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The Defeat of the Civil Rights Act of 1990: Wading Through the Rhetoric in Search of Compromise

Cynthia L. Alexander

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I. INTRODUCTION

On October 22, 1990 President Bush vetoed[1] the Civil Rights Act of 1990.[2] The Senate failed by one vote to override the veto.[3] The Act embodied the congressional response to a series of 1989 United States Supreme Court cases decided by a new conservative majority of Justices.[4] Finding that these decisions drastically limit civil rights protections,[5] Congress accordingly introduced the Civil Rights Act of 1990 to restore those protections.[6] Congress then spent almost a year refining the controversial bill[7] to make it palatable to the President and the business community. Despite congressional efforts, the President opposed several aspects of the bill and, in conjunction with his veto, proposed his own version of the legislation for congressional consideration.[8]

Because the bill was couched in civil rights terms, its proponents branded opponents of the bill, including the President, as hostile to civil rights. Unfortunately, the rhetoric that accompanied discussion of the bill in both Congress and the media obscured the complex and technical legal issues addressed in the bill. Despite the veto of the bill in

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1. 136 CONG. REC. S16,457 (daily ed. Oct. 22, 1990).

2. S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. H9552-55 (daily ed. Oct. 12, 1990) [hereinafter S. 2104]. All references are to Version 5 (the final conference committee version, dated Oct. 21, 1990) unless otherwise noted.

3. 136 CONG. REC. S16,562 (daily ed. Oct. 24, 1990).

4. Independent Fed'n of Flight Attendants v. Zipes, 109 S. Ct. 2732 (1989); Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702 (1989); Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989); Lorance v. AT&T Technologies, 109 S. Ct. 2261 (1989); Martin v. Wilks, 109 S. Ct. 2180 (1989); Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989); Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989).

5. S. 2104, *supra* note 2, § 2(a)(1), 136 CONG. REC. at H9552.

6. *Id.* § 2(b)(1), 136 CONG. REC. at H9552.

7. The bill initially was introduced on Feb. 7, 1990. *See* 136 CONG. REC. S1018 (daily ed. Feb. 7, 1990). Some members of Congress hailed the proposed legislation as a "significant step toward restoring, and assuring forever, the fundamental right of equal opportunity in the workplace for all Americans," 136 CONG. REC. S15,377 (daily ed. Oct. 16, 1990) (statement of Sen. Jeff Bingaman), while others denounced it as "a hodgepodge of sophistry and 'staff-speak' " consisting of "a lot of 'legalese' mixed in with a healthy measure of impatience and a dose of ambignity thrown in for fiavor." 136 CONG. REC. S15,376 (daily ed. Oct. 16, 1990) (statement of Sen. Alan Simpson).

8. President Bush outlined the proposal in his veto message. *See* 136 CONG. REC. S16,457 (daily ed. Oct. 22, 1990). Senator Robert Dole introduced the President's bill in the Senate. S. 3239, 101st Cong., 2d Sess., 136 CONG. REC. S18,046-48 (daily ed. Oct. 24, 1990) [hereinafter S. 3239]. Identical legislation was introduced in the House. H.R. 5905, 101st Cong., 2d Sess., 136 CONG. REC. H13,551-53 (daily ed. Oct. 24, 1990). Further references will be to the Senate bill.

1990, Congress clearly is not ready to concede defeat.[9] Likewise, the President remains willing to enact a civil rights bill if a compromise can be reached.[10]

This Note examines the most controversial issues raised by the defeated legislation and proposes compromise solutions that would increase the probability of agreement in the future.[11] Part II analyzes the dispute over the disparate impact theory of discrimination by tracing the evolution of the doctrine in the courts, which culminated in the controversial *Wards Cove Packing Co. v. Atonio*[12] decision, and identifying the most divisive issues such as allocation of burdens of proof, the definition of business necessity, and specificity requirements. Part II also outlines the responses of Congress and the President to *Wards Cove* and proposes a restructuring of disparate impact analysis that would serve the interests of both plaintiffs and employers.

Part III examines the problem with equitable remedies under Title VII of the Civil Rights Act of 1964[13] (Title VII) and the solutions proposed by Congress and the President. Part III also discusses the applicability of section 1981 of Title 42 of the United States Code to employment discrimination cases, describes its emasculation by the Supreme Court in *Patterson v. McLean Credit Union*,[14] and analyzes the attempts of Congress and the President to overturn *Patterson*. Part III then proposes a partial solution to resolve the debate over Title VII remedies.

Part IV addresses the controversy over consent decrees and the impermissible collateral attack doctrine. Part IV focuses on the demise of

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9. On January 6, 1991, House Democrats introduced the Civil Rights Act of 1991. H.R. 1, 102d Cong., 1st Sess. (1990) (text in LEXIS, Genfed library, Bills file) [hereinafter H.R. 1]. The bill is substantially similar to S. 2104, except that the drafters eliminated some of the compromise language contained in later drafts of S. 2104 and instead returned to language used in earlier drafts. Democrats introduced a second version on March 11, 1991. All references are to Version 2 unless otherwise noted.

10. The President's proposed legislation was introduced after his veto of the congressional bill. *See supra* note 8. On March 12, 1991, Republicans introduced the Administration's Civil Rights Act of 1991 in both the Senate and the House. S. 611, 102d Cong., 1st Sess., 137 CONG. REC. S3022-23 (daily ed. Mar. 12, 1991) [hereinafter S. 611]; H.R. 1375, 102d Cong., 1st Sess., 137 CONG. REC. H1662-64 (daily ed. Mar. 12, 1991). The bills are virtually identical, and further references will be to the Senate bill.

11. This Note does not address issues on which Congress and the President were in substantial agreement. For a thorough discussion of the congressional response to the Supreme Court's decisions in Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989), and Lorance v. AT&T Technologies, 109 S. Ct. 2261 (1989), see Comment, *Reconstruction, Deconstruction and Legislative Response: The 1988 Supreme Court Term and the Civil Rights Act of 1990*, 25 HARV. C.R.-C.L. L. REV. 475, 527-40, 555-65 (1990).

12. 109 S. Ct. 2115 (1989).

13. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

14. 109 S. Ct. 2363 (1989).

the collateral attack doctrine in *Martin v. Wilks*[15] and the response of Congress and the President to *Wilks*. Part IV then proposes an alternative solution. Finally, Part V addresses the controversy over the attorney's fee provisions in the Act. The controversy concerns both waiver of attorney's fees in settlement agreements and third-party liability for plaintiffs' fees when the third party challenges a judgment or order. This Note concludes that although Congress will face formidable obstacles in fashioning a successful compromise bill, it can construct a civil rights bill that all parties will accept by giving weight to important civil rights interests without compromising competing societal concerns.

II. Disparate Impact Analysis

A. *Evolution in the Courts*

1. Burdens of Proof

Title VII prohibits discrimination by employers on the basis of race, color, religion, sex, or national origin.[16] Title VII does not define discrimination explicitly, but the Supreme Court has fashioned two theories of discrimination—disparate treatment and disparate impact.[17] Disparate treatment occurs when employers treat some individuals less favorably than others because of their race, color, sex, religion, or national origin.[18] In *McDonnell Douglas Corp. v. Green*[19] the Supreme Court described the allocation of burdens of proof in a disparate treatment case.[20] The allocation of burdens of proof in a disparate impact

15. 109 S. Ct. 2180 (1989).

16. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

17. Disparate treatment and disparate impact are the primary theories of discrimination, but courts have defined four discrimination theories. The other two theories are "present perpetuation of past discrimination" and "failure to make a reasonable accommodation to an employee's religious practices." B. Schlei & P. Grossman, Employment Discrimination Law 1 (2d ed. 1983). For a thorough discussion of all four theories, see *id.* at 1-287.

18. The Court explained disparate treatment in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), as follows:

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.

Id. at 335 n.15 (citation omitted).

19. 411 U.S. 792 (1973).

20. First, the plaintiff must establish a prima facie case of discrimination. The plaintiff may establish a prima facie case by showing (1) membership in a racial minority class; (2) application and qualification for a position for which an employer was seeking applicants; (3) rejection for that position; and (4) an employer who continued to seek applicants for the open position from persons of plaintiff's qualification level. *Id.* at 802. The burden then shifts to the employer, who simply must articulate a legitimate, nondiscriminatory reason for its actions. *Id.* If the employer offers such a reason, the plaintiff may show that the justification offered by the employer for its conduct

case is not as settled and, thus, was a focal point of the Civil Rights Act of 1990.[21]

Disparate impact focuses on the effect of an employment practice on a particular group, rather than the practice itself. Disparate impact occurs when a facially neutral employment practice, which is not justified by business necessity, adversely affects a protected group.[22] The Supreme Court extended Title VII to disparate impact cases in *Griggs v. Duke Power Co.*[23] In *Griggs* the Supreme Court held that Duke Power's hiring criteria, which required applicants to possess a high school diploma and pass two aptitude tests, violated Title VII because the criteria disproportionately excluded blacks from higher paying jobs and were not related to successful job performance.[24]

According to the Court, an employment practice relates to job performance if it is required by business necessity.[25] The Court did not define business necessity, but seemed to equate the term with job relatedness throughout the opinion.[26] The Court placed the burden of proving the job relatedness of an employment practice on the employer.[27] Finally, the Court determined that Title VII forbade the use of testing procedures in employment decisions unless the employer shows that the procedures are reasonable measures of job performance.[28] Under the *Griggs* standard, then, if a plaintiff establishes a prima facie case of disparate impact discrimination,[29] the burden shifts to the defendant to

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was a pretext for discrimination. *Id.* at 804.

21. Although the burdens of proof for disparate treatment cases are well established, the burdens for disparate impact cases are the subject of much controversy. For this reason, the Civil Rights Act of 1990 focuses on the disparate impact analysis. Thus, this Note does not address the disparate treatment analysis.

22. *International Brotherhood*, 431 U.S. at 335 n.15.

23. 401 U.S. 424 (1971). *Griggs* often is characterized as the most important employment discrimination decision. *See, e.g.*, B. SCHLEI & P. GROSSMAN, *supra* note 17, at 5; Belton, *Causation and Burden-Shifting Doctrines in Employment Discrimination Law Revisited: Some Thoughts on* Hopkins *and* Wards Cove, 64 TUL. L. REV. 1359, 1360 (1990). In *Griggs* a group of black Duke Power employees claimed that the company's hiring criteria violated Title VII. The company required applicants for nonlabor jobs to possess a high school diploma and pass two aptitude tests. These facially neutral criteria disproportionately excluded blacks from the higher paying jobs. *Griggs*, 401 U.S. at 427-28.

24. *Griggs*, 401 U.S. at 431-32. The Court explained that Title VII is directed at the consequences of employment practices and prohibits practices that are facially neutral but discriminatory in operation. *Id.* "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups . . . ." *Id.* at 432. In addition, the Court indicated that Title VII does not prohibit employment practices related to job performance absent a discriminatory intent. *Id.* at 431.

25. *Id.* This assertion marked the genesis of the controversial business necessity defense.

26. The Court stated that if an "employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.*

27. *Id.* at 432.

28. *Id.* at 436.

29. The plaintiff must show that the employer's practices have a "substantially dispropor-

show that the challenged practice bears a manifest relationship to job performance.

In *Albemarle Paper Co. v. Moody*[30] the Court established what is known as the pretext stage in disparate impact analysis.[31] The Court held that if a plaintiff establishes a prima facie disparate impact case and the defendant shows job relatedness, the plaintiff then must have an opportunity to show that alternative selection devices with less discriminatory impact would serve the employer's business interests.[32] Yet the decision does not clarify the effect of this showing. The Court noted that the existence of a less discriminatory alternative would be evidence that the employer's test was a pretext for discrimination.[33] This observation implied that the existence of a less discriminatory alternative is evidence of discriminatory intent rather than lack of business necessity.[34] Thus, a plaintiff who identifies a less discriminatory alternative practice would not prevail as a matter of law because the court would require further inquiry into the motivation of the employer.[35]

After *Albemarle* lower courts disagreed about the burden of proof allocation in the pretext stage of litigation.[36] Some courts placed the burden of persuasion on the plaintiff to show that viable alternative approaches existed.[37] Other courts placed the burden of persuasion on the defendant to show that no viable alternatives existed.[38]

2. Business Necessity

According to *Griggs*, an employment practice relates to job performance if it is required by business necessity.[39] The Court equated the term "business necessity" with job relatedness.[40] Finally, the Court

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tionate exclusionary impact" on a protected class. B. SCHLEI & P. GROSSMAN, *supra* note 17, at 1326. The plaintiff may use comparisons of pass rates on tests, comparisons of population and work force compositions, regression analyses, or comparisons of other statistics to make this showing. *Id.*

30. 422 U.S. 405 (1975).

31. *See* Belton, *supra* note 23, at 1382-85.

32. *Albemarle*, 422 U.S. at 425. For authority, the Court cited McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (discussed *supra* notes 19-20 and accompanying text).

33. *Albemarle*, 422 U.S. at 425.

34. *See* Player, *Is* Griggs *Dead? Reflecting (Fearfully) on* Wards Cove Packing Co. v. Atonio, 17 FLA. ST. U.L. REV. 1, 20 n.89 (1989).

35. *Id.* at 20.

36. *See* B. SCHLEI & P. GROSSMAN, *supra* note 17, at 1330-31; Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1244-45 (1981).

37. *See* Belton, *supra* note 36, at 1244.

38. *Id.* at 1245.

39. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); *see supra* note 25 and accompanying text.

40. *Griggs*, 401 U.S. at 431; *see supra* note 25 and accompanying text.

found that testing procedures in employment decisions must bear a manifest relationship to the employment at issue.[41] The Court in *Albemarle* also addressed the business necessity stage of the disparate impact analysis. Although the Court used the *Griggs* job-relatedness requirement,[42] it significantly increased the defendant's burden of proof by emphasizing scientific validity.[43] A year later, however, the Court retreated somewhat from this more stringent position in *Washington v. Davis*.[44] In *Davis* the Court indicated that a positive relationship between a testing procedure and subsequent performance in a training program would suffice to validate the procedure.[45]

In *Dothard v. Rawlinson*,[46] decided two years after *Albemarle*, the Court used the manifest relationship language from *Griggs* to describe the defendant's burden of proof and focused on the job relatedness of the challenged practices.[47] The Court asserted that a discriminatory employment practice must meet the *Griggs* business necessity standard

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41. *See supra* notes 25-28 and accompanying text (discussing the business necessity defense of *Griggs*).

42. *Albemarle*, 422 U.S. at 425.

43. The facts in *Albemarle* resemble those in *Griggs*. A class of present and former employees challenged Albemarle Paper's hiring and promotion criteria, which required applicants to possess a high school diploma and to pass two aptitude tests. The company engaged a testing specialist to validate the job relatedness of the testing program, yet the Court held that the company had not demonstrated job relatedness adequately and implicitly required an extremely stringent standard for test validity. *Id.* at 435-36.

The Equal Employment Opportunity Commission (EEOC) issued guidelines on testing procedures in 1970. *See* Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12,333 (1970). The Guidelines set stringent statistical validation standards for employment tests. The Court in *Albemarle* suggested that courts should afford these Guidelines "great deference." 422 U.S. at 431. Thereafter, employers faced extreme difficulty in establishing the scientific validity of employment tests. The burden on employers to show job relatedness practically was impossible to meet under the Guidelines, and a real incentive to adopt preferential hiring systems to avoid liability existed. The Supreme Court never has been as rigorous in requiring scientific validity as it was in *Albemarle*, however, and in 1987 the EEOC and other agencies promulgated a new, more lenient set of guidelines. *See* Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1315-19 (1987).

44. 426 U.S. 229 (1976).

45. *Id.* at 251.

46. 433 U.S. 321 (1977). In *Dothard* the Court considered a Title VII challenge to an Alabama statute requiring prison guard applicants to meet a 120-pound weight requirement and a 5'2" height requirement. The plaintiff was a female whose application for employment was rejected because she failed to meet the height and weight criteria. The Court found that the height and weight requirements disproportionately excluded women from employment, and therefore, that the plaintiff had established a prima facie case of unlawful sex discrimination. The defendant argued that the criteria were related to strength, which was essential to effective job performance, but provided no evidence of correlation between the height and weight requirements and the strength required to perform the job. *Id.* at 329-31. Because the defendant was unable to show the job relatedness of its hiring criteria, the Court ruled in favor of the plaintiff. *Id.* at 332.

47. *Id.* at 324.

to survive challenge under Title VII.[48] In a footnote, however, the Court indicated that a more stringent standard requiring a discriminatory practice to be "necessary to safe and efficient job performance" was emerging.[49]

In contrast, Justice William Rehnquist's concurring opinion in *Dothard* suggested a more lenient standard than that applied in *Griggs*. The opinion stated that the defendant's burden entailed merely the articulation of job-related reasons for the hiring criteria.[50] Although *Griggs* and *Albemarle* require more than a mere articulation of job-related reasons for an employment practice, Justice Rehnquist relied on those decisions for support.[51]

The Court added considerably to the confusion developing in lower courts over the definition of business necessity in *New York City Transit Authority v. Beazer*.[52] Although the Court primarily focused on the inadequacy of the plaintiffs' statistical proof, it also indicated that the application of the Transit Authority's no-narcotic policy, which excluded methadone users from all jobs, was job related.[53] In a brief footnote, the Court noted that the no-narcotic policy bore a manifest relationship to the employment at issue because it significantly served the employer's goals.[54] This standard would diminish significantly the defendant's burden in disparate impact cases.

Because the plaintiffs in *Beazer* failed to establish a prima facie case, the Court's discussion of business necessity was not a crucial aspect of the case. Thus, the import of the Court's business necessity discussion is unclear. After *Beazer* lower court decisions were hopelessly

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48. *Id.*

49. *Id.* at 331-32 n.14. Lower courts had used similar language in disparate impact cases. Professor Hannah Furnish has cited as an example the language in Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971): "[T]he 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." *See* Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After* Beazer *and* Burdine, 23 B.C.L. REV. 419, 429 (1982).

50. *Dothard*, 433 U.S. at 339 (Rehnquist, J., concurring).

51. *Id.* (Rehnquist, J., concurring).

52. 440 U.S. 568 (1979). The plaintiffs challenged a Transit Authority no-narcotic policy as it applied to methadone users who had been in drug treatment programs for more than one year. *Id.* at 576. The policy applied to jobs that were not safety-related as well as to those that were. *Id.* at 571. The plaintiffs alleged that the policy disproportionately excluded blacks and Hispanics from employment and therefore violated Title VII. 399 F. Supp. 1032, 1033 (S.D.N.Y. 1975), *aff'd*, 558 F.2d 97 (2d Cir. 1977), *rev'd*, 440 U.S. 568 (1979).

53. *Beazer*, 440 U.S. at 587.

54. *Id.* at 587 n.31.

inconsistent on the issue of the defendant's burden in disparate impact cases.[55]

3. Specificity

Specificity is another controversial issue in disparate impact cases.[56] This doctrine requires the plaintiff to identify a specific discriminatory employment practice to establish a prima facie case of disparate impact.[57] Courts have divided on this issue.[58] In *Pouncy v. Prudential Insurance Co.*[59] the Fifth Circuit rejected a plaintiff's challenge to a range of employment practices because such a challenge would require a defendant to validate practices that caused no adverse effects.[60] According to the court, a fair allocation of burdens of proof required the plaintiff to show that a specific practice had a discriminatory impact.[61]

Other courts have derived a mutuality[62] argument for requiring specificity from the Supreme Court's decision in *Connecticut v. Teal.*[63] In *Teal* the Supreme Court refused to permit an employer to defend a specific hiring practice by showing that its hiring and promotion system as a whole did not result in a disparate impact.[64] The mutuality argument posits that because an employer cannot use "bottom-line" statistics to defend a specific practice, a plaintiff likewise may not use statistics showing that an entire hiring and promotion system has a disparate impact without identifying specific offensive practices.[65] A third argument that has been used to justify a specificity requirement is that the disparate impact analysis as applied to nonspecific employment practices would be unmanageable.[66]

The Eleventh Circuit, in contrast, permitted a challenge to a mul-

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55. *See* Player, *supra* note 34, at 22-23. According to Player, "lower federal courts were in a frenzy of disharmony, their only unity being that of ignoring *Beazer*'s footnote thirty-one. Some courts emphasized the 'manifest relationship' aspects of *Griggs*, and others gave a more literal construction to the word 'necessity.'" *Id.* at 22. As a result of these decisions, one commentator suggested that the Court has endorsed a sliding-scale approach in which a weak prima facie case requires only a weak justification of business necessity. *See* Rutherglen, *supra* note 43, at 1321-22.

56. The term "specificity" is borrowed from Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 AM. U.L. REV. 799, 829 (1985).

57. *Id.*

58. *See infra* notes 59-69 and accompanying text.

59. 668 F.2d 795 (5th Cir. 1982).

60. *Id.* at 801-02.

61. *Id.* at 800.

62. *See* Willborn, *supra* note 56, at 830-31.

63. 457 U.S. 440 (1982).

64. *Id.* at 452-56.

65. *See* Willborn, *supra* note 56, at 830-33; Belton, *supra* note 23, at 1381.

66. Willborn, *supra* note 56, at 830-31.

ticomponent promotion system without identification of a specific discriminatory practice in *Griffin v. Carlin*.[67] The court noted that the Supreme Court, by frequently referring to "practices" and "procedures" in *Griggs*, implied that a specific employment practice need not be identified.[68] The court pointed out that limiting the disparate impact model to cases in which a specific practice is attacked would exempt from scrutiny employment systems in which the interaction of several components causes an adverse impact.[69] As these decisions illustrate, no consensus exists among the courts on the specificity issue.

4. Precursor to *Wards Cove*: *Watson v. Fort Worth Bank & Trust*[70]

The Supreme Court directly addressed the burdens of proof, business necessity, and specificity issues in *Watson v. Fort Worth Bank & Trust*. In *Watson* a black employee of Fort Worth Bank & Trust who had been turned down for several promotions challenged the bank's hiring and promotion system.[71] The narrow issue before the Court was whether disparate impact analysis should apply to subjective employment practices;[72] a unanimous Court ruled that it should.[73]

A plurality of the Court also scrutinized the evidentiary structure of the disparate impact model.[74] The plurality was reluctant to permit plaintiffs to bring broad challenges to an employer's entire hiring and promotion system because broad claims would require the employer to isolate and justify each component of its system.[75] The plurality held that a plaintiff making a disparate impact challenge to subjective employment practices must identify the specific practice causing a disparate impact.[76] Next the plaintiff must establish causation by offering statistical evidence that the challenged practice has operated to discriminate against members of a protected group.[77] This holding clearly makes it more difficult for a plaintiff to establish a prima facie case of disparate impact.

The plurality then examined the defendant's burden of proof. The plurality was sympathetic to the defendant's argument that extending

67. 755 F.2d 1516 (11th Cir. 1985).
68. *Id.* at 1524.
69. *Id.* at 1525.
70. 487 U.S. 977 (1988).
71. *Id.* at 982-83.
72. *Id.* at 989.
73. *Id.* at 999.
74. *Id.* at 991-99.
75. *Id.* at 991-94.
76. *Id.* at 994.
77. *Id.* For a thorough discussion of causation in employment discrimination law, see Belton, *supra* note 23.

disparate impact analysis to subjective employment practices had the potential to lead to perverse results.[78] A desire to avoid quotas prompted the plurality to reduce the defendant's burden of proof significantly. The Court implied that the employer's burden is one of production rather than persuasion: although the employer must show that the challenged practice has a manifest relationship to the employment in question, the ultimate burden of persuasion remains with the plaintiff at all times.[79] If the defendant meets this burden of production, the plaintiff must prove that an alternative practice would serve the employer's interests with less discriminatory effect.[80] Even if the plaintiff does establish that a less discriminatory alternative exists, the defendant may prevail if it can show that the alternative practice is not viable for reasons such as cost.[81] This scheme represents a significant departure from earlier formulations of proof allocation.[82] Only a plurality of the Court endorsed this burden allocation scheme in *Watson*, but the Court again addressed the issue in *Wards Cove Packing Co. v. Atonio*.[83]

5. *Wards Cove Packing Co. v. Atonio*

The Supreme Court granted certiorari in *Wards Cove*[84] to address issues left unresolved in *Watson*.[85] The Supreme Court reversed the Ninth Circuit's holding that the plaintiffs had established a prima facie case of discrimination[86] by introducing statistics showing a high percentage of nonwhite workers in cannery jobs[87] and a low percentage of

78. *Watson*, 487 U.S. at 993.
79. *Id.* at 997.
80. *Id.* at 998.
81. *Id.*
82. Justice Harry Blackmun observed in his concurrence that the allocation of burdens suggested by the plurality "bears a closer resemblance to the allocation of burdens we established for disparate-treatment claims." *Id.* at 1001 (Blackmun, J., concurring in part and concurring in the judgment). For a discussion of this resemblance and its import, see Alessandra, *When Doctrines Collide: Disparate Treatment, Disparate Impact, and* Watson v. Fort Worth Bank & Trust, 137 U. PA. L. REV. 1755, 1784-86 (1989).
83. 109 S. Ct. 2115 (1989).
84. The plaintiffs in *Wards Cove*, a class of nonwhite cannery workers employed in Alaskan salmon canneries, brought a Title VII action against their employers alleging that a variety of the companies' hiring and promotion practices resulted in racial stratification in the work force and denied them employment opportunities on the basis of race. Among the practices mentioned were nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, and a practice of not promoting from within the company. *Id.* at 2120. The plaintiffs challenged the employers' hiring and promotion practices under both disparate treatment and disparate impact theories, although the district court dismissed the disparate treatment claims. *Id.* at 2119.
85. *Id.* at 2121.
86. *Id.* at 2123.
87. Cannery jobs were unskilled positions on the cannery lines. *Id.* at 2119.

nonwhites in noncannery jobs.[88] The Court explained that the comparison relied on by the plaintiffs between the racial composition of the cannery work force and that of the noncannery work force was inappropriate; the proper comparison would have been between the racial composition of the noncannery jobs and that of the qualified labor market.[89]

On the specificity issue, the Court endorsed the *Watson* plurality's position.[90] The Court held that plaintiffs, to establish a prima facie case of disparate impact, must demonstrate specifically that each challenged practice had a significant disparate impact on nonwhite employment opportunities.[91] The Court expressed concern that to hold otherwise would expose employers to liability for statistical imbalances caused by factors beyond the employers' control.[92] The Court rejected the contention that this requirement would burden plaintiffs unduly, explaining that discovery rules allow plaintiffs broad access to employers' records and that the Uniform Guidelines on Employee Selection Procedures[93] require employers to maintain these records.[94]

The Court also addressed the business necessity issue. Citing *Watson*, *Beazer*, and *Griggs* as authority, the Court held that a challenged practice must serve the employer's legitimate employment goals in a significant way to meet the business necessity standard.[95] The Court elaborated that the employer's justification for use of a challenged practice must be substantial, but that the practice need not be "essential" or "indispensable" to the employer's business.[96]

This formulation represents a partial retreat from the plurality's treatment of business necessity in *Watson*. Although the *Watson* plurality required only that the employer produce evidence that its employment practices are based on legitimate business reasons,[97] the majority in *Wards Cove* requires a greater showing. According to *Wards*

88. *Id.* at 2117. Noncannery jobs were higher paying skilled positions. *Id.* at 2119. The Ninth Circuit further held that once a plaintiff makes a showing of disparate impact caused by specific employment practices, the burden shifts to the defendant to prove business necessity. *Id.*

89. *Id.* at 2121-23. The Court remanded the case for a determination of whether sufficient evidence to support a prima facie case on some basis other than the racial disparity between cannery and noncannery workers existed. *Id.* at 2124. The Court proceeded to address unresolved issues in later stages of disparate impact analysis to aid the lower court on remand.

90. *See supra* text accompanying note 76.

91. *Wards Cove*, 109 S. Ct. at 2125.

92. *Id.*

93. 29 C.F.R. §§ 1607.1-1607.18 (1990).

94. *Wards Cove*, 109 S. Ct. at 2125.

95. *Id.* at 2125-26.

96. *Id.* at 2126.

97. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 997 (1988); *see supra* note 79 and accompanying text.

Cove, a challenged practice must serve legitimate employment goals in a significant way; an insubstantial justification will not suffice.[98] The Court explicitly endorsed the *Watson* plurality's implication that the employer's burden with respect to a legitimate business justification defense is one of production rather than persuasion.[99] The Court emphasized that the burden of persuasion remains with the plaintiff at all times.[100]

Finally, the Court addressed the pretext issue. The Court asserted that if a plaintiff shows a less discriminatory alternative hiring practice, and the defendant refuses to adopt the alternative, the refusal would undermine a defendant's claim that the practices were employed without discriminatory motive.[101] The Court clearly indicated that proof of viable alternative practices would imply discriminatory intent,[102] but only if the employer was or should have been aware of the less discriminatory alternative.[103] Yet the Court weakened the effectiveness of the showing of viable alternatives by quoting with approval the *Watson* plurality's holding that factors such as cost are relevant to a determination of the viability of proposed alternatives.[104] The Court asserted that because employers are more competent than the judiciary to restructure business practices, courts should be cautious about requiring an employer to adopt an alternative practice suggested by a plaintiff.[105]

Justice John Paul Stevens's dissent expressed dismay at the majority's dismantling of the traditional allocation of burdens of proof in disparate impact cases and at the majority's new business necessity formulation.[106] He disagreed with the majority's requirement that a plaintiff isolate and identify the specific employment practices responsi-

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98. *Wards Cove*, 109 S. Ct. at 2126. Unlike the plurality opinion in *Watson*, the *Wards Cove* decision did not draw a parallel between disparate impact cases and disparate treatment cases, in which the burden on the employer to refute an inference of improper motive is slight. One commentator has pointed out that this silence is significant evidence of the majority's intent to depart from the plurality's holding in *Watson*. The inference is that courts should interpret the *Watson* plurality's holding narrowly to apply only to subjective selection systems. *See* Player, *supra* note 34, at 26.

99. *Wards Cove*, 109 S. Ct. at 2126.

100. *Id.*

101. *Id.* at 2126-27.

102. *Id.* The effect of a demonstration of viable alternative practices was unclear in prior decisions. *See supra* notes 30-38 and accompanying text.

103. *Wards Cove*, 109 S. Ct. at 2126-27.

104. *Id.* at 2127. For a discussion of the unanswered questions regarding this "cost-justification defense," see Belton, *supra* note 23, at 1396-98.

105. *Wards Cove*, 109 S. Ct. at 2127. One commentator has observed that this approach "virtually insures that only the most intrepid trial judge would dare find that an employer was improperly motivated based on the argument that the employer could have, but refused to, accept selection devices proposed by the plaintiff." Player, *supra* note 34, at 29.

106. *Wards Cove*, 109 S. Ct. at 2127-36 (Stevens, J., dissenting).

ble for the disparate impact.[107] In a separate dissent, Justice Harry Blackmun lamented the direction that the conservative Court is headed and questioned whether the current majority is aware that race discrimination exists in society.[108]

B. *Response of Congress and the President to* Wards Cove

1. Business Necessity

Congress explicitly repudiated the *Wards Cove* ruling in sections 3 and 4 of the Civil Rights Act of 1990.[109] Subsection 3(o)(3) proclaimed that it codified the *Griggs* definition of business necessity and overruled the treatment of business necessity as a defense in *Wards Cove*.[110] An early draft of the legislation defined "required by business necessity" as "essential to effective job performance."[111] This language, which clearly was not borrowed from *Griggs*, would have imposed a much more stringent burden on defendants than courts had imposed in the past. Consequently, this section of the bill was quite controversial and after numerous compromises and amendments, Congress replaced the restrictive language with a two-tiered definition of business necessity.[112] The final version of the bill required employment practices concerning selection[113] to bear "a significant relationship to successful performance of the job";[114] employment practices unrelated to selection were required to "bear a significant relationship to a manifest business objective of the employer."[115] This final language still did not articulate the *Griggs* standard accurately, although it was closer than the language in the earlier draft.

Congress's definition of business necessity was one of the provisions that triggered the President's veto.[116] President Bush predicted that the

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107. *Id.* (Stevens, J., dissenting).

108. "One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was." *Id.* at 2136 (Blackmun, J., dissenting).

109. S. 2104, *supra* note 2, §§ 3-4, 136 CONG. REC. at H9552-53.

110. *Id.* § 3(o)(3), 136 CONG. REC. at H9552.

111. S. 2104, 101st Cong., 2d Sess. § 3(o) (Version 1, dated Feb. 9, 1990), 136 CONG. REC. S1019 (daily ed. Feb. 7, 1990) [hereinafter S. 2104 Version 1].

112. S. 2104, *supra* note 2, § 3(o)(1)(A)-(B), 136 CONG. REC. at H9552.

113. The bill lists tests, recruitment, evaluations, and requirements of education, experience, knowledge, skill, ability, or physical characteristics as examples of employment practices involving selection. *Id.* § 3(o)(1)(A), 136 CONG. REC. at H9552.

114. *Id.*

115. *Id.* § 3(o)(l)(B), 136 CONG. REC. at H9552. In the Democrats' version of the Civil Rights Act of 1991, practices unrelated to selection are required to bear a significant relationship to a significant business objective of the employer. H.R. 1, *supra* note 9, § 3(o)(1)(B).

116. In his veto message, the President criticized the provision as "an unduly narrow definition of 'business necessity' that is significantly more restrictive than that established by the Su-

bill's treatment of business necessity would render employers unable to defend legitimate practices and provoke them to adopt quotas to avoid liability.[117] The President suggested alternative language in his proposed substitute legislation.[118] That proposal also adopts a two-tiered definition, but states that employment practices "defended as a measure of job performance" must "bear a significant relationship to successful performance of the job"; employment practices "not defended as a measure of job performance" must "bear a siguificant relationship to a significant business objective of the employer."[119] The Senate denounced this definition for the leeway it would give employers to choose the standard that would apply in a given case.[120] Critics also fear that the President's proposal would permit not only actual or perceived business costs but also customer preference to deny employment opportunities.[121]

Congress repeatedly expressed its intention to return to the definition of business necessity articulated in *Griggs*, but did not incorporate the *Griggs* "manifest relationship to employment" langnage in any version of the bill.[122] The President, despite the omission of an express intention to return to the *Griggs* standard in his proposed legislation,[123] does not seem to object to a return to *Griggs* provided that a statute

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preme Court in *Griggs* and in two decades of subsequent decisions." 136 CONG. REC. S16,458 (daily ed. Oct. 22, 1990) (veto message from the President).

117. *Id.*

118. S. 3239, *supra* note 8.

119. *Id.* § 3(n)(1), 136 CONG. REC. at S18,047. The President's version of the Civil Rights Act of 1991 contains a simplified definition of business necessity. In this bill, a challenged practice is "justified by business necessity" if it has a "manifest relationship to the employment in question" or if an employer's "legitimate employment goals are significantly served by, even if they do not require, the challenged practice." S. 611, *supra* note 10, § 3(n), 137 CONG. REC. at S3022.

120. Senator James M. Jeffords predicted:

> Only in rare circumstances would [the] lesser standard, tied to business objectives rather than job performance, be applied. The "defended by" version drafted by the administration would allow employers to push virtually all employment practices into the second category and justify them . . . on the basis of ordinary business objectives rather than on the basis of their ability to predict which employees will be successful on the job.

136 CONG. REC. S16,571 (daily ed. Oct. 24, 1990) (statement of Sen. Jeffords).

121. Senator Jeffords expressed concern that the provision would permit health costs to excuse the denial of employment opportunities to women. Further, he asserted that the proposal would sanction a legitimate customer preference loophole that would allow an employer to discriminate simply because its customers preferred to deal with white males. *Id.* Much to the horror of supporters of S. 2104, the President endorsed the concept of customer preference during last minute negotiations on the bill. 136 CONG. REC. E3567 (daily ed. Oct. 26, 1990) (remarks of Rep. Louis Stokes); 136 CONG. REC. H13,545 (daily ed. Oct. 24, 1990) (remarks of Rep. Kweisi Mfume).

122. S. 2104, *supra* note 2, §§ 3-4, 136 CONG. REC. at H9552-53.

123. The President's bill also conspicuously omitted any assertion that it was overruling the treatment of business necessity in *Wards Cove*. S. 3239, *supra* note 8, 136 CONG. REC. at S18,046-48. The President's 1991 bill likewise contains no such provision. *See* S. 611, *supra* note 10, 137 CONG. REC. at S3022-23.

which clearly articulates the *Griggs* standard is fashioned.[124] The inherent problem in the debate, however, is that ambiguity in the *Griggs* definition led to inconsistent application and that identification of the use of a single precise standard prior to *Watson* and *Wards Cove* is difficult.[125]

2. Burdens of Proof

Congress suggested in its proposed legislation that to establish a prima facie case of disparate impact the plaintiff should be required to show that an employment practice results in a disparate impact with regard to race, color, religion, sex, or national origin.[126] The President objected to this provision on the grounds that it required no showing that the challenged employment practice actually caused statistical disparity.[127] The President's proposed alternative would permit a plaintiff to establish a prima facie case only when a plaintiff shows that a particular practice causes a disparate impact on the basis of race, color, religion, sex, or national origin.[128] This proposal presumably endorses the *Wards Cove* approach to causation in disparate impact cases.[129]

Surprisingly, the bills proposed by Congress and the President both shift the burdens of production and persuasion to the employer once a plaintiff has established a prima facie case.[130] Both bills require an employer to "demonstrate" that the challenged practice is required by business necessity,[131] and both bills define "demonstrate" as meeting "the burdens of production and persuasion."[132] Thus, both proposals would overrule the *Wards Cove* holding that the defendant's burden is

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124. *See supra* note 116.

125. *See supra* notes 17-69 and accompanying text.

126. S. 2104, *supra* note 2, § 4(k)(1)(A), 136 CONG. REC. at H9552. Identical language appears in the Democrats' 1991 bill. *See* H.R. 1, *supra* note 9, § 4(k)(1)(A).

127. 136 CONG. REC. S16,458 (daily ed. Oct. 22, 1990) (veto message from the President).

128. S. 3239, *supra* note 8, § 4(k)(1), 136 CONG. REC. at S18,047. This causation requirement is retained in the President's 1991 bill. *See* S. 611, *supra* note 10, § 4(k), 137 CONG. REC. at S3022.

129. In Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), the Court cited with approval the court of appeals' assertion that " 'it is . . . essential that the practices identified by the cannery workers be linked causally with the demonstrated adverse impact.' " *Id.* at 2124 (quoting Atonio v. Wards Cove Packing Co., 827 F.2d 439, 445 (9th Cir. 1987)).

130. *See infra* notes 131-33 and accompanying text.

131. S. 2104, *supra* note 2, § 4(k)(1)(A), 136 CONG. REC. at H9552; S. 3239, *supra* note 8, § 4(k)(1), 136 CONG. REC. at S18,047. *But see* 136 CONG. REC. S16,565 (daily ed. Oct. 24, 1990) (statement of Sen. Orrin Hatch) (criticizing S. 2104 for shifting the burden of persuasion in disparate impact cases to employers, thus converting Title VII into a quota statute). The President's 1991 bill, however, requires an employer to demonstrate that a challenged practice is "justified" by business necessity. *See* S. 611, *supra* note 10, § 4(k), 137 CONG. REC. at S3022.

132. S. 2104, *supra* noto 2, § 3(m), 136 CONG. REC. at H9552; S. 3239, *supra* note 8, § 3(m), 136 CONG. REC. at S18,047. Both 1991 bills retain this definition. *See* S. 611, *supra* note 10, § 3(m), 137 CONG. REC. at S3022; H.R. 1, *supra* note 9, § 3(m).

one of production only.[133]

A major source of contention between Congress and the President is the scope of the burden that shifts to the plaintiff if the employer is able to show business necessity. Although both proposals would shift the burden of proof back to the plaintiff at this stage,[134] there the similarity between the bills ends. The first draft of the congressional bill was silent on this issue,[135] but the final draft provided that the plaintiff would have to demonstrate that a less discriminatory practice would satisfy the employer's business needs as adequately as the challenged practice.[136] The President's bill, in contrast, provides that the plaintiff must establish the existence of a less discriminatory practice that is comparable to the challenged practice in cost, measurement of job performance, and achievement of the employer's legitimate employment goals, and that the employer has refused to adopt the alternative.[137] The President's provision closely approximates the *Watson* and *Wards Cove* formulations.

3. Specificity

A third major area of controversy is the specificity requirement in the congressional proposal. The language in the first draft of the bill was fairly straightforward. A plaintiff who demonstrated that a group of employment practices resulted in a disparate impact was not required to identify which specific practice was responsible for the disparity.[138] Furthermore, if a defendant showed that specific practices within the group of practices did not contribute to the disparate impact, proof that

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133. *See supra* note 101 and accompanying text.

134. *See* S. 2104, *supra* note 2, § 4(k)(1)(B), 136 CONG. REC. at H9552; S. 3239, *supra* note 8, § 4(k)(1), 136 CONG. REC. at H18,047.

135. S. 2104 Version 1, *supra* note 111.

136. Section 4(k)(1)(B) of S. 2104 provides in pertinent part: "[A]n employment practice or group of employment practices demonstrated to be required by business necessity shall be unlawful where a complaining party demonstrates that a different employment practice or group of employment practices with less disparate impact would serve the respondent as well." S. 2104, *supra* note 2, § 4(k)(1), 136 CONG. REC. at H9552. Identical language appears in the Democrats' 1991 bill. *See* H.R. 1, *supra* note 9, § 4(k)(1).

137. S. 3239, *supra* note 8, § 4(k)(1), 136 CONG. REC. at S18,047. The President's bill provides:

> [A]n unlawful employment practice shall . . . be established if the complaining party demonstrates the availability of an alternative employment practice, comparable in cost and equally effective in measuring job performance or achieving the respondent's legitimate employment goals, that will reduce the disparate impact, and the respondent refuses to adopt such alternative.

Id. The President's 1991 bill contains identical language, except that the phrase "equally effective in measuring job performance" is replaced by the phrase "equally effective in predicting job performance." *See* S. 611, *supra* note 10, § 4(k), 137 CONG. REC. at S3022.

138. S. 2104 Version 1, *supra* note 111, § 4(k)(1)(B)(i), 136 CONG. REC. at S1019.

business necessity required those practices was not necessary.[139]

The language in the final version, however, was complicated and confusing.[140] Apparently, the plaintiff would have had to identify the specific practice or practices responsible for the disparate impact unless the court found that the defendant either had not kept or had refused to produce business records that would have assisted the plaintiff in this showing.[141] The President rejected the requirement that employers keep detailed records to avoid having to prove the business necessity of each of a potentially large number of employment practices. The President's proposal provides simply that the plaintiff must identify the spe-

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139. *Id.* § 4(k)(1)(B)(ii), 136 CONG. REC. at S1019.

140. The relevant subsection provided:

(1) An unlawful employment practice based on disparate impact is established under this section when—

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

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

(i) except as provided in clause (iii), 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;

(ii) if the respondent demonstrates that a specific employment practice within such group of employment practices is not responsible in whole or in significant part for the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity; and

(iii) the complaining party shall be required to demonstrate which specific practice or practices are responsible for the disparate impact in all cases unless the court finds after discovery (I) that the respondent has destroyed, concealed or refused to produce existing records that are necessary to make this showing, or (II) that the respondent failed to keep such records; and except where the court makes such a finding, the respondent shall be required to demonstrate business necessity only as to those specific practices demonstrated by the complaining party to have been responsible in whole or in significant part for the disparate impact . . . .

S. 2104, *supra* note 2, § 4(k)(1), 136 CONG. REC. at H9552-53. The Democrats' 1991 bill differs in two respects. In § 4(k)(1)(B)(ii), the phrase "is not responsible in whole or significant part" has been changed to "does not contribute." *See* H.R. 1, *supra* note 9, § 4(k)(1)(B)(ii). In addition, § 4(k)(1)(B)(iii) has been rewritten as follows:

(iii) if the court finds that the complaining party can identify, from records or other information of the respondent reasonably available (through discovery or otherwise), which specific practice or practices contributed to the disparate impact—

(I) the complaining party shall be required to demonstrate which specific practice or practices contributed to the disparate impact; and

(II) the respondent shall be required to demonstrate business necessity only as to the specific practice or practices demonstrated by the complaining party to have contributed to the disparate impact. . . .

Id. § 4(k)(1)(B)(iii).

141. S. 2104, *supra* note 2, § 4(k)(1)(B), 136 CONG. REC. at H9552.

cific practice responsible for the disparate impact unless several elements of the decision-making process are not separable for analysis, in which case the elements may be analyzed as one employment practice.[142]

C. *A Proposed Restructuring of Disparate Impact Analysis*

Congress made a good faith effort to accommodate the conflicting concerns of civil rights advocates and the business community in the disparate impact section of the Civil Rights Act of 1990. Unfortunately, the endless negotiation and amendment of the bill resulted in unnecessary complexity and ambiguity in an area of the law that already is confused. In the wake of the legislation's defeat, Congress has several options.

First, Congress could abandon the disparate impact issue. The provisions in the defeated bill addressing disparate impact were by far the most controversial and divisive.[143] If the disparate impact provisions were excised, the President would be more apt to sign the remaining bill. Resolution of the disparate impact issue would be left to the courts. Although the Supreme Court in *Wards Cove* retreated somewhat from the *Watson* plurality's pro-employer stance,[144] the current conservative Court probably would not repudiate those decisions. Thus, proponents of the defeated bill may be loathe to defer to the judiciary on this issue.

A second alternative would be to reword the bill to conform more closely to the holding in *Griggs*. A primary objection of the bill's opponents was that the bill did not codify *Griggs*, but rather went further in favoring plaintiffs at the expense of employers.[145] This objection implies that opponents would agree to a codification of *Griggs*. The problem with this approach is that *Griggs*, as an early articulation of the disparate impact theory, does not address adequately issues that are controversial today. The "manifest relationship to employment" language in

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142. S. 3239, *supra* note 8, § 4(k)(1), 136 CONG. REC. at S18,047. The President's 1991 bill provides that "an unlawful employment practice based on disparate impact is established only when a complaining party demonstrates that a particular employment practice causes a disparate impact on the basis of race, color, religion, sex, or national origin. . . ." S. 611, *supra* note 10, § 4(k), 137 CONG. REC. at S3022. It contains no provision permitting a group of inseparable practices to be analyzed as one employment practice.

143. *See, e.g.*, 136 CONG. REC. S16,562 (daily ed. Oct. 24, 1990) (veto message from the President); 136 CONG. REC. S15,356-61 (daily ed. Oct. 16, 1990) (letters to Sen. Robert Dole from practicing attorneys opposed to the bill).

144. *See supra* notes 95-100 and accompanying text.

145. *See supra* text accompanying notes 116-25.

Griggs[146] resulted in judicial inconsistency in the past[147] and is unlikely to produce consistency in the future. Furthermore, because *Griggs* was silent on the pretext and specificity issues, a return to *Griggs* would not resolve the controversy surrounding the issues.

A third alternative, and the one most likely to lead to a satisfactory resolution of the controversial issues, is a restructuring of the disparate impact model. Because neither the approach that evolved in the courts nor the approaches espoused by either Congress or the President are completely satisfactory, a rethinking of the underlying disparate impact theory is necessary. In tension with the Title VII equal opportunity goal[148] is the legitimate efficiency interest of employers in hiring and maintaining a competent work force.[149] Any viable disparate impact model must balance these competing considerations effectively.

Professor Mack Player has suggested that current disparate impact theory does not achieve this balance and has proposed an alternative that, with a simple extension, likely would satisfy both sides in the current debate.[150] Professor Player theorizes that a legal standard is inherently valid if it balances competing goals to serve one goal without compromising the other, or even if it serves one goal at the expense of another provided that the relative benefit is proportional to the relative sacrifice.[151] Thus, a model that minimally serves one goal while undermining the competing goal is flawed.[152] Professor Player posits that the judicial inconsistency in disparate impact cases results from this type of flaw in the *Griggs* analysis.[153]

The first stage of the *Griggs* analysis requires a plaintiff to show that an employment practice used by the defendant created a disparate impact on a protected class.[154] The employer then must demonstrate that business necessity requires the practice.[155] This approach is problematic, however, in that the level of proof required to show business necessity is not a function of the level of impact established by the

146. *See supra* text accompanying notes 25-29.

147. *See supra* discussion in subpart II(A)(1).

148. As the Supreme Court noted in *Griggs*, the purpose of Title VII is to attain equal employment opportunities and to remove those obstacles that have operated to favor white employees. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Congress clearly did not intend for Title VII to accomplish its goal by encouraging the use of quotas or preferential hiring systems. 42 U.S.C. § 2000e-2(j) (1988).

149. *See generally* Player, *supra* note 34.

150. *See id.*

151. *Id.* at 37.

152. *Id.*

153. *Id.*

154. *See supra* notes 23-29 and accompanying text.

155. *Id.*

plaintiff's prima facie case.[156] This single-tier approach is too rigid.[157]

For example, if employers must meet the stringent business necessity standard of *Griggs*, *Albemarle*, and *Dothard* for a practice causing a slight impact, the employer's interest in efficiency is sacrificed without a counterbalancing equal opportunity benefit.[158] Hiring or promotion criteria that have some usefulness in predicting performance may be invalidated with little increase in minority employment.[159] Similarly, allowing employers to justify a practice causing a significant impact under a minimal business necessity standard of the sort adopted in *New York City Transit Authority v. Beazer*[160] and *Watson v. Fort Worth Bank & Trust*[161] sacrifices equal opportunity goals without a correlative increase in employer efficiency.[162] Courts may permit an employment practice with a tenuous relationship to job performance notwithstanding the significant impact of the practice on minority employment.[163]

A similar analysis applies to the plaintiff's burden to prove impact. If a court requires a high standard of proof as in *Beazer* and *Wards Cove*, equal opportunities are sacrificed without a corresponding benefit to employer efficiency.[164] An employer could use employment practices that have some impact on minority employment even if they are completely unrelated to job performance.

Although *Wards Cove* reached a balance between these competing interests by imposing a mid-level burden on the defendant and placing the burden of persuasion for justification on the plaintiff, Professor Player suggests that the *Wards Cove* approach is too inflexible and will result in decisions that reflect the socioeconomic philosophy of the Supreme Court.[165] He believes that a better approach would be a two-tiered analysis with motive as a central element.[166] Under this ap-

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156. *See* Player, *supra* note 34. For example, if a rigorous business necessity standard of the sort adopted in *Griggs*, Albemarle v. Paper Co. v. Moody, 422 U.S. 405 (1975), and Dothard v. Rawlinson, 433 U.S. 321 (1977), is adopted, the burden on employers to justify an employment practice would be the same whether the practice had a slight or a devastating impact on minority employment opportunities.

157. Player, *supra* note 34, at 38.

158. *Id.* at 38-39.

159. *Id.*

160. 440 U.S. 568 (1979).

161. 487 U.S. 977 (1988).

162. Player, *supra* note 34, at 38-39.

163. *See id.*

164. *Id.*

165. *Id.* at 39.

166. *Id.* at 42-45. Professor Mack Player points out that "the clear wording and history of Title VII suggest, at least as strongly as does the National Lahor Relations Act . . . that motive is an element of Title VII liability." *Id.* at 42 (footnote omitted).

proach, a plaintiff's showing that an employment practice has a disparate impact on a protected class creates a presumption of improper motive.[167] The plaintiff must show the degree of impact resulting from the use of the employment practice being challenged, and the employer's burden will be derived from this showing.[168] The employer must present a legitimate business justification sufficient to create an inference of legal motive that outweighs the presumption of improper motive.[169]

For example, if the employment practice causes only a slight impact, the defendant's burden will be one of production: it must present evidence that the practice serves important business interests in a significant manner.[170] If the employment practice causes a devastating impact, the presumption of improper motive will be so strong that it can be countered only by proof that the practice is absolutely essential to the safe and effective operation of the employer's business.[171] This disparate impact model would not overrule *Griggs* or *Wards Cove*.[172]

The pretext controversy over less discriminatory alternatives becomes irrelevant under this proposal.[173] According to the Court in *Albemarle*, the existence of a less discriminatory alternative is evidence that the employer used the challenged practice as a pretext for discrimination.[174] Because the proposed model introduces a presumption of illegal motive into disparate impact analysis, this third step becomes unnecessary. In a sense the first two steps subsume the third.[175]

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167. *Id.*

168. *Id.* at 42-43.

169. *Id.* at 42.

170. *Id.*

171. *Id.*

172. *Id.* at 43. If the plaintiff shows a significant disparate impact, the *Griggs*, *Albemarle*, and *Dothard* holdings would establish the employer's burden. *Id.* If the plaintiff shows a slight disparate impact, the treatment of business necessity in *Wards Cove* would control. *Id.*

173. The pretext stage of analysis requires that the plaintiff have an opportunity to show that alternative selection devices would serve the employer's interests, but have a lesser discriminatory impact. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

174. *Id.*

175. For example, in a case in which the degree of impact shown by the plaintiff is slight, the defendant nevertheless must refute a presumption of improper motive. If equally effective alternative practices exist that would have a less discriminatory impact, the defendant would be unable to refute the presumption. The existence of less effective alternative practices would not hinder the defendant's ability to counter the presumption because the underlying balancing concept inherent in the model dictates that the employer's efficiency interest must not be undermined significantly when employment opportunity goals are affected only slightly.

In contrast, by showing a significant impact, the plaintiff creates a strong presumption of improper motive on the part of the defendant. To refute this presumption, the defendant would have to prove that the practice is essential to its business. If viable alternative practices exist that would lessen the disparate impact, the defendant would be unable to defend its more discriminatory practice.

Yet the model as proposed would not resolve the controversy over specificity. In the proposed model, the plaintiff will bear the burden of showing the degree of impact resulting from an employment practice. In some cases, however, a single employment practice may be an inseparable element of a multicomponent hiring or promotion system. In these cases the plaintiff should be permitted to challenge the inseparable components as a group, and the burden should be on the defendant to show that specific practices in the group do not contribute to the disparate impact. In no case should the plaintiff be permitted to challenge a list of unrelated practices, however, because the burden on the defendant to defend each practice could be overwhelming. The language in the President's proposed legislation providing for challenges to inseparable components as a group, but requiring identification of distinct and separate criteria, adequately addresses this issue and should be incorporated.[176]

Because Professor Player's disparate impact model with the suggested extension effectively serves the interests of both employers and Title VII plaintiffs, it likely would satisfy Congress, the President, civil rights advocates, and the business community. The proposal resolves the burdens of proof and business necessity issues in a way that is fair to both plaintiffs and defendants. Moreover, the suggested extension would resolve the controversy surrounding the specificity issue.

III. REMEDIES

One of the most serious charges leveled against the Civil Rights Act of 1990 is that it dramatically and inappropriately would increase incentives for litigation.[177] Among the provisions attacked on this basis are those that would allow, for the first time, the award of both compensatory and punitive damages and trial by jury in Title VII actions.

A. The Problem with Title VII Remedies

The remedial structure of Title VII clearly contemplates equitable, as opposed to legal, remedies in Title VII cases.[178] The district court in

176. S. 3239, *supra* note 8, § 4(k)(1), 136 CONG. REC. at S18,047. The proposal provides that "if the elements of a decision-making process are not capable of separation for analysis, they may be analyzed as one employment practice," *id.*, and that "where the criteria are distinct and separate each must be identified with particularity." *Id.*

177. 136 CONG. REC. S16,458 (daily ed. Oct. 22, 1990) (veto message from the President).

178. The relief provision in Title VII provides:

> If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice . . ., 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.

Whitney v. Greater New York Corp. of Seventh-Day Adventists[179] analyzed the legislative history of Title VII and concluded that the congressional objective in enacting Title VII was not to punish employers with huge damage awards. According to the court, Title VII is meant to provide restitution to victims of discrimination, not to create another cause of action for personal injuries.[180]

An overwhelming majority of courts interpret the remedial provisions in Title VII to prohibit an award of compensatory or punitive damages.[181] Title VII, however, does permit "equitable" monetary relief in the form of back pay.[182] The Supreme Court in *Albemarle*[183] held that a court should deny a back-pay award only if doing so would not thwart Title VII's goals of eliminating discrimination and making victims of past discrimination whole.[184] The availability of back-pay awards discourages employers from discriminating because awards potentially can be huge.[185]

Title VII contains a mitigation clause, however, that often may limit the deterrent effect of this back-pay award. The clause provides that interim earnings or amounts that reasonably could have been earned by the plaintiff will operate to reduce back-pay awards.[186] The courts have interpreted this clause to impose on the plaintiff a duty of reasonable diligence to seek interim employment.[187] As the Supreme Court made clear in *Ford Motor Co. v. EEOC*,[188] a plaintiff who refuses a job substantially equivalent to the job originally denied is not entitled

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42 U.S.C. § 2000e-5(g) (1988).

179. 401 F. Supp. 1363, 1369 (S.D.N.Y. 1975).

180. *Id.* Similarly, Senator Harrison Williams, Jr. of New Jersey clearly articulated the "make whole" purpose of Title VII during consideration of the Equal Opportunity Act of 1972:

> The provisions of this subsection are intended to give the courts wide discretion in exercising their equitable powers to fashion the most complete relief possible. . . . [T]he courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

118 CONG. REC. 7168 (1972) (remarks of Sen. Williams).

181. *See* Panken & Gold, *Damages Awarded Under Title VII*, in 1 EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN FEDERAL AND STATE COURTS 569 (1990).

182. For a thorough discussion of back pay, see Special Project, *Back Pay in Employment Discrimination Cases*, 35 VAND. L. REV. 893 (1982).

183. 422 U.S. at 405.

184. *Id.* at 421.

185. *See* Special Project, *supra* note 182, at 901 n.36.

186. 42 U.S.C. § 2000e-5(g).

187. *See* Special Project, *supra* note 182, at 1017.

188. 458 U.S. 219 (1982).

to back pay.[189] In some cases this provision renders Title VII remedies meaningless because a plaintiff who finds alternative employment will be eligible only for back pay offset by interim earnings and may no longer desire reinstatement.[190] Thus, a defendant who has discriminated unlawfully may suffer few ill effects.

B. The Solutions Proposed by Congress and the President

Congress proposed a dramatic alteration in the Title VII remedial scheme in the Civil Rights Act of 1990. The bill would have amended Title VII to permit the award of compensatory and punitive damages in cases of intentional discrimination.[191] The initial draft provided that plaintiffs could recover compensatory damages except in cases of disparate impact.[192] The draft also permitted punitive damages when the employer had engaged in the unlawful employment practice with malice or reckless indifference to federally protected rights.[193] An exception forbade the award of punitive damages against a government, government agency, or political subdivision.[194] The provision further stated that either party may demand a jury trial when the plaintiff seeks compensatory or punitive damages.[195]

The final draft contained a clause extending the scope of the bill to cover unlawful employment practices under the Americans With Disabilities Act of 1990.[196] This draft also explicitly stated what the initial draft had implied: that compensatory and punitive damages and jury trials are available only for claims of intentional discrimination.[197] The most significant change, however, was the inclusion of a provision limiting punitive damages awarded to an individual to one hundred fifty thousand dollars or the amount of compensatory damages awarded,

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189. *Id.* at 232.

190. *See* Note, *Tort Remedies for Employment Discrimination Under Title VII*, 54 VA. L. REV. 491, 495 (1968). Harassment cases are also problematic because back-pay awards are not applicable if the plaintiff remains employed, and injunctive relief and reinstatement will be inappropriate if the workplace bas become hostile as a result of the litigation. *Id.* at 495-96.

191. S. 2104, *supra* note 2, § 8, 136 CONG. REC. at H9553-54.

192. S. 2104 Version 1, *supra* note 111, § 8, 136 CONG. REC. at S1020.

193. The plaintiff would have to show tbat the employer acted with "malice, or with reckless or callous indifference to the federally protected rights of others." *Id.* § 8(B), 136 CONG. REC. at S1020.

194. *Id.*

195. *Id.* § 8, 136 CONG. REC. at S1020.

196. S. 2104, *supra* note 2, § 8(a), 136 CONG. REC. at H9553-54. For further discussion of the Americans with Disabilities Act of 1990, see Note, *Addiction As Disability: The Protection of Alcoholics and Drug Addicts Under the Americans with Disabilities Act* 44 VAND. L. REV. 715 (1991).

197. S. 2104, *supra* note 2, § 8(a), 136 CONG. REC. at H9553-54.

whichever amount is greater.[198] Congress presumably added this limitation in response to sharp criticism that the prospect of unlimited damage awards invoked. Critics attacked the limitation as ineffectual, however, because a jury would have the discretion to inflate the amount of compensatory damages to include huge punitive awards.[199]

The President strongly opposed Congress's attempt to replace Title VII's conciliation scheme with a tort system,[200] but recognized the inadequacy of remedies under Title VII. The President's proposal permits the award of an "equitable" monetary remedy not exceeding one hundred fifty thousand dollars in cases of unlawful intentional discrimination.[201] This award would be available in addition to the remedies available under existing law.[202]

The issue of damages under Title VII is emotional and divisive. Civil rights advocates believe that the current remedial scheme is insufficient to deter discrimination.[203] The business community, on the other hand, insists that the threat of damages in Title VII actions would force employers to adopt quotas.[204] The chance that the President will sign legislation permitting compensatory and punitive damages and jury trials is slim. Equally unlikely is the prospect that the defeat of the Civil Rights Act of 1990 will end the debate. Moreover, the current treatment of section 1981 claims exacerbates the problem of remedies.[205]

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198. *Id.* § 8(b), 136 CONG. REC. at H9554. The Democrats' 1991 bill is identical to the defeated legislation except that it contains no provision limiting punitive damages. *See* H.R. 1, *supra* note 9, § 8.

199. *See, e.g.*, 136 CONG. REC. S15,356 (daily ed. Oct. 16, 1990) (letter from Zachary D. Fasman to Sen. Robert Dole).

200. In his veto message, the President voiced his opposition to the replacement of "measures designed to foster conciliation and settlement with a new scheme modeled on a tort system widely acknowledged to be in a state of crisis." 136 CONG. REC. S16,562 (daily ed. Oct. 24, 1990) (veto message from the President).

201. S. 3239, *supra* note 8, § 8(3), 136 CONG. REC. at S18,047.

202. *Id.* The President's 1991 bill would permit equitable monetary awards only in harassment cases. *See* S. 611, *supra* note 10, § 8(b)(1), 137 CONG. REC. at S3022. Such awards are limited to a maximum of $150,000. *Id.* The bill further provides that if such a monetary award constitutionally cannot be granted unless a jury determines liability issues, a jury may be empaneled to hear those issues but not to "consider, recommend, or determine the amount of any monetary award." *Id.* § 8(b)(2), 137 CONG. REC. at S3022.

203. *See* Coyle, *Undoing Another's Handiwork*, NAT'L L.J., Apr. 2, 1990, at 1; Moran, *Putting a Price on Discrimination—Damages Remedy Is Obstacle to Civil Rights Bill*, LEGAL TIMES, Mar. 26, 1990, at 2.

204. *See* Riley, *Business United in Fear of Quotas*, Wash. Times, Oct. 24, 1990, at A6.

205. *See infra* notes 206-21 and accompanying text.

C. Section 1981

1. Applicability to Employment Discrimination Claims

Plaintiffs seeking redress of intentional employment discrimination on the basis of race may seek damages under section 1981 of Title 42 of the United States Code.[206] In *Johnson v. Railway Express Agency, Inc.*[207] the Supreme Court held that a plaintiff who brings a successful section 1981 claim is entitled to legal as well as equitable relief and that this relief may include compensatory and punitive damages.[208] The Court concluded that section 1981 remedies, although related to those available under Title VII, are separate and distinct.[209] Because the two statutory schemes are coextensive, however, an individual may have a claim that can be brought under either or both statutes.[210]

2. Emasculation by *Patterson v. McLean Credit Union*

The Supreme Court severely restricted the applicability of section 1981 to employment discrimination in *Patterson v. McLean Credit*

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206. Section 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, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1988).

The original intent of § 1981 was to protect the rights of blacks after the abolition of slavery. For a comprehensive history of § 1981, see Comment, *Developments in the Law—Section 1981*, 15 HARV. C.R.-C.L. L. REV. 29 (1980). Yet the Supreme Court in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), held that § 1981 was applicable to racial discrimination claims in private employment contexts. *Id.* at 459-60.

207. 421 U.S. at 454.

208. *Id.* at 460.

209. *Id.* at 461.

210. *See id.* at 459. The Court also concluded that Congress did not intend Title VII and § 1981 to be mutually exclusive; on the contrary, the two schemes were intended to augment one another. *Id.* Several important differences between Title VII and § 1981 exist. Title VII prohibits discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2. Section 1981, in contrast, applies only to racial discrimination. *See* B. SCHLEI & P. GROSSMAN, *supra* note 17, at 674. In McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976), the Supreme Court held that § 1981 was applicable to racial discrimination against whites in employment contexts. A plaintiff who prevails under Title VII is entitled only to equitable remedies, but one who prevails under § 1981 is entitled to both legal and equitable remedies. *Johnson*, 421 U.S. at 458-60. A back-pay award under Title VII is subject to a two-year limitation; no limitation applies under § 1981. *See* Special Project, *supra* note 182, at 1024-32. Title VII is applicable only to employers with 15 or more employees, 42 U.S.C. § 2000e(b), but this restriction does not apply in § 1981 cases. Finally, Title VII provides assistance to plaintiffs for items that are unavailable under § 1981. "Title VII offers assistance in investigation, conciliation, counsel, waiver of court costs, and attorneys' fees, items that are unavailable at least under the specific terms of § 1981." *Johnson*, 421 U.S. at 460.

Union.[211] In addressing the plaintiff's racial harassment claim, the Court observed that, taken literally, section 1981 forbids racial discrimination only in the "making and enforcement of contracts."[212] Thus, it protects only two rights: The right to make contracts and the right to enforce them.[213]

According to the Court, the right to make contracts applies to contract formation, but does not extend to employment conditions arising after formation.[214] Specifically, the Court held that the right to make contracts does not apply to an employer's conduct after contract formation, even if the employer breaches the contract or implements discriminatory working conditions.[215] The right to enforce contracts ensures the ability of racial minorities to enforce contract rights through the legal process.[216] Because the plaintiff in *Patterson* was attacking the conditions of employment, the claim implicated neither the right to make nor the right to enforce contracts and, therefore, was not actionable under section 1981. The Court indicated that the plaintiff's claim could be brought under Title VII and suggested that courts should not interpret section 1981 broadly when the result would be to circumvent the Title VII remedial scheme.[217] The Court conceded that some overlap between the two statutes would remain in cases concerning a refusal to enter into an employment contract on the basis of race.[218]

Justice William Brennan, in dissent, argued that an interpretation of section 1981 that covered postcontractual harassment would not undermine the Title VII remedial scheme.[219] He pointed out that Congress rejected an amendment to Title VII that would have made it the exclusive remedy for employment discrimination.[220] In addition, he noted that Congress explicitly has stated that the two statutes provide alternative avenues for redress in employment discrimination cases.[221]

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211. 109 S. Ct. 2363 (1989). The plaintiff in *Patterson* was a black woman employed by McLean as a teller and file coordinator. *Id.* at 2368-69. The plaintiff alleged that during the course of her employment her employer subjected her to harassment, passed over her for promotion, denied her training for higher level jobs and wage increases, and finally laid her off because of her race. *Id.* at 2369. She brought claims under § 1981 for racial harassment, discriminatory discharge, and failure to promote. *Id.*

212. *Id.* at 2372.

213. *Id.*

214. *Id.*

215. *Id.* at 2373.

216. *Id.*

217. *Id.* at 2374-75.

218. *Id.* at 2375.

219. *Id.* at 2386-87 (Brennan, J., dissenting).

220. *Id.* (Brennan, J., dissenting).

221. *Id.* at 2387 (Brennan, J., dissenting).

3. Reinvigoration by Congress and the President

Congress sought to overturn *Patterson* in the Civil Rights Act of 1990. The bill would have amended section 1981 so that the right to make and enforce contracts would include the performance of those contracts.[222] This extension of section 1981 would have ensured the applicability of the statute to discriminatory conduct of the employer after an employment contract was formed and permitted racial harassment claims to fall within its rubric.

Interestingly, the President agreed with Congress on this issue. The language in his proposed compromise bill virtually is identical to that in the congressional bill.[223] Thus, both Congress and the President appear to support the coexistence of Title VII and section 1981 in employment discrimination law.

D. A Proposal to Resolve the Debate Over Title VII Remedies

If civil rights legislation does succeed in overturning *Patterson*, section 1981 remedies would be available to victims of intentional racial discrimination in employment. For individuals employed by companies with fewer than fifteen employees, section 1981 would represent the sole avenue of redress.[224] The availability of section 1981 remedies would make the lack of legal remedies in Title VII less debilitating to plaintiffs and to some extent would alleviate the concern about deterrence of discriminatory conduct, but ultimately would provide an unsatisfactory solution to the problem.

A primary goal of Title VII is to eliminate discrimination from the workplace;[225] thus, its remedial scheme should serve that goal. Another Title VII goal is conciliation between civil rights plaintiffs and defendants;[226] legislation likewise should not compromise that goal. Amending Title VII to permit punitive and compensatory damages and jury trials may serve the goal of eliminating discrimination by providing em-

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222. S. 2104, *supra* note 2, § 12(2), 136 CONG. REC. at H9554. The bill would have added to § 1981 the following clause: "For purposes of this section, the right to 'make and enforce contracts' shall include the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." *Id.* The Democrats' 1991 bill contains an identical provision. *See* H.R. 1, *supra* note 9, § 12(2).

223. The only difference between the bills is that the President used the word "contract" where Congress used "contractual relationship." *Compare* S. 3239, *supra* note 8, § 11(2)(b), 136 CONG. REC. at S18,048 *with* S. 2104, *supra* note 2, § 12(2)(b), 136 CONG. REC. at H9554. The President's 1991 bill is identical to S. 3239 in this respect. *See* S. 611, *supra* note 10, § 6, 137 CONG. REC. at S3022.

224. *See supra* note 210.

225. *See supra* note 181 and accompanying text.

226. Title VII contains a mandatory conciliation process. *See* 42 U.S.C. § 2000e-5(b) to -5(f) (1988).

ployers with a powerful incentive to prevent it, but may undermine the conciliation goal. Litigation would become much more attractive to plaintiffs and their attorneys, and settlements likely would become less frequent and more expensive for employers. Employers may be tempted to adopt quotas in contravention of the clear intent of Title VII.[227] For these reasons, adoption of the congressional proposal for Title VII remedies[228] is ill-advised.

President Bush's unorthodox suggestion that an "equitable" monetary award not to exceed one hundred fifty thousand dollars should be available to Title VII plaintiffs also is problematic. The President's proposal would leave the determination of an appropriate award to the equitable discretion of the court. Presumably, the court could use this additional remedy in cases in which existing Title VII remedies do not make the plaintiff whole, but not as a punitive damage award. The problem with this approach is that, notwithstanding the language, the award is not an equitable remedy. Courts and commentators which have begun to suggest that back-pay awards are not equitable remedies[229] easily would discern that this award is a legal one couched in equitable terms. Because jury trials generally are afforded to plaintiffs seeking legal relief,[230] this proposal eventually would lead to a trial by jury requirement in Title VII actions, which clearly is not the result intended by the President.[231]

A compromise is needed that would retain the conciliatory focus of Title VII and provide an effective deterrent to discrimination in employment. Elimination of the Title VII requirement that interim earnings be deducted from back-pay awards[232] is a viable solution. A court in its equitable discretion still could deduct interim earnings if the equities of the case required,[233] but the court should consider Title VII deterrence goals seriously before choosing deduction. Because the deduction of interim earnings serves as a disincentive for plaintiffs to challenge discriminatory conduct, elimination of the provision would decrease the possibility that an employer's discrimination would go un-

227. *See* 42 U.S.C. § 2000e-2(j).

228. *See supra* subpart III(A).

229. *See, e.g.*, Beesley v. Hartford Fire Ins. Co., 723 F. Supp. 635 (N.D. Ala. 1989); Comment, *Beyond the Dicta: The Seventh Amendment Right to Trial by Jury Under Title VII*, 38 U. KAN. L. REV. 1003 (1990).

230. The seventh amendment provides in part, "in Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. CONST. amend. VII; *see* Beacon Theatres v. Westover, 359 U.S. 500 (1959).

231. The President's proposal clearly rejects the imposition of a jury trial requirement by emphasizing equity. *See* S. 3239, *supra* note 8, § 8, 136 CONG. REC. at S18,047.

232. *See* 42 U.S.C. § 2000e-5(g) (1988).

233. *See* Special Project, *supra* note 182, at 1016 (suggesting that although Title VII requires deduction of only the interim earnings, courts generally deduct many other items).

punished. Further, this solution would not compromise the conciliatory goal of Title VII because the back-pay concept provides an implicit cap on monetary awards. Settlement would remain an attractive option in many cases, and unlimited liability, which might induce employers to adopt quotas, would not exist. Finally, this solution would be less likely to induce frivolous litigation than would the imposition of compensatory and punitive damage awards.

The restoration of section 1981 provided for in the Civil Rights Act of 1990, however, is an essential aspect of any attempt to address the inadequacy of remedies when back pay is not appropriate. Plaintiffs for whom Title VII equitable remedies are not sufficient, such as harassment victims, would have the option of bringing a claim under section 1981. Although section 1981 would accommodate racial harassment claims, courts never have interpreted it to apply to sex discrimination; hence, victims of sexual harassment would be left without adequate remedies.[234] Section 1981 should be amended, therefore, to permit sex and racial discrimination claims. Failure to adopt this proposed amendment will leave a significant group of aggrieved plaintiffs without redress.

IV. CONSENT DECREES AND THE IMPERMISSIBLE COLLATERAL ATTACK DOCTRINE

Another area of controversy surrounds the legislative response to the Supreme Court's holding in *Martin v. Wilks*.[235] In *Wilks* the Court addressed the procedural rules governing the preclusive effect of a consent decree on subsequent claims by third parties. Parties have used consent decrees[236] extensively in the context of employment discrimination claims,[237] and although the issue is procedural rather than substantive, civil rights plaintiffs and defendants have recognized its importance.

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234. *See* B. SCHLEI & P. GROSSMAN, *supra* note 17, at 674.

235. 109 S. Ct. 2180 (1989).

236. A consent decree is a hybrid between a private contract or settlement between parties and a judgment rendered by a court. The parties agree to the terms of a consent decree, and the court agrees to enforce it as a judgment. Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 324-25 (1988).

237. For example, nearly 90% of Justice Department Title VII claims against local and state governments between 1972 and 1983 ended in consent decrees. Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 894. Overall, more than 40% of civil rights actions are resolved by consent decree. Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43, 67 n.97.

A. *The Impermissible Collateral Attack Doctrine*

Prior to *Wilks* a majority of the federal courts embraced the impermissible collateral attack doctrine.[238] Under this doctrine, nonlitigants who are aware that the outcome of a lawsuit might affect their rights yet choose not to intervene in the action are precluded from attacking the resulting judgment or consent decree in a subsequent action.[239] This doctrine is desirable for several reasons. First, the doctrine encourages settlement.[240] Consent decrees subject to endless challenge by third parties would make affirmative action remedies adopted by consent decree much less attractive to both plaintiffs and defendants in civil rights cases. Second, the doctrine conserves judicial resources by preventing relitigation of settled claims.[241] Finally, the doctrine protects a defendant from conflicting judgments.[242] Despite these advantages, the impermissible collateral attack doctrine may pose a significant threat to the interests of third parties in some cases. The Supreme Court considered this problem in *Wilks*.[243]

B. *Demise of the Doctrine:* Martin v. Wilks

In *Wilks* a group of white firefighters brought a reverse discrimination suit against their employer, the city of Birmingham, Alabama.[244] The plaintiffs claimed that they were denied promotions in favor of less qualified black candidates as a result of the city's compliance with consent decrees requiring the implementation of an affirmative action plan in hiring and promotion.[245] The city admitted making race-conscious promotion decisions, but claimed the decisions were immune from at-

238. *Wilks*, 109 S. Ct. at 2185. One commentator has pointed out that the term "collateral attack" is a misnomer in this context because it ordinarily refers to an attempt by a party in a lawsuit to attack the judgment in a later action, rather than an attempt by a third party to attack an earlier judgment in which the third party was not involved. *See* Kramer, *supra* note 236, at 332.

239. *Wilks*, 109 S. Ct. at 2185.

240. Kramer, *supra* note 236, at 332-33.

241. *See id.*

242. *Id.* at 333. For example, a successful third party attack will invalidate the original consent order, and the defendant will have to seek modification. If the judge who originally entered the consent decree declines to modify it, the defendant will have irreconcilable obligations and will be subject to contempt citations by one or both of the courts. *Id.* at 333-34.

243. 109 S. Ct. at 2180.

244. *Id.* at 2182. The plaintiffs brought a similar claim against the Jefferson County Personnel Board. *Id.*

245. *Id.* at 2182-83. The consent decrees resulted from an earlier action in which the National Association for the Advancement of Colored People (NAACP) and seven black individuals claimed that the city's hiring and promotion practices were discriminatory. The parties subsequently entered into two consent decrees: one between the plaintiffs and the city and one between the plaintiffs and the Jefferson County Personnel Board. The city agreed to implement an extensive affirmative action scheme that included long-term and interim annual goals for the hiring and promotion of black firefighters. *Id.* at 2183.

tack under the impermissible collateral attack doctrine because they were made pursuant to the consent decrees.[246] The Supreme Court disagreed. According to the Court, the judgment may not bind a party who neither intervenes nor is joined in a lawsuit.[247]

The Court rejected the city's argument that the plaintiffs had forfeited their right to challenge the consent decrees by choosing not to intervene in the original action.[248] The Court pointed out that Rule 24 of the Federal Rules of Civil Procedure prescribes permissive rather than mandatory intervention, and thus, the appropriate mechanism to bind a party by a judgment or consent decree is the mandatory joinder provision of Rule 19(a).[249] The burden should be on the parties to a lawsuit to join additional parties rather than on potentially affected third parties to intervene, according to the Court, because the original parties will be best equipped to identify the third parties whose rights would be affected by the litigation.[250] In response to the city's objection that this rule would burden civil rights plaintiffs unduly and waste judicial resources in needless relitigation, the Court reasoned that a mandatory intervention rule would fare no better than a mandatory joinder rule in these regards and that the Court's acceptance of the former would require that the Federal Rules of Civil Procedure be rewritten.[251] The Court, therefore, rejected the impermissible collateral attack doctrine as inconsistent with Rules 19 and 24.[252]

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246. *Id.* at 2183. Accordingly, the city moved to dismiss the claim. The district court denied the motion, but agreed that the consent decrees would provide a defense to employment decisions required by the consent decrees. The issue for trial was whether the consent decrees required the promotion decisions. The court concluded that the consent decrees required the promotion decisions and, therefore, granted the motion to dismiss. *Id.* at 2183-84. On appeal, the Eleventh Circuit reversed. The Eleventh Circuit rejected the impermissible collateral attack doctrine, reasoning that the rights of third parties could not be sacrificed even in the face of an admittedly strong policy interest in voluntary affirmative action plans. *Id.* at 2184.

247. *Id.* at 2184. In a footnote the Court recognized two exceptions to the general rule. First, a judgment may bind nonlitigants when their interests are represented adequately by a party to the litigation with identical interests. Second, a special remedial scheme that expressly precludes successive litigation may prevent nonlitigants from challenging a judgment if the scheme comports with due process. *Id.* at 2184 n.2.

248. *Id.* at 2185.

249. *Id.* Rule 19(a) provides that a person who has an interest in the subject of the action must be joined if the person's absence either may impair the ability to protect that person's interest or may subject existing parties to a "substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest." FED. R. CIV. P. 19(a).

250. *Wilks*, 109 S. Ct. at 2186.

251. *Id.* at 2187.

252. *Id.* at 2186.

C. *Response of Congress and the President*

In section 6 of the Civil Rights Act of 1990,[253] Congress sought to restore the impermissible collateral attack doctrine as it had applied to employment discrimination claims. Section 6 distinguished between consent decrees entered prior to enactment of the bill and those entered after enactment. Subsection (1) of section 6 applied to the former, and subsection (2) applied to the latter. Under subsection (1) third parties who had actual notice from any source that an existing litigated or consent judgment might affect their rights, and who received a reasonable opportunity to present objections to the judgment or order, could not challenge an employment practice implementing that judgment.[254] Third parties not given actual notice or an opportunity to object still could be precluded from challenging the judgment if the court determined that another party who challenged the judgment or order adequately represented their interests, or if the court that entered the judgment or order found that the parties had made reasonable efforts to provide notice to the interested nonlitigants.[255] In the final version of the bill, this subsection applied only to consent decrees existing at the time of the bill's enactment, and Congress developed a separate standard in subsection (2) for consent decrees entered after enactment.[256]

Subsection (2) provided that a third party who was an employee, former employee, or job applicant during the period of notice and who had actual notice of the proposed judgment or order could not challenge an employment practice that implemented a litigated or consent judgment entered after the bill's enactment.[257] To bar collateral attack effectively, the notice would have had to inform the third party that the judgment or order could affect their interests adversely, that they could present objections, and that they would be barred from challenging the order or judgment if objections were not made in a timely manner. Additionally, however, the notice would have had to specify any numerical relief proposed in the judgment or order on the basis of race, color, reli-

253. S. 2104, *supra* note 2, § 6, 136 CONG. REC. at H9553.

254. *Id.* § 6(m)(1)(A)(i), 136 CONG. REC. at H9553. The bill actually distinguishes between orders and judgments entered prior to or less than 30 days after its enactment and those entered 30 days or more after enactment. *See id.* § 6(m)(1)-(2), 136 CONG. REC. at H9553. The former will be referred to as "existing" orders and judgments.

255. *Id.* § 6(m)(1)(B), 136 CONG. REC. at H9553. Earlier versions of the bill contained only this section and did not distinguish between existing and future consent decrees. *See* S. 2104 Version 1, *supra* note 111, § 6, 136 CONG. REC. at S1019-20. The Democrats' 1991 bill likewise contains only this section and does not distinguish between existing and future consent decrees. *See* H.R. 1, *supra* note 9, § 6.

256. S. 2104, *supra* note 2, § 6(m)(2), 136 CONG. REC. at H9553.

257. *Id.*

gion, sex, or national origin.[258] Further, employees, former employees, and applicants who failed to receive the requisite notice despite "diligent and best efforts" to provide individual notice would have been barred from challenging a judgment or order.[259] Individuals who were not employees, former employees, or job applicants during the period of notice could not have challenged a judgment or order if a similarly situated individual who previously challenged the judgment or order had represented their interests adequately.[260]

President Bush strongly objected to section 6 of the bill on the grounds that it denied those individuals victimized by quotas access to the courts.[261] Nevertheless, the President did address the issue in his proposed bill. The President's bill precludes challenge of an employment practice required by a litigated or consent judgment or order only by employees, former employees, and applicants who had actual notice of the proposed judgment or order.[262] By implication, the President's proposal would permit collateral attacks by individuals who had not received the requisite actual notice, even when the parties had made a diligent attempt to provide individual notice or another party had represented the individual's interests adequately.

Both bills provide that section 6 does not alter Rule 24 standards for intervention, does not apply to the rights of parties to the original action, and does not prevent challenges alleging that the court lacks subject matter jurisdiction, or that a judgment or order is "transparently invalid," or was obtained by collusion or fraud.[263] Both bills fur-

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258. *Id.* § 6(m)(2)(A), 136 CONG. REC. at H9553.

259. *Id.* § 6(m)(2)(B), 136 CONG. REC. at H9553.

260. *Id.* § 6(m)(2)(C), 136 CONG. REC. at H9553. The bill specifies that the similarly situated person must have challenged the judgment or order "on the same legal grounds and with a similar factual situation" and suggests that an intervening change in law or fact would render a challenge permissible. *Id.*

261. *See* 136 CONG. REC. S16,562 (daily ed. Oct. 24, 1990) (veto message from the President).

262. The notice requirements mirror those in the congressional bill: to be sufficient, notice must inform the persons that their interests may be affected adversely, that any relief is proposed, that a reasonable opportunity to challenge the judgment or order is available, and that they will be prohibited from challenging the order or judgment after a certain time period. S. 3239, *supra* note 8, § 6, 136 CONG. REC. at S18,047. The President's 1991 bill takes a substantially different approach. The bill provides that:

> [f]or purposes of determining whether a litigated or consent judgment or order resolving a claim of employment discrimination because of race color, religion, sex, national origin, or disability shall bind only those individuals who were parties to the judgment or order, the Federal Rules of Civil Procedure shall apply in the same manner as they apply with respect to other civil causes of action.

S. 611, *supra* note 10, § 5, 137 CONG. REC. at S3022.

263. S. 2104, *supra* note 2, § 6(m)(3), 136 CONG. REC. at H9553; S. 3239, *supra* note 8, § 6(m)(2), 136 CONG. REC. at S18,047. The President's 1991 bill does not include this provision. *See* S. 611, *supra* note 10, § 5, 137 CONG. REC. at S3022. The Democrats' 1991 bill retains the provision. *See* H.R. 1, *supra* note 9, § 6(m)(2).

ther provide that courts should not construe section 6 to deny constitutionally required due process to any person.[264] Finally, the congressional bill provided that any challenge to a judgment or order not precluded by section 6 should be brought in front of the court and, if possible, the judge that originally entered the judgment or order.[265] The President's bill lacks this provision.

D. Is There a Better Solution?

Commentators have criticized the Supreme Court's decision in *Martin v. Wilks* for failing to protect consent decrees in employment discrimination litigation adequately.[266] The mandatory joinder rule pronounced by the Court is probably unworkable in employment discrimination contexts. In cases involving large employers, for example, a judgment might affect the rights of thousands of employees and applicants. If all of these individuals must be joined pursuant to Rule 19, Title VII litigation will become prohibitively expensive and complex.[267] Presumably, many of the individuals joined would not have chosen to litigate otherwise. Requiring joinder of these parties will lead to unnecessary litigation.[268]

A more serious problem with the Court's approach is its literal interpretation of Rule 19.[269] Because Rule 19 requires mandatory joinder of parties whose interests may be affected adversely by the disposition of the action,[270] plaintiffs in cases similar to *Wilks* risk dismissal if they cannot feasibly join all of the parties.[271] Indeed, the Court in *Wilks* suggests that Rule 19's joinder provisions necessarily will shape the scope of a lawsuit and the requested relief.[272] This literal interpretation of

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264. S. 2104, *supra* note 2, § 6(m)(3)(D), 136 CONG. REC. at H9553; S. 3239, *supra* note 8, § 6(m)(2)(D), 136 CONG. REC. at S18,047. The President's 1991 bill lacks this provision as well. *See* S. 611, *supra* note 10, § 5, 137 CONG. REC. at S3022. The Democrats' 1991 bill retains this provision. *See* H.R. 1, *supra* note 9, § 6(m)(2)(D).

265. S. 2104, *supra* note 2, § 6(m)(4), 136 CONG. REC. at H9553. The Democrats' 1991 bill retains this provision. *See* H.R. 1, *supra* note 9, § 6(m)(3).

266. *See, e.g.*, Blumrosen, *The 1989 Supreme Court Rulings Concerning Employment Discrimination and Affirmative Action: A Minefield for Employers and a Gold Mine for Their Lawyers*, 15 EMPLOYEE REL. L.J. 175, 178-79 (1989); Grover, *Why the Veto Hurts More Than You Think*, LEGAL TIMES, Nov. 5, 1990, at 34; Strickler, Martin v. Wilks, 64 TUL. L. REV. 1557 (1990); Comment, *Reconstruction, Deconstruction and Legislative Response: The 1988 Supreme Court Term and the Civil Rights Act of 1990*, 25 HARV. C.R.-C.L. L. REV. 475, 540-55 (1990).

267. *See* Strickler, *supra* note 266, at 1593-95.

268. Joinder of unwilling parties also would impose a significant administrative burden on the courts if defaults for failure to answer were considered individually. *Id.*

269. *Id.* at 1599-1602.

270. FED. R. CIV. P. 19(a)(2)(i).

271. *See* Strickler, *supra* note 266, at 1601.

272. Martin v. Wilks, 109 S. Ct. 2180, 2187 (1989). Prior to *Wilks*, courts generally interpreted Rule 19 liberally, refusing to grant motions to dismiss for failure to join when joinder was

Rule 19 will impair severely the ability of civil rights plaintiffs to obtain the broad institutional reform envisioned by Title VII.[273]

Both Congress and the President seem willing to codify some variation of the impermissible collateral attack doctrine, but neither proposed approach is entirely satisfactory. Congress's proposal does not protect the interests of third parties adequately, and the President's approach does not shield consent decrees from collateral attack sufficiently.

Subsection (1) of the congressional bill was defective in several respects. First, actual notice from any source was considered sufficient for purposes of this subsection.[274] The Supreme Court set forth the due process standard for adequate notice in *Mullane v. Central Hanover Bank & Trust Co.*[275] According to *Mullane*, due process requires that notice must be reasonably designed to inform interested parties of the action and to afford them a chance to respond.[276] Notice from any source is not sufficient under *Mullane*, and adoption of the proposed congressional standard is likely to trigger disputes about whether and when notice has been received.[277] Congress should delete the "from any source" language from subsection (1) of its proposal.

Second, opponents of the congressional bill objected to the clause that precluded a person who did not receive notice but whose interests were represented adequately by another from challenging a consent decree.[278] This clause was consistent with class action requirements,[279] but

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not feasible. *See* Strickler, *supra* note 266, at 1600.

273. *See* Strickler, *supra* note 266, at 1601.

274. *See* S. 2104, *supra* note 2, § 6(m)(1)(A)(i), 136 CONG. REC. at H9553.

275. 339 U.S. 306 (1950).

276. Under the *Mullane* standard, notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" is constitutionally required. *Id.* at 314. The Court also held that in the case of missing or unknown persons, or individuals whose interests are "conjectural" or "future," less certain notice may be permissible. *Id.* at 317. The *Mullane* litigation concerned trust beneficiaries who were parties to a suit and whose interests were identical to those of other beneficiaries. *Id.* at 309-10. The *Mullane* rule, however, is particularly useful when finality is necessary, yet joinder of all interested persons is not feasible. *See* Strickler, *supra* note 266, at 1583-84. The method of notice used "must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315.

277. *See* Strickler, *supra* note 266, at 1578.

278. *See, e.g.*, 136 CONG. REC. S15,360 (daily ed. Oct. 16, 1990) (letter from Michael Carvin of Shaw, Pittman, Potts & Trowbridge to Sen. Robert Dole); 136 CONG. REC. S15,405 (daily ed. Oct. 16, 1990) (remarks of Sen. Orrin Hatch).

279. Rule 23 of the Federal Rules of Civil Procedure, which governs class actions, permits representative parties to represent a class if they "fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). The Supreme Court, in Hansberry v. Lee, 311 U.S. 32, 42-43 (1940), noted that it is "familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present."

these requirements should not apply necessarily to third-party challengers to consent decrees. Although inclusion of the clause may deprive some third parties of a forum for valid claims, omission of this clause would tax the resources of both the judiciary and parties to the original action by permitting endless litigation of similar claims.

The corresponding clause in subsection (2) more carefully defined adequate representation. Subsection (2) precluded collateral attack only by a person who was not an employee, former employee, or applicant during the period of notice and whose interests were represented adequately by a comparably situated individual who had challenged the judgment or order on the same legal basis and under similar facts, unless a change in law or fact occurred in the interim.[280] Some form of res judicata is necessary to preserve the appeal of consent decrees in Title VII litigation. The language in subsection (2) of the congressional proposal is preferable to that in subsection (1).

The third clause of subsection (1) precluded collateral attack by a person who did not receive notice if reasonable efforts to provide notice to an interested person were made.[281] This clause as written falls short of the *Mullane* standard for constitutionally acceptable notice.[282] Yet the disclaimer that nothing in section 6 should be construed to permit the denial of due process may redeem the clause.[283] The interaction of the two clauses probably would result in an interpretation that would satisfy *Mullane* due process requirements because *Mullane* does not require actual notice. Yet both this subsection and the corresponding provision in subsection (2)[284] are troubling because they would have denied a person who received no notice and whose interests were not represented adequately by another the opportunity to challenge a consent decree. A better approach is to excise the provisions and permit these individuals to challenge consent decrees that adversely affect their interests. This approach would not result in a surge in litigation as long as a res judicata provision remains in the bill to prevent comparable claims from being relitigated. The President probably would not accept any approach that denied these individuals access to the courts.[285]

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280. S. 2104, *supra* note 2, § 6(m)(2)(C), 136 CONG. REC. at H9553.

281. *Id.* § 6(m)(1)(C), 136 CONG. REC. at H9553.

282. *See supra* note 276 and accompanying text.

283. S. 2104, *supra* note 2, § 6(m)(3)(D), 136 CONG. REC. at H9553.

284. The corresponding provision in subsection (2) prevents challenge of a consent decree by a "person who during the period of notice was an employee, former employee, or applicant who, prior to the entry of such judgment or order, failed to receive actual notice of the proposed judgment or order . . . despite the diligent and best efforts of the parties to provide individual notice." *Id.* § 6(m)(2)(B), 136 CONG. REC. at H9553.

285. *See* 136 CONG. REC. S16,562 (daily ed. Oct. 24, 1990) (veto message from the President) (indicating that S. 2104 provisions that unfairly closed the courts to nonparties victimized by con-

The congressional bill, in its list of sufficiency requirements for notice, contained a provision that opponents of the bill found inflammatory because it allegedly approved the use of quotas in consent decrees.[286] The objectionable clause provided that notice must be sufficient to apprise a person whether the proposed judgment or order contains any numerical relief based on race, color, religion, sex, or national origin for any employment opportunity.[287] The President's bill, in a corresponding provision, simply requires notice that apprises a person of the relief proposed in the judgment.[288] The President's version is superior both because it avoids controversial quota language and because it affords more complete notice of remedies contemplated in the action.

Congress should retain the provision in its bill that requires claims not precluded by section 6 to be brought before the court and, if possible, the judge that originally entered the consent decree. Consent decrees often contain retention of jurisdiction clauses authorizing the court of origin to hear all related claims for the life of the decree, but the court has jurisdiction to modify or terminate a consent decree even in the absence of such a clause.[289] This provision will conserve judicial resources by preventing judges unfamiliar with the underlying litigation from hearing related third-party claims. In addition, it will prevent inconsistent judgments and minimize the likelihood that defendants will be faced with incompatible orders.

Congress also should retain subsection (3) of the congressional bill.[290] This subsection provided, first, that nothing in section 6 should be construed to alter Rule 24's intervention standards or to apply to individuals who intervene pursuant to Rule 24.[291] Second, courts should not interpret section 6 to apply to the rights of parties to the action in which the consent decree was entered,[292] or to prevent challenges to litigated or consent judgments or orders that are "transparently invalid," obtained by collusion or fraud, or obtained from a court lacking subject

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sent decrees were unacceptable).

286. *See, e.g.*, 136 CONG. REC. S16,562 (daily ed. Oct. 24, 1990) (veto message from the President); 136 CONG. REC. S15,329 (daily ed. Oct. 16, 1990) (letter from Attorney General Dick Thornburgh to Sen. Robert Dole) (complaining that the bill "expressly contemplates that consent decrees . . . might use quotas").

287. S. 2104, *supra* note 2, § 6(m)(2)(A)(ii), 136 CONG. REC. at H9553. This provision does not appear in the Democrats' 1991 bill. *See* H.R. 1, *supra* note 9, § 6.

288. S. 3239, *supra* note 8, § 6(m)(1)(B), 136 CONG. REC. at S18,047.

289. Kramer, *supra* note 236, at 335.

290. Subsection 2 of the President's bill contains virtually identical provisions. *See* S. 3239, *supra* note 8, § 6(m)(2), 136 CONG. REC. at S18,047.

291. S. 2104, *supra* note 2, § 6(m)(3)(A), 136 CONG. REC. at H9553.

292. *Id.* § 6(m)(3)(B), 136 CONG. REC. at H9553. These parties include members of a class represented in the action and individuals for whom the federal government sought relief in the action. *Id.*

matter jurisdiction.[293] This provision would have permitted individuals, regardless of notice to them and adequate representation of their interests, to challenge a consent decree that requires illegal affirmative action plans.[294] Third, the subsection provided that nothing in section 6 should be construed to permit the denial of due process of law to any person.[295]

Congress can fashion a viable compromise from the language in the existing bills. Congress should eliminate the dual standard in its proposed bill for existing and future consent decrees because no reason exists for treating the two types of decrees differently. In addition, compromise legislation should preclude a person who was an employee, former employee, or applicant during the period of notice and who had actual notice of the proposed judgment from challenging litigated or consent judgments or orders. To be sufficient, notice must inform individuals that the judgment or order is likely to affect their interests adversely, that the judgment proposes specified relief, that a reasonable opportunity to challenge the judgment or order is available, and that the law bars challenges of the proposed judgment or order after a specified date. The legislation also should preclude any person who does not receive adequate notice, but whose interests were represented adequately and competently by a similarly situated person who previously had challenged the judgment or order on the same legal grounds and with a similar factual situation, from challenging a judgment or order unless an intervening change in law or fact occurred.[296] The party should bring any action not precluded in the court and, if possible, before the judge that originally entered the consent or order. Moreover, compromise legislation should preserve subsection (3) of the congressional bill in its entirety.[297]

Finally, Congress should resolve the inconsistency between the impermissible collateral attack doctrine and Rule 19 that the Supreme Court identified in *Martin v. Wilks*.[298] Both bills fail to address this

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293. *Id.* § 6(m)(2)(C), 136 CONG. REC. at H9553.

294. Courts and others frequently rely on United Steelworkers v. Weber, 443 U.S. 193 (1979), in determining the validity of affirmative action plans. In *Weber* the Supreme Court validated an affirmative action plan that did not "unnecessarily trammel" the interests of nonminority employees because it did not require that employers replace white employees with black hirees and did not bar the advancement of white employees completely. The Court also considered the temporary nature of the measure. *Id.* at 198-99, 208.

295. S. 2104, *supra* note 2, § 6(n)(3)(C), 136 CONG. REC. at H9553.

296. This provision should apply to all persons rather than only to those not employees, former employees, or applicants during the period of notice. This broad application is necessary because of the deletion of the provision precluding challenge by employees, former employees, and applicants who did not receive adequate notice.

297. *See supra* notes 290-95 and accompanying text.

298. 109 S. Ct. 2180, 2186 (1989); *see* Strickler, *supra* note 266, at 1605.

problem by leaving intact the portion of the Court's decision that requires mandatory joinder of all interested parties under Rule 19.[299] Indeed, as the Court implied, it would be difficult to overrule this aspect of the decision without amending Rule 19.[300] Some courts have recognized a public rights exception to Rule 19, relaxing the mandatory joinder requirements in a variety of cases concerning broad matters of public policy.[301] Although Title VII litigation seems to fit within this exception, the Supreme Court in *Wilks* declined to apply the exception to a Title VII claim. Perhaps the best way to remedy the Court's literal application of Rule 19 is to codify a public rights exception for Title VII claims in future civil rights legislation. This exception, combined with the suggested notice requirements, would result in a workable mechanism that protects the rights of nonlitigants without unduly undermining the finality of consent judgments.

V. ATTORNEY'S FEES

The general rule that parties to litigation are responsible for their own attorney's fees[302] does not apply in civil rights cases. A variety of civil rights statutes permit a prevailing party to obtain reasonable attorney's fees as part of the costs awarded.[303] The purpose of these fee-shifting provisions is to encourage civil rights plaintiffs to seek judicial relief.[304] A court will award attorney's fees to a prevailing civil rights plaintiff unless special circumstances would render the award unjust;[305] a court ordinarily will not award attorney's fees to a prevailing defend-

299. *See Wilks*, 109 S. Ct. at 2185-86. Both bills disavow interference with Rule 24 intervention standards, but neither mentions Rule 19. *See* Strickler, *supra* note 266, at 1605.

300. *See Wilks*, 109 S. Ct. at 2187. Unfortunately, the Court reached its decision under the Federal Rules, rather than on due process grounds. The Eleventh Circuit reached the same decision in the case on due process grounds without reference to Rules 19 and 24. *In re* Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1497-1500 (11th Cir. 1987). Due process concerns limit claim preclusion, but formal joinder rules do not. *See* Strickler, *supra* note 266, at 1575.

301. *See, e.g.*, Jeffries v. Georgia Residential Fin. Auth., 678 F.2d 919, 928-29 (11th Cir.), *cert. denied*, 459 U.S. 971 (1982); Kirkland v. New York State Dept. of Correctional Servs., 520 F.2d 420, 424 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976). *See generally*, Schwarzschild, *supra* note 237; Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C.L. REV. 745 (1987).

302. *See* P. COX, EMPLOYMENT DISCRIMINATION ¶ 23.07 (Release 3, Dec. 1989).

303. The attorney's fees provision in Title VII is in § 706(k), 42 U.S.C. § 2000e-5(k) (1988).

304. *See* Newman v. Piggie Park Enters., 390 U.S. 400 (1968). A civil rights plaintiff acts as a "private attorney general" by "vindicating a policy that Congress considered of the highest priority." *Id.* at 402. Although *Newman* was a Title II case, subsequent cases established that the *Newman* standard was applicable to Title VII cases. *See, e.g.*, New York Gaslight Club v. Carey, 447 U.S. 54, 68 (1980); Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975).

305. *Newman*, 390 U.S. at 402; *see also* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416-17 (1978).

ant unless the plaintiff's lawsuit is "unreasonable, frivolous, meritless or vexatious."[306]

In addition, plaintiffs who obtain consent decrees or settlements in their favor presumptively are entitled to recover attorney's fees.[307] In these contexts, however, conflicts of interest can arise when defendants attempt to base settlement offers on a waiver of attorney's fees. A settlement offer based on a fee waiver may raise ethical problems for plaintiffs' attorneys, who will be tempted not to settle in order to recover fees, but who ethically are required to act in the best interests of their clients.[308]

In *Evans v. Jeff D.*[309] the plaintiff's counsel, a Legal Aid lawyer, confronted this dilemma. In a settlement offer, the defendants offered to grant the relief requested by the plaintiffs only if the settlement agreement waived attorney's fees and costs.[310] Although the Legal Aid Society was opposed to a settlement containing a fee waiver, the plaintiff's attorney determined that he had to accept the offer to serve the best interests of his clients.[311] The Supreme Court accepted the settlement terms because a prohibition of fee waivers would create a disincentive for defendants to settle and thereby adversely affect civil rights plaintiffs.[312] Justice William Brennan, in dissent, argued that permitting fee waivers would injure civil rights plaintiffs by impairing their ability to obtain competent counsel.[313] Justice Brennan expressed hope that Congress would correct the majority's mistake.[314]

Congress did seek to change the majority's rule in section 9 of the Civil Rights Act of 1990.[315] The proposed legislation provided that a consent order or settlement could not be entered and a stipulation of dismissal could not be effective unless the parties or their counsel certified to the court that the settlement did not compel a waiver of attor-

306. *Christiansburg Garment*, 434 U.S. at 421 (quoting Carrion v. Yeshiva Univ., 535 F.2d 722, 727 (2d Cir. 1976)).

307. *See* Maher v. Gagne, 448 U.S. 122, 129 (1980). *Maher* was a § 1980 case, but the principle is also applicable to Title VII cases. *See* B. SCHLEI & P. GROSSMAN, *supra* note 17, at 1482.

308. *See* P. COX, EMPLOYMENT DISCRIMINATION ¶ 23.07 (Release 3, Dec. 1989).

309. 475 U.S. 717 (1986). The plaintiff's counsel was a Legal Aid lawyer retained to represent a class of handicapped children in a claim against the Idaho Department of Public Education.

310. *Id.* at 722.

311. *Id.*

312. The district court accepted the terms of the settlement, *id.* at 723, but on appeal, the Ninth Circuit invalidated the waiver provision. 743 F.2d 648, 652 (9th Cir. 1984). The Supreme Court reversed the Ninth Circuit holding. 475 U.S. at 734. According to the Court, litigation would be preferable to settlement to a defendant faced with a settlement package containing "an attorney's fee component of potentially large and typically uncertain magnitude." *Id.*

313. *Evans*, 475 U.S. at 759 (Brennan, J., dissenting).

314. *Id.* at 765 (Brennan, J., dissenting).

315. S. 2104, *supra* note 2, § 9, 136 CONG. REC. at H9554.

ney's fees as a condition of settlement.[316] Opponents of the congressional bill sharply criticized this provision because it would have discouraged settlement.[317] They overstate this criticism, however, because the bill did not prohibit fee waivers entirely, and nothing in the bill prevented parties from voluntarily agreeing to fee waivers as part of a settlement agreement.[318] Opponents also have criticized the bill's imprecise language; nothing in the bill provided assistance in determining whether a fee waiver was coerced.[319] Some guidance in this determination definitely would improve the provision. The plaintiffs in *Evans* suggested that a waiver is coerced when it is a condition of a settlement on the merits in which the plaintiffs will receive an amount equal to or greater than the value reasonably expected as a result of a trial.[320] For clarity, Congress should include similar language in the bill.

A second provision of the bill also concerned attorney's fees. It stated that when a judgment or order is challenged, a court could permit the plaintiff in the original action to recover attorney's fees from either the unsuccessful challenger or the defendant in the original action.[321] The provision apparently applied only to collateral attacks; the bill did not award attorney's fees against intervenors. Thus, the bill did not overrule the Supreme Court's holding in *Independent Federation of Flight Attendants v. Zipes*.[322] In *Zipes* the Court held that attorney's fees may not be awarded against intervenors in Title VII actions unless

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316. *Id.* § 9(4), 136 CONG. REC. at H9554. The Democrats' 1991 bill contains an identical provision. *See* H.R. 1, *supra* note 9, § 9. Neither the President's 1990 bill nor his 1991 bill contains this provision. *See* S. 3239, *supra* note 8, 136 CONG. REC. at S18,047; S. 611, *supra* note 10, 137 CONG. REC. at S3023.

317. Senator Orrin Hatch, for example, complained:

> This provision of the bill will likely have a serious adverse impact on the ability of parties to settle the cases, because now it is in the lawyers' interest to continue the case and get more attorneys' fees. It is just like falling off a log, the way this bill is written.

136 CONG. REC. S16,566 (daily ed. Oct. 24, 1990); *see also* 136 CONG. REC. S16,562 (daily ed. Oct. 24, 1990) (veto message from the President) (indicating that the attorney's fees provisions in the bill unacceptably discourage settlement).

318. As a result, the bill also does not resolve the ethical dilemma faced by plaintiff's lawyers completely, but does signal Congress's awareness of the dilemma and its disapproval of coerced waivers of attorney's fees. Comment, *supra* note 266, at 575-78.

319. *Id.* at 577.

320. *Evans*, 475 U.S. at 729. The plaintiffs stated that a waiver is coerced when a defendant "offers a settlement on the merits of equal or greater value than that which plaintiffs could reasonably expect to achieve at trial," but "conditions the offer on a waiver of plaintiffs' statutory eligibility for attorney's fees." *Id.*

321. S. 2104, *supra* note 2, § 9(4)(3), 136 CONG. REC. at H9554. Factors a court must consider before it awards fees against a challenger include whether the challenge was successful, whether the award promotes fairness in light of the challenger's legal and factual position, and whether special circumstances render the award unjust. *Id.* This provision does not appear in either the President's 1990 bill or his 1991 bill. *See* S. 3239, *supra* note 8, 136 CONG. REC. at S18,047; S. 611, *supra* note 10, 137 CONG. REC. at S3023.

322. 109 S. Ct. 2732 (1989).

an intervenor's claim is frivolous, unreasonable, or without basis.[323] The dichotomy between treatment of challengers and intervenors is consistent with and reinforces section 6 of the bill, which strongly discourages collateral attack and encourages intervention.[324]

The prospect of liability for attorney's fees certainly will provide a strong disincentive to potential challengers, but it may compromise unfairly their ability to bring valid claims.[325] For this reason, Congress should excise the portion of the bill that permitted attorney's fees awards against challengers and leave only the original defendant liable for the plaintiff's attorney's fees. Justice Harry Blackmun, in his concurrence in *Zipes*, suggested that only the original defendant should be liable for attorney's fees incurred by plaintiffs in defending a judgment or order because the defendant's unlawful conduct was the underlying cause of the litigation.[326] Justice Blackmun's approach would serve the underlying purpose of civil rights fee-shifting provisions.[327] Furthermore, this approach would not deter settlement if Congress enacts section 6 of the Civil Rights Act of 1990 in a form that restricts collateral attack to individuals without sufficient notice and adequate representation by another, since defendants would be liable for attorney's fees only infrequently.

Justice Blackmun's proposal as applied to intervenors, however, is more troubling. His rule would diminish the amount that plaintiffs obtain in settlement offers because a defendant's liability would not end with the settlement.[328] Ultimately, defendants facing endless liability for attorney's fees may refuse to settle Title VII cases. For these reasons, liability for plaintiffs' fees resulting from intervention should not be shifted to defendants, and the *Zipes* holding should be permitted to stand.

Opponents of the Civil Rights Act of 1990 buttressed their objections to the attorney's fees provisions with allegations that lawyers would have been the primary beneficiaries of the bill.[329] Although the fee provisions were controversial, they alone would not have defeated

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323. *Id.* at 2736.

324. *See supra* notes 257-65 and accompanying text.

325. If Congress adopts either its own proposal or the proposed compromise set forth in Part IV of this Note, only individuals who have not received sufficient notice of a judgment or order and whose interests have not been represented adequately by another in the action could attack a judgment or order. *See supra* Part IV. To impose liability for the original plaintiffs' attorney's fees would impair unfairly these individuals' ability to protect their interests.

326. *Zipes*, 109 S. Ct. at 2740 (Blackmun, J., concurring).

327. *See supra* note 306 and accompanying text.

328. *Zipes*, 109 S. Ct. at 2740 (Blackmun, J., concurring).

329. *See, e.g.*, 136 CONG. REC. S15,332 (daily ed. Oct. 16, 1990) (statement of Sen. Orrin Hatch) (noting that the bill would be a "litigation bonanza for lawyers").

the bill. In future legislation, however, Congress should improve these provisions by including language that defines coercive waiver and deleting the provision that would impose liability for attorney's fees on third parties when a judgment or order is challenged.

VI. Conclusion

Judicial inconsistency in the interpretation of civil rights statutes indicates that congressional clarification is needed. A series of controversial Supreme Court decisions handed down in the 1989 Term dramatically altered employment discrimination law. The Civil Rights Act of 1990 was a noble attempt by Congress to clarify and strengthen civil rights protections and remedies. Although Congress was unable to override the President's veto this time, Congress certainly will continue the quest for a workable civil rights bill.

Congress could take several steps to make a future bill more palatable. Adoption of a disparate impact model that balances the competing interests of civil rights plaintiffs and the business community would be a move in the right direction. A model that ties the weight of an employer's burden to prove business necessity to the degree of impact an employment practice has on a protected group would balance equitably the interests of both plaintiffs and defendants in disparate impact cases.

A compromise on Title VII remedies that both retains the conciliatory focus of Title VII and deters discrimination also is needed. One possible approach is to eliminate the statutory requirement that backpay awards be reduced by interim earnings. This change would deter discrimination, but not settlement. In addition to strengthening section 1981 in the aftermath of *Patterson*, Congress should amend section 1981 to permit sex discrimination claims so that victims of sexual harassment will have a forum.

The controversy over consent decrees and the collateral attack doctrine must be resolved through a compromise that protects the interests of third parties without undermining the finality of consent decrees. The new legislation should bar later challenges to a consent decree or judgment by employees, former employees, or job applicants who receive sufficient notice that the judgment or consent decree likely will affect their interests, yet choose not to intervene. Moreover, Congress should bar attacks on judgments or decrees by individuals whose interests have been represented adequately and competently by a similarly situated person. Codification of a public rights exception to Rule 19 is necessary to prevent unmanageable joinder problems.

Finally, Congress should omit the provision in the defeated legislation imposing liability for attorney's fees on third parties challenging a

consent decree or judgment. Congress should require that the original defendant remain liable for these costs when a judgment is challenged by collateral attack. Liability should not be shifted to the defendant, however, when intervention occurs.

The controversy over the Civil Rights Act of 1990 pitted civil rights activists against the business community, the President against Congress, and all parties against the Supreme Court. Congress will experience extreme difficulties in fashioning a compromise bill that satisfies these competing interests. An approach that gives weight to important civil rights interests without compromising competing societal concerns stands the best chance of producing a civil rights bill that all parties will accept.

Cynthia L. Alexander