AFFIRMATIVE ACTION: TEMPORARY MEASURE OR PERMANENT SOLUTION ~ THE FUTURE OF RACE BASED PREFERENCES IN HIRING

by Le Von E. Wilson'

Justice Harlan perhaps said it best in his now famous resounding dissenting opinion which was expressed in *Plessy* v. *Ferguson}* He argued that a govemmentally enforced system of "separate but equal" racial segregation was inconsistent with the letter and spirit of the Fourteenth Amendment's equal protection guarantees. He said:

> In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances, when the rights of others, his equals before the law, are not affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved.[2]

While recognizing the perceived position of the white race, Justice Harlan went on to state what now constitutes the most famous lines of his dissent:

> . . . The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So I doubt not it will

'School of Buisness, Western Carolina University, CuLlowhee, North Carolina. [1]163 U.S. 537 (1896).

[2]*Id.*

> continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is colorblind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. [3]

AFTERMATH OF *BROWN*

Justice Harlan predicted that the court's majority opinion in *Plessy* would in time prove to be a pernicious one. Fortunately his prediction came true in later cases such as *Brown* v. *Board of Education of Topeka* Sweatt* v. *Painter*,[5] *Bolling* v. *Sharpe*[6] and others wherein the question of equal protection was raised. Obviously the most noteworthy of the cases was *Brown.* Probably no decision in the history of the Court has directly concerned so many individuals. At the time of the *Brown* case, segregation in the schools was required by law in seventeen states and the District of Columbia. In this area there were over 8 million white and 2.5 million black school children enrolled in approximately 35,000 white schools and 15,000 black schools.[7] The intrinsically difficult problems of implementing the *Brown* decision were intensified by salvos of defiance by political leaders and by vigorous defensive action in the legislatures of some states.

In another much celebrated case, *Swann v. Charlotte Mecklenburg Board of Education*,[1] the United States Supreme Court, largely in reliance on its previous decision in *Green* v. *County School Board,*[9] which required the creation of a unitary school system, suggested that the District Court has the powers to fashion a remedy which will so far as possible eliminate the present effects of past discrimination as well as bar like discrimination in the future.[10] Although courts have broad equity powers in fashioning an effective remedy

'*Id.*
♦347 U.S. 483 (1954).
5339 U.S. 629.
*347 U.S. 497 (1954).
[7]NEW YORK TIMES, May 18. 1954. **p.** 18.
*402 U.S. 1 (1971).
»391 U.S. 430 (1968).
[10]*See, e.g.,* Louisiana v. United States, 380 U.S. 145.

in an effort to eradicate discriminatory practices, the power to provide an effective remedy affords no basis for depriving others of a constitutionally protected right. If we are to assume the obvious, we must realize that a court cannot order governmental officials to take any action which would itself be unconstitutional.

In the early cases following *Brown* the courts engaged in a careful and systematic review of the problems involved in the utilization of benign racial classifications. The cases were judged by a permissive rather than a strict standard of review when a court was convinced that the purpose of the measure using a racial classification was truly benign; that is, the measure represented an effort to use the classification as part of a program designed to achieve an equal position in society for all races.

The United States Code[11] and the Fourteenth Amendment by their plain and unambiguous language accord equal rights to all persons regardless of race. Those provisions proscribe any discrimination in employment based on race whether the discrimination be against whites or blacks. This view is supported by *Gnggs* v. *Duke Power Company*[12] which held:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.[13]

BENIGN DISCRIMINATION

The issues raised in *Griggs* have often been litigated where the results of the administration of an employment exam have a disparate impact on minorities. Under most of the early minority preference provisions, a white person who, in a subsequently conducted examination fairly conducted and

"42 U.S.C 1981 provides that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue. be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

[12]401 U.S. 424 (1971).

"*Id.* at 430-431.

free of racial discrimination, obtained a higher rating than a minority person may have been denied employment solely because he was white. Is the fact that some unnamed and unknown white person in the distant past may, by reason of past racial discrimination in which the present applicant in no way participated, have received preference over some unidentified minority person with higher qualifications, in any way justification for discriminating against the present better qualified applicant upon the basis of race?

The school integration cases such as *Swann* are clearly different. Because whites have no constitutional right to insist upon segregated schools, no constitutional rights violations can be alleged in decrees ordering school integration. However, in employment situations, an absolute preference ordered by the court can operate as a present infringement on those nonminority group persons who are equally or superiorly qualified for the job in question. While a court may acknowledge the legitimacy of erasing the effects of past racially discriminatory practices, does a court have the power to implement one constitutional guarantee by the outright denial of another?

That is today, our dilemma. We are faced with the crucial question which is whether giving absolute preference to a racial minority who meets the qualification tests and standards infringes upon the constitutional rights of white applicants whose qualifications are established in a particular instance to be superior. In an effort to accommodate these conflicting considerations, the courts were willing to entertain some reasonable ratio for having carefully constructed qualification standards that were imposed for a limited period of time, or until there was a fair approximation of minority representation consistent with the population mix in the area. Although such procedures were viewed generally as a quota system, the courts did not consider them as such because as soon as the trial court's order was fully implemented, all hirings would be on a racially nondiscriminatory basis, and it could well be that many more minority persons or fewer, as compared to the population at large, over a long period of time would apply and qualify for the positions. As a method of presently eliminating the effects of past racial discriminatory practices and in making meaningful in the immediate future the constitutional guarantees against racial discrimination, the courts required more than a token representation. As a result the courts were permitted to use mathematical ratios as a starting point in the process of shaping a remedy. The United States Supreme Court found the practice to be constitutional and "within the equitable remedial discretion of the District Court."[14] It is obvious that fashioning a remedy in these cases was a practical question which differed substantially from case to case, depending on the circumstances. Affirmative Action had thus moved beyond the infancy stage.

[14] *See supra* note 8, at 25.

A full-scale attack on the early use of racial classifications in an effort to aid underprivileged groups is contained in Alexander and Alexander, "The New Racism: Analysis of the Use of Racial and Ethnic Criteria in Decision- Making."[13] The authors concluded:

> We do indeed have an obligation to aid the unjustly disadvantaged and to oppose prejudice and discrimination, but we have an equal obligation to do so without resorting to the use of irrelevant group membership criteria such as race.
> The moral and legal basis for our attacks on disadvantagement and discrimination are the same principles of liberty and justice (embodied in the Constitution as due process and equal protection) which require that we do not take irrelevant group membership into consideration. There could be no greater catastrophe for this nation than abandonment of these principles of individual equality for the spurious justice of equality among arbitrarily chosen groups.

THE IMPACT OF CROSON

In *Albemarle Paper Co. v. Moody*[16] the United States Supreme Court ruled that nondiscriminatory alternatives to testing can be used by private companies in an effort to bring blacks into the work force. In the now famous and often cited case of *Regents of the University of California v. Bakke*[1'] the Supreme Court held that while race can be taken into account as one factor in determining admission policies at a state university, the actual setting aside of a specific number of positions for minorities, thus amounting to a quota, is unconstitutional. One year following the *Bakke* decision the Court decided *Kaiser Aluminum Co. and Steelworkers of America v. Weber.*[16] In that case the Court upheld a voluntary affirmative action program which had been the result of negotiations between a labor organization and a private company even though the program favored minorities over whites who may have had more seniority. The purpose of the program was to increase minority representation in certain jobs where they had been effectively excluded. The goal of the program was to raise the level of minority participation in those jobs to a percentage which was equal to that of the community at large. In *Fullilove v. Kluznick*[19] the Supreme Court held that narrowly tailored remedies for past societal and systematic discrimination may be appropriate in limited

[15] Elaine A Alexander and Lawrence A. Alexander, 9 SAN DIEGO L REV. 190 (1972).
[16] 22 U.S. 405 (1975).
[17] 438 U.S. 265 (1978).
[18] 443 U.S. 193 (1979).
[19] 448 U.S. 448 (1980).

circumstances. In deciding the case the Court upheld a ten percent (10%) minority set-aside program which was established by Congress. In *Wygant* v. *Jackson Board of Education*[20] the Court ruled that race conscious relief would be permissible in the context of hiring, but there must be convincing evidence of past discrimination. In perhaps the most celebrated case of the 1988-89 term, the Supreme Court ruled in *City of Richmond v. Croson*[21] that the Constitution limits the power of states and local governments to reserve a percentage of their business for minority contractors if they are not correcting well documented past cases of discrimination.

In *Croson,* the City of Richmond, Virginia argued that the Supreme Court's decision in *Fullilove* should be controlling, and that as a result the city enjoys sweeping legislative power to define and attack the efforts of prior discrimination in its local construction industry. In *Fullilove,* the Court upheld the minority set aside contained in Section 103 of the Public Works Employment Act of 1977[22] against a challenge based on the equal protection component of the Due Process Clause. The Act authorized a four billion dollar appropriation for federal grants to state and local governments for use in public works projects. The primary purpose of the Act was to give the national economy a quick boost in a recessionary period. The Act also contained the following requirements: "Except to the extent the Secretary determines otherwise, no grant shall be made under this Act. . .unless the applicant gives satisfactory assurance to the Secretary that at least 10 percent of the amount of each grant shall be expended for minority business enterprises."[23] Minority business enterprises (MBE's) were defined as businesses effectively controlled by "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."[24]

The Court's strict scrutiny standard as applied in *Croson* would suggest that the Court is willing to accept only a remedial purpose as sufficiently compelling governmental action. The Court reasons that unless racial classifications are strictly reserved for remedial settings it may prove to promote notions of racial inferiority and perhaps lead to racial hostility. In order to use racial preferences, there must be adequate evidence of remedial necessity. The Principal opinion in *Fullilove* did not employ "strict scrutiny" or any other traditional standard of equal protection review. Chief Justice Burger, who wrote the opinion, noted that although racial classifications call for close examination, the Court was at the same time, "bound to approach [its] task with appropriate deference to Congress, a co-equal branch charged by the Constitution with the power to ' provide for the general welfare of the

[20]476 U.S. 267 (1986)

[21]109 S.Ct. 706 (1989).

[22]Pub. L 95-28. 91 Stat. 116, 42 U.S.C. 6701 et. seq.

[23]*See supra* note 19, at 454.

[24]*Id.*

United States' and ' to enforce by appropriate legislation[1], the equal protection guarantees of the Fourteenth Amendment."[25] The principal opinion in *Fullilove* asked two questions: first, were the objectives of the legislation within the power of Congress? Second, was the limited use of racial or ethnic criteria a permissible means for Congress to carry out its objectives within the constraints of the Due Process Clause?

On the issue of congressional power, the Chief Justice found that Congress' commerce power was sufficiently broad to allow it to reach the practices of prime contractors on federally funded local construction projects.[26] He further suggested that Congress could mandate state and local government compliance with the set-aside program under its Section 5 power to enforce the Fourteenth Amendment.[27] Next, he addressed the issue of the constraints on Congress' power to use race-conscious remedial relief. In upholding the MBE set-aside program, he stressed two factors. First was what he described as the unique remedial powers of Congress under Section 5 to enforce the Fourteenth Amendment:

> Here we deal . . . not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.[2]®

Because of these unique powers, the Chief Justice concluded that "Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct."[29]

The second factor emphasized by the principal opinion in *Fullilove* was the flexible nature of the 10% set-aside. Two "congressional assumptions" underlay the MBE program: first, that the effects of past discrimination had impaired the competitive position of minority businesses, and second, that "adjustment for the effects of past discrimination" would assure that at least 10% of the funds from the federal grant program would flow to minority businesses. The Chief Justice noted that both of these "assumptions" could be

[25]*Id.* at 472.
[26]*Id.* at 475-476.
[27]*Id.* at 476, citing Katzenbach v. Morgan. 384 U.S. 641. 651 (1966).
[28]*See supra* note 19, at 483.
[29]*Id.* at 483-484.

"rebutted" by a grantee seeking a waiver of the 10% requirement.[30] Thus, a waiver could be obtained where minority businesses were not available to fill the 10% requirement or, more importantly, where an MBE attempted to "exploit the remedial aspects of the program by charging an unreasonable price, Le., a price not attributable to the present effects of prior discrimination."[31] The Chief Justice further indicated that without this fine tuning to remedial purpose, the statute would not have "pass[ed] muster".[32]

In viewing *Croson* in light of its decision in *Full dove,* the Supreme Court stated that because Congress may identify and redress the effects of society-wide discrimination does not mean that, a fortiori, the states and their political subdivisions are free to decide that such remedies are appropriate. The Court further stated that Section 1 of the Fourteenth Amendment is an explicit constraint on state power, and the states must undertake any remedial efforts in accordance with that provision. To hold otherwise, the Court said, would be to concede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions. The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the state to exercise the full power of Congress under Section 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under Section l.[33]

THE STRICT SCRUTINY STANDARD

In *Wygant,* four members of the Court applied heightened scrutiny to a race-based system of employee layoffs. Justice Powell, writing for the plurality, again drew the distinction between "societal discrimination" which he suggested was an inadequate basis for race-conscious classifications, and the type of identified discrimination that can support and define the scope of race- based relief. The challenged classification in that case tied the layoff of minority teachers to the percentage of minority students enrolled in the school district. The lower courts had upheld the scheme based on the theory that minority students were in need of "role models" to alleviate the effects of prior discrimination in society. The Supreme Court reviewed, with a plurality of four justices reiterating the view expressed by Justice Powell in *Bakke* that "[sjocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."[54]

In applying the stricter test in *Croson,* the Court went on to say that absent searching judicial inquiry into the justification for such race-based

[30]Id. at 487-488.

[31]Id. At 488

[32]Id. At 487

[33]See *supra* note 21.

[34]*See supra* note 20, at 276.

measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. The purpose, said the Court, of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The Court further suggested that the test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.[35]

Although the decision by the Court in *Croson* did not entirely close the door on the official use of some form of narrowly defined racial preference in "extreme" circumstances, it nevertheless greatly restricted their use by state and local governments. The Court went on record to suggest that all racial classifications are subject to the strict scrutiny standard of review and that such classifications will be upheld only if they are justified by a compelling state interest and are narrowly defined to serve that purpose.

The Supreme Court made it clear that it was not totally stripping the state or local subdivision (if delegated the authority by the state) of the authority to eradicate the effects of private discrimination within its own legislative jurisdiction. In the original panel opinion, the Court of Appeals held that under Virginia law the city had the legal authority to enact the set- aside program.[36] That determination was not disturbed by the Court's subsequent holding that the Plan violated the Equal Protection Clause. This authority, said the Court, must be exercised within the constraints of Section 1 of the Fourteenth Amendment. The Court suggested that its decision in *Croson* was not contrary to its holding in *Wygant. Wygant* addressed the constitutionality of the use of racial quotas by local school authorities pursuant to an agreement reached with the local teachers' union. It was in the context of addressing the school board's power to adopt a race-based layoff program affecting its own work force that the *Wygant* plurality indicated that the Equal Protection Clause required "some showing of prior discrimination by the governmental unit involved."[37] The Court stated that as a matter of law, the city of Richmond had legislative authority over its procurement policies, and can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment. Therefore, to that extent, on the question of the city's competence, the Supreme Court suggested that the Court of Appeals erred in following such a strict adherence to *Wygant* in a case involving a state entity

[35]*See supra* note 21.
[36]J. A. Croson Co. v. Richmond 779 F. 2d 181. 184-186 (4th Cir. 1985).
[37]See *supra* note 20, at 274.

which has state-law authority to address discrimination practices within local commerce under its jurisdiction.[38]

THE FUTURE OF RACE-BASED PREFERENCES

An affirmative action program imposes a duty on employers to correct .past discrimination by giving preferences to minorities and women in the employment process. There are typically two situations in which an employer may institute such a program: 1) an employer may voluntarily institute an affirmative program in order to qualify for certain government contracts; or 2) courts may order an employer that has intentionally discriminated against minorities to institute an affirmative program. Affirmative action programs have been upheld by the United States Supreme Court in both situations.

The executive branch of the federal government has undertaken direct responsibility in the area of affirmative action programs since the beginning of these programs in Executive Order 11264,[39] signed by President Johnson in 1965.

An employer with a federal contract[40] is required to analyze its workforce in order to determine whether minorities and women are underrepresented in relation to their availability in the local work force.

Courts have occasionally imposed an affirmative action plan on an employer that has intentionally discriminated. They have ordered quotas for

[u]*See supra* note 21.

[3S]The key provision of the Executive Order is Section 202. which prohibits employment discrimination by government contractors.

> The Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or natural origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or natural origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

On October 13,1967, the President issued Executive Order 11375, adding sex to the categories for which non discrimination and affirmative action are mandated by government contractors.

Executive Order 11264 provides the basis for the federal government contract compliance program. Under the Executive Order, as amended, firms doing business with the federal government must agree not to discriminate in employment on the basis of race, color, religion, natural origin, or sex The contract compliance program is administered by the Secretary of Labor through the Office of Federal Contract Compliance Program (OFCCP).

"The regulations provide that all forms having contracts or subcontracts exceeding $10,000 with the federal government must agree to include a no-discrimination clause in the contract. In addition to requiring the no-discrimination clause, the OFCCP regulations may require that a contracting firm develop a written plan regarding its employees. Firms with contracts of services or supply for over $50,000 and having fifty or more employees are required to maintain formal written affirmative action plans for the utilization of women and minorities in their workplace.

hiring and promotion.[41] Some employers have voluntarily instituted affirmative action plans in an attempt to rectify past or present discrimination. This has prompted some white males to assert that Title VII protects them from race and sex discrimination as well. [42] They have raised the issue of reverse discrimination.[43]

The term "affirmative action" has changed in meaning since it was first introduced. Initially, the term referred primarily to special efforts to ensure that equal opportunities were available for members of groups that had been subject to discrimination. Those special efforts included public advertising for positions to be filled, active recruitment of qualified applicants from the formerly excluded groups, as well as special training programs designed to help meet the standards for admission or appointment.

More recently the term has come to refer to the necessity of providing some degree of definite preference for members of these groups in determining access to positions from which they were formerly excluded. Such preferences have been permitted to influence decisions between candidates who are otherwise equally qualified. Indeed, quite often such preferences have involved the selection of women or minority members over other candidates who are better qualified for the position.

The *Croson* majority seems to have expressed a discomfort with the

"In United States v. Paradise. 480 U.S. 149 (1987), the Alabama Department of Public Safety had been found guilty by a federal district court of "pervasive, systematic, and obstimatic" discrimination in the hiring and promotion of blacks as state troopers. The court ordered 50 percent black promotions until each rank was 25 percent black, but only if there were qualified black candidates, if a particular rank was less than 25% black, and if the Department had not developed and implemented a promotion plan that did not have an adverse impact on blacks. The U.S. Supreme Court held in a 5 to 4 decision, that the order did not violate the equal protection clause of the Fourteenth Amendment: there is compelling governmental interest in eradicating stubborn discrimination against blacks, and the one-for-one promotion requirement was sufficiently narrowly tailored to withstand even strict scrutiny analysis.

Specifically, the plan was temporary in nature, it did not require gratuitous promotions, it could be (and had been) waived by the constitution if there were no qualified black candidates, the numerical relief ordered bore a proper relationship to the percentage of nonwhites in the relevant labor force, and it did not impose an unacceptable burden on innocent white candidates for promotion.

The court noted that the plan did not bar the advancement of whites, but only postponed their promotion, and concluded that the plan represented an informal attempt to balance the rights and interests of the plaintiffs, the Department, and white state troopers.

See also Sheet Metal Workers v. EEOC 478 U.S. 421 (1986)

[c]For the application of TiUe VII to white males see generally, McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976).

[°]The decision in Martin v. Wilks, 109 S.Q. 2180 (1989) permits court-approved affirmative action settlements to be reopened if nonminority (white male) employees allege reverse discrimination.

It should be further noted that in Wards Cove Packing Co. v. Atonio, 109 S.Q. 2155 (1989) the Court held that a racial imbalance in the makeup of an employer's work force is not in itself proof of racial discrimination in hiring.

ever-increasing use of race as a criterion for distributing public resources and opportunities. The decision in *Croson* strongly suggests that the Court is becoming less tolerant to government-sponsored racial preferences. The decision, however, will not prevent courts from remedying past discrimination where discrimination is found to be the cause of racial imbalances. In those cases, the Court has left open the availability of affirmative action remedies. It appears that mere racial imbalances based on past societal discrimination or even past discrimination in a particular industry, without any showing of actual discrimination, will no longer be the basis of a broad sweeping affirmative action quota program. When we look at the basic goals of affirmative action programs, we see that most were designed and implemented for the purpose of providing a present solution to problems caused by past societal discrimination.

The *Croson* Court has not totally eliminated affirmative action but rather limited its scope. The concern of the Court is that racial preferences not become a commonplace and continuing part of the American society.

It is believed by many that companies will feel freer to discriminate, especially those which do not have a genuine commitment to a diversified work force. Some believe that these companies will use the recent Supreme Court decisions as a basis for "going back to the good old days." Some believe that the Court is moving faster than society. And still others hold the view that affirmative action should be a permanent solution.

The conservative majority of the Court appears poised to insist on proof that affirmative action plans will remedy proven bias and not just compensate for lingering past problems.

The Court is signaling a gradual end to such preferences.[44] The Court perhaps envisions a society which is color-blind, a society in which there are no classes of individuals based on race or color. Perhaps the vision of the Court is better than our own.

[44]For a better understanding of the Court's current position on race based preferences, see Metro Broadcasting, Inc. v. FCC 110 S.Ct. 2997 (1990).