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**THE CIVIL RIGHTS ACT OF 1991:
FROM CONCILIATION TO LITIGATION--
HOW CONGRESS DELEGATES LAWMAKING TO THE COURTS**

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other government agency.

by Charles B. Hernicz,
Major, U.S. Army
Judge Advocate General's Corps

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ABSTRACT: In the Civil Rights Act of 1991, Congress shifted the emphasis of employment discrimination law from the original goal of employer/employee conciliation to a litigation oriented remedy with tort-like damages. The new law unfortunately fails to provide the courts with sufficient definition of terms and goals to implement the "intent" of the new law. This thesis identifies many of the Act's shortcomings and suggest ways the courts can interpret the law to encourage better lawmaking in the future.

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THE CIVIL RIGHTS ACT OF 1991:
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Major, U.S. Army

I. INTRODUCTION

"In our democracy, there is no last word, no closed issue or final resolution. There is only the next word, a new twist or nuance, plan or idea which displaces our collective understanding of what is the norm and establishes a new standard in its place."¹

Nearly 30 years have passed since the civil rights movement of the 1960's brought us "equal employment opportunity" through Title VII remedies for employment discrimination based on race, color, religion, sex, and national origin.² This promise of race and gender neutrality in employment has evolved with societal expectations and become better defined in over a quarter century of application. In the 1991 amendment to Title VII,³ however, Congress has radically altered the evolution of employment discrimination law and thrust upon the courts the task of fostering its ill-conceived creation.

The original intent of Title VII was to remedy personal injustice caused by individual acts of disparate treatment--particularly for blacks.⁴ It was hailed as the "Magna Carta" for black America; inclusion of sex discrimination in Title VII was actually a last moment attempt to defeat the bill in voting.⁵ In an address to a joint session of Congress, President Johnson proclaimed "[t]heir cause must be our cause, too. Because it's not just Negroes, but it's really all of us who must overcome the crippling legacy of bigotry and injustice. And, we shall overcome."⁶

The Civil Rights Act of 1964 created a new commission, the Equal Employment Opportunity Commission (EEOC), with broad powers and responsibilities for administration and enforcement of the new laws.⁷ The law required an aggrieved individual to negotiate a series of administrative hurdles beginning with the filing of a "charge" with the EEOC within 30 days of the alleged discriminatory act.⁸ The EEOC was then allowed 180 days to investigate and resolve the charges, in which time the charging party could not bring suit.⁹ An aggrieved person who was not satisfied with the EEOC resolution could file suit only after 180 days had passed, providing that the filing was within 90 days of the EEOC "right to sue" letter.¹⁰

The Supreme Court extrapolated on the individual rights contained in Title VII to recognize group rights through a "disparate impact" theory of discrimination. In *Griggs v. Duke Power Co.*,¹¹ the Court recognized that certain "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory practices." This concept became known as "disparate impact" for its disproportionate effect on a recognized minority without

intentional discrimination. After years of refinements by the Court, Congress has codified the *Griggs* model of disparate impact analysis, with a few twists, in the Civil Rights Act of 1991.¹²

Until 1978, the Supreme Court consistently held that the phrase "equal employment opportunity" was to be read literally. It interpreted the law as intending "to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, including Caucasians."¹³ In a series of decisions beginning with the monumental case of *Regents of University of California v. Bakke*,¹⁴ the Court abandoned its "color-blind" analysis under Title VII and interpreted the law as allowing the voluntary adoption of programs that provided advantages to specific minorities. This policy of "affirmative action" has never been incorporated into Title VII, and its continued validity under the 1991 Act is questionable.¹⁵

The addition of group protection by disparate impact analysis and creation of voluntary affirmative action programs constituted radical changes to Title VII analysis that eventually became widely accepted and generally understood. The 1991 Act contains a more fundamental--yet not specifically articulated--change in employment discrimination theory, however: the transformation from an administrative system of remediation to a litigation oriented cause of action for damages. One of "the most basic and far-reaching" of the 1964 Act's provisions was the emphasis on employer-employee conciliation that was manifested by the law's restrictions on litigation and by enforcement by the Equal Employment Opportunity Commission.¹⁶ The 1991 Act shifts the emphasis of Title VII from conciliation with equitable remedies to litigation with tort-like damage awards.

Congress made this left turn from the freeway of fundamental civil rights theory without providing a clear indication of direction or even a likely destination. The burden of navigating therefore falls on the already overburdened courts.

The Civil Rights Act of 1991 was an election-year political compromise between a beleaguered Republican White House and a Democratically controlled Congress.¹⁷ Congress passed the Civil Rights Act of 1990, which was intended to "restore" the law in six specific Supreme Court cases decided in the 1988 term.¹⁸ When it failed to muster the votes to override President Bush's veto of the 1990 Act,¹⁹ Congress reconsidered a slightly modified version of the 1990 Act in 1991²⁰

The controversy surrounding the Clarence Thomas Supreme Court confirmation debate and hearings caused the Bush administration to become far more amenable to compromise.²¹ Members of Congress who had extended and embarrassed themselves in the hearings were also looking for an opportunity for redemption.²² The same Congress and administration that had closed their eyes and minds to an obvious case of sexual harassment by a proposed Supreme Court Justice were now scrambling to establish greater protections for victims of such harassment.²³ Frenzied negotiations culminated in what many call the "Anita Hill Civil Rights Act of 1991,"²⁴ a bill that reaches well beyond mere "restoration" of prior law.²⁵

The 1991 Act lacks both vision and direction. Its amendments fail to recognize that discrimination is systemic, pervasive, and generally without motive. Instead they emphasize a plaintiff's chances of winning a judgment, increasing recovery of damages, and litigating

without risk of cost. They state a preference for race and minority consciousness instead of color blindness, individual relief instead of class improvement, and unequal treatment as a means to achieve "equal" opportunity."²⁶

The 1991 Act includes changes in diverse areas of employment discrimination law; among the more substantial:

- Extending the coverage of 42 U.S.C. § 1981 to the "making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship";²⁷

- Compensatory and punitive damages, and jury trials to determine the amount of damages, in cases of intentional discrimination;²⁸

- Codification of the disparate impact analysis, under which an employer must "demonstrate" that a challenged employment practice is "job related for the position in question and consistent with business necessity";²⁹

- Prohibition of "race-norming," the practice of adjusting test scores based on race or other factors prohibited by Title VII;³⁰

- Allowance of injunctive and declaratory relief, attorney's fees, and costs in "mixed motive" cases, even when the employer demonstrates it would have taken the same action without a prohibited "motivating factor" based on race, color, religion, sex, or national origin;³¹

- Extraterritorial application for American citizens working in a foreign country for an American employer or a foreign company "controlled by an American employer";³²

- Allowance of "expert fees" in awards of attorney's fees;³³ and

• Definition of the period for challenging an intentionally discriminatory seniority system.³⁴

Each of these areas encompasses multiple issues and ambiguities; this thesis could not possibly address them all in detail. This thesis will focus instead on the areas that are likely to cause the most controversy and, thereby, litigation: disparate impact law, race norming, mixed motive issues, affirmative action, and remedies and jury trials. The 1991 Act amends employment discrimination law in these areas but fails to define the terms, concepts, and goals of the amendments. Through this failure, Congress has delegated to the courts authority to shape and "make" the new law.

The first area covered in this thesis is, however, one not specifically contained in the Act. Congress, in fact, had included a very specific provision in previous bills but omitted it from the final 1991 Act.³⁵ This particular delegation by omission of lawmaking from Congress to the courts has already inspired hundreds of suits and wasted tens of thousands of attorney and court productive hours; the issue is retroactivity, or when the Act became effective.

II. RETROACTIVITY

*To this end it is that men give up all their natural power to the society they enter into, as they think fit, with this trust, that they shall be governed by declared laws, or else their peace, quiet, and property will still be at the same uncertainty as it was in the state of Nature.*³⁶

John Locke

No comment on the Civil Rights Act of 1991 would be complete without an analysis of the retroactivity issue.³⁷ This single issue has already caused an avalanche of litigation in the federal courts;³⁸ every district court will probably hear the issue eventually.³⁹ It has also been a ripe issue for in depth, although at times misguided, analysis and comment.⁴⁰ In their attempts to find the "Congressional intent" of the Act, many courts and commentators have paid insufficient attention to the obvious: Congress "intended" to leave the issue to the courts!⁴¹

A. A Tale of Two Presumptions

The retroactivity controversy revolves around two Supreme Court precedents that many perceive as contradictory.⁴² Proponents of retroactive application cite *Bradley v. Richmond School Board*,⁴³ where the Court held that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Supporters of nonretroactivity believe *Bowen v. Georgetown University Hospital*⁴⁴ is the appropriate precedent. The Court held there that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."⁴⁵ Lower courts have cited one, both, or a combination of rationales in interpreting the Act.⁴⁶

The Supreme Court recently sidestepped an opportunity to reconcile *Bradley* and *Bowen*. In *Kaiser Aluminum & Chemical Corp. v. Bonjorno*,⁴⁷ the Court recognized the "apparent tension" between the two cases but found it unnecessary to clarify the confusion.

Justice O'Connor, writing for a majority, held that Congressional intent was clear on the face of the postjudgment interest law involved there and further analysis was unnecessary.⁴⁸ Justice Scalia concurred in the decision but castigated the majority for its failure to overturn *Bradley*, which he viewed as an aberration.⁴⁹

The circuit courts have generally reached the same conclusion on the retroactivity issue by many different avenues of analysis. The Eighth Circuit found an overall legislative intent to apply the Act only prospectively;⁵⁰ it therefore reached the same conclusion whether applying the *Bowen* or the *Bradley* test. The Seventh Circuit found the legislative history unhelpful and applied the *Bowen* presumption after a thorough analysis of possible consequences.⁵¹ The Eleventh Circuit found the Act prospective only under either test.⁵² The Ninth Circuit based its retroactive application of the Act on maxims of statutory construction without use of either presumption.⁵³ The divergence of analysis among these learned courts indicates, at the least, that Congress made itself less than perfectly clear on the issue of effective date.

B. Only Two Ways to go Here???

An alternative "principled approach" analysis would avoid the *Bradley/Bowen* entanglement.⁵⁴ This theory requires courts first to determine whether the statute at issue "implicates any of the dangers of retroactivity," such as unsettling expectations, depriving parties of notice, or targeting vulnerable groups.⁵⁵ If these factors are present, the court should decline to apply the law retroactively.

The author of the principled approach test justifies retroactive application of the Civil Rights Act of 1991 because: the Act "restores" expectations; employers were "on notice" that prior Supreme Court decisions in the area were controversial and have no "entrenched right to preserve particular remedies" in a regulated area; the Act applies equally to all employers, who played an integral role" in shaping the Act; and employers, not plaintiffs, should bear the burden of Congressional inaction.⁵⁶ This position is, however, factually and conceptually misguided.

1. *Factual Objections.*--The overriding theme in the principled approach is the 1991 Act's "restoration" of preexisting laws. None of the stated purposes of the Act is to "restore" a disputed Supreme Court decision,⁵⁷ and the amendments in the Act "go much further than merely restore a pre-1989 status quo."⁵⁸ The one case specifically reversed in the Act, *Wards Cove Packing Company v. Atonio*,⁵⁹ is specifically exempted from retroactive application of the new law.⁶⁰ Several of the Act's other provisions are not only "new law," they are also vast departures from the original policies of Title VII.⁶¹ The author of the reasoned judgment theory perhaps began her analysis based on the retroactivity and restoration language in the Civil Rights Act of 1990.⁶² Both that vetoed Act⁶³ and the House version of the 1991 Act contained explicit guidance on when various provisions were to become effective.⁶⁴ One of the reasons President Bush cited for his veto of the 1990 bill was the "unfair retroactivity rules."⁶⁵ These bills also specifically stated they were intended to "restore" law from several Supreme court cases.⁶⁶ The 1991 Act contains no such restoration language.⁶⁷

Discrimination suits commonly languish in the federal courts for years or even decades.⁶⁸ It is hardly "fair" to consider a legislative change to the law during the life of such a suit as "restoring" rights that did not exist at the time of the conduct.⁶⁹ Congress seldom responds to court decisions with legislation.⁷⁰ The only certainty parties to litigation can have is not through some vague hope of Congressional "restoration" or creation of rights, but rather by application of the law in effect at the time the acts occur.⁷¹ "To judge action on the basis of a legal rule that was not even in effect when the action was taken, . . . is not really . . . about 'justice' at all, but about mercy, or compassion, or social utility, or whatever other policy motivation might make one favor a particular result. A rule of law, designed to give statutes the effect Congress intended, has thus been transformed to a rule of discretion giving judges power to expand or contract the effect of legislative action."⁷²

Most employers were probably unaware that they had specific interests involved when the provisions of the Act were being drafted.⁷³ Radical changes and compromises in the bill's language continued until virtually the day Congress voted on the bill.⁷⁴ The one employer that did benefit from the Act, despite vehement opposition, was the Wards Cove Packing Company.⁷⁵ It paid a Washington lobbying firm over \$175,000 over two years and enlisted both Alaskan senators to fight for its exemption from the Act.⁷⁶ Wards Cove Packing Company is, however, the "exceptional exception" to the rule of employer involvement in the Act, and Congressional sponsors are still trying to reverse its special exception.⁷⁷

The Act applies to all "employers,"⁷⁸ including federal agencies,⁷⁹ which seldom have input into Congress during pending legislation. Most employers simply do not have the money, political connections, or immediate litigation interest of a Wards Cove Packing Company.⁸⁰ It is fanciful and naive to conclude that most employers in the U.S. were on notice of Congress' intent or "integrally involved" in negotiating the terms of the Act.⁸¹

2. *Conceptual Breakdown.*--There are many examples of laws that place the burden of retroactive application on the employer.⁸² Such laws, unlike the Civil Rights Act of 1991, clearly stated they were to be applied retroactively and why.⁸³ Courts have no difficulty interpreting consistently such a clear statement from Congress. The difficulty arises when courts are asked to interpret internally conflicting provisions such as those in the 1991 Act, or distinguish between "substantive" and "procedural" changes in a law.⁸⁴

The author of the principled approach theory naively concludes that "application of the Act to pending cases best achieves fairness and efficiency."⁸⁵ It is "fair," in her estimation, for employers to shoulder the costs of "congressional inaction" and efficient to immediately begin application of the new law instead of "belaboring interpretations that Congress rejected."⁸⁶ These conclusions are loosely reasoned and impossible to justify based on any reasonable judgment.

There are currently some and 10,000 suits pending under Title VII.⁸⁷ Application of the principled approach test to these cases would lead courts to reach anomalous conclusions under the same law. In some cases, the absence of "dangers of retroactivity" would justify applying the Act retroactively; in others, "unsettling expectations" would

require prospective application. There seems little fairness in parties not being able to rely on previous precedent from the same court under the same law. Application of this test would also require courts to take evidence in each of the 10,000 cases to determine whether the "dangers of retroactivity" are present. Such a burden on every court in the land hardly promotes efficiency.⁸⁸

Other commentators have analyzed the retroactivity issue from a less idealistic approach than the principled approach analysis. A common observation is that "Congress deliberately employed ambiguous language in drafting the act for their own political gain in order to skirt the controversial retroactivity issue."⁸⁹ A brief look at the statutory language shows just how successful Congress was in making the retroactivity language ambiguous.

C. Statutory Language and Interpretation

Section 109 of The Act is entitled "Effective Date," and states that "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment."⁹⁰ This section is a tribute to ambiguous draftsmanship, leading one circuit court to outline the multiple possible interpretations embraced by this language:

it might mean that the 1991 Act applies to conduct which occurred after the enactment, it might mean that the Act applies to all proceedings beginning after the enactment, it might mean that the Act's provisions apply to all pending cases at any stage of the proceedings, or it might mean that the Act's procedural

provisions apply to proceedings begun after enactment and the substantive provisions apply to conduct that occurs after the enactment.⁹¹

The confusion really begins when section 109 is read with other Act provisions on effective date of particular sections.

1. *Conflicting Messages.*--Section 402(b), often referred to as the Wards Cove amendment,⁹² further clouds any attempt at statutory interpretation by specifically not applying the Act retroactively to one single case. Section 109(c), pertaining to extraterritorial application, also clearly states that "The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act."⁹³ The Ninth Circuit based its retroactive application of the Act on the negative inference that this specifically prospective provision must mean the remainder of the Act is retroactive.⁹⁴ This opinion unfortunately fails to recognize the conflicting negative inference based on the veto of the 1990 Act and deletion of the specific retroactivity language from the 1991 Act.⁹⁵

2. *Legislative Intent.*--The Civil Rights Act of 1990 and the original version of the 1991 Act, House Resolution 1, each specifically applied retroactively.⁹⁶ In working out a compromise of the 1991 Act, the Senate sponsors of the bill came to an understanding on every issue except retroactivity.⁹⁷ Almost like children unable to admit they had lost out, members of Congress littered the congressional Record with personal interpretations of the "intent" of the Act.⁹⁸ Senator Dole's opinion, which the President endorsed,⁹⁹ denounced by memorandum any retroactive application of the Act.¹⁰⁰ In response to the Dole

memorandum, Senator Kennedy entered perhaps the most honest assessment of the Act when he stated "[i]t will be up to the courts to determine the extent to which the bill will apply to cases and claims that are pending on the date of enactment."¹⁰¹

The retroactivity issue in the 1991 Act is perhaps the ideal example of the evils involved in interpreting laws based on legislative intent. By considering the documents involved in the making of legislation, courts have distorted the legislative process, a classic example of the Heisenberg principle applied to the legislative process.¹⁰² "The search for original intent has led courts to pursue progressively "deeper" readings of legislation, usually involving use of the myriad legislative documents such as floor debates, conference committee reports, standing committee reports, and even committee hearing testimony."¹⁰³ Opposing members of Congress were well aware of how courts look to legislative history. Instead of working out a compromise and enacting positive, responsible law, they instead chose to leave a hole in the 1991 Act with hopes the courts would select their own position on retroactivity.

More than one-half of the Supreme Court's docket is monopolized by review of statutory construction,¹⁰⁴ much of it caused by intentionally poor drafting. Congress leaves these gaps and relies on the courts to read its "intent." Some supporters of legislative interpretation believe the courts should continue to interpret the perceived purpose of laws so that "an already overworked Congress is [not] forced to rewrite statutes whose language does not neatly cover every conceivable situation."¹⁰⁵ This view fails to acknowledge the burden on the courts, the separation of powers contemplated in the Constitution, and the virtual impossibility of reading a unified "intent" of a law-making body that consists of over

500 individuals. Any gauging of Congressional "intent" must also consider the Presidential "trump card" available by veto.¹⁰⁶

A search for the legislative "intent" behind the retroactivity issue in the 1991 Act is less an analysis of the law than it is "psychoanalysis of Congress."¹⁰⁷ In such instances, the Supreme Court has often deferred to interpretations by executive agencies.¹⁰⁸ The EEOC, perhaps emulating the example set by Congress, initially decided the Act applied only to conduct occurring after its effective date of the Act and recently reversed itself.¹⁰⁹ Some courts cited the original EEOC guidance as persuasive.¹¹⁰ The Ninth Circuit flatly rejected the EEOC's initial position on retroactivity as contrary to the Act's "clear" meaning¹¹¹ but would likely endorse the "new" interpretation.

3. *No "Right" Answer.*--The Civil Rights Act of 1991 was a law of compromise. Congressional supporters of the bill sought to draft a law that the President would sign. Instead of compromising on how this law would be implemented, however, "Congressmen manipulated in order to serve their own interests and . . . provided no guidelines on how the Act affects pending cases."¹¹² This was not a case of failure to anticipate some improbable contingency, but rather a straight, intentional delegation of lawmaking authority.

The "right" answer to the retroactivity issue will remain in dispute until it comes before the Supreme Court. If Justice Scalia's textualist approach is shared by a majority of the Court, the Act will certainly be applied prospectively. Should the Court apply its "manifest injustice" test from *Bonjorno*, it may well adopt the analysis from *Fray*:

Here, the President vetoed a bill containing an explicit retroactivity provision. That veto could not be overridden and a compromise bill omitting those provisions was then enacted. Whatever ambiguities may be found elsewhere in the Act and its legislative history, we think this history is dispositive even under *Bradley*. When a bill mandating retroactivity fails to pass, and a law omitting that mandate is then enacted, the legislative intent was surely that the new law be prospective only; any other conclusion simply ignores the realities of the legislative process.¹¹³

Certainly any analysis of the legislative intent would be lacking without consideration of the President's veto power.¹¹⁴ The "intent" of this legislation was to get past the President, and a retroactive law would have failed.¹¹⁵

4. *Right or Wrong, the Supreme Court Will Decide.*--After twice declining to review the retroactivity issue,¹¹⁶ the Supreme Court has now agreed to consider the issue. The Court will consolidate oral arguments in two cases under the 1991 Act, one a Fifth Circuit sexual harassment case¹¹⁷ and the other Sixth Circuit suit based on race discrimination.¹¹⁸ With the issue pending before the Court, a possible reversal of position by the EEOC seems relatively insignificant.¹¹⁹

While the retroactivity issue rides its collision course to the Supreme Court, Congress will be left to contemplate the irony of its irresponsible lawmaking. It reversed Court decisions it viewed as repugnant but intentionally handed back to the Court authority to

decide when the new law applies. Unfortunately, retroactivity is only the first ambiguous issue to be litigated; the 1991 Act contains many more examples of such Congressional delegation of lawmaking.

III. DISPARATE IMPACT: THE WARDS COVE CONUNDRUM

"The fault . . . is not in our stars, [b]ut in ourselves."

*William Shakespeare*¹²⁰

The Supreme Court has defined disparate impact discrimination as "employment policies that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."¹²¹ Although no specific provision of Title VII addressed disparate impact before the 1991 Act, the Court "found" the cause of action based on section 703(a)(2) of the Civil Rights Act of 1964, which--

makes it an unfair employment practice for an employer to discriminate against any individual with respect to hiring or the terms and condition of employment because of such individual's race, color, religion, sex, or national origin; or to limit, segregate, or classify his employees in ways that would adversely affect any employee because of the employee's race, color, religion, sex, or national origin.¹²²

The Court first articulated this theory of liability in the landmark case of *Griggs v. Duke Power Co.*¹²³

A. Development of Disparate Impact Discrimination

The Supreme Court developed a three-part analysis for disparate impact in *Griggs* and subsequent cases.¹²⁴ First, the plaintiff had the burden of establishing a *prima facie* case by showing that a facially neutral employment practice disproportionately affects a recognized minority. If the plaintiff established the *prima facie* case, the employer must then had to prove that the challenged practice was justified by "business necessity." Finally, the plaintiff could rebut the employer's evidence of business necessity by showing that other practices could have served the employer's legitimate business interests with less impact on the affected minority.¹²⁵

The Court refined the concept of "business necessity" in later cases. Originally it focused on whether the challenged practice was "job related," a more narrow view of business necessity.¹²⁶ Later cases analyzed business necessity from the broader scope of the employer's "legitimate employment goals."¹²⁷

These later Supreme Court cases consistently imposed on the employer the burden of proof on the issue of business necessity. In 1988, however, a plurality of the Court held in *Watson v. Fort Worth Bank & Trust Co.*¹²⁸ that the plaintiff maintained the burden of proof in a disparate impact case. Justice O'Connor wrote for the plurality, which found that an employer must only articulate legitimate business reasons for its practice. The plaintiff must prove the stated policy was not legitimate or the employer's goals could be met by less

onerous practices and is also "responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."¹²⁹

Before *Watson*, the Supreme Court had inexplicably applied different tests for disparate impact discrimination and disparate treatment--or intentional--discrimination. The plurality's holding in *Watson* actually brought disparate impact analysis in line with the well-established test for disparate treatment cases from *McDonnell-Douglas Corp. v. Green*.¹³⁰ Under its three-part test for disparate treatment, a plaintiff must identify specific discriminatory acts and establish a *prima facie* case of discrimination; the employer then has a burden of production to show a valid, nondiscriminatory reason for its actions; to establish liability, the plaintiff must then demonstrate the employer's articulated reasons are a mere pretext for discrimination.¹³¹ At all times the burden of persuasion remains on the plaintiff.

B. Wards Cove Packing v. Atonio

Watson set the stage for *Wards Cove*.¹³² The packing company plaintiffs there were nonwhite cannery workers who filed suit in 1974 alleging that the company discriminated against them when hiring and promoting into noncannery positions (mostly administrative and management jobs).¹³³ After a lengthy and complex gauntlet of appeals and remands,¹³⁴ the case came before the Supreme Court in 1989.

In *Wards Cove* the Court reversed an *en banc* finding of discrimination and remanded the case to the Ninth Circuit to reanalyze what the Court perceived as a misapplication of

statistical information.¹³⁵ The circuit court had found a *prima facie* case of discrimination in the simple disparity between minorities in the geographical labor market and those hired into the cannery and noncannery positions. The Supreme Court held that the proper analysis required a comparison of the qualified labor pool for the cannery and noncannery positions and those hired into the disputed positions.¹³⁶ The record did not reflect whether the qualified nonwhite applicants were disproportionately passed over for selection and promotion when compared to the qualified white applicants in the labor pool.

After its holding based on misapplication of statistical evidence, the Court gratuitously outlined additional evidentiary considerations for disparate impact cases. These changes to prior law can be divided into four areas:

- Redefining "business necessity" to allow evidence of "legitimate employment goals" instead of a strict job-related business necessity standard. The Court stated that a "mere insubstantial justification" would be insufficient, but "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster."¹³⁷

- "Clarifying" that an employer has a burden of production instead of persuasion in establishing a valid "business necessity."¹³⁸ The Court emphasized that the burden of persuasion always remains with the plaintiff in an employment discrimination action.

- Specifically adopting language from *Watson* requiring a plaintiff to specify particular employment practices that caused the challenged practice to have a disparate impact.¹³⁹

- Emphasizing that a plaintiff's alternative business practices must be "equally effective as [the employer's] chosen hiring procedures in achieving [the employer's]

legitimate employment goals."¹⁴⁰ In determining what is equally effective, "factors such as the cost or other burdens of proposed alternative selection devices are relevant."¹⁴¹

C. *The Civil Rights Act of 1991*

Two of the four stated purposes of the Act address disparate impact suits.¹⁴² Section 3¹⁴³ of the Act specifies that the Act is intended to legislatively overrule the Supreme Court's decision in *Wards Cove*¹⁴⁴ and reestablish the rule of law from *Griggs*.¹⁴⁵ The Act does indeed reverse portions of *Wards Cove*; however, it also leaves intact much of the case and falls far short of providing clear guidance to the courts on how to reconcile the gaps.

The 1991 Act is intended to overturn *Wards Cove* and codify the *Griggs* scheme on burden of proof in disparate impact cases.¹⁴⁶ Ironically, however, Congress adopted substantial language from *Wards Cove* and left intact some of the dicta "directions" most damaging to plaintiffs in disparate impact cases. It also bowed to intense lobbying and carved out a specific exception in the Act for the *Wards Cove* case; this section of the Act is specifically prospective from the date after the *Wards Cove* holding.¹⁴⁷ Coupled with Congress' inability to reach a compromise definition of the terms "business necessity" and "job related,"¹⁴⁸ this fork-tongued amendment typifies the schizophrenic composition of the Act. It also adds more fuel to the already flaming fire of legal battles over the issue of retroactive application of the remainder of the Act.¹⁴⁹

1. *Business Necessity*.--Congress not only returned the "necessity" to the business necessity of disparate impact analysis in the Act, it also imposed an even greater burden on

employers to demonstrate "job relatedness" than previously applied by the courts. Section 105(a) of the Act states that an unlawful employment practice based upon disparate impact is established if--

a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.¹⁵⁰

The job relatedness and business necessity tests required by this section do not distinguish between practices related to selection of employees and those not related to selection, as did prior versions of the bill.¹⁵¹ Congress could not agree, however, on a definition of the terms "job related" and "business necessity." The compromise merged the two sections and left the terms undefined and open to interpretation by the courts during litigation.¹⁵²

Congress openly authorizes the courts to define job related and business necessity from the 1991 Act by specifically limiting limit the use of legislative history.¹⁵³

No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove--Business necessity/cumulation/alternative business practice.¹⁵⁴

The referenced Interpretive Memorandum sheds little light on the elusive "job related/business necessity" mystery.

The terms "business necessity" and "job related" are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).¹⁵⁵

This "official" history incorporates all Supreme Court cases before *Wards Cove*. It seems that Congress was dissatisfied with the Court's holding but trusted the Court to define the essential terms in the Act and reach a different conclusion based on its own precedents.¹⁵⁶

2. *Reality Check.*--The Supreme Court had actually applied several different tests for business necessity before its holding in *Wards Cove*. Griggs used the terms business necessity and job related interchangeably.¹⁵⁷ Later cases, especially *New York City Transit Authority v. Beazer*¹⁵⁸ and *Connecticut v. Teal*¹⁵⁹ emphasized that the challenged practice be job related in much broader terms of employment goals. Despite the unsubtle twists of analysis in *Wards Cove*, the lower courts were on much firmer ground in understanding and applying the concepts of business necessity and job related before Congress muddied the waters.¹⁶⁰

The business necessity requirement involved in initial selection practices may differ significantly by position recruited and from those used for other personnel decisions or

internal promotions.¹⁶¹ The 1991 Act makes no distinction for these different scenarios. The Act's language "job related for the position in question" appears to reject the use of non-job related criteria such as attendance, training, personal hygiene, and manners.¹⁶² Such a definition not only conflicts with EEOC guidance and prior case law,¹⁶³ it also creates yet another issue for the courts to resolve.

Total confusion is an apt description of the current state of disparate impact law. Lower courts are left to sort out the scramble of issues Congress created. The 1991 Act does not specifically overrule *Wards Cove* or define business necessity inconsistently with the Court's holding.¹⁶⁴ It also fails to even address the application of *Watson*, a case "prior to" *Wards Cove* that contains much the same analysis. The Act's lack of clear direction and definitions opens the door for advocacy by both sides in a disparate impact suit.

Employee plaintiffs and defendant employers will both have excellent arguments to support their own interpretations of how "essential" to job performance a test must be to satisfy business necessity and what constitutes job related. Portions of the unofficial legislative history indicate that business necessity and job relatedness can no longer be interpreted as including broad business goals that are unrelated to specific job performance.¹⁶⁵ This view, of course, was not adopted in the law itself, and a negative inference argument exists to counter this analysis.¹⁶⁶

Employers will certainly want to argue *Wards Cove*'s language: "the dispositive issue . . . [is] whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."¹⁶⁷ This is but a restatement of language from *Beazer's*

"legitimate employment goals of safety and efficiency."¹⁶⁸ Since earlier Supreme Court cases are specifically preserved in the Act,¹⁶⁹ courts should continue to define job related as including "legitimate employment goals," a position also well supported in the "unofficial" legislative history.¹⁷⁰

Congress has, in the words of one commentator, "imposed on employers, the bar, and the courts the burden of determining both the degree of necessity and the extent of job relatedness required for a showing of business necessity in disparate impact analysis."¹⁷¹ This area, quite certainly, "remains a fertile ground for advocacy."¹⁷²

3. *Burden of Proof*.--The clearest articulation of law in the 1991 Act imposes on the employer the burden of persuasion for business necessity and job relatedness--however those terms will be defined. It imposes liability on an employer who "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."¹⁷³ The Act defines "demonstrates" as meeting both the burden of production and persuasion.¹⁷⁴ The plaintiff must therefore demonstrate only that the challenged practice has a disparate impact to shift the burden of production and persuasion onto the employer to show job relatedness and business necessity.¹⁷⁵

The Bush administration willingly conceded the "restoration" of the *Griggs* test of shifting burdens of proof in disparate impact suits.¹⁷⁶ This was probably the least controversial of the disparate impact changes.¹⁷⁷ Only extensive litigation will reveal whether this burden to "demonstrate" will cause employers to institute "quota" hiring systems,¹⁷⁸ the concern voiced by the Court in *Wards Cove*. During this litigation, however,

a common issue will be whether the plaintiff had adequately identified an "employment practice"--the new "key" to disparate impact liability.

4. *Particularity - The Quota Dispute.*--Congress resolved few issues and created many when it attempted to delineate a plaintiffs' burden when challenging an "employment practice." The Act incorporates language from *Wards Cove*¹⁷⁹ that dates back to at least 1982.¹⁸⁰

With respect to demonstrating that a particular employment practice causes a disparate impact . . . , the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking practice are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.¹⁸¹

This "particularity" requirement was part of the compromise to save the 1991 Act from another veto as a "quota bill."¹⁸² The first obvious issue it creates for the courts is the definition of "employment practice," another term Congress failed to define. Another imprecise *entre* on the litigation menu is how the plaintiff demonstrates a practice is "not capable of separation for analysis." The most ambiguous aspect of the analysis, however, is a new "no cause" defense.¹⁸³

(a). *Employment Practices and "Alternatives."*--The definition of "alternative employment practice" begets the question of what is an employment practice? The Act

defines neither. Courts will have ample sources of reference and opportunities to find or to create definitions for these terms.

The exclusive legislative history of the Act uses the height and weight standards of *Dothard v. Rawlinson*¹⁸⁴ as an example of one employment practice.¹⁸⁵ These requirements are considered one employment practice because they both are "functionally integrated components" of the criterion strength.¹⁸⁶

Having reached some understanding of an employment practice under the Act, courts will still wrestle with the concept of an "alternative employment practice." This new term replaces the "pretext" element from the pre-*Wards Cove* analysis. The Act is internally confusing by stating that the concept is to be defined "in accordance with the law as it existed [before *Wards Cove*],"¹⁸⁷ but using the language "alternative employment practice" directly from that case. Congress' "explanation" of how a plaintiff demonstrates liability is therefore somewhat circular.

The complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.¹⁸⁸

This section raises additional issues certain to be heard in courts throughout the land.

Employers will argue that this section is the equivalent of the previous pretext element. After the employer demonstrates job relatedness and business necessity, the

employee can still prevail only by proving the existence of an alternative practice with a lesser impact that the employer refused to adopt.¹⁸⁹ This approach may agree with prior law but is inconsistent with a literal--or textualist--reading of the law.¹⁹⁰

The two new subsections to section 703(k)(1)(A) of the Civil Rights Act¹⁹¹ are joined by the disjunctive "or." This appears to create three steps in a disparate impact analysis with two separate routes for the employee to establish liability: (1) the employee demonstrates the challenged practice had a disparate impact; (2) the employer fails to demonstrate job relatedness or business necessity; or (3) despite the employers showing of job relatedness and business necessity, the employee demonstrates a less drastic alternative practice the employer refused to adopt.¹⁹²

The only thorough analysis of alternative employment practice appears--where else--in *Wards Cove*.¹⁹³ The Court stated, for example, that a plaintiff's proposed alternative employment practice "must be equally effective as [the employer's] . . . in achieving . . . [the employer's] legitimate employment goals."¹⁹⁴ The Court also emphasized that courts "should proceed with care" before requiring an employer to adopt an alternative employment practice and must consider "cost or other burdens" in making their determination.¹⁹⁵

Once again, the lower courts will be tasked with unraveling the tangled interplay between the 1991 Act and *Wards Cove*. That decision cites *Watson* and *Albemarle Paper Co.* as authority for its alternative practice analysis. Those decisions continue to be binding precedent; indeed, they are specifically preserved in the Act itself.¹⁹⁶ Should the lower

courts continue to apply these cases, the concept of alternate business practices from *Wards Cove*--the actual basis of the Court's holding--will survive the 1991 Civil Rights Act.

(b). *Practices Not Capable of Separation.*--The Act creates a fall-back position for plaintiffs who are unable to demonstrate the disparate impact of particular employment practices; they can demonstrate particular practices are "not capable of separation for analysis."¹⁹⁷ This is another wholecloth creation of Congress for which courts will be called upon to hem the borders in the course of vigorous litigation.

Astute defense attorneys will certainly attempt to force the particularity issue by pretrial motion for failure to specify sufficiently particular employment practices. Plaintiffs will argue the employment practices are sufficiently particular, or, in the alternative, are incapable of separation. The courts will initially decide the particularity motion only to face it again in a motion for summary judgment after discovery is completed.¹⁹⁸ The plaintiff who succeeds in having the employer's decisionmaking process analyzed as one employment practice--the "bottom line" of the employment numbers--may still be defeated by the employer's final line of defense; a showing of no cause.¹⁹⁹

The Act and its "official" history contain conflicting interpretations of this exception to the particularity requirement. The statutory language itself speaks of practices "not capable of separation for analysis."²⁰⁰ The official legislative history addresses "functionally integrated practices": "When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, such as the height and weight requirements designed to measure

strength in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the particular, functionally-integrated practices may be analyzed as one employment practice."²⁰¹

The "functionally integrated practice" test appears to be much narrower than "not capable of separation," but its application may be limited. "Functionally integrated" may apply only to separate components of one employment practice, such as an intelligence or similar test.²⁰² Plaintiffs will certainly attempt to argue for a much broader definition. For example, plaintiffs will attempt to convince the court that multiple practices are "functionally integrated" as an alternative to demonstrating that the challenged practices are incapable of separation. This analysis requires the employer to defend all aspects of the hiring or employment process. How the courts will rule is a coin toss, and Congress provided no odds on the outcome.

(c). *No Cause Defense to Bottom Line Impact.*--The "no cause" defense is also new to Title VII and ripe with unanswered questions. The Act states "[i]f the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity."²⁰³ This provision is another cure for the Bush administration's "quota bill" objection.²⁰⁴

Congress, unfortunately, failed again to outline or shed any insight into the application of this provision. It appears to allow the employer to avoid proving job relatedness and business necessity by first demonstrating that a specific challenged business practice does not cause a disparate impact.²⁰⁵ The hanging "but" here is what effect does

this have on the plaintiff who has demonstrated an overall disparate impact in the employer's selection process (referred to as "bottom line" impact). The only logical answer is that the plaintiff loses.²⁰⁶ An employer who demonstrates that a challenged practice has no disparate impact must prevail. Any other outcome would impose on employers absolute liability to explain and account for foreseeable and unforeseeable outcomes of every aspect of the employment process.²⁰⁷ Liability for disparate impact discrimination would become based not only on unintentional actions but on unforeseeable actions beyond the employer's control as well.²⁰⁸

Another unanswered question is whether this no cause defense applies only to multicomponent cases. Common logic and the construction of section 105 indicate it would apply even to a single challenged employment practice.²⁰⁹ An employer who is able to demonstrate that a challenged selection practice has no discriminatory impact should not be required to demonstrate job relatedness or business necessity.

D. What About Those Statistics?

One of the more troubling oversights in the Civil Rights Act of 1991 is the absence of any response to the actual holding in *Wards Cove* regarding a plaintiff's use of statistical data. The Court believed that a "dearth" of qualified minority applicants in the geographic area can not be used to demonstrate an employer's employment practices have a disparate impact.²¹⁰

The Court's holding in *Wards Cove* was based in part on its perception of the "goals behind the statute."²¹¹ In the 1991 Act, Congress denounced the use of hiring quotas, which

the *Wards Cove* Court feared would be the result of allowing use of statistical comparisons based on the minority members in the geographic area. Although the "qualified labor pool" can be representative of the minority population in the geographic area, it would be more coincidence than correlation. The key test that survives *Wards Cove* is whether "the percentage of selected applicants who are [a minority] is not significantly less than the percentage of qualified applicants who are [a minority]." ²¹² The dissent in *Wards Cove* characterized this analysis as a "major stride backwards in the battle against race discrimination," ²¹³ but the 1991 Act fails to counterattack.

The Court's restrictive recognition of statistics in *Wards Cove* appears to remain good law. ²¹⁴ The Act codifies the Court's distinction between particular practices and "bottom line" impact. Creative plaintiffs' counsel will surely argue that the Act overrules the Court's prior analysis and guidance on the use of statistics. Plaintiffs are, however, still required to show causation, and this burden includes eliminating external factors that could explain a statistical disparity. ²¹⁵

The changes in disparate impact law in the 1991 Act promise to generate far more in litigation costs, confusion, and aggravation than they will provide in relief to potential plaintiffs for many years. All the issues raised above will eventually be resolved, at great expense and trouble. If the issues proceed through the lower courts as quickly as they did in *Wards Cove*, the Court will entertain argument sometime in the year 2006.

E. Race Norming - The Dos and Don'ts of Test Scores

Employers have used scored, objective tests as an employee selection tool for many years, increasingly so in the twentieth century.²¹⁶ The Civil Rights Act of 1964 specifically acknowledged this practice by allowing employers to "act upon the results of any professionally developed ability test."²¹⁷ The 1991 Act amendments do not prohibit the continued use of tests, but they do forbid the practice of race norming, or adjusting test scores by minority category.

Under the practice of race norming, raw test scores are converted to a percentile within a racial or ethnic group for comparison with other groups. The percentile scores within each ethnic group are then compared with the percentile scores of other groups. In a use of race normed tests as the sole hiring criterion, for example, a black could achieve a raw score of 22 that is in the 80th percentile for blacks; a Hispanic scores 19, placing him in the 85th percentile for Hispanics; and a caucasian scores 42, which is in the 76th percentile for caucasians. The Hispanic would receive the job based on the highest percentile ranking, 85th, although he had the lowest raw score. Some courts have actually ordered this type of race norming to resolve to redress disparate impact in discrimination suits.²¹⁸

Section 106 of the 1991 Act may make the practice of race norming illegal:

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.²¹⁹

Although this section's meaning appears to be clear, opposing Congressional articulations of "intent" require reconciliation. Senator Dole's Memorandum, for example, supports the literal and broad interpretation of section 106:

Section [106] means exactly what it says: race norming or any other discriminatory adjustment of scores or cutoff points of any employment related test is illegal. This means, for instance, that discriminatory use of the Generalized Aptitude Battery (GATB) by the Department of Labor's [sic] and state employment agencies' [sic] is illegal. It also means that race-norming may not be ordered in any case, nor may it be approved by a court as part of a consent decree, when done because of the disparate impact of those test scores.²²⁰

This literal interpretation prohibits the practice of race norming altogether and is consistent with a literal reading of section 107 prohibiting affirmative action.²²¹ Senator Danforth and Representative Edwards disagree with Senator Dole's interpretation. They believe this section allows race norming in certain circumstances.

By its terms, the provision applies only to those tests that are "employment related." Therefore, this section has no effect in disparate impact suits that raise the issue of whether or not a test is, in fact, employment related. The

prohibitions of this section only become applicable once a test is determined to be employment related."²²²

This interpretation requires "employment related tests" to be defined as "job related for the position in question and consistent with business necessity" from section 105(a). Such a definition leads to several anomalies that will generate additional unnecessary litigation.

The Danforth/Edwards interpretation would allow race norming of tests that have inconsequential relation to employment decisions. Such an employment practice could not cause a disparate impact and would therefore not be "employment related" under section 106.²²³ This possibility is rather remote, however, since few employers would incur the trouble and expense of testing that had insignificant value in employment decisions and raised potential issues for litigation.

The second permissible use of race norming under the Danforth/Edwards interpretation is more confusing, circular, and far onerous on employers. The "logic" is that some tests have no disparate impact and require no race norming. Most tests, do, however, disparately impact on certain groups. Race norming these tests might be required to meet the business necessity test and avoid liability under section 105. This interpretation places employers in the "lose-lose" position: use tests without norming and risk failing the business necessity test under section 105 or race norm the test and risk liability under section 106 if it satisfies the section 105 business necessity test. This interpretation also requires an employer to argue against himself by proving his test is not justified by "business necessity" under section 105.

Section 106 was another part of the compromise for President Bush's "quota" objection. It was actually proposed by the civil rights lobby to placate the administration's objections.²²⁴ The prohibition against race norming does not limit an employers use of testing, only the use of race adjusted scores. The significance of the difference is tied to an employer's ability to use subjective criteria in employment decisions. Whether protected status can be one of the subjective criteria is precisely the issue raised under section 116 of the Act: are affirmative action programs still legal?

IV. Mixed Motive Cases - An End to Affirmative Action?

"It doesn't matter whether a cat is black or white, as long as it catches mice."

Deng Ziaopeng²²⁵

The complex issues involved in the so-called "mixed motive" cases have "left the [courts] in disarray."²²⁶ In these suits, a plaintiff proves the employer was motivated to some degree by prohibited reasons when taking a personnel action. The employer rebuts the plaintiff's case by proving a legitimate reason for taking the action and that it would have taken the action without the prohibited reason. The presence of both valid and invalid motivations for the action gives rise to the moniker of "mixed-motive."²²⁷ The changes in the 1991 Act further complicate this confusing area and also call into question the continued legality of voluntary affirmative action programs.²²⁸

Mixed motive cases arise not only under Title VII, but also in labor relations and other areas of employment law.²²⁹ Although the "evil" involved is similar in these areas, Congress has been anything but consistent in legislating how courts should analyze these actions. The new mixed motive standards in the 1991 Act continue this record of consistent inconsistency. These changes to Title VII mixed motive analysis have received less publicity than other changes in the 1991 Act but have an even greater "potential for mischief and abuse."²³⁰

A. Setting the Stage for the 1991 Act

Mixed motive issues are no stranger to employment law. The Supreme Court has consistently applied a "but for" test of liability in these cases; employers are not liable unless the prohibited basis was the actual motivation for the action. Under the National Labor Relations Act²³¹, for example, an employer can avoid liability in a disciplinary action motivated in part by anti-union sentiment by demonstrating a valid basis was the motivating reason for the action.²³² The same rule applies under 42 U.S.C. § 1983 cases of retaliatory discharge²³³ and wage discrimination claims under the Equal Pay Act.²³⁴ Congress, in fact, recently codified this liability limiting analysis for prohibited personnel practices involving federal employees in the Whistleblower Protection Act of 1989.²³⁵ The 1989 decision in *Price Waterhouse v. Hopkins*²³⁶ was, however, the Supreme Court's first mixed motive opinion under Title VII.

The plaintiff in *Price Waterhouse* was a senior female associate in the large accounting firm. She alleged the firm deferred her for consideration to partner based on her sex. She later resigned her position, and the Circuit Court of Appeals for the District of Columbia

held the firms' failure to renominate her for partner amounted to constructive discharge based on sex discrimination.²³⁷ The Supreme Court reversed and remanded the case because the circuit court had required Price Waterhouse to prove by clear and convincing evidence that it would have made the same decision without consideration of gender.²³⁸

A plurality of the Court held in *Price Waterhouse* that a Title VII employee must initially prove discrimination played a "motivating part" in the decision.²³⁹ The employer then has the burden of persuasion to prove by a preponderance of the evidence that it would have made the same decision absent the prohibited discrimination.²⁴⁰ The employer "must show that its legitimate reason, standing alone, would have induced it to make the same decision."²⁴¹

Both the plurality decision and the dissent in *Price Waterhouse* discussed at great length the causation factor in disparate treatment analysis. At the center of the controversy was the meaning of the words "because of" in section 703 of the Civil Rights Act of 1964. This section prohibits an employer from making employment decisions regarding an employee's "conditions or privileges of employment . . . or otherwise adversely affect[ing] his status as an employee, *because of* such individual's race, color, religion, sex, or national origin."²⁴² The plurality believed this section does not create a "but-for" test of causation.²⁴³ The dissent adamantly argued it does.²⁴⁴

B. The Changes of the 1991 Act - Liability Without Causation

The changes to mixed motive law in the 1991 Act are both troubling and perplexing. In *Price Waterhouse*, the Court created a new test favoring plaintiffs in disparate treatment

suits. Although the case involved gender discrimination, the new burden-shifting analysis applied not only to retaliation claims²⁴⁵ and other bases of discrimination under Title VII, but also to other anti-discrimination laws,²⁴⁶ to which the courts applied Title VII case law by analogy. Congress was perhaps concerned with the strength of the dissent and the uncertain plurality in *Price Waterhouse* when it decided to confuse an area of employment discrimination law that had finally been clarified.

Instead of limiting liability in mixed motive cases, as did the *Price Waterhouse* Court, the 1991 Act imposes an irrebuttable presumption of liability in all mixed motive cases. Section 107 of the Act is, paradoxically, titled "Clarifying Prohibition Against Impermissible Consideration of Race, Color, Religion, Sex, or National Origin in Employment Practices" and states, in pertinent part, that--

Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.²⁴⁷

This change goes much further than did the plurality's decision in *Price Waterhouse*. Instead of shifting the burden to the employer to disprove causation, a plaintiff establishes a violation by demonstrating a prohibited basis was a "motivating factor" in the decision.

A plaintiff who successfully demonstrates a discriminatory "motivating factor" in an employment practice may receive declaratory relief, injunctive relief, and attorney's fees

and costs under section 107.²⁴⁸ In effect, this creates a "safety net" for all plaintiffs; they recover their costs without proving a prohibited reason caused any harm. The employer may only avoid the additional Title VII remedies of reinstatement, promotion, backpay, and compensatory and punitive damages by demonstrating it would have taken the same action without consideration of the discriminatory factor.²⁴⁹ An employer may not avoid this liability by demonstrating a legitimate basis for the decision discovered after the discriminatory act--a "could have" test--as proposed by the dissent in *Price Waterhouse*.²⁵⁰

Although it departs from the Supreme Court's analysis in *Price Waterhouse*, section 107 of the Act reflects the holdings of several circuit courts and a position advocated by a minority of "remedies limiting" commentators.²⁵¹ These cases and writings do not, unfortunately, begin to answer all the questions created by the new law. The courts will confront many complex and varied issues raised by section 107, the first of which may be filling in the void Congress left by failing to define "motivating factor."

1. *Substantial v. Motivating - A Real Difference?*--In her concurrence in *Price Waterhouse*, Justice O'Connor diverged from the plurality decision on the plaintiff's burden in establishing a mixed motive violation. She believed the proper standard requires a showing "that an illegitimate criterion was a *substantial* factor in an adverse employment decision."²⁵² She would also require "direct evidence" of discrimination that could not include "stray remarks" or "statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself."²⁵³

The 1991 Act adopts the "motivating factor" test of the plurality in *Price Waterhouse*²⁵⁴ but lacks a definition for motivating. This test initially appears to be at odds with the "substantial factor" test, but the difference may be minimal. The apparent conflict between the tests applied by the plurality and the concurrence might be explained by the Court's prior use of the terms "motivating" and substantial."

In *Mt. Healthy City Board of Education v. Doyle*,²⁵⁵ the Court used the terms motivating and substantial interchangeably. Later cases applying the *Mt. Healthy* standard also failed to distinguish a substantive difference between a "motivating factor" and a "substantial factor."²⁵⁶ Justice Brennan even used "substantial" to describe the plaintiff's burden at one point in *Price Waterhouse*.²⁵⁷ What initially appears to be a disconnect between the concurring and plurality decisions in *Price Waterhouse* is actually a case of different Justices using substantively equivalent terms.

The lower courts have also freely mixed the terms "motivating" and "substantial" in mixed motive analysis. In *Conaway v. Smith*,²⁵⁸ the Tenth Circuit required proof of either "a substantial or motivating factor." The Fourth Circuit appears to prefer the "substantial factor" test, but in *White v. Federal Express Corp.*²⁵⁹ it cited Justice White's concurrence in *Price Waterhouse* as authority instead of Justice O'Connor's opinion. The Sixth Circuit covers both bases by requiring evidence that "unlawful discriminatory animus was a substantial motivation."²⁶⁰ The Second Circuit similarly will accept evidence that discrimination played either a motivating or substantial role in the decision.²⁶¹ The district courts are at least as thoroughly confused over any distinction between "motivating" and "substantial."²⁶²

The determining discriminatory factor, whether labeled motivating or substantial, must also be proven by direct evidence.²⁶³ This is a two step process: first, the plaintiff must present direct evidence of a discriminatory motive; next, the plaintiff must demonstrate that the employer "*actually relied on*" the prohibited factor in making the decision.²⁶⁴ Stray remarks or comments made by nondecisionmakers--"discrimination in the air"--is insufficient; "the discrimination must be shown to have been 'brought to ground and visited upon an employee."²⁶⁵

Whether applying the "substantial factor" or "motivating factor" test, the courts must strictly apply the direct evidence test and read into section 107 a certain *de minimis* causation threshold.²⁶⁶ Based on prior Supreme Court case law, which has not been overruled, "motivating" will be defined as "a determining factor" or a "substantial factor" in the challenged decision-making process.²⁶⁷ This definition would limit recovery of costs to truly mixed motive cases and prevent a any perception of "cost-free, risk-free" litigation. Any other definition would shatter the base of case law interpreting mixed motive cases and cause even greater injustice to employers already facing liability without causation.

2. *The Litigation Two-Step.*--The new mixed motive shifting-burdens evidentiary test established in *Price Waterhouse* and codified in the 1991 Act presents some very practical problems for the lower courts. Under this new procedure, "a disparate treatment plaintiff must show by direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision."²⁶⁸ Until *Price Waterhouse* and the 1991 Act, courts heard all issues of law and fact²⁶⁹ and applied derivations of one test in all

disparate treatment cases.²⁷⁰ Lower courts now must determine which, or how many, of several tests apply, what matters the jury will decide, and how to conduct the litigation procedurally.²⁷¹ What was previously difficult has now become a litigation nightmare.

Title VII plaintiffs will now always argue their cases in the alternative. They will argue first that discrimination was the sole motivation, alleging first direct and then circumstantial proof under the *McDonnell-Douglas prima facie* test. In the alternative, plaintiffs will argue that mixed motive analysis applies. Both the plurality and dissent opinions in *Price Waterhouse* recognized the potential evidentiary problems this scenario would raise, but the plurality stated that courts and juries were up to the challenge.²⁷² The modifications in the 1991 Act unfortunately cloud the plurality's picture of a logical analysis of these cases.

Cases involving direct evidence present the fewest problems for the courts, although such cases still bear some thorns. The plaintiff who demonstrates discriminatory motive by direct evidence is entitled to full Title VII damages unless the employer proves it would have taken the same action for a legitimate reason. If the employer meets this burden, then the limitations of section 107 limit damages to declarative relief, injunctive relief, and attorneys' fees and costs.²⁷³ This much of the law is clear; less clear is how the courts will reach their verdicts procedurally in these easy cases.

The courts will have various options in reaching the mixed motive conclusion: decide itself whether a case involves mixed motives as a matter of law; bifurcate the proceedings and have the jury determine the threshold issue of mixed motives (dismissing the jury if it

determines mixed motives present); or lump all the issues of mixed motive and damages together in one, multi-volume instruction to the jury and let it take all responsibility for the outcome.²⁷⁴ The lower courts will undoubtedly diverge and apply all three possibilities and create some new deviations of their own.²⁷⁵

The more common discrimination case involving the *McDonnell Douglas prima facie* test will provide an even greater challenge for the courts. The plaintiff will initially argue that discrimination was the sole motivation for the employer's action. This opens the door for the full panoply of Title VII damages, including compensatory and punitive damages,²⁷⁶ and allows the plaintiff to request a jury trial.²⁷⁷ The court will then apply its interpretation of the "direct evidence, motivating factor" test, which, again, is subject to multiple procedural variations. A plaintiff who fails the direct evidence step will argue a jury should still decide the facts under the rebuttable presumption test from *McDonnell Douglas*.²⁷⁸ Employers will argue, of course, that summary judgment is always appropriate when a plaintiff has failed to prove discrimination was a motivating factor for the action challenged and move to strike a jury request.²⁷⁹ Neither the court in *Price Waterhouse* nor the 1991 Act clearly distinguished the evidentiary differences between the mixed motive analysis and the traditional *McDonnell Douglas* test.

In some cases, counsel for employers may attempt to establish a valid basis for the employer's practice and chose, tactically, to move for a limited summary judgment on mixed motives. This limits the potential liability to fees and costs and precludes a jury trial and potential reinstatement, backpay, and compensatory and punitive damages.²⁸⁰ Full summary judgment will be far less likely under a section 107 analysis.²⁸¹ Lower courts may

be more amenable to the partial summary judgment as a type of "compromise" in weak cases; they avoid a jury trial but do not impose the full costs of litigation on the plaintiff.²⁸² The lower courts will be forced to wade through floods of these summary judgment motions and motions to strike jury demands before obtaining further guidance or reaching any consensus or deeper understanding of these issues.²⁸³

Congressional "tinkering" has resulted in a new level of "disarray" in the courts. "Race and gender always 'play a role' in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion."²⁸⁴ Personality conflicts often give rise to employment disputes and difficult conditions for an employee, but such circumstances do not "translate into discrimination."²⁸⁵ In his dissent in *Johnson*, Justice Scalia warned against "[a]ttempts to evade tough decisions by erecting novel theories of liability or multitiered systems of shifting burdens."²⁸⁶ The mixed motive changes in the 1991 Act appear to be just such an attempt to avoid a firm finding for one party in a discrimination action.²⁸⁷ These changes also raise new questions as to the validity of affirmative action programs.

C. An End to Affirmative Action?

By prohibiting all employment practices that involve a prohibited "motivating factor," section 107 of the 1991 Act appears to spell the end for affirmative action programs. Such programs, by definition, intentionally grant hiring or promotion preference to individuals based on their protected status, which is precisely the definition of disparate treatment.²⁸⁸ Civil rights advocates in Congress attempted to overcome this result by inserting additional

"guidance" into section 107 of the Act: "Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law."²⁸⁹

Unfortunately, the Act does not provide a hint of what "law" is contemplated in section 107. Applying the prior "law" disregards the radical changes contained in the 1991 Act and forces the courts to create a hypothetical law whenever an affirmative action program is at issue. If the definition of "law" is "as amended by the 1991 Act," then affirmative action programs would become illegal. The two provisions in the 1991 Act constitute a classic circular argument--one says you do, the other says you don't!²⁹⁰ The EEOC perpetuates this circular reasoning by approving all affirmative action measures that "comply with the requirements set by the Supreme Court and the lower federal courts."²⁹¹ The "law" again appears to be what the courts say it is.

Not surprisingly, members of Congress could not agree on the meaning or intent of section 107 and again attempted to "clarify" the patent ambiguity by inserting contradictory interpretive memoranda into the record. Representative Edwards thought it was clear that section 107--

is not intended to provide an additional method to challenge affirmative action. As Section 116 of the legislation makes plain, nothing in this legislation is to be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law. This understanding

has been clear from the time this legislation was first proposed in 1990, and any suggestion to the contrary is flatly wrong.²⁹²

This explanation fails to clarify what "law" the affirmative action program must be "in accordance with." Not surprisingly, Senator Dole believed that the section 107 prohibition "is equally applicable to cases involving challenges to unlawful affirmative action plans, quotas, and other preferences."²⁹³

President Bush further confused matters by releasing an informal statement apparently calling for the elimination of affirmative action, only to reverse his field during the formal signing ceremony for the Act. The day before signing the Act, the President's press corps circulated a statement calling for the elimination of "any regulation, rule, enforcement practice, or other aspect of these [equal employment opportunity] programs that mandates, encourages, or otherwise involves the use of quotas, preferences, set-asides, or other similar devices, on the basis of race, color, religion, sex or national origin."²⁹⁴ The President altered his tone radically during the official signing ceremony, when he simply declared: "I support affirmative action. Nothing in the bill overturns the Government's affirmative action programs."²⁹⁵

Congressional sponsors of the Act recognized the internal conflict in the Act and issued a joint memorandum acknowledging their failure to provide appropriate guidance:

This legislation does not purport to resolve the question of the legality under Title VII of affirmative action programs that grant preferential treatment to

some on the basis of race, color, religion, sex or national origin, and thus "tend to deprive" other "individual[s] of employment opportunities . . . on the basis of race color, religion, sex, or national origin." In particular, this legislation should in no way be seen as expressing approval or disapproval of *United Steelworkers v. Weber*, 443 U.S. 193 (1979), or *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), or any other judicial decision affecting court ordered remedies.²⁹⁶

Congress again "punted" on the issue and delegated responsibility for deciding the matter to the courts. To date, only one Circuit Court has entertained the issue.

Consistent with its position on retroactivity, the Ninth Circuit has held that the 1991 Act does not affect the legality of affirmative action programs under Title VII. In *Officers for Justice v. Civil Service Commission*,²⁹⁷ the police officers' union of San Francisco challenged the city's use of "banded" test scores and a voluntary affirmative action program. The court cited *Johnson's* "manifest imbalance" test as authority for placing the burden on the union to prove the city's voluntary affirmative action program violated Title VII. Without extensive analysis, the court rejected application of section 107, finding that "[t]he language of the statute is clear, and the City's interpretation is consistent with that language."²⁹⁸

The Ninth Circuit's reliance on *Johnson* may be misplaced. Only Justices Stevens, Blackmun, and O'Connor remain from the plurality of the Court that decided the case, and at least three Justices would have overruled *Weber* because it encourages "reverse discrimination" where there is no evidence of a prior manifest imbalance.²⁹⁹ The language

in section 107 of the 1991 Act appears to reinforce Justice Scalia's dissent in *Johnson*³⁰⁰ and could be the cornerstone for a new majority to invalidate voluntary affirmative action programs.

Justice Scalia highlighted in his dissent that the affirmative action program in *Johnson* involved "nontraditional" jobs for women³⁰¹ but still set specific guidelines and percentages for hiring the "proper" proportion of minorities--the dreaded "quota" practice.³⁰² Justice O'Connor voted with the plurality but sits on the fence between positions. She was dissatisfied with the plurality's analysis of the "statistical imbalance" required in affirmative action reviews,³⁰³ but was swayed in *Johnson* by the qualifications of the selected female candidate. To justify most voluntary affirmative action programs, but she would still require direct evidence of a "statistical disparity . . . sufficient for a *prima facie* Title VII case."³⁰⁴

Even without Justice O'Connor, however, those favoring greater scrutiny of voluntary affirmative action programs need find only two votes among Justices Kennedy, Souter, and Thomas--with Justice Thomas a near certain vote.³⁰⁵ The circular reasoning between sections 107 and 116 may be sufficiently compelling for the Court to adopt Justice Scalia's "do what I say, not what I intended to say" approach to statutory interpretation.³⁰⁶ Because Congress failed to address conscious minority hiring practices in the 1991 Act, the Supreme Court "is free to modify or overrule" its prior holdings on affirmative action.³⁰⁷

Another factor in the future viability of affirmative action programs is the level of judicial scrutiny applied. The Court decided *Johnson* only under Title VII; the plaintiff

simply failed to raise the equal protection issue in the district court.³⁰⁸ The Court therefore applied the lower scrutiny *prima facie* test of *McDonnell-Douglas* test. The employer was required only to articulate a valid nondiscriminatory reason for its decision, and that burden was satisfied by the use of an affirmative action plan.³⁰⁹ Under the shifting burdens test of *Price Waterhouse* and section 107 of the 1991 Act, however, an employer could be forced to demonstrate the underlying basis of an affirmative action plan, "requiring the employer to carry the burden of proving the validity of the plan."³¹⁰

Since the inception of affirmative action in *Bakke*,³¹¹ the Supreme Court has struggled to justify the concept within the law.³¹² In her concurrence in *Johnson*, Justice O'Connor states that "Section 703 [of the Civil Rights Act of 1964] has been interpreted by Weber and succeeding cases to permit what its language read literally would prohibit."³¹³ Even Justice Stevens recognized that his opinion supported "an authoritative construction of the Act that is at odds with my understanding of the actual intent of the authors of the legislation."³¹⁴ Instead of supporting the Court's prior interpretation of Title VII with a codification of the parameters for affirmative action, however, Congress has made it more difficult for the Court to rewrite "the statute it purport[s] to construe."³¹⁵

Many see affirmative action as a perversion of the individual right to equal employment opportunity that unlawfully grants minorities a right to proportional representation in the labor force.³¹⁶ Others see it as a hypocritical policy doomed to fail for a society supposedly pledged to equal protection of its laws for all citizens.³¹⁷ Supporters of affirmative action see hiring quotas as appropriate "fair share" representation for minorities and women at every level of the workforce.³¹⁸ Affirmative action advocates generally discount the value of merit and superior qualifications in hiring decisions; they

recognize that the policy is unfair to individual white males but justified by policy, no matter how great the disparity in qualifications.³¹⁹ It should come as no surprise that "[t]he average white American believes civil rights legislation is preference legislation."³²⁰

Opposition to affirmative action is also not restricted to caucasian theorists. Professor Stephan Carter of Yale University Law School finds he is a "victim" of affirmative action because it is perceived he succeeded because he was the "best black."³²¹ Carter believes that affirmative action has gone astray by abandoning relief for the poor minorities in favor of diversifying the white male professional world;³²² affirmative action programs, as applied, stray from the original goal of identifying minorities with potential and placing them in a position to be competitive in a truly equal employment environment.³²³ Such programs should strive instead to eliminate the "vestiges" of the nation's racist past by providing opportunities to young black people instead of buying off a few middle class blacks with law suit judgments and promotion quotas.³²⁴

Professor Carter is not alone in his perception that affirmative action programs fail to address the problems of minorities in today's society. Affirmative action may be justified as a societal policy and necessary to remedy past discrimination.³²⁵ The whether, why, and how of such a policy decision should be made by Congress, however, and not by individual courts. There is no "exception" in Title VII "equal opportunity" for affirmative action programs. Only after Congress undertakes the task of defining its concept of "equal opportunity" under Title VII and what constitutes a "lawful" affirmative action program will the courts be able to adjudicate Title VII cases consistently with a societal goal. Congress, not the courts, must rewrite a law that "does not mean what it says,"³²⁶ outline how our

nation will overcome past discrimination, and define under what circumstances "reverse discrimination" is justified.³²⁷ Until then, courts should apply the equal protections of Title VII literally: employment decisions must be based only on competence, qualification, experience, and nondiscriminatory factors. Under the amendments in the 1991 Act, this will require nullification of all voluntary affirmative action programs.

The other circuits and the Supreme Court will not likely find the intent of changes in the 1991 Act as "clear" as did the Ninth Circuit in *Officers for Justice*.³²⁸ Before the Supreme Court grants review on the issue, however, it will have the benefit of thousands of hours of argument and case law from the lower courts outlining all possible permutations of the issues.

D. Other Problems

Critics of the original Civil Rights Act criticized the law as a "thought control bill."³²⁹ Congress could not, of course, lawfully prohibit the thought or the expression of prejudicial thoughts.³³⁰ An employer can lawfully say "I don't like _____ minorities and I don't believe they're capable of honest work." Congress may, however, prohibit discrimination, or "prejudice in action." An employer must recognize the difference and understand its duty to make employment decisions based on the law, not on prejudice.³³¹ The changes to mixed motive law in the 1991 Act blur the distinction somewhat and come very close to crossing the boundary between the two.

Section 107 amends only Title VII's substantive bases for discrimination (race, color, national origin, sex, or religious discrimination). Neither the retaliation provision of Title

VII³³² nor the Age Discrimination in Employment Act has been amended;³³³ these causes of action will, therefore, continue to be analyzed under the *Price Waterhouse* test. In its Revised Enforcement Guidance, however, the EEOC states that it has a "unique interest in protecting the integrity of its investigative process" which justifies application of the section 107 analysis in retaliation cases to avoid a "chilling affect upon the willingness of individuals to speak out against employment discrimination."³³⁴ A similar rationale would presumably apply to the ADEA, but such "guidance" will not survive any level of judicial scrutiny.³³⁵

The mixed motive scheme under the 1991 Act also has possible collateral consequences for employers and supervisors. An employer may, for example, discharge an employee for stealing. The employee alleges some discriminatory remarks and manages to convince a jury that race, color, national origin, sex, or religious discrimination was a motivating factor for the discharge. The jury also believes, however, that the plaintiff was indeed guilty of stealing and would have been discharged for that reason alone. This employer would have been relieved of all liability under *Price Waterhouse*, but under the 1991 Act it will liable for injunctive and declaratory relief, fees and costs, and, perhaps more importantly, be branded as a discriminator. Although no action was taken "because of" discrimination, the employer suffers significant monetary loss and damage to his reputation in the community.³³⁶

A scenario similar to the one above could be even more devastating for a supervisor under federal employment law. Discrimination is a prohibited personnel practice under federal law; appropriate disciplinary action against a supervisor found guilty of

discrimination can be severe, including removal.³³⁷ In the mixed motive setting under the 1991 Act, such a result would not only be unjust, it would also be subject to attack on due process grounds.³³⁸

With the mixed motive changes to the Civil Rights Act of 1991, Congress has skewed the scales in balancing interests between protection of individuals from unlawful discrimination in employment and "maintenance of employer prerogatives."³³⁹ The Act applies to "any employment practice,"³⁴⁰ not just hiring, firing, and promotion actions. Plaintiffs are now in a position to leverage employers with threats of discrimination suits for trivial personnel actions, such as periodic appraisals or granting and denying vacation time. Employers will be wary of challenging employees for fear of some bit of evidence--valid or contrived--sufficient to convince a jury that some illegitimate motive existed.

To counterbalance the scales of justice, the courts must read and apply the mixed motive standards restrictively. Plaintiffs must produce direct and substantial evidence that discrimination motivated the challenged action. More than ever, courts must make the difficult decision of whether discriminatory animus existed and be prepared to take the issue from the jury if necessary. Simple disparities in the percentage of employees compared to the minorities in the geographic area is a short-sighted, feeble attempt to prove discrimination and should always be rejected.³⁴¹

V. Remedies and Jury Trials

"Write that down, ' the King said to the jury, and the jury eagerly wrote down all three dates on their slates, and then added them up, and reduced the answer to shillings and pence."

Lewis Carroll

Next to the great "quota" dispute,³⁴² damage awards for intentional discrimination was the most hotly debated issue in the 1991 Act and the failed Civil Rights Act of 1990. Opponents of expanded damages presented testimony that similar changes in state discrimination laws had spurred plaintiffs' attorneys to file suit instead of seeking conciliation and to refuse settlement in "hopes of a large jury verdict, large punitive damage verdict, and a contingent fee coming into their pocket."³⁴³ A spokesman for the National Foundation for the Study of Equal Employment Policies estimated that the cost of Title VII litigation would skyrocket from 775 million dollars to over two billion dollars per year.³⁴⁴

More troubling than the increased litigation costs, however, is the doctrinal genesis that compensatory and punitive damages symbolize. In the original Civil Rights Act of 1964, "Congress institutionalized a preference for conciliation" by adopting a complex administrative complaint process oriented toward equitable remedies.³⁴⁵ "It wanted women and minorities on the job, not languishing in the courts."³⁴⁶ The 1991 Act vaults employment discrimination law from this basic underpinning of conciliation into a litigation oriented system with tort-like damages. One Congressional opponent of the change stated for the record that

Currently, there are incentives in place for a quick settlement. This system enables the employee to seek redress and get back to work. But under [the 1991 Act], huge monetary award amounts are encouraged through jury trials, eliminating any incentive for the plaintiff and defendant to settle early. And with legal and expert fees allowed, there is no incentive for the lawyer to settle either. So, what we have here is an invitation to long, drawn out court battles over huge stakes, replacing the current system of solving the problem and getting people back to work."³⁴⁷

The first stated purpose--and most significant change to civil rights law--in the 1991 Act is "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace."³⁴⁸

The shift of focus in employment discrimination law from employer-employee conciliation to tort-based litigation change may be "[o]ne of the darkest clouds on the horizon for corporate counsel."³⁴⁹ The advent of jury trials in Title VII provides an additional disincentive for plaintiffs to settle employment disputes, promises a dramatic increase in employment discrimination litigation, and presents numerous procedural problems for the courts.

A. Damages

1. *The "Truth."*--Under pre-1991 Act law, the circuit courts had unanimously held that compensatory and punitive damages were not available under Title VII.³⁵⁰ Section 102 of the 1991 Act creates a limited right of recovery of compensatory and punitive damages in

cases of *intentional* discrimination under Title VII and under the Americans With Disabilities Act. The Act does not, however, provide for recovery of either compensatory or punitive damages under the Age Discrimination in Employment Act or under the retaliation provision of Title VII.³⁵¹

The portion of section 102 that applies to Title VII damages provides--

(1) Civil rights. In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.³⁵²

This section contains a broad expansion of prior damages, but also has many limitations. There appear to be three thresholds in this section: the first requires a "complaining party," the second disparate treatment discrimination, and the third a claim not compensable under 42 U.S.C. § 1981.

The Act manages to confuse what constitutes a "complaining party" by defining it as "the Equal Employment Opportunity Commission, the Attorney General, or a person who

may bring an action or proceeding under title VII of the Civil Rights Act of 1964."³⁵³ Since damages are limited to each "complaining party,"³⁵⁴ the EEOC appears to be limited to a single capped recovery when it brings suits on behalf of multiple plaintiffs.³⁵⁵ The EEOC General Counsel has already challenged this interpretation,³⁵⁶ but the success of his position depends on how deeply a court reads into the legislative "intent" of section 102. A textualist reading would certainly limit the EEOC to one recovery.

(a). *Compensatory Damages.*--Section 102 clearly prohibits recovery of compensatory and punitive damages in disparate impact actions. This exclusion could affect a plaintiff's litigation strategy because some cases are amenable to analysis under both disparate treatment and disparate impact theories.³⁵⁷ Jury trials are not available in disparate impact suits. Plaintiffs will therefore always attempt to establish a disparate treatment cause of action to try before the jury and collaterally estop the court from entering findings on the disparate impact claims.³⁵⁸

Less clear is the degree of overlap between 42 U.S.C. § 1981 damages and the new section 102 damages (designated as § 1981a). In his interpretive memorandum, Senator Danforth "explained" the purpose behind the prohibition against compensatory and punitive damages whenever recovery is possible under 42 U.S.C. § 1981. This restriction was ostensibly intended to limit double recovery in certain cases rather than require an election of theories. He believed, however, that a plaintiff could recover under both section 1981 and the new damages provision if more than one type of discrimination is alleged, such as race and gender.³⁵⁹

Senator Danforth's interpretation contradicts the clear language of the statute. Once again, however, the EEOC has adopted his rationale.³⁶⁰ This explanation seems tenuous because Congress easily could have included language prohibiting double recoveries. The more likely meaning is that the damages provision is only available when no cause of action exists under section 1981. Plaintiffs will sue more often under section 1981 when possible because there are no limits on recovery and fewer procedural hoops to clear than under Title VII. Such plaintiffs should not, however, be able to collect double damages for multiple discrimination based on the same acts.³⁶¹

Under the new section 1981a, there are currently different caps on the amount of compensatory and punitive damages a plaintiff may recover that are based on the size of the employer's workforce. The caps range from \$50,000 for employers with 100 or fewer employees up to \$300,000 for employers with 500 or more employees.³⁶² The single issue of what constitutes an "employee" under the Act raises multiple issues, but the courts have prior case under analogous issues to guide them.³⁶³ Plaintiffs in smaller companies will increasingly attempt to name parent corporations as defendants to maximize their recovery potential.³⁶⁴

The 1991 Act raises an issue of exactly damages are subject to the caps by again providing inadequate definitions. The purpose and nature of compensatory damages are common issues in the law and should create few problems.³⁶⁵ The controversy in section 1981a is caused by ambiguous draftsmanship in the "exclusions" and "limitations" to compensatory damages:

(2) Exclusions from compensatory damages. Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.

(3) Limitations. The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed . . . [damage caps].³⁶⁶

Plaintiffs will attempt to exclude damages from these caps by pleading alternate bases for recovery. Employers will argue that all damages fall under this section and are subject to the caps unless compensable under the limited equitable remedies of Title VII.

Recovery of "damages" in Title VII cases was previously based exclusively on Section 706(g) of the Civil Rights Act of 1964,³⁶⁷ which is generally limited to equitable relief.³⁶⁸ In its Enforcement Guidance, the EEOC has recognized that traditional equitable relief under Title VII includes only injunctive and declaratory relief, backpay, reinstatement, and frontpay; there is no provision for recovery of past pecuniary damages.³⁶⁹ The EEOC has, nonetheless, concluded that past pecuniary losses are somehow included in the new "compensatory damages" but not subject to the damages cap. Reasoning by negative inference, it has concluded that section 102 limits future pecuniary losses but not past pecuniary losses; therefore, past pecuniary losses may be recovered without limitation.³⁷⁰

The EEOC interpretation impugns the clear language of the law, which does not provide at all for recovery of past pecuniary losses. Section 102(a) allows recovery of "compensatory and punitive damages as allowed in section(b)."³⁷¹ Section 102(b) limits compensatory damages but includes no "savings" clause or other provision that would allow recovery of past pecuniary damages.³⁷² Under the general tenet that damages may not be recovered against the United States absent an explicit waiver of sovereign immunity,³⁷³ past pecuniary losses may not be recovered under this section.

(b). *ADA "Good faith" Defense.*--The Act's limitations on ADA cases shadows the mixed motive exclusion for intentional discrimination under Title VII; a plaintiff cannot recover compensatory and punitive damages if the employer demonstrates it made good faith efforts to reasonably accommodate the complainant's disability.

(2) Disability. In an action brought by a complaining party under . . . the Americans with Disabilities Act of 1990 (42 U.S.C. § 12117(a)), and section 505(a)(1) of the Rehabilitation Act of 1973 (29 U.S.C. § 794a(a)(1)), respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) . . . , the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort. In cases where a discriminatory practice involves the provision of a reasonable accommodation . .

. damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.³⁷⁴

There are several potential tripwires in this language that will challenge the courts interpreting them.

The "good faith" defense is specifically limited to damages "under this section," meaning compensatory and punitive damages. An employer who fails to reasonably accommodate but satisfies the good faith test will still be guilty of discrimination and liable for reinstatement, backpay, attorney's fees, costs, and other appropriate relief.³⁷⁵ An employer who successfully demonstrates a reasonable accommodation will ostensibly avoid liability entirely. Unfortunately, reasonable accommodation is a fact-intensive, case-by-case conclusion requiring full litigation of the issues.³⁷⁶

Another issue in the handicap restrictions is the appropriate evidentiary and procedural process to establish "good faith efforts." As in mixed motive cases, plaintiffs can request jury trials when seeking compensatory or punitive damages.³⁷⁷ Courts must determine how to juggle the trial proceeding to reach the threshold issue of "good faith" before charging the jury with damage instructions.³⁷⁸

A more obscure issue may be raised by the language "in consultation with the person with the disability who has informed the covered entity that accommodation is needed." There appear to be two separate steps to the test: (1) the employee informs the employer reasonable accommodation is needed, and (2) the employer consults with the disabled employee in a good faith effort to find a reasonable accommodation. This section raises at least two issues for the courts: how an employer shows good faith with an uncooperative employee³⁷⁹ and whether an employee can strip the employer of the potential defense altogether by simply failing to inform the employer an accommodation is needed. The courts will likely rely on abundant case law in defining reasonable accommodation and good faith, but there is a paucity of guidance on the employee's duty to disclose a disability.³⁸⁰

(c). *Punitive Damages.*--Section 1981a allows recovery of punitive damages under Title VII, ADA, and the Rehabilitation Act, as follows:.

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.³⁸¹

This section clearly exempts federal, state, and local agencies from liability for punitive damages. There is no clue, however, in the extensive legislative history or elsewhere, why

Congress chose to define the common term of "punitive damages" while omitting far more essential definitions. It is even more puzzling why Congress chose this particular definition instead of the universally accepted definition from *Smith v. Wade*.³⁸² In his "unofficial" remarks on the Act, Representative Edwards did attempt to clarify the definition of punitive damages in the Act by stating they would be available "to the same extent and under the same standards that they are available to plaintiffs under 42 U.S.C. § 1981. No higher standard may be imposed."³⁸³

Most of the circuit courts have adopted the *Smith v. Wade* definition for punitive damages under 42 U.S.C. § 1981 and will likely apply the same test under new section 1981a.³⁸⁴ The courts may also adopt the recent analysis for punitive damages from the Supreme Court in *Molzof v. United States*.³⁸⁵ The *Molzof* Court applied a common law meaning to punitive damages because the statute involved did not specifically define the term. The 1991 Act does define the term, which will require the Court to decide whether the Act definition is different from the common law meaning.³⁸⁶

2. *The Consequences.*--The 1991 Act's broad expansion of remedies will spawn litigation in two ways. First, plaintiffs and employers will seek to define the parameters of the new law and challenge the numerous controversial and ambiguous provisions that are contrary to their respective positions. Second, and more significantly, suits alleging sexual, religious, and disability discrimination will increase dramatically with the prospect, for the first time, of recovering compensatory and punitive damages with a right to jury trial.³⁸⁷ Now "the path to equal employment does run through the courthouse door!"³⁸⁸

The opponents of the Act feared jury trials with damage awards would be a burden on the system and present an open invitation to litigation,³⁸⁹ and those worst fears are now being realized. In the first quarter of fiscal year 1993, 1,608 sexual harassment complaints were filed with the EEOC--more than two and a half times as many as were filed in the first quarter of 1991.³⁹⁰ The EEOC received a record 19,160 charges during the three months from October 1 to December 1, 1992.³⁹¹ Age, race, and gender complaints increased in fiscal year 1992 more than 11% from the 1991 rate of 60,000 charges.³⁹² The new Americans with Disabilities Act, which went into effect for employers with 25 or more employees on July 26, 1992, alone generated 2401 complaints in the quarter.³⁹³ It will be some time before the EEOC fully realizes the prolonged case load brought about by this law and the changes to Title VII.

Even with compensatory and punitive damages available for sexual, religious, and disability discrimination, some civil rights advocates are not satisfied with the damage caps imposed on these suits.³⁹⁴ There are no limits to recovery on actions based on race or ethnicity under 42 U.S.C. § 1981.³⁹⁵ Members of Congress who are sympathetic to the damages anomaly have already proposed lifting the damage caps for all cases.³⁹⁶

The current caps on damages are also an open invitation to Constitutional challenge. Plaintiffs have consistently alleged a deprivation of their Constitutionally guaranteed right to equal protection in challenging legislative caps on tort damages.³⁹⁷ Most courts have rejected such challenges under a rational basis analysis.³⁹⁸ Some courts, however, have applied a heightened scrutiny review to damage caps.³⁹⁹

Section 1981a includes an additional factor that may heighten judicial scrutiny: the court cannot advise the jury of the limitations on damages.⁴⁰⁰ Plaintiff-employees of smaller employers will argue they should not be limited in their recovery because of the size of the employer's business. Large employers will argue, conversely, that they should not be liable for more damages in each incident of discrimination simply because they employ more workers.⁴⁰¹ All will argue some Seventh Amendment deprivation because of the prohibition on jury advisements.

The courts may easily become confused by the diversity and complexity of Title VII issues under "one" law. Unless the Supreme Court finds the 1991 Act applies retroactively, courts will continue to try Title VII cases under pre-Act law for many years to come.⁴⁰² New cases will arise under the damage caps in that same period, some of which will involve claims based on both pre- and post-Act conduct. The same court could contemporaneously hear yet a third type of Title VII claim should Congress lift the current damage caps. Individual suits will be difficult enough; any court confronted with a class action suit under Title VII will want "Supreme" guidance.⁴⁰³

The Supreme Court held recently in *United States v. Burke*⁴⁰⁴ that Title VII awards may not be excluded from personal income under the tax code as "damages received . . . on account of personal injuries."⁴⁰⁵ The Court found only recoveries based on "tort-like personal injuries" could be excluded from income.⁴⁰⁶ The prior Title VII remedial structure focused "on 'legal injuries of an economic character'"⁴⁰⁷ but failed to address "traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, and other consequential damages."⁴⁰⁸ The Court caveated its

holding with the proviso that "discrimination could constitute a personal injury . . . if the relevant cause of action evidenced a tort-like conception of injury and remedy."⁴⁰⁹

In *Burke*, the Court distinguished Title VII remedies from other discrimination laws that provide for compensatory and punitive damages and jury trials.⁴¹⁰ The courts will likely use this language to find damages under the new section 1981a are excludable from income under the tax code. Less clear is whether the traditional Title VII damages under section 706(g) will continue to be subject to *Burke*. Because the provision for compensatory and punitive damages actually amends section 1981 instead of Title VII, the Internal Revenue Service and the courts will argue persuasively that they do.⁴¹¹ This "novel" bit of draftsmanship in the 1991 Act creates a fertile environment for judicial lawmaking in both the areas of damages and jury trials.

Although it has no authority under section 42 U.S.C. § 1981, the EEOC has now interpreted section 1981a as authorizing compensatory and punitive damages during the administrative phase of Title VII processing of federal employees' complaints.⁴¹² Federal agencies will likely compound the litigation workload by rejecting such awards and taking their chances in court.⁴¹³ Many cases will, however, never complete EEOC processing. A sharp rise in complaints and a slashed budget will stretch the EEOC's administrative processing time from the 1992 average of 11 months to over three years.⁴¹⁴ With the prospect of a jury trial and compensatory damages as the alternative, plaintiffs will be disinclined to wait more than the minimum 180 days to file suit⁴¹⁵ or to accept any settlement less than the moon.⁴¹⁶

B. Jury Trials

The differences between traditional Title VII equitable remedies and section 1981a damages creates a new vacuum in employment discrimination law; how does the jury function in Title VII suits? Congress could have provided the courts with guidance by amending Title VII with language on jury trials similar to that contained in Title VIII of the Civil Rights Act of 1968⁴¹⁷ or even section 1981 itself.⁴¹⁸ It created instead a hybrid by limiting jury trials to certain cases and certain issues, which again requires statutory interpretation as the courts attempt to find the "right" application. Supportable conclusions cover a wide range of options, from limiting the jury to determining only compensatory and punitive damages after the court has found liability to certifying all issues of liability and damages to the jury.

Under section 1981a, any party can request a "trial by jury" when a complaining party seeks compensatory or punitive damages.⁴¹⁹ Title VII plaintiffs were not previously entitled to a jury trial for determination of liability or "equitable" damages, such as backpay and reinstatement,⁴²⁰ and nothing in the Act changes this portion of the law.⁴²¹ The courts must now separate responsibilities--define what matters the "trial by jury" will try--and there are numerous possibilities.

One textualist definition of section 1981a would maintain all liability issues in Title VII suits within the province of the court; juries would decide only compensatory and punitive damages after the court has found liability. This interpretation is both consistent with the statutory language and would allow for greater procedural efficiency of Title VII suits. The Act allows for the new damages "in addition to any relief authorized by section

706(g) of the Civil Rights Act of 1964."⁴²² This language implies the new damages provision does not alter the existing equitable damages under Title VII, which are determined by the court. The 1991 Act also limits jury trials to those seeking "compensatory or punitive damages under this section,"⁴²³ "against a respondent who engaged in unlawful intentional discrimination."⁴²⁴ There can be no "engaged in" until a proper finding of liability. The court must therefore hear the evidence and find unlawful intentional discrimination before a jury can determine appropriate compensatory or punitive damages.

Maintaining issues of liability within the purview of the court solves numerous procedural problems potentially raised by the Act. Courts would avoid the struggle of apportioning responsibility for findings of liability and damages under section 1981a and section 706(g). They could also determine whether the mixed motive rules apply before selection of a jury became necessary.⁴²⁵ In cases susceptible of analysis under either disparate impact or disparate treatment theories, the court could find liability under the appropriate theory and certify damage issues to the jury only for its intentional discrimination findings; potential Seventh Amendment objections over split juries in class action suits would be eliminated.⁴²⁶

Although alluring, the "jury for damages only" concept will certainly draw Constitutional attacks from plaintiffs. Simultaneous trial to the court and a jury is fairly common in suits alleging violations of both Title VII and § 1981.⁴²⁷ Common factual issues are first tried to the jury so that the litigants' Seventh Amendment jury trial rights are not foreclosed. The court is then bound by the jury's determination of factual issues common

to both causes of action.⁴²⁸ Most courts have found the "allocation of the factfinding function between the jury and the court" complicated in cases tried under both § 1981 and Title VII.⁴²⁹ The difficulty factor will increase exponentially with section 1981a added.

The Supreme Court recently addressed the roles of the court and jury in discrimination suits in *Lytle v. Household Manufacturing, Inc.*⁴³⁰ The district court had improperly dismissed the plaintiff's § 1981 action in *Lytle* and entered summary judgment on the Title VII claims. The Circuit Court affirmed, but a unanimous Supreme Court found that the plaintiff's Seventh Amendment right to a jury trial had been impinged and reversed.⁴³¹ Although the decision rambles somewhat, its message clearly requires legal issues to be tried to a jury before the court decides equitable issues.

Some courts have applied the *Lytle* procedure, found the jury determination unsupported by the evidence, and entered judgment N.O.V.; however, the appellate courts have regularly reinstated the jury verdicts on appeal.⁴³² Courts that apply the *Lytle* rule will encounter additional Seventh Amendment issues in class action suits. Because either party can request a jury trial, employers will argue they have a Seventh Amendment right to have the same jury determine liability and damages. Large class actions involving dozens--or even hundreds-- of plaintiffs would make this impracticable. Should the court successfully bifurcate the proceedings and get beyond this challenge, it would still be forced to try numerous damage claims for individual plaintiffs.⁴³³

The intent of section 1981a sharpens in focus when considered in light of the complexity of suits tried under the "new" Title VII. The allowance of compensatory and

punitive damages, "provided that the complaining party cannot recover under section . . . 1981,"⁴³⁴ is a practical limitation on civil rights actions. Contrary to other interpretations, this section must force an election of remedies at the trial level. Congress has left this door open for the courts to enter their own interpretations. To prevent unjust double damages, and save themselves countless headaches and reversals, these courts should interpret the law consistently with judicial economy and fairness by forcing an election.

C. Attorney and Expert Fees

To complete the shift of Title VII orientation from conciliation to litigation, the 1991 Act allows prevailing plaintiffs to recover "expert fees" as part of an award of attorney fees. Section 113 amends section 706(k) of the Civil Rights Act of 1964⁴³⁵ "by inserting '(including expert fees)' after 'attorney's fee.'"⁴³⁶ This section also allows recovery of expert fees as part of attorney's fees under 42 U.S.C. § 1981.⁴³⁷ This seemingly simple change fails to allow such fees for other basis of discrimination, which may cause even more litigation than the change itself.

The amendment for expert fees overrules the recent case of *West Virginia University Hospitals, Inc., v. Casey*,⁴³⁸ where the Supreme Court rejected payment of both testimonial and nontestimonial expert witness fees under the Civil Rights Attorneys' Fee Awards Act. The 1991 Act goes beyond what the plaintiffs sought in *Casey* by authorizing "expert fees," which include fees of experts who provide services during the administrative phase of an action and preparation for litigation.⁴³⁹

By an obvious oversight in drafting, section 113 does allow payment of expert fees under either section 1983 or the Age Discrimination in Employment Act. A more subtle oversight in drafting may preclude recovery of expert fees in mixed motive cases and Title VII retaliation suits. This error is again caused by amendment of 42 U.S.C. § 1981 for damages instead of amending Title VII. Section 107 of the Act limits recovery of attorney fees and costs in mixed motive cases "demonstrated to be directly attributable only to the pursuit of a claim under section 703(m)."⁴⁴⁰ Section 703(m) is specifically limited to actions based on race, color, religion, sex, or national origin. Because mixed motive plaintiffs may not recover damages under the new section 1981a, they may not recover expert fees as part of their "attorney fees and costs."⁴⁴¹

A similar analysis bars recovery of expert fees for plaintiffs prevailing only under a theory of retaliation under Title VII. These plaintiffs are not authorized compensatory or punitive damages under section 1981a. Because expert fees are tied to attorney fees recovered under the new section 1981a, plaintiffs proving only retaliation may not recover.

One commentator stated the sentiments of many when he wrote "[t]his provision may lead to 'over-trying' cases, but courts are likely to use rule 16 pre-trial conferences to keep . . . [expert fees] from becoming a blank check." To discourage this "blank check" mentality, courts must use their discretionary authority to limit awards of fees and costs to plaintiffs who incur exorbitant costs or refuse reasonable settlement.⁴⁴²

VI. Conclusion

"That's the penalty we have to pay for our acts of foolishness-- someone else always suffers for them."

Alfred Sutro

A contemplative study of the Civil Rights Act of 1991 leaves a reader questioning the purpose and direction of civil rights law in the 1990's. The changes in this Act contribute nothing to increase the likelihood of achieving true equal employment opportunity in our society. In this law, there is no strategy to eradicate the vestiges of black slavery or sexism, no plan to speed the understanding and homogenization of cultural diversities, and no deterrent to class consciousness. Congress has provided treatment only for some symptoms of discrimination instead of attacking the causes. The 1991 Act is a law of stratification that encourages racism, sexism, and litigation to further individual goals and not society's. It does not encourage equal opportunity, it encourages political correctness. "When will the people in Washington wake up and recognize that what is needed to better race relations in America are good jobs, good economic opportunities and a good workplace."⁴⁴³

By encouraging litigation, the 1991 Act places employers and employees at odds against one another. This diametrical opposition to the original far-sighted Civil Rights Act of 1964 leaves civil rights law in the United States confused, complicated, and without direction. Congress further perpetuated this state in the 1991 Act by delegating lawmaking authority to the courts on the difficult, key issues. The courts will be deluged with

employment discrimination suits raising issues of first impression. The result will be delays in judgment, reversals above, and overall dissatisfaction by everyone involved.

Virtually everyone involved in employment discrimination cases will pay the price for Congress' foolishness in passing the Civil Rights Act of 1991, from the employees and employers, through the EEOC, up to the appellate courts and Supreme Court. Only when Congress begins to pass civil rights laws that have a specific goal and provide guidance to the parties and courts will some measure of equal employment opportunity be possible. Until then, political correctness rules.

1. Michael E. Solimine and James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425 (1992).

2. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 42 U.S.C. §§ 2000e-2000e-17 (1988). See Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 917 (1978) ("The bill passed the Senate on June 17, 1964, by a vote of 76 to 18. On July 2, 1964 . . . the House of Representatives passed the Senate version of the bill by a vote of 289 to 126. At seven o'clock that evening, President Johnson signed the Civil Rights Act of 1964 in the East Room of the White House.").

3. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at scattered sections of 29 U.S.C. and 42 U.S.C.).

4. See BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 2 (2d. ed. 1984) (citing S. Rep. No. 91-1137, 91st Cong., 2d Sess. 4 (1970)) ("In 1964, employment discrimination tended to be viewed as a series of isolated and indistinguishable events, for the most part due to ill will on the part of some identifiable individual or organization."). In *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971), Chief Justice Burger wrote for the Court that "[t]he objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."

5. See CHARLES & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT OF 1964 117-119 (1986); see also, Richard

Fitzpatrick, *The Civil Rights Act of 1991: The Politics of Race*, C742 A.L.I. A.B.A. 191, 192 (1992); Note: *Did She Ask for It?: The "Unwelcome" Requirement In Sexual Harassment Cases*, 77 COR. L. REV. 1558, 1562 (1992) (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63 (1986)) ("The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives . . . [and thus] we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex'."). The amendment adding sex discrimination was proposed by Representative Howard Smith of Virginia, Chairman of the House Rules Committee. See *Barnes v. Costle*, 561 F.2d 983, 987 (D.C. Cir. 1977) ("[The inclusion of 'sex'] was offered as an addition to other proscriptions by opponents in a last-minute attempt to block the bill which became the Act.") Representative Smith's plan obviously failed. See generally, J. RALPH LINDGREN & NADINE TAUB, *THE LAW OF SEXUAL HARASSMENT*, 110-11 (1988) ("One of the most powerful remedies for sex discrimination available today owes its origin to a misfired political tactic on the part of opponents of the Act.").

6. Address of President Lyndon Baines Johnson to a joint session of Congress, March 15, 1965.

7. Civil Rights Act of 1964, §§ 705-713 (codified as 42 U.S.C. §§ 2000e-4-2000e-12 (1988)).

8. 42 U.S.C. § 2000e-5(b) (1988).

9. *Id.* Because of a backlog of some 120,000 charges that had accumulated at the EEOC by 1975, investigations were rarely even begun within the 180 day window. See, SCHLEI & GROSSMAN, *supra* note 4, § 21 n.7, n.115 and accompanying text.

10. 42 U.S.C. § 2000e-5(f)(1) (1988). The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 (1972), amended the Civil Rights Act of 1964 to cover federal employees. The procedures involved for federal employees are somewhat different, however. See 42 U.S.C. 2000e-16 (1988). See also *Wade v. Secretary of the Army*, 796 F.2d 1369 (11th Cir. 1986) (finding that federal employees must exhaust administrative processing requirements of agency before filing suit in federal court). For the current procedures for complaints by federal employees, see 29 C.F.R. §§ 1614.106-110 (1992). A bill proposed by Senator Glenn would radically alter the substance and procedures of discrimination complaints by federal employees. See S. 404, 103rd Cong., 1st Sess. (1993) (proposing the "Federal Employees Fairness Act of 1993").

11. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (finding a group right of action based on an adverse impact not justified by business necessity, commonly referred to as "disparate impact"), discussed in section III., *infra*. *Griggs* actually applied a rationale established in several earlier district court cases; see, e.g., *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd as modified*, 472 F.2d 631 (9th Cir. 1972) (finding policy of not hiring any individual with prior arrest unintentional discrimination but in violation of Title VII because blacks arrested with higher frequency than whites and policy not shown to be essential to the safe and efficient operation of the business).

12. Civil Rights Act of 1991, § 105 (codified as 42 U.S.C. § 2000e-2(k)(1) (1992)), discussed further in section III., *infra*. Congressional action to "restore" the disparate impact law was prompted by the Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Some commentators believe that Congress specifically rejected group theories of liability, such as disparate impact, when it enacted Title VII. See, e.g.,

HERMAN BELZ, EQUALITY TRANSFORMED: A QUARTER-CENTURY OF AFFIRMATIVE ACTION, 17 (1991) ("The Civil Rights Act of 1964 was intended to establish color-blind equal employment opportunity through a combination of voluntary compliance, agency conciliation, and judicial enforcement in civil litigation of the personal right of individuals not to be discriminated against because of race."). The addition of disparate impact in the Civil Rights Act of 1991 has made moot these arguments.

13. Johnson v. Transp. Agency, Santa Clara County, 480 U.S. 616, 642 (1987) (Stevens, J., concurring).

14. 438 U.S. 265 (1978).

15. See discussion of affirmative action in Section IV, *infra*.

16. Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 452 (1966). See also, Note, *Protection from Employer Retaliation: A Suggested Analysis for Section 704(a)*, 65 VA. L. REV. 1115, 1155 n.2 and accompanying text (1979) ("Title VII places major responsibility for enforcing compliance with its policies, through either formal or informal conciliation, on the individual complainant.").

17. CHARLES A. SULLIVAN, MICHAEL J. ZIMMER, & RICHARD F. RICHARDS, SPECIAL RELEASE ON THE CIVIL RIGHTS ACT OF 1991, EMPLOYMENT DISCRIMINATION xi-xii (1992) [hereinafter SPECIAL RELEASE].

18. H.R. 4000, S. 2104, 101st Cong., 2d Sess. (1990). The cases are *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (construing 42 U.S.C. § 1981 not to cover on-the-job racial harassment); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (placing the burden of proof on plaintiff in a disparate-impact claim under Title VII to show lack of business necessity); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (shifting burdens of

proof and limiting liability in mixed-motive claim under Title VII); *Lorance v. A.T.&T. Technologies, Inc.*, 490 U.S. 900 (1989) (determining accrual of Title VII action against allegedly unlawful seniority system); *Martin v. Wilks*, 490 U.S. 755 (1989) (permitting collateral attack against a consent decree containing an affirmative action plan); and *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989) (finding intervenors not liable for attorneys' fees in Title VII action). The Act also would have reversed or modified several other Supreme Court decisions. See Steven R. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37 & n.11 (1991) (total of 10 cases affected by 1990 Act).

19. President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632-34 (Oct. 22, 1990), reprinted in 136 CONG. REC. S 16457-58 (daily ed. Oct. 22, 1990); 136 CONG. REC. S 16589 (daily ed. Oct 24, 1990) (reporting Congress failed to override veto of civil rights law).

20. 137 CONG. REC. H 53 (daily ed. Jan 3, 1991) (noting its introduction as H.R. 1, 102d Cong., 1st Sess., (1991)). The Civil Rights Act as passed is Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of 29 U.S.C. and 42 U.S.C. (1992)).

21. See David Louter, *Rush of Events Broke Rights Bill Impasse*, L.A. TIMES, Oct. 26, 1991, at A1.

22. See, e.g., Mitchell Locin, *Senate's Frayed Image May Help Rights Bill*, CHI. TRIB., Oct. 17, 1991, at 12 ("Ever since professor Anita Hill's allegations against Thomas raised the issue of sexual harassment to the peak of public attention, senators have been tripping over themselves in a rush to express abhorrence of such behavior.").

23. Under the Civil Rights Act of 1991, § 102 (codified as 42 U.S.C. 1981a (1992)), a

victim of sexual harassment can now recover limited compensatory and punitive damages-- even when no adverse employment action has been taken. For a discussion of damages under the 1991 Act, see section V., *infra*. See also, Peter M. Panken and Michael Starr, *Sexual Harassment in the Workplace: Employer Liability for the Sins of the Wicked*, R176 A.L.I. A.B.A. 813 (1992); Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1299 (1992) ("[Clarence Thomas'] claim was not necessarily believed by the public, and since public opinion in favor of Thomas almost perfectly tracked disbelief in Anita Hill, the vote seems to have been decided by the ability of Senate Republicans to attack her.") (citations omitted).

24. See SPECIAL RELEASE, *supra* note 17, at xii; see also, Martha R. Mahoney, *Gender, Race, and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1283 (1992); Michael J. Gerhardt, *Divided Justice: A Commentary on the Nomination and Confirmation of Justice Thomas*, 60 GEO. WASH. L. REV. 969, 974 (1992) ("Justice Thomas' race and ideology accounted for his nomination. . . . The Thomas nomination reflected President Bush' general political approach to civil rights: The President hoped to mollify many whites dissatisfied with affirmative action through his opposition to the Civil Rights Act of 1991.").

25. See David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, C742 A.L.I. A.B.A. 1, § I. (1992) [hereinafter Cathcart].

26. See James Forman, Jr., *Victory by Surrender: The Voting Rights Amendments of 1982 and the Civil Rights Act of 1991*, 10 YALE L. REV. 133, 170 (1992).

27. Civil Rights Act of 1991, § 101, *overruling* Patterson v. McLean Credit Union,, 491 U.S. 164 (1989).

28. Civil Rights Act of 1991, § 102 (codified as 42 U.S.C. § 1981a (1992)). Previously compensatory and punitive damages and jury trials were available only for race and ethnic discrimination claims under 42 U.S.C. § 1981 (1988).

29. Civil Rights Act of 1991, § 105 (codified as 42 U.S.C. § 2000e-2(k)(1) (1992)).

30. Civil Rights Act of 1991, § 106 (codified as 42 U.S.C. § 2000e-2(l) (1992)).

31. Civil Rights Act of 1991, § 107 (codified as 42 U.S.C. § 2000e-2(m) (1992)).

32. Civil Rights Act of 1991, § 109 (codified as 42 U.S.C. § 2000e-1(a) (1992)), *overruling* E.E.O.C. v. Arabian American Oil Co., 111 S. Ct. 1227 (1991).

33. Civil Rights Act of 1991, § 113 (codified as 42 U.S.C. § 2000e-5(k) (1992)).

34. Civil Rights Act of 1991, § 112 (codified as 42 U.S.C. § 2000e-5(e)(2) (1992)), *overruling* Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989).

35. The vetoed Civil Rights Act of 1990 and the original House version of the 1991 Act contained very specific language on effective date. *See infra*, notes 64-65 and accompanying text.

36. John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government*, in SOCIAL CONTRACT, 80 (1977).

37. A "retroactive" law is one that takes away or impairs a vested right under existing law, imposes a new duty, or creates a new obligation involving past acts or transactions. A "retrospective" law affects acts or facts that occurred before it came into force but also can take away or impair vested rights. BLACK'S LAW DICTIONARY, 1184 (5th ed. 1979). The obvious overlap in definition has led the courts and commentators to consistently refer

to the "retroactive" application, although the controversy in certain aspects of the Act involve its retrospective application.

38. Seven circuit courts of appeals have heard the retroactivity issue; six concluded the Act does not apply retroactively and one that it does. Those cases finding prospective application only are *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886 (D.C. Cir. 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992); *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225 (7th Cir. 1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929 (7th Cir. 1992); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992); *Baynes v. AT & T Technologies, Inc.*, 976 F. 1370 (11th Cir. 1992). Only one circuit court has applied the Act retroactively; in *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1556 (9th Cir.1992), the Ninth Circuit concluded "that Congress intended the courts to apply the Civil Rights Act of 1991 to cases pending at the time of its enactment and to pre-Act conduct still open to challenge after that time."

39. Cathcart, *supra* note 25, § XI. For an impressive list of district courts that have already heard the issue, see the Appendix in *Fray*, 960 F.2d at 1382-83.

40. See, e.g., Michele A. Estrin, *Retroactive Application of the Civil Rights Act of 1991 to Pending Cases*, 90 MICH. L. REV. 2035 (1992) (capably arguing for prospective application but concluding, apparently based on personal emotion, that the Act should apply retroactively to all cases); David Allen, Comment, *Retroactivity of the Civil Rights Act of 1991*, 44 BAYLOR L. REV. 569 (1992) (finding the Act should apply prospectively).

41. Senator Kennedy, the chief democratic sponsor of the original bill, stated "[i]t will

be up to the courts to determine the extent to which the bill will apply to cases and claims that are pending on the date of enactment." 137 CONG. REC. S 15485 (daily ed. Oct. 30, 1991) (statement of Sen. Kennedy). One district court aptly described the issue when it stated "Congress in this new civil rights legislation punted on the question of whether or not the Act applies retroactively." *King v. Shelby Medical Ctr.*, 779 F. Supp 157, 165 (N.D. Ala. 1991). *See also Fray*, 960 F.2d at 1379 ("A majority of Congress favored retroactivity, but retroactive legislation carried the risk of another presidential veto. Congress therefore deliberately left the Act retroactivity neutral, reserving the issue for the courts to decide."); *Estrin*, *supra* note 40 at 2065 ("On the issue of the Civil Rights Act's retroactive applicability, Congress clearly and knowingly left a gap in the statute."); *Cook v. Foster Forbes Glass*, 783 F. Supp. 1217, 1219 (E.D. Mo. 1992) ("If anything, the legislative history of the Act shows merely that Congress decided not to decide.").

42. *See, e.g.,* Ellen M. Martin, Gerald D. Skoning, & Patricia K. Gillette, *Recent Developments in Sexual Discrimination*, 441 P.L.I. LIT. 647, 692 (1992) ("Courts have experienced difficulty in interpreting the Act because the language of the statute is ambiguous, a clear indication of congressional intent cannot be deciphered, and an apparent tension exists in Supreme Court precedent regarding retroactive application of a new statute.").

43. 416 U.S. 696, 711 (1974). The Court in *Bradley* cited as authority *United States v. Schooner Peggy*, 1 Cranch 103, 107 (1801), where the Court enforced a treaty with France that required restoration of property "not yet definitively condemned." Chief Justice Marshall wrote for the Court in finding that "if subsequent to the judgment and

before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." *Id.* at 110.

44. 488 U.S. 204 (1988). *Bowen* followed a long line of precedents disfavoring retroactive application of laws. *See, e.g.,* *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806) ("Words in a statute ought not to have a retroactive operation, unless they are so clear, strong and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied."). *See also*, Elmer Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1935).

45. 488 U.S. at 208.

46. *Compare* *Van Meter v. Barr*, 778 F. Supp. 83, 85 (D.D.C. 1991) (applying the *Bowen* presumption against retroactivity) with *Stender v. Lucky Stores, Inc.*, 780 F. Supp. 1302 (N.D. Cal. 1992) (finding the Act retroactive under *Bradley*). The *Van Meter* court also found that the plaintiff, an FBI agent, had not raised the issue of compensatory damages in the administrative phase of his complaint. Because the Title VII waiver of sovereign immunity for suits against the United States is conditioned on raising all substantive matters in an administrative complaint, the plaintiff had failed to exhaust administrative remedies. 778 F. Supp. at 85. When it decided *Van Meter*, the D.C. District Court had 332 Title VII suits pending, most of which involved federal employees. *Id.* at 83.

47. 494 U.S. 827, 837.

48. *Id.* ("[U]nder either [the *Bradley* or *Bowen*] view, where the congressional intent is clear, it governs.").

49. *Id.* at 857. (Justice Scalia wanted to apply "the clear rule of construction that has been applied, except for these last two decades of confusion, since the beginning of the Republic and indeed since the early days of the common law: absent specific indication to the contrary, the operation of nonpenal legislation is prospective only."). Justice Scalia is well known for his disdain of legislative history in favor of the textualist, or clear-meaning, approach to statutory interpretation. *See, e.g.,* *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527-30 (1989) (Scalia, J., concurring); *Union Bank v. Wolas*, 112 S. Ct. 527, 534 (1991) (Scalia, J., concurring). For reviews and critiques of his position, see WILLIAM N. ESKRIDGE, JR., & PHILLIP P. FRICKEY, *LEGISLATION: STATUTES AND CREATION OF PUBLIC POLICY*, 650-84 (1988) (reviewing Justice Scalia's adherence to textualism); Nicolas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1310-35 (critiquing textualism with emphasis on Justice Scalia). Justice Scalia's support of textualism is based on "notions of fairness because parties should only be held accountable for the laws at the time of their conduct." *Moze*, 963 F.2d at 935.

50. *Fray*, 960 F.2d at 1378.

51. *Moze*, 963 F.2d at 937-938.

52. *Baynes*, 970 F. 2d at 1375 ("[T]his case has been litigated for two and one-half years through a non-jury trial on the merits, all in reliance on prior law. In circumstances like these, we conclude that the effect of the statutory change [allowing jury trials] strongly mitigates against retroactivity.").

53. *Davis*, 976 F.2d at 1551; *see also, infra*, notes 93-95 on the use of negative inferences.

54. Estrin, *supra* note 40, at 2065-77. This approach is similar to the *Bradley* "manifest injustice" test and also requires full adjudication of each case to reach a conclusion. For another approach see what Professor Friedman refers to as the "Bennett reconciliation" in Leon Friedman, *The Civil Rights Act of 1991: Procedural Issues: Retroactivity, Changes in Procedures for Attacking Consent Decrees and Seniority Systems; New Limitations Periods*, C742 A.L.I. A.B.A. 1073 (1992) (analyzing the Act based on *Bennett v. New Jersey*, 470 U.S. 632 (1985), which distinguishes between merely procedural and substantive changes in the law). Many courts have flatly rejected a case-by-case analysis for substantive v. procedural issues. *See, e.g., Mozee*, 963 F.2d at 940 ("[I]t may cause undue confusion to require a trial court to conduct a provision-by-provision analysis of an act in order to distinguish between those provisions regulating procedure and damages and those provisions that affect substantive rights and obligations.").

55. Estrin, *supra* note 40, at 2069.

56. *Id.* at 2076-77.

57. Civil Rights Act of 1991, § 3(2) ("[T]o codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).").

58. CHARLES A. SULLIVAN, MICHAEL J. ZIMMER, RICHARD F. RICHARDS, *EMPLOYMENT DISCRIMINATION--1992 SUPPLEMENT* § 2 (2d ed. 1992) [hereinafter 1992 Supplement].

59. 490 U.S. 642.

60. Civil Rights Act of 1991, § 402(b). *See also, supra*, note 12 and accompanying text.

61. *See, supra* notes 2-6 and accompanying text. *See also*, SPECIAL RELEASE, *supra* note 17, at viii ("Even where the new statute attempts to codify the pre-1989 law, it often introduces subtleties and variations that will play an important role in the future."); *United States v. Burke*, 112 S. Ct. 1867, 1887 (1992) ("[T]he circumscribed remedies available under Title VII stand in marked contrast not only to those available under traditional tort law, but under other federal antidiscrimination statutes, as well.") (holding that Title VII backpay awards are not excludable from gross income as are tort damages); 137 CONG. REC. H 9548 (daily ed. Nov. 7, 1991 (statement of Rep. Hyde) ("Not only would retroactive application of the Act and its amendments to conduct occurring before the date of enactment be contrary to the language of section 402, but it would be extremely unfair. . . . defendants in pending litigation should not be made subject to awards of money damages of a kind and an amount that they could not possibly have anticipated prior to the time suit was brought against them.")).

62. H.R. 4000, S. 2104, 101st Cong., 2d Sess. (1990).

63. H.R. 1, 102d Cong., 1st Sess. (1991), *reprinted in* 137 CONG. REC. H 3922, H 3925 (daily ed. June 5, 1991). The President actually has no authority to "veto" legislation under the Constitution. Under Article I, Section 7, the President must "approve and sign" a bill or return it to the House where it originated with his "objections." That House must "proceed to reconsider" the bill in light of these "objections" and both Houses must approve by two-thirds approving the law despite the President's "objections." U.S. CONST. art. I, § 7.

64. H.R. 1, 102d Cong., 1st Sess., § 213 (1991), *reprinted in* 137 CONG. REC. H 3922-H 3925 (daily ed. June 5, 1991) applied effective dates of the based on the date of the Supreme Court decision being "restored." This section provides--

SEC. 213. APPLICATION OF AMENDMENTS AND TRANSITION

RULES. (a) APPLICATION OF AMENDMENTS.-The amendments made by-

(1) section 202 shall apply to all proceedings pending on or commenced after June 5, 1989;

(2) section 203 shall apply to all proceedings pending on or commenced after May 1, 1989;

(3) section 204 shall apply to all proceedings pending on or commenced after June 12, 1989;

(4) sections 205(a)(1), 205(a)(3), 205(a)(4), 205(b), 206, 207, 208, and 209 shall apply to all proceedings pending on or commenced after the date of enactment of this Act;

(5) section 205(a)(2) shall apply to all proceedings pending on or commenced after June 12, 1989; and

(6) section 210 shall apply to all proceedings pending on or commenced after June 15, 1989.

(b) TRANSITION RULES.-

(1) IN GENERAL.-Any orders entered by a court between the effective dates described in subsection (a) and the date of enactment of this Act that are inconsistent with the amendments made by sections 202, 203,

205(a)(2), or 210, shall be vacated if, not later than 1 year after such date of enactment, a request for such relief is made.

(2) SECTION 204.-Any orders entered between June 12, 1989, and the date of enactment of this Act, that permit a challenge to an employment practice that implements a litigated or consent judgment or order and that is inconsistent with the amendment made by section 204, shall be vacated if, not later than 6 months after the date of enactment of this Act, a request for such relief is made. For the 1-year period beginning on the date of enactment of this Act, an individual whose challenge to an employment practice that implements a litigated or consent judgment or order is denied under the amendment made by section 204, or whose order or relief obtained under such challenge is vacated under such section, shall have the same right of intervention in the case in which the challenged litigated or consent judgment or order was entered as that individual had on June 12, 1989.

(c) PERIOD OF LIMITATIONS.-The period of limitations for the filing of a claim or charge shall be tolled from the applicable effective date described in subsection (a) until the date of enactment of this Act, on a showing that the claim or charge was not filed because of a rule or decision altered by the amendments made by sections 202, 203, 205(a)(2), or 210.

65. 136 CONG. REC. S 16562 (daily ed. Oct 24, 1990).

66. One of the stated purposes of the 1990 Act and the original 1991 bill was to "respond to the Supreme Court's recent decisions *by restoring* the civil rights protections that were dramatically limited by those decisions." (emphasis added). H.R. 1, 102d

Cong., 1st Sess. § 2(b)(1) (1991), *reprinted in* 137 CONG. REC. H 3922, H 3925 (daily ed. June 5, 1991).

67. Statutory changes that are remedial in nature or simply restore rights will generally be applied retroactively, while substantive changes will not. *See, e.g., Baynes*, 976 F.2d at 1374; 137 CONG. REC. S 15485 (daily ed. Oct. 30, 1991) (statement of Sen. Kennedy).

68. *See, e.g., Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978) ("The length of litigation in complex Title VII . . . [cases] often rivals that of even the most notorious antitrust cases. In the instant case, we encounter another judicial paleolithic museum piece.").

69. In *Davis*, 976 F.2d at 1539-1540, the only circuit court decision applying the Act retroactively, the alleged discriminatory acts occurred in 1978--13 years before the "restoration" of the law in the Civil Rights Act of 1991. The original suit in *Wards Cove*, 493 U.S. at 647, was filed in 1974! The court in *Moze*, 963 F.2d at 938, rebutted a fairness argument for retroactive application of the Act: "It is far from clear that the equities in this case favor a retroactive application of the 1991 Act. We must remember that this case has been in litigation over fifteen years. A remand under a new statute after fifteen years of litigation seems anything but just."

70. *See* Beth Henschen, *Statutory Interpretations of the Supreme Court: Congressional Response*, 11 AM. POL. Q. 441, 444-45 (1983) (reporting that among all the bills involving federal labor or antitrust issues from 1950 to 1972, 176 were proposed to alter 27 Supreme Court decisions and only nine were enacted into law--nine changes in 22 years in both labor and antitrust).

71. Congressional overturns of Supreme Court decisions increased somewhat in the

1980's. See generally William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 616-17 (1991); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Decisions*, 101 YALE L.J. 331, 377-89 (1991). Such reversals are still fairly rare, however, despite routine monitoring of Court decisions by both House and Senate Judiciary Committees. See Solimine & Walker, *supra* note 1, at 448-430 (reviewing the process of and trends in Congressional response to Supreme Court decisions).

72. *Bonjorno*, 494 U.S. at 857 (Scalia, J., concurring).

73. The compromise between Republicans and Democrats that led to the 1991 Act was completed and signed into law on November 21, 1991--just over 30 days following the Clarence Thomas confirmation. This frenzied exchange left little time for anyone other than close insiders to take any part in the process. See Forman, *supra* note 26, at 199 ("Indeed, final testament to the impact of the Thomas/Hill hearings on the process was the speed with which the Senate took the virtually unprecedented steps of applying the civil rights law to members of Congress and providing that individual Senators, not the taxpayers, would be liable for the damages.").

74. The version of the bill the Senate finally approved, S. 1745, 102d Cong., 1st Sess. (1991) (enacted), was a frenetic compromise between House and Senate sponsors. See, e.g., 137 CONG. REC. H 9510 (daily ed. Nov. 7, 1991) (statement of Rep. Dreier) ("As we rush to ratify . . . the compromise settlement that has been reached between the parties who negotiated it, we have created a lack of symmetry between remedies.").

75. The Wards Cove Packing Company had been involved in defending a discrimination suit in federal court for over a decade. For a discussion of the case before the Supreme

Court and how the 1991 Act overturned the law of the case but exempted the packing company from the effects of the law, see the discussion of disparate impact at section III., *infra*.

76. See 137 CONG. REC. H 9555 (daily ed. Nov. 7, 1991 (statement of Rep. Faleomavaega); see also *Civil Rights for Some--Stealthy Amendment Sells Out Cannery Workers*, SEATTLE TIMES, Nov. 4, 1991, at A1 ("Senate Republicans managed to slip in a one-sentence amendment that would exempt the parties involved in Wards Cove Packing Co. v. Atonio, the very Supreme Court decision the new act is intended to overturn. . . . Fair is fair. This kind of lawmaking stinks.").

77. Congressman McDermott has sponsored a bill entitled the "Justice for Wards Cove Workers Act" that would delete the special Wards Cove exception. H.R. 1172, 103rd Cong., 1st Sess. (Mar. 2, 1993).

78. The term "employer" is defined by section 701(b) of the Civil Rights Act of 1964, as amended (codified as 42 U.S.C. § 2000e(b) (1992)) as

a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2101 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 5601(c) of Title 26, except that during the first year after

March 23, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

79. See 42 U.S.C. § 2000e-16(a) (1992) (applying the Civil Rights Act to employees and applicants of military departments and executive agencies, the Postal Service and Postal Rate Commission, the Government of the District of Columbia, and the competitive service employees in the legislative and judicial branches and the Library of Congress).

80. See, e.g., *Equal Employment Opportunity Comm'n v. Consol. Serv. Sys.*, 47 Daily Lab. Rep. (BNA) D-1, 2 (Mar. 12, 1993) (7th Cir. Mar. 4, 1992) ("Consolidated is a small company. . . . [T]he company's annual sales are only \$400,000. We mention this fact not to remind the reader of David and Goliath, or to suggest that Consolidated is exempt from Title VII (it is not), or to express wonderment that a firm of this size could litigate in federal court for seven years (and counting) with a federal agency, but to explain why [the company recruits employees by word of mouth].

81. The author herself recognized that businesses were at odds with one another over provisions in the Act. See *Estrin*, *supra* note 40, at 2076 n.266.

82. See *Estrin*, *supra* note 40, at 2077.

83. See, e.g., Federal Home Loan Bank Act, 12 U.S.C. § 1439a (1992) (all monies deposited pursuant to the statute shall be available "retroactively as well as prospectively"); Black Lung Benefits Act, 30 U.S.C. § 945(a)(1) & (c) (1992) (providing for processing of benefit claims "pending on, or denied on or before" the effective date and awarding benefits "on a retroactive basis"). See also *Luddington*, 966 F.2d at 228 ("A legislature has awesome power uncabined by a professional tradition of modesty and this

power is held a little in check by the presumption that its handiwork is to be applied only to future conduct.").

84. Even a so-called "procedural" alteration of available remedies can have a substantive effect on the parties. *See, e.g., Luddington*, 966 F.2d at 229 ("But many of us would squawk very loudly if people with unpaid parking tickets were made retroactively liable to life imprisonment.") (Posner, J.). *See also Gersman*, 975 F.2d at 898-899 ("[W]e agree with the Fifth Circuit that the Bradley presumption of applicability of law as of the time of decision must pertain to 'remedial provision[s]--not substantive obligations or rights under a statute.'" (citation omitted)).

85. Estrin, *supra* note 40, at 2076-2077. This analysis draws from the "manifest injustice" analysis of Bradley, discussed *supra* at notes 43-45, but ignores Justice Scalia's powerful objection to this analysis: it transforms a rule of law into a rule of judicial discretion, "giving judges power to expand or contract the effect of legislative action." *Bonjorno*, 494 U.S. at 857.

86. Estrin, *supra* note 40, at 2077.

87. 2 D.O.J. ALERT No. 5, 8 (1992) (reporting statistics from Michael Selmi of the Lawyers Committee for Civil Rights Under Law).

88. Contrary to popular understanding, a cause of action under Title VII is not limited to suit in federal courts; state courts will also be forced to consider and rule on these issues. For an excellent summary of the interplay between federal and state civil rights laws in state courts, see Friedman, *supra* note 54; *see also*, Steven H. Steinglass, *The Civil Rights Act of 1991 and The Judicial Improvements Act of 1990: Their Impact on State Court*

Practice and on the Supplemental Jurisdiction of the Federal Courts, C742 A.L.I. A.B.A. 93 (1992).

89. Allen, *supra* note 35, at 589.

90. Civil Rights Act of 1991, § 402(a).

91. *Moze*, 963 F.2d at 932.

92. The sole purpose of this section is to exempt from application of the Act the case of *Wards Cove*, 490 U.S. 642. See *Davis*, 976 F.2d at 1551 n.7; SPECIAL RELEASE, *supra* note 17, at viii; *Moze*, 963 F.2d at 933, n.2, (quoting 137 CONG. REC. S 15478 (daily ed. Oct 30, 1991) (statement of Senator Dole) ("At the request of the Senators from Alaska, section [402(b)] specifically points out that nothing in the Act will apply retroactively to the Wards Cove Packing Company, an Alaska company that spent 24 years defending against a disparate impact challenge.")).

93. Civil Rights Act of 1991 § 109(c) (codified as 42 U.S.C. § 2000e-1(c)(1) (1992)).

94. *Davis*, 976 F.2d at 1551 ("We would rob Sections 109(c) and 402(b) of all purpose were we to hold that the rest of the Act does not apply to pre-Act conduct."). *But see*, 137 CONG. REC. H 9548 (daily ed. Nov. 7, 1991) ("Absolutely no inference is intended or should be drawn from the language of subsection (b) [of section 402 of the Act] that the provisions of the Act of the amendments it makes may otherwise apply retroactively to conduct occurring before the date of enactment of this Act. Such retroactive application of the Act and its amendments is not intended; on the contrary, the intention of subsection (b) is simply to honor a commitment to eliminate every shadow of doubt as to any possibility of retroactive application to the case involving the Wards Cove Company.") (statement of Rep. Hyde).

95. See generally, Cathcart, *supra* note 25, § XI. ("A difficulty with the reasoning from negative inference is that there is an inferential argument going the other way."); *Fray*, 960 F.2d at 1376 ("The 1990 bill contained specific retroactivity provisions and was vetoed in part for that reason. The 1991 Act omitted those provisions, and the debate in both houses emphasized the need to pass a bill that the President would sign. . . . This sequence of events is highly probative [of prospective application]."). *Accord*, *Moze*, 963 F.2d at 933.

96. See *supra*, note 64, for the specific retroactivity language of the prior bills.

97. See SPECIAL RELEASE, *supra* note 17, n.3.

98. See Cathcart, *supra* note 25, § XI ("The battle over retroactivity was waged on the floor of the House and Senate as Members of Congress sought to create legislative history expressing their views on retroactivity."). The *Moze* court found that proponents on both sides of the retroactivity issue "[d]emonstrat[ed] a sophisticated understanding of how judges dissect legislative history." 960 F.2d at 1376. For an excellent summary of the interpretations placed in the congressional record, see *id.*, n.10.

99. Statement on signing the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOC. 1701, 1702 (Nov. 21, 1991).

100. 137 CONG. REC. S 15953 (daily ed. Nov. 5, 1991) (statement of Sen. Dole).

101. 137 CONG. REC. S 15485 (daily ed. Oct. 30, 1991) (statement of Sen. Kennedy).

102. By observing the process of lawmaking, the courts have fundamentally altered the process itself. See, Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 17-23 (1989) (examining post-Newtonian theoretical physics as they apply to law).

103. Symposium, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L. J. 705 (1992) (supporting the use of "positive political theory" for the interpretation of legislation, which involves consideration of the compromise realities in the political process) [hereinafter Bargains].

104. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 657 (1990) (analyzing data from the 1986 through 1988 terms).

105. Solimine & Walker, *supra* note 71, at 428, (citing Nicolas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1332 (1990)).

106. See Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231 (discussing the importance of "plain meaning" in statutory interpretation). See also, Eskridge, *supra* note 71, at 650-84 (reviewing Justice Scalia's support of the textualist analysis of statutory decisions); Kenneth A. Shepsle, *Congress Is a They, Not an It: Legislative Intent as an Oxymoron*, 12 INT'L REV. L. & ECON. (1992).

107. *United States v. Public Util. Comm'n*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring) ("When we decide from legislative history . . . what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a Congressman, I am handicapped in that weird endeavor. That process seems to me not interpretation of a statute but creation of a statute.").

108. See, e.g., *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1983) (deferring to agency interpretation is appropriate when the statute

is unclear, the agency interpretation is reasonable, and neither the law nor the legislative history indicates a clear rejection of the agency's position).

109. *Equal Employment Opportunity Commission Policy Guidance on Retroactivity of the Civil Rights Act of 1991*, EEOC Notice No. 915.002 (December 27, 1991), 1991 WL 323429 (finding the Act applies only to conduct occurring after the effective date); *see also* 59 Daily Lab. Rep (BNA) AA-1 (Mar. 30, 1993) (reporting that three members of the EEOC voted to reverse the policy on retroactivity without following EEOC procedures on voting; Chairman Kemp, scheduled to leave on April 2, declared the vote out of order and invalid. If implemented, the revised opinion would affect more than 10% of the EEOC's currently pending 60,000 cases).

110. *See, e.g., Fray*, 960 F.2d 1370; *Moze*, 963 F.2d 929.

111. *Davis*, 976 F.2d 1536.

112. *Allen*, *supra* note 35, at 577.

113. *Fray*, 960 F.2d at 1378, (citing NORMAN J. SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 48.04 (5th ed. 1992)).

114. *See Bargains*, *supra* note 103, at 718 ("Because the President has a constitutionally granted role in the legislative process, statutory interpretation must take the President's preferences into account and must accord them considerable weight if the President possessed a credible veto threat over the statute in question.").

115. *See id.* at 719 ("A statutory interpretation is invalid if the explicit statement of that interpretation would have caused the President to veto the bill without Congress being able to override the veto.").

116. *Mozee v. American Commercial Marine Service Co.*, 963 F.2d 929 (7th Cir. 1992), *cert. granted*, 113 S. Ct. 207 (1992); *Hamilton v. Komatsu-Dresser, Inc.*, 964 F.2d 600 (7th Cir. 1992), *cert. granted*, 113 S. Ct. 324 (1992).

117. *Landgraf v. U.S.I. Film Products*, 968 F.2d 427 (4th Cir. 1992), *cert. granted*, No. 92-757 (Feb. 22, 1993).

118. *Rivers v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992) (en banc), *cert. granted*, No. 92-938 (Feb. 22, 1993).

119. *See* 29 Daily Lab. Rep. (BNA) AA-1 (Feb. 16, 1993) (reporting that a change to the EEOC's nonretroactivity opinion may be in the offing under the Clinton administration). *See also supra*, note 109, on the "out of order" vote by the EEOC.

120. WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 1, sc. 2, 11. 140-41 (Arthur Humphries ed., Oxford Press 1984).

121. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

122. 42 U.S.C. § 2000e-2(a)(2) (1988).

123. 401 U.S. 424 (1971).

124. The leading cases in disparate impact discrimination before *Wards Cove* were *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *New York City Transit v. Beazer*, 440 U.S. 568 (1979); *Connecticut v. Teal*, 457 U.S. 440 (1982).

125. *See* SPECIAL RELEASE, *supra* note 17, § 4.

126. *Griggs* applied a strict test of "manifest relationship to the employment practice in question." 401 U.S. at 432.

127. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 n.31 (1979).

128. 487 U.S. 977 (1988).

129. *Id.* at 993.

130. 411 U.S. 792 (1973).

131. *McDonnell-Douglas*, 411 U.S. at 802. The *prima facie* case is established by showing that the plaintiff is a member of a protected group (by race, color, sex, religion, or national origin) and the employer's most likely legitimate basis for taking the challenged action is unfounded. *See generally*, SCHLEI & GROSSMAN, *supra* note 4, § 2.5.

132. *Wards Cove*, 490 U.S. 642.

133. 490 U.S. at 645.

134. For a description of the case history, see *id.* at 647-649.

135. 490 U.S. at 650-655.

136. *Id.* at 650-651. The courts had widely applied the concept of "qualified" labor pool before *Wards Cove*. *See, e.g.*, *McCullough v. Consol. Rail Corp.*, 776 F. Supp. 1289 (N.D. Ill. 1991) (finding that qualified, as used in the context of a *prima facie* case of disparate impact discrimination, does not necessarily mean best qualified for the position; it does require a showing of being competent and otherwise eligible).

137. 490 U.S. at 659. The Court also referenced here "a host of evils" it had previously identified, referring to the possibility of employer's establishing employment quotas to protect themselves against disparate impact claims. This reasoning would later become the guidon for the Bush administration in its objections to the Civil Rights Act of 1990 and the initial drafts of the 1991 Act, discussed *infra* at notes 179-181 and accompanying text.

138. *Id.* The Court went on to state that "[w]e acknowledge that some of our earlier decisions can be read as suggesting otherwise. . . . But to the extent that those cases speak of an employer's 'burden of proof' with respect to a legitimate business justification defense, . . . they should have been understood to mean an employer's production -- but not persuasion -- burden." *Id.* at 660.

139. *Id.* at 656 ("the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities"), *quoting Watson*, 487 U.S. at 994.

140. 490 U.S. at 661.

141. *Id.*

142. The Supreme Court established this concept of discrimination in *Griggs*, 410 U.S. 424, which some commentators have heralded as "the most important court decision in employment discrimination law." *See, e.g., SCHLEI & GROSSMAN, supra* note 4, at 5.

143. Civil Rights Act of 1991 § 3(2). *See supra*, note 57 for the text of Section 3(2).

144. 490 U.S. 642 (1989).

145. The Act also specifically preserves all "other Supreme Court decisions prior to *Wards Cove*." *See supra*, note 57 for text of the Act.

146. One commentator describes this portion of the Act as where "Congress and the President told a conservative Supreme Court that enough is enough." *See J. Shannon, The Civil Rights Act of 1991: What Does it Mean to Me?*, 26 A.P.R. ARK. LAW. 16, 18 (1992).

147. Civil Rights Act of 1991 § 402(b). This section states the following: "Certain Disparate Impact Cases. Notwithstanding any other provision of this Act, nothing in this

Act shall ap[ply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1989." Numerous groups protested this overt political duplicity and lobbied intensely against it. *See, e.g.*, citations at *supra* notes 76-77. Congressman McDermott has also proposed legislation to overturn Section 402(b) entitled the "Justice for Wards Cove Workers Act." H.R. 1172, 103rd Cong. 1st Sess. (1993)

148. Section 105 of the Act states that "[t]he demonstration referred to by subparagraph (a)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice.'" Civil Rights Act of 1991, § 105(a) (codified as 42 U.S.C. § 2000e-2(k)(1)(C) (1992)). This provision simply refers to pre-Wards Cove law. Subparagraph (b) also limits interpretation of "business necessity/cumulation/alternative business practice" to an interpretive memorandum entered into the Congressional Record. Civil Rights Act of 1991, § 105(b). *See infra*, text accompanying note 155 for the relevant portion of the Interpretive Memorandum.

149. *See supra*, notes 74-78 and accompanying text for a discussion of the retroactivity issue and the effect of the *Ward's Cove* exception on the interpretation of retroactivity.

150. Civil Rights Act of 1991, § 105(a) (codified as 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1992)); *see also* Michael J. Davidson, *The Civil Rights Act of 1991*, ARMY LAW., Mar. 1992, at 6 (*citing* remarks from the unofficial legislative history).

151. The last House version of the Act defined "business necessity" for two different scenarios -- employment decisions involving selection and those not involving selection. It provides that --

(o)(1) The term 'required by business necessity' means- (A) in the case of employment practices involving selection (such as hiring, assignment, transfer, promotion, training, apprenticeship, referral, retention, or membership in a labor organization), the practice or group of practices must bear a significant relationship to successful performance of the job; or (B) in the case of employment practices that do not involve selection, the practice or group of practices must bear a significant relationship to a significant business objective of the employer. (2) In deciding whether the standards in paragraph (1) for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The defendant may offer as evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence, and the court shall give such weight, if any, to such evidence as is appropriate.

H.R. 1, 102d Cong., 1st Sess. § 3(o) (1991).

152. See Ingerswon, *New Civil Rights Law Bears Seeds of Controversy*, The Christian Science Monitor, Nov. 21, 1991, at 2, col. 2 ("[T]o win passage, the bill had to blur a key point by avoiding a clear definition of how business can justify job requirements that end up discriminating by race or sex.").

153. This was doubtlessly motivated by volumes of "legislative history" placed into the

record by both pro-employee and pro-employer proponents and is discussed in more detail at notes 97-101 and accompanying text, *supra*.

154. Civil Rights Act of 1991, § 105(b).

155. 137 CONG. REC. S 15276 (daily ed. Oct 25, 1991).

156. Many courts will undoubtedly attempt to gauge "the intent of Congress" before attempting to define these terms. This would not only be a futile search, it would also help to encourage such careless draftsmanship in future legislation. *See generally*, Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005 (1992) ("The problems that have resulted from judicial reliance on legislative history would probably prompt Learned Hand today to reject the legislative histories he once embraced.") [hereinafter Learned Hand].

157. 401 U.S. at 432; *see also Dothard*, 433 U.S. at 331 (overturning the use of height and weight standards for the selection of correctional counselors based on job relation--a strict interpretation of business necessity).

158. 440 U.S. 568, 587 n.31 (1979) (holding that the challenged practice must serve "legitimate employment goals of safety and efficiency.").

159. 457 U.S. 440, 451 (1982) ("The examination given was not an artificial, arbitrary, or unnecessary barrier, because it measured skills related to effective performance of [the job]."). Circuit courts of appeals had also begun to apply a job related standard based on legitimate employment goals. *See, e.g., Rivera v. City of Wichita Falls*, 665 F.2d 534, 537 (5th Cir. 1982); *Gillespie v. Wisconsin*, 771 F.2d 1035, 1040 (7th Cir. 1985, *cert. denied*, 477 U.S. 1083 (1986)). *See generally* SCHLEI & GROSSMAN, *supra* note 4, at 102-114;

FIVE YEAR SUPPLEMENT TO EMPLOYMENT DISCRIMINATION LAW, 43 (BNA Books, 1989) [hereinafter Five Year Supplement].

160. See SPECIAL RELEASE, *supra* note 17, § 4 ("These lower court decisions have lost their authority both as to what the terms mean and whether both are necessary elements to the employer's defense.").

161. The EEOC's *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607.5(I) (1991), recognize such distinctions: "If job progression structures are so established that employees will probably, within a reasonable period of time and in a majority of cases, progress to a higher level, it may be considered that the applicants are being evaluated for a job or jobs at a higher level."

162. See generally, SCHLEI & GROSSMAN, *supra* note 159, Ch. V. (discussing use of subjective criteria in hiring).

163. See *infra*, note 327-328 and accompanying text.

164. Cathcart, *supra* note 25, § III.B.3.

165. "Justifications such as customer preference, morale, corporate image, and convenience, while perhaps constituting 'legitimate' goals of an employer, fall far short of the specific proof required under *Griggs* and this legislation to show that a challenged employment practice is closely tied to the requirements of performing the job in question and thus is 'job related for the position in question.'" 137 CONG. REC. H 9528 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards). Representative Edwards reasons that the language "job related for the position in question and consistent with business necessity" was borrowed from § 102(b)(6) of the Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (codified as 42 U.S.C. §§ 12101-12213 (1992)), and "this

language clearly requires proof by an employer of a close connection between a challenged practice with disparate impact and the ability to actually perform the job in question." *Id.*

166. *But see supra* notes 94-95 and accompanying text for a discussion of how a negative inference cuts both ways when applied to the 1991 Act.

167. 490 U.S. at 659, *citing Watson*, 487 U.S. at 997-999; *Beazer*, 440 U.S. at 587, n.31; *Griggs*, 401 U.S. at 432.

168. 440 U.S. at 587 n.31.

169. Section 3(2) states that one of the purposes of the Act is "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)." Civil Rights Act of 1991, § 3(2). Since *Wards Cove* was simply a restatement and clarification of existing case law, its analysis, if not its precedential value, continues to be valid.

170. Senator Dole's interpretation is that

"job related for the position in question" is to be read broadly, to include any legitimate business purpose, even those that may not be strictly required for the actual day-to-day activities of an entry level job. Rather, this is a flexible concept that encompasses more than actual performance of actual work activities or behavior important to the job.

137 CONG. REC. S 15476 (daily ed. Oct. 30, 1991) (statement of Senator Dole).

President Bush formally endorsed this interpretation in the signing ceremony for the Act. Statement on Signing the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOC. 1701, 1702 (Nov. 21, 1991).

171. Cathcart *supra* note 25, § III.B.

172. Davidson, *supra* note 150, at 7. *See also*, Irving Geslewitz, *Understanding the 1991 Civil Rights Act*, 38 PRAC. LAW No. 2, 57 (1991) ("No doubt this issue will fuel protracted controversy, with further clarification likely coming from the courts rather than Congress."). Another "fertile" issue is the "drug exception" in section 105, which states that

Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, . . . other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

Civil Rights Act of 1991, § 105(c) (codified as 42 U.S.C. § 2000e-2(k)(3) (1992)). Little imagination is needed to contemplate arguments for either plaintiffs or employers using this language.

173. Civil Rights Act of 1991, § 105 (codified as 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1992)).

174. Civil Rights Act of 1991, § 104 (codified as 42 U.S.C. § 2000e(m) (1992)).

175. The plaintiff's burden requires demonstrating the discriminatory impact of particular practices. *See infra*, notes 179-83 and accompanying text for the plaintiff's burden of demonstrating "particularity."

176. In his memorandum to President Bush, which was attached to the President's veto of the 1990 Act, then Attorney General Richard Thornburgh wrote: "As you know, your administration is prepared to accept the shifting of this burden [of proof] to the defendant." 136 CONG. REC. S 16562 (daily ed. Oct 24, 1990).

177. Cathcart, *supra* note 25, § III.B.

178. One commentator believes it "will depend on the results that emerge in future disparate impact cases. If the perception among employers is that their success rate in these cases is too low, many of them may apply a cost-benefit analysis and conclude that they are safer in hiring and promoting by numbers reflecting the percentages in the surrounding community than by risking disparate impact lawsuits they are likely to lose. On the other hand, if employers perceive that they can win these cases, they may not let this consideration sway hiring decisions." Geslewitz, *supra* note 172, at 62.

179. 490 U.S. at 65? ("A plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack.").

180. *See Pouncy v. Prudential Ins. Co.*, 668 F.2d 795 (5th Cir. 1982).

181. Civil Rights Act of 1991, § 105 (codified as 42 U.S.C. § 2000e-2(k)(1)(A) (1992)).
The original draft of the Act allowed a plaintiff to simply establish a disparate impact

without demonstrating which particular practice caused the impact. See H.R. 1, § 4, 101st CONG., 2d Sess. (1991) ("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."). President Bush called this a "quota" provision when he vetoed the 1990 Act. 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990).

182. President Bush continued to ride the "quota" horse after his veto of the 1990 Act. See, e.g., Martin Schram, *Bush is Jogging on the Racial Low Road*, NEWSDAY, June 5, 1991, at A1 ("It's a quota bill, no matter how the authors dress it up. You can't put a sign on a pig and say it's a horse."). He finally accepted the compromise language authored by Senator Danforth, stating "we have reached an agreement with Senate Republican and Democratic leaders on a civil rights bill that will be a source of pride for all Americans. It does not resort to quotas, and it strengthens the cause of equality in the workplace." Bush News Conference on Civil Rights Accord, N.Y. TIMES, Oct. 26, 1991, § 1 at 7. The President's political motivation in supporting the bill was obvious to most. See, e.g., Robin Toner, *Having Ridden Racial Issues, Parties Try to Harness Them*, N.Y. TIMES, Oct. 27, 1991 § 1 at 1 ("Mr. Bush . . . pulled off yet another deft move in racial politics. He presented himself Friday as both the opponent of quotas and the defender of civil rights, a comfortable place to be in American politics.").

183. Civil Rights Act of 1991, § 105(a)(B)(ii) (codified as 42 U.S.C. § 2000e-2(k)(1)(B)(ii) (1992)) ("If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity."). See discussion of no cause defense

in text accompanying notes 203-209, *infra*. See also SPECIAL RELEASE, *supra* note 17, § 4 ("A major issue is whether this new defense differs from the previous rebuttal possibility of the employer to undermine plaintiff's showing of impact.").

184. 433 U.S. 321 (1977). See text accompanying note 201, *infra*, for the text of the Interpretive Memorandum.

185. 137 CONG. REC. S 15276 (daily ed. Oct. 25, 1991) (Interpretive Memorandum).

186. SPECIAL RELEASE, *supra* note 17, § 4. Lower courts had come to some understanding of what constituted a "practice" in disparate impact cases. See, e.g., *Council 31, AFL-CIO v. Ward*, 771 F. Supp. 247 (N.D. Ill. 1991) (holding that to constitute a practice sufficient to establish a disparate impact claim, the allegedly discriminatory conduct must be a continuing, ongoing system or method used by the employer in the course of regularly conducted employment activity). The value of these precedents must be questioned after the changes in the 1991 Act.

187. Civil Rights Act of 1991, § 105(a) (codified as 42 U.S.C. § 2000e-2(k)(1)(C) (1992)).

188. Civil Rights Act of 1991, § 105(a) (codified as 42 U.S.C. § 2000e-2(k)(1)(a)(ii) (1992)). See text accompanying note 187, *supra*, for an explanation of the contents of subparagraph (C).

189. The plaintiff has the burden of proof on the alternative practice and would be required to demonstrate the alternate practice had a lesser impact than the one chosen by the employer, the employer was aware of the alternate practice, and the employer refused to adopt the alternate practice. Congress could have defined all these terms but, instead, left them open to development in the courts. This result of a frenzied compromise

motivated by reelection politics would certainly earn a failing grade in a college level course on legislative drafting.

190. The "textualist" analysis limits interpretation to the actual language of the law. For an excellent summary of the differences between the textualist approach and statutory interpretation, see Learned Hand, *supra* note 156. *See also*, Solimine & Walker, *supra* note 71 (critically reviewing the textualist approach).

191. 42 U.S.C. 2000e-2 (1991). *Cf.* text accompanying note 45 and note 48.

192. *See* SPECIAL RELEASE, *supra* note 17, § 4 n.80 and accompanying text. Resolution of these issues should provide full employment opportunities for labor attorneys for many years.

193. 490 U.S. at 660-661.

194. *Id.* at 661.

195. *Id.* Several circuit court cases have also upheld the relevance of cost in consideration of alternative business practices. *See, e.g.*, Clady v. County of Los Angeles, 770 F.2d 1424, 1426 n.1 (9th Cir. 1985, *cert. denied*, 475 U.S. 1009 (1986)); Christner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1263 (6th Cir. 1981). *But see* City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978).

196. *See supra* note 169 and accompanying text.

197. *See supra* note 181 and accompanying text for the actual language of the Act. Entries in the "unofficial" legislative history of the Act indicate that mere difficulty or expense in demonstrating particular practices is insufficient. *See, e.g.*, 137 CONG. REC. S 15474 (daily ed. Oct. 30, 1991) (views of Senators Burns, Cochran, Dole, Garn, Gorton,

Grassley, Hatch, Mack, McCain, McConnell, Murkowski, Simpson, Seymour, and Thurmond).

198. Cathcart, *supra* note 25, § III.B.2.

199. *See infra*, notes 203-208 and accompanying text for a discussion of the no cause defense.

200. *See* text accompanying note 181, *supra*, for the actual statutory language.

201. 137 CONG. REC. S 15276 (daily ed. Oct. 30, 1991) (Interpretive Memorandum); *see also supra*, note 184 and accompanying text.

202. This was the outcome envisioned by Republican supporters of the Act. "For instance, a 100 question intelligence test may be challenged and defended as a whole; it is not necessary for the plaintiff to show which particular questions have a disparate impact." 137 CONG. REC. S 15474 (daily ed. Oct 30, 1991) (statement of Senator Dole).

203. Civil Rights Act of 1991, § 105 (codified as 42 U.S.C. § 2000e-2(k)(1)(A) (1992)).

204. *See* Cathcart, *supra* note 25, § III.B.3.

205. SPECIAL RELEASE, *supra* note 17, § 4.

206. *See id.* § 4 n.84 ("There exists the possibility that defendant could carry its burden on all the employment practices making up its selection process without undermining the bottom line showing of impact. Presumably defendant would win because the unexplained was not attributable to the employer.").

207. *See* Cathcart, *supra* note 25, § ? ("Many employers were concerned that this 'bottom line' attack would impose on them the nearly impossible requirement of defending all of their employment practices, or would require them to commence a

tactically self-destructive litigation effort to show that alleged employment discrimination had been caused by one practice and not all of them.").

208. This outcome is consistent with the EEOC's *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607.4(C) (1991), which requires evidence that the "total" selection process results in an adverse impact.

209. An employer who can successfully show that a single challenged practice does not have a disparate impact should, logically, avoid any liability. The particularity and no cause provisions amend § 703(k)(1)(B) of the Civil Rights Act of 1964. The two new subsections, (i), addressing multicomponent practices and (ii), the no cause provision, are not, however, connected by either coordinating or subordinating conjunction. This indicates the two sections are separate components and the no cause defense would apply to a single challenged employment practice. See SPECIAL RELEASE, *supra* note 17, § 4.

210. 490 U.S. at 651.

211. *Id.* at 652.

212. *Id.* at 653. The Court recognized that this is a "bottom line" analysis and that an employee could still establish that a particular employment practice has a disparate impact even when the bottom line shows a balanced minority representation. *Id.* n.8.

213. 490 U.S. at 661-662 (Blackmun, J., joined by Brennan and Marshall, J.J., dissenting) ("[I]t requires practice-by-practice statistical proof of causation, even where, as here, such proof would be impossible.").

214. See Geslewitz, *supra* note 172, at 62 ("[N]ot all of *Wards Cove* was legislatively reversed. . . . that portion of *Ward Cove* that adopted stricter statistical standards for proving disparate impact . . . is still good law.").

215. *See, e.g.,* E.E.O.C. v. Chicago Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991) (overturning an EEOC finding of discrimination for failing to account for language and cultural practices in Hispanic neighborhood; EEOC simply when compared percentage of black employees to black population in neighborhood); Geslewitz, *supra* note 172, at 62 ("Although this decision immediately preceded the passage of the Act, it would appear that the Seventh Circuit's analysis might not be affected by the Act's new requirements.").

216. *See generally* SCHLEI & GROSSMAN, *supra* note 4, at Chap. 4 (reviewing development of objective testing).

217. Civil Rights Act of 1964 (as amended), § 703(h) (codified as 42 U.S.C. 2000e-2(h) (1992)).

218. *See, e.g.,* Bridgeport Guardians, Inc. v. City of Bridgeport, 933 F.2d 1140 (2d Cir.), *cert. denied*, 112 S. Ct. 337 (1991) (involving hiring and promotion testing for police department).

219. Civil Rights Act of 1991, § 106 (codified as 42 U.S.C. § 2000e-2(l) (1992)).

220. 137 CONG. REC. S 15476 (daily ed., Oct. 30, 1991).

221. *See infra*, Section V.

222. 137 CONG. REC. S 15484 (daily ed. Oct. 30, 1991); 137 CONG. REC. H 9529 (daily ed. Nov. 7, 1991).

223. Cathcart, *supra* note 25, § VIII.A.

224. Forman, *supra* note 26, n.237.

225. *Quoted in* Mark Starr, *Emerson: 'I Hate Quotations,'* NEWSWEEK, Mar. 12, 1990, at 75, 76.

226. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 238 (1989) (Brennan, J.).

227. The EEOC has recently defined mixed motive cases as those where "the evidence shows that the employer acted on the basis of both lawful and unlawful reasons." Equal Employment Opportunity Comm'n Directive 915.002, *Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory*, (Jul. 14, 1992), 1992 WL 189088, *5 [hereinafter EEOC Revised Guidance].

228. Cathcart, *supra* note 25, § IV.

229. Whistleblower Protection Act (WPA), Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified as 5 U.S.C. § 2302 (b)(8) (1992) (applying a "contributing factor" test that can be defeated by "clear and convincing evidence" in cases of reprisal against federal employees); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 (1983) (applying mixed motive analysis to retaliatory discharge under National Labor Relations Act).

230. Geslewitz, *supra* note 172, at 63. *See also*, Shannon, *supra* note 146, at 21 ("Perhaps more than any other issue in the [1991 Act], mixed motive decisions provide the greatest potential for increasing Title VII and ADA litigation. Hiring and promotion decisions for executive and professional positions often involve a myriad of objective and subjective criteria. Many representatives of the employer are involved in the decision-making process. A plaintiff will often be able to find someone whose input into the process was motivated by discrimination. Identifying that one unlawfully motivated contributing individual assures minimum liability.").

231. 29 U.S.C. §§ 151-187 (1992).

232. *See, e.g., NLRB*, 462 U.S. at 400 ("[T]he employer could avoid [liability] by proving by a preponderance of the evidence that . . . the employee would have lost his

job in any event."); *accord*, Hall v. NLRB, 941 F.2d 684, 688 (8th Cir. 1991) (finding the protected conduct "would have brought about the same result even without the illegal motivation.").

233. See Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (holding that the employer established it would have reached the same decision and was not liable for discharge motivated in part by retaliation for employee's exercising First Amendment Rights); *see also* Warren v. Dep't of the Army, 804 F.2d 654, 658 (Fed. Cir. 1986) (requiring action to be motivated by "predominantly retaliation" and causally connected to retaliation in whistleblower reprisal before the Whistleblower Protection Act of 1989).

234. 29 U.S.C. § 206(d)(1) (1992) (stating differential must be discrimination "on the basis of sex"). *See generally*, Corning Glass Works v. Brennan, 417 U.S. 188 (1974); SCHLEI & GROSSMAN, *supra* note 4, §17.5.

235. Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989). A violation is established if the employee proves by a preponderance of the evidence that the protected activity "was a contributing factor in the personnel action." 5 C.F.R. § 1209.7(a) (1992). The agency can rebut the employee's proof by showing "by clear and convincing evidence that it would have . . . taken the same personnel action in the absence of the [protected activity]." 5 C.F.R. § 1209.7(b) (1992).

236. 490 U.S. 228.

237. 825 F.2d 458 (1987). The lower courts may have been influenced somewhat by the underrepresentation of women in the firm. At the time of the plaintiff's consideration for partner, only seven of 662 partners were women. 490 U.S. at 232-233. Of the 47 candidates considered for partner with the employer, only one--the plaintiff--was a

woman. *Id.* at 233. There was, however, ample evidence that factors other than sex were involved. One reviewing partner at Price Waterhouse described the plaintiff as "universally disliked," and another described her as "consistently annoying and irritating." *Id.* at 236.

238. 490 U.S. at 250.

239. *Id.*

240. *Id.* at 250. This shifting of the burden of proof was new to disparate treatment analysis, which had previously imposed only a burden of production on the employer to state a valid, nondiscriminatory reason for its action. *See supra*, notes 123-124 and accompanying text for the elements of a disparate impact analysis. This departure from previously accepted precedent was highlighted in Justice O'Connor's concurrence and in the dissent of Justices Kennedy and Scalia and Chief Justice Rehnquist. *See e.g.*, 490 U.S. at 279 ("Today the Court manipulates existing and complex rules for employment discrimination cases in a way certain to result in confusion. Continued adherence to the evidentiary scheme established in [prior disparate treatment cases] is a wiser course than creation of more disarray in an area of the law already difficult for the bench and bar, and so I must dissent.") (Scalia, J., dissenting).

241. *Id.* at 252 (emphasis added). The dissenting opinion advocated a "could have" test, which would allow an employer to justify its actions based on information not known at the time of the alleged discriminatory act but which "could have" justified the challenged act if known. *See id.* at 280.

242. 42 U.S.C. § 2000e-2(a)(1) (1992) (emphasis added).

243. *Price Waterhouse*, 490 U.S. at 239-246.

244. *See id.* at 280-281 ("By any normal understanding, the phrase 'because of' conveys the idea that the motive in question made a difference to the outcome.") (citing W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS, 265 (5th ed. 1984) ("An act or omission is not regarded as a cause of an event if the particular event would have occurred without it.")).

245. *See* SPECIAL RELEASE, *supra* note 17, at 35 (citing 42 U.S.C.A. § 2000e-3 (1988)); *see also* Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985).

246. *Id.* at 36. *See also* Perry v. Kunz, 878 F.2d 256 (8th Cir. 1989) (applying the *Price Waterhouse* test to the Age Discrimination in Employment Act); Wilson v. Firestone Tire & Rubber Co., 932 F.2d 510 (6th Cir. 1991) (requiring direct evidence in mixed motive test under Title VII).

247. Civil Rights Act of 1991, §107(a) (codified as 42 U.S.C. §2000e-2(m) (1992)). *See generally* 137 CONG. REC. S 15476 (daily ed. Oct 30, 1991).

248. Civil Rights Act of 1991, §107(b) (codified as 42 U.S.C. §2000e-5(g)(3)(B)(ii) (1992)).

249. *Id.* Compensatory and punitive damages are also a new addition to Title VII from the 1991 Act. *See infra* section V.

250. 490 U.S. at 280-281. *See also* EEOC v. Alton Packing Co., 901 F.2d 920, 925 (11th Cir. 1990) (holding that better qualified candidate who applied for position and was selected after nonpromotion of plaintiff was not a defense to employer's decision not to hire plaintiff, but employer proved other valid reason for nonselection by preponderance). The EEOC has proposed a novel approach for cases involving valid

after-acquired evidence: the employer is shielded from reinstating a terminated employee but would be liable for back pay and compensatory damages up to the date when the valid basis was discovered. Such a plaintiff could also be entitled to punitive damages. EEOC Revised Enforcement Guidance, *supra* note 227, at *8.

251. See, e.g., *Fadhl v. City and County of San Francisco*, 741 F.2d 1163, 1165-1166 (9th Cir. 1984); *Bibbs v. Block*, 778 F.2d 1318, 1320-1324 (8th Cir. 1985) (*en banc*); Brodin, *The Standard of Causation in the Mixed Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982); Weber, *Beyond Price Waterhouse v. Hopkins: A New Approach to Mixed Motive Discrimination*, 68 N.C.L. REV. 495 (1990). *Contra*, Belton, *Causation in Employment Discrimination Law*, 34 WAYNE L. REV. 1235 (1988).

252. *Price Waterhouse*, 490 U.S. at 265 (emphasis in original) (O'Connor, J., concurring). Justice White also supported use of the "substantial factor" test in his concurrence. *Id.* at 259-260 (White, J., concurring).

253. *Id.* at 276-277.

254. Civil Rights Act of 1991, §107(b) (codified as 42 U.S.C. § 2000e-5(g)(2)(B) (1992)).

255. 429 U.S. 274, 286 (1977). The plaintiff in *Mt. Healthy* alleged he had been discharged as a public school teacher for exercising his free-speech rights under the First Amendment. The Court held that an employee "ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record." The Court did not believe it should "place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." *Id.* at 285.

256. *See, e.g.,* Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 416 (1979) (applying "substantial factor" test); Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252, 266 (1977) (holding that the test is "whether invidious discrimination was a motivating factor.) (emphasis added); Hunter v. Underwood, 471 U.S. 222, 228 (1985) (using both "motivating or substantial factor").

257. 490 U.S. at 230.

258. 853 F.2d 789, 795 (10th Cir. 1988) (applying *Mt. Healthy* test for retaliatory discharge).

259. White v. Fed. Express Corp., 939 F.2d 157, 159 (4th Cir. 1991) (citing Price Waterhouse, 490 U.S. at 259-60, (White, J., concurring)). *Accord*, Visser v. Packer Eng'g Ass'n, Inc., 924 F.2d 655, 658 (7th Cir. 1991) (applying substantial factor in age discrimination suit).

260. 932 F.2d 510, 515 (6th Cir. 1991) (applying test in age discrimination action analyzed under *Price Waterhouse*) (citing Gagne v. Northwestern Nat'l Ins. Co., 881 F.2d 309, 315-316 (6th Cir. 1989)).

261. Tyler v. Bethlehem Steel Corp., 958 F.2d 1176 (2d Cir. 1992); *but see*, Ostrowski v. Atlantic Mutual Ins. Co., No. 91-7674 (2d Cir. 1992) (requiring showing of a motivating factor).

262. *See, e.g.,* Dinwiddie v. Jefferson Elementary School Dist., 1992 U.S. Dist. LEXIS 19150, *8 (N.D. Cal. 1992) (holding that mixed motive cases require proof "that a protected characteristic 'played a motivating part.'" (quoting Price Waterhouse, 490 U.S. at 244, n.12); Dennis v. New York City Police Dep't, 1992 U.S. Dist. LEXIS 10085, *21 (S.D.N.Y. 1992)(Jul 13) (motivating part); Pagana-Fay v. Washington Surburban

Sanitary Commission, 797 F. Supp. 462, 474 (D. Mary. 1992) ("a motivating and substantial factor") (dicta); Kelber v. Forest Elec. Corp., 799 F. Supp. 326, 332 (S.D. N.Y.) (motivating or substantial); Collins v. Outboard Marine Corp., 808 F. Supp. 590, 596 (N.D.Ill. 1992) (citing *Price Waterhouse* but specifying no particular test for mixed motive cases).

263. *Price Waterhouse*, 490 U.S. at 251.

264. *Id.* See also, EEOC Revised Enforcement Guidance, *supra* note 227, at *3 ("[A] link must be shown between the employer's proven bias and its adverse action.").

265. EEOC Revised Enforcement Guidance, *supra* note 227 at *3 (quoting *Price Waterhouse*, 490 U.S. at 251). See also *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 569 (7th Cir. 1989) (holding that direct evidence must pertain to both intent and specific employment decision involved).

266. Cathcart, *supra* note 25, §IV.B.; see also, Shannon, *supra* note 146, at 20.

267. See, Shannon, *supra* note 146, at 20.

268. *Price Waterhouse*, 490 U.S. at 230.

269. See, e.g., *Lehman v. Nakshian*, 453 U.S. 156, 164 (1982) ("[O]f course . . . there is no right to trial by jury in cases arising under Title VII."); but see, *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 548 (1990) ("This Court has not ruled on the question whether a plaintiff seeking relief under Title VII has a right to a jury trial."). See also, SCHLEI & GROSSMAN, *supra* note 4, at 427.

270. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The plaintiff's prima facie case consists of the following three elements: (1) that the employee engaged in protected

activity; (2) that the employer took adverse employment action against the employee; and (3) that a causal connection existed between the protected activity and the adverse action.

271. The issue of jury trials is developed more fully in section V, *infra*.

272. 490 U.S. at 247. Justice Brennan, writing for the plurality, stated

Nothing in this opinion should be taken to suggest that a case must be correctly labeled as either a "pretext" case or a "mixed-motives" case from the beginning in the District Court; indeed, we expect that plaintiffs often will allege, in the alternative, that their cases are both. Discovery often will be necessary before the plaintiff can know whether both legitimate and illegitimate considerations played a part in the decision against her. At some point in the proceedings, of course, the District Court must decide whether a particular case involves mixed motives. If the plaintiff fails to satisfy the factfinder that it is more likely than not that a forbidden characteristic played a part in the employment decision, then she may prevail only if she proves, following *Burdine*, that the employer's stated reason for its decision is pretextual. The dissent need not worry that this evidentiary scheme, if used during a jury trial, will be so impossibly confused and complex as it imagines. . . . Juries long have decided cases in which defendants raised affirmative defenses.

The dissent disagreed and was concerned over the complexity of the procedures.

Although the Price Waterhouse system is not for every case, almost every plaintiff is certain to ask for a Price Waterhouse instruction, perhaps on the basis of "stray remarks" or other evidence of discriminatory animus. . . . Courts will also be required to make the often subtle and difficult distinction between "direct" and "indirect" or "circumstantial" evidence. Lower courts long have had difficulty applying McDonnell Douglas and Burdine. Addition of a second burden-shifting mechanism, the application of which itself depends on assessment of credibility and a determination whether evidence is sufficiently direct and substantial, is not likely to lend clarity to the process.

Id. at 290 (Scalia, J., dissenting).

273. Civil Rights Act of 1991, §107(b) (codified as 42 U.S.C. § 2000e-5(g)(3)(B) (1992)). Opponents of the damages changes in the 1991 Act objected to awarding attorney's fees and costs, which can be substantial, to a plaintiff who had not been "harmed" by discrimination. *See*, 137 CONG. REC. S 15468 (daily ed. Oct. 30, 1991) (statement of Sen Symms) ("[H]uge monetary award amounts are encouraged through jury trials, eliminating any incentive for the plaintiff and defendant to settle early. And with legal and expert fees allowed, there is no incentive for the lawyer to settle either."); *id.* at 15483 (statement of Sen. Simpson) (expressing concern that trial attorneys will intentionally prolong litigation to increase fees).

274. The jury will not, however, have authority to decide the equitable remedies such as reinstatement, backpay, and declaratory relief, which remain within the purview of the court. *See* discussion of the damages issue and procedural problems at text accompanying notes 382-434, *infra*.

275. See discussion of the Seventh amendment requirements at the text accompanying notes 422-433, *infra*.

276. Discussed more fully in section V, *infra*.

277. The 1991 Act allows any party to demand trial by jury "[i]f a complaining party seeks compensatory or punitive damages." Civil Rights Act of 1991, §102(c) (codified as 42 U.S.C. § 1981a(c) (1992)).

278. See *supra* note 247-265 for analysis of the direct evidence, motivating factor analysis.

279. Cf. *Visser*, 924 F.2d at 660 ("Caution is required in granting summary judgment, especially under a statute that allows for trial by jury."). Plaintiffs will argue for at least a partial summary judgment on the issue of causation. If the discrimination did not motivate the challenged act, the plaintiff is not entitled to compensatory or punitive damages or a jury trial. The courts, already overburdened with drug-related cases, may be amenable to these partial summary judgments to avoid jury trials on the merits. The question will depend in part on the law of the Circuit and Seventh Amendment considerations. See discussion of jury trials and the Seventh Amendment at section V, *infra*.

280. If successful in limiting liability to the mixed motives remedies, employers' counsel will then attempt to discredit the plaintiff's "direct evidence" that discrimination was a "motivating factor." Their success depends on how the court hears the case procedurally.

281. Cathcart, *supra* note 25, § IV.A.; see also Geslewitz, *supra* note 172, at 63 ("The practical effect of this change in the law may be to make employers vulnerable to even the weakest and most unsubstantiated claims. As long as an employee has the

barest direct evidence that a supervisor had a discriminatory motive, then no matter how conclusive the employer's evidence of a nondiscriminatory reason for the discharge, the employee could still avoid dismissal of his lawsuit and hold out for a significant settlement on the chance that the jury would at least find that discrimination was 'a' motivating factor.").

282. *But see* the discussion of potential damage and stigma to employers found guilty of "discrimination" without causation at note 338-40 and accompanying text, *infra*.

283. *See*, Fitzpatrick, *supra* note 5, at 233. The district courts have borrowed procedures from cases with dual causes of action amid the confusion over retroactivity and jury trial requirements. *See, e.g., Fay*, 797 F. Supp. at 465 (trying case before both a jury and the court simultaneously to avoid possible retrial).

284. *Johnson*, 490 U.S. at 277 (Scalia, J., dissenting); *see also* Cathcart, *supra* note 25, § IV.A. ("Employment decisions of this sort are almost always mixed motive decisions turning on many factors.").

285. *Pagana-Fay*, 797 F. Supp. at 473 (entering judgment NOV for the defendant in sex discrimination suit).

286. *Price Waterhouse*, 490 U.S. at 295.

287. In his dissent in *Price Waterhouse*, Justice Scalia aptly describes the "tough decision" facing courts in a discrimination suit:

Employment discrimination claims require factfinders to make difficult and sensitive decisions. Sometimes this may mean that no finding of discrimination is justified even though a qualified employee is passed over by

a less than admirable employer. In other cases, Title VII's protections properly extend to plaintiffs who are by no means model employees.

Id. at 294 (Scalia, J., dissenting).

288. In disparate treatment discrimination, "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin." SCHLEI & GROSSMAN, *supra* note 4, at 27 (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)).

289. Civil Rights Act of 1991, § 116. The far-reaching advocate might argue that the comma preceding "that are in accordance with the law" indicates makes that phrase nonrestrictive and, therefore, not an essential part of the sentence structure. Under this theory, all court-ordered remedies, affirmative action, and conciliation agreements would be unaffected by the Act. I will simply say that this section is poorly written and improperly punctuated and not attempt to infer any grammatical insight into the writer's "intent." For proper use of commas and the pronoun "that" in restrictive and nonrestrictive clauses and phrases, see WILLIAM STRUNK AND E.B. WHITE, *THE ELEMENTS OF STYLE*, 59 (3rd ed. 1979) ("That is the defining, or restrictive pronoun."); *see also*, HARBRACE COLLEGE HANDBOOK, § 12d at 139 (9th ed. 1984) ("The writer signifies the meaning [restrictive or nonrestrictive] by using or omitting commas [comma implies nonrestrictive].").

290. *See Cathcart*, *supra* note 25, § IV.B.

291. EEOC Revised Enforcement Guidance, *supra* note 227, at *9-10.

292. 137 CONG. REC. H 9529 (daily ed. Oct. 30, 1991).

293. 137 CONG. REC. S 15476 (daily ed. Oct. 30, 1991).

294. See Robert A. Sedler, *Employment Equality, Affirmative Action, and the Constitutional Political Consensus*, 90 MICH. L. REV. 1315, 1334-35 (1992) (citing Steven A. Holmes, *Bush to Order End of Rules Allowing Race-Based Hiring*, N.Y. TIMES, Nov. 21, 1991, at 1).

295. Remarks on the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOC. 1699, 1700 (Nov. 21, 1991). See also Andrew Rosenthal, *Reaffirming Commitment, Bush Signs Rights Bill*, N.Y. TIMES Nov. 22, 1991, at 1 (reporting the President's counsel, C. Boyden Gray, prepared a draft statement ordering an end to the use of racial preferences without conferring with either the President or his Chief of Staff John Sununu).

296. 137 CONG. REC. S 15477-78 (daily ed. Oct. 30, 1991), 137 CONG. REC. H 9548 (daily ed. Nov. 7, 1991). *Johnson* and *Weber* approved employer-initiated affirmative action programs favoring minorities and women based on a "manifest . . . imbalance in traditionally segregated job categories." *Johnson*, 480 U.S. 631, quoting *Weber*, 443 U.S. at 197.

297. 979 F.2d 721, 725 (9th Cir. 1992), *cert. denied*, No. 92-1298 (Mar. 29, 1993). The Supreme Court denied *certiorari* without comment. See 59 Daily Lab. Rep. (BNA) A-1 (Mar. 30, 1993).

298. *Id.* ("In reversing the result of those decisions, Congress did not state that it also sought to overturn affirmative action. '[A]bsent a clear manifestation of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction.' *Johnson v. First Nat'l Bank*, 719 F.2d 270, 277 (8th

Cir.1983), *cert. denied*, 465 U.S. 1012 (1984). Therefore, we conclude that the 1991 Act does not alter existing affirmative action case law."). The EEOC General Counsel has now adopted the Ninth Circuit's position for evaluating affirmative action programs. See *U.S. Equal Employment Opportunity Commission, Office of General Counsel Memorandum to All Regional Attorneys* [Feb. 22, 1993], reported in 34 Daily Lab. Rep. (BNA) E-1 (Feb. 23, 1993) [hereinafter EEOC General Counsel Memorandum].

299. See *Johnson*, 480 U.S. at 632; *id.* at 657 (White, J., dissenting); *id.* at 676-677 (Scalia, J., dissenting, joined by the Chief Justice) ("A statute designed to establish a color-blind and gender-blind workplace has thus been converted into a powerful engine of racism and sexism, not merely permitting intentional race- and sex-based discrimination, but often making it, through operation of the legal system, practically compelled.").

300. Justice Scalia would find compelling Section 107's mandate for a finding of discrimination "even though other factors also motivated the practice." Civil Rights Act of 1991, §107(a) (codified as 42 U.S.C. § 2000e-2(m) (1992)). See *Johnson*, 480 U.S. at 676 ("The practical effect of our holding is to accomplish de facto what the law . . . forbids anyone from accomplishing de jure: in many contexts it effectively requires employers, public as well as private, to engage in intentional discrimination on the basis of race or sex.") (Scalia, J., dissenting) (citing *Griggs*, 401 U.S. 424).

301. *Johnson* involved a voluntary affirmative action plan adopted in 1978 by the Santa Clara County (California) Transportation Agency that set as its goal "a statistically measurable yearly improvement in hiring and promoting minorities and women in job classifications where they are underrepresented, and the long-term goal is to attain a

work force whose composition reflects the proportion of minorities and women in the area labor force." *Johnson*, 480 U.S. at 619. Under the plan, a higher qualified man was passed over for a dispatcher position and a lesser qualified woman was hired.

302. *Id.* at 660 ("Quite obviously, the plan did not seek to replicate what a lack of discrimination would produce, but rather imposed racial and sexual tailoring that would, in defiance of normal expectations and laws of probability, give each protected racial and sexual group a governmentally determined 'proper' proportion of each job category.").

303. *Id.* at 655.

304. *Id.* Despite the District Court's specific finding of fact that a woman had been hired based exclusively on her sex, Justice O'Connor accepted the employer's argument that sex was just a "plus factor" in the selection. *Id.* Many Circuit Courts and the EEOC have adopted Justice O'Connor's direct evidence test. *See, e.g.*, EEOC Revised Enforcement Guidance, *supra* note 227, at *3, *11; *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 514 (6th Cir. 1991); *Jones v. Gerwens*, 874 F.2d 1534, 1539 n. 8 (11th Cir. 1989); *Holland v. Jefferson Nat'l Life Ins. Co.*, 883 F.2d 1307, 1313 n. 2 (7th Cir. 1989); *but see Visser v. Packer Eng'g Assoc.*, 924 F.2d 655, 658 (7th Cir. 1991) (*en banc*) (finding no discrimination but stating in dicta that "The proverbial 'smoking gun' is not required."); *cf. White v. Fed. Express Corp.*, 929 F.2d 157, 160 (4th Cir. 1991) (*per curiam*) (finding plaintiff's burden satisfied "by any sufficiently probative direct or indirect evidence.").

305. In his final opinion as a circuit court judge, Justice Thomas (joined by Judge James Buckley, with Chief Judge Abner Mikva dissenting) overturned a Federal Communication's

Commission policy providing preferential licensing to women. Justice Thomas found the policy denied equal protection to white men. *Lamprecht v. FCC*, 958 F.2d 382, 393 (D.C. Cir. 1992) ("Any 'predictive judgments' concerning group behavior and the differences in behavior among different groups must at the very least be sustained by meaningful evidence).

306. See, e.g., *Johnson*, 480 U.S. at 671 (stating the Court often proceeds based on "the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant.") (Scalia, J., dissenting).

307. Sedler, *supra* note 294, at 1335.

308. *Johnson*, 480 U.S. at 620 ("No constitutional issue was either raised or addressed in the litigation below.").

309. *Johnson*, 480 U.S. at 627 ("This case also fits readily within the analytical framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid. As a practical matter, of course, an employer will generally seek to avoid a charge of pretext by presenting evidence in support of its plan. That does not mean, however, as petitioner suggests, that reliance on an affirmative action plan is to be treated as an affirmative defense

requiring the employer to carry the burden of proving the validity of the plan. The burden of proving its invalidity remains on the plaintiff.").

310. *Id.* at n.144. In *Lamprecht*, 958 F.2d 382, the D.C. Circuit applied a mid-level scrutiny test to overturn the plan involved there.

311. 428 U.S. 265. Critics often cite the legislative history of the Civil Rights Act of 1964 as support for their attack on affirmative action. See *Johnson*, 480 U.S. at 643 n.2 ("Title VII was intended to 'cover white men and white women and all Americans,' 110 Cong.Rec. 2578 (1964) (remarks of Rep. Celler), and create an 'obligation not to discriminate against whites,' *id.* at 7218 (memorandum of Sen. Clark).") (Stevens, J., concurring).

312. The EEOC has recognized that the literal language of the 1991 Act would not allow affirmative action, but it has chosen to interpret the Act otherwise: "[I]f Section 116 saves only those affirmative action measures that are consistent with the new amendments, then it in fact saves nothing at all, and is rendered useless. For the section to serve any purpose, it should have to be read to protect affirmative action plans that are in accordance with the law as it exists without reference to Section 107." EEOC Revised Enforcement Guidance, *supra* note 227, n.32.

313. 480 U.S. at 646.

314. 480 U.S. at 644 (Stevens, J., concurring).

315. *Id.* at 616 (Scalia, J., dissenting) (criticizing the majority's reliance on congressional inaction to support its interpretation of affirmative action: "This assumption, which frequently haunts our opinions, should be put to rest. It is based, to begin with, on the patently false premise that the correctness of statutory construction is

to be measured by what the current Congress desires, rather than by what the law as enacted meant. To make matters worse, it assays the current Congress' desires with respect to the particular provision in isolation, rather than (the way the provision was originally enacted) as part of a total legislative package containing many quids pro quo.").

316. *See, e.g., supra* note 12, at 17 ("The Civil Rights Act of 1964 was intended to establish color-blind equal employment opportunity through a combination of voluntary compliance, agency conciliation, and judicial enforcement in civil litigation of the personal right of individuals not to be discriminated against because of race. . . .

[F]ederal courts . . . fashioned an administrative-judicial enforcement scheme that forced employers to give preferential treatment to racial and ethnic minorities under a new theory of discrimination based on the concepts of group rights and equality of result.").

See also, Johnson, 480 U.S. at 658 ("The Court today completes the process of converting this from a guarantee that race or sex will not be the basis for employment determinations, to a guarantee that it often will. Ever so subtly, without even alluding to the last obstacles preserved by earlier opinions that we now push out of our path, we effectively replace the goal of a discrimination-free society with the quite incompatible goal of proportionate representation by race and by sex in the workplace.") (Scalia, J., dissenting).

317. MELVIN I. UROFSKY, *A CONFLICT OF RIGHTS: THE SUPREME COURT AND AFFIRMATIVE ACTION*, 38 (1991). Professor Urofsky also questions whether affirmative action is either the proper policy to achieve race and gender equality or fair—even in an admittedly white-male-dominated society. *Id.* at 23-29.

318. Sedler, *supra* note 294, at 1330. Mr. Sedler, a renowned champion of affirmative action, also believes that a "constitutional political consensus" supports affirmative action in this country and, without addressing the implications of Section 107, concludes this consensus was "reaffirmed in the passage and enactment of the Civil Rights Act of 1991." *Id.* at 1336.

319. *Id.* at 1320 ("However, the fact remains that the gains made by racial minorities and women through affirmative action will come at the expense of white males . . . who but for affirmative action would have received the job in question. The degree of 'qualification disparity,' if any, between the white male denied the job and the minority person or woman who gets it is irrelevant."). *See also*, RONALD J. FISCUS, *THE CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION*, (1992) (supporting affirmative action based on a hypothetical "distributive justice" model of what society would look like without discriminatory practices).

320. Steve Daley, *House Demos OK Rights Bill, But Bush Calls It a Win*, CHI. TRIB., June 6, 1991, at C1 (quoting Representative Vin Weber).

321. STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY*, 49-62 (1991) (describing his "best black" syndrome). Justice Thomas has also stated for the record that he finds affirmative action programs "offensive." *See* Neil A. Lewis, *Thomas' Journey on Path of Self-Help*, N.Y. TIMES, July 7, 1991, at A12.

322. CARTER, *supra* note 322, at 32-34 (stating that the original goal of affirmative action was to identify minorities in areas of traditional discrimination and provide them an opportunity for advancement and to compete in an equal opportunity environment).

323. *Id.*

324. *Id.*

325. *See, e.g.,* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 387-402 (1978) (separate opinion of Marshall, J.).

326. 480 U.S. at 673 (Scalia, J., dissenting).

327. *See* BELZ, *supra* note 12, at 148-55, 159-65 (criticizing the analysis of the so-called "reverse discrimination" cases as contrary to any reasonable concept of equal opportunity and equal protection).

328. 979 F.2d at 725 ("The City properly argues that a more natural reading of the phrase 'in accordance with law' is that affirmative action programs that were in accordance with law prior to passage of the 1991 Act are unaffected by the amendments. The language of the statute is clear, and the City's interpretation is consistent with that language."). The court refused to consider challenges based on § 106 of the Act because they were not raised at the trial level.

In its reply brief, the Union argues that banding is prohibited by section 106 of the 1991 Act, which provides that it is unlawful "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin." . . . The Union also argues that the Civil Rights Act of 1964 prohibits banding because it unnecessarily trammels the interests of nonminorities. The Union did not raise or discuss either of these issues in its opening brief. . . . [W]e will not ordinarily consider matters on appeal that are not specifically and distinctly raised and argued in appellant's opening brief.

Id. at 725-726 (citation omitted).

329. See 100 CONG. REC. 7254 (1964) (remarks of Sen. Ervin); Senator Case defended the bill as controlling conduct, not thoughts: "The man must do or fail to do something in regard to employment. There must be some specific external act, more than a mental act. Only if he does the act because of the grounds stated in the bill would there be any legal consequences." *Id.* Accord, *Price Waterhouse*, 490 U.S. at 262 (O'Connor, J., concurring).

330. See SPECIAL RELEASE, *supra* note 17, at 43.

331. The same employer could lawfully say, "I don't like ____ minorities and I don't think they're capable of honest work, but I will make all employment decision in compliance with law and regulations despite my personal feelings." Such an open expression of prejudice would create obvious evidentiary problems for this employer in defending his decisions. *Id.* Compare, Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 U.C. L.A. L. REV. 1791 (1992) (finding various aspects of free speech have been abridged as violations of employment discrimination law).

332. 42 U.S.C. §2000 e-3(a) (1992).

333. 29 U.S.C. §§ 621-634 (1992).

334. See EEOC Revised Compliance Guidance, *supra* note 227, n. 14 ("Although Section 107 does not specify retaliation as a basis for finding liability whenever it is a motivating factor for an action, neither does it suggest any basis for deviating from the Commission's long-standing rule that it will find liability . . . whenever retaliation plays any role in an employment decision.").

335. Among other factors, the EEOC guidance overlooks the individual right of action for federal employees to file suit without EEOC intervention in 42 U.S.C. §2000e-16 (1992). *See also*, Cathcart, *supra* note 25, § IV.A. ("Congress's failure to amend title VII's retaliation provision . . . suggests that retaliation cases should not be decided under the Act's mixed motive analysis.").

336. Geslewitz, *supra* note, 172, at 64.

337. Prohibited personnel practice based on discrimination is in 5 U.S.C. § 2302 (b)(9) (1992). *See also* Williams v. Dep't of Defense, 46 M.S.P.R. 549 (1991), *rev'g* 45 M.S.P.R. 146 (1990). Disciplinary action against a supervisor under 5 U.S.C. § 1215 (a)(3) (1992) can include "a removal, a reduction in grade, a debarment (not to exceed five years), a suspension, a reprimand, or an assessment of civil penalty not to exceed \$1000." 5 C.F.R. § 1201.126(c) (1992).

338. An official who may be stigmatized by a finding of discrimination has a constitutionally protected liberty interest that requires due process commensurate with the potential deprivation. *Arnett v. Kennedy*, 416 U.S. 153, 155 (1974); *Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961).

339. *Price Waterhouse*, 490 U.S. at 244. *Contra*, Sedler, *supra* note 294, at 1336 ("At the present time, therefore, it is once again correct to say that there is a constitutional political consensus on the meaning of employment equality in American Society. . . . Under this constitutional political consensus the meaning of employment equality under federal civil rights policy is that racial minorities and women should have a fair share of the jobs in an employer's workforce - that they should be represented at every level in

the workforce in some reasonable proportion to their representation in the overall labor market.").

340. Civil Rights Act of 1991, §107(a) (codified as 42 U.S.C. § 2000e-2(m) (1992)).

341. For an outstanding application of the "spirit" of Title VII applied against the EEOC's attempt to prove discrimination by such evidence, see *Equal Employment Opportunity Commission v. Consolidated Service Systems*, 47 Daily Lab. Rep. (BNA), D-1 (Mar. 12 1993) (7th Cir. Mar. 4, 1993) ("Discrimination is not preference or aversion; it is acting on the preference or aversion. If the most efficient method of hiring, adopted because it is the most efficient (not defended because it is efficient--the statute does not reference to efficiency, 42 U.S.C. Section 2000e-2(k)(2)), just happens to produce a work force whose racial or religious or ethnic or national-origin or gender composition pleases the employer, this is not intentional discrimination.") (Posner, J.).

342. See discussion of disparate impact and the quota issue generally in section III., *supra*.

343. 2 The Civil Rights Act of 1990: Hearings on S. 2104 Before the Senate Comm. on Labor and Human Resources, 101st Cong., 2d Sess. 69, 196 (1990) (testimony of David Maddux for the National Retail federation on the California experience) [hereinafter Senate Hearings].

344. 3 The Civil Rights Act of 1990: Hearings on H.R. 4000 Before the House Comm. on Education and Labor, 101st Cong. 2nd Sess. (1990) (testimony of Edward Potter) [hereinafter House hearings].

345. Laurie M. Stegman, Note: *An Administrative Battle of the Forms: The EEOC's Intake Questionnaire and Charge of Discrimination*, 91 MICH. L. REV. 124, 127 (1992).

346. Senate Hearings, *supra* note 343, at 208 (testimony of Lawrence Lorber).
347. 137 CONG REC. S 15468 (Oct. 30, 1991) (statement of Sen. Symms).
348. Civil Rights Act of 1991, § 3(1).
349. *See, e.g.,* Geslewitz, *supra* note 172, at 58.
350. SCHLEI & GROSSMAN, *supra* note 4, § 15.1 at 54 n.3.
351. Plaintiffs seeking damages under these theories will present arguments similar to those advanced under mixed motive analysis. *See generally* section IV., *supra*.
352. Civil Rights Act of 1991, § 102(a) (codified as 42 U.S.C. § 1981a(a)(1) (1992)).
353. Civil Rights Act of 1991, § 102(d)(1) (codified as 42 U.S.C. § 1981a(d)(1) (1992)).
354. Civil Rights Act of 1991, § 102(b)(3) (codified as 42 U.S.C. § 1981a(b)(3) (1992)).
355. In 1992, the EEOC filed 354 such suits, down somewhat from the 495 suits filed in 1991. *See* 232 Daily Lab. Rep. (BNA) A-7 (Dec 2., 1992). The 1991 total was also a drop from the 525 suits filed in 1990. 185 Daily Lab. Rep. (BNA) A-2 (Sep. 23, 1992). The EEOC pending caseload increased during this period from 42,000 in 1990, 46,000 in 1991, to 52,856 at the end of fiscal 1992, despite record productivity of 92.8 cases per investigator during the year. *Id.*
356. *See* EEOC General Counsel Memorandum, *supra* note 298, at p.4 ("When OGC pursues litigation on behalf of more than one person, it shall be OGC's position that statutory damage limitations apply to each aggrieved individual. Thus, if the Commission brings suit against an employer with more than 500 employees, damages of up to the cap of \$300,000 could be sought for each aggrieved person.").
357. *See*, Five Year Supplement, *supra* note 159, Ch. 36 n. 134 (listing representative cases).

358. See the discussion of jury trials in section V.B., *infra*.

359. See 137 CONG. REC. S 15484 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth). See also, Cathcart, *supra* note 25, § I.B.

360. Equal Employment Opportunity Comm'n Directive 915.002, Enforcement Guidance: *Compensatory and Punitive Damages Available Under §102 of the Civil Rights Act of 1991*, § I. (Jul. 14, 1992), 1992 WL 189089, at *1.

361. Plaintiffs often file suit under both 42 U.S.C. § 1981 and Title VII based on the same facts. Jury verdicts finding liability under 42 U.S.C. § 1981 are normally conclusive on the issue of liability in an accompanying Title VII action. See, e.g., *King v Alco Controls Div. of Emerson Elec. Co.*, 746 F.2d 1331, 1332 .2 (8th Cir. 1984); *Whatley v. Skaggs Companies, Inc.*, 707 F.2d 1129, 1139 (10th Cir.), *cert. denied*, 464 U.S. 938 (1983). If Senator Danforth's interpretation were adopted by the courts, a plaintiff could win a verdict on a 1981 claim and recover double damages for the same incident of discrimination. See also, discussion of the complexity of jury trials and damages at section V, *infra*.

362. Civil Rights Act of 1991, § 102(b)(2) (codified as 42 U.S.C. §1981a(b)(2)(A) (1992)) ("In the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$ 50,000; "(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$ 100,000; and "(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year,

\$ 200,000; and "(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$ 300,000.").

363. See Fitzpatrick, *supra* note 5 at § V.D. ("Plaintiffs' attorneys will seek to maximize the potential number of employees to increase the amount of damages that may be available. . . . To maximize the employer's potential number of employees, plaintiffs' attorneys will increasingly file suit against both subsidiaries and the parent corporations."). See also Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc., 380 U.S. 255 (1965) (finding two different corporations were one for purposes of National Labor Relation Board's jurisdiction).

364. The courts will probably use tests developed to count employees in prior Title VII litigation, including the "single employer" doctrine. See generally, Five Year Supplement, *supra* note 159, at 385-389.

365. See, e.g., Carey v. Piphus, 435 U.S. 247, 254 (1978) (stating purpose of compensatory damages is to "compensate persons for injuries caused by the deprivation of . . . rights").

366. Civil Rights Act of 1991, § 102(b) (codified as 42 U.S.C. § 1981a(b) (1992)). Note that this section amends 42 U.S.C. 1981 and not Title VII.

367. 42 U.S.C. § 2000e-5(g) (1991).

368. See, e.g., Mitchell v. Seaboard System Railroad, 883 F.2d 451, 452 (6th Cir. 1989) (limiting Title VII plaintiffs to equitable relief; compensatory damages not available).

369. Equal Employment Opportunity Comm'n Directive 915.002, *Enforcement*

Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, (Jul. 14, 1992), 1992 WL 189089, n.5 [hereinafter EEOC Guidance].

370. *Id.* § I.A.

371. Civil Rights Act of 1991, § 102(a) (codified as 42 U.S.C. § 1981a(a) (1992)).

372. Fitzpatrick, *supra* note 5, § V.

373. *See, e.g.*, Block v. N. Dakota, 461 U.S. 273, 287 (1983) (holding that when Congress attaches conditions on waiver of sovereign immunity, "those conditions must be strictly construed"); United States v. Sherwood, 312 U.S. 584, 596 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued, . . . and the terms of its consent to be sued in any court defines that court's jurisdiction to entertain that suit."); United States v. Mitchell, 445 U.S. 535 (1980) (finding a Congressional waiver of sovereign immunity must be unequivocally expressed and will be strictly construed).

374. Civil Rights Act of 1991, § 102(a)(2)&(3) (codified as 42 U.S.C. § 1981a(a)(2)&(3) (1992)).

375. EEOC Guidance, *supra* note 368, at *1-2.

376. *See* Five Year Supplement, *supra* note 159, at 85-87. There will likely be a great deal of litigation under the ADA. The EEOC has found that only about 10.9% of ADA complaints are informally resolved, compared to about 75% of all other discrimination complaints. *See* 58 Daily Lab. Rep. (BNA) A-7 (Mar. 29, 1993) (over 5,500 charges have already been filed under the ADA and the rate of filings is increasing).

377. Civil Rights Act of 1991, § 102(c) (codified as 42 U.S.C. § 1981a(c) (1992)). *See also* discussion of the evidentiary questions raised in mixed motive cases at text

accompanying notes 369-87, *supra*, and discussion of jury trials in general at text accompanying notes 416-434, *infra*.

378. See discussion of Seventh Amendment issues at text accompanying notes 422-433, *infra*.

379. On the issue of good faith in Rehabilitation Act cases, *see, e.g., Pesterfield v. Tennessee Valley Auth.*, 941 F.2d 437 (6th Cir. 1991) ("The question is thus not whether TVA's decision that plaintiff was not employable due to his psychiatric condition was correct measured by "objective" standards. What is relevant is that TVA, in fact, acted on its good faith belief about plaintiff's condition based on Dr. Paine's opinion, and, as the district court pointed out, there is no proof to the contrary."). *See also, Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1116 (2d Cir. 1988) ("[T]he reasons tendered need not be well-advised, but merely truthful."); *Williams v. S.W. Bell. Tel. Co.*, 718 F.2d 715, 718 (5th Cir.1983) ("The trier of fact is to determine the defendant's intent, not adjudicate the merits of the facts or suspicions upon which it is predicated."); *Jones v. Orleans Parish Sch. Bd.*, 679 F.2d 32, 38 (5th Cir.), *modified on other grounds*, 688 F.2d 342 (5th Cir. 1982), *cert. denied.*, 461 U.S. 951 (1983) ("Whether the Board was wrong in believing that Jones had abandoned his job is irrelevant to the Title VII claim as long as the belief, rather than racial animus, was the basis of the discharge."); *Jeffries v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1036 (5th Cir. 1980) ("[W]hether HCCAA was wrong in its determination that Jeffries acted in violation of HCCAA guidelines . . . is irrelevant. . . . [W]here an employer wrongly believes an employee has violated company policy, it does not discriminate in violation of Title VII if it acts on that belief."); *Fahie v. Thornburgh*, 746 F. Supp. 310, 315 (S.D.N.Y. 1990) ("[T]he

Bureau's honestly held, although erroneous, conviction that [plaintiff] was not a good employee is a legitimate ground for dismissal.").

380. The courts may impute knowledge to the employer, although there is little case law on imputed knowledge in this area. *See, e.g., Kimbro v. Atl. Richfield Co.*, 889 F.2d 869 (9th Cir. 1989) ("There is a dearth of authority on the propriety of imputing knowledge from an employee-supervisor to the employer in this type of action. Consequently, we must turn to traditional agency/employer-employee principles to determine whether ARCO should be charged with knowledge of Kimbro's condition in this case.").

381. Civil Rights Act of 1991, § 102(b)(1) (codified as 42 U.S.C. § 1981a(b)(1) (1992)).

382. 461 U.S. 30, 47-48 (1983) ("Punitive damages may be awarded for conduct that is outrageous, because of defendant's evil motive or his reckless indifference to the rights of others.") (citing *RESTATEMENT (SECOND) TORTS* § 908 (1979)).

383. 237 CONG REC. H 9527 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards). This statement is not binding on the courts and fails to explain why a definition of punitive damages was needed at all. It was, perhaps, one of the few definitions agreed to in compromise negotiations.

384. *See, e.g., Rowlett v. Anheuser-Bush, Inc.*, 832 F.2d 194, 205 (1st Cir. 1987); *Stephens v. South Atl. Cannery, Inc.*, 848 F.2d 484, 489 (4th Cir.), *cert. denied*, 488 U.S. 996 (1988); *Beauford v. Sisters of Mercy, Providence of Detroit, Inc.*, 816 F.2d 1104, 1108-09 (6th Cir.), *cert. denied*, 484 U.S. 913 (1987); *Williamson v. Handy Button Mach. Co.*, 817 F.2d 1290, 1296 (7th Cir. 1987); *Block v. R.H. Macy & Co.*, 712 F.2d 1241 (8th Cir. 1982); *Woods v. Graphic Communications*, 925 F.2d 1195, 1206 (9th Cir. 1991); *Walters v. City of Atlanta*, 803 F.2d 1135, 1147 (11th Cir. 1986). The EEOC has also

adopted this test and listed factors to determine malice or reckless indifference. See EEOC Enforcement Guidance, *supra* note 368, at *8-10.

385. 112 S. Ct. 711 (1992) ("[P]unitive damages" [are] commonly understood to be damages awarded to punish defendants for torts committed with fraud, actual malice, violence, or oppression.").

386. *Id.* at 715 ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.") (Thomas, J.) (citations omitted).

387. Cathcart, *supra* note 25 § II.B. See also Geslewitz, *supra* note 172, at 60 ("The problem for employers, however, is that the new Act opens up the possibility of compensatory and punitive damages and jury trials in every Title VII case involving intentional discrimination allegations. This holds out the possibility of very large damages awards in practically any case, turning fairly routine discharge cases into the functional equivalent of personal injury lawsuits.").

388. Adams Clymer, *Battle Over Civil Rights Emphasizes Sexual Bias*, N.Y. TIMES, March 4, 1991, at A14 ("The path to equal employment does not run through the courthouse door.") (quoting Zachary Fisman). See also, Cathcart, *supra* note 25, § II.B. ("It would be surprising, indeed, if the promise of significant financial compensation did not escalate the resolution of employment discrimination claims through litigation.").

389. See, e.g., *House Civil Rights Law Should be Law*, USA TODAY, June 5, 1991, at 12A (according to President Bush, "The Democratic bill invites people to litigate, not cooperate. This is no way to promote harmony.").

390. 48 Daily Lab. Rep. (BNA) A-4 (Mar. 15, 1993). Sexual harassment complaints were also up some 69% in fiscal year 1992. These charges were also disproportionately concentrated in the last few months of the year: the EEOC "didn't begin to see an appreciable increase until after the mini-series back in the fall with the Supreme Court." 15 Daily Lab. Rep. (BNA) A-4 (Jan 26, 1993) (referring to the Clarence Thomas Supreme Court confirmation hearings) (citing statistics from EEOC General Counsel Donald R. Livingston).

391. 48 Daily Lab. Rep. (BNA) A-4 (Mar. 15, 1993).

392. 15 Daily Lab. Rep. (BNA) A-4 (Jan 26, 1993).

393. 48 Daily Lab. Rep. (BNA) A-4 (Mar. 15, 1993).

394. See *Geslewitz*, *supra* note 172, at 60 ("Womens' rights groups and many in Congress, however, are unhappy with this compromise and promise to push for elimination of the caps in future legislative sessions.").

395. See SPECIAL RELEASE, *supra* note 17, at 79 (actions under Section 1981 also provide other procedural advantages over Title VII suits).

396. H.R. 224, 103rd Cong., 1st Sess., (1993) ("Equal Remedies Act of 1993"); S. 17, 103rd Cong., 1st Sess. (1993) (same). Similar proposals in the last Congress never came to a floor vote. H.R. 3975, S. 2062, 102nd Cong., 2nd Sess. (1992).

397. See generally, Mary Ann Willis, *Limitation on Recovery of Damages; Medical Malpractice Cases: A Violation of Equal Protection?*, 54 U. CIN. L. REV. 1329-51 (1986).

398. *See, e.g.,* Davis v. Omitowoju, 883 F.2d 1155, 1158 (3d Cir. 1989); Boyd v. Bulala, 871 F.2d 1191, 1196-97 (4th Cir. 1989).

399. *See, e.g.,* Richard v. Carnegie Library Restaurant, Inc., 763 P.2d 1153, 1163 (N.M. 1988); Sibley v. Bd. of Supervisors of Louisiana State Univ., 477 So. 2d 1094, 1107-09 (La. 1985); Condemarin v. Univ. Hosp., 775 P.2d 348, 353-56 (Utah 1989).

400. Civil Rights Act of 1991, § 102 (codified as 42 U.S.C. § 1981a(c)(1) and § 1981a(d)(1)(B) (1992)).

401. Cathcart, *supra* note 25, § II.C.

402. The "burden" on the courts to distinguish between the laws applied does not, however, justify modifying the expectations and rights of the parties by retroactive application of the Act. *Contra*, Estrin, *supra* note 40, at 2078 (concluding that the "Civil Rights Act of 1991 reaffirms the principles embodied in Title VII, and only retroactive application of the Act can fulfill the Court's obligation to effectuate legislative intent by eradicating discrimination from the American workplace.").

403. Currently class actions under Title VII are normally certified under FED. R. CIV. PRO. 23(b)(2) (1992), which is inappropriate when plaintiffs seek primarily money damages. *See, e.g.,* Franks v. Bowman Transp. Co., 495 F.2d 398, 422 (5th Cir. 1974), *reversed on other grounds*, 424 U.S. 747 (1976). The more appropriate basis for class certification under the 1991 Act may be Rule 23(b)(3), requiring common questions of law or fact. The court would have to determine, however, that a class action is the most efficient form of litigation. Especially in cases involving different sizes of employers under the damage caps, this will be difficult conclusion to reach.

404. 112 S. Ct. 1867 (1992).

405. 26 U.S.C. § 104(a)(2) (1991).

406. 112 S. Ct. at 1873.

407. *Id.* (quoting *Albemarle Paper Co.*, 422 U.S. at 418).

408. 112 S. Ct. at 1873.

409. *Id.*

410. *Id.* at 1873-1874.

411. The Act amends 42 U.S.C. § 1981 (1988) with the following language: "The Revised Statutes are amended by inserting after section 1977 (42 U.S.C. 1981) the following new section: 'SEC. 1977A. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION IN EMPLOYMENT.'" Civil Rights Act of 1991, § 102. This peculiar amendment is the source of further confusion pertaining to jury trials. See discussion at text accompanying notes 422-434, *infra*.

412. See 242 Daily Lab. Rep. (BNA) A-4 (Dec 16, 1992).

413. EEOC awards are not binding on federal agencies, unlike in the private sector. Federal agencies can accept the EEOC decision and preclude suit by the employee, or reject the EEOC decision and provide the employee an opportunity for *de novo* review in federal district court. See, 29 C.F.R. § 1614.109 (1992) ("Within 60 days of receipt of the findings and conclusions [of the EEOC administrative judge], the agency may reject or modify the findings and conclusions or accept the relief ordered by the administrative judge."). Administrative awards of damages are paid from agency funds, but damages awarded by courts are paid from a judgment fund. See 28 U.S.C. § 2414 (1992). In times of slashed federal budgets, federal agencies may often choose to gamble with someone else's budget.

414. 184 Daily Lab. Rep. (BNA) A-7 (Sep. 22, 1992) (reporting that EEOC Chairman Evan Kemp Jr. stated the 1992 EEOC budget of \$222 million would bring the Commission to the "brink of disaster. If we were a business, we'd be out of business," he warned, and the commission would be forced into "a Chapter 11-type reorganization, jeopardizing the very product we deliver." Personnel costs account for 76% of the EEOC budget. Commission officials said the pending caseload of about 43,000 claims would escalate to more than 100,000 in the next two years, and complaints, which currently take about 11 months to resolve, would take three years). The current budget-cutting frenzy in the Federal government does not bode well for future prospects of speedy EEOC claim processing.

415. 42 U.S.C. § 2000e-5(f)(1) (1992) ("If within one hundred and eighty days of the filing of such charge . . . the Commission has not filed a civil action under this section, . . . a civil action may be brought.")

416. *But see infra*, note 442, on limitation of costs.

417. 42 U.S.C. § 3613(c) (language).

418. 42 U.S.C. § 1981(?) (language).

419. Civil Rights Act of 1991, § 102(c) (codified as 42 U.S.C. § 1981a(c) (1992)).

420. *See, Burke*, 112 S. Ct. at 1881 (citing *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969)). *See also*, SPECIAL RELEASE, *supra* note 17, at 63 ("The importance of the exclusion of § 706(g) remedies from the provisions of § 1981a must not be overlooked. This exclusion means that the rules and procedures that have governed Title VII backpay awards are not directly affected by § 1981a. For example,

the Title VII backpay award remains a form of equitable relief that is in the purview of the court, not the jury.").

421. As one commentator notes, "the rules and procedures that have governed Title VII backpay awards are not directly affected by §1981a." SPECIAL RELEASE, *supra* note 17, at 63.

422. Civil Rights Act of 1991, § 102(a)(1) (codified as 42 U.S.C. § 1981a(a)(1)(1992)).

423. Civil Rights Act of 1991, § 102(c) (codified as 42 U.S.C. § 1981a(c) (1992)).

424. Civil Rights Act of 1991, § 102(a)(1) (codified as 42 U.S.C. § 1981a(a)(1) (1992)) (emphasis added).

425. See the discussion of mixed motive issues generally at section III., *supra*.

426. See the discussion of jury trials in class action suits at text accompanying notes 432-433, *infra*.

427. See, e.g., *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1443 (10th Cir. 1988) ("Bifurcation is necessary because of the different remedies available under each statute. . . . Under Title VII . . . remedies are equitable in nature . . . under § 1981, however, . . . remedies have been characterized as legal in nature.") (citations omitted) (holding jury determination in Section 1981 action binds the court in Title VII findings).

428. *Id.* at 1442. See generally, Friedman, *supra* note 54 (discussing litigation related to Title VII). Several courts have found that jury determinations of discrimination in Equal Pay Act claims binds the court in accompanying Title VII claims. See, e.g., *Korte v. Diemer*, 909 F.2d 954 (6th Cir. 1990); *Cattlett v. Missouri Hefewig*, 828 F.2d 1260 (8th Cir. 1987); *Kitchen v. Chippewa Valley Schs.*, 825 F.2d 1004 (6th Cir. 1987; *Ward v.*

Texas Employment Comm., 823 F.2d 907 (5th Cir. 1987); *Lincoln v. Bd. of Regents*, 697 F.2d 928 (11th Cir. 1983).

429. *Skinner*, 859 F.2d at 1438. Unfortunately, "they ain't seen nothin' yet!"

430. 494 U.S. 545 (1990). The Court held that--

The Seventh Amendment preserves the right to trial by jury in "Suits at common law." . . . When legal and equitable claims are joined in the same act, "the right to jury trial on the legal claim, including all issues common to both claims, remains intact" (citation omitted). . . . "[O]nly under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims" (citation omitted). . . . The Court in *Beacon Theaters* emphasized the importance of the order in which legal and equitable claims joined in one suit would be resolved because it "thought that if an issue common to both legal and equitable claims was first determined by a judge, relitigation of the issue before a jury might be foreclosed by res judicata or collateral estoppel" (citation omitted).

Accord, Farber v. Massillion Bd. of Educ. 917 F.2d 1391 (6th Cir. 1990 (holding that a court determination of facts under Title VII cannot preclude right to jury trial under Section 1983 claim). The difficulty with applying these cases to the 1991 Act, of course, is that they involved two separate laws and distinct

causes of action; procedures applying to jury trials under Section 102 of the Act involve only Title VII remedies, albeit both equitable and legal remedies.

431. *Lytle*, 494 U.S. at 556.

432. *See, e.g., Arenson v. Southern Univ. Law Ctr.*, 911 F.2d 1124 (5th Cir. 1990 (jury verdict in 1983 claim reinstated over court's judgment N.O.V.); *Van Houdnor v. Evans*, 807 F.2d 648, 657 (7th Cir. 1986) (same); *see also, Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d. Cir 1990) (affirming judgment N.O.V. on 1983 claim against city but reversing on claims against individuals).

433. *Cathcart*, *supra* note 25, § II.C.

434. Civil Rights Act of 1991, § 102(a)(1) (codified as 42 U.S.C. § 1981a(a)(1) (1992)).

435. 42 U.S.C. § 2000e-5(k) (1992).

436. Civil Rights Act of 1991, § 113(b) (codified as 42 U.S.C. § 2000e-f(k) (1992)).

437. "The last sentence of section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting ', 1977A' after '1977'." Civil Rights Act of 1991, § 103, 42 U.S.C. § 1988 (1992). "In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of sections 1977 or 1977A of the Revised Statutes, the court, in its discretion, may include expert fees as part of the attorney's fee." Civil Rights Act of 1991, § 113(c) (codified as 42 U.S.C. § 1988(c) (1992)).

438. 111 S. Ct. 1138 (1991).

439. For a discussion of the distinction, *see id.* *See also, Shannon*, *supra* note 146, at 18 ("Therefore, prevailing parties may be reimbursed for the fees of experts who consulted during trial preparation.").

440. Civil Rights Act of 1991, § 107(b)(3)(B) (codified as 42 U.S.C. § 2000e-5(g)(3)(B) (1992)).

441. Section 102 limits recovery of compensatory and punitive damages to those in "an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964." Civil Rights Act of 1991 (codified as 42 U.S.C. § 1981a(2) (1992)).

442. *See, e.g.,* *Brooms v. Regal Tube Co.*, 881 F.2d 412, 425 (7th Cir. 1989) (denying attorney fees to prevailing plaintiff who extended litigation by refusing a settlement "with no hope of greater recovery."). *Cf. FED. R. CIV. PRO.* 68 (1992) (requiring a plaintiff who does not recover more than an offered settlement to "pay the costs incurred after the making of the offer.").

443. 137 CONG. REC. S 15467 (Oct. 30, 1991) (statement of Sen. Symms).

444. *Id.*

445. 137 CONG. REC. S 15472 (Oct. 30, 1991) (statement of Sen. Dole).