Report of the United States Commission on Civil Rights On the Civil Rights Act of 1990

July 1990

THE UNITED STATES COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is an independent, bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and Congress.

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Executive Summary

More than 25 years after the enactment of the 1964 Civil Rights Act, employment discrimination on the basis of race, color, religion, sex, or national origin remains a serious national problem. Too many instances of discrimination go unpunished under current law, in large part because many of those who suffer invidious discrimination cannot afford the heavy costs imposed by current law on persons who seek to bring employment discrimination complaints, especially given the limited remedies afforded under Title VII. More, not less, needs to be done to provide redress to persons who have been harmed by employment discrimination and to reduce the amount of discrimination in employment. It is with this conviction that the U.S. Commission on Civil Rights considers the Civil Rights Act of 1990 currently before Congress.

The Civil Rights Act of 1990 would amend Title VII of the 1964 Civil Rights Act and section 1977 of the Revised Statutes of the United States (42 U.S.C. 1981) with the following stated purpose:

> (1) to respond to the Supreme Court's recent decisions by restoring the 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.[1]

This report examines the provisions of the Civil Rights Act of 1990 from both a legal and a policy perspective. The analysis in this report has led us to the conclusion that Congress should pass and the President should sign the proposed legislation with some modifications that are described below.

The U.S. Commission on Civil Rights strongly supports the efforts of Congress in drafting the Civil Rights Act of 1990 to enhance civil rights protections for all Americans. We urge

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[1] S. 2104, 101st Cong., 2d Sess. § 2(b) (1990).

Congress to pass and the President to sign the proposed legislation. However, we insist that Congress clarify the language of the bill to make clear that in the absence of a finding of egregious discrimination or order by a court of competent jurisdiction, section 4 of this act is not intended to promote employment quotas, nor will the use of quotas be condoned as a means of avoiding liability under this section.

Recommendation 1

We insist that Congress clarify the language of the bill to make clear that in the absence of a finding of egregious discrimination or order by a court of competent jurisdiction, section 4 of this act is not intended to promote employment quotas, nor will the use of quotas be condoned as a means of avoiding liability under this section.

This executive summary discusses briefly each of the major controversial provisions of the Civil Rights Act of 1990 and presents our recommendations to Congress and the President.

Section 4: Restoring the Burden of Proof in Disparate Impact Cases

Section 4 addresses methods of proof in employment discrimination cases brought under disparate impact theory. Disparate impact theory had its origins in the 1971 Supreme Court decision, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and was further refined in subsequent Supreme Court decisions. In *Griggs*, the Supreme Court held that employment practices that have an adverse impact on minorities are illegal, regardless of intent, unless the employer can prove that they are justified by business necessity.

In cases using the disparate impact theory, the plaintiff makes a prima facie case of discrimination by demonstrating that an employment practice (or practices) of the defendant has an adverse impact. He usually does this by comparing the composition of the employer's work force with the composition of the qualified applicant pool or, in some cases, with the composition of the qualified population in the relevant labor market. If the plaintiff succeeds in persuading the court that an employment practice has a disparate impact, then the burden shifts to the defendant to prove that the practice is justified by business necessity. If the defendant proves business necessity, the plaintiff can still prevail by showing that there exists an

alternative employment practice with less of an adverse impact that equally well meets the defendant's business needs.

Two recent Supreme Court cases have changed the nature of disparate impact cases. In a 1988 decision, *Watson v. Fort Worth Bank & Trust*, 108 S.Ct. 277 (1988), the Supreme Court resolved a controversy that had arisen in the lower courts by deciding that subjective employment practices, such as hiring based on an interview, could be challenged with disparate impact analysis. Previously, Supreme Court disparate impact cases had always dealt with objective employment practices, such as a high school diploma requirement, or hiring according to scores on a test. In a 1989 decision, *Wards Cove Packing Co., Inc. v. Atonio*, 109 S.Ct. 2115 (1989), the Supreme Court:

(1) held that to make a prima facie case of discrimination under the disparate impact theory, the plaintiff must show which specific employment practice causes a statistical disparity in the employer's work force.
(2) decided that the employer's burden in justifying his employment practice is a burden of production and not a burden of persuasion.
(3) stated that the employer must prove that his employment practice has a "legitimate business reason," but not necessarily that it is "essential" to his business.

The *Wards Cove* decision appeared to be responding to concerns that employers would find it difficult to justify subjective employment practices by making it more difficult for plaintiffs to make a prima facie showing of discrimination and by making it easier for defendants to respond to a prima facie showing of discrimination. Our analysis shows that the *Wards Cove* decision represented a clear departure from disparate impact theory as it was being applied by the lower courts and was in some ways inconsistent with previous Supreme Court disparate impact decisions. Before the *Wards Cove* decision, many lower courts had allowed plaintiffs to make a prima facie case of discrimination by showing that a group of employment practices, sometimes the employer's entire employment process, caused the disparate impact. Virtually all lower courts had given the employer the burden of persuasion in showing business necessity. Indeed, the Supreme Court disparate impact cases prior to *Wards Cove*, by using strong language, implicitly gave employers the burden of persuasion. The lower courts and previous Supreme Court cases had clearly required the defendant

to show that a challenged practice was required by business necessity, not just to show a legitimate business reason for the practice.

Section 4 would overturn the *Wards Cove* decision by:

(1) Allowing plaintiffs to make a prima facie showing of discrimination by establishing either that a single employment practice or that a group of employment practices results in a disparate impact.
(2) Specifying that defendants have the burden of persuasion in showing that their employment practice has a business justification.
(3) Restoring the requirement that the defendant show that the disputed business practice is necessary to his business by requiring that he show that it "bears a substantial and demonstrable relationship to effective job performance."[2]

Our analysis concludes that section 4 restores the law in large measure to the way it was applied before the *Wards Cove* decision. The only exception is that section 4 would allow plaintiffs to make a prima facie case of discrimination by challenging an entire employment process, possibly even when they could have narrowed the complaint through normal discovery.

The most important argument against section 4 is that it might lead employers to adopt hiring quotas, or hire by the numbers. According to this argument, section 4 would make it too easy for plaintiffs to make a prima facie case of discrimination because it would allow plaintiffs to attack disparities in the employer's bottom line, rather than requiring them to show which specific practice used by the employer causes the disparity. Also, section 4 would make it too hard for employers to defend their employment practices, particularly in light of the extension of disparate impact analysis to subjective employment practices.

We believe for several reasons that section 4 will not cause quotas. First, our legal analysis shows that section 4 would largely restore the law as it was applied by the courts before the *Wards Cove* decision. Since there is, to our knowledge, no evidence that employers adopted quotas before the *Wards Cove* decision, they are not likely to do so now. Second, hiring by the numbers, rather than hiring the most qualified applicants is very costly for employers, likely more costly than their other

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[2] S. 2104, 101st Cong., 2d Sess. § 3(o) (1990).

alternatives under section 4, which are to expend more resources documenting the business necessity of their employment practices, to change their employment practices so that they can justify them, or to live with the higher expected liability costs. Third, if employers were to hire by the numbers, they would only be opening themselves up for reverse discrimination suits, which ought to provide a strong deterrent to quota hiring.

In making this argument, we are cognizant of the fact that disparate impact analysis now applies to subjective as well as to objective employment practices. We recognize that some subjective practices might be harder to justify—but employers always have the option of changing their practices in response to this law. Moreover, in principle, most subjective practices can be validated in much the same way objective practices are. Finally, it should be noted that many circuit courts allowed disparate impact challenges of subjective practices before the *Watson* decision, and there is no evidence that employers adopted quotas in these circuits.

In addition to our belief that section 4 will not cause quotas, we believe that there are several very important reasons to adopt section 4. First, allowing plaintiffs to challenge groups of employment practices under disparate impact theory is essential, because sometimes it is impossible to distinguish the separate effects of individual employment practices that combine to produce a disparate impact. Second, this provision provides employers with a strong incentive to keep good records of the individual effects of each employment practice, since these records will be useful in an employer's defense in a potential lawsuit. Under current law, employers do not have the incentive to maintain good records, because good records would help the plaintiff. Third, a high burden on the defendant in a disparate impact suit gives employers strong incentives to adopt employment practices that are not discriminatory. If all defendants were required to do to defend an employment practice was to produce evidence of some legitimate reason why it was used, employers would have no incentive to scrutinize and change their current employment procedures. Fourth, the burdens placed on employers by Section 4 are fair, in the sense that defendants, because they know their businesses well, are in a far better position to identify the disparate impact and determine the business necessity of their employment practices than are plaintiffs, on whom these burdens are placed under current law. Finally, although section 4 will undoubtedly

increase employers' costs somewhat,[3] it will also have some important benefits: not only will persons who suffer invidious discrimination be more likely to obtain redress, but employers are likely to adopt better employment practices under section 4. Thus section 4 is likely to reduce discrimination, and it might also increase the productivity of the work force.

We have one major reservation about section 4. Although we think that it is important for plaintiffs to be able to challenge employment practices as a group when their individual effects cannot be disentangled, we fear that section 4 might allow plaintiffs to attack an employer's bottom line even when only a single practice is truly at issue, thereby saddling defendants with unnecessarily large defense costs. To respond to this concern, we make the following recommendation for amending the language in section 4.

Recommendation 2

Congress should amend section 4 to require plaintiffs to identify and challenge employment practices as narrowly and specifically as possible given the data they can obtain with reasonable effort through the discovery process. One way this could be done is to alter the language of section 4(k)(1)(B) as follows:

> (B) a complaining party demonstrates that a group of employment practices *whose individual effects cannot be determined by reasonable efforts of the complaining party* results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such group of employment practices are required by business necessity, except that . . .

Alternatively, the language in section 4(k)(1)(B) (i) could be altered as follows:

> (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

[3] In many cases, these will be one-time costs as employers incur the expense of validating their employment procedures.

in such disparate impact *when the individual effects of the practices cannot be determined by reasonable efforts of the complaining party.*

We also have one minor concern. The proposed legislation discusses the plaintiff's prima facie case and the defendant's business necessity defense, but does not mention the traditional third phase of a disparate impact trial, which allows plaintiffs to prevail even if the defendant has demonstrated that the disputed employment practice(s) is required by business necessity if the plaintiff can show that there exists an alternative practice that equally well meets the defendant's business needs but has less of a disparate impact. We are concerned that this omission in the codification of the procedures to be used in disparate impact trials may mean that plaintiffs will no longer be able to prevail once the defendant has demonstrated that the disputed employment practice is required by business necessity. For this reason, we recommend that Congress explicitly mention the third phase of the disparate impact trial in the legislation.

Recommendation 3

Congress should clarify that if the plaintiff succeeds in demonstrating that the challenged practice or practices have a disparate impact and if the defendant succeeds in demonstrating that the challenged practice or practices are required by business necessity, the plaintiff may still prevail if he can demonstrate that there exist other employment practices that equally well meet the defendant's business needs but have a less discriminatory impact. This could be done by adding at the end of section 4(k)(1):

(C) If the respondent demonstrates that a specific employment practice or a group of practices is required by business necessity, an unlawful employment practice based on disparate impact is still established if the complaining party can demonstrate that there exists some other employment practice or group of employment practices that meets the defendant's business needs equally well but has less of a disparate impact.

Section 5: Clarifying Prohibition Against Impermissible Consideration of Race, Color, Religion, Sex, or National Origin in Employment Practices

Section 5 would make a defendant liable for discrimination whenever the plaintiff can demonstrate that discrimination was a "motivating factor" in an employment decision, whether or not the ultimate employment decision would have been the same without the discrimination. Section 5 overturns the 1989 Supreme Court decision in *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989), which held that an employer would not be liable for discrimination in a "mixed motive" case if he could show that the same employment decision would have been made without the discrimination.

Section 5 would have the important benefit of giving courts the power to enjoin a defendant from future discriminatory behavior once it has been shown that he has engaged in impermissible behavior, whether or not the plaintiff would have been hired/promoted anyway. An injunction would significantly deter the defendant from future discriminatory behavior. Furthermore, under section 8, the plaintiff could be awarded compensatory and/or punitive damages in cases of egregious discrimination. Thus, when the plaintiff in a mixed motive case is harmed by the discrimination, he could be given redress. Moreover, the possibility of punitive damages would help to deter discriminatory behavior by employers in mixed motive cases.

There are two arguments against section 5. The first is that section 5 would hold a defendant liable for discrimination even when the plaintiff is not harmed. However, as we noted above, it is important for defendants to be held liable in mixed motive cases so that they can be enjoined from future discriminatory behavior. The second is that the defendant might be held liable for "discriminatory thoughts," or in cases when discrimination was not really important in the employment decision. Although we think it is unlikely that a plaintiff can prove that discrimination was a motivating factor in these situations, it should be possible to ensure that there is no confusion about what a plaintiff needs to show for a defendant to be held liable in a mixed motive case. We think that Congress should consider defining the term "motivating factor" in section 3.

Recommendation 4

We suggest that Congress consider defining the term "motivating factor" to avoid any possibility of confusion about what the plaintiff needs to demonstrate to establish a defendant's liability in a mixed motive case. This could be done by adding the following definition at the end of section 3:

> (q) The term "motivating factor" means a factor that enters in a significant way into an employment decision or process.

Section 6: Facilitating Prompt and Orderly Resolution of Challenges to Employment Practices Implementing Litigated or Consent Judgments or Orders

Section 6 addresses the rights of third parties to challenge court orders—consent decrees and judgments—entered in employment discrimination cases. These court orders often affect third parties, and courts have had to resolve the problem of how to guarantee these third parties their due process rights while not impairing the finality of the court orders. The general goal is to resolve all issues in a timely manner in one court, so that once a court order is entered, it is final.

Before 1989 most circuit courts had addressed this problem by giving third parties the right to intervene in a timely manner in the original lawsuit (or otherwise make their interests known to the court) and barring "collateral attacks" on court orders once they were entered. In a 1989 decision, *Martin v. Wilks*, 109 S.Ct. 2180 (1989), the Supreme Court held that unless Congress provided a legislative basis to the contrary, the only way to ensure the due process rights of third parties was for third parties to be joined as parties to the original lawsuit under Federal Rule of Civil Procedure 19(a) or forever retain their rights to challenge the court order.

Section 6 constitutes the necessary legislative basis. Under section 6, third parties are precluded from challenging court orders after they are entered except in certain specific situations. They retain the right to attack the court order collaterally if they did not receive sufficient notice of the court order and opportunity to make their objections known before the court order was entered, unless the parties to the court order made reasonable efforts to contact them or they were adequately represented by other parties in previous challenges to the court order. Third parties can also attack a court order if circum-

stances change,[4] or if the order "was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction."[5] Section 6 also preserves their rights to intervene in the lawsuit under Federal Rule of Civil Procedure 24. Thus, although many circuit courts before the *Wilks* decision had barred collateral attacks altogether, section 6 establishes when third parties can challenge court orders.

The first issue concerning section 6 is whether the protections it provides third parties are sufficient to guarantee them their constitutional rights of due process. Although this is a controversial issue, our legal analysis concludes that section 6 is likely to be found constitutional, because it meets the conditions for constitutional due process spelled out in two previous Supreme Court decisions, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Hansberry v. Lee*, 311 U.S. 32 (1940).

The second issue is which procedure better meets the policy goal of achieving final judgments without violating third party rights: the joinder rule adopted by the Supreme Court in *Wilks*, or the provisions contained in section 6. It is our conclusion that the Supreme Court's joinder rule is less well suited to meeting this goal than is section 6's modified collateral attack bar.

For one thing, the current joinder rule has the disadvantage relative to section 6 of involving more parties in the lawsuit than may actually be necessary, including forcing uninterested third parties to acquire legal representation.

More importantly, our analysis concludes that there are likely to be many fewer collateral attacks under section 6 than under the current joinder rule. This is an important benefit. First, the financial costs of subsequent litigation are high, for both of the original parties. If collateral attacks become frequent, as it seems they will under current law, the overall costs of combatting employment discrimination are likely to increase considerably. This will provide a significant disincentive to the bringing of employment discrimination suits and mean that fewer victims of discrimination will receive redress. Second, subsequent litigation is likely to have nonfinancial costs as well: it will delay

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[4] This right was established in *United States v. Swift & Co.*, 286 U.S. 106 (1932).

[5] S. 2104, 101st Cong., 2d. Sess., § 6(m)(2)(B).

the healing that is likely to be needed after the years of litigation that it normally takes before a court order in a classwide discrimination suit is entered.

In achieving this benefit, however, it is important to ensure that third parties do get an opportunity to have their day in court before the court order is entered. Before the *Wilks* decision, third parties sometimes did not have an opportunity to be heard, because they were denied intervention when they did not seek to intervene in the early stages of litigation and because courts did not normally allow them to appear in fairness hearings. The proposed legislation contains safeguards that go a long way towards ensuring that third parties will have an opportunity to be heard. In particular, a person who has not been given sufficient notice and reasonable opportunity to present objections retains the right to challenge a court order after it is entered, unless he has been adequately represented by someone else or reasonable efforts to notify all interested parties were made before the court order was entered.

There is some concern, however, about when courts will deem that a person has received sufficient notice and a reasonable opportunity to present objections. It is important that parties be notified not only of the existence of a lawsuit but also of the terms of the court order in time to present objections. If they do not get notification of the terms of the court order, they may not fully realize the extent to which their interests are affected. It is also important that they be given more than a minimal opportunity to present objections. Not only will they need sufficient time to prepare their presentation, but they may need access to information that can only be obtained through discovery. They may also need the opportunity to call witnesses on their behalf. The proposed legislation leaves these issues to the courts to decide, on the basis of third parties' constitutional rights to due process. It might be wise for Congress to provide more guidance to the courts to ensure that third parties are not given only their minimal rights of due process, but as much opportunity to make their case as possible without significantly delaying a final resolution to employment discrimination litigation.

We recommend that Congress respond to this concern by providing more guidance to the courts as to what would constitute "sufficient notice" and "reasonable opportunity to present objections."

Recommendation 5

Congress should clarify what is meant by "sufficient notice" and "reasonable opportunity to present objections." In particular, Congress should ensure that third parties who are not given notice of the actual terms of consent orders before they are entered will retain the right to challenge these orders at a later date. Congress should also emphasize that third parties should be given a meaningful opportunity to present their objections and not just be accorded a pro forma hearing.

Section 8: Providing for Damages in Cases of Intentional Discrimination

Section 8 increases the remedies available under Title VII to allow persons who have been harmed by discrimination to receive compensatory and punitive damages in cases of intentional discrimination.[6] It also authorizes jury trials when damages are sought.

There are three important reasons for allowing damages under Title VII. First, section 8 would extend to women and religious minorities the same remedies already afforded racial and ethnic minorities under section 1981. Second, compensatory damages would allow victims of discrimination to be made whole in situations where the discrimination did not result in the loss of a job or a promotion (e.g., racial or sexual harassment on the job) but when injury occurred. Third, punitive damages would create a powerful incentive for employers to avoid discriminatory activities.

Those who are against section 8 argue that it will increase the number of discrimination charges, bring about unreasonably high damage awards, and reduce incentives to settle. We believe that, given that many instances of discrimination currently never result in a charge, an increase in the number of discrimination charges is not necessarily bad. Our review of damage awards in other areas, in particular under section 1981, leads us to conclude that damage awards will not be excessively high. Finally, although the addition of damages will likely increase settlement amounts, there is no reason to think that it will affect the proportion of cases settled prior to trial.

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[6] Thus, damages would not be allowed in disparate impact cases.

Recommendation for Congressional Review of the Effects of the Civil Rights Act of 1990

To ensure that the Civil Rights Act of 1990 does not have serious unintended consequences, Congress must commit itself to a periodic review of the effects of this legislation, with a view to making statutory changes if necessary. Although we have concluded that such consequences are unlikely, concern about these consequences is sufficiently important to warrant careful monitoring of the law.

Pursuant to its mandate under 42 U.S.C. 1975c sections 5(a)(3) and 5(b), the U.S. Commission on Civil Rights will monitor the implementation of the Civil Rights Act of 1990 over the next 5 years and will provide Congress and the President with a series of comprehensive and objective reports assessing its effects and recommending changes to the law if necessary. To enable the Commission to accomplish this task, we ask that Congress provide additional funds during the next 5 years.

Recommendation 6

Congress should amend the proposed legislation by adding the following section.

SEC. 16. CONGRESSIONAL HEARINGS TO CONSIDER UNITED STATES COMMISSION ON CIVIL RIGHTS RECOMMENDATIONS.

The Committees on the Judiciary of the House of Representatives and of the Senate shall hold hearings to consider any report submitted by the Civil Rights Commission, should the report contain recommendations for statutory changes in the provisions of this act. These hearings will be held within 60 days after the date of receipt of the Civil Rights Commission report.

Chapter 1
Introduction

More than 25 years after the enactment of the 1964 Civil Rights Act, employment discrimination on the basis of race, color, religion, sex, or national origin remains a serious national problem. Too many instances of discrimination go unpunished under current law, in large part because many of those who suffer invidious discrimination cannot afford the heavy costs imposed by current law on persons who seek to bring employment discrimination complaints, especially given the limited remedies afforded under Title VII. More, not less, needs to be done to provide redress to persons who have been harmed by employment discrimination and to reduce the amount of discrimination in employment. It is with this conviction that the U.S. Commission on Civil Rights considers the Civil Rights Act of 1990 currently before Congress.

The Civil Rights Act of 1990 would amend Title VII of the 1964 Civil Rights Act and Section 1977 of the Revised Statutes of the United States (42 U.S.C. 1981) with the following stated purpose:

> (1) to respond to the Supreme Court's recent decisions by restoring the 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.[7]

The most important of the recent Supreme Court decisions referred to in (1) are: *Wards Cove Packing Co., Inc. v. Atonio*, 109 S.Ct. 2115 (1989); *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989); *Martin v. Wilks*, 109 S.Ct. 2180 (1989); *Lorance v.*

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[7] S. 2104, 101st Cong., 2d Sess. § 2(b) (1990).

AT&T Technologies, 109 S.Ct. 2261 (1989); and *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989).

This statement examines the major provisions of the proposed legislation from both a legal and a policy perspective and makes recommendations to Congress and the President.

Chapter 2

Section 4: Restoring the Burden of Proof in Disparate Impact Cases

Section 4 of the Civil Rights Act of 1990 addresses methods of proof in Title VII trials involving disparate impact. Its stated purpose is to restore "the burden of proof in disparate impact cases," by overturning the Supreme Court's 1989 decision, *Wards Cove Packing Co. Inc. v. Atonio*, 109 S.Ct. 2115 (1989). Section 4 is unquestionably the most controversial section in the act. Chapter 2 examines section 4 both from a legal and a policy perspective.

Legal Analysis

This section lays out the basic disparate impact and disparate treatment theories; summarizes and evaluates the history of Supreme Court and lower court disparate impact decisions; and analyzes in detail the *Wards Cove* and *Watson*[8] decisions. Finally it examines the provisions of Section 4 in the context of the above discussion.

Background: The Disparate Impact and Disparate Treatment Analyses

The general prohibition against employment discrimination in Title VII of the Civil Rights Act of 1964 is found in § 703, which declares, in pertinent part, that:

> (a) It shall be an unlawful employment practice for an employer
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any

[8] *Watson v. Ft. Worth Bank and Trust*, 108 S.Ct. 2777 (1988).

individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . . .

(h) . . .[N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

. . . .

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by any employer . . . .

A Title VII violation has traditionally been established using one of two forms of analysis: disparate *treatment* or disparate *impact*.[9] To make a prima facie case of discrimination, disparate treatment analysis requires a plaintiff to prove that the defendant possesses a motive or intent to discriminate against the plaintiff because of "race, color, religion, sex, or national origin." Thus, for example, where the plaintiff alleges racial discrimination, "[t]he ultimate focus of the inquiry, and thus the proof, is whether or not the decision or action was 'racially premised.'"[10]

By contrast, in a disparate impact case, unlawful discriminatory intent, direct or implied, is irrelevant. "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in head winds' for minority groups and are unrelated to measuring job capability."[11] Rather, in a disparate impact case, to make a prima facie case of discrimination, a plaintiff is required to prove that facially neutral employment practices, procedures, or tests used by an employer cause a disparate impact on the basis of

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[9] Disparate impact analysis was first applied in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971).

[10] Barbara Lindemann Schlei and Paul Grossman, *Employment Discrimination Law* (Washington DC: Bureau of National Affairs, 1976), pp. 1153–54 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. at 805 n.18).

[11] *Griggs v. Duke Power Company*, 401 U.S. 424, 432 (1971).

race, color, religion, sex, or national origin. The plaintiff makes this claim most often with statistical proof. The Supreme Court recently confirmed that disparate impact analysis is applicable to subjective employment practices in its *Watson* decision.[12] Prior to *Watson*, no disparate impact case involving subjective employment practices had been brought to the Supreme Court.

It should be understood that classwide disparate treatment cases also often make use of statistical data. A prima facie case in a class action disparate treatment case can sometimes be made by showing that the racial or gender composition in a certain job category is substantially different from the racial or gender composition of the qualified labor force. Unless the employer offers an alternative explanation, discriminatory intent may be inferred from a marked imbalance in the defendant's work force. However, the imbalance in the defendant's work force is generally required to be substantial and often needs to be bolstered with other evidence of discrimination in order for the intent to discriminate to be inferred in a disparate treatment case, whereas a much smaller imbalance, tied to a specific employment practice, will suffice to make a prima facie showing of discrimination in a disparate impact case.[13]

In both disparate impact and disparate treatment cases, the plaintiff bears the burden of persuasion in the prima facie case. In a classwide disparate treatment case, the plaintiff needs to persuade the court that the statistical and other evidence he offers is sufficient to make an inference of illegal discrimination. In a disparate impact case, the plaintiff needs to persuade the court that a practice or practices of the employer caused a statistical disparity in his work force. In both types of cases, the defendant can dispute the evidence offered by the plaintiff.

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[12] Examples of subjective criteria are the decision to hire a candidate based upon recommendations and personal knowledge of the candidate, the discretionary decision to fire an individual said not to get along with co-workers, a discretionary promotion decision, brief interviews with candidates, and leaving promotion decisions to the unchecked discretion of lower level supervisors. Examples of objective criteria are written aptitude tests, written tests of verbal skills, height and weight requirements, a high school diploma requirement, and a rule prohibiting employment of methadone users.

[13] This discussion is derived from Michael J. Zimmer, Charles A. Sullivan, and Richard F. Richards, *Federal Statutory Law of Employment Discrimination* (Indianapolis: Bobbs-Merrill, 1980), pp. 303.

Once a prima facie showing of discrimination has been made, in both analyses, the burden of going forward shifts to the defendant. In disparate treatment analysis, the "defendant must rebut the inference of discrimination by showing that the statistics are misleading or inaccurate, or by presenting legitimate, nondiscriminatory reasons for the disparity."[14] The defendant's burden is one of production: "It is now clear that a defendant's burden is one of production, not persuasion. It is sufficient to meet the burden if the defendant's admissible evidence clearly 'raises a genuine issue of fact' as to whether it discriminated against the plaintiff."[15]

The defendant in a disparate impact case must show that the employment practice that has been shown to have a disparate impact is required by business necessity. Before the *Watson* and *Wards Cove* decisions, this defense was regarded as an affirmative defense, and most courts held that this burden was a burden of persuasion. (See discussion below.)

In both disparate treatment and disparate impact cases, there is a possible third phase if the defendant was successful in meeting his burden in the second phase. For disparate treatment cases, this phase consists of the plaintiff showing that the reason given by the defendant in the second phase is merely a pretext for discrimination and not the true reason for the statistical disparities. For disparate impact cases, this phase consists of the plaintiff showing that there exists an alternative to the employment practice in question that meets the defendant's business needs equally well but has a less discriminatory

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[14] *Croker v. Boeing Co.*, 662 F.2d. 975 (3rd Cir. 1981) (en banc) at 991.

[15] *Id.* See also Stephen N. Shulman and Charles F. Abernathy, *The Law of Equal Employment Opportunity* (Boston: Warren, Gorham & Lamont, 1990), pp. 3–89—8–90. They observe:

> In *Texas Department of Community Affairs v. Burdine*, the Supreme Court held that once an individual plaintiff established a prima facie case of intentional discrimination, the only burden that shifted to the employer was one of "production." The employer need only "articulate" a nondiscriminatory reason for having rejected plaintiff, and need not satisfy a "persuasion burden" of convincing the court of its nondiscriminatory intent. For a time, courts were split as to whether *Burdine* applied to class actions as well. Now, however, it is settled that *Burdine* applies at the rebuttal phase of deciding whether defendant has intentionally discriminated against the class.

impact.[16] For instance, if an employer has succeeded in justifying an employment test that has a discriminatory impact on the grounds that it accurately measures a skill necessary to do the job, the plaintiff might show that there exists an alternative test that has less of a discriminatory impact but measures the necessary skill equally well.

Background: History of Supreme Court Cases Dealing with the Disparate Impact Model

Disparate impact analysis has its origin in the 1971 Supreme Court decision, *Griggs v. Duke Power Company*. The *Griggs* decision held that Title VII:

> proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. . . .Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.[17]

Disparate impact analysis was further elaborated in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979); and *Connecticut v. Teal*, 457 U.S. 440 (1982).

In all of these Supreme Court disparate impact cases, the employment practices under attack were objective tests and, therefore, easily identified by the plaintiff as the cause of the imbalance in his prima facie case. *Griggs*, 401 U.S. 424 (high school diploma and intelligence tests); *Albemarle*, 422 U.S.405 (written aptitude tests); *Dothard*, 433 U.S. 321 (height and weight requirements); *Beazer*, 440 U.S. 568 (rule against employing drug addicts); *Teal*, 457 U.S. 440 (written examination). Until *Watson*, the Court had yet to address a case where a plaintiff attacked a hiring or promotion decision based on the exercise of personal judgment or the application of inherently subjective criteria.

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[16] *Albemarle Paper Co. v. Moody*, 95 S.Ct. 2362, 2375 (1975).

[17] *Griggs v. Duke Power Co.* 91 S.Ct. 849, 853–4.

Most lower courts, however, did allow disparate impact analysis to be applied to subjective employment practices.[18]

In *Watson*, the Supreme Court confirmed that disparate impact analysis could be used to challenge subjective or discretionary employment practices. In a portion of the opinion in which all eight sitting justices joined, Justice O'Connor wrote:

> Our decisions have not addressed the question whether disparate impact may be applied to cases in which subjective criteria are used to make employment decisions. . . .
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> . . . .
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> We are persuaded that our decisions in *Griggs* and succeeding cases could largely be nullified if disparate impact analysis were applied only to standardized selection practices. . . .
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> . . . .
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> . . . [D]isparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests. . . . . We conclude, accordingly, that subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases.[19]

In a portion of the opinion joined by four justices, but which four refused to join, Justice O'Connor proceeded to respond to concerns that the extension of disparate impact analysis would lead to adoption of quotas by setting out the "evidentiary standards that should apply in such cases."[20] She noted that "extending disparate impact analysis to subjective employment practices has the potential to create a Hobson's choice for employers and thus lead to perverse results,"[21] such as "implementing quotas and preferential treatment" as a "cost-effective means of avoiding potentially catastrophic liability."[22] This practice, wrote O'Connor, "can violate the Constitution" and is "far from the intent of Title VII."[23]

O'Connor then elaborated on the evidentiary standards for disparate impact cases. In discussing the plaintiff's burden in the prima facie case, she argued that the extension of disparate

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[18] Stephen N. Shulman and Charles F. Abernathy, *The Law of Equal Employment Opportunity*, p. 2-79.

[19] *Watson*, 487 U.S. at 989-91.

[20] *Id.* at 991.

[21] *Id.* at 993.

[22] *Id.*

[23] *Id.*

impact analysis to subjective practices required the plaintiff, in turn, to be specific in identifying the employment practice he is challenging:

> [T]he plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged. Although this has been relatively easy to do in challenges to standardized tests, it may sometimes be more difficult when subjective selection criteria are at issue. Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities. Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.[24]

In discussing the defendant's burden in the second phase of a disparate impact trial, she argued that the defendant's burden in the second phase of a disparate impact trial is one of production:

> Although we have said that an employer has "the burden of showing that any given requirement must have a manifest relationship to the employment in question," such a formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant. . . . Thus when a plaintiff has made out a prima facie case of disparate impact, and when the defendant has met its burden of producing evidence that its employment practices are based on legitimate business reasons, the plaintiff must "show that other tests or selection devices, without a similarly undesirable racial effect, would serve the employer's legitimate interest in efficient and trustworthy workmanship."[25]

Writing for himself and two other justices, Justice Blackmun agreed that disparate impact analysis was applicable to subjective employment practices. He argued, however, that the "plurality mischaracterizes the nature of the burdens this court has allocated for proving disparate impact claims" and "it is not

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[24] *Id.* at 994.

[25] *Id.* at 997.

enough for an employer merely to produce evidence that the method of selection is job-related. It is an employer's obligation to persuade the reviewing court of this fact."[26] Justice Stevens concurred in the judgment but declined to give a "fresh interpretation" of disparate impact cases in an opinion.

The Court ultimately adopted the *Watson* plurality opinion in *Wards Cove v. Atonio*, 109 S.Ct. 2115 (1989). In agreeing that the plaintiff must show the disparity caused by each employment practice separately, Justice White, writing for the majority, quoted *Watson* directly. He then elaborated:

> Our disparate impact cases have always focused on the impact of particular hiring practices on employment opportunities for minorities. Just as an employer cannot escape liability under Title VII by demonstrating that, "at the bottom line," his work force 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 racial *imbalance* in the work force. 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. Such a showing is an integral part of the plaintiff's prima facie case in a disparate impact suit under Title VII.[27]

Justice White also argued that statistical disparities can only be shown by comparing the composition of the at-issue jobs with the composition of the "qualified population in the relevant labor market."[28]

Justice White agreed with Justice O'Connor's *Watson* opinion that the defendant could rebut a prima facie case by producing evidence that the challenged practice has a business justification:

> If. . .respondents establish a prima facie case of disparate impact with respect to any of petitioner's employment practices, the case will shift to any business justification petitioners offer for their use of these practices. . . The dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. . . The touchstone of this enquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice. . . .At the same time,

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[26] *Id.* at 1000-01.

[27] *Wards Cove v. Atonio*, 109 S.Ct. at 2125.

[28] *Id.* at 2121.

though, there is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster.[29]

For the dissent, Justice Stevens responded directly to the majority's holding that a plaintiff must "isolate and identif[y] the specific employment practices that are allegedly responsible for any statistical disparities."[30] He argued that this was an "unwarranted proof," but acknowledged that "[i]t is elementary that a plaintiff cannot recover upon proof of injury alone; rather, the plaintiff must connect the injury to an act of the defendant in order to establish prima facie that the defendant is liable."[31] Nevertheless, Stevens stated that "[a]lthough the causal link must have substance, the act need not constitute the sole or primary cause of the harm."[32]

Background: Did Wards Cove Change Disparate Impact Analysis?

In confirming that disparate impact analysis applies to subjective employment practices, the *Watson* plurality enunciated the following evidentiary standards (see quotes above):

(1) In making his prima facie, case the plaintiff must identify the specific employment practice or practices responsible for the disparity and prove that each employment practice separately causes a disparity.
(2) In rebutting the plaintiff's prima facie case, the defendant has only the burden of production, not the burden of persuasion.
(3) An employment practice is justified if the employer has "legitimate business reasons"[33] for the employment practice.

The *Wards Cove* decision adopted these standards. To what extent are these evidentiary standards different from those that prevailed before *Watson* and *Wards Cove*?

Before *Watson* and *Wards Cove*, the issue of whether the plaintiff need show the disparate impact separately for each

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[29] *Wards Cove v. Atonio*, 109 S.Ct. at 2125 and 2126.
[30] *Id.* at 2132.
[31] *Id.*
[32] *Id.*
[33] *Watson* 487 U.S. at 998.

employment practice challenged had not arisen in Supreme Court cases, because only one or two practices were being challenged, and the individual effects of the practices challenged were easy to separate. The lower courts generally allowed groups of practices to be challenged using disparate impact analysis,[34] but were split on whether the plaintiff could challenge an overall selection process. In *Pouncey v. Prudential Insurance Co.*, Judge Reavley argued that "the discriminatory impact model of proof in an employment discrimination case is not . . . the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices."[35] In *Green v. USX Corp*, on the other hand, Judge Higgenbotham rejected the *Pouncey* decision:

> In large part, USX's argument . . . is predicated upon the rationale announced in *Pouncey*. . . We can too easily imagine the instance in which an employer, who without any discernible discriminatory intent, devises a scheme the aggregate components of which cause disproportionate hiring. Under the test urged upon this Court by USX, such a scheme would be immune from challenge.[36]

Thus, the *Wards Cove* requirement that plaintiffs show the disparate impact of each challenged employment practice separately represents a significant change from most lower court interpretations. Not only did most circuits allow several employment practices to be challenged in combination, but some even allowed an entire selection process to be challenged using disparate impact analysis.

Before *Watson* and *Wards Cove*, the Supreme Court had never expressly stated whether the defendant's burden in the second phase of a disparate impact trial was one of production or persuasion. However, the words used in previous Supreme Court decisions were strongly suggestive that the defendant's burden

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[34] Examples of cases allowing several practices to be challenged jointly are: *Griffin v. Carlin*, 755 F.2d. 1516 (11th Cir. 1985); *Gilbert v. City of Little Rock*, 722 F.2d. 1390 (8th Cir. 1983); *Segar v. Smith*, 738 F.2d. 1249 (DC Cir. 1984), *cert. denied, sub. no., Segar v. Meese*, 105 S. Ct. 2357 (1985); and *Fisher v. Proctor & Gamble*, 613 F.2d. 527 (5th Cir. 1980).

[35] *Pouncey v. Prudential Insurance Co.*, 668 F.2d. 795 (5th Cir. 1982) at 800-01.

[36] *Green v. USX Corp*, 843 F.2d. 1511 (3rd Cir. 1988) at 1521 and 1522.

was a burden of persuasion.[37] In *Griggs*, the Supreme Court stated that the defendant has "the burden of showing that any given requirement must have a manifest relationship to the employment in question."[38] In *Albemarle*, the Supreme Court gave the employer the "burden of proving that its tests are job related."[39] In *Dothard*, the employer must "prove that the challenged requirements are job related."[40] Furthermore, most lower courts required employers to meet the burden of persuasion.[41] A leading employment discrimination text stated that:

[I]f the court is satisfied by a preponderance of all the evidence presented that a substantial disparate impact indicative of discrimination exists, the burden shifts to the defendant to prove that the substantial disparate impact is the result of a job-related selection device. . . .Of

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[37] Burden of proof is almost always read to mean the burden of persuasion, not the burden of production.

[38] *Griggs v. Duke Power*, 401 U.S. 431 at 854.

[39] *Albemarle v. Moody*, 95 S.Ct. 2362 at 2375.

[40] *Dothard v. Rawlinson*, 97 S.Ct. 2720 at 2727.

[41] Susan Agid, *Fair Employment Litigation: Proving and Defending Title VII Cases*, 2nd ed. (New York: Practicing Law Institute, 1979), pp. 510-1 states:

> The cases are somewhat ambiguous as to the exact effect of establishing a prima facie case. It is clear that some burden then shifts to the employer, but courts differ on whether it is the burden of persuasion or simply the burden of producing evidence. The opinion of the Seventh Circuit in *Flowers v. Crouch-Walker Corp.* expresses the majority view. There the court held that establishing a prima facie case does not mean simply that the plaintiff has produced sufficient evidence to avoid dismissal. Rather
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> > it signifies that the plaintiff has produced sufficient evidence to be entitled to judgment if the defendant fails to meet his burden in response. . .
>
> Many courts never discuss the nature of the burden that shifts to the defendant but simply treat the defenses available to the employer as affirmative defenses for which the burden of persuasion automatically shifts to the party asserting the defense.

Also see Charles F. Abernathy, "Decision Making in Employment Discrimination Cases Under Title VII" (1990), p. 7.10, which states: "Business necessity was originally considered an affirmative defense and the burden of persuasion rested on the employer, *Moore v. Hughes Helicopter's, Inc.*, 708 F.2d. 475, 481 (9th Cir. 1983)."

course, plaintiff is afforded the opportunity to rebut the defendant's evidence in this respect, with the ultimate burden concerning these defenses on the defendant.[42]

In accompanying footnote 54, Schlei and Grossman added:

several decisions refer to defendant's burden in this respect as a heavy one. Neither *Griggs* nor *Albemarle* however has used any language suggesting that the defendant's burden is more stringent than the "preponderance of the evidence" burden.[43]

Since the preponderance of evidence burden is one of persuasion, it is clear that Schlei and Grossman regarded the defendant's burden in a disparate impact case as one of persuasion.

The reason for regarding the defendant's burden as a persuasion burden is that the employer's defense in a disparate impact case was traditionally viewed as an affirmative defense. The reasoning for this is laid out by Justice Stevens in his *Wards Cove* dissent.

In the ordinary civil trial, the plaintiff bears the burden of persuading the trier of fact that the defendant has harmed her. . . . The defendant may undercut plaintiff's efforts both by confronting plaintiff's evidence during her case in chief and by submitting countervailing evidence during its own case. But if the plaintiff proves the existence of the harmful act, the defendant can escape liability only by persuading the factfinder that the act was justified or excusable. The plaintiff in turn may try to refute this affirmative defense. Although the burdens of producing evidence regarding the existence of harm or excuse thus shift between the plaintiff and the defendant, the burden of proving either proposition remains throughout on the party asserting it.

In a disparate treatment case there is no "discrimination" within the meaning of Title VII unless the employer intentionally treated the employee unfairly because of race. Therefore, the employee retains the burden of proving the existence of intent at all times. . . .

In contrast, intent plays no role in the disparate impact inquiry. The question, rather is whether an employment practice has a significant adverse effect on an identifiable class of workers—regardless of the cause or motive for the practice. The employer may attempt to contradict the factual basis for this effect; that is, to prevent the employee from establishing a prima facie case. But when an employer is faced with sufficient proof of disparate impact, its only recourse is to justify the

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[42] Barbara Lindemann Schlei and Paul Grossman, *Employment Discrimination Law*, p. 1160.

[43] *Id.*

practice by explaining why it is necessary to the operation of business. Such a justification is a classic example of an affirmative defense.[44]

It would seem, therefore, that to require only that employers meet a burden of production is a substantial departure from the prevalent interpretation of *Griggs* before *Watson* and *Wards Cove*.[45]

Finally, the definition of what the employer was required to show in *Watson* and *Wards Cove* also represents a departure from *Griggs* and its progeny.[46] In *Griggs*, the Court held that the defendant has to show that "any given requirement . . . [has] a manifest relationship to the employment in question."[47] Furthermore, it stated that "[t]he touchstone is business necessity."[48] In *Wards Cove*, on the other hand, the practice must serve "in a significant way, the legitimate employment goals of the employer"[49] and "[t]he touchstone . . . is a reasoned review of the employer's justification for his use of the challenged practice."[50] In this way, *Wards Cove* appears to replace a business justification defense for the idea of a business necessity

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[44] *Wards Cove* 109 S.Ct. at 2131 (footnotes omitted).

[45] This is confirmed by Judge Posner in his decision in *Allen v. Seidman*, 881 F.2d. 3105, 377 (7th Cir. 1989), in which he states:

> This appeal . . . .[is] the first disparate-impact appeal heard and decided by this court in the wake of the Supreme Court's decision in *Wards Cove Packing Co. v Atonio*. . ., which modified the ground rules that most lower courts had followed in disparate-impact cases. Before *Wards Cove* it was generally believed that if the plaintiff in a Title VII case showed. . .that a criterion or practice. . .was disproportionately excluding members of a group protected by the statute,. . . the burden shifted to the employer to persuade the judge. . .that the criterion was necessary to the effective operation of the employer's business.

[46] Judge Posner states, "*Wards Cove*...dilutes the 'necessity' in the 'business necessity' defense in a manner anticipated by the plurality opinion in *Watson*. . ." *Id.* at 377.

[47] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) at 432.

[48] *Id.* at 431.

[49] *Wards Cove v. Atonio*, 109 S.Ct. at 2125.

[50] *Id.*

defense.[51] Furthermore, although the *Griggs* definition of business necessity, "manifest relationship to the employment in question" or "job-related," is relatively moderate, many lower courts had applied much stricter definitions.[52] Thus, although the *Wards Cove* definition might be considered to be consistent with previous Supreme Court decisions, it is certainly a weaker definition than many that were applied by the courts.

In sum, *Wards Cove*, based on *Watson*, made three important changes to disparate impact analysis as it had been applied by most courts.

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[51] Stephen N. Shulman and Charles F. Abernathy, *The Law of Equal Employment Opportunity*, p. 2-27 argues:

> In light of the Court's refusal in *Wards Cove* to require that an employer's practice be "essential" or "indispensable" one may expect that in the future the Court will replace the "business necessity" label with "business justification." There seems in *Wards Cove* to be a conscious attempt to avoid use of the original label from the *Griggs* case . . . *Wards Cove* thus reverses several circuit court decisions, though whether it represents a departure from previous Supreme Court practice is more difficult to determine.

[52] The following are examples of definitions applied in circuit court cases:

> Employer must show that the "procedure used measures important skills, abilities and knowledge that are necessary for the successful performance of the job"—*Black Law Enforcement Ass'n v. City of Akron*, 824 F.2d. 475, 480 (6th Cir. 1987).
>
> "[T]he test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business." *Craig v. Alabama State University*, 804 F.2d. 682, 689 (11th Cir. 1986) and other cases.
>
> "[T]he proper standard is not whether it is justified by routine business considerations but whether there is a *compelling need* for . . . that practice." *EEOC v. Rath Packing Co.*, 787 F.2d. 318, 331-32 (8th Cir. 1986).
>
> "[T]he system in question must not only *foster* safety and efficiency, but must be *essential* to that goal." *Green v. Missouri Pacific Railroad Co.*, 523 F.2d. 1290, 1298 (8th Cir, 1975)
>
> "The applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business." *Robinson v. Lorillard Corp.*, 444 F.2d. 791, 798 (4th Cir. 1971).

(1) *Wards Cove* departed from most previous interpretations in its requirement that plaintiffs show separately the disparate impact of each disputed employment practice in the prima facie case.
(2) *Wards Cove* clearly lessened the burden of proof on the defendant in the second phase of a disparate impact trial by specifying that the defendant has only the burden of production in showing that the challenged employment practice is justified by business necessity.
(3) *Wards Cove* moderated the definition of business necessity to mean "business justification."

Legal Analysis of Section 4 of the Civil Rights Act of 1990

This section summarizes the section 4 provisions dealing with disparate impact analysis and compares them to prevailing interpretations of disparate impact theory before *Watson* and *Wards Cove*, on the one hand, and with *Watson* and *Wards Cove*, on the other.

Section 4 has three major provisions:

(1) Section 4 allows the plaintiff to make a prima facie case of discrimination by demonstrating (meeting both the burdens of production and persuasion) that either a single employment practice or a group of employment practices has an adverse impact based on race, color, religion, sex, or national origin. The plaintiff is not required to show which specific employment practice results in a disparity.
(2) Section 4 makes clear that after the plaintiff has made a prima facie case of discrimination, the defendant must meet the burdens of production and persuasion in proving that the disputed employment practice is justified by business necessity.
(3) To prove that a disputed employment practice is justified by business necessity, the defendant must prove that it "bears a substantial and demonstrable relationship to effective job performance."[53]

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[53] This provision derives from the definition of business necessity stated in section 3 of the 1990 Civil Rights Act, as approved by the House Education and Labor Committee. The Senate sponsors of the bill, in a May 17 press conference, agreed to support this language in a floor

(continued...)

Each of these three provisions is examined in turn.

The first provision reverses *Wards Cove*'s requirement that the plaintiff show separately the disparate impact of each employment practice at issue. Section 4 specifies that to make a prima facie showing of discrimination, the plaintiff must demonstrate that "an employment practice" or a "group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin. . . ."[54] The term, "group of employment practices," is defined as "a combination of employment practices that produce one or more employment decisions."[55] The proposed legislation also states that the plaintiff "shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact."[56] This language seems to indicate that not only could plaintiffs challenge several practices in combination, but also plaintiffs would be allowed to make a prima facie case by demonstrating that the employer's work force has a disparity at the bottom line without being required to show which specific practice or practices cause the disparity. Thus, where the *Wards Cove* decision changed the law as it had been applied previously in most circuits by requiring that each challenged practice be shown to have a disparate impact, the proposed legislation adopts the view, previously held in some circuits and not in others, that not only can several employment practices be challenged in combination, but a prima facie case can be made by showing

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[53](...continued)
amendment. The original legislation contained a different definition of business necessity, "essential for effective job performance," which appears to be somewhat stronger. However, in offering an amendment to change the language, Representative Hawkins argued that his goal was to clarify rather than to weaken the definition of business necessity. He also clearly stated that "[o]ne of the stated purposes of this bill is to restore the standard of business necessity that prevailed until a year or two ago."

[54] S. 2104, 101st Cong., 2d Sess. § 4(k)(1) (1990).

[55] S. 2104, 101st Cong., 2d Sess. § 3(n) (1990). The House bill defines group of employment practices as "a combination of employment practices that produces one or more decisions with respect to employment, employment referral, or admission to a labor organization, apprenticeship or other training or retraining program." [Amendment in the Nature of a Substitute to H.R. 4000, as reported by the Committee on Education and Labor on May 8, 1990]. This wording represents a change from the original House bill definition, "a combination of employment practices or an overall employment process." [H.R. 4000, 101st Cong., 2d Sess. § 3(n)].

[56] S. 2104, 101st Cong., 2d Sess. § 4(k)(B)(i) (1990).

that an entire employment selection procedure results in a disparate impact. The proposed legislation might go even further than earlier lower court decisions because it appears to allow the plaintiff to make a prima facie case based on bottom-line numbers even when it might be possible to show the impact of a specific practice.

The second provision overturns *Wards Cove*'s finding that defendants have only the burden of production in rebutting the prima facie case by imposing on defendants both the burden of production and the burden of persuasion. As argued above, imposing the burden of persuasion on employers is consistent with traditional disparate impact theory and previous established practice. Thus, the second provision would tend to restore the law to its pre-*Wards Cove* state.

The third provision specifies what the defendant is to prove in the second phase of a disparate impact trial. He must prove that the disputed employment practice is "required by business necessity,"[57] or "bears a substantial and demonstrable relationship to effective job performance."[58] It can be argued that "bears a substantial and demonstrable relationship to effective job performance" is somewhat stronger than the *Griggs* definition, "manifestly related to the employment in question."[59] It should be noted, however, that in another formulation of the business necessity definition, the *Griggs* Court held that a test should "bear a demonstrable relationship to successful performance of the jobs for which it [is] used."[60] The words "successful" from the *Griggs* decision and "effective" from the bill are synonyms. Thus the only difference between the bill's definition and the *Griggs* definition appears to be the addition of the word "substantial" to the bill's definition. This does not appear to be an important difference in practice: even the *Wards Cove* Court seems to imply that the relationship needs to be "substantial," when it holds that an "insubstantial justification . . . will not suffice."[61] Furthermore, the bill's definition is consistent with

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[57] S. 2104, 101st Cong., 2d Sess § 4(k)(B) (1990).

[58] Amendment in the Nature of a Substitute to H.R. 4000, 101st Cong., 2d Sess. § (3) (o). As noted above, this language was adopted by the House Education and Labor Committee, and Senate sponsors have also agreed to this language.

[59] *Griggs v. Duke Power Co.* 401 U.S. at 432.

[60] *Id.* at 431.

[61] *Wards Cove v. Atonio* 109 S.Ct. at 2126.

Wards Cove decision (see discussion above). It also seems much more in keeping with the spirit of pre-*Wards Cove* (and *Watson*) Supreme Court (and lower court) decisions that emphasized business necessity than does the *Wards Cove* definition, requiring the challenged practice to serve, "in a significant way, the legitimate employment goals of the employer," which emphasizes business justification.

Some would argue with Justice O'Connor that the Supreme Court's confirmation that disparate impact analysis can be applied to subjective employment practices in and of itself fundamentally changed disparate impact analysis. If this were true, then there is no real sense in which the effects of the law, after *Watson*, could be exactly the same as they were before *Wards Cove*, unless *Watson*'s extension of disparate impact analysis to subjective employment practices were overturned or limited by Congress. However, it should be remembered that, although the *Watson* case was the first time that the Supreme Court had expressly stated that subjective practices could be challenged using disparate impact theory, many circuits had allowed disparate impact challenges of subjective employment practices well before the *Watson* decision. In these circuits at least, section 4 will largely reinstate the way employment discrimination law was practiced before *Wards Cove*. Furthermore, the Uniform Guidelines have long required that all job selection procedures, not just objective selection procedures, be validated if they have an adverse impact.[62]

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[62] The Uniform Guidelines on Employee Selection Procedures (1978) [29 C.F.R. § 1607, Section 2] state:

> The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines. . . .

Section 6 states:

> When an informal or unscored selection procedure which has an adverse impact is utilized, the user should eliminate the adverse impact, or modify the procedure to one which is a formal, scored or quantified measure or combination of measures and then validate the procedure in accord with these guidelines or otherwise justify continued use of the procedure. . . .

Justice O'Connor seems to be arguing in her *Watson* opinion that the extension of disparate impact theory to subjective employment practices necessarily requires the tighter evidentiary standards for plaintiffs and the easier standards for defendants laid out in her *Watson* opinion and the *Wards Cove* decision because it makes the employer's business necessity defense more difficult. The argument that we should change the law to make things more difficult for plaintiffs because things have become more difficult for defendants is not compelling. Nor is it entirely clear that subjective practices will be all that hard to validate. There is no reason, in principle, why subjective practices should be harder to validate than objective practices. The American Psychological Association, in its *Watson* brief, argues that: "Subjective selection devices *can* be scientifically validated for the assessment of individuals for hiring, promotion, or other selection decisions in the employment context."[63]

In conclusion, the second and third provisions of section 4 do not appear to depart in any significant way from the way disparate impact theory was interpreted before the *Wards Cove* decision. In allowing several practices to be challenged in combination, the first provision conforms with the law as it was applied in most circuits. But, in allowing plaintiffs to attack an entire employment process, possibly even when they could identify a specific practice that causes a disparate impact, the first provision departs from the law as it was applied by many lower courts. On balance, the provisions of section 4 are generally quite consistent with disparate impact theory as it was applied by the courts before the *Wards Cove* decision.

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[62](...continued)
the procedure in accord with these guidelines or otherwise justify continued use of the procedure. . . .

[63] The Supreme Court, October Term, 1987, Brief No. 86-6189, American Psychological Association in Support of Petitioner, Sept. 14, 1987.

Policy Analysis

This section analyzes the major provisions of the Civil Rights Act of 1990 from a policy perspective. The analysis in this section is based, in part, on the legal analysis developed above. It is also based on the following foundation.

- The analysis does not question whether the *Griggs* decision allowing a finding of discrimination based on disparate impact theory was consistent with congressional intent in enacting the Civil Rights Act of 1964. Congress has indicated support for the decision by allowing it to stand for almost 20 years. Nor do we question the wisdom of the *Griggs* decision from a policy perspective.

As stated above, section 4 has three major provisions:

(1) Section 4 allows the plaintiff to make a prima facie case of discrimination by showing (meeting both the burdens of production and persuasion) that either a single employment practice or a group of employment practices has an adverse impact on a protected group. By contrast, current law, as laid out in the *Wards Cove* decision, requires the plaintiff to show the disparate impact of each employment practice separately.
(2) Section 4 makes clear that after the plaintiff has made a prima facie case of discrimination, the defendant must meet the burdens of production and persuasion in proving that the disputed employment practice is justified by business necessity. Under current law, as made clear by the *Wards Cove* decision, the defendant need only meet the burden of production.
(3) To prove that a disputed employment practice is justified by business necessity, the defendant must prove that it "bears a substantial and demonstrable relationship to effective job performance."[64] The *Wards Cove* decision appeared to imply a less stringent notion of business necessity.

Thus, under section 4, disparate impact cases would proceed as follows.

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[64] This provision derives from the definition of business necessity stated in section 3 of the 1990 Civil Rights Act, as approved by the Senate Labor and Human Resources Committee and the House Education and Labor Committee. The original legislation contained a much stronger definition of business necessity, "essential for effective job performance."

- First, the plaintiff would make his prima facie case of discrimination by showing that an employment practice or a group of employment practices had an adverse impact on a protected group. To do this, the plaintiff would have to compare the employer's[65] work force with the "qualified population in the relevant labor market."[66] Usually, this would involve comparing those who applied for a position or group of positions and those who were actually hired. Sometimes, however, particularly when the employer's recruiting process is at issue, the comparison would be between the incumbents in a job with the qualified labor force in the relevant labor market. The defendant could rebut the prima facie case altogether, or reduce the number of practices at issue, by showing that each individual employment practice listed in the plaintiff's complaint does not have a disparate impact.
- Second, if the plaintiff succeeds in making a prima facie case of discrimination by persuading the court that the practices at issue have an adverse impact, then the burden falls on the defendant to persuade the court that each of these practices is justified by business necessity, that is, that it "bears a substantial and demonstrable relationship to effective job performance."
- Third, if the defendant succeeds in persuading the court that his employment practices are justified by business necessity, the plaintiff can still win his case by persuading the court that there are other less discriminatory practices that equally well satisfy the defendant's business needs.[67]

Each provision of section 4 is examined separately below, followed by a general discussion of the potential effects of the provisions taken together.

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[65] Title VII applies to employment agencies, labor organizations, and joint labor-management committees as well as to employers. For convenience, the term "employer" will be used in this analysis to refer to all of these.

[66] *Wards Cove Packing Co., Inc. v. Atonio*, 109 S.Ct. at 2121 (1989). The *Wards Cove* requirement that the comparison be between the composition of the incumbents in the job and the composition of the qualified population in the relevant labor market has not been changed by section 4.

[67] This third phase of the disparate impact trial is not mentioned in the proposed legislation. However, drafters of the legislation have assured us that their intention is to retain the third phase of the disparate impact trial. (Conversation with Reggie Govan, House Education and Labor Committee, May 31, 1990).

Provision Allowing Plaintiffs to Challenge Defendants' Employment Practices Either Individually or as a Group

Section 4's provision allowing plaintiffs to challenge employers' employment practices either individually or as a group would help to ensure that persons who have suffered employment discrimination will be able to make their case in court.

In most instances it is straightforward to establish whether or not an individual employment practice has or does not have an adverse impact because the defendant has on hand adequate documentation of his employment practices. Indeed, the Equal Employment Opportunity Commission's Uniform Guidelines currently require many employers to keep records showing for each individual component of their employee selection process whether it has an adverse impact.[68] With liberal discovery rules giving plaintiffs access to defendants' records, it would thus be possible for the plaintiff to show which individual employment practices have an adverse impact. However, the defendant can equally well show which do not. Thus, section 4's requirement that defendants show that individual practices do not have an adverse impact is not burdensome for employers in these situations.

In some instances, however, the defendant might not have kept adequate documentation of his employment process. In these situations, even with liberal discovery, it might not be possible for the plaintiff to show which individual employment practices

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[68] The Uniform Guidelines on Employee Selection Procedures (1978) [29 C.F.R. §1607, section 15A(2)] require employers with more than 100 employees to maintain records

> showing whether the total selection process. . .has an adverse impact. . . .Where a total selection process for a job has an adverse impact, the user should maintain and have available records. . .showing which components have an adverse impact. Where the total selection process for a job does not have an adverse impact, information need not be maintained for individual components.

Thus, firms with fewer than 100 employees are not required to keep records on individual components of their selection process. Also, even firms with 100 or more employees are not required to keep records on individual components if the entire selection process does not have an adverse impact—even though the Supreme Court case, *Connecticut v. Teal* [457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982)], did not allow employers to defend an individual component's adverse impact with the argument that the entire selection process had no adverse impact.

have an adverse impact even when he can establish that a group of practices has an adverse impact. To require that the plaintiff show the adverse impact of each individual employment practice, as does current law, is not fair in these situations, because it penalizes the plaintiff for poor record keeping on the part of the defendant. Not only does current law make it impossible for plaintiffs to prevail in these situations, but also it gives employers a powerful incentive not to keep adequate records: by keeping inadequate records employers can virtually guarantee that they will prevail in future disparate impact suits. If section 4 is adopted, on the other hand, employers will have the incentive to document their employment practices fully, since their records, rather than making it more likely that the plaintiff will prevail in a potential disparate impact suit, will be crucial for their own defense.

On occasion, it might be extremely costly to isolate the individual effects of various employment practices, or, alternatively, certain employment practices may interact in such a way as to have an adverse impact in combination but not separately. In these cases, under current law, the plaintiff is unlikely to prevail. If section 4 is adopted, however, the plaintiff will still be able to make a prima facie case of discrimination by showing that the practices have an adverse impact as a group. Then, even if the defendant cannot show that individual employment practices do not have an adverse impact, he may still be able to avoid liability by showing that the various practices are justified by business necessity. Furthermore, even if the employer cannot defend the individual practices based on their business necessity, he has the option, prior to suit, of altering his employment practices in such a way as to make them defensible. In these situations, the section 4 requirement that the defendant show that individual practices do not have an adverse impact is arguably an onerous burden on defendants. Yet, to require plaintiffs to prove that individual practices do have an adverse impact would be an even more onerous burden on plaintiffs.

A serious concern about this provision is that, if it is adopted, plaintiffs will automatically challenge all of the defendants' employment practices at the bottom line, even in the usual case when they can easily narrow their complaint, thereby forcing defendants to mount a costly defense of all of their practices when only one or two are really at issue. To avoid this outcome, it is possible to add language to section 4 that requires plaintiffs to be as specific as reasonably feasible in challenging the employer's employment practices.

This provision undoubtedly places a greater burden on employers than does current (post-*Wards Cove*) law. However, current law places an even higher burden on plaintiffs. Defendants are generally in a better position to identify and evaluate individual employment practices than are plaintiffs. Not only are employers usually much more familiar with the details of their employment practices than plaintiffs can hope to be, but they also are able to choose their employment practices. As a result, it is easier for an employer to defend his employment practices (or if he cannot defend them, change them) than it is for a plaintiff to challenge them.

Provision Giving the Defendant the Burden of Persuasion in Proving the Business Necessity of His Employment Practices

Placing the burden of persuasion in addition to the burden of production on the defendant in proving that a disputed employment practice is justified by business necessity is very important. If defendants have only the burden of production, it is likely that they will prevail frequently, even when the disputed practice should be dispensed with: to prevail, all they would have to do is to make a reasonable-sounding statement of why the disputed practice serves their business needs. It would then fall to the plaintiff to prove that the disputed practice was not indeed necessary.

Again, requiring the defendant to persuade the court that his practices are justified by business necessity is likely less of a burden for the defendant than requiring the plaintiff to demonstrate that they are not justified would be for the plaintiff. The defendant, with his intimate knowledge of his employment practices, is in a much better position to prove their business necessity than the plaintiff is to disprove it. Furthermore, responsible employers will already have examined their employment practices before the onset of any discrimination suit and discarded those practices that they cannot justify. This provision gives employers the proper incentive to use an employment practice that has a disparate impact only if they are persuaded that it is necessary. If employers were only required to meet the burden of production in court, they would not have any incentive at all to second guess their existing employment practices, since these were presumably chosen based on some reasonable rationale.

Definition of Business Necessity as "Bears a Substantial and Demonstrable Relationship to Effective Job Performance"

In the original version of the legislation, an employment practice was defined as justified by business necessity if it was "essential for effective job performance." Compromise language has softened the definition of business necessity to "bears a substantial and demonstrable relationship to effective job performance." The compromise language is consistent with the language used by the Court prior to the *Wards Cove* decision[69] and should go a long way towards alleviating the fears of many that the bill would make it impossible or extremely difficult to prove business necessity. It also alleviates fears that the legislation could be read to require an employer to hire any one who meets the minimum qualifications for a job rather than the most qualified applicant. At the same time, the compromise language makes clear that a showing that the practice is "reasonable" is not sufficient.

General Discussion of Section 4

The *Wards Cove* decision made it significantly more difficult than before for plaintiffs to prevail in disparate impact cases.[70] As a result, the likelihood that persons who have been harmed by discrimination would receive redress under Title VII was reduced and employers' incentives to seek out nondiscriminatory employment practices were lessened by the *Wards Cove* decision. The provisions in section 4, taken as a group, will make it easier, once again, for plaintiffs to prevail in disparate impact cases and will thus further the goal of eliminating discrimination.

This benefit does not come without some potential costs, and these potential costs should be recognized. The following discussion examines the potential costs of the proposed legislation.

Although section 4 will help to reduce discrimination and to obtain redress for victims of discrimination, it may also cause more employers whose employment practices are legitimate to be challenged and lose their cases in court. Thus, less discrimination and more redress for victims of discrimination may come at the expense of more innocent employers being found guilty of discrimination. However, it should be remembered that

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[69] See the discussion of the definition of business necessity above.

[70] See the discussion of the *Wards Cove* decision above.

the reverse is true under current law: although fewer legitimate employers are brought to court or found guilty of discrimination, more victims of discrimination do not obtain justice, and the incentive to avoid discriminatory employment practices is lower.

It is clear that section 4, if adopted, will impose additional costs on employers. Employers will undoubtedly have to examine their employment practices more carefully, perhaps rejecting some legitimate employment practices that they do not feel they can adequately justify in court. To the extent that truly legitimate practices are discarded, this represents a social cost of the proposed legislation as well.

Perhaps the major concern of those who are opposed to the bill, however, is that the provisions in section 4 might make it so difficult for employers to prove their case in court that they would be forced to adopt numerical hiring quotas.[71] This outcome seems unlikely for a number of reasons.[72]

- First, there is no evidence that section 4 would make it significantly harder for employers to prevail in court than it was before the *Wards Cove* decision. Section 4 eases the requirements for the plaintiff to make a prima facie case of discrimination slightly, to the extent that courts did not allow bottom-line attacks before *Wards Cove*. However, the *Wards Cove* requirement that the plaintiff compare the defendant's work force with the "qualified population in the relevant labor market"[73] is left

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[71] For instance, Donald Ayer, representing the U.S. Department of Justice, stated, "It would be difficult for an employer not to adopt a silent practice of quota hiring and promotion in an effort to protect himself from the real probability of litigation and liability wherever a statistical imbalance is shown." [Testimony before the Senate Labor and Human Resources Committee, Feb. 27, 1990, p. 20] Similarly, Charles Fried, former Solicitor General of the United States, stated, "This section comes as close to anything I have seen in federal legislation to imposing quota hiring throughout the private sector. . . .It would force employers to use quotas in hiring or else expose themselves to law suits they cannot win." [Testimony before the Senate Labor and Human Resources Committee, Feb. 23, 1990, p. 1]

[72] It should be noted that this argument is based upon the revised definition of business necessity, "substantially and demonstrably related to job performance." The likelihood that quotas would result would be much stronger if the original definition, "essential for effective job performance" had been retained because under the original definition employers would find it much harder to prevail in court once a *prima facie* showing of discrimination had been made.

[73] *Wards Cove* 109 S.Ct., at 2121.

in place by the proposed legislation. Furthermore, the language of section 4 suggests that employers will be able to defend themselves once a prima facie case has been made in much the same way as they did before the *Wards Cove* decision. Since defendants often prevailed in disparate impact cases before the *Wards Cove* decision,[74] there is little reason to believe that they will not be able to prevail if section 4 is adopted.

- Second, to our knowledge, there is no persuasive evidence that many employers adopted hiring quotas before the *Wards Cove* decision. Indeed, there is some evidence that quotas did not result.[75] To the extent that section 4 restores the law to its pre-*Wards Cove* status, there are no compelling reasons to believe that many employers will adopt hiring quotas now.
- Third, quota hiring is very costly for employers (and, it should be noted, for the wider society as well). An employer who hires to fulfill numerical quotas forgoes opportunities to hire the most productive workers available. As such, quota hiring is likely to cause a considerable reduction in the productivity of the employer's work force and lead to a substantial increase in his production costs. Employers have other alternative responses besides resorting to numerical quotas. Instead of adopting quotas, an employer can:

  (1) prepare documentation sufficient to justify his employment practices in court; or
  (2) modify his employment practices by discarding those practices he does not think he can justify in court and adopting new practices that can be justified; or

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[74] Preliminary data provided by Peter Siegelman and John Donohue on a random sample of 44 disparate impact cases brought to court under Title VII between the years of 1972 and 1987 show that only 4 of these cases were won by plaintiffs. Norman Dorsen of the American Civil Liberties Union lists numerous disparate impact cases that were won by defendants in his testimony before the House Committee on Education and Labor, Feb. 27, 1990, p. 17.

[75] Jonathan Leonard, "Anti-Discrimination or Numerical Balancing: The Impact of Title VII 1978–1984," unpublished manuscript, 1984. Looking at EEO–1 forms filed by firms with 100 or more employees, Leonard finds that, contrary to what one might expect if firms were adopting quotas because of the *Griggs* decision, there has been no narrowing over time in the differences in the racial and sex composition of similar firms in the same labor market.

(3) bear the higher expected liability costs that would result if he made no changes at all to his employment practices.

Each of these three options, it would seem, is likely to be much less costly than quota hiring.

- Fourth, if an employer were to adopt quota hiring to avoid potential liability in disparate impact cases, he would only be opening himself up to another type of litigation: reverse discrimination suits. To the extent that potential lawsuits are costly to employers, the possibility of reverse discrimination should provide a significant disincentive to adopting quotas.

Although employers are very unlikely to adopt strict numerical quotas, it remains possible that some employers will adopt preferential hiring strategies if section 4 is adopted. By making it more difficult for employers to prevail when a prima facie case of discrimination has been made, section 4 will give employers an increased incentive to improve the "statistical balance" of their work force. If they can do this without incurring substantial costs, for instance, by selecting a minority applicant whenever two potential employees appear to be closely matched (even when the majority employee might otherwise have been hired), they probably will. This is most likely to occur in situations where the skill differences between the minority and majority employees are comparatively small, however.

A second source of concern about the proposed legislation is that the provisions in section 4, if adopted, might place an undue burden on small businesses. It would seem that, in many cases, it will be difficult or prohibitively expensive for an employer who hires only a small number of people in each job category over a several-year period to show that his hiring practices are related to job performance.

There is a strong *a priori* reason to believe that small businesses will not be substantially affected by the provisions in section 4, however. Small businesses, it would seem, are unlikely to be sued under the disparate impact theory. The very same factors that would make it difficult for a small employer to defend his employment practices in a disparate impact case would make it difficult for a potential plaintiff to make a prima facie showing of discrimination. Since making a prima facie case of discrimination usually requires statistical analysis of the employer's applications and hires, the small numbers of applicants and persons hired means that it will generally be difficult for the plaintiff to make a prima facie case when attacking a small business.

Empirical evidence on the frequency with which small employers have been sued under the disparate impact theory in the past would likely be helpful on this point. If it could be shown that small employers were seldom sued under the disparate impact theory in the years before the *Wards Cove* decision, the argument that the provisions of section 4 would hurt small businesses unduly would seem weak. Unfortunately, it was not possible to assemble the requisite statistics in the short period of time allowed for preparing this statement. These numbers are theoretically available, however, and could be assembled with more time.

Absent empirical evidence, the *a priori* argument outlined in the preceding paragraphs cannot be entirely persuasive. Small businesses might still be subject to disparate impact suits where the plaintiff relies on general labor market data rather than on data on the business' actual applicants and hires. For instance, a small business that requires a high school diploma for all its new hires might be vulnerable to a disparate impact suit if it can be shown that a smaller percentage of a protected group than of the majority group in the local labor market has a high school diploma. The question of whether the small business could successfully defend its requirement under the provisions in section 4 by showing the relationship between the skills and capabilities generally held by high school graduates and the skills necessary to perform the job is open.

Small businesses may protect against disparate impact suits by using validity generalization[76] or conducting validation studies jointly with other substantially similar businesses (e.g., dry cleaners, fast food restaurants, small grocery stores). For example, if an employer wishes to use a high school diploma to screen job applicants, then its relationship to the job performance of employees from several similar small businesses might provide sufficient numbers to justify the high school diploma requirement. The Small Business Administration might help coordinate joint validation studies or assemble information that can be used for validity generalization.

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[76] Validity generalization is using results obtained in one or more validity studies to justify inferences about performance in jobs (or groups of jobs) in different settings. Thus, rather than conducting a validity study using his own job applicants and employees, an employer would use other studies to infer that the selection criterion and job performance are related in his firm.

Another consideration is that the language of section 4 implicitly allows the plaintiff to use disparate impact theory to challenge any type of employment practice, not just practices that affect selection into and out of jobs. Most disparate impact cases until now have challenged practices that affected job selection.[77] Some have raised the possibility that, because section 4 does not explicitly restrict disparate impact challenges to selection practices, disparate impact theory could now be used to require comparable worth pay systems, since market-based pay systems tend to have a "disparate impact" on women and minorities[78] This is an unlikely outcome. Congress has made clear in considering the Civil Rights Act of 1990 that its intent is to restore disparate impact law to its pre-*Wards Cove* interpretation and no more.[79] Thus, it is highly unlikely that the Supreme Court's earlier refusal to address the comparable worth question with disparate impact theory in *Spaulding v. University of Washington*[80] would not stand as precedent.

Another concern is related to the extension of disparate impact analysis to subjective employment practices made possible by the *Watson* decision.[81] Until the *Watson* decision, disparate impact challenges had generally been confined to objective employment practices. It has been argued that it is inherently harder to show that a subjective employment practice is related to job performance than it is to show that an objective employment practice is, and that extending disparate impact analysis to subjective employment practices requires lowering the employer's

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[77] For instance, in denying *certiorari* in *Spaulding v. University of Washington* [740 F.2d 686, *cert. denied*, 469 U.S. 1036 (1984)], the Supreme Court made clear that disparate impact analysis could not be used to challenge an employer's pay system. The Supreme Court also refused to apply disparate impact analysis to the exclusion of maternity coverage from sickness and disability benefits in *General Electric v. Gilbert*, 429 U.S. 125 (1976).

[78] See N. Thompson Powers, Testimony before the House Judiciary Committee, Feb. 27, 1990, p. 10, and Cathie A. Shattuck, Testimony before the Senate Labor and Human Relations Committee, Mar. 1, 1990, p. 12.

[79] Drafters of the legislation say that the intent is to allow disparate impact claims to be made in any situation it could have been made before *Wards Cove* but not to extend its boundaries. (Conversation with Reggie Govan, House Education and Labor Committee, May 31, 1990).

[80] *Spaulding v. University of Washington*,740 F.2d 686, *cert. denied*, 469 U.S. 1036 (1984)

[81] *Watson v. Fort Worth Bank and Trust* , 487 U.S. at 989 (1988).

burden of proof in his business necessity defense. It is not at all clear that the employer's burden of proof should be lowered when objective employment practices are being challenged just because of the addition of subjective employment practices to the set of practices that can be challenged. To the extent that objective practices are easier to validate, placing the burden of persuasion on the employer may encourage employers to switch from subjective to objective practices when possible. Since objective practices are less open to possible abuse, this may be a desirable outcome. Moreover, it is reasonable to expect courts to take the greater difficulty of justifying subjective employment standards into account when deciding whether or not they are "persuaded" by the defendant's business necessity defense.

For the reasons outlined above, the costs resulting from the legislation are not likely to be high. In particular, the likelihood that quotas will result has been greatly exaggerated. Moreover, estimates of these potential costs should be made with the awareness that disparate impact cases are far less common than disparate treatment cases. Data reveal that cases raising disparate impact claims represent fewer than 5 percent of all Title VII cases filed in court.[82]

Finally, in evaluating the provisions of section 4, it should be remembered that, balanced against the potential costs are the potential benefits. As mentioned above, section 4 increases employers' incentives to find nondiscriminatory employment practices. Discarding nondiscriminatory employment practices is likely to result in a better allocation of persons to jobs.[83] Thus, not only will section 4 reduce discrimination, it should also, in many instances, increase the productivity of the American work force.

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[82] Based on preliminary data provided by Peter Siegelman and John Donohue, in a representative sample of 920 Title VII claims, there were 44 cases of disparate impact.

[83] This argument has been made by John J. Donahue III in "Is Title VII Efficient?" *University of Pennsylvania Law Review*, July 1986, vol. 134 no. 6, pp. 1411-31. David Rose argued in his House testimony that the *Griggs* decision has forced employers to improve their selection procedures and therefore raised productivity over the past 20 years and is likely to continue to do so. Others, including psychologists John Hunter and Frank Schmidt, have made the opposite argument, however. The *Griggs* decision, they contend, has led to employers choosing less efficient selection procedures.

Chapter 3

Section 5: Clarifying Prohibition Against Impermissible Consideration of Race, Color, Religion, Sex or National Origin in Employment Practices

Section 5 of the Civil Rights Act of 1990 deals with "mixed motive" discrimination cases, that is, cases in which a discriminatory motive entered an employment decision, but a nondiscriminatory motive was also present. Its purpose is to clarify that it is illegal to let an employment decision or process be affected by a discriminatory motive, whether or not a permissible motive was also present. Section 5 overturns the Supreme Court's 1989 decision, *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989).

Legal Background

As discussed in other parts of this paper, a plaintiff in a Title VII disparate treatment case can establish that an employer possessed a motive or intent to discriminate illegally in an employment decision by the use of circumstantial evidence. In such a case, once a plaintiff makes a prima facie case,[84] an employer can rebut the plaintiff's prima facie case with evidence of a legitimate, nondiscriminatory reason for the treatment.[85]

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[84] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), described how a plaintiff would make a prima facie case:

> This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *Id.* at 802.

[85] *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1990).

Plaintiffs can still prevail, if they demonstrate that the defendants' reasons are merely a pretext for discrimination.[86]

In certain cases, however, the plaintiff produces direct evidence of a discriminatory motive, such as employer statements or documents that indicate consideration of an illegal criterion (such as race, color, religion, sex, or national origin) in the employment decision, and the defendant can rebut this direct evidence by showing that the true reason for the employment decision adverse to the plaintiff is not discrimination but some nondiscriminatory factor. In some instances, both discriminatory and nondiscriminatory motives may be present in the employment decision. In these cases, the nondiscriminatory factor is not the true reason for the employment decision; instead, both the discriminatory factor and the nondiscriminatory factor played a part. This is known as a mixed motive case—where an employer allegedly combines legal with illegal factors in coming to an employment decision.

Until its decision in *Price Waterhouse v. Hopkins*,[87] the Supreme Court had yet to rule on a Title VII mixed motive case, and the Federal appellate circuits had not come to a consensus on how to deal with these cases. Some appellate circuits placed the burden on plaintiffs to show that the employment decision would have been in their favor had it not been for the employer considering an illegal factor.[88] Others held that, once the plaintiff had shown that the illegal motive was a "substantial" or "motivating" factor in the adverse employment decision, then the defendant, to escape liability, had to show that he would have made the same decision in the absence of the illegal factor.[89] Two appellate circuits held that liability of the defendant was established once the plaintiffs had shown that any illegitimate discriminatory factor had entered into the employment decision process, and that a showing by the defendant that he would have made the same decision absent the illegal factor would only prevent imposition of the remedies of reinstatement and backpay.[90] The circuits also differed on whether the employer

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[86] *Id.* at 256.

[87] *Id.* at 256.

[88] The Third, Fourth, Fifth and Seventh Circuits followed this practice. *Price Waterhouse* 109 S.Ct. at 1784 n. 2.

[89] The First, Second, Sixth, and Eleventh Circuits and the District of Columbia followed this practice. *Id.*

[90] The Eighth and Ninth Circuits followed this practice. *Id.*

had to show his case by a standard of preponderance of the evidence or clear and convincing evidence.[91]

In a plurality decision, the Supreme Court held in *Price Waterhouse* that once a disparate treatment plaintiff establishes by direct evidence that an illegitimate criterion was a substantial factor in the employment decision, then, to escape liability, the defendant must show by a preponderance of the evidence that he would have made the same decision had the illegitimate criterion not been considered.[92]

Section 5 of the Civil Rights Act of 1990 would change this standard. It states that "an unlawful practice is established when the complaining party demonstrates [bears the burdens of production and persuasion] 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."[93] In other words, liability of a defendant is established once the plaintiff shows that any discriminatory factor entered into the employment decision process. A showing by the defendant that he would have made the same decision adverse to the plaintiff absent the illegal factor would not absolve the defendant of liability, but only prevent imposition of the remedies of reinstatement and backpay.[94]

Policy Analysis

Section 5 establishes that discrimination is illegal whenever it is a motivating factor in an employment decision, whether or not other factors also entered into the employment decision. However, if the defendant can prove that he would have made the same decision even in the absence of the discriminatory motive, he will not be required to hire, promote, or pay backpay or frontpay to the plaintiff.[95] The plaintiff may be given injunctive or declaratory relief, however, and, under the provisions of

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[91] *Id.*

[92] *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989).

[93] S. 2104, § 5(a)(1) (emphasis added).

[94] S. 2104, § 5(b). Although the defendant's liability, once established, is limited to damages, § 8 of the proposed legislation would expand the meaning of damages to include compensatory and punitive damages to be determined by a jury. *See* S. 2104 § 8.

[95] S. 2104, 101st Cong., 2d Sess, § 5(b) (1990).

section 8, would be eligible for compensatory and punitive damages.[96]

Adoption of section 5 would provide a tool, not currently available under Title VII law, to hold discriminatory employers accountable for their actions. There are three compelling reasons why it is important for an employer who allows a discriminatory motive to enter into an employment decision, even when he would have made the same decision otherwise, to be held liable for discrimination.

- When employers allow discriminatory motives to enter their employment decisions, the persons at whom this discrimination is directed often suffer real harm, whether or not they are qualified for the positions they are seeking. Finding these employers guilty of discrimination would allow the victims to be compensated for any harm caused by the discriminatory behavior. Moreover, the possibility of punitive damages in such cases would serve to deter discriminatory behavior on the part of employers.
- An employer who discriminates in one instance may well discriminate again at some point in the future, when, perhaps, his discriminatory behavior will be the deciding factor in his employment decision. If the employer is found liable in the first instance, and injunctive or declaratory relief is granted to the plaintiff, the employer is likely to be deterred from future discriminatory behavior.
- Under the law as it stands currently, an employer will not be held liable for discrimination against a job applicant who is not fully qualified for the job or an employee whom he is going to fire anyway. This amounts to giving employers a license to discriminate against incompetent employees.

Opponents of the proposed legislation are concerned that section 5 would have the effect of employers being held liable for "discriminatory thoughts."[97] It is unlikely that a plaintiff could persuade a judge, as would be required, that discrimination "motivated" an employment decision, when the employer or his

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[96] S. 2104, 101st Cong., 2d Sess., § 8 (1990).

[97] For instance, Donald Ayer, representing the U.S. Department of Justice, states, "The proposed legislation takes the startling step of allowing a damage recovery based solely on the discriminatory thoughts of an agent of the employer, which have no consequence to the plaintiff." Testimony before the Senate Labor and Human Resources Committee, Feb. 27, 1990, pp. 12-3.

agent only had discriminatory thoughts, especially if they were not expressed. The term "motivating factor" in section 5 is likely to be interpreted in the context of the decision in *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), a leading Supreme Court mixed motive case prior to *Price Waterhouse*, which viewed "motivating factor" and "substantial factor" as synonyms. In *Mount Healthy*, the Court required:

> respondent to show that his conduct was constitutionally protected, and that the conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him.[98]

Furthermore, there is nothing in section 5 that changes Justice Brennan's statement in his *Price Waterhouse* decision that to show that discrimination was a motivating factor, "[t]he plaintiff must show that the employer actually relied on her gender in making its decision."[99]

It is possible that a change in the language of the bill could alleviate the fears of opponents, however. Section 5 currently requires plaintiffs to show that discrimination is a "motivating factor" in the employer's decision before the employer is held liable for discrimination. To clarify the meaning of "motivating factor," section 3 of the bill (the definitions section) could define "motivating factor" as a factor that "enters in a significant way into the employment process or the employment decision."

Another concern is that employers might be found liable under section 5 for discriminatory behavior on the part of a subordinate, even when they had repudiated the behavior, disciplined the subordinate, and instituted corrective measures to ensure that the behavior would not be repeated in the future. The issue of employer liability for the actions of subordinates is not new to Section 5. The Supreme Court dealt with this issue in part in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1985). In that case, the Court declined to issue a definitive rule on employer liability. It agreed, however, that traditional agency principles should govern employer liability.[100] Dealing with the issue of whether an employer is always liable for sexual harassment by supervisors in their employ, the Court stated: "[T]he Court of

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[98] *Mount Healthy Board of Education v. Doyle*, 429 U.S. 274, 287 (1977)

[99] *Price Waterhouse v. Hopkins*, slip. op. p. 21.

[100] *Meritor Savings Bank v. Vinson*, 477 U.S. 57 at 70 (1985).

Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors,"[101] but "absence of notice to an employer does not necessarily insulate that employer from liability."[102] The Court rejected the view that "the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability."[103] Dealing with the issue of whether an employer is liable for discrimination by a supervisor exercising authority in a hiring or firing situation, the Court agreed that

> where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them. . . . Thus, the courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of supervisor's actions.[104]

The Court's interpretation of the standard agency rules suggests that under section 5 employers will be held strictly liable for the behavior of supervisors who allow discriminatory motives to affect employment decisions. This seems proper and in keeping with the previous court decisions referred to above by the Court. They will not necessarily be liable, however, for all discriminatory actions of their employees. The Court made clear in its *Meritor* decision that employers are not liable in all instances for the actions of employees. The Court has not yet established the exact limits of employer liability in all situations. However, there does not seem to be a compelling need to address the issue within the context of section 5.

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[101] *Id.* at 72.

[102] *Id.*

[103] *Id.*

[104] *Id.* at 70–1.

Chapter 4

Section 6: Facilitating Prompt and Orderly Resolution of Challenges to Employment Practices Implementing Litigated or Consent Judgments or Orders

Section 6 of the Civil Rights Act of 1990 addresses the question of third-party rights in challenging consent decrees and court orders entered in employment discrimination litigation. Its stated purpose is to "facilitate prompt and orderly resolution"[105] of such challenges. Section 6 addresses the Supreme Court's decision in *Martin v. Wilks*, 109 S.Ct. 2180 (1989). Chapter 4 examines the provisions in section 6 to determine whether they achieve a good balance between society's competing interests in guaranteeing the right of due process to third parties and in ending and redressing discrimination.

Legal Analysis

Title VII discrimination suits are often resolved through court orders that specify changes in the defendant's employment procedures and are enforced by the court. Some court orders are judgments imposed by the court after a full trial on the merits and a finding that the defendant is liable for discrimination. Others are consent decrees agreed to by the parties after varying amounts of litigation and entered by the court. Section 6 establishes the circumstances when third parties can challenge court orders (judgments or consent decrees) after they are entered.

One author gives the following definition of a consent decree: "A consent decree is a settlement agreement among the parties to a lawsuit, signed by the court and entered as a judgment in

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[105] S. 2104, 101st Cong., 2d Sess. § 6 (1990).

the case."[106] In some ways, consent decrees are like contracts: they are voluntary agreements between the parties to the lawsuit. However, in other ways they are like judgments. In entering a consent decree, the court agrees to enforce it. Thus, if the defendant does not live up to the agreement, the plaintiff need not institute a new lawsuit to enforce the agreement; instead, the defendant can be cited for contempt of court. Moreover, whereas a contract can only be modified by the parties to the contract, "a consent decree can be modified by the court, even over the objections of a party, in order 'to effectuate the basic purpose of the decree.'"[107]

Consent decrees play a useful role in resolving Title VII disputes. Unlike out-of-court settlements, they are under the ongoing jurisdiction of the court: the court enforces, interprets, and often administers the agreement. This has advantages for both parties. It is useful to have the court interpret consent decrees' provisions because consent decrees usually involve complex agreements. Also, unanticipated circumstances can be accommodated easily with a consent decree because the court can interpret or modify the decree as needed. To the advantage of the plaintiff, it is easy to enforce an agreement entered as a consent decree. To the advantage of the defendant, consent decrees are often thought to provide him with a defense in a possible reverse discrimination suit: he cannot be held liable for reverse discrimination ordered by the court.[108] In situations where out-of-court settlements are impractical, consent decrees provide a means for the parties to resolve their differences without bearing the costs of fully litigating the dispute.

Title VII court orders, whether they are judgments entered after a full trial or consent decrees, often affect third parties, however. Typically, Title VII court orders require an employer to institute an affirmative action plan with preferential hiring or promotion or both. The employer might also be required to grant employees belonging to the plaintiffs' class retroactive seniority. Requirements of this type usually directly affect employees who

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[106] Maimon Schwarzschild, "Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform," *Duke Law Journal*, vol. 1984, pp. 887-936, at p. 894.

[107] *Id.*, p. 895.

[108] For instance, in the *Wilks* case, the district court held that if an employer's actions are required by the terms of a consent decree, then he cannot be held liable for discrimination.

do not belong to the plaintiffs' class. Courts have had to solve the problem of how best to protect the rights of third parties without destroying the finality provided by court orders.

Before the *Martin v. Wilks* decision, virtually all courts had used the "collateral attack doctrine" to justify denying third parties the right to challenge a court order after it is entered."[109] In effect, these courts required third parties to make their interests known to the court before the court order was entered. This could be done in several ways. Third parties could seek to intervene in the lawsuit under Federal Rule of Civil Procedure 24(a) before the consent order was entered. Rule 24(a) gives affected third parties the right to intervene in a lawsuit, provided that they exercise that right in a timely manner and that their interests are not already adequately represented by another party.[110] Alternatively, if the third parties did not wish to become parties, they could file briefs with the court or appear at a fairness hearing to state their interests.[111]

Theoretically, intervention could be at any time. However, courts often denied third parties the right to intervene even before the court order was entered, on the basis that their applications to intervene were not sufficiently timely. For example, in *Culbreath v. Dukakis*,[112] predominately white labor unions were not allowed to intervene in an employment discrimination lawsuit against various Massachusetts State agencies, even though they applied to intervene 1 month before the consent decree was submitted to the court. "The court

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[109] See *Martin v. Wilks*, 109 S.Ct. at 2185 n. 3 for a listing of previous lower court decisions relying on the "impermissible collateral attack doctrine." Before the *Wilks* decision, every circuit except the 11th Circuit had held that collateral attacks were impermissible.

[110] Fed. R. Civ. P. 24(a)(2) provides:

> Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and [the applicant] is so situated that the disposition of the action may as a practical matter impair or impede [the applicant's] ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

[111] Another way third parties could become parties to the lawsuit is for the original parties to join them under Rule 19(a) discussed below.

[112] 630 F.2d 15 (1st Cir.), *cert. denied*, 439 U.S. 837 (1978).

reasoned that the unions should have known all along that the suit was pending and that the plaintiffs' ultimate objective was that minorities should be employed by the State agencies in proportion to the local minority population. The union's interest should thus have been 'obvious' from the beginning."[113] Thus some courts required third parties to intervene as soon as they knew that a lawsuit was pending, and did not allow them to wait until the terms of the court order were known. Because third parties often do not become aware of the full extent to which their interests are affected until after the terms of a court order are known, they may not seek to intervene as soon as it is known that a lawsuit is pending. Furthermore, courts often did not permit white third parties to participate in fairness hearings before entering court orders.[114] Thus, in many cases, third parties were never given a real opportunity to make their interests known to the courts.

In the *Wilks* case, white firefighters challenged a consent decree between the City of Birmingham and black firefighters that had been entered after 7 years of litigation. Before the consent decree was entered by the court, the white firefighters' union participated in a fairness hearing, in which it voiced the firefighters' objections to the decree. When the union applied to intervene in the lawsuit the day after the fairness hearing, the judge denied its motion as untimely.[115] After the consent decree was entered, the white firefighters challenged the decree in a separate lawsuit. The district court dismissed their claims, ruling that "'if in fact the City was required to [make promotions of blacks] by the consent decree, then they would not be guilty of [illegal] racial discrimination' and that the defendants had 'establish[ed] that the promotions of the black individuals were

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[113] Maimon Schwarzschild, "Public Law by Private Bargain," p. 920. Another example is the case, *Deveraux v. Geary*, 765 F. 2d. 15 (1st Cir. 1980). This and other examples are discussed in full in Charles J. Cooper, "The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process," *The University of Chicago Legal Forum 1987: Consent Decrees: Practical Problems and Legal Dilemmas*, pp. 157–60.

[114] Maimon Schwarzschild, "Public Law by Private Bargain," p. 919.

[115] Stephen L. Spitz, "Impact of the Supreme Court Decision in *Martin v. Wilks*," (Washington, DC: Lawyers Committee for Civil Rights, February 1990), 2–7.

in fact required by the consent decree.'"[116] The circuit court of appeals reversed, holding that "[b]ecause . . . [the *Wilks* respondents] were neither parties nor privies to the consent decrees, . . . their independent claims of unlawful discrimination are not precluded."[117] In other words, since the white firefighters were not parties to the original consent decree, they could still sue for racial discrimination. The Supreme Court affirmed this view:

> All agree that "[i]t is a principle of general application in anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." This rule is part of our "deep rooted historic tradition that everyone should have his own day in court." A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.[118]

The controlling principle in the Supreme Court's *Wilks* decision is Federal Rule of Civil Procedure 19(a), which requires the joinder of a third party in a lawsuit when a judgment or settlement rendered in the absence of that third person will:

> as a practical matter impair or impede the person's ability to protect that interest or . . . leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been joined, the court shall order that the person be made a party.[119]

The Court held that Rule 19(a) places an affirmative duty on the court, the plaintiff, and defendant to seek out and include all parties who may be affected by the lawsuit or decree. The Court rejected the argument that it was the *Wilks* plaintiffs' burden to find the lawsuit and intervene: "[A] party seeking a judgment

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[116] *Martin v. Wilks*, 109 S.Ct. 2180, 2184 (1989) (quoting the district court opinion) (original brackets).

[117] *Id.* (quoting *In Re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1498 (1987)) (original brackets).

[118] *Id.* (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); 18 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4449, at 417 (1981) (citations and footnote omitted)).

[119] Fed. R. Civ. P. 19(a).

binding on another cannot obligate that person to intervene; he must be joined."[120]

The Supreme Court's *Wilks* decision, thus, repudiated the collateral attack doctrine. The Court decided that third parties who had not been joined as parties to a consent decree could challenge the decree after it was entered, even if they knew about the decree and failed to attempt to intervene at the time that the consent decree was entered. The *Wilks* decision means that as long as a person is not a party to the lawsuit resulting in the court order, he retains the right to attack the court order at a later date even if he knew about the court order and failed to exercise his right to intervene before it was entered, or if he was represented at a fairness hearing prior to the entry of the order.

Congress, as Justice Rehnquist acknowledged, can overturn the *Wilks* decision, as long as any new rules drafted by Congress do not violate third parties' constitutional rights to due process:

> where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process.[121]

Section 6 in the proposed legislation constitutes such a remedial scheme. At the same time, unlike most courts that relied on the impermissible collateral attack doctrine, the proposed legislation does not impose an absolute bar to collateral attacks of court orders. Instead, it establishes conditions under which third parties retain their rights to challenge court orders after they are entered.

Third party challenges would be disallowed under the legislation only if they were made:

> (A) by a person who, prior to entry of such judgment or order, had 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 a reasonable opportunity to present objections to such judgment or order; or
> (B) by a person . . . 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 the entry of such judgment or order; or

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[120] *Id.* at 2185.

[121] *Martin v. Wilks*, 109 S.Ct. 2180 at 2184, n. 2.

(C) if the court that entered the judgment or order determines that reasonable efforts were made to provide notice to interested persons consistent with the Constitutional requirements of due process of law.[122]

Thus, the proposed legislation makes clear that a person who did not have sufficient notice and opportunity to present objections before a court order was entered would be allowed to challenge the court order later on, unless the court found that "reasonable efforts" had been made to give notice to all interested persons or that the person had been "adequately represented" by someone else who had already challenged the court order. However, to reduce the waste of judicial resources and the possibility of conflicting judgments, the proposed legislation requires that all challenges be made in the court that originally entered the court order.[123] The legislation also expressly states that the order could still be challenged by anyone if it was "obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction."[124] Although it is not explicitly stated in the proposed legislation, third parties, as well as the original parties to the lawsuit, would retain the right, established in the Supreme Court decision *United States v. Swift and Co.*, to challenge the decree if altered circumstances warrant a change: "[A] court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong. . . .All the parties to the consent decree concede the jurisdiction of the court to change it."[125] Finally, the legislation would not change third parties' rights to intervene under Rule 24 before or after a court order is entered.

At issue is whether the third-party rights specified in (A)-(C) quoted above meet constitutional requirements of due process. These rights are spelled out in the Supreme Court decision *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), as follows:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the

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[122] S. 2104, 101st Cong., 2d Sess. § 6(m)(1) (1990).

[123] S. 2104, 101st Cong., 2d Sess. § 6(m)(3) (1990).

[124] S. 2104, 101st Cong., 2d Sess. § 6(m)(2) (1990).

[125] *United States v. Swift & Co.*, 286 U.S. 106 (1932) at 114–5.

pendency of the action and afford them an opportunity to present their objections. . . . The notice must be of such nature as reasonably to convey the required information,. . ., and it must afford a reasonable time for those interested to make their appearance. . . .But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the Constitutional requirements are satisfied. . . .[126]

Combined, (A) and (C) appear to meet the *Mullane* notice requirements. The wording in (A) appears to be chosen so as to guarantee to third parties the type of notice and opportunity specified in *Mullane.* The wording in (C) ensures that efforts to notify third persons will be sufficient to meet constitutional requirements—which were spelled out in *Mullane.*

The *Mullane* decision does not have a provision like (B), which precludes challenges by persons whose interests are deemed adequately represented by someone who previously challenged the consent decree. However, if the fundamental rights of due process required that each person have his or her own day in court, even when he or she had been adequately represented by someone else, class action suits would not be constitutional. This would not be consistent with the Supreme Court decision in *Hansberry v. Lee,* 311 U.S. 32 (1940), which states:

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. . .To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a "class" or "representative" suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.[127]

It should be noted that the proposed legislation leaves it up to the courts to determine when a person has been "adequately represented." The courts might hold that a person has been adequately represented if someone else who challenged the court order previously was in the same situation and raised the same issues. On the other hand, the courts might hold that a person has only been adequately represented by someone else when a formal class designation was made.

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[126] *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314–15 (1950).

[127] *Hansberry v. Lee,* 311 U.S. 32 at 40–1.

In conclusion, it would appear that, on the whole, section 6 is likely to be found constitutional.[128]

Policy Analysis

The merits of section 6 should now be considered on other grounds: in particular, which rule, allowing challenges to court orders by persons who were not parties to the original litigation, (hereafter, *Wilks* rule), or barring such challenges except in the specific circumstances permitted by the proposed legislation better meets the policy goal of achieving providing final judgments in employment discrimination cases without unnecessarily trammeling the rights of third parties?

One argument often given in favor of the *Wilks* rule is that it gives all parties a full chance to be heard in court and thus might lead to a better overall settlement. The same would be true, however, if affected third parties sought to intervene under Rule 24.

In the *Wilks* decision, Justice Rehnquist argues that not only is the *Wilks* rule required by Rule 19(a), but also there are practical reasons for preferring it. He argues that the original parties to the suit are in a better position to know which third parties might be affected by the outcome of the litigation than are the third parties themselves:

> [P]laintiffs who seek the aid of the courts to alter existing employment policies, or the employer who might be subject to conflicting decrees, are best able to bear the burden of designating those who would be adversely affected if plaintiffs prevail; these parties will generally have a better understanding of the scope of likely relief than employees who are not named but might be affected.[129]

There is some merit to this argument. However, the original parties need not join interested parties to communicate their superior knowledge; instead, they could do so by notifying potentially affected third parties. Furthermore, the original parties cannot know which third parties will feel it worthwhile

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[128] For other analyses concluding that section 6 is constitutional, see Julia Erickson, Memorandum to the American Civil Liberties Union, Apr. 2, 1990; Larry Kramer, Testimony before the House Committee on Education and Labor, Mar. 20, 1990; Laurence H. Tribe, Testimony before the Senate Labor and Human Resources Committee, Mar. 7, 1990. For a conflicting analysis, see Glen D. Nager, Testimony before the Senate Labor and Human Resources Committee, Mar. 7, 1990.

[129] *Martin v. Wilks*, 104 L. Ed. 2d. at 848.

to enter the lawsuit. As a result, they may join many unnecessary parties—parties who would not seek to intervene on their own, and in fact do not want to be in the lawsuit.[130] Not only will it be expensive for the original parties to try to join every conceivable interested party, but many of the joined parties will be forced to incur unnecessary legal expenses.

Justice Rehnquist also argues that there is no necessary reason why the *Wilks* rule should lead to more challenges after the court order is entered than a system that relies on third parties exercising their rights to intervene. He notes that "even under a regime of mandatory intervention, parties who did not have adequate knowledge of the suit would relitigate issues."[131] His argument appears to assume that the same persons would be joined under the *Wilks* rule (and hence be precluded from subsequent collateral attacks) as would be given notice under a system, such as that provided in the proposed legislation, that would preclude collateral attacks by persons who had been given notice. However, the process of joining a person to a lawsuit is more costly than the notification that would be required under the proposed legislation. For this reason alone, it is likely that the parties would join fewer people under the *Wilks* rule than they would notify under the proposed legislation. Another reason why fewer people would be joined under the *Wilks* rule than would be notified under the proposed legislation is that all persons joined would become parties to the lawsuit, whereas only some of the persons notified would choose to intervene.[132] Since the addition of parties to a lawsuit is both costly and inconvenient for the original parties, they would likely join as few people as possible.

Justice Rehnquist's argument also ignores the reality that a large number of employment discrimination court orders were entered before the *Wilks* decision, when the prevalent understanding was that collateral attacks after a court order was

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[130] "The Supreme Court—Leading Cases," *Harvard Law Review*, vol. 103, no. 1, November 1989, p. 315, states: "Because mandatory joinder requires the parties to make their decisions at the beginning of the litigation, they must file redundant and expensive motions for each employee potentially affected by the suit, even though at that point it is unclear which employees will be affected and how."

[131] *Martin v. Wilks*, 104 L. Ed. 2d. at 848.

[132] Notified persons could choose to intervene under Rule 24. Alternatively, as noted above they could simply file a brief or appear at a fairness hearing. Also, they can choose not to enter the proceeding in any way.

entered were impermissible. As a result, third parties were generally not joined to existing court orders, and thus most existing court orders are now vulnerable to attack. Thus, even if the two rules would lead to the same number of collateral attacks in a steady state, for a transitional period at least, the *Wilks* rule is likely to lead to a large number of collateral attacks. Not surprisingly, there have been many court order challenges since the decision.[133]

The system proposed in section 6 will lead to fewer collateral attacks than current law and, therefore, will have the benefit of providing finality to court orders in employment discrimination litigation. This is an important benefit. First, the financial costs of subsequent litigation are high for both of the original parties. If collateral attacks become frequent, as it seems they will under current law, the overall costs of combatting employment discrimination are likely to increase considerably. This will provide a significant disincentive to the bringing of employment discrimination suits and mean that fewer victims of discrimination will receive redress. Second, subsequent litigation is likely to have nonfinancial costs as well: it will delay the healing that is likely to be needed after the years of litigation that it normally takes before a court order in a classwide discrimination suit is entered.

In achieving this benefit, however, it is important to ensure that third parties do get an opportunity to have their day in court before the court order is entered. As noted above, before the *Wilks* decision, third parties sometimes did not have an opportunity to be heard, because they were denied intervention when they did not seek to intervene in the early stages of litigation and because courts did not normally allow them to appear in fairness hearings. The proposed legislation contains safeguards that go a long way towards ensuring that third parties will have an opportunity to be heard. In particular, a person who has not been given sufficient notice and reasonable opportunity to present objections retains the right to challenge a court order after it is entered unless he has been adequately represented by someone else or reasonable efforts to notify all interested parties were made before the court order was entered.

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[133] See Stephen L. Spitz, *Impact of the Supreme Court Decision in Martin v. Wilks* (Washington, DC: Lawyers Committee on Civil Rights Under Law, 1990) for examples of litigation spawned by the *Wilks* decision.

There is some concern, however, about when courts will deem that a person has received sufficient notice and a reasonable opportunity to present objections. It is important that parties be notified not only of the existence of a lawsuit but also of the terms of the court order in time to present objections. If they do not get notification of the terms of the court order, they may not fully realize the extent to which their interests are affected. It is also important that they be given more than a minimal opportunity to present objections. Not only will they need sufficient time to prepare their presentation, but they may need access to information that can only be obtained through discovery. They may also need an opportunity to call witnesses on their behalf. The proposed legislation leaves these issues to the courts to decide, on the basis of third parties' constitutional rights to due process. It might be wise for Congress to provide more guidance to the courts to ensure that third parties are not given only their minimal rights of due process, but as much opportunity to make their case as possible without significantly delaying a final resolution to employment discrimination litigation.

The main issue is whether section 6 or current law better satisfies the goal of achieving finality in employment litigation without unnecessarily trammeling the rights of innocent third parties. As argued above, section 6 would achieve finality in court orders to a much greater extent than current law. It would also guarantee that third parties would be given an opportunity to have their day in court.

Chapter 5
Section 7: Statute of Limitations—Application to Challenges to Seniority Systems

Section 7 of the Civil Rights Act of 1990 extends the statute of limitations under Title VII and clarifies when the statute of limitations begins. Chapter 5 briefly reviews section 7 and compares it with the corresponding provision of the Civil Rights Protections Act of 1990,[134] an alternative bill currently backed by the administration.

Section 7(a)(1) extends the statute of limitations under Title VII from 180 days to 2 years.[135] This would make the statute of limitations under Title VII comparable to the statute of limitations under section 1981, which ranges from 2 to 3 years.[136] The Civil Rights Protections Act of 1990 would not change the statute of limitations.

Section 7(a)(2) of the Civil Rights Act of 1990 addresses the Supreme Court decision *Lorance v. AT&T Technologies.*[137] In *Lorance*, the Court held that a challenge against a facially neutral seniority system was barred by Title VII's statute of limitations. Title VII considers claims to go stale 180 days (or 300 days if referred to a State agency) after the alleged discrimination occurred. The Court held in *Lorance* that a plaintiff's claim would begin to toll when the seniority system was first implemented, not when the system had allegedly adversely affected the plaintiffs.

Section 7(a)(2) of S. 2104 would amend the statute by starting the statute of limitations when an unlawful employment practice "occurs or has been applied to affect adversely the person aggrieved, whichever is later." Currently, the statute of limitations begins when an unlawful employment practice "occurs."

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[134] S. 2166, 101st Cong., 2d Sess. (1990).

[135] S. 2104, 101st Cong., 2d. Sess. § 7(a) (1990).

[136] S. Rep. No. 315, 101st Cong., 2d Sess. 53 (1990).

[137] 109 S.Ct. 2261 (1989).

Section 3 of S. 2166, in contrast, would add the following language:

> For purposes of this section, an unlawful employment practice occurs when a seniority system is adopted, when an individual becomes subject to a seniority system, or when a person aggrieved is injured by the application of a seniority system, or provision thereof, that was adopted for an intentionally discriminatory purpose, in violation of this Title, whether or not that discriminatory purpose is apparent on the face of the seniority provision.[138]

The language contained in section 3 of the Civil Rights Protections Act appears to cover only seniority systems adopted with the intent to discriminate, whereas the language in section 7(a)(2) of the Civil Rights Act of 1990 is broader, since it covers all unlawful employment practices.

Section 7(b) of the Civil Rights Act of 1990 amends Title VII to make unlawful the application of a seniority system that is part of a collective bargaining agreement if the seniority system was "included in the agreement with the intent to discriminate on the basis of race, color, religion, sex, or national origin."

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[138] S. 2166, 101st Cong., 2d Sess. § 3 (1990).

Chapter 6

Section 8: Providing for Damages in Cases of Intentional Discrimination

Section 8 of the Civil Rights Act of 1990 addresses the remedies available to prevailing plaintiffs under Title VII. Its stated purpose is to "strengthen existing protections and remedies available under civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination."[139] Chapter 6 examines the possible effects of section 8.

Legal Background

Title VII provides for the remedies a court may implement to make a plaintiff whole once it has found that an employer has discriminated.

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.[140]

Title VII has traditionally been interpreted as allowing a trial court judge to do any and all of the following: issue an injunction to stop a discriminatory practice, reinstate the plaintiff at the job for which he would have been qualified absent the illegal discrimination, or award the plaintiff the "backpay" he would have accrued at that position.[141] Moreover, Title VII provides that

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[139] S. 2104, 101st Cong., 2d Sess. 2(b)(2) (1990).

[140] 42 U.S.C. 2000e-5(g) (1982).

[141] *Id.*

a Federal judge alone will "hear and determine the case" arising under the statute.[142]

The Civil Rights Act of 1990 would amend Title VII to allow a prevailing plaintiff to be awarded compensatory damages for intentional violations and punitive damages for violations committed with malice, or reckless or callous indifference to the rights of others, in addition to the affirmative relief already specified in the statute.[143] In addition, "if compensatory or punitive damages are sought . . . any party may demand a trial by jury."

Policy Analysis

Section 8 represents a major change in Title VII to allow successful plaintiffs to recover compensatory and punitive damages in cases of intentional discrimination. It also authorizes jury trials when compensatory and punitive damages are sought. There are three very compelling arguments in favor of adopting section 8.

(1) Persons who suffer racial harassment are entitled to compensatory and punitive damages under section 1981 of the 1866 Civil Rights Act.[144] Thus, allowing compensatory and punitive damages under Title VII would extend to sex discrimination and religious discrimination remedies that are already available in cases of racial (and by court interpretation, national origin) discrimination. Yet, discrimination based on sex and discrimination based on religion are just as reprehensible as discrimination based on race and ethnicity. It is important for all types of discrimination to be treated equally under the law.[145]

(2) The relief currently available under Title VII leaves a large gap in civil rights law: plaintiffs cannot be "made whole" under Title VII in situations where an employer's discriminatory be-

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[142] 42 U.S.C 2000e-5(f)(4) (1982).

[143] S. 2104, § 8 (A), (B). Section 8 expressly states that compensatory and punitive damages and the jury trial right would not be applicable to disparate impact cases arising under § 4 of the Civil Rights Act of 1990.

[144] In a recent decision, *Patterson v. Mclean*, 109 S.Ct. 2363 (1989), the Supreme Court restricted the application of section 1981, so that it no longer applies to most on-the-job discrimination. Section 12 of the proposed legislation would reestablish that section 1981 applies to on-the-job discrimination as well has hiring and firing discrimination.

[145] This argument is predicated on the assumption that Congress will overturn the Supreme Court's decision in *Patterson v. Mclean*.

havior has caused the plaintiff harm that is not related to the loss of a job or a promotion possibility. For instance, an employee who needs to use mental or physical health services as a result of harassment on the job by an employer or coworker cannot recover the costs of these services under Title VII. The addition of compensatory damages to the remedies allowed under Title VII is crucial for ensuring that victims of discrimination receive justice.

(3) Many forms of employment discrimination, such as on-the-job harassment, are currently left undeterred by Title VII, because employers cannot be assessed monetary damages in these situations. Even discrimination that results in backpay or frontpay awards is not sufficiently deterred under current law, because most instances of discrimination go unprosecuted. To deter discrimination effectively, given that most discriminators are not brought to court, requires the ability to assess punitive damages. Thus, the addition of punitive damages to the remedies available under Title VII will constitute a crucial step towards deterring discriminatory behavior on the part of employers.

Opponents of the proposed legislation are concerned that allowing compensatory and punitive damages under Title VII will dramatically increase the number of discrimination charges, result in excessively large damage awards, and reduce the incentives to settle discrimination cases.

It is clear that the number of discrimination charges filed will increase if compensatory and punitive damages become available under Title VII. An increase in the number of discrimination charges filed is not necessarily a bad thing, however. Under current law, many actual cases of discrimination never result in a discrimination charge, because it is not worth it to the person who has been harmed by the discrimination to undergo the costs (e.g., psychic, monetary, and time costs) entailed if the only form of relief the person can hope to obtain is injunctive relief. Thus, an increase in discrimination charges filed is likely to mean that more victims of discrimination will obtain justice.[146]

The question of whether excessively large damage awards will result is controversial. Critics of the legislation argue that the damage awards will be extremely high, especially if jury trials are granted. They point to California's experience with wrongful

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[146] Of course, some nonvictims might also bring charges in the hopes of winning large damage awards.

termination suits as an example of the problems that result when damages are awarded.[147] A RAND study of the damage awards under California's wrongful termination law finds, however, that:

> Despite the visibility of million-dollar jury awards, most plaintiffs receive less than $30,000 after post-trial reductions and legal fees....Despite the uproar over wrongful termination litigation, the aggregate legal costs are really not very large.[148]

By contrast, other studies point to the average damage awards in employment discrimination cases under section 1981, which appear to have been generally modest.[149] The experience of section 1981, which is more similar to Title VII, is likely to approximate more closely the possible effects of adding compensatory and punitive damages to Title VII.

The argument by critics that the addition of compensatory and punitive damages will reduce the number of settlements under Title VII is not supported by theory or evidence. Economic theory predicts that increasing the amounts plaintiffs can receive in a lawsuit will lead to larger settlements, but the percentage of lawsuits settled will not necessarily decline. Although plaintiffs might hold out for larger settlement amounts, defendants, knowing that they are potentially liable for more than they were before, should also be willing to make higher settlement offers.

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[147] For instance, see Edward E. Potter and Ann Elizabeth Reesman, *An Assessment of Remedies: The Impact of Compensatory and Punitive Damages on Title VII* (Washington, DC: National Foundation for the Study of Employment Policy, 1990).

[148] James N. Dertouzos, Elaine Holland, and Patricia Ebener, *The Legal and Economic Consequences of Wrongful Termination* (Santa Monica: RAND Institute for Civil Justice, 1988), p. ix.

[149] See, for instance, Wendy S. White, Daniel W. Shelton, A. Mechele Dickerson, and Jennifer U. Toth, "Analysis of Damage Awards Under Section 1981," research undertaken for the National Women's Law Center by the law firm Shea and Gardner, 1990; and Theodore Eisenberg and Stewart Schwab, Testimony on the Civil Rights Act of 1990 before the House Committee on Education and Labor, Mar. 13, 1990. Also, note that plaintiffs appear to be less likely to win section 1981 cases that make it to court than they are to win Title VII cases that do not raise a section 1981 claim. The American Bar Foundation data show that of cases decided in court, roughly 3 percent of section 1981 cases and roughly 6 percent of other Title VII cases are won by the plaintiff. These numbers do not support the argument that juries (currently available under Section 1981, but not under Title VII) are more likely to find for the plaintiff than judges are.

There has been one attempt to estimate the potential increase in litigation costs resulting from the addition of compensatory and punitive damages to the remedies available under Title VII. The National Foundation for the Study of Employment Policy (NFSEP) estimates that total private and public sector litigation costs of Title VII will increase by from $1.7 billion to $2 billion if section 8 is adopted, under the assumption that the Title VII caseload will increase by between 10 and 30 percent.[150] However, the analysis in the NFSEP report is flawed and is likely to overestimate substantially the additional litigation costs associated with allowing compensatory and punitive damages under Title VII. For one thing, the NFSEP report ignores the fact that damages are already available in roughly half the Title VII cases, those that are also filed under section 1981. For another, the NFSEP report includes settlement amounts among the social costs of litigation, when, in fact, settlement amounts are a transfer from defendants to plaintiffs and are not a social cost.[151] A complete exposition of the problems with the NFSEP analysis has been prepared by Professor Theodore Eisenberg of Cornell Law School.[152]

Even if the NFSEP $2 billion estimate of additional litigation costs were taken at face value, this amount represents a relatively small cost in comparison to the potential benefits of reducing discrimination and affording justice to the victims of discrimination.[153]

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[150] Edward E. Potter and Ann Elizabeth Reesman, *An Assessment of Remedies: The Impact of Compensatory and Punitive Damages on Title VII*, p. 95.

[151] Settlement amounts represent a cost to defendants and a benefit to plaintiffs. On net, they represent neither a cost nor a benefit to society.

[152] Theodore Eisenberg, "A Response to the National Foundation for the Study of Employment Policy's An Assessment of Remedies: The Impact of Compensatory and Punitive Damages on Title VII," May 21, 1990, letter to the Members of the House of Representatives.

[153] Professor Eisenberg, in the May 21, 1990, letter to the Members of the House of Representatives cited above, estimates these benefits "conservatively" to be in the neighborhood of $6.6 billion.

Chapter 7

Section 12: Restoring Prohibition Against All Racial Discrimination in the Making and Enforcement of Contracts

Section 12 of the Civil Rights Act of 1990 addresses the prohibition of racial discrimination in the making and enforcing of contracts under section 1981. It overturns the 1989 Supreme Court decision, *Patterson v. McLean Credit Union*.[154] Chapter 7 discusses the provisions of Section 12 and the corresponding provisions in the Civil Rights Protections Act of 1990.

In pertinent part, 42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .[155]

In *Patterson*, the Court reaffirmed its precedent of *Runyon v. McCrary*,[156] which had held that section 1981 prohibits racial discrimination in private sector employment contracts. The Court held in *Patterson*, however, that section 1981 is limited by its terms to the "mak[ing] and enforc[ing]" of contracts and that the statute could not be used against employers for "problems that may arise later from the conditions of employment."[157] The Court stated that Title VII, which prohibits employment practices based on race, color, sex, religion, and national origin, was an adequate remedy for racial harassment in the course of employment.[158]

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[154] 109 S.Ct. 2363 (1989).

[155] 42 U.S.C. § 1981 (1982).

[156] 427 U.S. 160 (1976).

[157] *Patterson*, 109 S.Ct. at 2372.

[158] *Id.* at 2374.

Two Senate bills have been proposed to expand the application of section 1981 to the conditions of employment. Section 12 of S. 2104 would amend the statute by adding this language:

> For the purposes of this section, the right "to make and enforce contracts" shall include the making, performing, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.[159]

Section 2 of S. 2166, on the other hand, would amend the statute by adding this language:

> The rights protected by this section are protected against impairment by nongovernmental discrimination as well as against impairment under color of state law. This section affords the same protection against discrimination in the performance, breach, or termination of a contract, or in the setting of the terms or conditions thereof, as it does in the making or enforcement of that contract.[160]

Both proposed sections appear to extend section 1981 protection to every aspect of the conditions of employment. The latter section appears to go farther to codify the Supreme Court holding in *Runyon v. McCrary* where section 1981 was interpreted to apply to private as well as government employment.

Because the language in section 2 of the Civil Rights Protections Act is broader, it might be preferable to the language in Section 12 of the Civil Rights Act of 1990.

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[159] S. 2104, 101st Cong., 2d Sess., § 12(b) (1990).

[160] S. 2166, 101st Cong., 2d Sess. § 2 (1990).

Chapter 8
Recommendations

The U.S. Commission on Civil Rights strongly supports the efforts of Congress in drafting the Civil Rights Act of 1990 to enhance civil rights protections for all Americans. We urge Congress to pass and the President to sign the proposed legislation. However, we insist that Congress clarify the language of the bill to make clear that in the absence of a finding of egregious discrimination or order by a court of competent jurisdiction, section 4 of this act is not intended to promote employment quotas, nor will the use of quotas be condoned as a means of avoiding liability under this section.

Recommendation 1

We insist that Congress clarify the language of the bill to make clear that in the absence of a finding of egregious discrimination or order by a court of competent jurisdiction, section 4 of this Act is not intended to promote employment quotas, nor will the use of quotas be condoned as a means of avoiding liability under this section.

Recommendations Pertaining to Section 4

Recommendation 2

Congress should amend section 4 to require plaintiffs to identify and challenge employment practices as narrowly and specifically as possible given the data they can obtain with reasonable effort through the discovery process. One way this could be done is to alter the language of section 4(k)(1)(B) as follows:

> (B) a complaining party demonstrates that a group of employment practices *whose individual effects cannot be determined by reasonable efforts of the complaining party* results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such group of

employment practices are required by business necessity, except that . . .

Alternatively, the language in section 4(k)(1)(B) (i) could be altered as follows:

> (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 *when the individual effects of the practices cannot be determined by reasonable efforts of the complaining party.*

Because the term "group of employment practices" used in section 4 might be interpreted as meaning all the employment practices used by an employer, Section 4 as currently worded might allow plaintiffs to make a prima facie case of discrimination by showing that an employer's work force has a disparity at the bottom line without requiring the plaintiff to show that an employment practice or practices used by the employer causes the disparity. We feel strongly that in a disparate impact trial, plaintiffs should not be able to make a prima facie case merely by showing that a disparity exists: they must show that an employment practice or practice used by the employer causes the disparity. At the same time, we believe that plaintiffs should be allowed to challenge several employment practices as a group when their individual effects cannot be disentangled.

Recommendation 3

Congress should clarify that if the plaintiff succeeds in demonstrating that the challenged practice or practices have a disparate impact and if the defendant succeeds in demonstrating that the challenged practice or practices are required by business necessity, the plaintiff may still prevail if he can demonstrate that there exist other employment practices that equally well meet the defendant's business needs but have a less discriminatory impact. This could be done by adding at the end of section 4(k)(1):

> *(C) If the respondent demonstrates that a specific employment practice or a group of practices is required by business necessity, an unlawful employment practice*

based on disparate impact is still established if the complaining party can demonstrate that there exists some other employment practice or group of employment practices that meets the defendant's business needs equally well but has less of a disparate impact.

The proposed legislation discusses the plaintiff's prima facie case and the defendant's business necessity defense, but does not mention the traditional third phase of a disparate impact trial, which allows plaintiffs to prevail even if the defendant has demonstrated that the disputed employment practice(s) is required by business necessity if the plaintiff can show that there exists an alternative practice that equally well meets the defendant's business needs but has less of a disparate impact. We are concerned that this omission in the codification of the procedures to be used in disparate impact trials may mean that plaintiffs will no longer be able to prevail once the defendant has demonstrated that the disputed employment practice is required by business necessity. For this reason, we recommend that Congress explicitly mention the third phase of the disparate impact trial in the legislation.

Recommendation Pertaining to Section 5

Recommendation 4

We suggest that Congress consider defining the term "motivating factor" to avoid any possibility of confusion about what the plaintiff needs to demonstrate to establish a defendant's liability in a mixed motive case. This could be done by adding the following definition at the end of section 3:

(o) The term "motivating factor" means a factor that enters in a significant way into an employment decision or process.

We have a slight concern with the language of section 5 that the plaintiff's burden of demonstrating that discrimination was a "motivating factor" in the defendant's employment decision may be interpreted too leniently by the courts. To ensure that there is no confusion about what a plaintiff needs to show for a defendant to be held liable in a mixed motive case, we think that Congress should consider defining the term "motivating factor" in section 3.

Recommendation Pertaining to Section 6

Recommendation 5

Congress should clarify what is meant by "sufficient notice" and "reasonable opportunity to present objections." In particular, Congress should ensure that third parties who are not given notice of the actual terms of consent orders before they are entered will retain the right to challenge these orders at a later date. Congress should also emphasize that third parties should be given a meaningful opportunity to present their objections and not just be accorded a pro forma hearing.

Section 6 strives to achieve a fair balance between third parties' rights of due process and the need for prompt and orderly resolutions in employment discrimination cases. We think that section 6 will provide the important benefit of greater finality in court orders resolving employment discrimination litigation. Section 6 contains safeguards that go a long way towards ensuring that third parties will have an opportunity to make their interests known to the court. In particular, a person who has not been given sufficient notice and reasonable opportunity to present objections retains the right under section 6 to challenge a court order after it is entered, unless he has been adequately represented by someone else or reasonable efforts to notify all interested parties were made before the court order was entered.

We have some concern, however, about when courts will deem that a person has received sufficient notice and a reasonable opportunity to present objections. It is important that parties be notified not only of the existence of a lawsuit but also of the terms of the court order in time to present objections. It is also important that they be given more than a minimal opportunity to present objections. The proposed legislation leaves these issues to the courts to decide. We think that Congress should provide more guidance to the courts to ensure that third parties are given as much opportunity to be heard as possible without significantly undermining the need for finality in resolving employment discrimination litigation.

We recommend that Congress respond to this concern by providing more guidance to the courts as to what would constitute "sufficient notice" and "reasonable opportunity to present objections."

Recommendation for Congressional Review of the Effects of the Civil Rights Act of 1990

Recommendation 6

Congress should amend the proposed legislation by adding the following section.

> *SEC. 16. CONGRESSIONAL HEARINGS TO CONSIDER UNITED STATES COMMISSION ON CIVIL RIGHTS RECOMMENDATIONS.*
>
> > *The Committees on the Judiciary of the House of Representatives and of the Senate shall hold hearings to consider any report submitted by the Civil Rights Commission, should the report contain recommendations for statutory changes in the provisions of this act. These hearings will be held within 60 days after the date of receipt of the Civil Rights Commission report.*

To ensure that the Civil Rights Act of 1990 does not have serious unintended consequences, Congress must commit itself to a periodic review of the effects of this legislation, with a view to making statutory changes if necessary. Although we have concluded that such consequences are unlikely, concern about these consequences is sufficiently important to warrant careful monitoring of the law.

Pursuant to its mandate under 42 U.S.C. 1975c sections 5(a)(3) and 5(b), the U.S. Commission on Civil Rights will monitor the implementation of the Civil Rights Act of 1990 over the next 5 years and will provide Congress and the President with a series of comprehensive and objective reports assessing its effects and recommending changes to the law if necessary. To enable the Commission to accomplish this task, we ask that Congress provide additional funds during the next 5 years.

Statement of Vice Chairman Charles Pei Wang

On June 21, 1990, at a meeting of the U.S. Commission on Civil Rights, I cast my vote in support of the Civil Rights Act of 1990 which is currently being considered by the U.S. Congress. However, the Commission is suggesting clarification of the language used in the proposed legislation.

Ever since the passage of the 1964 Civil Rights Act, employment discrimination on the basis of race, color, religion, sex, or national origin has remained a serious national problem. The recent Commission finding on the employer sanctions provision of the Immigration Reform and Control Act clearly attests to the fact that job applicants with a foreign accent face a significant disadvantage as compared with native English speakers.

The Civil Rights Act of 1990 will amend Title VII of the 1964 Civil Rights Act and section 1977 of the Revised Statutes under 42 U.S.C. 1981. These amendments will help to

1. Restore civil rights protections that were dramatically limited by the Supreme Court's recent decisions.
2. Strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrents and adequate compensation for victims of discrimination.

Critics of the 1990 Civil Rights Act claim that this act will result in a possible increase in lawsuits, thus further clogging our already overcrowded legal system. Further, employers, in order to avoid lawsuits, will practice quota hiring.

To address these major concerns, the Commission recommends that Congress amend section 4 to require plaintiffs to identify and challenge employment practices as specifically as possible, given the data they can obtain with reasonable effort through the discovery process.

Further, the Commission asks Congress to clarify that if the plaintiff succeeds in demonstrating that the challenged practice has a disparate impact and the defendant shows that it is

required by business necessity, the plaintiff may still prevail if he or she can demonstrate that there exist other employment practices that equally well meet the defendant's needs but have less discriminatory impact.

With these and some other modifications, I believe that the new law will result in helping not only victims to obtain redress, but employers to adopt better employment practices.

The Commission, to ensure that the outcome will be as predicted, will closely monitor and analyze the implementation of the act on an annual basis and will recommend to Congress necessary amendments to prevent illegal quota hiring, if the conclusion of the Commission's analysis so indicates.

It is in this spirit that I voted in favor of supporting the Civil Rights Act of 1990.

Statement of Commissioners William B. Allen, Carl A. Anderson, and Russell G. Redenbaugh

Summary

It is our considered judgment that the Commission's "Report on the 1990 Civil Rights Act" misstates the actual contents of the proposed legislation. We disagree with its implied policy conclusions and, moreover, find it sometimes shallow and incomplete. Accordingly we dissent from the Report.

Among our specific concerns we must highlight the following:

1. We have various and grave reservations regarding section 4 and the entire issue of quotas, requirements for a *prima facie* case, the burden of proof allocation, and unjustified threats to innocent employers. The Commission "Report" undoubtedly gives too little consideration to the debate on this topic.

2. We also think it manifestly incorrect to imply that Congress can overturn constitutional rulings of the Supreme Court. The "Report" accepts too easily spurious arguments about this legislation as correcting court "errors" and fails to pay due heed to questions of responsibility and accountability regarding legislation. That is the reason it unfortunately overlooks due process considerations in collateral challenges to consent decrees.

3. We endorse the correction of prior omissions in the law, as pointed out in *Lorance v. At&T* and also in *Patterson v. McLean Credit Union*. Here we concur with the Commission's analysis that, in the first case, the statute of limitations should be tied to actual injuries, not theoretical injuries. And in the second case it is manifestly unjust that some employees should be protected from racial harassment while others are not.

4. We believe that a more effective argument could be made for extending compensatory and punitive damages to Title VII, but we are nevertheless appreciative of the "Report's" analysis of the fallacy in the "social cost" argument. We concur in the "Report's" support for this provision.

A Reason to Dissent

Quotas aren't everything! Accordingly, our dissent from the Commission's "Report on the 1990 Civil Rights Act (CRA)" must

be recognized as evidencing no less concern for the overall presentation of the "Report" than for its overly-sanguine expectations about the likelihood of quotas. To the end of preserving that broader context, we address the "Report" as a whole before turning to the specific issue of quotas, and starting with the most general question, Does the CRA *overturn* Supreme Court decisions?

Congress and the Court

The Congress of the United States possesses no power whatever *directly* to overturn a constitutional ruling of the United States Supreme Court. To recall that elementary civics lesson is a first step toward understanding the dimensions and significance of the 1990 Civil Rights Act. The power that Congress does possess, in company with the President, is to enact legislation designed to overcome limitations and omissions in previously existing statutes to the extent that such limitations and omissions may have been pointed out in rulings by the Supreme Court or by other means.

It is therefore fitting and proper that Congress, in response to the Court's decision in *Lorance v. AT&T Technologies* (109 S.Ct. 2363 [1989], should correct the statute of limitations defect in Title VII of the 1964 Civil Rights Act that the court had so clearly pointed out. Such a move does not "overturn" the court so much as it corrects Congress'own prior error. In its statutory rulings, as opposed to its constitutional rulings, the court is required to be guided by the nation's legislative will, and not to go beyond it. When that legislative will is accordingly inadequate, *only* Congress can actually initiate a correction.

The same principle operates in the projected response to the Court's ruling in *Patterson v. McLean Credit Union* (109 S.Ct. 2261 [1989]), where only legislation, and not judicial interpretation, should remove the unfortunate disproportion between Title VII and Section 1981. When the day at length arrives that policy will support frank recognition that the separate titles meant to deal with employment and contract discrimination ought to be reduced to a single title, that too must be the work of Congress and the President, and not the Supreme Court.

It is therefore fundamentally misleading to describe the 1990 Civil Rights Act as overturning Court decisions. The purported reversals are actually corrections of, or attempts to correct, defects in previous legislation, the development of new initiatives previously unprovided, or modifications of judicial procedures.

Overturning Judicial Policies

In one area alone does it happen, therefore, that Congress might be said to *overturn the Court—that is, the modification of judicial procedures* (and even here Congress has ultimate responsibility). This applies to provisions to limit collateral challenges to consent decrees (as in the response to *Martin v. Wilks*, 109 S.Ct. [1989] and to provisions to shift burden of proof requirements (as in the response to *Wards Cove Packing Co., Inc. v. Atonio*, 109 S.Ct. [1989]). It is further the case that, in each of these areas, the Court will ultimately decide whether these are mere policy questions or involve fundamental guarantees beyond legislative tinkering.

Insofar as the Commission "Report" fails to reflect this status of things, which it does to great extent, then it fails to provide an adequate foundation in defense of the proposed legislation. We dissented, therefore, from those aspects of the "Report" that mislead readers as to the actual content of the proposed 1990 Civil Rights Act.

In yet other respects we concurred with the "Report." In particular, the "Report's" defense of extending punitive and compensatory damages into Title VII against the seriously flawed argument of social costs makes a valuable contribution to discussion of enforcement efforts. Further, the discussion of the relation between disparate impact analysis and disparate treatment analysis is useful though far from adequate.[1] Moreover, the discussion of "mixed motive" cases alerts us to pitfalls which, if not urgent or likely, ought nevertheless to command serious attention. Our reaction to the "Report" is therefore mixed, save that in one highly salient respect our dissent is unqualified.

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[1] Among other things, it fails to emphasize that litigants could file claims not only in the context of hiring but also in other contexts where Title VII applies, such as compensation, terms, conditions, or privileges of employment. Thus, a disproportionate impact would be open to challenge based upon race, color, religion, gender, or national origin whenever resulting from employment practices, subjective or objective, and whether within employer's workforce alone or in relation to a qualified external population.

Quotas Are Enough

The Commission's "Report" on the CRA, then, is a mixed product of pluses and minuses. There are elements in it worth approving no less than there are elements worth disapproving. Still, it would be fair to say, on balance, that we would not dissent, save for the disproportionate impact of its insouciance about quotas. The threat of quotas demands more caution in the consideration of the bill than it has received heretofore. The "Report" credits all too glibly a major premise of the legislation, namely that its alterations in section 4 of Title VII are nothing more than a restoration of the pre-*Wards Cove* status quo. This premise is simply wrong.

The landmark case on the issue in section 4, *Griggs v. Duke Power Co.*, said only that the employer had to "show" a "manifest relationship to the employment in question." This test applied only to objective practices and requirements. *Wards Cove* said that the employer must "produc[e] evidence" that the challenged practice "serves, in a significant way, the legitimate employment goals of the employer." Both of these phrasings, of which the latter was also used by the Supreme Court in *Beazer* 11 years before, are a far cry from those in the bill, under which the employer would have to prove—with the burden of persuasion—that the practice "bears a substantial and demonstrable relationship to effective job performance."

This test—even though it represents a compromise between backers and some opponents of S. 2104 (CRA)—is very different from any test employers have ever had to meet in title VII cases. "Demonstrable relationships" may well mean the same thing as the "manifest relationship" required in *Griggs*, but the bill's words "substantial" and "effective" both represent an upward ratcheting of what the employer has to prove, far beyond the *Griggs/Wards Cove* doctrine.

The bill also transfers the burden of proof to defendants as soon as the plaintiff has made out a *prima facie* case. This, of course, upends the policy in *Ward Cove*, but it is not a "restoration" of *Griggs*. It would be an entirely new national civil rights policy.

Some of the Federal circuit courts did interpret "show," as used in *Griggs*, to mean that the burden of persuasion shifted to the defendant; others did not. *Wards Cove* simply resolved this split in the circuits and in favor of the traditional and fair notion that the plaintiff, not the defendant, has the burden of persuasion in our legal system (just as the Court had done, through Justice Brennan, in the 1987 case, *Johnson v. Santa*

Clara County Transportation Agency and in which a white male plaintiff had filed a *reverse* discrimination suit).

Of course, Congress has the power to resolve the split differently than did the court (leaving the question of fairness aside). But we doubt much whether it were wise to do so. As the Commission "Report" itself states: "[L]ess discrimination and more redress for victims of discrimination may come at the expense of more innocent employers being found guilty of discrimination." In the opinion of the report, this is an acceptable trade-off; to us it is not possible to trade justice for injustice. That justice will occasionally miscarry is a risk inherent in any legal system. But the proper response, for legislators and judges alike, is to minimize such miscarriages—not to multiply one type of injustice in the hope of getting less of another kind.

Better protection for victims of discriminatory employment practices should be the goal of Congress no less than it is the goal of this Commission. But this goal should be pursued in ways that neither transgress fundamental principles of American jurisprudence nor violate the civil rights of those valuable citizens, employers who put together their workforces without discrimination.

In view of these changes which all come at the expense of the rights of defendants, the "Report's" assurances on the quota issue would persuade only if one believed that employers enjoyed losing Title VII suits.

To be sure, some assert that the use of quotas would lead to reverse discrimination suits by those excluded by the quotas. But this is surely no defense of the bill. Over and above the fact that such plaintiffs must play by different rules—under a double standard—the argument only serves further to leave employers defenseless. Employers will be successfully sued by *someone*; unless, of course, the reverse discrimination at issue is insulated by a consent decree! Alternatively, hiring policies will be determined by which group can gain the reputation of being the quickest off the dime with a lawsuit. Either way, hiring will be driven not by the concern for equal opportunity that fuels productivity but by a concern to avoid litigation.

Another flaw in the "Report's" analysis is that it uses the dubious theory that *Wards Cove* reversed previous law in order to argue that the bill would not lead to quotas. The argument goes: the bill merely restores the *Griggs* rule that *Wards Cove* overturned; there were not many instances of quota hiring before

Wards Cove; therefore, the bill will not cause many instances of quota hiring.

Even if the second premise were correct, the first premise is clearly wrong. Between *Griggs and Wards Cove*, courts were not obliged by statute to assign employers the burden of persuasion in suits brought by minority groups, as they will be under the CRA as it now stands. Nor could plaintiffs target the sum total of all of the employer's hiring practices, as they are encouraged to do by the CRA.

The fact is, nothing in our previous practice furnishes an adequate guide as to what would happen under this legislation. Thus the bill's quota threat comes from three separate danger sources, which have never before been faced in combination by employers on a nationwide basis and as a matter of statutory law:

(1) the ability of plaintiffs, under the bill, to challenge all of an employer's practices (both objective and subjective), thus making it very easy to mount a *prima facie* case based on a statistical disproportion while leaving it to the employer to mount a separate defense for each practice.

(2) the defendant's having a burden of persuasion following a successful *prima facie* case by the plaintiff.

(3) the standard for defining "business necessity," which the bill (even with its compromise language) would ratchet far beyond what it was either in *Griggs* or *Wards Cove*.

In sum, it is reasonable to think the Commission's "Report" on the 1990 CRA has too many flaws, of too serious a nature, to be adopted by this Commission.

Repealing the Illusion of Colorblindness

The only conceivable defense of the CRA as it now stands would be that offered by those who imagine that the candid imposition of quotas would serve to break the opinion and policy logjam in which the nation has now been locked for twenty-six years. Because the 1964 Civil Rights Act created a presupposition of race neutrality or non-discrimination, it has been argued that quotas are inconsistent with the intent of that legislation. Nevertheless, Justice William J. Brennan plausibly argue in *United Steelworkers of America v. Weber* (443 U.S. 193 [1979]) that Congress specifically intended Title VII to improve the economic conditions of black people. If his argument is correct, it would follow that the almost universal bows to race neutrality were devices to get the legislation past opponents.

The quota bashing created only an illusion of colorblindness, an illusion that now deserves repeal.

The historical foundation of Brennan's view seems quite sound, since quotas pre-existed the 1964 Civil Rights Act and were primarily a source of contention only between the political parties, each of which seemed to wish to monopolize quotas as an instrument for managing relations between blacks and labor unions. Further, it is incontestably true that the existence of Title VII has in no way whatever slowed the imposition of quotas in various forms and whenever it suited policy throughout the society. Ironically, then, folk who fight against the *future* prospects of quotas unwittingly contribute to the legitimation of quotas as they exist in diverse and widespread form presently.

One may measure the reality of quotas as sponsored by the 1964 Civil Rights Act in the form of a table proudly submitted to the U.S. Commission on Civil Rights by the Kentucky State Commission on Human Rights in evidence of the success of Kentucky's recently imposed affirmative action plan. Inspecting the highlighted fourth row in the Table (on the page following), the reader will perceive at once that the population ratio for black people in the State operates as an ironclad quota (4 years running), meaning that neither more nor fewer blacks will be retained in the State government's workforce than called for by the quota! A figure that grew from 5.8% to 7.2% in just 6 years, remained throughout the succeeding 3 years firmly fixed at 7.3%. What is the probability against something like that happening randomly, out of a workforce of nearly 40,000 people?—something greater by several times than the odds against intelligent life elsewhere in the universe!

That the Kentucky State Commission on Human Rights might proudly proclaim these results as evidence of their compliance with Title VII, and that the U.S. Commission on Civil Rights might approvingly receive it, is more than sufficient evidence that quotas enjoy a high level of approval under the 1964 Civil Rights Act. It is likely, however, that that approval depends utterly on the false impression created by the almost universal testimony against quotas. Accordingly, it would be of great utility to the society if the 1990 Civil rights Act were to pass in such form as to eliminate the illusion of color-blindness and to repeal the 1964 Civil Rights Act to that extent.

Table I

Number and Percent of Black Full-Time Employment in Kentucky State Government 1967-1987

	Nov. 1967	Nov. 1971	Nov. 1975	Nov. 1977	Nov. 1979	Nov. 1981	Nov. 1983	Nov. 1985	Nov. 1987
Total Full-time Employees	26,708	31,263	34,924	35,388	40,927	35,832	34,715	36,446	37,504
Black Full-time Employees	1,408	1,540	2,023	2,125	2,707	2,567	2,520	2,667	2,751
Absolute Change in Black Employment	—	+132	+483	+102	+582	-140	-47	+85	+84
Percent Black Employment	5.3	4.9	5.8	6.0	6.6	7.2	7.3	7.3	7.3
Change in Black Share of Employment	—	+0.4%	+0.9%	+0.2%	+0.6%	+.06%	+0.1%	—	—

SOURCE: *Black Employment in Kentucky State Agencies*, Kentucky Commission on Human Rights, 1988, page 5.

Let repeal unveil the reality. It is black folk, not white males who bear the burden of quotas—no surprise to people of modest historical sensitivity. Beginning in slavery and continuing long thereafter, black folk participated in the labor pool at rates far exceeding other sub-populations. Thus, where a rate of 5 or 600 per 1,000 population would have been high for the average group, a rate approaching 90% or 900 per thousand population would have been normal for black folk. In recent years the spread between black folk and others diminished, but it is unlikely that parity has been reached. Accordingly, a quota based on general population ratios, as in Kentucky, actually represents a new loss of jobs for black folk! This job loss is principally in unskilled and blue collar fields, and that helps explain persistent high unemployment in those areas (and the corollary of welfare subsistence). That was the original protection for labor unions. It also explains the *general* impression of a displacement of white workers, for that does occur in white collar fields where blacks had been minimally employed. Thus, hiring to a general population level in blue and white collar jobs, while still falling short of historical labor patterns, explains both apparent improvements and high unemployment resulting from discrimination. Reinforce the effect by means of black competition with white women, hispanics, and others, and one has the real picture of the quota regime sponsored by the 1964 Civil Rights Act.

Diversity in Dissent

With so much said it will perhaps appear evident why one of the dissenters specifically refuses to endorse the CRA because of the threat of quotas. A second of us endorses it only under the strict proviso that Congress must cure it of the defect of quotas.[2] And the third dissenter, no less avid an opponent of quotas, supports the bill precisely *because* it is a quota bill.[3] In

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[2] In the Commission's separate action to endorse the CRA, Commissioner Redenbaugh desired and moved language to "endorse it provided that the legislation include upon approval modifications to the effect of those listed" by the Commission. The reported form of the Commission's action differs on account of some parliamentary ambiguities.

[3] Commissioner Allen, in only his second Commission meeting on May 15, 1987, had declared his understanding that the country suffered from widely shared, official pretenses to discountenance quotas (as in the original Title VII), while the country nevertheless moved irresistibly toward implementing them under various disguises (disguises that seem

each case it is necessary to disagree with the Commission's "Report."

Further, our concern with quotas extends beyond the language of the bill itself. We note with concern how heavily weighted toward quotas the initial and subsequent testimony regarding the bill has been. Prevalent throughout, including in the official legislative summaries, one witnesses uniform reference to "women and minorities," the language of "protected groups" that excludes so-called non-protected Americans and that has formed the central or organizing principle of the quota regime. That legislative history speaks far more volubly of the intent of this legislation than any analysis of its mere words could ever do. And so we expect the courts to reason regarding it.

Therefore, however differently affected we may stand individually towards the Commission's endorsement of this legislation, concerning this "Report" we equally dissent from its unfortunate depreciation of the danger of quotas. We join in requesting a fuller, unbiased airing of that question for the benefit of the entire society.

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completely to have deceived the Commission majority!). The pretenses had two consequences: first, to deceive and mollify the public; then, second, to facilitate spurious efforts at compliance which neither hit upon the end aimed at nor avoided the ill of polarizing the community over apparent preferences (*vide*, the case of the suspended university student at Michigan State University who offended by means of publicly displaying a cartoon censoring racial preferences). In that sense, the 1964 Civil Rights Act spawned efforts at quotas while denying it, and the job of the 1990 Civil Rights Act is to make the law explicit, effectively repealing not the law of the 1964 Civil Rights Act but its pretenses. Once that process is consummated the country will enjoy its first real test of the adequacy of recent theories about civil rights laws.

Statement of Commissioner Carl A. Anderson

I regret that I cannot add my voice to that of the majority of the Commission endorsing the report on the Civil Rights Act of 1990 (S.2104).

Discrimination is abhorrent to me. Under our Constitution and Declaration of Independence, people have the right to be judged by factors more meaningful than their race or gender. Consequently, I believe that Title VII should be vigorously enforced. However, I see a very real danger that S.2104 will do more to undermine than to advance these goals. Furthermore, I do not believe the report we have adopted adequately weighs the potential for injustice arising out of the bill's departures from traditional American jurisprudence.

This Commission is charged with combatting the immorality that is discrimination. Because it cannot itself pass laws or issue binding judgments, the Commission's authority is moral in nature. We exert moral authority against immoral acts.

Because of this, the Commission has a special responsibility to refrain from using or endorsing unjust means. One of those unjust means would be reverse discrimination. Another unjust means is to cause innocent parties to be found guilty of discrimination; the report explicitly acknowledges that this will be a likely result of the bill. Still another is to deprive parties of their day in court; this is the effect of the part of the bill that makes consent decrees unchallengeable even by affected parties who were not involved in the litigation.

We read in the report itself: "[L]ess discrimination and more redress for victims of discrimination may come at the expense of more innocent employers being found guilty of discrimination." According to the report, this is simply part of the cost of eliminating discrimination. But it is contrary to the spirit of the civil rights movement to do cost-benefit analysis where basic rights are at stake.

The report endorses—with a few suggested revisions that are unlikely to be effective even if adopted—a bill that, in practice,

would make quotas all but inevitable. The antiquota language that we urge Congress to include in the bill is fine as far as it goes, but it is purely precatory and does nothing to remedy those aspects of the bill that will lead to quotas.

As Morris Abram, a distinguished civil rights attorney and a former Vice Chairman of this Commission, has written in a letter to President Bush:

> If I were still practicing law, I would love the "Civil Rights Act of 1990." While it may enrich some lawyers, it will impoverish the principle of equality for all Americans. . . . It is not a civil rights bill but a quota bill because it will achieve precisely what the landmark 1964 Civil Rights Act stood foursquare against.

Title VII of the Civil Rights Act of 1964 has proven to be a very effective tool for bringing our nation out of the moral pit of discrimination. At the time of its passage, fears were expressed in Congress and elsewhere that Title VII would have the unintended side-effect of pressuring employers into using quotas. Such fears were dealt with in debate by, for instance, a memorandum from House Republican supporters of the act, stating that "title VII does not permit the ordering of racial quotas in businesses or unions and does not permit interference with the seniority rights of employers or union members."[1]

Senator Hubert Humphrey, acting as floor leader for the Civil Rights Act, said:

> The truth is that this title forbids discriminating against anyone on account of race. This is the simple and complete truth about title VII.... In effect, it says that race, religion and national origin are not to be used as the basis for hiring and firing.[2]

Senators Dick Clark and Clifford Case wrote a memorandum in which they stated:

> There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. It

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[1]See Steelworkers v. Weber, 443 U.S. 193, 234 (Rehnquist, J., dissenting)
[2]See *id.* at 238.

must be emphasized that discrimination is prohibited as to any individual.[3]

The same claim cannot credibly be made about S.2104. Its acknowledged goal is to tilt Title VII litigation more toward plaintiffs. Its supporters argue that certain recent Supreme Court decisions, notably *Wards Cove Packing Co. v. Atonio*, 109 S.Ct. 2115 (1989), tilted Title VII analysis so far towards defendants that legislation is needed merely to restore the former status quo. However, far from merely restoring the situation that prevailed the day before *Wards Cove* was handed down, S.2104 would create a legal environment that has never before been used as a whole nationwide. Its definitions and its burdens of proof would drastically diminish a defendant's chance of prevailing, which in turn would mean strong new pressures towards quotas.

The debate among the Commissioners over this bill has clearly shown two things: 1) the Commission, like the original supporters of Title VII, is against quotas, and 2) most Commissioners see a danger of quotas arising out of S.2104. As I have noted, we have officially urged Congress to add language rejecting quotas. While I support such an addition to the bill, I am skeptical of its effectiveness.

If quotas arose out of legislative language, legislative language could prevent them. In fact, such language is already in Title VII, and, as we have seen, in its legislative history. But at ground level, when quotas are used, they are used because an employer decides it is cost-effective to use them rather than face a Title VII lawsuit. The more Title VII is tilted against employers, the stronger this type of pressure towards quotas will be. Employers will not be deterred from using quotas by a mere expression of Congress's distaste for them, when the burdens of proof and standards of evidence are such that many employers will face a Hobson's choice between using quotas and facing expensive litigation.

It is sometimes argued that quotas will not be used because they are uneconomical, in that they entail the hiring of persons who may not be the most qualified applicants for the job. But the same is true of discrimination. An employer who discriminates is cheating himself out of employees who may be better qualified. Any pattern of hiring based on considerations other

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[3]See *id.* at 239.

than merit is economically irrational. Yet we see that prejudice drives some employers to make just such irrational decisions; and what prejudice can do, legal rules can do too. In fact, the danger of the legal rules in section 4 of S.2104 is that they would go a long way toward transforming quotas from an uneconomical to an economical decision in many cases.

I would also urge greater attention to a problem raised in our debate by Commissioner Redenbaugh: that quotas create resentment, leading to a net set-back for racial harmony. When we think of the "victims of quotas," we usually think of better qualified job applicants who lose out because they happen not to belong to the desired race, gender, or ethnicity. But we should not ignore quotas' other victims: women and minority-group members who have gotten where they are through merit, but who are stigmatized among their colleagues and future employers as possible quota-hires. Furthermore, if objectively less qualified applicants were hired on a quota basis, they would tend to reinforce negative prejudices as to how qualified people in those categories are.

Dr. Martin Luther King, Jr., spoke of the Founding Fathers' promise of equal rights as a "promissory note" on which America had defaulted. Quotas are an attempt to pay off that note with funny-money. They redistribute injustice, rather than establishing justice.

While quotas have quite properly been the focus of our attention, other sections of the bill are problematic as well. Section 5 exposes employers to civil liability (and, under §8, compensatory and punitive damages and attorneys' fees) for mere discriminatory thoughts or attitudes, even without injury caused to the plaintiff by those thoughts or attitudes. The modifying language urged by the Commission is, as in the case of §4, well-meaning but weak.

Section 6 deprives persons affected by consent decrees of their day in court. It would bar them from challenging a consent decree if they had notice of the proposed judgment and an opportunity to present objections, even if the notice was not sufficient to inform them that their rights were at stake; or even if they did not have such notice, if the court determines that someone "adequately represented" them even if that "representative" had interests adverse to their own; or even with neither notice nor "adequate representation," if the court determines that "reasonable efforts" were made to provide notice. Whatever this is, it is not due process of law.

Perhaps we have here a conflict between two visions of civil rights law. In my view, Title VII aims to do justice between employers and persons who believe they have been discriminated against by those employers. Legal procedures, definitions, burdens of proof, etc. should be arranged so as to promote the efficient discovery of the truth of each case. When an individual is found to have been discriminated against, that individual becomes entitled to a remedy.

I fear that a different view may be evident in the report, however: that Title VII should aim to implement a theory of group entitlement, in which the members of the protected groups are favored not to the extent that they have been discriminated against, but solely because they are members of those groups. This view makes legal rights depend in substantial part on race, gender, or other suspect classifications, in violation of moral principles and of the whole spirit of the civil rights movement.

In this latter view, making the plaintiff's burden lighter, and the defendant's burden heavier, can never go too far. Logically, those who take this view would have to hail it as a great victory for civil rights if Title VII were someday amended to create an irrebuttable presumption in favor of plaintiffs. Indeed, S.2104 as presently worded does not stop far short of this.

Title VII has done, and continues to do, a tremendous amount of good. But the path to further progress does not lie in merely putting more "teeth" into antidiscrimination laws. As the Commission pursues its mandate into the new decade and the new century, it will be remiss if it thinks further advances in civil rights can be attained solely, or even primarily, by further tightening of the screws on employers, many of whom are in fact innocent, as the report acknowledges.

The real avenue for further progress is to clear away the barriers to opportunity, and to restore the social institution with the highest success rate for overcoming the effects of discrimination, namely, the family. I look forward to a bill with "Civil Rights" on its title page that would look at issues like these.

When Dr. King offered his great metaphor of the "promissory note" of equal rights, he said: "We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation." Yet precisely the assumption Dr. King rejected seems still to persist today: that opportunity is in fact limited, and that therefore, civil rights is a zero-sum game in which further rights for some have to come at the expense of others.

Because I see S.2104 as more likely to redistribute injustice than to increase justice, and because I see the report as failing to come to grips with the problems in the bill, I must dissent from the Commission's decision to adopt the report. Furthermore, for the above-stated reasons and also for the reasons outlined by my colleagues Commissioners Allen and Redenbaugh, I am pleased to join in their statement as well.

Statement of Commissioners Mary Frances Berry and Blandina Ramirez on the Civil Rights Act of 1990

The Civil Rights Act of 1990 currently under consideration in the Congress needs urgently to be enacted into law and enforced. The act responds to a series of Supreme Court decisions in 1989 that left many persons who continue to suffer invidious discrimination on the job or in seeking employment opportunities without a remedy. The decisions essentially undermined the work ethic which is so important in our society. The Court eroded the possibility for many women and individuals who have historically been victims of discrimination in our society to use their hard work to overcome the plagues of poverty and lack of opportunity. The decisions reinforced the effects of the long standing status quo of racial and gender exclusion in the higher reaches of employment in universities and colleges, in business, and in every sector of our society.

The people who have been affected by the Supreme Court decisions are real. This is not an abstract discussion about hypothetical realities. Since 1989, hundreds of pending claims of race discrimination have been dismissed by the courts.

The struggle to pass the Civil Rights Act should not be retarded by scare tactics over nonexistent issues. The goal should be to address the demoralizing realities faced by those who suffer discrimination. We should pass the Civil Rights Act of 1990 and get on with the business of redressing inequities and realizing the dream of opportunity in our society.

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