

NOSTALGIA AS CONSTITUTIONAL DOCTRINE: LEGALIZING NORMAN ROCKWELL'S AMERICA

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INTRODUCTION

Every year from Thanksgiving to Christmas, television advertisements appeal to our national sentimentality for the imaginary small town society of a bygone era. That social order, if it ever existed outside the paintings of Norman Rockwell, glosses over the complexity and reality of contemporary American society. In Norman Rockwell's America, the world was fair, just, and simple.¹ Each man controlled his own destiny and a woman's fate was inseparable from her family's. Women did not work outside the home. There was no domestic violence. A man's home was his castle and owning a single family home was a realizable American dream. Prosperity was the reward for hard work and the measure of success. Rugged individualism and the Horatio Alger myth of "rags to riches" reigned triumphant. Large government and faceless bureaucrats in faraway Washington were considered the evil empire: democracy meant local government and local control. Discrimination did not exist. Racial and ethnic minorities did not attempt to participate in the business world. A white male power structure dominated corporate America. The national ethos reflected corporate values: what was good for General Motors was good for America.²

The United States Supreme Court has turned back the clock

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1. George Bush effectively played upon this longing for a simpler time in his 1988 presidential campaign rhetoric, constantly invoking a "kinder, gentler nation." See, e.g., N.Y. Times, Nov. 9, 1988, at A27, col. 2 (victory speech); C.M. BLACK & T. OLIPHANT, ALL BY MYSELF: THE UNMAKING OF A PRESIDENTIAL CAMPAIGN 249 (1989) (television commercials).

2. See THE MACMILLAN BOOK OF BUSINESS AND ECONOMIC QUOTATIONS 46 (M. Jackman ed. 1984) (quoting Charles "Engine Charlie" Wilson). Wilson was the President of General Motors from 1941-1953 and the Secretary of Defense from 1953-1957. WEBSTER'S AMERICAN BIOGRAPHIES 1142 (1979).

to that imaginary world instead of confronting today's difficult issues. While African-American families descend further into poverty at a rate disproportionate to that of the rest of America,³ the Supreme Court protects "business as usual" from discrimination claims and revives nineteenth century natural law to enshrine property rights. While family violence and upheaval reach epidemic proportions,⁴ the Court clings to the anachronism of the traditional two-parent, one wage-earner nuclear family.⁵ Despite the need for a national solution to society's problems,⁶ the Court

3. African-Americans, and other persons of color, constitute a disproportionate number of the poor in the United States. The rate of whites living below the poverty level dropped from 11 percent in 1986 to 10.5 percent in 1987. The poverty rate for African-Americans, on the other hand, rose from 31.1 percent in 1986 to 33.1 percent in 1987. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, MONEY INCOME AND POVERTY STATUS IN THE UNITED STATES: 1987, P-60, No. 161, at 8 (Aug. 1988). In addition, the African-American middle class is not economically stable. See Updegrave, *Race and Money*, MONEY, Dec. 1989, at 152. These and other statistics that show the lower economic position of African-Americans are summarized in Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.3 (1988).

4. Former Surgeon General C. Everett Koop has called the physical abuse of women an "overwhelming" public health burden. N.Y. Times, Jan. 4, 1989, at B3, col. 3. It has been estimated that abuse accounts for the death of 1,000 to 1,500 children each year. Pitt, *New Program to Combat Child Abuse*, N.Y. Times, Mar. 15, 1988, at B4, col. 4. There has been a dramatic increase in the number of reported spousal and child abuse cases. See, e.g., *id. Quere*, whether this reflects an actual increase in domestic violence or merely a heightened awareness of the problem. *Id.* It is clear, however, that women's continued economic dependence on men leaves them vulnerable to violence. S. SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* 224-26 (1982).

5. Fewer women are now part of two-income families. R. SIDEL, *WOMEN AND CHILDREN LAST: THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA* 15-18 (1986). See D. MOYNIHAN, *FAMILY AND NATION* 147 (1986). The Census Bureau has labelled the increase in female-headed families as one of the "most dramatic changes in the composition of family households." BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *HOUSEHOLDS, FAMILIES, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1989* (Nov. 1989) P-120, No. 441, at 3. In 1986, 24 percent of children in America lived with one parent, up from 10 percent in 1960. N.Y. Times, Jan. 28, 1988, at C8, col. 3. About 44 percent of African-American families were maintained by women as compared to 13 percent for whites. *Id.*

There are, however, some state court cases that are beginning to acknowledge the reality of the new American family. See, e.g., *Braschi v. Stahl Assoc. Co.*, 74 N.Y.2d 201, 544 N.Y.S.2d 984 (1989) (the term "family" as used in rent-control laws includes unmarried lifetime partners); *Two Associates v. Brown*, 131 Misc. 2d 784, 502 N.Y.S.2d 604 (N.Y. Sup. Ct. 1986) (surviving "gay life partner" deemed a family member for purposes of housing laws); *Donovan v. Workers' Comp. Appeals Bd.*, 138 Cal. App. 3d 323, 187 Cal. Rptr. 869 (1982) (same sex lover of twenty years a member of deceased's household); Note, *Property Rights of Same Sex Couples: Toward a New Definition of Family*, 26 J. FAM. L. 375 (1987-1988) (collection of cases).

6. See, e.g., the Child Support Enforcement Amendments of 1984, 42 U.S.C. §§ 651-669 (1983 & Supp. 1989) (requiring Secretary of Health and Human Services to establish standards for state programs for locating absent parents, establishing paternity, and obtaining child support); the National Narcotics Leadership Act of 1988, 21 U.S.C. §§ 1501-1509

preaches a return to states' rights and local control.

This essay comments on recent cases that portray these trends, focusing on the judicial transformation of discrimination law from a vehicle that promoted the rights of women and minorities into a barrier that preserves the status quo. The Court has justified these results with the rhetoric of judicial self-restraint. But, in fact, the Court has embraced judicial activism by abandoning precedent, interpreting legislation to protect property and business interests, and preventing white males from becoming "victims" of discrimination remedies. The Court has not hesitated to overturn local governments' programs in order to protect property rights or entrepreneurial capitalism. At the same time, it has invoked local control to reject constitutional claims that challenge its notion of the traditional family.

In attempting to constitutionalize Norman Rockwell's world, the Court has employed a number of myths: first, that our society is colorblind, and free from discrimination; second, that the model of the two parent family is sacrosanct; third, that local government is the best forum for resolving the great public issues of the day; and finally, that the values of the corporate world should shape American society and guide the Court. In one sense the Court is quite consistent. It has returned time and again to this mythology in order to further its ideological imperative. However, the Court has also invoked this mythology selectively, depending on the result it wants to reach. Thus, the myths are, at the same time, the doctrinal bedrock and the rhetorical pretext for the jurisprudence of nostalgia.

I. THE MYTH OF THE JUST SOCIETY

Underlying recent civil rights opinions, the myth of the just society teaches that the world in which we live is fair and correct. Challenges to that social order, therefore, are unwelcome threats. The Court's tenacious embrace of this imaginary social order is exemplified in *City of Richmond v. J.A. Croson Co.*⁷ Richmond, Vir-

(Supp. 1989) (establishing an Office of National Drug Control Policy); the Public Utility Regulatory Policy Act (PURPA) of 1980, 16 U.S.C. §§ 824-824k (1982 & Supp. 1989) (mandating a federal policy for both conservation and alternative methods of producing energy). PURPA was enacted as part of a legislative package designed to combat the "nationwide" energy crisis. *FERC v. Mississippi*, 456 U.S. 742, 745 (1982).

7. 488 U.S. 469 (1989).

ginia was the capitol of the Confederacy.⁸ Segregated well into the sixties, Richmond was notorious for its resistance to school desegregation, its patterns of private and public housing discrimination, and its attempts to dilute minority voting strength.⁹ The African-American community finally succeeded in winning a political majority on the Richmond City Council.¹⁰ To rectify some of the effects of past discrimination, the council designed a plan that required general contractors under city construction contracts to subcontract at least thirty percent of the dollar value of each contract to minority owned businesses.¹¹ The city council patterned the Richmond plan after a similar program Congress had passed and the Supreme Court had upheld.¹²

The Richmond plan not only challenged the myth of the just society, but also questioned its social Darwinist underpinnings: the fittest succeed because of their superiority. In this laissez-faire view of the world, giving the less fit a governmental boost up the economic ladder is unfair—and, in a just society, unnecessary, counterproductive,¹³ and probably illegal. Thus, a city that wished to set aside benefits for minorities would first have to admit that it had acted unjustly and illegally by committing discriminatory acts.¹⁴ Thereafter, the city must limit its program to the specific victims of that behavior.

In invalidating Richmond's minority set-aside plan, the Court stubbornly adhered to the myth of the just society by denying the existence of racism in Richmond. The Court refused to credit the findings of the city council or the exhaustive studies documenting

8. Justice Blackmun in his dissent referred to Richmond as the "cradle of the Old Confederacy." *Id.* at 561 (Blackmun, J., dissenting). Richmond was an historic symbol of slavery and racism.

9. Justice Marshall's dissenting opinion is replete with citations to the extensive litigation that documents this history. *See id.* at 544-45 (Marshall, J., dissenting).

10. *Id.* at 495.

11. *Id.* at 477-78.

12. *Id.* at 480 (citing *Fullilove v. Klutznick*, 448 U.S. 448 (1980)). Justice Marshall noted that the Richmond plan was indistinguishable in "all meaningful respects" from the plan in *Fullilove*. *Id.* at 528 (Marshall, J., dissenting).

13. Opponents of affirmative action have argued that such programs are unfair because they are not based on merit. *See, e.g.*, N. GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* (1987); Reynolds, *An Equal Opportunity Scorecard*, 21 GA. L. REV. 1007 (1987).

14. It is hard to imagine that any city would have the political will to make this admission.

the discrimination¹⁶ which the plan sought to remedy.¹⁶ In the Court's eyes, the undisputed past history of official segregation in Richmond was simply irrelevant.

In her opinion, Justice O'Connor was explicit about the invidiousness of racial classifications. The focus of her interest, however, was not Richmond's shameful treatment of African-Americans, but the potential victimization of whites.¹⁷ Justice O'Connor's world is just and colorblind; in her world, the remedial program creates discrimination against white contractors. Of course, this rather startling conclusion requires ignoring two hundred years of what Justice O'Connor herself labels the "sorry history"¹⁸ of racism, as well as the voluminous sociological and economic data¹⁹ on the continuing effects of that history on African-Americans.²⁰ The Court's idealized vision of the world—"[t]he dream of a Nation of equal citizens in a society where race is irrelevant"²¹—cannot admit the reality of that history and those facts.

Viewed in this light, the result in *Croson* is not surprising. Because there is no discrimination in a just society, there can be no remedy for that discrimination. Indeed, the recent affirmative action cases have held that race or gender conscious relief is constitutionally impermissible unless there has first been a specific violation.²² The requirement of particularized fault to support a race-conscious remedy has been a familiar theme of the Burger and Rehnquist Courts. The injury to society as a whole which institutionalized discrimination causes is an insufficient foundation upon which to construct such a violation. "Societal discrimination, without more, is too amorphous a basis"²³ upon which to predicate a

15. *Croson*, 488 U.S. at 480-81.

16. *Id.* at 478.

17. *Id.* at 493.

18. *Id.* at 499.

19. *See id.* at 530-35 (Marshall, J., dissenting).

20. Indeed, Justice O'Connor finds it necessary to reconstrue the fourteenth amendment in order to justify her novel theory of federalism. She posits that section 5 of the fourteenth amendment removes from the states any authority for implementing race-conscious plans in order to remedy discrimination. *See id.* at 490-91, 504. *Cf.* Justice O'Connor's impassioned defense of state powers in *FERC v. Mississippi*, 456 U.S. 742, 777 (1982) (states are not the "field offices" of the federal bureaucracy, rather, each state is sovereign within its own domain).

21. *Croson*, 488 U.S. at 505.

22. *See, e.g.,* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-76, *reh'g denied*, 478 U.S. 1014 (1986); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305, 307-10 (1978).

23. *Wygant*, 476 U.S. at 276.

remedy. Because we live in a just society, only specific bad acts by specific individuals warrant remedies. These remedies are further limited to the specific minorities or women who were the victims of the conduct in question. The fit between violation and remedy must be perfect. In other words, discriminatory conduct is aberrant: an extraordinary exception to normal behavior in a just society. No victim of such behavior can be made whole unless he or she proves that the myth of the nondiscriminatory society is false.

The Court has undertaken the protection of those whites or men who benefited from racism and sexism, although were not themselves the cause of it. These "potential innocent victims" and their rights now take priority over the rights of the actual victims of racism and sexism.²⁴ The Court's solicitude for the "innocent victims" of anti-discrimination programs rests on two assumptions. The first is that if discrimination based on race or sex ever existed, any lingering effects of past discrimination have since vanished. The second assumption is that whites justly deserve the rewards for their achievements even if these benefits might have been earned at the expense of women and minorities. The Court refuses to consider that these "innocent victims" may have achieved their position because of the exclusion of women and minorities from the "neutral" Darwinian meritocracy.²⁵ To the contrary, the Court's recent affirmative action decisions are permeated by an irrefutable commitment to the notion that the system is just and legitimate.

This same ideology is reflected in the cases brought under Title VII of the Civil Rights Act of 1964.²⁶ The Court has imposed a

24. There are many examples of this trend. See Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986). See, e.g., *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982) (employer could toll accrual of back pay liability by offering claimant a job previously denied, but employer need not grant retroactive seniority because doing so would place a particularly onerous burden on other employees); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 355-56 (1977) (expanding the definition of a "bona fide seniority system" under Title VII to protect the rights of white employees). Compare *Martin v. Wilks*, 109 S. Ct. 2180 (1989) (white employees who have failed to intervene in earlier employment discrimination proceedings have broad rights to challenge consent decrees) with *Lorance v. AT&T Technologies*, 109 S. Ct. 2261 (1989) (statute of limitations for women employees challenging seniority system begins to run at the time of the adoption of the system even if employee could not reasonably have been harmed when the system was adopted).

25. Nor are the cases willing to speculate that if African-Americans and women had been allowed to fully participate, they might have kept white men from reaching the heights they did.

26. 42 U.S.C. § 2000e (1988).

heavy burden on Title VII plaintiffs who challenge the fundamental fairness of the status quo. By manipulating and reallocating the burdens of proof, the Supreme Court shifted the focus of discrimination law from a commitment to protect employees from discrimination to a concern that discrimination law not interfere with the prerogatives of the business community.²⁷ Like *Croson*, the recent Title VII cases ignore the historical context that necessitated anti-discrimination laws.²⁸

Ironically, the Court chose the egregious fact situation in *Wards Cove Packing Co. v. Atonio*²⁹ to announce the newest burden on Title VII plaintiffs. The blatantly segregated workplace in that case would have been illegal under any definition of discrimination. As the dissenting Justices recognized, *Atonio* presented "a kind of overt and institutionalized discrimination [it] ha[d] not dealt with in years: a total residential and work environment organized on principles of racial stratification and segregation, which . . . resembles a plantation economy."³⁰ What was critical to the Court in *Atonio*, however, was not the segregation but its profitability.³¹ *Atonio* establishes two hurdles for a Title VII plaintiff. First, a plaintiff must prove the disparate impact of defendant's practices.³² Second, a plaintiff must persuade the Court that the practices do not serve a legitimate business purpose.³³ To satisfy this second requirement, a plaintiff must establish both that there is another equally effective means for the defendant to run its business, and that this alternative would impose no additional burdens on the defendant.³⁴

When viewed in the context of the Court's other recent Title

27. The authors have discussed this trend extensively in Brown, Parmet & Baumann, *The Failure of Gender Equality: An Essay in Constitutional Dissonance*, 36 BUFFALO L. REV. 573 (1987).

28. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (purpose of Title VII was to remove the artificial barriers that had operated to favor white employees).

29. 109 S. Ct. 2115 (1989).

30. *Id.* at 2136 (Blackmun, J., dissenting).

31. See *id.* at 2127.

32. *Id.* at 2124-25.

33. *Id.* at 2125.

34. *Id.* at 2126-27. Despite the Court's protestations to the contrary, *Atonio* overrules the precedent of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *Griggs* held that once a plaintiff established the racially disparate effect of a facially neutral rule, the defendant had the burden by way of affirmative defense of showing the business necessity of its practices. *Id.* at 432. *Atonio* also appears to overrule the cases allowing a plaintiff to prove disparate impact through statistics. See *Atonio*, 109 S. Ct. at 2121-24.

VII cases, the result in *Atonio* is less surprising. By requiring a plaintiff to prove a defendant's subjective racist or sexist motivation,³⁵ the Court had already signalled a retreat from its earlier focus on the discriminatory impact of a defendant's practices.³⁶ The creation of this construct, called disparate treatment, has been devastating to plaintiffs.³⁷ Under disparate treatment, the Court has generally been unwilling to infer the defendant's impermissible state of mind. Even blatantly racist remarks fail to prove the requisite discriminatory intent.³⁸ For example, in *Watson v. Ft. Worth Bank & Trust*,³⁹ the plaintiff was told that the bank teller position she sought was "a big responsibility with a 'lot of money . . . for blacks to have to count.'"⁴⁰

The requirement that a plaintiff prove a defendant's subjective state of mind in discrimination cases is wholly judge made, and finds no basis in the statutory language or the legislative history of Title VII.⁴¹ The Supreme Court first created the requirement of intent for discrimination cases in *Washington v. Davis*,⁴² a case decided under the fifth amendment. Initially, the Court had said it would confine its new intent requirement to constitutional

35. See, e.g., *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

36. *Griggs*, 401 U.S. at 431. The Court in *Griggs* focused on eliminating the effects of discrimination.

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

Id. at 429-30.

37. See *Brown, Parmet & Baumann, supra* note 27, at 598-601. For a judicial criticism of the difficulties of proving intent, see *Thornburg v. Gingles*, 478 U.S. 30, 71-73 (1986) (referring approvingly to the Senate Report accompanying the 1982 amendments to the Voting Rights Act which found that the intent test was "unnecessarily divisive" and placed an "inordinarily difficult" burden on plaintiff).

38. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988). It is difficult to pinpoint the precise holding of the plurality opinion in *Watson*. As Justice Stevens has noted, that opinion "profoundly misapprehends" the distinction between disparate impact and disparate treatment. *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2132 n.18 (1989) (Stevens, J., dissenting).

39. 487 U.S. 977 (1988).

40. *Id.* at 990, quoting app. at 7.

41. See COMMERCE CLEARING HOUSE, CIVIL RIGHTS ACT OF 1964 67-99 (1964).

42. 426 U.S. 229 (1976).

claims and exempted cases brought under civil rights statutes.⁴³ But the Court soon ignored its own holding and inserted the intent requirement into Title VII through the disparate treatment model.⁴⁴

Personnel Administrator of Massachusetts v. Feeney,⁴⁵ a fourteenth amendment case, illustrates both the type of intent a plaintiff must prove, as well as the Herculean nature of this burden. In *Feeney*, the plaintiff lost because she failed to prove the discriminatory purpose of the Massachusetts statute that created an absolute lifetime civil service preference for veterans.⁴⁶ The District Court had found that this preference impacted so inevitably and severely on women that its discriminatory effect could not be unintended:

Conceding . . . that the goal here was to benefit the veteran, there is no reason to absolve the legislature from awareness that the means chosen to achieve this goal would freeze women out of all those state jobs actively sought by men. To be sure, the legislature did not wish to harm women. But the cutting-off of women's opportunities was an inevitable concomitant of the chosen scheme—as inevitable as the proposition that if tails is up, heads must be down. Where a law's consequences are *that* inevitable, can they meaningfully be described as unintended?⁴⁷

While conceding that the foreseeability of the consequences had some "bearing" upon the existence of discriminatory intent,⁴⁸ the Supreme Court held that the plaintiff failed to prove the requisite state of mind of the Massachusetts legislature.⁴⁹ The notion that a legislative body has a uniform or provable state of mind is absurd. Indeed, there will rarely be evidence of overt discriminatory intent. Even if discriminatory intent exists, plaintiffs lack access to the evidence to prove it.⁵⁰

43. See *id.* at 238-39.

44. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36, n.15 (1977). The Court held in *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 388-89 (1982), that the intent requirement also applies to cases brought under 42 U.S.C. § 1981 and, by inference, § 1982 as well. See also *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582, 584 (1983) (Title VII of the Civil Rights Act of 1964).

45. 442 U.S. 256 (1979).

46. *Id.* at 276-80.

47. *Id.* at 278 (quoting *Feeney v. Massachusetts*, 451 F. Supp. 143, 151 (1978)).

48. *Id.* at 279 n.25.

49. See *id.* at 278-80.

50. See, e.g., *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S.

The discriminatory intent cases refocus the inquiry from the discriminatory consequences of the defendant's behavior to the plaintiff's ability to demonstrate both the defendant's motivation and the unbroken causal link between the defendant's behavior and the plaintiff's injury. By limiting the anti-discrimination principle to plaintiff's ability to prove the defendant's racist or sexist motivation, the Court has redefined equality and reconceptualized discrimination from a societal problem into the aberrant acts of isolated individuals.⁵¹ Historical and social context become irrelevant because in a just society there are only occasional instances of injustice or inequality. It follows that a just society is absolved of any responsibility for discrimination. No plaintiff can recover unless he or she proves that the taboo of a nondiscriminatory society was broken by a racist or sexist defendant whose behavior was so atrocious that it shocked the conscience of the just society.⁵²

II. THE MYTH OF THE TRADITIONAL FAMILY

The Supreme Court resorts to another myth—that of the traditional, stereotypical family—to thwart efforts to maintain constitutionally protected privacy rights. This myth does not accommodate the reality of personal relationships or domestic problems of the 1990's. The Court's opinions that address intimate relationships betray a longing for the idealized traditional nuclear family, where the primary function of a woman was that of wife and mother. Women who depart from this role by taking control over their own bodies and their own lives challenge the biological determinism essential to the myth of the traditional family. Women's attempts to deny the state's control over reproduction collide with stereotypical notions of women's proper place.

To the Court, then, the abortion debate is not about the conflict between the "rights" of the fetus and the woman's constitutional right to privacy. Instead, the issue is the government's right

252 (1977) (discussing plaintiffs' problems in questioning public officials with regard to motivation for zoning laws). As the Court has expanded the range of cases subject to the intent requirement, many more forms of discrimination have become shielded from judicial examination. The comparable worth cases are illustrative. See Brown, Baumann & Melnick, *Equal Pay for Jobs of Comparable Worth: An Analysis of the Rhetoric*, 21 HARV. C.R.-C.L. L. REV. 127 (1986).

51. See Brown, Parmet & Baumann, *supra* note 27, at 597-98.

52. The Court views discrimination remedies as punitive to defendants; such draconian measures are to be meted out in only a few cases. See, e.g., *Milliken v. Bradley*, 433 U.S. 267 (1977).

to control the woman's decision-making process. To the Court, women are not and should not be constitutionally capable of making this decision on their own.⁵³ Indeed, in *Roe v. Wade*,⁵⁴ the Court only allowed women the right to make an abortion decision "in consultation with"⁵⁵ their physicians; the abortion decision was as much medical as personal, as much shared as individual. The Court's discomfort with having a woman make the abortion decision on her own explains *Webster v. Reproductive Health Services*.⁵⁶ In *Webster*, the Court invited state legislatures to reinvolve themselves in abortion decisions,⁵⁷ which participation had been limited sixteen years earlier in *Roe v. Wade*.⁵⁸

What is really at issue in the abortion debate is whether a woman is an independent decision-maker with sole responsibility for her fetus and her body.⁵⁹ This demand for empowerment threatens the Court's vision of the proper roles for women.⁶⁰ Childbearing is an essential component of the traditional family,⁶¹ while aborting a

53. For an example of this approach, see Justice White's characterization of a woman's choice to have an abortion as based on "convenience, whim, or caprice." *Doe v. Bolton*, 410 U.S. 179, 221 (1973) (White, J., dissenting).

54. 410 U.S. 113 (1973).

55. *Id.* at 162-63. *Accord*, *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3058 (1989) (abortion as a "medical practice traditionally subject to state regulation"). The same issue—who is best suited to make the most fundamental decisions—underlies the right-to-die cases. See Goodman, *Should the State Have More Power than the Family*, Boston Globe, Dec. 5, 1989, at 19, col. 1.

56. 109 S. Ct. 3040 (1989).

57. In *Webster*, the Court declined the opportunity to debate the scope of the underlying constitutional right to privacy. Justice Rehnquist nonetheless distinguished *Roe*, and the *Roe* trimester approach, to hold that the Missouri statute does not violate the woman's right to privacy. *Id.* at 3049-58. Although the Court declined to reverse *Roe*, it opened the door to state regulation. *Id.* at 3058.

58. *Roe v. Wade*, 410 U.S. 113, 162-64 (1973).

59. Justice Rehnquist has long been of the opinion that gender equality threatens the patriarchal family. In 1970, commenting upon the proposed Equal Rights Amendment (ERA), then Assistant Attorney General Rehnquist opined that "there are overtones of dislike and distaste for the traditional differences between men and women in the family unit, and in some cases . . . a complete rejection of the woman's traditionally different role in this regard." 132 CONG. REC. S12557 (daily ed. Sept. 15, 1986) (statement of Sen. Metzenbaum) (citing Memorandum for the Honorable Leonard Garment, Special Consultant to the President, from Assistant Attorney General Rehnquist, dated May 4, 1970). As an example of the "unsettling effect" that the rigid doctrine of equality might have in many fields, Rehnquist suggested (albeit erroneously) that the ERA would empower a married woman to select a domicile different from her husband, thus turning "holy wedlock" into "holy deadlock." *Id.* This example demonstrates a lack of understanding that the ERA, like the fourteenth amendment, required state action and did not apply to purely private conduct.

60. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 335-36 (1977) (employee's "very womanhood" would "undermine her capacity" to perform her job as a correctional counselor).

61. Having children is in the natural order of things. See, e.g., *General Electric v. Gil-*

fetus is not. Thus, abortion threatens the myth of the traditional family by dramatically changing a woman's subordinate family status. State regulation of abortion denies women's autonomy and preserves the myth of the traditional family.

Ironically, during the same term, the Court held in *DeShaney v. Winnebago County Department of Social Services*⁶² that state intervention to protect abused children also poses a threat to the family. Joshua DeShaney's father beat him so severely that he became permanently impaired. The defendant's own social worker and the local hospital reported the father's long history of abusing the child to the Winnebago County social service agency. Yet the agency took no action. The Court in *DeShaney* admitted that these facts were "undeniably tragic."⁶³ Nevertheless, the Court held that the Constitution did not impose an affirmative duty on the state to protect Joshua DeShaney from his father's repeated abuse.⁶⁴ The Court refused to recognize that the boy had a right to "life" that was protected by the due process clause of the Constitution.

In *Webster*, the Court empowered the state to intervene in a woman's most intimate decision; in *DeShaney*, the Court rejected any notion that a state is obligated to protect a child in its custody. The *DeShaney* Court somehow thought that imposing this obligation on the state would violate the due process clause by "improperly intruding into the parent-child relationship."⁶⁵ Thus, the state must abstain from interfering with the traditional biological tie between father and son, and must protect the "privacy" of this relation no matter how torn by abuse. Yet, a woman's intimate biological tie to her fetus warrants increased state intervention.⁶⁶

bert, 429 U.S. 125, 139 n.7 (1976) (the prohibition of discrimination under Title VII does not affect the unequal impact that results from "the scheme of human existence"). See also *Harris v. McRae*, 448 U.S. 297, 324-26 (1980) (exclusion of medically necessary abortions from federal Medicaid program merely encouraged childbirth and did not infringe on abortion rights).

62. 489 U.S. 189 (1989).

63. *Id.* at 191.

64. See *id.* at 196-97. There was no special relationship created between Joshua and the state where the state knew he faced a "special danger of abuse at his father's hands, and specifically proclaimed . . . its intention to protect him against that danger." *Id.* at 197.

65. *Id.* at 203.

66. Consider the implications for prenatal care in the Court's holding in *Wimberly v. Labor & Indus. Relations Comm'n*, 479 U.S. 511 (1987) (the state has no obligation to provide unemployment compensation to women who leave their jobs when they are pregnant). The Court characterized the Missouri statute as one that "prohibits discrimination but does

The state's interest in the potential life of a fetus, therefore, is greater than its interest in the health of a living child. These contradictory positions on state regulation of intimate matters are consistent if seen as part of the Court's attempt to preserve its mythic ideal of the family.⁶⁷

Similarly, in *Bowers v. Hardwick*,⁶⁸ the Court denied constitutional protection to intimate relationships that deviate from stereotypical family relationships. *Bowers* explicitly rejected any resemblance between constitutionally protected privacy within the family, marriage, or procreation and "the claimed constitutional right of homosexuals to engage in acts of sodomy."⁶⁹ Although it can find constitutional protection or limitations to shelter what it views as "normal" behavior in Rockwellian America, the Court is unwilling to confer constitutional status upon what it feels is aberrant behavior. Acknowledging the existence of lesbian and gay relationships would force the Court to deviate from its myth of traditional family life.

The most recent case involving the Court's refusal to recognize an unorthodox familial relationship is *Michael H. & Victoria D. v. Gerald D.*⁷⁰ The petitioners were a child and her biological father. The respondent was the husband of the child's mother. The biological father had lived with the child and her mother intermittently, and he sought paternity and visitation rights. The child sought to maintain a relationship with her biological father. In rejecting the petitioners' claims, the Court indulged in a lengthy essay extolling the sanctity of the traditional family and the threat to it posed by the petitioner's claim. Holding that the Constitution protected the marital family against petitioners' claims, the Court refused to recognize that family relationships might develop in unconventional ways.⁷¹ As in *Bowers*, the issue is not the personal relationship or the degree of intimacy which constitutes a "family." Instead, what is critical is the preservation of the formal, legally sanctioned, traditional patriarchal family.⁷²

not mandate preferential treatment" in unemployment compensation schemes. *Id.* at 522.

67. Frances Olsen has repeatedly pointed out that the state's intervention in the "private" sphere is selective. See Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1509-13 (1983).

68. 478 U.S. 186 (1986).

69. *Id.* at 190-91.

70. 109 S. Ct. 2333 (1989).

71. See *id.* at 2342-46.

72. *Cf. Caban v. Mohammed*, 441 U.S. 380 (1979) (invalidating state law that gave un-

III. THE MYTH OF TOWN MEETING DEMOCRACY

Judicial nostalgia for the participatory democracy of small town, agrarian America is often constitutionally expressed in terms of local control and states rights. Yet the Court's deference to local authority is selective.⁷³ The Court downplays its role and glorifies the democratic processes of municipal and state government only when doing so furthers its ideological agenda. For example, when inviting the states to experiment with increased regulation of abortion in *Webster v. Reproductive Health Services*,⁷⁴ Justice Rehnquist eulogized the process whereby the people through their elected representatives can debate the great issues of the day: "The goal of constitutional adjudication is to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not. We think we have done that today."⁷⁵

Protecting access to local political processes has a long and distinguished constitutional history. Classic liberal democratic theory has also taught that a critical aspect of the judiciary's role is to protect "discrete and insular minorities"⁷⁶ from majoritarian tyranny. The theory is that today's minorities should have the opportunity to become the next political majority. In this scheme, the Court's role is to guarantee broad access to the political process. Typically, the Court performs this role by safeguarding voting rights, and thereafter deferring to legislative decisions.⁷⁷ In this

wed fathers who had close relationships with child fewer rights than mother in adoption proceedings); *Stanley v. Illinois*, 405 U.S. 645 (1972) (invalidating automatic deprivation of custody of children to unwed father at mother's death).

73. *Warth v. Seldin*, 422 U.S. 490 (1975), contains a particularly illogical invocation of the myth of local control. In *Warth*, the Court held that the plaintiffs lacked standing to challenge exclusionary zoning practices that rendered plaintiffs non-residents of defendant town. Asserting that zoning is within the province of state and local authorities, the Court noted that citizens dissatisfied with zoning "need not overlook the availability of the normal democratic process." *Id.* at 509 n.18. Yet, these plaintiffs did not have access to the political process in the localities that enacted exclusionary ordinances. Compare the lack of judicial deference to state statutes regulating interstate commerce. Such statutes may result from discrimination against out-of-state interests who have no access to the political process of the regulating state. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-33 (2d ed. 1988). The Court has extolled the virtues of the democratic process in other opinions rejecting plaintiffs' challenges to exclusionary or discriminatory practices. See, e.g., *Crawford v. Board of Educ.*, 458 U.S. 527 (1982); *City of Eastlake v. Forest City Enters.*, 426 U.S. 668 (1976).

74. 109 S. Ct. 3040 (1989).

75. *Id.* at 3058.

76. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

77. See generally J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW*

way, the Court has traditionally limited its inquiry to the fairness of the political process rather than the substance of the outcome.

However, in *City of Richmond v. J.A. Croson Co.*,⁷⁸ after the community succeeded in electing five African-Americans to the Richmond City Council, the Court promptly second-guessed the city council's decision to establish an affirmative action plan. Justice O'Connor insisted on subjecting the council's ordinance to the strictest constitutional scrutiny, intimating that African-Americans in political control will not engage in the democratic process, but rather will act unfairly, helping only their constituency or undoing the years of white political control.⁷⁹ Justice O'Connor's concern that the African-American community, having finally achieved political power, would exercise it in a discriminatory way creates the offensive presumption that minorities (like women deciding about abortion) are not to be trusted in the decision-making process.

The Court's willingness to subject the Richmond City Council's actions to strict scrutiny stands in stark contrast to cases challenging the activities of a white dominated power structure. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*⁸⁰ illustrates this point. In *Arlington Heights*, the plaintiffs challenged the exclusionary zoning practices of an all-white suburb of Chicago. The plaintiffs argued that the defendants violated the fourteenth amendment by discriminating against African-Americans when they refused to allow an integrated low-income housing development. The Court held that the plaintiffs must establish the racially discriminatory animus of the local zoning board, and was unwilling to infer invidious intent from the lack of minority participation.⁸¹ More troubling was the Court's refusal to find discriminatory intent despite the overwhelming statistical evidence of discrimination against African-Americans. In deferring to the board's asserted reasons for refusing to rezone, the Court ignored the defendant's exploitation of the segregated housing market in the Chicago metropolitan area⁸² and refused to apply strict scrutiny to the local decision-making process. In *Arlington Heights*, the judicial

(1980).

78. 488 U.S. 469 (1989).

79. *Id.* at 495-96, 506.

80. 429 U.S. 252 (1977). *Arlington Heights* was, of course, decided by a different Court than most of the cases discussed in this essay. That case is, however, the harbinger of a trend that fully flowered in the Rehnquist Court.

81. *Id.* at 270.

82. *See id.* at 269-71.

refusal to look behind the local political process perpetuated segregated housing. In *Croson*, the judicial eagerness to second-guess the local political process eliminated a plan designed to remedy generations of segregation by promoting opportunities for minority businesses.

IV. THE MYTH OF SOCIAL DARWINISM

The myth of social Darwinism,⁸³ that only the fittest prosper, is predicated upon the primacy of wealth and the sanctity of property rights. An important corollary to this myth is that private enterprise should be free from governmental meddling. Although social Darwinism has long been discredited as a theory of constitutional analysis,⁸⁴ the Court in *Nollan v. California Coastal Commission*⁸⁵ breathed new life into that doctrine by departing from its long history of deferring to local land use restrictions.⁸⁶ *Nollan* demonstrates that the judicial eagerness to yield to local processes vanishes when such processes threaten the Court's ideological commitment to the natural law foundation of property rights.

In *Nollan*, the California Coastal Commission conditioned approval to renovate a beachfront home on the owners' grant of a public easement across the beach.⁸⁷ The Court strictly scrutinized the commission's justification that the easement would alleviate the impact of the enlarged house on the beach and held that the condition had to further the same legitimate police power purpose as a refusal to issue a permit. The Court found that the commis-

83. Perhaps the most famous example of the constitutionalization of this theory is *Lochner v. New York*, 198 U.S. 45 (1905). Justice Holmes' dissent in *Lochner* is among his most famous:

This case is decided upon an economic theory which a large part of the country does not entertain The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.

Id. at 75. For the impact of Charles Darwin and Herbert Spencer on the subordination of women, see R. ROSENBERG, *BEYOND SEPARATE SPHERES: INTELLECTUAL ROOTS OF MODERN FEMINISM* 5-12, 36-43 (1982).

84. See L. TRIBE, *supra* note 73, at §§ 8-1 to 8-7.

85. 483 U.S. 825 (1987).

86. *Cf.* *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926).

87. *Nollan*, 483 U.S. at 828.

sion's explanation was irrational and was not a legitimate exercise of the police power. Rejecting the commission's findings, the Court characterized the condition as "an out-and-out plan of extortion"⁸⁸ and held the commission to an exacting standard to validate its regulatory scheme.

Read together, *Nollan* and *Arlington Heights* demonstrate the Court's abandonment of long-settled constitutional precedent: strict scrutiny in race discrimination cases and minimal review of local police power regulations in land use cases.⁸⁹ In *Arlington Heights*, the Court was unwilling to impugn the motivation of the local board or scrutinize the board's refusal to allow a low income housing development.⁹⁰ The Court did not intervene despite strong evidence of segregated housing patterns and documentation of racist remarks in the hearing room. When the constitutional claim is property-based as in *Nollan*, however, the Court actively intervened to protect those rights.

In Rockwellian America, the corollary to the sanctity of property rights is the presumed legitimacy of private enterprise and the deep suspicion of governmental interference with entrepreneurial freedom. Once again, it is useful to revisit the employment discrimination cases. The original Title VII jurisprudence was based on the notion of eliminating discrimination. Thus, an employer could continue a racially disparate practice only by persuading a court of its business necessity.⁹¹ Emphasizing the danger of judicial interference with business, recent cases defer to corporate practices even though they may disparately impact on minorities or women.⁹² As discussed earlier, the cases that require plaintiffs to establish perniciously motivated intent insulate many business practices from judicial scrutiny. Unless a plaintiff can obtain evidence of subjective racism or gender bias, employers will never

88. *Id.* at 837 (quoting *J.E.D. Assoc., Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)).

89. See, *Nollan*, 483 U.S. at 842-48 (Brennan, J., dissenting). Justice Brennan also argued that the standard for reviewing exercises of the police power is the same in a takings analysis as in a due process or equal protection analysis. *Id.* at 843-44 n.1. Justice Scalia asserted to the contrary, that takings challenges require a stricter level of scrutiny. *Id.* at 836 n.3.

90. "[J]udicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Arlington Heights*, 429 U.S. at 268 n.18.

91. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

92. See, e.g., *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).

have to justify the discriminatory impact of their practices.

In its last two terms, the Court has further insulated discriminatory business practices from judicial examination. In *Watson v. Fort Worth Bank & Trust*,⁹³ Justice O'Connor warned of a "chilling effect" on business practices should employees feel pressured to adopt quotas or engage in preferential treatment in response to possible liability under the disparate impact theory.⁹⁴ Both *Watson* and *Ward's Cove Packing Co. v. Atonio*⁹⁵ reflect a pro-business bias. They trumpet the Court's view that profits and the uninterrupted functioning of the business world are more important than workplace equality. *Watson* and *Atonio* do not require the defendant to justify its offensive practices until after the plaintiff persuades the court that there is another way for a defendant to run its business which will accommodate the antidiscrimination principle without additional cost or other burdens. In other words, discriminatory practices which are cheaper or more convenient than non-discriminatory practices are now permissible.⁹⁶ Both *Watson* and *Atonio* rationalize this permissiveness by piously lamenting the lack of judicial competence to improve upon business practices,⁹⁷ while, ironically, assigning to a plaintiff the task of devising better operating methods for the defendant.⁹⁸ The Court, moreover, cautions that a plaintiff's proposals will not be welcomed: The "judiciary should proceed with care"⁹⁹ before requiring an employer to adopt a plaintiff's suggestions. When the burden of justifying its business practices was on the defendant, the Court could fulfill its function by weighing conflicting claims. By shifting this onerous burden to plaintiffs, the Court protects defendants from exposure to civil rights litigation. It is hard to escape the conclusion that imposing such a burden on plaintiffs is nothing more than an unabashed attempt to give constitutional stature to "business as

93. 487 U.S. 977 (1988).

94. *Id.* at 993.

95. 109 S. Ct. 2115 (1989).

96. The focus of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), was whether the defendant could justify a practice with a discriminatory impact as "necessary" to its business. Under *Atonio*, the issue is no longer the necessity for the practice but whether it is merely legitimate. See *Atonio*, 109 S. Ct. at 2129-32 (Stevens, J., dissenting).

97. *Atonio*, 109 S. Ct. at 2127; *Watson*, 487 U.S. at 999.

98. Is a plaintiff more competent than a court to restructure business operations? If competency is the issue, the judicial focus should be on the defendant's justifications for its practices. *Griggs*, 401 U.S. at 431-32.

99. *Atonio*, 109 S. Ct. at 2127.

usual."¹⁰⁰

CONCLUSION

The judicial resurrection of a mythical simpler time may suit a conservative political agenda, but it denies today's complex realities. This deliberate judicial tunnel vision mirrors other now infamous cases where the Court also created and relied upon an image of society that comported with its ideological agenda and allowed that agenda to overwhelm its constitutional analysis. By turning a blind eye to the real world in these cases, the Court severely wounded itself as an institution.

Perhaps the most egregious example is *Dred Scott v. Sandford*,¹⁰¹ where the Court's failure to resolve the constitutional and moral crisis of slavery led to the Civil War. In *Dred Scott*, the Court's holding that no descendants of slaves could be citizens was compelled by its inaccurate analysis of the status of African-Americans at the time of the constitutional convention.¹⁰² The Court's revisionist view foreclosed it from considering the legal rights of any African-American—slave or free—whose situation did not comport with its version of history. The Court's defense of slavery and inflammatory essay on the inferiority of African-Americans made the opinion itself a political issue.¹⁰³

Similarly, in *Lochner v. New York*,¹⁰⁴ the Court elevated to constitutional magnitude a discredited economic theory that thwarted the aspirations of many Americans and prevented government from ameliorating the intolerable conditions suffered by many workers. The *Lochner* Court described an employer/em-

100. In *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989), the Court significantly limited the coverage of another employment discrimination statute, and held that 42 U.S.C. § 1981 extends only to the formation of the employment contract and not to issues arising out of continued employment. This holding has led to the dismissal of at least ninety-six Section 1981 claims between June 15 and November 1, 1989, and thus belies Justice Kennedy's insistence that *Patterson* does not signal "one inch of retreat" from the antidiscrimination principle. *Id.* at 2379. See THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE IMPACT OF *Patterson v. McLean Credit Union* (Nov. 20, 1989) (on file with the authors).

101. 60 U.S. (19 How.) 393 (1837).

102. Professor Fehrenbacher has called Chief Justice Taney's opinion "a gross perversion of the facts." D. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 349 (1978).

103. See J. MCPHERSON, BATTLE CRY OF FREEDOM 176 (1988).

104. 198 U.S. 45 (1905).

ployee relationship that bore no relation to what most workers experienced. The Court's fantasy of a workplace where employer and employee had equal bargaining power has been criticized from the day the opinion was handed down.¹⁰⁵

The jurisprudence of *Dred Scott* and *Lochner* warrants the condemnation the Court received.¹⁰⁶ Those cases exemplify a judicial insistence on a view of the world already rejected by much of society. Today the Court seems set upon that treacherous path again, ready to transform itself from an effective forum for the resolution of complex disputes into an institutional irrelevancy. It has inconsistently invoked its various home-spun myths, distorting legal reasoning by its quixotic jurisprudence of nostalgia. By selectively indulging in its mythic vision of the world, the Court has closed its doors to those whose claims challenge its simplistic vision, while welcoming only those few who share its political agenda.¹⁰⁷ Ostrich-like, it has buried itself in its mythology, abdicating its function as a forum for debate on critical issues. In the process, the Court has lowered our constitutional aspirations and undermined its own legitimacy.

105. S. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* 282 (1989).

106. L. TRIBE, *supra* note 73, at §§ 7-2, 8-6. As Justice Frankfurter noted: "Basic human rights expressed by the constitutional conception of liberty were equated with theories of laissez-faire. The result was that economic views of confined validity were treated by lawyers and judges as though the Framers had enshrined them in the Constitution." *AFL v. American Sash & Door Co.*, 335 U.S. 538, 543 (1949) (Frankfurter, J., concurring) (footnote omitted).

107. Indeed, the current Term has fewer cases on the docket than any Term since 1954. 59 U.S.L.W. 3173 (Sept. 18, 1990).