1990 Thesis/~~Dissertation~~

The Civil Rights Act of 1990: Advancing Civil Rights?

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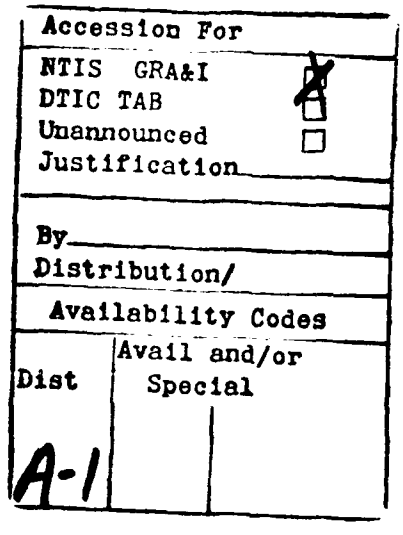
Prepared For: Professor Leibig
Graduate Paper
Labor & Public Policy Seminar
Course Number: LAWG-714-11



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THE CIVIL RIGHTS ACT OF 1990: ADVANCING CIVIL RIGHTS?

Introduction

In the aftermath of a number of Supreme Court employment discrimination decisions during the 1988-89 term, one author commented, "[t]hese cases all interpret civil rights statutes in a manner that may prompt civil rights organizations to demand legislative redress,"[1] but also cautioned, "in some cases a clear judgment as to whether a case creates serious roadblocks to remedies against discrimination may only emerge after future litigation."[2] His prediction was correct. Without waiting to see the whether the cases created any serious roadblocks for victims of discrimination, Congress acted.

On February 7, 1990, less than one year after the decisions above were announced, the proposed Civil Rights Act of 1990 (hereinafter, the Act) was introduced into both Houses of Congress.[3] Proponents of the Act, which will amend Title VII of the Civil Rights Act of 1964 and 29 U.S.C. § 1981, agree that "[i]n the past 35 [sic] years, America has made significant progress in removing the stain of bigotry and segregation from

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[1] Clark, *The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization*, 38 Cath. U. L. Rev. 795, 811 (1989).

[2] *Id.* at 812.

[3] The Civil Rights Act of 1990 (hereinafter, the Act) was introduced in the Senate as Senate Bill 2104 (hereinafter, S. 2104) and House Resolution 4000 (hereinafter, H.R. 4000). Both versions of the legislation are identical.

our land."[4] However, they claim that over the past year the Supreme Court has issued a series of rulings that mark "an abrupt and unfortunate departure from its historic protection of civil rights."[5]

The stated purposes of the proposed legislation are to respond to the recent Supreme Court decisions by restoring the civil rights protection supposedly limited by those decisions and to strengthen existing laws to increase deterrence and adequately compensate victims of discrimination.[6] However, the Act undeniably does much more than just address recent Supreme Court decisions. The Act will entirely restructure the existing civil rights scheme in the areas of disparate impact analysis, the handling of "mixed-motive" cases, bars to collateral attack, limitations on actions, the availability of compensatory and punitive damages, attorneys fees, and expert witness fees. The

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[4] 136 Cong. Rec. S 1018 (February 7, 1990).

[5] *Id.*

[6] Section 2 of the Act reads as follows:

"(a) Findings.- Congress finds that-

(1) in a series of recent decisions addressing employment discrimination claims under Federal law, the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protections; and

(2) existing protections and remedies under Federal law are not adequate to deter unlawful discrimination or to compensate victims of such discrimination.

(b) Purposes.- The purposes of this Act are-

(1) respond to the Supreme Court's recent decisions by restoring civil rights protections that were dramatically limited by those decisions; and

(2) to strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination."

proposed legislation is not merely restorative or curative, but is in many respects new and radical.

Given the stated purposes of the Act, an analysis of the necessity or desirability for passing such legislation must determine: (1) whether the recent Supreme Court rulings have the adverse impact on civil rights claimed by proponents of the Act; and (2) whether the Act itself will be beneficial to the advancement of civil rights. Since specific sections of the Act have been drafted in response to specific Supreme Court cases, my analysis of both issues will be discussed by comparing past court decisions with key sections of the proposed Act.

In ultimately answering both questions in the negative, I have reached my conclusions based on three fundamental concepts which guided the 1964 Congress in the enactment of Title VII, and which I believe to be necessary to any effective civil rights legislation. Those three principles are: (1) employment discrimination law should protect individuals from arbitrary employment discrimination, but absent discrimination, should not be concerned with numerical balancing of all protected groups within all job classifications; (2) employment discrimination laws should intrude as little as possible on the authority of employers to make employment decisions; and (3) voluntary compliance and prompt and inexpensive dispute resolution best serves those whom Title VII seeks to protect.[7]

[7] 110 Cong. Rec. 13,088, et. seq.

Review of the various sections of the Act reveals that its proponents consistently seem to focus on the mistaken premise that the effectiveness of civil rights laws can be measured solely by reference to how many plaintiffs win cases, or how uniform the representation of each protected class is within each of the employer's job classifications. They seem to lose sight of one of the original purposes of the Act, which was to encourage conciliation, voluntary compliance with the law, and swift and inexpensive resolution of disputes.[8]

There is no doubt that discrimination in employment still exists, and appropriate efforts should be made to eradicate all forms of discrimination. But if anything, the advancement of civil rights protection may be better served by adhering to the fundamental concepts above. Any revision of the civil rights laws should focus on simplifying and streamlining the mechanisms for addressing employee concerns, rather than endorsing litigious procedures that result in protracted litigation and intensive court and agency supervision of businesses.[9]

The remedial provisions of Title VII were patterned after the National Labor Relations Act (NLRA).[10] In fact, in the legislation as originally proposed, the Equal Employment

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[8] Written statement of Glen D. Nager before the House Committee on Education and Labor and the Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, March 20, 1990, p. 7.

[9] See, Clark, supra., p. 817; Written Statement of Victor Schachter before the Committee on Education and Labor and Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, March 13, 1990, p. 14.

[10] Clark, supra., p. 815.

Opportunity Commission (EEOC) would have had authority to decide its own cases after an adversarial hearing and to issue its own orders.[11] Unfortunately, this provision was eliminated in a compromise to gain support for passage of Title VII, leaving the EEOC with only the power to investigate allegations of discrimination and either sue employers on behalf of individuals or issue right to sue letters to the individuals who were discriminated against.

One consequence of this compromise has been the salutary role the federal courts have played in fleshing out the skeletal framework of the statute, which lacked specificity in a number of vital areas. As one former EEOC Commissioner has stated, "Congress left it largely to the courts to mold Title VII into the historic and effective tool it often has been."[12]

Lest only one side of the tale be told, it should be noted that there are two recent Supreme Court decisions which appear to warrant legislative action by Congress: *Patterson v. McLean Credit Union*, which limits the scope of 42 U.S.C. § 1981, and *Lorance v. AT&T Technologies, Inc.*, which sets affects the point from which the statute of limitations runs in Title VII cases. With the possible exception of the decisions in those cases, which are

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[11] Norton, *Equal Employment Law: Crisis in Interpretation - Survival Against the Odds*, 62 Tulane L. Rev. 681, n. 3 (March 1988). See also, M. Sovern, *Legal Restraints on Racial Discrimination in Employment*, 205-09 (1966); Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 Brooklyn L. Rev. 62, 85-85, 96-97 (1964); Rosen, *Division of Authority Under Title VII of the Civil Rights Act of 1964: A Preliminary Study in Federal-State Interagency Relations*, 34 Geo. Wash. L. Rev. 846, 891 (1966).

[12] See, Norton, *id.*, p. 695.

discussed more fully below, the Supreme Court has not reduced any of the protection available under our civil rights laws. The Court has continued to balance the interests of protected individuals in equal employment opportunities while limiting intrusion on the legitimate business decisions of employers. As stated by one author:

> "In short, the new majority on the Court has signaled that future rulings on employment discrimination will turn on an examination of each individual employment relationship or practice and not on presumptions, statistics, inferences and other technical legal devices. They have sent a clear message that affirmative action and minority set-aside programs will not receive automatic approval but will be carefully scrutinized to ensure that they do not unduly trample the rights of nonminority, nonprotected employees.
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> This is welcome news for employers of all sizes and descriptions because these decisions give them a chance to defend against civil rights related employment suits on an equal footing with their adversaries.
>
> On the other hand, the decisions should not be cause for alarm among civil rights proponents; contrary to the more intemperate reactions on both sides, the major victories of the civil rights movement of the 1960's have been left intact. The Court's fundamental devices for assessing employment discrimination remain in place."[13]

While the majority of the Court's recent decisions appear to take to heart the fundamental principles behind the enactment of Title VII, the following analysis of the major sections of the Act will reveal clearly that it seems to be designed to undermine those principles. Some of the major changes wrought by the Act are in the area of disparate impact analysis. In order to see the

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[13] F. Coleman, *New Rules for Civil Rights*, 75 A.B.A.J., p. 78 (Oct. 1989).

effect the Act has had, some review of traditional disparate impact analysis is necessary.

DISPARATE IMPACT ANALYSIS PRIOR TO THE ACT

One of the prime examples of the Supreme Court's advancement of civil rights law has been its creation and expansion of the disparate impact theory, first used in *Griggs v. Duke Power Co.*[14] Proponents of the Act argue that a recent Supreme Court decision, *Wards Cove Packing Co. v. Antonio,*[15] overruled *Griggs* and drastically changed the disparate impact theory. In order to determine whether they are correct, it is necessary to briefly review the evolution of disparate impact analysis.

Simply stated, the disparate impact theory holds that a facially neutral business practice which disproportionately excludes applicants or employees from a protected class cannot be used, even if the employer has no intent to discriminate, unless the employer can show a business necessity for the criteria. Business necessity under *Griggs* traditionally exists wherever an employer's legitimate goals of safety and efficiency are significantly served by (even if they do not require) the challenged selection criteria. The *Griggs* court struck down Duke Power Company's use of a general intelligence test and a high school completion requirement, since they were adopted "without

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[14] 401 U.S. 424 (1971).

[15] 109 S. Ct. 2115 (1989).

meaningful study of their relationship to job performance ability."[16]

In an effort to balance the interests of protected individuals with the rights of employers to make legitimate business decisions without court interference, the court established a system of allocating burdens. Under the *Griggs* allocation of burdens, once an employee shows that the practice disproportionately disqualifies members of a protected class, the employer must produce evidence that the employment practice "bears a demonstrable relationship to successful performance of the jobs for which was used."[17]

A few years after the *Griggs* decision, in *Albemarle Paper Co. v. Moody*,[18] the Supreme Court rejected a paper mill's testing program which disproportionately impacted black employees because the employer failed to show that the tests were job related. In *Albemarle*, the Court introduced a third step in the allocation of burdens: if an employer does prove job relatedness, the burden shifts back to the employee to show that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest."[19]

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[16] 401 U.S. at 431.

[17] *Id.*

[18] 422 U.S. 405 (1975).

[19] *Id.* at 425.

Until 1988, all of the disparate impact cases decided by the Supreme Court had involved objective criteria, such as test results, height and weight requirements, or the necessity of a high school diploma. The Supreme Court had not decided whether the disparate impact analysis could be used where subjective criteria, such as judgment, honesty, or loyalty were involved. The federal circuit courts were in conflict regarding the permissibility of challenging an employer's use of subjective criteria, in its hiring and promotion practices. Plaintiffs had frequently attempted to use the disparate impact theory to challenge subjective practices related to job assignments, promotion, transfer, and salary decisions, as well multifactor performance assessment policies. Courts in the Second, Third, Sixth, Ninth, Tenth, Eleventh, and District of Columbia Circuits permitted the disparate impact analysis to be used in such cases. The Fourth and Fifth Circuits did not. The Seventh and Eighth Circuits were inconsistent in their approach to the issue, and the First Circuit had not addressed the issue.[20]

Prior to June 1988 three major issues relating to the use of the disparate impact theory were unresolved by the Supreme Court: (1) whether plaintiffs may challenge subjective employment practices or criteria under this theory, (2) if so, what evidentiary burden must defendant employers meet to successfully rebut assertions that subjective practices are violative of Title

[20] Lee, *Subjective Employment Practices and Disparate Impact*, Emp. Rel. L. J., Vol. 15, No. 3, p. 404 (Winter 1989/90).

VII, and (3) whether plaintiffs may attack the cumulative effects of an employer's practices instead of identifying each of the specific policies or practices that disfavor a protected class.[21]

In an 8-0 opinion in June 1988, the Supreme Court decided in *Watson v. Fort Worth Bank and Trust*[22] that the disparate impact theory could be applied to cases involving subjective employment criteria. Justice O'Connor's opinion suggests that the court sanctioned the disparate impact analysis for subjective practices because of concern that an employer could simply combine an objective criterion with subjective practices to insulate itself from the *Griggs* impact analysis and recognition that "undisciplined" subjective decision-making could have the same discriminatory effects as a system pervaded by intentional discrimination.[23] The court could not reach a consensus on the two remaining issues.

The day after announcing its *Watson* decision, the Supreme Court granted certiorari in *Wards Cove* to determine what standard of causation must be met by plaintiffs in establishing a prima facie case of discrimination under the disparate impact theory. This case gave the Court the opportunity to consider for the second time what burden employers must meet to establish business

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[21] *Id.*

[22] 108 S. Ct. 2777 (1988).

[23] *Id.* at 2786. See also, T. Sampson & E. Lyons, *Recent Developments in Title VII Actions*, 31 For the Defense pp. 8-10, 4 (Sept. 1989).

necessity and the propriety of allowing plaintiffs to attack a multifactor hiring or promotion scheme on the basis of its cumulative effects.[24]

Regarding the issue of causation, the majority opinion of Justice White stressed that Supreme Court rulings in previous disparate impact cases

> "have always focused on the impact of *particular* hiring practices on employment opportunities for minorities [emphasis in original]. Just as an employer cannot escape liability under Title VII by demonstrating that 'at the bottom line,' his workforce is racially balanced (where particular hiring practices may operate to deprive minorities of employment opportunities), see *Connecticut v. Teal*... a Title VII plaintiff does not make out a case of disparate impact simply by showing that 'at the bottom line,' there is a racial *imbalance* in the workforce [emphasis in original]. As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack."[25]

It is clear then, that employees must attack a specific practice or a specific combination of practices in establishing a prima facie case, rather than relying on the bottom line analysis.

Regarding the employer's burden in rebuttal of a prima facie case, the majority opinion stated unequivocally that only the burden of producing evidence of a legitimate business

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[24] The facts of the case involved a challenge to the hiring, promotion, and work assignment practices at two Alaska salmon canneries. Filipino and Native American unskilled (cannery) employees charged that the canneries' use of nepotism, rehire preferences, separate hiring channels for unskilled and skilled (noncannery) jobs, and refusal to promote from within, resulted in a work force segregated by national origin and race. Noncannery workers were predominantly white, and cannery workers were overwhelmingly minority members. In addition, the housing and eating facilities for cannery and noncannery workers were segregated.

[25] 109 S. Ct. at 2124.

justification shifts to the employer once a plaintiff proves a prima facie case. The ultimate burden of persuasion remains at all times with the plaintiff.

The Court in *Wards Cove* gave additional insight into what is required for an employer to meet the burden of production by stating that the dispositive issue with respect to business necessity is whether "a challenged practice serves, in a significant way, the legitimate employment goals of the employer."[26] The Court stated "the touchstone of the inquiry is a reasoned review of the employer's justification for his use of the challenged practice,"[27] neither accepting "a mere insubstantial justification," nor requiring that the employment practice be "essential" or "indispensable."[28]

The Court acknowledged that "some of our earlier decisions can be read as suggesting that the burden of persuasion shifted to the employer in impact cases,"[29] but stated that those cases should have been understood to mean an employer's burden is one of production, not persuasion.

Early on, the *Griggs* decision had created confusion among lower courts by seeming to endorse two competing theories of equality: the equal treatment theory, which seeks to guarantee

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[26] *Id.* at 2125.

[27] *Id.* at 2126.

[28] *Id.*

[29] *Id.* at 2126.

fair process in hiring, and the theory of equal achievement, which is result oriented in the sense that it strives for racial parity after years of discrimination.[30] For example, the *Griggs* court supported the job redistribution goals of the equal achievement theory by indicating that facially neutral employment practices aren't allowable if they "freeze" the status quo of prior discriminatory employment practices.[31] While this implicit endorsement of preferential hiring is consistent with the equal achievement theory, the Court seemed to endorse the merit-based principle of equal treatment when it stated "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins."[32] As a result of the tension between the two competing theories of equal opportunity in *Griggs*, lower courts applying the decision often differed on the degree of justification required of an employer

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[30] The equal treatment theory, one of color blindness, urges that employers make hiring decisions without regard to race (and presumably sex). Job applicants should compete purely on the basis of merit, thus free from the handicap of racial prejudice. See Comment, *The Business Necessity Defense to Disparate-Impact Liability Under Title VII*, 46 U. Chi. L. Rev 911, 921 (1979).

The theory of equal achievement focuses on the disabling effects of previous discrimination that prevents many minorities from being competitive for certain positions. Because even "color blind" practices may eliminate minorities from consideration because prior discrimination made them less competitive, any practice having an adverse impact on minorities or other protected groups requires a compelling justification. See Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 Cornell L. Rev. 1, 12 (1979). See also, Fiss, *A Theory of Fair Employment Laws*, 38 U. Chi. L. Rev. 235, 244-249 (1971).

[31] 401 U.S. at 430; see also, Liebman, *Justice White and Affirmative Action*, 58 U. Colo. L. Rev. 471, 474 (1987).

[32] 401 U.S. at 436.

to uphold a practice which created a disparate impact.[33] *Griggs* added to the confusion by speaking in terms of both "business necessity" and "relat[ion] to job performance."[34]

Wards Cove resolved the conflict inherent in *Griggs* by implicitly adopting the theory of equal treatment. By excluding criteria that fail to measure merit, *Wards Cove* focuses on the fairness of an employment practice rather than the results.[35] This decision brings the Court full circle, articulating the equal treatment theory, which is consistent with the legislative intent behind Title VII[36] and merges what some courts had held to be distinctly different burdens of allocation in disparate impact and disparate treatment cases.[37] The merging of the

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[33] See *Contreras v. City of Los Angeles*, 656 F. 2d 1267, 1275-76 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982) (requiring that a practice be "job-related") with *Green v. Missouri Pacific R.R.*, 523 F. 2d 1290, 1298 (8th Cir. 1975)("[B]usiness necessity...connotes an irresistible demand.").

[34] 401 U.S. at 431.

[35] See, *The Supreme Court - Leading Cases III*, Harvard U. L. Rev., Vol. 103:137, p. 320, 356 (1989).

[36] 401 U.S. at 434 ("Proponents of Title VII sought throughout the debate to assure the critics that the Act would have no effect on job-related tests."); Senator Humphrey declared during the debate that "the word discrimination...means different treatment. That is all it means." 110 Cong. Rec. 5864 (1964) (remarks of Sen. Humphrey). In urging passage of the Act, Senator Muskie added, "[The Act] seeks to do nothing more than to lift the Negro from the status of inequality to one of equality of treatment." *Id.* at 14,238 (remarks of Sen. Muskie). According to a memorandum placed in the record by Senator Case, "Title VII says merely that a covered employer cannot refuse to hire someone simply because of his color;...it expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications." *Id.* at 7247; 42 U.S.C. 2000e-2(j) (1982) states, "Nothing contained in this subchapter shall be interpreted to require any employer...to grant preferential treatment to any individual or to any group...on account of an imbalance which may exist with respect to the total number or percentage or persons of any race...."; See also, Gold, *Griggs Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 Indus. Rel. L.J. 429, 489-503, 564-567 (1985)(analyzing the legislative history of Title VII); Helfand & Pemberton, *The Continuing Vitality of Title VII Disparate Impact Analysis*, 36 Mercer L. Rev. 939, 944 (1985).

[37] T. Sampson & E. Lyons, *supra.*, p. 7.

burdens will aid in bringing consistency to the implementation of Title VII.

Proponents of the Act contend that the *Wards Cove* decision eliminates the disparate impact model introduced in *Griggs*. However, the case doesn't reach that far. Plaintiffs retain the weapon of disparate impact, and may now apply it even to cases involving subjective employment criteria. *Wards Cove* conforms disparate impact law with the equal treatment theory originally espoused in Title VII, and resolves much of the ambiguity that arose out of the *Griggs* decision.

Some of the concern by proponents of the Act is undoubtedly based on the fear that plaintiffs will be unable to identify a particular practice or group of practices that actually cause a workforce imbalance. However, in view of the liberal discovery rules and the record-keeping requirements of the EEOC's Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1 *et. seq.* (1988), information concerning the effects of an employer's practices is as readily available to plaintiffs as it is to the defendant. In addition, plaintiffs may use requests for admission to force the employer to admit what factors are used in making employment decisions and what factors the employer will rely on in articulating reasons to justify selection criteria. With such information, plaintiffs can employ multiple regression analyses to identify and isolate the effects

attributable to the various employment practices used by an employer.[38]

DISPARATE IMPACT UNDER SECTION 4 OF THE ACT

In introducing the Act, Senator Kennedy stated:

> "In the *Wards Cove* decision, the Court unfairly shifted a key burden of proof from employers to employees, in cases involving practices that operate to exclude minorities and women. Hundreds of cases in the past two decades have struck down subtle and not-so-subtle practices designed to keep minorities and women from participating fully and fairly in our economy. By shifting the burden of proof to workers, the Supreme Court has made it far more difficult and expensive for victims of discrimination to challenge the barriers they face.
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> *Wards Cove* was a 5 to 4 decision in 1989 that overruled the unanimous *Griggs* decision by Chief Justice Burger in 1971. Chief Justice Burger was right in 1971, and Congress should restore the law in 1990.
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> What is at stake in this apparently technical restoration of the law is of profound importance for the future of our country. Ninety-one percent of the growth in the Nation's workforce in the 1990's will be women and minorities. If America is to compete successfully in the world, Congress cannot look the other way while the Supreme Court erects artificial and senseless barriers to their full participation in our economy."[39]

There are three aspects of the *Wards Cove* decision which proponent of the Act seek to change: (1) The requirement that the plaintiff identify the specific elements of the employer's

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[38] Regression analysis is a technique that seeks to correlate one hypothesized factor (e.g. the employer's nondiscriminatory explanation of hiring practices) with the actual results of hiring. Multiple regression is a similar technique, except that it seeks correlations when multiple factors are involved. See, Campbell, *Regression Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet*, 36 Stanford L. Rev. 1299 (1984).

[39] 136 Cong. Rec. S 1018 (February 7, 1990) (remarks of Sen. Kennedy).

practice that is causing the disparity; (2) The requirement that the burden of persuasion remain with the plaintiff at all times; and (3) the ability of a defendant to justify disparate impact by showing that the challenged practice serves, in a significant way, legitimate employment goals, even though the practice is not essential or indispensable.[40]

Section 4 of the Act[41] will not require the plaintiff to identify specific elements of the employer's business practices that create a disparate impact. Instead the plaintiff will be allowed to establish that an employment practice or "overall employment process" is unlawful when it results in disparate impact upon a protected group. Section 3(n) of the Act defines

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[40] Written statement of N. Thompson Powers before the House Committee on Education and Labor and the Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, February 27, 1990, pp. 2-3.

[41] Section 4 of the Act provides:

"Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end thereof the following new subsection:

'(k) Proof of Unlawful Employment Practices in Disparate Impact Cases.-

(1) An unlawful employment practice is established under this section when-

(A) a complaining party demonstrates that an employment practice results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate such practice is required by business necessity; or

(B) a complaining party demonstrates that a group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national, and the respondent fails to demonstrate that such practices are required by business necessity, except that-

(i) if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact; and

(ii) if the respondent demonstrates that a specific employment practice within such group of employment practices does not contribute to the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(2) A demonstration that an employment practice is required by business necessity may be used as a defense only against a claim under this subsection.'."

the term "group of employment practices" as "a combination of employment practices or overall employment process." Since the plaintiff would not be required to identify a specific practice or group of practices, "[t]he legal inquiry would be changed from an examination of a single suspect practice into an open-ended inquisition of an employer if its total workforce did not reflect some idealized numerical balance suggested by a plaintiff."[42] By allowing the plaintiff to base a disparate impact case on the results of an "overall employment process," the Act will effectively create the presumption that any workforce imbalance is the result of employment discrimination. The Act appears to ignore the fact that there may innocent causes for such an imbalance. As stated by Justice O'Connor in *Watson*

> "It is completely unrealistic to assume unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. It would be equally unrealistic to suppose that an employer can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their workforces."[43]

In essence, the plaintiff is allowed to use "bottom line" statistics to show disparate impact. Without pointing to a specific practice or practices, the plaintiff need only point to the entire list of the employer's selection practices and requirements: where it recruits, where it advertises, when it

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[42] Written statement of Lawrence Z. Lorber before the Senate Committee on Labor and Human Resources, February 27, 1990, p. 4.

[43] 108 S. Ct. at 2787.

accepts applications, what qualifications it imposes, requirements for interviews or references, and so on. Without establishing causation between any particular practices and the disparate impact, plaintiff has made a prima facie case under the Act. The employer must then go through each and every employment selection criterion that he uses, and prove which ones have no disparate impact. After doing that, if any of the practices have a disparate impact, the employer must then prove that the particular practice used is essential to effective job performance. It will be hard enough to prove that objective criterion, such as height and weight requirements, are essential to effective job performance, but it will be impossible to prove that subjective factors such as honesty, loyalty, and judgment are essential.

The effect of the Act is to reject long accepted Title VII jurisprudence. In *Connecticut v. Teal*[44] and *New York Transit Authority v. Beazer*[45] the Supreme Court rejected use of such a "bottom line" analysis and required that plaintiffs prove that a particular practice or practices caused the disparate impact. Perhaps the case most directly on point is *Furnco Construction Corp. v. Waters.*[46] In that case, the court specifically held that where plaintiffs challenged an employer's hiring processes, which involved

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[44] 457 U.S. 440, 446-448 (1982).

[45] 440 U.S. 568, 587 n. 31 (1979).

[46] 438 U.S. 567 (1978).

delegating responsibilities to a supervisor who hired mostly former employees who had worked for him previously, the case should be analyzed as a disparate treatment case rather than a disparate impact case. This provision of the Act would also apparently conflict with § 703(j) of Title VII, which expressly states that employers are not required to maintain numerical balances or grant preferential treatment to eliminate numerical imbalances, yet the Act does not purport to amend that section. Absent some indication of intentional discrimination or identification of an employer practice causally connected to the such an imbalance, there is no sound reason to find a prima facie violation of Title VII.

The second area the Act seeks to address is the requirement of *Wards Cove* that the burden of proof always remains with the Plaintiff. If the plaintiff succeeds in proving a prima facie case, the Act will place the burden of persuasion on the employer to prove that the employment practice causing the disparate impact is justified by "business necessity."

Proponents of the Act attempt to justify the shifting of the burden of proof to the employer by interpreting *Wards Cove* as requiring that plaintiffs undertake the virtually impossible task of proving a negative, i.e., the absence of any conceivable business justification for a challenged practice. *Wards Cove* never imposed such an obligation. A plaintiff's only obligation under *Wards Cove* is to show that alternative business practices with no disparate impact can be used as effectively as the

challenged practice. This is consistent with the reason for the underlying allocation of burdens, which is simply to facilitate the orderly and focused presentation of evidence.[47]

By placing the burden of persuasion upon the employer to establish justification for a particular business practice, Section 4 will relieve the plaintiff from determining whether there are any alternative practices that would be as effective for the business without the resulting adverse impact, and place the burden on the employer to prove there is no possible alternative to the way its business is operated that might lessen the adverse impact upon protected groups. The Act will implicitly overrule the standard set in *Albemarle* fifteen years ago.

Placing the burden of persuasion on the employer goes hand-in-hand with the third area the Act seeks to address, which is the test for determining whether a practice causing a disparate impact is justified. As defined by the Act, a selection criterion may be justified by business necessity only if it is proven to be ***essential to effective job performance***. This is obviously a more stringent standard of justification than the test announced in *Wards Cove*. This elevation of the degree of justification required of employers squarely conflicts with prior Supreme Court decisions, which have held that manifestly

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[47] 438 U.S. at 577. See also, *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (the disparate treatment model "is merely a sensible, orderly way to evaluate evidence in light of common experience as it bears on the critical question of discrimination.").

job-related criteria do not have to be essential or indispensable in order to be sustained,[48] even in cases where the term "business necessity" is used. Even worse, the judgment as to what is essential will not be made by the employer but by a judge or possibly a jury, and then in the context of a numerical deficiency rather than actual business needs. This is precisely the problem identified in *Furnco* of requiring courts to assume the difficult, if not impossible, burden of ascertaining what hypothetical practices would be essential to a given business. In that case, the Court astutely noted that "courts lack competence to make business decisions."[49]

The cumulative effect of the changes proposed in Section 4 is staggering. Charles Fried, a professor at Harvard Law School and former Solicitor General of the United States, stated the Act "contains some provisions that are unfair, extreme, and dangerously, pointlessly intrusive into the inner workings of private businesses and institutions of all sorts...."[50] With regard to Section 4, he stated, "This section comes as close to anything I have seen in federal legislation to imposing quota hiring throughout the private sector."[51]

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[48] See Dothard v. Rawlinson, 433 U.S. 321 (1977); *Griggs, supra.*; *Teal, supra.*; *Beazer, supra.*; and *Albemarle, supra.*, among others.

[49] 433 U.S. at 578.

[50] Written statement of Charles Fried before the Senate Committee on Labor and Human Resources, February 23, 1990, p.1.

[51] *Id.* at p.3.

Any reflection on how the Section will work makes such a conclusion inescapable. As indicated above, a plaintiff accusing an employer of discrimination by race only needs to show that the employer hires a lower proportion of minority employees than is available in the workforce. The reality is that actual work responsibilities tend constantly to alter over time, as the conditions of each job, the market, technology, governmental policies, and intellectual and social fashions change. As a result, it is rarely possible to define precisely the content of a particular job. Qualities such as alertness, common sense, compatibility with others, drive, ethical sensitivity, judgment, and originality are needed to perform almost any job. Yet, there is little agreement about how to detect or measure these qualities.

The Act places business planners in the dilemma of having to choose between quotas and the legal requirement of proving that each and every aspect of the employment process, in addition to the overall process itself, is not only reasonable and manifestly related to bona fide job requirements but is also essential or indispensable.

The sponsors of the Act provide no explanation how an employer can prove that common employment practices such as job recommendations or supervisory evaluations can be proven essential. "The legislation is based on the faulty premise that every employment practice, including interviews, supervisory

ratings and the like, can be reviewed with scientific precision."[52] It is in conflict with Title VII in that it will encourage employers to adopt quotas, something never sanctioned by Title VII, or face extremely unpredictable and risky prospects of litigation.

By forcing employers toward the use of quotas, the Act will work against the very persons it Act aims to help, primarily disadvantaged minorities and women. Employers who replace merit systems with quota systems are, in many circumstances, forced to restructure jobs to correspond with the quota systems they are using. Employers typically do so by breaking complex jobs down into their component parts in order to create a multiplicity of simple, repetitive tasks. Once this is done, as it was in a large number of jobs in the first half of the century, and again in the last two decades, individual competence becomes irrelevant and workers are treated as interchangeable parts. Job satisfaction wanes because there is no longer any challenge. In addition, having been relegated to the level of a machine, employees become replaceable, frequently either by machines or foreign workers willing to work for less pay.

A growing body of empirical evidence suggests that, as our employment discrimination and other laws have required employers to artificially restructure jobs and selection practices, we as a country have become less efficient, less productive, and less able to compete with our foreign competitors. As businesses

[52] Lorber, *supra.*, p. 3.

become less competitive, business drops off and jobs are lost. The first jobs to be eliminated are usually the marginal jobs occupied by unskilled and untrained workers, the very people that need work the most. Such results are plainly inconsistent with Title VII's goal of increasing employment opportunities for minorities and women. Making our businesses more competitive, and in the process, creating more jobs, requires that employers be allowed to experiment with employment selection devices and find the ones that work best for them.[53] To the considerable extent that Section 4 of the Act forces employers toward quotas, it is at odds with that goal.

"MIXED-MOTIVE" ANALYSIS PRIOR TO THE ACT

Another area the Act would significantly change is the traditional analysis of "mixed-motive" cases. "Mixed-motive" cases in the employment context are those cases in which both legal and illegal factors enter into an employment decision. Section 5 of the Act is intended to expand upon the Supreme Court's decision in *Price Waterhouse v. Hopkins*,[54] which was decided as a "mixed-motive" case.

Before discussing the Supreme Court's decision in *Price Waterhouse*, it will be helpful to provide some background regarding "mixed-motive" cases. The "mixed-motive" doctrine

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[53] Lerner, *Washington v. Davis: Quantity, Quality, and Equality in Employment Testing*, 1976 Sup. Ct. Rev. 263, 304-305.

[54] 109 S. Ct. 1775 (1989).

appears to have its genesis in *Mt. Healthy City Board of Education v. Doyle*.[55] Doyle was employed by the board of education as a school teacher. In 1969, he was elected president of the Teacher's Association. Beginning in 1970, he was involved in several incidents, including an argument with another teacher in which that teacher slapped him, an argument with cafeteria employees over the amount of spaghetti that he had been served, and using profanity and making obscene gestures toward students as a result of their failure to obey him. Finally, in February 1971, in response to a memorandum from the school principal relating to teacher dress and appearance, Doyle contacted a local radio station regarding the memorandum and criticized the adoption of the dress code. Approximately one month later, Doyle was notified that he would not be rehired. When he requested a statement of reasons for the decision not to renew his contract, his lack of tact in handling professional matters was cited, specifically referring to the radio call and the obscene gestures made to students. Doyle argued that he was being discharged for constitutionally protected conduct. The Supreme Court agreed that Doyle met his burden of proving that constitutionally protected conduct (the call to the radio station) was a "motivating factor" in the board's decision not to rehire him, and stated that the board then had the burden of proving by a preponderance of the evidence that it would have reached the same

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[55] 429 U.S. 274 (1977).

conclusion absent the protected conduct.

Mt. Healthy was applied in *Wright Line, Inc.*[56] in the context of Section 8(a)(3) of the Labor Management Relations Act, which makes it unlawful to discriminate against employees based on their union activities or sympathies. In that case the NLRB held that the General Counsel had the burden of proving that the employee's protected conduct was a substantial or motivating factor in the employee's discharge. The Board held that if there was another legitimate reason for the discharge the employer could avoid a violation of the Act by proving that the discharge rested on the employee's unprotected conduct, and that the discharge would have occurred absent any protected conduct.

The NLRB's *Wright Line* principle was expressly approved by the Supreme Court in *NLRB v. Transportation Management Corp.*[57] The Court, relying on the *Wright Line* precedent, characterized the doctrine as one where the employer could prevail by presenting an "affirmative defense", which under normal rules of burden of proof, placed upon the employer the burden to sustain its affirmative defense by a preponderance of the evidence.

Despite this precedent, the federal circuits had been split in deciding whether the burden ever shifted to the employer in "mixed-motive" employment cases. A number of circuits had held that the plaintiff in a "mixed-motive" case under Title VII bears

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[56] 251 NLRB 1083, 105 LRRM 1169 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

[57] 462 U.S. 393 (1983).

the burden of proving that the adverse decision would not have been made *but for* the discriminatory motive involved.[58] Other circuits had held that once a plaintiff shows that a discriminatory motive played a part in the decision, the burden of persuasion shifts to the employer to show that it would have made the same decision in the absence of the discriminatory motive.[59]

The primary import of the *Price Waterhouse* decision is that it determined which party has the burden of proving causation in a "mixed-motive" setting. Ann Hopkins worked for Price Waterhouse, a "big eight" accounting firm. In 1982, she was one of eighty-eight partner candidates, the only female, and had brought the firm more business than any of the male candidates being considered. The first time she was considered for partnership, the partners in her office supported her, but others expressed opposition on the basis of her "interpersonal skills". As a result, a one year "hold" was placed on her candidacy. Of the eighty-eight candidates that year, 47 were admitted to partnership, 21 were rejected, and twenty, including Hopkins, were held for reconsideration the following year. Of 662 partners in the firm, only seven were women. One partner, a

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[58] See *McQuillen v. Wisconsin Educ. Ass'n Council*, 830 F.2d 659 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1068 (1988); *Peters v. City of Shreveport*, 818 F.2d 1148 (5th Cir. 1987); *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175 (3rd Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986); *Ross v. Communications Satellite Corp.*, 759 F.2d 355 (4th Cir. 1985).

[59] See, *Berl v. County of Westchester*, 849 F.2d 712 (2d Cir. 1988); *Terbovitz v. Fiscal Court of Adair County*, 825 F.2d 111 (6th Cir. 1987); *Fields v. Clark Univ.*, 817 F.2d 931 (1st Cir. 1987); *Bell v. Birmingham Linen Serv.*, 715 F.2d 1552 (11th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984).

supporter of Hopkins, communicated the "hold" decision to her in a sex-based way, advising her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry,"[60] indicating that she should act more feminine to overcome the interpersonal relations problems and succeed next time. Other supporting partners referred to her in their partnership evaluations in sex-based terms as well.[61]

After being denied partnership again the following year, Hopkins filed Title VII charges of sex discrimination with the EEOC and then filed a complaint in the U.S. District Court for the District of Columbia. The firm claimed she was refused partner status because of her lack of interpersonal skills.[62]

After reviewing the case, the Supreme Court resolved the split among the circuits by holding that once plaintiff proves a prima facie case the burden shifts to the employer to prove that

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[60] 109 S. Ct. at 1782.

[61] *Id.*

[62] *Price Waterhouse* is somewhat unique in that the remarks made about Hopkins were made by her supporters. Most of the remarks made about her, taken alone, were sex-based only and were not necessarily indicators of sex bias by individual partners or the firm. Even if sex bias existed, that alone would not constitute a violation of Title VII. Action, not attitude, is a prerequisite to a finding of discrimination under Title VII. The denial of partnership was action that could have constituted discrimination in light of the fact that remarks were made by her supporters, who were among the virtually all-male evaluators for partnership status.

Even more unique about *Price Waterhouse* is how it came to be characterized as a "mixed-motive" case. At the district court level, the case was filed and tried as a pure pretext case, using the traditional *McDonnell Douglas-Burdine* disparate treatment analysis. See, *McDonnell Douglas Corp. v. Green*, 93 S. Ct. 1817 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The circuit court, realizing that it could not support the district court decision based on the traditional *McDonnell Douglas-Burdine*, characterized the case as a "mixed-motive" case in order to affirm the district court's finding of liability. For an excellent discussion of the bizarre transformation of *Price Waterhouse* from a pure pretext case into a "mixed-motive" case, see generally, Kandel, *Current Developments in Employment Litigation*, Empl. Rel. L. J., Vol. 15, No. 1 (Summer 1989), p. 101.

it would have reached the same decision absent any discrimination. In reversing the lower court's opinion that the employer's proof must be by clear and convincing evidence, all six Justices who approved of burden shifting agreed that the employer need prove only by a preponderance of the evidence that it would have reached the same decision absent any discrimination.

An important problem that remains unresolved after *Price Waterhouse* is the evidentiary showing necessary to shift the burden to the employer. Justice Brennan, writing the plurality opinion for three other Justices, would require only that gender play "a motivating part" in the decision.

Justice White, concurring in the judgment, would not allow the burden to shift unless the discrimination represents "a substantial factor," that is, *the* motivating factor, in the decision. Justice O'Connor, would only shift the burden in cases where the employer has created uncertainty as to causation by knowingly giving substantial weight to an impermissible criterion. Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia in dissent, would not depart from tradition disparate treatment analysis used in *McDonnell Douglas* and *Burdine*, and therefore, would never shift the burden of persuasion to the employer. The conflicting opinions may arise in part from the test articulated in *Mt. Healthy*, in which the Court used the terms "substantial" and "motivating" interchangeably.

There is no doubt that the burden-shifting mechanism adopted by the Court operates to the benefit of plaintiffs, who previously retained the burden of persuasion throughout the trial. The extent to which it is an advantage will depend upon how lower courts interpret the plaintiff's threshold burden of proof. If they adopt the test used by Justice Brennan, the plaintiff will avoid having to prove the degree to which the illegitimate factor influenced an employer. Although the plurality would allow any "motivating factor" to shift the burden, a majority of the court has not sanctioned that test. Should the issue be decided by the Court in the future, it is likely that the dissenters and Justice O'Connor would side with Justice White in requiring that the discrimination be either the only motivating factor or a "substantial" motivating factor in the employment decision.

"To employment lawyers, the Supreme Court's *Price Waterhouse* [decision] is far less momentous than the media spin to which it has been subjected."[63] The decision in *Price Waterhouse* doesn't change basic principles with respect to burden of proof or causation. In terms of framing its decision, the Court is consistent with its previous "mixed-motive" precedent.

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[63] Kandel, *supra*.

"MIXED MOTIVE UNDER SECTION 5 OF THE ACT

When *Price Waterhouse* was decided it was greeted as a major advance by most civil rights advocates because it represented first time the Supreme Court had recognized the concept of "mixed-motives" in the Title VII context, and allowed the burden of persuasion to shift to the employer to prove causation. Section 5 of the Act[64] will expand upon the *Price Waterhouse* decision by providing that a violation of the Act is established when a complaining party demonstrates that a prohibited practice was a motivating factor in any employment decision even though the decision was also motivated by other factors, and the employer would have reached the same decision in any event. In effect, the Act imposes strict liability on employers for discrimination even though it does not alter the employment decision.

In contrast to *Price Waterhouse*, the most drastic effect of the Act is that the employer cannot use proof that it would have made the same decision absent the discriminating factor to avoid

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[64] Section 5 reads as follows:

"(a) In General.- Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2)(as amended by section 4) is further amended by adding at the end thereof the following new subsection:

'(l) Discriminatory Practice Need Not Be Sole Motivating Factor.- Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though such practice was also motivated by other factors.'

(b) Enforcement Provisions.- Section 706(g) of such Act (42 U.S.C. 2000e-5(g)) is amended by inserting before the period in the last sentence the following: 'or, in a case where a violation is established under section 703(l), if the respondent establishes that it would have taken the same action in the absence of discrimination'."

liability under the Act. Rather, an employer can only use such proof to limit the employee's entitlement to reinstatement or back pay. The employer will still be liable for attorney's fees and other damages provided for in Title VII and the Act, such as the compensatory and punitive damages proposed in Section 8. There is a punitive aspect to Section 5 that is incompatible with the overall remedial nature of Title VII. This topic will be discussed more fully in the discussion of Section 8 of the Act, but one must wonder what legitimate basis there is for the rationale that an employer is liable for a discriminatory thought or action that has no bearing whatsoever on the adverse action taken against the plaintiff. The fact that an employer can currently avoid liability by proving he would have made the same decision absent discrimination arguably serves to limit litigation over relatively trivial occurrences that have no real effect on the adverse action. The Act will take away that disincentive.

There are two ways in which Section 5 conflicts with the original intent of Title VII. First, it will discourage settlement of "mixed-motive" cases. By adding attorneys fees, compensatory damages, and punitive damages to the price of settlement, the Act will discourage both employers and plaintiffs from settling these cases, giving rise to increased litigation, and reducing the possibilities for administrative dispute resolution. This result is completely contrary to one goal of Title VII, which was to foster conciliation and encourage swift

and inexpensive resolution of disputes.

Second, the "motivating factor" standard in Section 5 provides little guidance to employers or courts. Decisionmaking in most employment settings is a multiperson, multifactor process. While it is unfortunate, it is not uncommon for a person in the process to say things they shouldn't say, or think things they shouldn't think. In order to limit liability, should this section become law, employers will have to conduct legal reviews of personnel appraisals, supervisory ratings and similar personnel tools in order to delete any phrase or reference which could be pointed to as a "motivating factor" and which would thereby subject an employer to absolute liability.

From a business perspective, employers cannot control the thoughts of each and every employee involved in the decisionmaking process. The most an employer can do is establish an employment process that, through an effective system of checks and balances, prevents decisions from being made for illegal reasons. An employer who is successful in this endeavor should be rewarded, not penalized, by the law. Under *Price Waterhouse*, those illicit statements or thoughts will produce liability for the employer only if they were necessary to the ultimate decision. As Senator Case stated during the 1964 debates in response to claims that Title VII would become a thought control bill, "[t]here must be some specific external act, more than a mental act. Only if he does the act because of the grounds

stated in the bill would there be any legal consequences."[65]

By imposing liability wherever these statements and thoughts exist, however, Section 5 comes dangerously close to policing speech and thought rather than action.[66]

COLLATERAL ATTACK BAR: THE QUEST FOR FINALITY

While Section 5 may give cause for legitimate concern about its constitutionality, those concerns become more concrete in Section 6 of the Act.[67] Section 6 will overrule the Supreme

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[65] 100 Cong. Rec. S 7254 (1964).

[66] Nager, *supra.*, pp. 20-21.

[67] Section 6 of the Act reads as follows:
"Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by sections 4 and 5) is further amended by adding at the end thereof the following new subsection:
'(m) Finality of Litigated or Consent Judgment or Orders.-
(1) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements a litigated or consent judgment or order resolving a claim of employment discrimination under the United States Constitution or Federal civil rights laws may not be challenged in a claim under the United States Constitution or Federal civil rights laws-
(A) by a person who, prior to the entry of the judgment or order, had-
(i) notice from any source of the proposed judgment or order sufficient to apprise such person that such judgment or order might affect the interests of such person; and
(ii) a reasonable opportunity to present objections to such judgment or order;
(B) by a person with respect to whom the requirements of subparagraph (A) are not satisfied, if the court determines that the interests of such person were adequately represented by another person who challenged such judgment or order prior to or after entry of such judgment or order; or
(C) if the court that entered the judgment or order determines that reasonable efforts were made to provide notice to interested persons.
(2) Nothing in this subsection shall be construed to-
(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure;
(B) apply to the rights of parties to the action in which the litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal government; or
(C) prevent challenges to a litigated or consent judgment or order on the ground that
(continued...)

Court's decision in *Martin v. Wilks*,[68] in an effort to limit collateral challenges to litigated judgments and consent decrees.

In *Wilks*, the Supreme Court held that certain white firefighters were not estopped from challenging a consent decree entered into between the Justice Department and the City of Birmingham, to which the firefighters were not a party. The Supreme Court in *Wilks* implicitly recognized that existing rules and procedures, such as class actions, joinder, transfer and consolidation of cases, and the doctrine of laches, provide an adequate framework to allow parties to negotiate a consent decree which ensures finality to the maximum extent possible, while protecting the individual's right to due process.

Both joinder and class action procedures were created in the interest of finality and judicial economy, yet both provide conform to minimum standards of due process. Both processes recognize that the existing parties to the litigation are in the best position to determine who may be potentially affected by the relief sought in the litigation, and both require that the existing parties provide adequate notice to parties who will be

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[67](...continued)

such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction.

(3) Any action, not precluded under this subsection, that challenges an employment practice that implements a litigated or consent judgment or order of the type referred to in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order.'."

[68] 109 S. Ct. 2180 (1989).

joined or become members of a class.[69]

To be sure, the existing parties to a litigated judgment or consent decree would welcome the finality Section 6 attempts to bring to the seemingly endless lawsuits that spring up from class action consent decrees and other employment cases. However, some thought must be given to preserving the rights of affected parties who were not parties to the original litigation.

Although the purpose of Section 6 is laudable, the means by which it seeks to achieve its end likely will not be able to withstand constitutional challenge on due process grounds. Section 6 seeks to address any employment practice that *implements* a litigated or consent judgment, not just employment practices *required* by the consent judgment, which were at issue in *Wilks*. It will reach to prevent challenges to employment practices implemented to comply with a litigated judgment or consent decree, even though the particular employment practice complained of is not required by the judgment or decree.[70] By foreclosing subsequent litigation regarding a consent decree by anyone,

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[69] Large numbers of people similarly situated may be joined into litigation through the class action mechanisms of Federal Rule of Civil Procedure 23. The court, in certifying a class, must ensure that the proper notice is given to prospective class members and that their interests are adequately represented. Parties to a consent decree can use the joinder procedures under FRCP 19 to join parties that it knows have an interest in the proceeding. Through the use of joinder other interested parties are provided with a full complement of due process safeguards that are not available in the Fairness hearing process used when a consent decree has been entered into by the existing parties. For example, they receive notice by summons, a date certain after which default judgment may be entered, full discovery rights, a full evidentiary hearing, and the right to appeal adverse decisions. The fact that joinder of parties will involve some cost should be of no consequence. If the parties want to engage in a settlement the cost of which a third party will bear, they should pay the price of joinder or have to face the claims of those third parties in the future. See Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987

[70] Nager, *supra*., p.21.

including those who may be affected by the decree, but were not an original party to it, the judgment is made binding on parties who were not privy to the litigation in which the judgment was entered. Such a result is contrary to the fundamental principle of American jurisprudence that it "is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy" to the litigation in which that judgment was entered.[71]

Arguably, under the present language of the Act, every time an employer is sued under Title VII, the employees of that employer, as well as the prospective employees of that employer, must intervene to preserve their right to contest a decree which might possibly affect their rights regarding seniority, future advancements, continued retention, or the myriad of other personnel issues that arise from day to day. Uncertainty by nonminorities about their standing to participate, or the need to bear the expenses of litigation, mean that they will often discover that their rights have been compromised but that they are too late to intervene. This situation occurred in *Wilks*, where the nonminority firemen tried to intervene prior to entry of the consent decree in 1981. The City of Birmingham and the Justice Department argued against intervention, claiming that

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[71] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979). See also, *Blonder-Tongue Laboratories, Inc. v. University Foundation*, 402 U.S. 313, 328-29 (1971); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969); *Hansberry v. Lee*, 311 U.S. 32, 40-42 (1940); *Davis v. Wood*, 1 Wheat. 6, 8-9 (1816); *Ashley v. City of Jackson*, 464 U.S. 900, 902 (1983)(Rehnquist, J., joined by Brennan, J., dissenting from denial of certiorari); C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure, Vol. 18 C., §4449, p. 417 (1st ed. 1981).

they should have intervened five years earlier when the case was initiated.

Section 6 makes it clear that current standards of intervention under Federal Rule of Civil Procedure 24 remain unchanged. While future litigation of their interests is barred under the Act, interested nonparties who attempt to intervene will still be faced with claims of untimeliness and lack of standing. In any event, the Supreme Court held long ago that the mere availability of the process of intervention is not a sufficient basis for binding an individual to a judgment entered in litigation to which the individual was not a party.[72]

Of course, as proponents of the Act assert, in some instances, there are exceptions to the general rule that a judgment or decree among parties to a lawsuit resolves issues among them but not issues relating to those not a party to the lawsuit. Examples of this situation occur in bankruptcy and probate statutes. The legal proceedings may terminate pre-existing rights of others. However, in those cases, there are provisions for notice reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Also, under those legislative schemes, the claims required to be asserted already exist, and the government is simply requiring that they be filed in order to ensure the termination of a legal entity, such as a business or an estate. In those types of cases, the private

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[72] See *Chase National Bank v. Norwalk*, 291 U.S. 431, 441 (1934).

interest at stake, the likelihood of government error, and the magnitude of the governmental interest are fundamentally different.[73] These factors must be considered in determining the type of hearing required.[74]

The notice provisions of Section 6 are also inadequate under due process standards. Section 6 amends Title VII by creating section 703(m). 703(m)(1)(A) provides that any person who was subject to a fairness hearing prior to the entry of a judgment or order may not collaterally attack the provisions of the judgment or order. However, a fairness hearing does not provide nonparty objectors with an adequate opportunity to be heard. Most fairness hearings do not provide objecting parties with the benefits normally afforded to parties in litigation. They are unable to engage in discovery, call witnesses, or offer evidence. Most importantly, they have no appeal rights. In contrast to objectors at a fairness hearing regarding a consent decree, a class which is approved by the Court has the right to appeal from the entry of a decree which affects its rights.

The fairness hearing process does not rise to the level of the full hearing necessary to terminate the substantive rights of nonparties. It is similar in nature to the predeprivation

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[73] See *Hansberry v. Lee*, 311 U.S. at 41-42 (strangers adequately represented by a certified class may be bound); *Montana v. U.S.*, 440 U.S. 147, 154-55 (1979)(if a party has sufficient control over the conduct of a party to the litigation, he may be treated as if he were a party); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529-30 (employer's bankruptcy action terminates right of nonparty union to enforce a collective bargaining agreement).

[74] See *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433-38 (1982).

conference in *Cleveland Board of Education v. Loudermill*,[75] where the employee is given the right to appear before the decisionmaker to object and respond to the proposed deprivation, but may not call witnesses or cross-examine those of the employer. *Loudermill* required a full hearing after the deprivation in order to allow the employee due process. Employees who are denied a promotion or discharged on the basis of discrimination are certainly entitled to no less.[76]

The notice provisions of section 703(m)(1)(B) and (C) are also inadequate. They do not require nor provide any type of notice procedure reasonably calculated to provide persons who may be affected with notice of the proceedings to which it attempts to bind them. Nor do they ensure an opportunity for adequate preparation for the hearing.[77] Finally, they do not provide for a hearing that is appropriate to the nature of the case, that occurs at a meaningful time, and that is undertaken in a meaningful manner.[78] Affected individuals need not be informed of the consequences of failing to appear, or of the rights that they will obtain by appearing. Rather, these provisions purport to bind any person, who prior to the judgment, had notice from *any source* that such judgment *might affect* his or her interests.

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[75] 470 U.S. 532 (1985).

[76] Written statement of Raymond P. Fitzpatrick, Jr. before the Senate Labor and Human Resources Committee, March 7, 1990, p. 5 n. 7.

[77] See, *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 14 (1978).

[78] See, *Boddie v. Connecticut*, 401 U.S. 371, 377-78 (1971).

Such notice, occurring before the employment practice has even come into existence, much less applied to the individual, is too general and too speculative to be constitutionally meaningful.[79]

The provisions of the Section 6 are in conflict with the Supreme Court's recent due process decision in *Tulsa Professional Collection Services v. Pope*.[80] In *Pope*, the Court held that if the interested nonparties' identity is known or "reasonably ascertainable" then termination of the appellant's claim without actual notice violates due process. *Mullane v. Central Hanover Bank & Trust Co.*[81] requires that to make a judgment binding against interested third parties, those parties are entitled to "the best notice practicable." If a person's identity and whereabouts are known, the party seeking to bind another must mail or personally serve specific notice of the action. However, even actual notice of the proceeding does not relieve the government of the affirmative duty to give an individual formal notice of a proceeding in which his rights will be finally adjudicated.[82]

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[79] See, generally, Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. 321, 344 (1988); *Goldberg v. Kelly*, 397 U.S. 254, 266-71 (1970); *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959); Laycock, *Consent Decrees Without Consent*, 1987 U. Chi. Legal F. 103, 111, 128; and *Firefighters v. Cleveland*, 478 U.S. 501, 528-29 (1986)(holding that even parties to the litigation can not be bound by a decree to which they have not consented unless they have had an opportunity to litigate their claims.

[80] 108 S. Ct. 134 (1988).

[81] 339 U.S. 306, 317 (1950). See also, *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800 (1983).

[82] See Comment, *Collateral Attacks on Employment Discrimination Consent Decrees*, 53 U. Chi. L. Rev. 147, 160-61 (1986).

The proponents of the Act claim a collateral attack bar saves judicial resources and litigation costs, but the in fact it will encourage unnecessary protective intervention applications which will expand the breadth of discrimination litigation and make it virtually unmanageable. Such a burden of voluntary intervention has never been placed on strangers to litigation.[83]

While allowing successive litigation in the traditional sense may discourage settlements that would give rise to liability to third parties, such settlements don't deserve special protection by Congress; those settlements, by definition, involve unlawful, race-conscious action, and should be condemned rather than praised. Section 6, in its present form, invites settlements that abrogate the rights of third parties and, acts as a means of shielding, and possibly promoting, unlawful employment discrimination. Yet, the Act does not appear to bar relitigation of issues by a group represented in the action where the consent decree was entered, nor by members of a group on whose behalf relief was sought by the Federal government. It appears to bar relitigation of issues only by persons that no one sought to protect. That group would include principally, if not exclusively, white males. Section 6 apparently overlooks the

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[83] See, *Chase National Bank v. Norwalk*, 291 U.S. at 441 ("law does not impose...the burden of voluntary intervention"); *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984) (individual unlitigated claims of class members are not precluded despite the fact that other class members intervened to assert individual claims.); and *Safir v. Dole*, 718 F.2d 475 (D.C. Cir. 1983) (Safir's possible future reentry into the shipping business was deemed too speculative to confer standing.).

fact that Title VII applies to them as well.[84] This raises the specter of another constitutional challenge; to the extent that Section 6 hampers white males' ability to assert their statutory rights, it may well be unconstitutional under the Equal Protection portion of the Due Process Clause.

In short, Section 6 will do nothing to further the original goals of Title VII. While it tries to achieve finality of litigation, it may well increase litigation by forcing unnecessary intervention. From both a constitutional and a policy perspective, the traditional procedures available to promote finality provide a fairer method of producing a prompt and orderly resolution of challenges to employment practices implementing litigated or consent judgments. It makes little sense to require any person who *may be* affected to participate at a time when their claims are so premature and speculative, not to mention that they may be totally unaware of the legal proceedings.[85] This is the very basis upon which Section 7 of the Act seeks to overrule the Supreme Court's decision in *Lorance* v. AT&T Technologies and extend the statute of limitations.[86]

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[84] See, *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987).

[85] See Nager, *supra.*, p. 31.

[86] 109 S. Ct. 2261 (1989).

LIMITATIONS ON ACTIONS

While Section 7 of the Act[87] accomplishes its stated purpose of responding to the Supreme Court's decision in *Lorance*, it goes well beyond a simple restoration of the law as it was prior to *Lorance*. Section 7(a)(1) of the Act quadruples the limitations period for filing charges with the EEOC from 180 days to two years. Section 7(a)(2) will further extend the limitations period by beginning the two year period at the time the adverse action impacts the employee rather than the time that the employee has notice of the action.

In *Lorance*, the Supreme Court addressed the problem of deciding what triggers the limitation period for challenges to seniority systems. Prior to 1979 the employer's facility had operated under a collective bargaining agreement that provided for accumulation of competitive seniority by all employees, regardless of job classification, on the basis of years worked in

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[87] Section 7 reads as follows:

"(a) Statute of Limitations.- Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended-

(1) by striking out 'one hundred and eighty days' and inserting in lieu thereof '2 years';

(2) by inserting after 'occurred' the first time it appears 'or has been applied to affect adversely the person aggrieved, whichever is later,';

(3) by striking out ',except that in' and inserting in lieu thereof '.In'; and

(4) by striking out 'such charge shall be filed' and all that follows through 'whichever is earlier, and'.

(b) Application to Challenges to Seniority Systems.- Section 703(h) of such Act (42 U.S.C. 2000e-2) is amended by inserting after the first sentence the following new sentence: 'Where a seniority system or seniority practice is part of a collective bargaining agreement and such system or practice was included in such agreement with the intent to discriminate on the basis of race, color, religion, sex, or national origin, the application of such system or practice during the period that such collective bargaining agreement is in effect shall be an unlawful employment practice.'."

the plant. In 1979, the collective bargaining agreement was modified with respect to higher paid "tester" positions so that seniority in that position was based on time spent as a tester. The bargaining agreement was altered shortly after women, for the first time, began transferring into the tester positions. The plaintiffs had become testers in 1978 and 1980. In 1982, as a result of a reduction in force, the plaintiffs were selected for demotion. They would not have been demoted had the former plant-wide seniority system remained in place. The plaintiffs filed EEOC charges and then sued under Title VII alleging that the 1979 collective bargaining agreement was intended to protect incumbent male employees and to discourage women from transferring into the tester positions, and thus was prohibited discrimination within the meaning of Section 703(h).

The District court granted summary judgment for the employer on the ground that the EEOC charges had not been filed within the applicable limitations period. The Seventh Circuit affirmed. The Supreme Court also affirmed. Relying on *Delaware State College v. Ricks*[88] and *United Air Lines, Inc. v. Evans*,[89] the court reasoned

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[88] 449 U.S. 250 (1980). Both *Ricks* and *Evans* limited the continuing violation theory. The continuing violation theory is one which extends forward the accrual date of the action by deeming that an ongoing violation reaccrues each time an incident in the discriminatory transaction recurs; all prior incidents are deemed timely and are a proper part of the charge if the last incident in the claim led to timely filing of a charge. In *Ricks*, a black librarian was refused tenure, and offered a conditional termination contract of one year, which he accepted. He immediately filed a grievance with the school. During the pending grievance, the school continued to plan for his termination. Upon denial of the grievance, Ricks filed a discrimination charge with the EEOC. The Court held the charge time-barred, ruling that the cause of action accrued upon his denial of tenure, and rejecting the proposition that the grievance procedure was part of a "continuing violation." The focus of *Ricks* undermined the concept of continuing violations by making it less likely that courts would even conceive of discriminatory actions as ongoing over time. See generally, Jacobs, "Ricks v.

(continued...)

that since there was no allegation that the seniority system had been administered in a discriminatory fashion (all employees with equal job seniority were treated equally), the claim depended on proof that the system was adopted with intent to discriminate. Further, since the seniority system was adopted outside the limitation period, the plaintiffs' claim on behalf of themselves and a class of female employees was time-barred. The majority concluded that its holding was consistent with the special protection accorded seniority systems under Section 703(h) of Title VII, which seeks to balance the interests of those relying upon the validity of a facially neutral seniority system with those who are discriminated against by the system.

In light of the fact that some of the plaintiffs were not even testers when the collective bargaining agreement was effective, and that none of the plaintiffs could reasonably have anticipated being harmed by the 1979 modifications to the bargaining agreement, the Court's result seems particularly harsh. As Justice Marshall stated in dissent, the "bizarre and impractical" result of the majority opinion is that "employees

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[88](...continued)
Delaware State College: An End to Continuing Violations," 7 Employee Rel. L.J. 85, 92, 100 (1981); Shulman & Abernathy, The Law of Equal Employment Opportunity (Boston: Warren, Gorham & Lamont, 1990), ¶ 7.05[6].

[89] 431 U.S. 553 (1977). In *Evans*, the Court rejected an attempt to merge the continuing violation theory to disparate impact analysis. In that case, a stewardess discharged as a result of a nonmarriage policy was subsequently rehired. She attempt to get credit for seniority for the time she was discharged. The airline refused. Evans argued that since the employer's seniority system "gives present effect to a past act of discrimination" it constituted a "continuing violation" under disparate impact analysis (See, 431 U.S. at 558). The Court rejected her analysis, holding that her claim accrued upon her discharge for violating the policy, reasoning that virtually every past violation would have a continuing effect and thus would permit a permutation of the continuing violation theory that would effectively delete the filing deadline from Title VII.

must now anticipate, and initiate suit to prevent, future adverse applications of a seniority system, no matter how speculative or unlikely these applications may be."[90]

Charles Fried, the former Solicitor General who filed a brief on behalf of the United States in *Lorance*, states, "[t]he Supreme Court's decision in that case came from no hostility to the justice of the claims, but from a sense that the Court was boxed in by its prior decisions interpreting Title VII."[91]

As Justice Marshall pointed out in his dissenting opinion, the rule adopted by the *Lorance* court could have the result of shielding intentionally discriminatory seniority systems from attack by people who never have had an opportunity to challenge them. Such a result is possible because the discriminatory reasons for adoption of such a system may become apparent only when the system is finally applied to affect the employment status of the employees it covers, which may be well after the limitations period for filing a complaint has expired.

Although the Court's decision in *Lorance* was a reasonable interpretation of prior case law, it is easy to be sympathetic with the view that, where an employment practice may not be challenged under the disparate impact theory, the statute of limitations applicable to disparate treatment challenges should begin to run from the date an individual knows or has reason to

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[90] 109 S.Ct. at 2273.

[91] Written statement of Charles Fried before the Senate Committee on Labor and Human Resources, 23 February 1990, p. 2.

know that the practice will actually be applied to him. In such circumstances, an exception to ordinary statute of limitations principles is warranted as a way to ensure that individuals do not institute premature lawsuits and that they are able to challenge employment systems when they learn or have reason to know that the system will be adversely applied to them.

By beginning the accrual of the limitations period from the time the unlawful employment practice occurs or has been adversely applied to the person aggrieved, whichever is later, Section 7 effectively reinstates the continuing violation theory that the Supreme Court tried to eliminate in *Ricks* and *Evans*. Those two cases represent the proper balance between two competing interests: vindication of employee rights on one hand and preventing employers from having to defend against stale claims on the other.

The 180 day period for filing was initially established to encourage the prompt processing of all charges of employment discrimination. One of the reasons for the short limitations period was to advance the potential for conciliation and prompt establishment of a nondiscriminatory relationship. Another was to diminish the harm to innocent co-workers, who acted in reliance on the prior employment decisions and whose career could be adversely affected by a change in policies.

There are several reasons why such an extension is not justified. To permit an employee to wait two years after becoming aware of the adverse impact of an employment practice to

file charges permits co-workers to rely to their detriment on continuation of the prior policy, creating a greater adverse impact on them when the policy is changed. Allowing a grievance to fester for two years after knowledge of the impact of the employment decision means that witnesses memories will fade, documents will be lost, misplaced or discarded, and personnel will have changed. In addition, it permits the victim of the discrimination to "grow" a potential backpay award while the employer goes without notice of any problem in the workplace. By unnecessarily expanding an employer's potential backpay liability, Section 7 may impede conciliation and resolution of disputes, another fundamental goal of Title VII.[92] A more prudent practice would be to keep the present limitations period, but allow it to be tolled until an employee knows or has reason to know that a discriminatory practice has been or will be applied to him.

Section 7 also inappropriately eliminates the extended period for filing claims in deferral states. Deferral provisions were included to give states an opportunity avoid Federal intervention redressing discrimination within their own borders. Elimination of this provision may tend to increase Federal intervention and further overburden the Federal court system.

In sum, the extension of the filing periods will undermine the conciliatory purposes of Title VII.

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[92] Written statement of James C. Paras before the Senate Committee on Labor and Human Resources, March 1, 1990, p. 17.

COMPENSATORY AND PUNITIVE DAMAGES

The sponsors of the Act represent it as a "technical restoration" of the law and an attempt to fill "gaps in our antidiscrimination laws resulting from other Supreme Court decisions."[93] Indeed, one proponent of the Act claims that

> "[t]he Civil Rights Act of 1990 introduces no new or revolutionary concepts into Title VII law. On the contrary, proposed legislation would reestablish and strengthen legal principles that have long been a part of the jurisprudence of fair employment."[94]

However, Section 8 of the Act[95] is a radical change to the very nature of Title VII. Section 8 eliminates the "make-whole" purposes of the statute that allowed it to be interpreted as a remedial statute and given broad statutory construction, and undermines the emphasis on voluntary compliance, through

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[93] 136 Cong. Rec. S 1019 and S 1021, February 7, 1990 (Comments of Senator Kennedy and Summary of the Civil Rights Act of 1990).

[94] Written statement of Judith Lichtman before the Senate Committee on Labor and Human Resources, February 27, 1990, p. 2.

[95] Section 8 of the Act reads as follows:
"Section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g)) is amended by inserting before the last sentence the following new sentences: 'With respect to an unlawful employment practice (other than an unlawful employment practice established in accordance with section 703(h))-
(A) compensatory damages may be awarded; and
(B) if the respondent (other than a government, government agency, or a political subdivision) engaged in the unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others, punitive damages may be awarded against such respondent;
in addition to the relief authorized by the preceding sentences of this subsection, except that compensatory damages shall not include backpay or any interest thereon. If compensatory or punitive damages are sought with respect to a claim under this title, any party may demand a trial by jury.'."

conciliation, settlement, and the prompt and orderly resolution of disputes.

Proponents of the Act argue that the compensatory and punitive damages available to victims of racial discrimination under 42 U.S.C. § 1981 should be available to all victims of discrimination under Title VII. The prevailing opinion among proponents of the change seems to be that Title VII in its current form does not provide adequate relief to victims of discrimination, nor adequate deterrence to employers.[96]

There are fundamental differences between the purposes of § 1981 and Title VII which provide a sensible rationale for different remedies. Section 1981 is not an employment statute. It is a contract enforcement law, created during the Reconstruction period with the goal of permitting emancipated black citizens to make and enforce contracts on the same footing as whites.[97] As one Congressional witness noted,

> "The fact that more than a century later the courts began to use § 1981 to redress discrimination in the making and enforcement of *employment* contracts does not transform §1981 into an appropriate model for Title VII's overhaul (emphasis in original)."[98]

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[96] Although a number of people testified before Congress in favor of such a change, a good overview of the position of the proponents is provided by the written testimony of Marcia Greenberger, Managing Attorney of the National Women's Law Center, before the Senate Committee on Labor and Human Resources, February 27, 1990.

[97] Written testimony of Victor Schacter before the House Committee on Education and Labor and the Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, March 13, 1990, p. 8.

[98] *Id.*

Title VII is better compared with other federal statutes[99] designed to regulate the employment relationship, such as the proposed Americans with Disabilities (ADA), in which the Senate recently declined to allow compensatory and punitive damages.[100] Congress has consistently concluded that such remedial statutes can best foster voluntary compliance by limiting remedies to "make-whole" and injunctive relief.[101]

Title VII actions have traditionally been considered equitable actions, tried before a judge, where the court has broad remedial power to award back pay, front pay, reinstatement, or any other equitable or injunctive relief it deems appropriate. Such actions have not traditionally included compensatory damages (e.g. emotional distress) or punitive damages. Section 1981 claims have traditionally been actions in both law and equity tried before a jury. Available remedies under § 1981 include

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[99] See, e.g., the National Labor Relations Act (29 U.S.C. § 141, *et. seq.*); the Fair Labor Standards Act (29 U.S.C. § 201, *et. seq.*); the Age Discrimination in Employment Act (20 U.S.C. § 621, *et. seq.*); the Occupational Safety and Health Act (29 U.S.C. § 651, *et. seq.*); the Rehabilitation Act (29 U.S.C. § 701, *et. seq.*); the Employment Retirement Security Act (29 U.S.C. § 1001, *et. seq.*); the Vietnam-Era Veteran's Readjustment Act (38 U.S.C. § 2011, *et. seq.*); and the Workers' Adjustment and Retraining Notification Act (29 U.S.C. § 2101, *et. seq.*).

[100] The Senate recently debated this problem in the context of the Americans with Disabilities Act, and concluded, for many of the reasons articulated above that compensatory and punitive damages were not appropriate in the employment discrimination context. As Senator Durenberger explained,

> "[W]e also took great effort to address the concerns many had over the punitive nature of the remedies section. Instead of allowing punitive and compensatory damages as originally introduced, the bill before us today parallels current civil rights legislation under Title II and Title VII of the Civil Rights Act of 1964...This change will help avoid some of the excessive and unnecessary litigation the original bill would have caused." [135 Cong. Rec. S 10721 (Sept. 7 1989)(Statement of Senator Durenberger).]

[101] *Id.* at p. 3.

compensatory, and in certain circumstances, punitive damages.[102]

There are good reasons why the remedies of the two statutes should differ. They are not co-extensive in coverage. Section 1981 applies only to intentional racial discrimination in the making, execution, or enforcement of contracts. It is applicable to all employers, regardless of size. The statute merely provides a private right of action without any kind of administrative support mechanism. Title VII is a more comprehensive scheme covering a broader range of discrimination which is designed to facilitate, through government investigation of claims and attempts at conciliation, a prompt resolution of employment disputes. As indicated by a unanimous Supreme Court in *Johnson v. Railway Express*, "the remedies available under Title VII and under Section 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent."[103]

Several congressional witnesses have alluded to California's experience with the availability of compensatory and punitive damages in wrongful discharge litigation as an indication that this provision will work against the fundamental principles of Title VII. When California began to allow such damages in wrongful discharge cases, courts quickly became overwhelmed with

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[102] See Holmes, *Discrimination Actions in Federal Court*, New Hampshire Bar Journal, Vol. 30:4, p. 221 (Summer 1989).

[103] 421 U.S. 460, 464 (1975).

cases. Between 1980-1986, employees won more than 70% of the cases tried before juries, with an average award of more than $645,000.[104] In recognition of the problems that such verdicts created, the California Supreme Court determined in *Foley v. Interactive Data Corp.*[105] that compensatory and punitive damages should no longer recovered in most wrongful discharge cases. After the *Foley* decision, the number of wrongful discharge cases filed in California declined dramatically.

Compensatory and punitive damages will not serve Title VII well. By producing unreasonably large verdicts, they will increase the cost of goods, making the market less efficient and competitive, and eventually culminate in a loss of jobs. They will encourage employers to retain incompetent or marginal employees, resulting in a less productive workforce. As the *Foley* court noted, "the expansion of tort remedies in the employment context has potentially enormous consequences for the stability of the business community."[106]

In addition, the availability of jury trials will undermine Title VII's concern for relatively prompt resolution of

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[104] See, Written testimony of James C. Paras before the Senate Committee on Labor and Human Resources, March 1, 1990; Written testimony of Victor Schacter before the House Committee on Education and Labor and the Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, March 13, 1990; Written testimony of Ralph H. Baxter, Jr. before the House Committee on Education and Labor and the Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, March 13, 1990; J. Dertouzos, *The Legal and Economic Consequences of Wrongful Termination*, Rand Corporation Study R-3601-ICJ (1988); Gould, *Stemming the Wrongful Discharge Tide: A Case for Arbitration*, 13 Emp. Rel. L.J. 404 (1988).

[105] 47 Cal. 3d 654, 765 P.2d 373 (1988).

[106] *Id.* at 669, 765 P.2d at 388.

discrimination claims. While a few individual plaintiffs may reap large benefits from the enactment of such a measure, the availability of damages and jury trials will reduce chances of settlement, increase litigation, prolong the resolution of cases, and ensure that alleged victims' claims, meritorious or not, will be unresolved for years to come. In 1964 Congress was concerned with the prompt resolution of disputes and elected not to include compensatory and punitive damages. The problem of delayed adjudication is even more pronounced now than in was in 1964.[107] The creation of additional damage provisions in Title VII will only exacerbate the problem. If deterrence of employers is as grave a concern as proponents of this legislation propose, perhaps a more viable alternative would be liquidated damages similar to those used in the Age Discrimination and Employment Act and the Fair Labor Standards Act. In those statutes liquidated damages established by a standard formula, and are available only upon proof of a willful violation.

A related problem ari .s from the fact that the compensatory and punitive damages are superimposed on an existing remedial scheme which already grants to successful plaintiffs the right to recover back pay, front pay, reinstatement, and injunctive relief. These are equitable remedies which are issues for the court, not the jury, while the issue whether to award compensatory and punitive damages is a jury question. What

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[107] The Federal Courts Study Committee recently estimated (*National Law Journal*, February 12, 1990) that the number of employment discrimination cases filed in federal court has increased by 2,166% since 1969.

results is a situation similar to current cases where Title VII allegations and § 1981 allegations are part of the same case. A serious and complex issue of judicial economy is apparent, and Section 8 provides absolutely no guidance as to how to resolve, or better yet avoid, inconsistent results between a judge and jury.[108]

Aside from the concerns heretofore enumerated, there should also be some consideration of possible constitutional problems with the punitive damages provisions in Section 8. Though nominally civil, punitive damages are functionally penal, giving rise to the need for due process protection when punitive damages are available. Juries must be given guidance in their decisionmaking. The standards used in Section 8 for the imposition of punitive damages are identical with the language contained in 42 U.S.C. § 1981. Although such standards probably meet the minimal requirements articulated by the Supreme Court in *Smith v. Wade*[109], they provide little guidance to courts or juries as to when punitive damages should be awarded, or what maximum damages may be imposed, essentially leaving the jury to its own devices.[110] Because Section 8 will allow punitive damages for engaging in an unlawful employment practice "with reckless or

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[108] Some circuits have addressed the issue in the context of combined Title VII and § 1981 actions. They generally hold that the jury's factual determinations on the § 1981 claim control. See, e.g., *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir. 1990); *Wade v. Orange County*, 844 F.2d 951 (2d Cir. 1988).

[109] 461 U.S. 30 (1983).

[110] Nager, *supra.*, pp. 39-41. See also, *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2923 (1989) (O'Connor, Stevens, JJ., concurring and dissenting in part).

callous indifference" to federal law, punitive damages would appear to be authorized in virtually every disparate treatment case.

Over the past few years there has been an increase in litigation challenging punitive damage provisions on due process grounds. The Supreme Court has recently granted certiorari in *Pacific Mutual Life Insurance Co. v. Haslip*[111] to determine whether the a lack of guidance contained in statutes authorizing punitive damages violates due process.

ATTORNEY AND EXPERT WITNESS FEES

In addition to providing for compensatory and punitive damages, the Act has eased restrictions on the availability of attorney fees and expert witness fees. Section 9 of the Act[112] purports to "clarify" the attorneys' fees provisions of Title

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111 58 U.S.L.W. 3620 (April 2, 1990).

112 Section 9 reads as follows:
"Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)) is amended-
(1) by inserting '(1)' after '(k)';
(2) by inserting '(including expert fees and other litigation expenses) and' after 'attorney's fee,';
(3) by striking out 'as part of the'; and
(4) by adding at the end thereof the following new paragraphs:
'(2) A court shall not enter a consent order or judgment settling a claim under this title, unless the parties and their counsel attest that a waiver of all or substantially all attorneys' fees was not compelled as a condition of the settlement.
(3) In any action or proceeding in which judgment or order granting relief under this title is challenged, the court, in its discretion, may allow the prevailing party in the original action (other than the Commission or the United States) to recover from the party against whom relief was granted in the original action a reasonable attorney's fee (including expert fees and other litigation expenses) and costs reasonably incurred in defending (as a party, intervenor, or otherwise) such judgment or order.'."

VII. In doing so, it goes far beyond reversing the Supreme Court's 1988-89 decisions in this area. It provides for recovery of additional expert witness fees in Title VII, thus reversing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*[113] As with several other sections of the Act, this will have the effect of encouraging complex and protracted litigation.

Under Title VII, attorneys' fees cannot be recovered if the judgment of the court is less than a previously proposed settlement offer.[114] Section 9 will allow recovery of attorneys' fees in any event, eliminating a realistic incentive for attorneys to evaluate their cases prior to trial and settle if warranted. Section 9 will further discourage settlement by prohibiting a waiver of attorneys' fees as a condition of settlement, reversing *Evans v. Jeff D.*[115] As the Court of Appeals for the District of Columbia noted in *Moore v. National Ass'n of Securities Dealers, Inc.*,[116] there are mechanisms already in place that will protect against unfair results that may arise when plaintiffs or their attorneys feel unfairly compelled to waive attorneys' fees.

By providing for recovery of attorneys' fees from intervenors, Section 9 effectively overrules *Independent Federation*

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[113] 107 S. Ct. 1494 (1987).

[114] See, *Marek v. Chesney*, 473 U.S. 1 (1984).

[115] 475 U.S. 717 (1986).

[116] 762 F.2d 1093, 1113 (D.C. Cir. 1985) (Wald, J., concurring opinion).

of Flight Attendants v. Zipes.[117] In that case, the Supreme Court held that plaintiffs cannot recover attorneys fees from intervenors unless their challenge is frivolous, unreasonable, or without foundation. Section 9 will allow the prevailing party to recover reasonable costs and attorneys fees from the party against whom relief was granted. This will create a situation in which an unsuccessful employer will bear the burden of paying plaintiff's attorneys' fees incurred because of the intervention of a third party, even though the intervening party may be unsuccessful.

These provisions makes little sense in light of the conciliatory purposes of the Act, which were intended to foster expeditious processing of cases and "make whole" relief. Title VII will be better served by keeping litigation as simple and informal as possible. The increased availability of expert witness and attorney fees will encourage more complex, expensive, and lengthy litigation, all toward the end of intruding on an employer's right to make business decisions.

RESTORING THE SCOPE OF 42 U.S.C. § 1981

One Supreme Court case which should be overruled is *Patterson v. McLean Credit Union*,[118] in which the Court restricted the scope of 42 U.S.C. § 1981, known as the Reconstruction Civil Rights

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[117] 109 S. Ct. 2732 (1989).

[118] 109 S. Ct. 2363 (1989).

Act. The court held that § 1981 prohibits intentional racial discrimination in the making and enforcement of contracts, but does not apply to the modification, performance, or termination of contracts. Prior to the decision in *Patterson*, § 1981 had been construed broadly and was held to apply to such things as racial harassment on the job, since an employment relationship is contractual and harassment on the job affects the terms and conditions of employment.

Purporting to interpret the "plain language" of § 1981, the Supreme Court reached an admittedly strained interpretation of the statute that was completely inconsistent with its prior precedent.[119]

However, in the *Patterson* decision the Supreme Court did not endorse racial harassment. It noted that the remedial provisions of Title VII would have been available to the plaintiff. The court was apparently questioning the efficacy of having multiple statutory forums available to remedy employment discrimination and attempted to channel such matters through Title VII, which was created specifically to deal with discrimination in employment. Section 1981 was intended to remedy racial discrimination in the making and enforcement of business contracts. The 1866 Congress that passed it undoubtedly did not

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[119] See, e.g., *Runyon v. McCrary*, 427 U.S. 160 (1976). *Runyon* first applied § 1981 to prohibit racial discrimination in the making and enforcement of private contracts and indicated that employment was in the nature of a contract. Declining to overrule *Runyon*, the Court in *Patterson* opted instead to narrow severely the scope of § 1981. By choosing an interpretation that focuses on the "plain terms" of the statute, the Court retreated from its dedication to consistency. Prior to *Patterson*, the statute had universally been interpreted much more broadly.

intend or foresee that a century later it would be applied in the employment discrimination context.

While the concerns of the Supreme Court regarding the unintended application of § 1981 to the employment discrimination context are valid, its strained departure from prior precedent will have an adverse impact on the application of the statute to its original intended purpose. Section 12 of the Act[120] will overrule the Supreme Court's decision in *Patterson*. To the extent that the Act extends the protections of § 1981 to all aspects of a contractual relationship, I believe it is consistent with the original intent of the 1866 Congress when the legislation was passed. However, this Congress should examine whether it makes any sense to allow victims of racial discrimination to allege violations of both Title VII and § 1981, and try the same facts partially before a judge and partially before a jury using different procedural rules and statutes of limitations, while trying to obtain different remedies. That is the state of the law as it existed prior to *Patterson*. If § 1981 is going to be applied in the employment discrimination context, Congress should examine whether plaintiffs ought to be required to choose an exclusive forum, and whether equal employment litigation should

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[120] Section 12 of the Act reads as follows:
"Section 1977 of the Revised Statutes of the United States (42 U.S.C. 1981) is amended-
(1) by inserting '(a)' before 'All persons within'; and
(2) by adding at the end thereof the following new subsection:
'(b) For purposes of this section, the right to 'make and enforce contracts' shall include the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.'."

involve the complexities of trying parallel federal, state, and common law counts.

While the Supreme Court may have strained the bounds of logic in reaching its decision in *Patterson*, Congress should ensure that § 1981 is not allowed to unnecessarily overlap with or undermine the provisions of Title VII. The need is not for further complex legislation, but for quick, inexpensive administrative or arbitral remedies. To that extent that it allows such an overlap the attempt to restore the provisions of §1981 that existed prior to *Patterson* may be misplaced.

OTHER CONCERNS ABOUT THE ACT

None of the remaining sections of the Act attempt to overrule, modify, or expand any recent Supreme Court decisions. However, there are several sections which should give cause for concern. Each of those sections will be addressed briefly.

Section 11[121] contains two provisions. The first provides for broad construction of all Federal civil rights laws to in order to eliminate discrimination and provide effective remedies. The second prohibits courts from using one civil rights law to limit the rights, procedures, or remedies available under another

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[121] Section 11 reads as follows:

"(a) Effectuation of Purpose.- All Federal laws protecting the civil rights of persons shall be broadly construed to effectuate the purpose of such laws to eliminate discrimination and provide effective remedies.

(b) Nonlimitation.- Except as expressly provided, no Federal law protecting the civil rights of persons shall be construed to restrict or limit the rights, procedures, or remedies available under any other Federal law protecting such civil rights."

such law. Both provisions are imprudent.

The provision for broad construction of federal civil rights laws to effectuate their purposes is simply an invitation to judicial activism that could easily cause confusion. If the "broad construction" was viewed by courts to be limiting rather than expanding, there would inevitably be the same kind of congressional "restoration" that gave rise to this legislation. Instructing courts to construe statutes on the basis of their purposes invites courts to ignore congressional intent and to substitute their own preferences. This encouragement is especially inappropriate in the employment context, where courts should be strictly construing legal rules and declining to substitute their judgments for the reasonable judgments of employers.[122]

It is equally important that courts be able to reconcile federal civil rights laws. In the context of civil rights, Section 11(b) appears to abolish the doctrine that subsequent legislation that is more specific operates to limit prior legislation that is more expansive. If that is the intent, then Section 11(b) ought to be thoroughly debated. Reconciliation is essential to preserve a coherent and manageable scheme of laws. Thus, subsequent legislation that is more specific in nature typically should be found to restrict prior legislation that is more general. To prohibit courts from reconciling statutes ignores fundamental principles of statutory construction and,

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[122] Nager, *supra*, p. 44; Lorber, *supra*, p. 44.

more importantly, will result in statutory schemes that unnecessarily and improperly interfere with each other.[123]

The purpose of Section 13 is not entirely clear. It states in its entirety "[n]othing in the amendments made by this Act shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law." This provision may constitute a recognition that expressly race-based remedies and actions that appear to be permissible under Title VII would be impermissible under § 1981, as expanded by Section 12, without the inclusion of this section. Alternatively, it may constitute a recognition that employers cannot show that affirmative action plans are essential to effective job performance and thus constitute a means for insulating affirmative action plans from the legal rules created elsewhere in the Act. In any event, this Section's purpose and effect should be clarified.

Section 14 of the Act[124] is a severability clause that attempts to insulate other provisions of the Act from any portion that may be held to be invalid. This section may be a tacit recognition of the constitutional concerns enumerated throughout this discussion.

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[123] Id.

[124] Section 14 of the Act reads as follows:
"If any provision of this Act, or an amendment made by this Act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendment made by this Act, and the application of such provision to other persons and circumstances, shall not be affected thereby."

Section 15 of the Act[125], which will make many of the substantive rules created in the Act retroactive to various dates raises serious questions of constitutionality. In general, there must be a compelling reason to make legislation retroactive.[126]

Employment discrimination laws traditionally have not been

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[125] Section 15 of the Act reads as follows:

"(a) Application of Amendments.- The amendments made by-

(1) section 4 shall apply to all proceedings pending or commenced after June 5, 1989;

(2) section 5 shall apply to all proceedings pending or commenced after May 1, 1989;

(3) section 6 shall apply to all proceedings pending or commenced after June 12, 1989;

(4) sections 7(a)(1), 7(b), 8, 9, 10, and 11 shall apply to all proceedings pending or commenced after the date of enactment of this Act;

(5) paragraphs (2) through (4) of section 7(a) shall apply to all proceedings pending or commenced after June 12, 1989; and

(6) section 12 shall apply to all proceedings pending or commenced after June 15, 1989.

(b) Transition Rules.-

(1) In General.- Any orders entered by a court between the effective dates described in subsection (a) and the date of enactment of this Act that are inconsistent with the amendments made by sections 4, 5, 7(a)(2) through (4), or 12, shall be vacated if, not later than one year after such date of enactment, a request for such relief is made.

(2) Section 6.- Any orders entered between June 12, 1989 and the date of enactment of this Act, that permit a challenge to an employment practice that implements a litigated or consent judgment or order and that is inconsistent with the amendment made by section 6, shall be vacated if, not later than 6 months after the date of enactment of this Act, a request for such relief is made. For the 1-year period beginning on the date of enactment of this Act, an individual whose challenge to an employment practice that implements a litigated or consent judgment or order is denied under the amendment made by section 6, or whose order or relief obtained under such challenge is vacated under such section, shall have the same right of intervention in the case in which the challenged litigated or consent judgment or order was entered as that individual had on June 12, 1989.

(c) Period of Limitations.- The period of limitations for the filing of a claim or charge shall be tolled from the applicable effective date described in subsection (a) until the date of enactment of this Act, on a showing that the claim or charge was not filed because of a rule or decision altered by the amendments made by sections 4, 5, 7(a)(2) through (4), or 12."

[126] In *Pension Benefit Guarantee Corporation v. R.A. Gray & Co.*, 104 S. Ct. 2709 (1984), the Supreme Court reviewed the constitutionality of retroactive provisions in the Multiemployer-Employee Pension Plan Amendments Act (MPPAA) of 1968, stating, "retroactive legislation has to meet a much heavier burden than legislation that only has future effects."

In *Gray*, the Supreme Court viewed with favor the factors considered by the Seventh Circuit in determining the constitutionality of retroactive legislation: (1) the reliance interest of the affected parties; (2) whether the interest impaired in an area previously subjected to regulatory control; (3) the equities of imposing the legislative burden; and (4) the statutory provisions that limit and moderate the impact of the burdens imposed. Normally, some sort of compelling need for retroactivity must be shown.

applied retroactively.[127] One of the overriding concerns of the 1964 Congress at the time it passed Title VII was that none of the provisions be retroactive. Proposed retroactive provisions had to be removed as a compromise to get Title VII passed.

The inequities of enacting retroactive legislation would fall most heavily on small to medium sized companies who have pending cases, sometimes in the courts for years, and who cannot afford to retry them in light of new legislation. The situations in which Congress has historically been allowed to apply legislation retroactively have normally involved legislation that expands liabilities but does not change the substance of the responsibilities of the parties under the law. The Act now before Congress represents a significant substantive departure from previous liabilities established in Title VII.[128]

To the extent that it upsets final judgments or orders entered in ongoing litigation, the Act treads aggressively on both the Due Process clause of the Fifth Amendment the Separation of Powers clause. In any event, retroactively imposing legal rules on employment decisions is fundamentally unfair, and by forcing innumerable cases to be retried, is inconsistent with the

[127] Following the Supreme Court's decision in *Geduldig v. Aiello*, 94 S. Ct. 2485 (1974), where the Court rejected an equal protection attack upon an employee-funded disability insurance system that specifically excluded pregnancy from its list of compensable disabilities, there was an outcry for legislation to overturn the system. As a result, the Pregnancy Disability Act of 1978 was passed, but Congress, in its wisdom chose not to make the provisions retroactive.

[128] Written testimony of Gerard C. Smetana before the Committee on Education and Labor and the Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, March 13, 1990, p.16.

professed concerns in Section 6 regarding finality of judgments.[129]

CONCLUSION

From the discussion above it is apparent that most of the Supreme Court's decisions of last term have not been the abrupt and drastic departure from the Court's historic protection of civil rights that proponents of the Act have claimed. In some ways these decisions have advanced civil rights. For instance, the scope of the disparate impact analysis has been expanded to cover allegations of disparate impact resulting from subjective employment criteria. The burden of proof in "mixed-motive" motive cases was placed squarely on the shoulders of the employer to show that an adverse action would have occurred despite the existence of discrimination that was a "motivating factor," although the plaintiff must still prove the prima facie case of discrimination.

It may be fairly said that some of what the Supreme Court has done does not provide the ultimate solution to the problem of employment discrimination. None of the Supreme Court decisions of last term will reduce litigation or promote the conciliatory purposes of Title VII, although it is apparent from the decisions that the court gives thoughtful consideration to the principles behind Title VII. The Supreme Court cannot create a completely new scheme to help eradicate employment discrimination. It is

[129] Naget, *supra*, p. 47.

limited by its very nature to the realm of litigation. Within the litigation framework, the Supreme Court has, with a couple of exceptions discussed earlier, worked consistently to advance civil rights. The same cannot be said of Congress.

Within the broad framework of the Constitution of the United States, Congress is free to create legislation designed to eradicate all forms of employment discrimination. The Civil Rights Act of 1990 has been introduced by some members of Congress to accomplish that goal. Will the Civil Rights Act of 1990 truly advance civil rights? The clear answer is that it will not.

The proposed legislation rejects the concept of conciliation and rapid settlement of complaints, and seems to rest on two premises, both highly dubious. First, the sponsors of the Act seem to assume that resort to protracted and complex litigation, or in the alternative, driving employers to adopt surreptitious employment quotas, are the solution to discrimination. Second, they seem to believe that discrimination remains the major problem for racial minorities in this country. There is substantial reason to question both of these assumptions.

In fiscal year 1989, the EEOC reported it had received 39,975 new discrimination charges.[130] If the Americans with Disabilities Act is passed, it will undoubtedly trigger a large number of new complaints filed with the EEOC since millions of disabled Americans have heretofore had no redress for

[130] Schachter, *supra*, p. 9.

discriminatory conduct. In addition, the research director for the Women Employed Institute estimates that approximately 80% of the 1200 women it counsels each year choose not to file discrimination charges.[131]

Assuming that the Act passes with compensatory and punitive damages intact, and that 39,000 new charges of discrimination are filed with the EEOC next year, the already overburdened federal court system can look forward to a much higher percentage of those 39,000 charges proceeding to litigation. A significant increase in cases will also accompany the enactment of the Americans with Disabilities Act. Moreover, assuming that only 20% of female victims of discrimination nationwide now file discrimination charges each year, that percentage can be expected to increase dramatically with the addition of compensatory and punitive damages. Instead of taking years to litigate a case to finality, it may literally take decades.

From the available statistics it is crystal clear that neither the EEOC nor the judiciary are presently equipped to handle the onslaught of additional cases that plaintiffs certainly will pursue in hopes of winning a big jury award. This thrust toward litigation is particularly ill-conceived at a time when there is almost universal recognition that the problem our economy faces in this decade is not too few jobs, but too few trained or trainable employees. These facts belie the apparent

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[131] Written testimony of Nancy Kreiter before the House Committee on Education and Labor and the Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights, March 13, 1990, p.2.

assumption by Congress that discrimination is the biggest problem facing racial minorities and women today. In fact, there are innumerable problems, the least of which is discrimination.

The reason that discrimination is not the biggest problem for the protected classes under Title VII is quite simple. As we move toward the year 2000, the role to be played in the workforce by people of color, women, and immigrants is commanding more and more attention. These groups will comprise a clear majority of the labor pool by the year 2000.[132] The degree to which our country productively utilizes their skills, both potential and actual, will mean the difference between competing effectively in the world market or continuing our decline as a world economic power.

Our country has long since outgrown the pernicious "luxury" of discriminatory exclusion. In the increasingly tight labor markets of this decade, employers inclined to indulge in discriminatory hiring will be unable to meet their own needs for workers, and will therefore be less competitive.[133] In light of this fact, it is ironic that at a time when business necessity dictates open, nondiscriminatory employment practices, Congress seeks to saddle employers with the prospects of protracted, expensive litigation.[134]

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[132] Johnson and Packer, Workforce 2000: Work and Workers for the Twenty-first Century (Hudson Institute, 1987).

[133] Written testimony of Paul J. Andrisani before the Senate Committee on Labor and Human Resources, February 27, 1990, p. 1.

[134] Lorber, supra, pp. 3-4.

Many of the numerical imbalances in the workplace arise not from discrimination, but from other sources. As one author writes:

> "Thus, differences in earnings and occupational assignments between white and minorities, males and females, do not necessarily reflect discrimination by employers, since competition in labor and productive markets tends to erode discriminatory preferences by employers. Rather race and sex differences in earnings and occupational distributions also reflect the differences between whites and minorities, males and females, in productive skills, qualifications, work experiences, and preferences for various types of work."[135]

The trends affecting social, educational and family life experiences of low income urban communities pose a far greater threat to the attainment of full social and economic parity for racial minorities than does discrimination in the workplace. There is almost unanimous agreement that this country made significant progress in reducing employment discrimination over the past quarter century. However, during that same period, employment rates for Afro-American males were not only much lower than they were for white males, but much lower than they had been for Afro-American males in earlier times.[136] Much of the reason for this phenomenon can be traced to a lack of education and training. Lack of education and training tends to occur at a higher rate for disadvantaged minorities and women. Minorities who have suffered the documented problems of the inner cities,

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[135] Amirsani, *supra*, p. 2.

[136] See, *A Common Destiny, Blacks and American Society*, The National Research Council, National Academy of Sciences (1989).

such as the collapse of normal family life, increases in violence and crimes, and an epidemic of drug abuse, generally have not had an equal opportunity for education and training, and thus are less competitive for jobs in the labor market. Disadvantaged women who are single parents often find themselves in a similar situation. The basic problems of education and training for these individuals is of paramount importance and should be the first concern of Congress. As stated by Professor Glenn C. Loury in his Congressional testimony, "[i]t is very important, I believe, to understand that antidiscrimination laws provide a very limited tool with which to redress the problem of racial [and gender] equality."[137] It is certain the Civil Rights Act of 1990 will not create any jobs, or provide education and training for disadvantaged minorities and women. What it will create is contentious litigation and surreptitious quota systems. However, encouraging litigation is not the only way the Act works against the advancement of civil rights. There are other problems that it creates as well.

This Act tells employers to be careful about hiring marginal employees, because if they take a chance by hiring unskilled and inexperienced employees and then run into problems, they may have difficulty enforcing work standards or terminating troublesome employees without risking a lawsuit. Employers may try to reduce their need of unskilled labor to avoid this risk, which will lead

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[137] Written testimony of Glenn C. Loury before the Senate Committee on Labor and Human Resources, February 23, 1990, p. 1.

to a reduction in job opportunities in precisely the most crucial areas of employment.

In addition, by intensifying the resort to quotas, this legislation will inevitably suggest to nonminorities that special preferences in hiring or promotion exist. Reverse discrimination litigation will then increase. Moreover, the adoption of quota systems by employers may erode popular support among nonminorities for other social policies demanding wider sacrifice from the public to provide increased opportunities for the education and training of minorities and women.

The Civil Rights Act of 1990 fails miserably in its attempt to advance the cause of civil rights. Contrary to its expressed purpose, the Act is not an antidiscrimination law. In sum, it is a mechanism for discrimination, disruption, and litigation. It practically forces employers to superimpose quotas on their selection processes and denies affected nonparties the opportunity to challenge discriminatory practices instituted under the guise of a litigated or consent decree. It invites courts and administrative agencies to substitute their views for employers' views concerning the need for reasonable selection practices, and practically compels employers to abandon reasonable selection practices and adopt inefficient and regimented ones in an attempt to avoid costly litigation. It mandates protracted litigation of employment discrimination claims, and makes settlement and voluntary compliance less viable solutions. However, to say that the Civil Rights Act of 1990

does not advance civil rights is not to say that there is no work left to be done in the employment discrimination context.

It is clear that employment discrimination still exists and appropriate efforts must be made to eradicate it. The purpose of our existing statutory scheme is not to exact punishment from employers, or to establish some type of litigation sweepstakes, but to find the most expeditious means possible to fully and finally remove considerations of race, color, religion, sex, or national origin from the employment decisionmaking process. Obviously, the swiftest and most efficient means of eradicating employment discrimination, making victims whole, and deterring wrongdoers from future misconduct, is to strengthen the EEOC's administrative enforcement capabilities rather than to encourage all discrimination claimants to run headlong into federal court.

In an effort to enable the EEOC to work effectively against employment discrimination, perhaps a suitable alternative measure would be to grant the EEOC authority equivalent to the powers vested in the National Labor Relations Board (NLRB). By using a setup similar to the NLRB to handle discrimination cases, possibly including an alternative dispute resolution method such as binding arbitration, Congress could ease the tremendous burdens on our court system, and facilitate the prompt and orderly resolution of discrimination complaints at a fraction of the cost of litigation. Similar authority was part of the original Title VII proposal, but was withdrawn in a compromise to assure passage of the legislation. Perhaps it is an idea whose

time has now come. Whatever action Congress chooses to take should be consistent with the original principles of Title VII.