure to do so means that, for the time being at least, there is a constitutional political consensus in support of the Court’s interpretation of the law and of the results that the interpretation produces.

This constitutional political consensus can be determined to exist only at a given point in time and is always subject to change. It can be changed unilaterally by presidential action in administering the laws or in exercising the relevant executive power. It can also be called into question by a Supreme Court decision overruling or modifying a prior interpretation of the law, which will necessitate a collaboration between Congress and the President to amend the law and restore the preexisting political consensus. But the delicacy of a constitutional political consensus in this sense does not deny the reality of its existence — even a fragile constitutional political consensus is deemed to reflect the popular will of the American people.

24. *United Steelworkers v. Weber*, 443 U.S. 193, 216 (1979) (Blackmun, J., concurring).

IV

I will now describe how Professor Belz' "equality transformed" thesis relates to the current constitutional political consensus on the meaning of employment equality under federal civil rights law. In Belz' view, although Title VII was "intended to establish color-blind equal employment opportunity through a combination of voluntary compliance, agency conciliation, and judicial enforcement in civil litigation of the personal right of individuals not to be discriminated against because of race," instead, "federal courts and the civil rights bureaucracy . . . fashioned an administrative-judicial enforcement scheme that forced employers to give preferential treatment to racial and ethnic minorities under a new theory of discrimination based on the concepts of group rights and equality of result."²⁵ This transformation "was effected by administrative regulations [regarding federal contracts] and court decisions [in the Title VII cases] based on the disparate impact theory of discrimination" (p. 2).

Belz insists that Congress rejected the disparate impact theory of discrimination when it enacted Title VII, but that "this theory was asserted by the EEOC as soon as Title VII went into effect and adopted by the Supreme Court as the authoritative interpretation of the law in *Griggs v. Duke Power Co.* in 1971."²⁶ The vice of the disparate impact theory, says Belz, is that it rejects the traditional view of civil rights law that discrimination is "an individual act of injury or denial of rights caused by racial prejudice," and treats discrimination instead as "the sum of the unequal effects of employment procedures and business practices on racial groups" (p. 2). As a practical matter, "[p]ersistent and widespread application of disparate impact theory after the *Griggs* decision gave employers a powerful incentive to engage in hiring quotas in order to avoid liability and costly litigation" (p. 2).

Belz further maintains that the "transformation" of Title VII that occurred as a result of judicial decisions and administrative enforcement was clearly inconsistent with congressional intent, as reflected in Title VII's legislative history, which shows that the statute was intended to settle the controversy over quotas and preferential treatment by prohibiting them. Belz finds this intent "mainly expressed in the nondiscrimination principle that was the heart of the bill," and "clarified and reinforced by a series of amendments provoked by opponents' fears that the law would be used to require race-conscious preferential treatment" (p. 24). As a result, Belz would interpret Title VII to (1) prohibit any race-conscious preferential programs; (2) reach only intentional discrimination; (3) ignore racial imbalance in the employer's workforce as evidence of discrimination; (4) permit courts only to or-

25. P. 17. Although Belz does not deal directly with gender equality in employment, *see supra* note 4, his criticism presumably applies to preferential treatment for women as well.

26. P. 2 (citing *Griggs*, 401 U.S. 424 (1971)).

der an end to the intentional discrimination and to give individual relief, but not to order quota relief; and (5) preserve employer prerogatives (p. 25).

Needless to say, Belz is highly critical of virtually every pro-plaintiff Title VII decision rendered by the federal courts that did anything other than allow relief to identified individual victims of intentional discrimination.²⁷ His strongest criticism goes to the disparate impact decision in *Griggs* and the racial and gender preference decisions in *Weber* and *Johnson*. But the criticism also extends to the recognition of Title VII class action suits,²⁸ the invalidation of aptitude and other employment testing under the disparate impact theory (pp. 49, 61-62, 112-24), the award of fictional seniority to employees who had been discriminated against by being rejected for employment,²⁹ and the judicial imposition of racial quotas as a means of remedying identified past discrimination.³⁰

Belz is most informative, in my opinion, as he demonstrates how the Office of Federal Contract Compliance Programs (OFCCP), during both Democratic and Republican presidential administrations, "made quotas and preferential treatment an operative feature of private employment more effectively, with fewer legal controversies, than did the judicial establishment of quotas under Title VII" (p. 102). This effort began early in the Nixon administration, with the promulgation of OFCC Order Number 4.³¹ According to Belz, the "affirma-

27. Belz assumes that the only proper way for the Supreme Court to have interpreted Title VII was with reference to legislative intent as ascertained by legislative history. The matter of whether a civil rights statute should be interpreted with reference to plain meaning, legislative intent, or broad underlying purpose would require a lengthy and separate undertaking, and it is a matter in which I have little interest. Nor do I have any interest in challenging Belz' particularized and rather one-sided analysis of the legislative history of Title VII, although I think that such a challenge could be made. See, e.g., Alfred W. Blumrosen, *Griggs Was Correctly Decided — A Response to Gold*, 8 INDUS. REL. L.J. 443 (1986). Rather, my interest is in the constitutional political consensus that is supportive of this "transformation of equality" of which Belz complains. As I will point out subsequently, the current constitutional political consensus, particularly as reflected in the enactment of the Civil Rights Act of 1991, specifically endorses the disparate impact theory of employment discrimination, and at least accepts, if it does not approve, the Supreme Court's *Weber* and *Johnson* decisions, authorizing the use of race- and gender-conscious affirmative action in certain circumstances. See *infra* notes 47-58 and accompanying text.

28. P. 45. "Through the class action device, the judiciary in effect transformed the Title VII personal right of equal employment opportunity into a collective public right." P. 45.

29. Pp. 62-63. E.g., *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976). Belz says that "*Franks* marked the point where judicial revision of Title VII ceased to have even a remote connection to equal opportunity and unambiguously began to promote outright preferential treatment." P. 63.

30. Pp. 214-21. In cases such as *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986), and *United States v. Paradise*, 480 U.S. 149 (1987), the Court specifically rejected the argument put forth by the Reagan Justice Department, and advocated by Belz, that the courts' remedial authority under Title VII was limited to providing relief to identified individual victims of discrimination. Pp. 214-16.

31. See p. 90 (citing OFCC Order No. 4, 41 C.F.R. § 60-2.10 (1971)).

tive action" required of federal contractors was first cast as a "nondiscrimination" obligation in 1961, when President Kennedy issued Executive Order 10,925, directing that federal contractors "'take affirmative action to ensure' that individuals were treated without regard to race, creed, color, or national origin."³² This order was affirmed by President Johnson in Executive Order 11,246, issued in 1965, and in 1968 the Office of Federal Contract Compliance Programs,³³ without specifying the precise nature of the obligation, required contractors to submit written affirmative action plans (p. 90).

According to Belz, the significance of OFCC Number 4 as the linchpin of affirmative action was that it required all federal contractors to submit affirmative action plans containing *goals and timetables*.³⁴ Belz notes that in the 1960s, as in the "earlier phases of the struggle to define American equality," there was agreement that quotas "as a general policy were unwise, unconstitutional and illegal" (p. 94). While critics of affirmative action insisted that the OFCCP goals and timetables were the equivalent of a quota, supporters saw a distinction between goals and quotas, insisting that OFCC Number 4 required only good-faith efforts by employers and denying that specific numbers of minorities had to be hired (p. 94). However, Belz points out, correctly in my view, that the "semantic sparring over the consequences to the employer" obscured the fact that employers would be required to engage in "preferential racial hiring" (p. 94).

As the recent debate over the Civil Rights Act of 1991 demonstrates, the term *quota* has a repugnant political connotation; it implies that a fixed proportion of jobs at every level in the employer's workforce must be reserved for minorities or women. But the debate over quotas deliberately skirts the more fundamental question of "paying attention to the numbers," and securing those numbers with a race or gender preference in hiring and promotions. There could have been no doubt that, once the OFCCP required federal contractors to establish goals and timetables, there would be at least some degree of racial and gender preference in hiring and promotions by employers to bring themselves into compliance with the guidelines. As Belz bitterly laments: "The paradoxical and perverse result of Nixon Administration policy was that good-faith efforts *to hire according to race* were seen as

32. P. 18 (quoting Exec. Order. No. 10,925, 3 C.F.R. § 448 (1959-63 Comp.)).

33. At that time it was called the Office of Federal Contract Compliance. It took its current name in 1978 when it was given control over all federal contracting programs.

34. P. 91. Urofsky says that President Nixon asked Arthur Fletcher, an Assistant Secretary of Labor, who was black, to find a way of enforcing the hiring provisions of Title VII that would withstand court challenge, and that Fletcher came up with the idea of goals and timetables, contained in OFCC Order No. 4. According to Urofsky, Fletcher said that "the Nixon Administration [had] ordered what Congress had not: numerical goals and enforcement." P. 18. Urofsky goes on to contend that "[t]he Nixon order also proved the turning point for private employers," who wanted something specific to work with and who were willing to "hire by the numbers." Pp. 19-20.

protecting employers against the penalties imposed by law for discriminatory racial hiring" (p. 94).

Belz asserts that the OFCCP goals-and-timetables requirement brought business interests and the civil rights establishment together on the affirmative action issue: "Business lobbyists were no more inclined to challenge the basic tenets of race-conscious affirmative action than the civil rights establishment" (p. 99). Business interests strove mainly to avoid excessive governmental regulation, and the Nixon administration shared the concern. Thus "[t]he Republican approach to equal employment opportunity was to promote preferential racial hiring by emphasizing results, while acknowledging problems inherent in affirmative action and proposing to modify its administration to make it more acceptable to business executives" (p. 97). It was the Nixon and Ford administrations that "further redefined . . . equality of opportunity based on the nondiscrimination principle . . . to be group rights and equality of result based on proportional representation" (p. 100).

Moreover, Belz contends that the goals-and-timetables requirement of the OFCCP reinforced the *Griggs* disparate impact theory. *Griggs* "practically compelled [employers] to adopt preferential practices in order to avoid disparate impact discrimination charges," while at the same time "government contract agencies forced federal contractors . . . to adopt affirmative action plans giving preference to minorities," so that "[b]y 1976 race-conscious policies were widely established in public and private employment" (p. 135).

It remained for the Supreme Court to "affirm explicit racial preference" (p. 135), which it did in *Weber*. Belz finds that *Weber* "reveal[s] the inherent contradiction in federal anti-discrimination policy": (1) under the *Griggs* disparate impact theory, "employers were forced to engage in preferential hiring to avoid liability and the potentially heavy costs of litigation and remedial measures"; (2) because of federal contract enforcement, employers felt "pressure to prefer minorities in hiring in order to avoid being found out of compliance with the affirmative action obligation"; and (3) "both measures expressly prohibited discrimination against individuals because of race" (pp. 158-59). *Weber* "expressly sanctioned racial discrimination against white employees in the absence of unlawful discrimination" and, "[a]t the level of principle" it "marked a fundamental turning point" because it "repudiated the explicit prohibition of unequal treatment because of race in Title VII and the concept of individual equality on which it rested" and "elevated racial group equality and proportional representation to a paramount position in national civil rights policy" (p. 165). Thus, claims Belz, "*Weber* completed the transformation of Title VII from a law protecting individual rights and equal opportunity to a statute recognizing and enforcing the right of racial groups to proportionate em-

ployment.”³⁵ It also gave employers a *quid pro quo* protection for acquiescing in the federal government’s demand for affirmative action, and in this sense, “transformed Title VII from a law to protect individual employees irrespective of race into a law for the protection of employers who were forced to adopt racial hiring practices” (p. 168).

Next, Belz turns his attention in Chapter Eight to “The Reagan Administration and Affirmative Action” — a chapter sure to prove illuminating to those on both sides of the debate who perceived President Reagan as a strong opponent of race-conscious affirmative action.³⁶ The main problem, says Belz, was that Reagan administration policy on equal employment opportunity lacked consistency; this administration was no more successful than its predecessors in coordinating employment discrimination policy among the departments and agencies involved in civil rights enforcement. As a result, “[i]nstead of consistently opposing race-conscious affirmative action throughout the government, the administration tried to limit its excesses and make it more politically and administratively palatable” (p. 183).

Belz notes that “President Reagan had the legal authority to alter or abolish affirmative action *unilaterally*, insofar as it consisted of mandatory goals and timetables under Executive Order 11246” (p. 182; emphasis added) — an authority *he did not exercise*.³⁷ The most that the Department of Labor and the OFCCP did in regard to mandatory goals and timetables was to enforce the policy less aggressively (p. 183). Belz says that Reagan’s unwillingness to “revise or abolish the quota system” stemmed from the “political risk of appearing opposed to civil rights” and from prevailing attitudes within the business community (p. 192), whose primary concern was that enforcement be less onerous and adversarial than in the Carter administration. “[T]he unresolved legal questions concerning affirmative action,” gave business “little incentive to discontinue racially proportional employment plans that offered protection against Title VII liability” (p. 192). In its antidiscrimination policy affecting the largest number of employers, federal contractors, the Reagan administration “acted as a party of balance” and “maintained the policy of preferen-

35. P. 169. In his subsequent discussion of *Johnson*, however, Belz says that the *Weber* Court’s reference to “manifest imbalances in traditionally segregated job categories” allows *Johnson* “to be read as consistent with the Court’s previous remedial approach.” P. 224. The *Johnson* decision, says Belz, “dropped the idea of preferential treatment as a remedy for discrimination and introduced the concept of ‘underrepresentation,’” and “severed race and gender preference from any plausible understanding of discrimination, even under disparate impact theory.” P. 224.

36. Belz portrays even former Assistant Attorney General for Civil Rights William Bradford Reynolds as only a “partial” opponent of affirmative action, pp. 184-85, and now-Supreme Court Justice Clarence Thomas, the head of the Equal Employment Opportunity Commission during the Reagan administration, as not much of an opponent at all. Pp. 188-89.

37. As we will see in our subsequent discussion of the enactment of the Civil Rights Act of 1991, President Bush has not done so either, and he explicitly rebuffed an effort in this direction by White House Counsel C. Boyden Gray. See *infra* notes 56-57 and accompanying text.

tial treatment while trying to curb its bureaucratic excesses.”³⁸

At the instigation of Assistant Attorney General Reynolds, the Department of Justice “vigorously pursued an anti-quota policy” (p. 183), and argued without success, either in the courts or with regard to the federal contract program (pp. 185-87), against preferential treatment for those who were not the identified victims of past discrimination. But Belz still faults Reynolds for “accept[ing] the judicial development of Title VII law based on the theory of disparate impact discrimination in almost every respect”³⁹ and for permitting the civil rights division to file class actions under the *Griggs* effects test and to “[seek] remedies for victims of discrimination under the make-whole concept of relief.”⁴⁰ So, according to Belz, the Reagan Justice Department still enforced affirmative action (p. 186). Furthermore, Belz finds that at the Equal Employment Opportunity Commission, under the stewardship of Clarence Thomas, “[e]xisting policies continued with little change. Using disparate impact theory, the EEOC made *prima facie* discrimination charges and sought appropriate remedies, including various forms of affirmative action.”⁴¹

Belz submits that “employment discrimination policy under the Reagan administration was characterized more by continuity than change,” and that “[o]n the whole . . . the administration rationalized and strengthened affirmative action more than it restricted it” (p. 196). For instance, the Reagan administration “restored the bargain whereby corporations accepted race and sex preferences within a framework of sufficient flexibility of enforcement to satisfy their need for business autonomy” (p. 199). Although Belz finds no reason to believe President Reagan insincere in his professed opposition to quotas, he sees Reagan’s “protestations conform[ing] to a pattern which saw Republican presidents criticize quotas, even as their administrations established or maintained systematic racial preference” (p. 207).

38. P. 192. Belz emphasizes that “the OFCCP continued to define equal opportunity as proportional racial representation,” p. 192, and says that “Labor Department officials believed that the Supreme Court’s standard for requiring or permitting affirmative action was essentially that of the OFCCP.” P. 195. He also notes that, “[i]n addition to maintaining goals and timetables, the Reagan Administration expanded minority business enterprise quotas, or set-asides.” P. 195.

39. P. 184. He notes that in *Connecticut v. Teal*, 457 U.S. 440 (1982), the Department of Justice filed an amicus brief in support of the unsuccessful “bottom line” theory of Title VII enforcement — an employer would not be liable on a disparate impact claim if the bottom line result of the challenged process was an appropriate racial balance — and says that this “was hardly the action of an unconstructed proponent of the intentional disparate treatment concept of discrimination.” P. 186.

40. P. 185. This included hiring, back pay, and back seniority relief for qualified persons who were discouraged from applying for a job because of an employer’s reputation for discrimination. P. 185.

41. P. 188. “Although Thomas expressed disapproval of quotas as a matter of statutory interpretation, he nevertheless said numerical standards were a useful measure of equal employment opportunity progress and were sometimes the only effective type of affirmative action.” P. 188.

Belz details how, by the 1980s, race- and gender-conscious affirmative action had become "institutionalized . . . as part of the corporate culture. . . . The prevalent business attitude was toleration of affirmative action, provided that it was modified to permit greater employer autonomy and self-regulation" (pp. 196-97). Business believed that it benefited from race- and gender-conscious affirmative action in a number of ways: (1) adherence to goals and timetables, by increasing the employment of racial minorities and women, helped companies avoid successful discrimination lawsuits; (2) any formal change in a company's affirmative action policy would be likely to provoke grievances among employees who were beneficiaries of affirmative action, while continuing the policy would foster their loyalty; (3) corporate equal employment opportunity officers and executives believed that affirmative action expanded the pool of available talent and led to increased productivity; (4) affirmative action improved a company's public image and customer relations.⁴²

Belz has clearly demonstrated, although much to his chagrin, that by the end of the 1980s federal civil rights policy defined employment equality to mean that racial minorities and women should have what I call a "fair share" of the jobs and what Belz calls "proportional representation" in an employer's workforce. Operationally, this means that racial minorities and women should be represented at every level in the workforce of a particular employer in some reasonable proportion to their representation in the overall labor market.⁴³

Belz says, and I agree, that three main factors brought about this

42. Pp. 197-98. Belz quotes a General Motors executive as saying: "I hate to think where this corporation would be today without these [affirmative action] programs. GM should be a reflection of the larger community and society around us." P. 198. General Motors, it may be noted, has its corporate headquarters in the city of Detroit, which is 76% black in population, according to the 1990 census. U.S. DEPT. OF COM., BUREAU OF THE CENSUS, STAT. ABSTRACT OF THE U.S., 1991 at 34, table no. 40 (111th ed.).

Belz also cites surveys showing "that many large firms believed affirmative action was simply a part of doing business, and that within two decades all companies would have irrevocably altered their business culture." P. 198. A survey of Fortune 500 companies showed that 88% of the 197 respondents said that they would maintain quotas even if not required to do so. P. 198. Belz concludes that "[b]usiness support was thus the political reward [Reagan] administration pragmatists got for their conciliatory approach toward affirmative action." P. 198.

43. I should note that the concept of the "overall labor market" is an "affirmative action" concept and, except for some entry-level jobs, ordinarily not relevant for Title VII purposes. In *Johnson*, for example, the county's affirmative action plan looked to the proportion of women and minorities in the county's labor force — illustrating what I mean by the "overall labor market" — and had as its long-range goal that women and minorities would be represented in each job category in county agencies in proportion to their representation in the county's labor force. 480 U.S. at 620-22. For Title VII purposes, the determination whether there has been a prima facie case of disparate treatment discrimination is made through comparing the representation of minorities with women in the employer's work force and their representation in the relevant labor market from which the employer recruits. The relevant labor market, of course, takes into account the specific qualifications for the job in issue. The concept of "overall labor market," however, reflects a notion of *seeking out* racial minorities and women from the number of minority persons and women in the larger workforce without regard to the labor market in which the employer is recruiting or the available applicant pool.

result: (1) the *Griggs* disparate impact theory of discrimination; (2) the goals-and-timetables requirement imposed on federal contractors by the OFCCP; and (3) the Supreme Court's explicit approval of the use of race- and gender-conscious affirmative action in hiring and promotion in *Weber* and *Johnson*. As noted previously, Belz couples his excellent historical analysis of the "transformation of equality" with unremitting criticism of it. For Belz, the ultimate criticism of race-conscious affirmative action is that it lacks *political legitimacy* — "in a substantial sense it has not been approved by democratic decision-making" (p. 249). This is intolerable because "the reconciliation of conflicting values and interests provoked by affirmative action proposals were political questions that should have been decided by representative institutions" (p. 249).

By contrast, I submit that Belz' historical analysis of the "transformation of equality" demonstrates that the "political questions" involving affirmative action *have indeed been decided by the "representative institutions" in our constitutional system*. There is now a constitutional political consensus that under federal civil rights policy employment equality means that racial minorities and women should have a "fair share of the jobs" (my term) or "proportional representation" (Belz' term) at every level in an employer's workforce. That constitutional political consensus existed at the end of the Reagan administration and has been confirmed anew by the passage and enactment of the Civil Rights Act of 1991.

As we have seen, Belz insists that the Supreme Court had acted contrary to "legislative intent" when it interpreted Title VII to include the disparate impact theory of discrimination in *Griggs* and to authorize the explicit use of race and gender preference in *Weber* and *Johnson*. At any time, however, this purportedly improper interpretation could have been set aside by the political branches. While Congress' failure to amend Title VII to overturn these interpretations does not mean that Congress has thereby endorsed them, the failure to amend does mean that Congress has acquiesced in these interpretations.

When Congress amended Title VII in 1972 to expand the scope of its coverage and increase the enforcement powers of the EEOC, it was, of course, aware of the *Griggs* decision, which had been issued the year before. It could have amended Title VII to overturn *Griggs* and eliminate the disparate impact theory of discrimination, but it did not do so.⁴⁴ Belz says that, "[i]n a political rather than in a legal sense, Congress may be said to have approved the Supreme Court's acceptance of

44. Belz insists that, in the legislative process leading up to the enactment of the 1972 amendments, neither the Senate's rejection of two "anti-quota" amendments proposed by Senator Ervin nor the reference to *Griggs* by several lawmakers could be interpreted as statutory approval of the disparate impact theory of discrimination. Pp. 76-77. He is correct in this regard, since Congress did not do anything affirmatively to incorporate disparate impact liability into the law. This is also, of course, irrelevant with regard to the matter of a constitutional political consensus.

disparate impact theory, but this expression of opinion did not alter the legal requirements of Title VII" (p. 77). But it is precisely the approval "in a political rather than in a legal sense" that goes to the meaning of a constitutional political consensus. Congress' failure to amend Title VII to eliminate the disparate impact theory of discrimination supported a constitutional political consensus to the effect that disparate impact liability — which, according to Belz, leads to the use of race- and gender-conscious affirmative action in hiring and promotion decisions — should remain.

Likewise, in the years after *Weber* and *Johnson*, neither Congress nor the President moved to amend Title VII to prohibit the kind of explicit race and gender preferences that the Supreme Court had authorized in those cases.⁴⁵ The constitutional political consensus over the permissibility of racial and gender preference in employment was further strengthened by President Reagan's rejection of the Justice Department's recommendation to make the OFCCP goals-and-timetables requirement voluntary instead of mandatory, and to prohibit expressly the use of race or gender preference.⁴⁶

Thus, Belz the historian has succeeded in documenting what Belz the social philosopher said did not take place; the purported "transformation of equality" that Belz so strongly decries has indeed been approved by the "representative institutions" of the American system of constitutional governance. The "transformation of equality" adopting race- and gender-conscious affirmative action in employment, therefore, does not "lack political legitimacy"; it is supported by a constitutional political consensus — a measure of agreement between the political branches on an important matter of public policy — and so in American constitutional theory is deemed to represent the popular will of the American people.

V

This consensus has been confirmed anew by the enactment of the Civil Rights Act of 1991. During the 1988-1989 Term, the Supreme Court rendered a series of decisions interpreting Title VII, characterized by Belz as involving "technical legal issues concerning the nature of employment discrimination that had persisted since the *Griggs* case . . . especially the problem of the *prima facie* charge and the order and allocation of evidentiary burdens" (p. 226). The most significant of these decisions (and the only one relevant for present purposes) was

45. On the other hand, when the Supreme Court interpreted Title VII's prohibition against "discrimination on the basis of sex" not to reach pregnancy discrimination in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), Congress responded with the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e (1988), which specifically prohibited discrimination on that basis.

46. P. 194. As Belz notes: "Affirmative action was probably too deeply entrenched to be radically eliminated by 'a stroke of the pen' . . ." P. 207.

Wards Cove Packing Co. v. Atonio.⁴⁷ There the Court held that, in a claim of disparate impact discrimination: (1) although the employer bears the burden of producing evidence to justify the challenged practice, the plaintiff bears the ultimate burden of persuasion on the issue of the job-relatedness of that practice, and (2) the employer could satisfy the requirement of "business necessity" by showing that, "[the] challenged practice serves, in a significant way, the legitimate employment goals of the employer."⁴⁸

Wards Cove and the other decisions were widely perceived as "pro-employer" rulings making it more difficult for racial minorities and women to establish Title VII discrimination claims against employers.⁴⁹ Belz correctly observes that these decisions "sent shock waves through the civil rights establishment" (p. 230), and concludes from this "that the well-organized constituencies of affirmative action will resist any judicial tampering with the group-equality legal theories that provide the incentives for preferential treatment" (pp. 226-27).

Belz has proved prophetic. While it took two years for the Democratic-controlled Congress and the Republican President to enact a new civil rights law, the ultimate collaboration of the political branches showed that the Supreme Court in its 1988-1989 decisions had indeed misperceived the political will. A major purpose of the Civil Rights Act of 1991 was to "respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."⁵⁰ The Act overruled aspects of every one of the Court's Title VII decisions in the 1988-1989 Term, and added a number of other provisions that expanded significantly the protections afforded by federal civil rights law against employment discrimination. The Act specifically approved the disparate impact theory of discrimination, thereby incorporating the holding of *Griggs* into the text of Title VII and foreclosing any possible overruling of *Griggs* by the Supreme Court.⁵¹ So now, for the first time, there is not only a constitutional

47. 490 U.S. 642 (1989).

48. 490 U.S. at 659.

49. The Court also was perceived as having dealt a blow to affirmative action plans by holding in *Martin v. Wilks*, 490 U.S. 755 (1989), that white male employees could challenge an employer's race- or gender-conscious affirmative action program even if undertaken pursuant to a court-approved consent decree.

50. Civil Rights Act of 1991, Pub. L. No. 102-166 § 3(4), 105 Stat. 1071 (1991).

51. As stated in § 3(2) and § 3(3), two of the Act's purposes are to "codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*," and to "confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964." Section 105 of the Act deals with the burden of proof in disparate impact cases by adding a new subsection (k)(1)(A) to § 703 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2). In accordance with prior law, the claimant must still identify a particular employment practice that causes the alleged disparate impact except where the claimant can demonstrate that the elements of an employer's decisionmaking

political consensus in favor of the disparate impact theory of discrimination — including the resulting race- and gender-conscious affirmative action that Belz says this theory of discrimination may produce — but this theory of discrimination has been specifically incorporated into the text of Title VII.

In the political struggle leading up to the enactment of the Act, Congress and the President could have specifically approved race- and gender-conscious affirmative action through statutory ratification of the OFCCP goals-and-timetables requirement for federal contractors, and through incorporation of the *Weber* and *Johnson* holdings into the text of Title VII (as was done with the disparate impact holding of *Griggs*). Or they could have specifically prohibited any use of race- and gender-conscious affirmative action in hiring and promotions, thereby overruling *Weber* and *Johnson* (as was done with aspects of the Court's 1988-1989 Title VII decisions). They did neither. On race- and gender-conscious affirmative action, they simply let everything stand as it was.⁵² A group of Republican senators, expressing

process are not "capable of separation for analysis," in which case the decisionmaking may be analyzed as one employment practice. Overruling *Wards Cove* on this point, the Act then saddles the employer with the burden of persuasion as well as the burden of production on the issue of the job-relatedness of the challenged practice. §§ 104(n), 105(a).

Most of the political debate over the enactment of the Act involved the definition of *business necessity* as a defense to a disparate impact claim. The *Wards Cove* majority articulated the test as whether the challenged practice "serves, in a significant way, the legitimate employment goals of the employer." 490 U.S. at 659. The version of the Act vetoed by the President in 1990 defined *business necessity* as "essential to effective job performance," and the President and other opponents of the legislation insisted that this definition was so strict that, when coupled with the requirement that the employer bear the burden of persuasion on the issue of job-relatedness, it would force the employer to adopt racial and gender "quotas" in order to avoid a successful disparate impact claim. For a summary of this argument, see Kingsley R. Browne, *On the Civil Rights Act of 1991* 10-21 (Sept. 28, 1991) (unpublished manuscript on file with the *Michigan Law Review*).

The bill eventually enacted tries to give "focused guidance" to the courts on how they should interpret *business necessity* in particular cases. Section 105 attempts to limit judicial use of legislative history by providing that nothing other than a specified interpretative memorandum (at 137 CONG. REC. S15,276 (daily ed. Oct. 25, 1991)) "shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to *Wards Cove* — Business necessity/cumulation/alternative business practice." That interpretative memorandum simply contains the language incorporated as a purpose of the Act in § 3(2) above. It will be interesting to see how the courts deal with this "focused guidance." Opponents of the bill contended that the *Wards Cove* definition of *business necessity* did not mark any departure from the definition contained in prior Supreme Court decisions, *see, e.g.*, 137 CONG. REC. S15,467 (daily ed. Oct. 30, 1991) (statement of Sen. Symms), while proponents of the bill contended that it did. *See, e.g.*, 137 CONG. REC. S15,445 (daily ed. Oct. 30, 1991) (statement of Sen. Robb). In the congressional debate on the bill, a group of Republican Senators contended that the phrase *job related for the position in question and consistent with business necessity* "embodies longstanding concepts of job-relatedness and business necessity and rejects proposed innovations," so that it "represents an affirmation of existing law, including *Wards Cove*." 137 CONG. REC. S15,474 (daily ed. Oct. 30, 1991). I would doubt, however, that any court, including the Supreme Court, would expressly adopt the test enunciated in *Wards Cove*.

52. The only reference that the Act makes to "affirmative action" is in § 116, which provides simply that "[n]othing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law."

the views of the Bush administration as well as their own, correctly observed that "the legislation does not purport to resolve the question of the legality under Title VII of affirmative action programs," and it should "in no way be seen as expressing approval or disapproval" of the decisions in *Weber* or *Johnson*.⁵³

On the one hand, precisely because Congress did not deal with the permissible use of race- or gender-conscious affirmative action in one way or another, and did not either approve or disapprove *Weber* or *Johnson*, the Supreme Court is free to reconsider and modify or overrule those decisions. On the other hand, and more to the point for present purposes, the decision of the political branches to leave affirmative action alone means that, at least for the present, there is a constitutional political consensus on this issue. The current political will of the executive and legislative branches is that they will not prohibit either the affirmative action approved in *Weber* and *Johnson* or the OFCCP's imposition of the goals-and-timetables requirement on federal contractors.

It has been noted previously that the goals-and-timetables requirement could be ended by the President with the stroke of a pen. President Reagan refused to do so, on the advice of the Justice Department, despite his professed opposition to "quotas." And when he signed the Civil Rights Act of 1991, President Bush refused to do so as well.

President Bush signed the Act during an elaborate ceremony in the White House Rose Garden on Thursday, November 21, 1991. That morning's *New York Times* carried the headline, "Bush to Order End of Rules Allowing Race-Based Hiring." The report said: "President Bush is expected Thursday to direct all Federal agencies to phase out regulations authorizing the use of racial preferences and quotas in hiring and promotions when he signs the civil rights bill recently passed by Congress." According to a "senior Administration official," the President's action was spelled out in a statement prepared for release the next day — a statement "intended to underscore his opposition to affirmative action programs that give 'unfair preferences' to minorities or women."⁵⁴

It turned out, however, that the President was not going to do this at all. The next day's *New York Times* carried the headline, "Reaffirming Commitment, Bush Signs Rights Bill." The story below reported that White House officials said that on Wednesday night the President's counsel, C. Boyden Gray, without consulting either the President or Chief of Staff John Sununu, circulated a draft policy statement that would have ended the use of racial preferences and

53. 137 CONG. REC. S15,477-78 (daily ed. Oct. 30, 1991).

54. Steven A. Holmes, *Bush to Order End of Rules Allowing Race-Based Hiring*, N.Y. TIMES, Nov. 21, 1991, at 1.

quotas in federal government hiring.⁵⁵ The story did not make clear whether the policy statement would have affected the OFCCP's goals-and-timetables requirement, although this was the intimation in the previous day's story.

In any event, the President firmly repudiated the policy directive that Gray had circulated. The President had his press secretary say that Gray had acted without the President's knowledge, "and the White House called civil rights leaders who had been invited to the signing ceremony to assure them that the affirmative action regulations dating from 1965 were not being wiped out."⁵⁶ President Bush took care to "say again that I support affirmative action. Nothing in this bill overturns the Government's affirmative action programs."⁵⁷

At the present time, therefore, it is once again correct to say that there is a constitutional political consensus on the meaning of employment equality in American society. This consensus exists as a result of Congress' specific approval of the disparate impact theory of discrimination in the Civil Rights Act of 1991, of the OFCCP's continuing imposition of the goals-and-timetables requirement on federal contractors, and of the Supreme Court's explicit authorization of the use of race- and gender-conscious affirmative action in *Weber* and *Johnson*, which the political branches have decided to let stand. Under this constitutional political consensus the meaning of employment equality under federal civil rights policy is that racial minorities and women should have a fair share of the jobs in an employer's workforce — that they should be represented at every level in the workforce in some reasonable proportion to their representation in the overall labor market.

The consensus is always subject to change. The most secure of the three elements that comprise the consensus is, of course, the disparate impact theory of discrimination, since it has now been incorporated into the text of Title VII. The President could at any time eliminate the executive branch contribution to the consensus by abrogating the OFCCP's imposition of the goals-and-timetables requirement, but President Bush has recently and explicitly refused to do so. The Supreme Court is free to force a reconsideration of the third element of the consensus, the interpretation of Title VII as authorizing the use of race- and gender-conscious affirmative action by employers in certain circumstances, by overruling *Weber* or *Johnson*. Such a move by the Court would destroy this element of the current consensus until such time as Congress and the President came together to enact a new law or amend Title VII specifically to authorize race- and gender-con-

55. Andrew Rosenthal, *Reaffirming Commitment, Bush Signs Rights Bill*, N.Y. TIMES, Nov. 22, 1991, at 1.

56. *Id.*

57. *Id.*

scious affirmative action in employment.⁵⁸

The current consensus has existed ever since the *Weber* decision was rendered in 1979 and was not overturned by Congress. The consensus was not altered at all during the Reagan years despite the anti-quota rhetoric of the President and largely ineffective legal actions of the Reagan Justice Department. And the consensus was reaffirmed in the passage and enactment of the Civil Rights Act of 1991. For now, and barring some unexpected presidential action or the deliberate overruling of *Weber* or *Johnson* by the Supreme Court, the consensus seems rather secure.

58. A consideration of the constitutional questions that may arise from governmental action requiring or authorizing race- and gender-conscious affirmative action by private employers or from the use of race- and gender-conscious affirmative action by governmental employers is beyond the scope of the present writing. Some aspects of this issue are discussed in Sedler, *Ambivalence*, *supra* note 19, at 1199-206.