The Substantive Impact of Legislation on Employment Discrimination and the Civil Rights Act of 1991

"Cheshire Puss," Alice began . . . "would you please tell me which way I ought to go from here?"

"That depends on where you want to get to," said the cat.

LEWIS CARROLL [1]

I. INTRODUCTION

The sage advice of the Cheshire cat applies even today. As we move closer to the twenty-first century, we must constantly ask which way we ought to go as society moves to the future. Certainly, in terms of race relations we want to follow a new path to lead us away from racial oppression. Slavery, segregation, and discrimination based on color must be left in the past as we move towards racial equality.

Employment is a particularly important area of need for racial equality since it involves both economic and social concerns. Although comprehensive civil rights legislation concerning employment has been in place for over twenty years, marked inequalities still exist between the races in this country. Looking to the future, it is difficult to determine the path to take which will lead to the end of employment discrimination.

The United States Congress has chosen a particular path by enacting the Civil Rights Act of 1991.[2] The Civil Rights Act of 1991 is a congressional response to several decisions handed down by the United States Supreme Court during the 1988-89 term which restricted civil rights legislation on employment discrimination.

This paper will focus on provisions of the Civil Rights Act of 1991 which strengthen individual rights against racial discrimination in employment. The paper first provides a picture of the state of racial inequality in employment. Next, it reviews the *Ward's Cove Packing Co. v. Antonio*[3] decision handed down by the Supreme Court in 1989 and the provisions of the Civil Rights Act which overturn this decision. Finally, this paper reviews the substantive impact of civil rights legislation on the attitudes which cause racial bias and job discrimination.

A. *The Political History of the Civil Rights Act of 1991*

The passage of the Civil Rights Act of 1991 was surrounded by political controversy and was fiercely opposed by the Bush administration. In fact, the original version of this Act was vetoed by President Bush.[4] The Bush admin-

1. LEWIS CARROLL, THROUGH THE LOOKING GLASS (Macmillan 1872).

2. S. 1207-1209, 102d Cong., 1st Sess. (1991), states in Section 2: "a) Finding.Congress finds that legislation is necessary to provide additional protections against unlawful discrimination in employment.

b) Purpose.The purpose of this Act of to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." *Id.*

3. 109 S. Ct. 2115 (1989).

4. President Bush bears the distinction of becoming only the third president to veto a civil rights bill. The first two presidents were Andrew Jackson and Ronald Reagan. Sheilah Goodman,

istration opposed the original Act making strong charges that the Act encouraged employers to adopt racial hiring quotas and placed an unnecessary regulatory burden on employers.[5] An attempt to override the presidential veto fell short of the necessary two-thirds majority by a single vote.[6] The current version, often referred to as the Kennedy-Danforth compromise, was passed and directly signed into law by President Bush on November 21, 1991.[7]

B. *The Current Status of Racial Employment Discrimination*

Civil rights legislation expressly prohibits job discrimination based on race. However, wide disparities are present in employment along racial lines. A national snapshot of the current situation challenges the notion that discrimination based on race has been erased by such legislation.

In 1987, one study found the poverty rate for Black Americans was 33.1%, an increase of 700,000 people from 1986. By contrast, the White poverty rate fell from 11% to 10.5% in the same year.[8] Although Blacks represent around 20% of the American population, they currently represent only 11% of the employed workforce. Further, Blacks represent 23% of unemployed workers.[9] Studies also show a widening income gap between Blacks and Whites since 1980. One study found that the typical Black family has only 56 cents for each dollar of income for the typical White family. This was the largest gap recorded since 1967 when the data was first collected.[10]

The statistics noted above are evidence of alarming economic and social differences between the races in this country. The problems evidenced by these statistics can be traced to racial discrimination.[11] In fact, studies have estimated that 40% of the difference between Black and White median incomes is the direct result of job discrimination.[12] Professor Lester Thurow concluded back in 1967 that "(sic) the sheer fact of being Black explains 38%

Trying to Undo the Damage: The Civil Rights Act of 1990, 14 HARV. WOMEN'S L.J. 185, at 189 n.26 (1991).

5. Ann Devroy, *Bush Vetoes Civil Rights Bill*, WASH. POST, Oct. 23, 1990, at A1. After vetoing the bill, President Bush stated, " Equal opportunity is thwarted by quotas" and that the civil rights bill contained provisions which would provide "powerful incentives for employers to adopt quotas in order to avoid discrimination suits." *Id.*

However, proponents of the bill argued that the "quota" charge was a diversionary ploy. Comments in the Congressional Record stated ". . . nothing in the amendments made by this bill shall be construed to require . . . hiring or promotional quotas." 136 CONG. REC. H9558 (Oct. 12, 1990).

6. Devroy, *supra* note 5, at A1.

7. Ann Devroy, *President Signs Civil Rights Bill*, WASH. POST, Nov. 22, 1991, at A1. President Bush praised the current version of the Act as an important weapon against the "evil of discrimination." Even though few sections had been changed, Bush made no reference to "quotas." Although no official explanation for this reversal was offered, it has been suggested that Bush signed the revised version to effect a domestic political victory. *Id.*

8. CENTER ON BUDGET AND POLICY PRIORITIES, STILL FAR FROM THE DREAM: RECENT DEVELOPMENTS IN BLACK INCOME, EMPLOYMENT AND POVERTY (U.S. Govt. Printing Office, Oct. 1988).

9. *Id.* at v-vii, ix-x.

10. *Id.* at vii-viii.

11. *See* DERRICK A. BELL, JR., RACE, RACISM, AND AMERICAN LAW 589-94 (1980). Bell states that economic disadvantage for Blacks is directly attributable to racial discrimination in employment. It is his basic premise that employment discrimination can be traced to attitudes that remain in the aftermath of the slavery system. Specifically, Bell points to the attitude that blacks are second class workers.

12. *Id.* at 592 n.16 (citing several studies which link income difference and job discrimination).

of the difference" between the incidence of poverty for Whites and Blacks.[13] From the statistics cited above, it appears that Professor Thurow's conclusions hold true today.

In order to prevent employment discrimination, Congress has enacted fair employment laws which prohibit discrimination based on factors such as race, sex, or religion. One of the broadest of these laws is Title VII of the Civil Rights Act of 1964[14], which makes it unlawful for an employer to discriminate based on "race, color, religion, sex, or national origin."[15] The Civil Rights Act of 1991 is a direct response by Congress to several decisions of the U.S. Supreme Court in its 1988-89 term which interpret the provisions of Title VII.[16] The provisions of the Act are important in preventing these decisions from limiting the scope of civil rights legislation prohibiting racial employment discrimination.[17]

II. THE SUPREME COURT DECISIONS OF 1989: A CHANGE IN COURSE FOR EMPLOYMENT DISCRIMINATION SUITS

Of the decisions handed down by the Supreme Court during the 1988-89 term, *Wards Cove v. Antonio*[18] was considered the most controversial since it severely limited a plaintiff's ability to prevail under Title VII. The decision in *Wards Cove* was regarded as a change in course from precedent established by early decisions.

A. *Historical Precedent Leading to* Wards Cove

One of the earliest decisions interpreting Title VII is *Griggs v. Duke Power Co.*[19] which held that a discrimination suit could be brought under Title VII against facially neutral practices that have a disparate impact on racial minorities and women. In *Griggs*, the employer restricted Black employees to the Labor Department prior to the effective date of Title VII.[20] After Title

13. *Id.* (quoting LESTER THUROW, ECONOMICS OF POVERTY AND DISCRIMINATION, Ch. VIII, at 1 (1967)).

14. 42 U.S.C. §§ 2000(e)-2000(e)-17 (1964).

15. *Id.* § 2000e-2 of Title VII states that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to . . . employment, because of such individual's race, color, religion, sex, or national origin."

16. Among the decisions which the Civil Rights Act of 1991 overturns or modifies are: Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989) (allowing the statute of limitations under Title VII to begin running at the time a policy is enacted rather than the point an individual faces its effects); Martin v. Wilks, 109 S. Ct. 2180 (1989) (allowing a collateral attack of a court ordered consent decree); Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) (holding that an employment decision may be discriminatory when proper and improper considerations form a mixed motive); and Wards Cove Packing Co. v. Antonio, 109 S. Ct 2115 (1989) (holding that an employment practice, neutral on its face, does not violate Title VII absent a showing of subjective intent to discriminate by the employer, discussed *infra* nn. 37-58 and accompanying text).

Also, the Act overturns Patterson v. McClean Credit Union, 109 S. Ct. 2363 (1989) (limiting application of Section 1981 of the Civil Rights Act of 1866 to the formation of an employment contract and preventing the application of this Reconstruction Act to discrimination which occurs during the performance of a contract).

17. *See* Leland Ware, *The Civil Rights Act of 1990: A Dream Deferred*, 10 ST. LOUIS U. PUB. L.J. 1-68 (1991); *see also* Goodman, *supra* note 4, at 185-205.

18. 109 S. Ct. 2115 (1989).

19. 401 U.S. 424 (1971).

20. The plant had a total of five departments. Jobs in the Labor Department paid less than any of the jobs in the other four departments. *Id.* at 427.

VII became effective, the formal racial barriers were removed but access to the higher paying positions became conditioned on a high school diploma and a passing score on two standardized tests. The new requirements effectively excluded Blacks from the other departments.[21] The Supreme Court held that proof of discriminatory intent was not required when facially neutral practices had a discriminatory effect and when those practices were not related to job performance.[22]

The procedure for bringing a suit under Title VII was outlined by the Supreme Court in *McDonnell Douglas v. Green*.[23] A plaintiff establishes a prima facie case by showing that an employment practice disproportionately disqualifies members of a protected group. Importantly, the prima facie case based on the disparate impact theory is often shown by statistical evidence.[24] Once the plaintiff meets this burden, the employer can rebut the prima facie case by demonstrating that the practice has a "manifest relationship" to the jobs involved.[25] If the employer satisfies this burden, a plaintiff may still prevail by showing that alternative practices which would not produce a disparate impact served the employer's interest.[26]

In 1975, the Supreme Court applied the job-relatedness standard from *Griggs* in *Albemarle Paper Co. v. Moody*.[27] The *Albemarle* decision followed the order and allocation of proof established in *McDonnell Douglas*.[28] The facts of *Albemarle* were similar to those in *Griggs* since the employer required applicants to have a high school diploma and to pass two standardized tests which resulted in excluding a large number of minority applicants. The employer argued that the requirements were job related and satisfied the business necessity standard from *Griggs*.[29] The Court rejected this defense and found that the requirements were not adequately related to the jobs in question.[30] The Court repeated its holding in *Griggs* that "Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets the burden of showing that any given requirement (has) a manifest relationship to the employment in question."[31]

21. *Griggs*, 401 U.S. at 426.

22. *Id.* at 431. The touchstone is "business necessity." If an employment practice which excludes Blacks cannot be related to job performance, then the practice is prohibited. *Id.*

23. 411 U.S. 792 (1973).

24. *See* BELL, *supra* note 11, at 619-20 (commenting on the importance of statistical proof as a substitute for discriminatory motive).

25. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (citing *Griggs*, 401 U.S. at 432).

26. *Albemarle*, 422 U.S. at 425 (citing *McDonnell Douglas*, 411 U.S. at 801).

27. 422 U.S. 405 (1975).

28. A plaintiff has two avenues to file a claim under Title VII. First, the plaintiff can claim disparate treatment when an employer treats an individual Black worker different from White workers. Second, the plaintiff may claim disparate impact has occurred to Black workers in general as a result of certain practices and procedures. *See* BARBARA SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1298-1300 (1983) (for a general discussion of disparate treatment), and 1324-31 (for a general discussion of disparate impact).

In *McDonnell Douglas*, the Court held that a plaintiff may establish a prima facie case of racial discrimination by "showing 1) that he belongs to a racial minority; 2) that he applied and was qualified for a job for which the employer was seeking applicants; 3) that, despite his qualifications, he was rejected; and 4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. 411 U.S. at 802.

29. *Albemarle*, 422 U.S. at 429-30.

30. *Id.* at 435-36.

31. *Id.* at 425 (quoting *Griggs*, 401 U.S. at 432).

Following the *Albemarle* decision, lower courts adopted differing definitions of the job related and business necessity standards as related to the employer's evidentiary burden. The phrase "business necessity" indicated that a practice producing a disparate impact must be actually necessary to the operations of the employer's business. On the other hand, the phrase "job related" indicates a lower standard under which a practice merely needs to bear some reasonable relationship to the job in question. The difference in the two standards is substantial and could affect the plaintiff's ability to prevail in a case.[32]

Some circuits supported the higher business necessity standard based on a footnote which appeared in a 1977 Supreme Court case, *Dothard v. Rawlinson*.[33] In *Dothard*, the Court struck down minimum height and weight requirements producing a disparate impact on female applicants for guard positions at Alabama prisons. The defendant in *Dothard* argued that applicants must meet certain the height and weight requirements in order to physically perform their job duties as guards.[34] The Court stated in a footnote that to satisfy the business necessity standard "a discriminatory practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge."[35]

Other courts concluded that the business necessity standard suggested in *Dothard* was too stringent and did not provide employers the discretion to operate their businesses without unnecessary interference. In *Contreras v. City of Los Angeles*,[36] the Ninth Circuit flatly rejected what it characterized as an "unnecessary footnote." Instead the Ninth Circuit held that the employer's evidentiary burden could be satisfied if the defendant showed that the challenged practices "significantly serve, but are neither required nor necessary to, the employer's legitimate business interests."[37] The different interpretations of the employer's evidentiary burden continued until the job relatedness/business necessity dichotomy was directly addressed in 1989 by the Supreme Court in *Wards Cove Packing Co. v. Antonio*.[38]

B. *The* Wards Cove *decision*

In the *Wards Cove* case, a class of nonwhite workers sued two Alaskan salmon canneries under Title VII challenging hiring and promotion practices based on a disparate impact theory.[39] Jobs at the canneries were seasonal and fell into two categories, "cannery" positions which were unskilled and "noncannery" jobs which were primarily skilled. Approximately two-thirds of the cannery positions were filled by Filipinos and Alaskan Eskimos. The noncannery jobs were predominately filled by White workers.[40] In addition, "virtually all of the noncannery jobs pay more than cannery positions."[41]

The original suit was filed in 1974 by nonwhite workers alleging that a

32. Ware, *supra* note 17, at 14.
33. 433 U.S. 321, 332 n.14 (1977).
34. *Id.* at 331.
35. *Id.*
36. 656 F.2d 1267, 1279 (9th Cir. 1981).
37. *Id.* at 1280.
38. 109 S. Ct. 2115 (1989).
39. *Id.* at 2120.
40. *Id.* at 2119.
41. *Id.* at 2119-20.

number of practices, including nepotism, rehire preferences, word-of-mouth hiring, and separate hiring channels for cannery and noncannery jobs, had resulted in a racially stratified workforce. The plaintiffs also complained that the companies' failure to promote from within contributed to a pattern of racial segregation.[42] These practices were aggravated by the fact that the nonwhite cannery workers lived and ate in dormitories and mess halls which were segregated from the White noncannery workers.[43]

The Ninth Circuit Court of Appeals held that this showing of racial stratification by job category was sufficient to support a presumption of discrimination in hiring practices.[44] However, even though the plaintiffs had made out a prima facie case of disparate impact, the case was remanded to the district court to determine whether the employer had satisfied its burden of proving that any disparate impact was justified by business necessity.[45] Before the district court could act on remand, the U.S. Supreme Court granted certiorari and subsequently reversed and remanded the case.[46]

In *Wards Cove*, the Supreme Court made it harder for plaintiffs to prevail in a disparate impact case by shifting the burden of proof from the employer to the employees.[47] After *Wards Cove*, the prima facie case consists of two subparts. First, the plaintiff must show a disparity by making the proper statistical comparison between those occupying the jobs at issue and those who are qualified for the positions.[48] Proof of a prima facie case raises a presumption that the practice constitutes unlawful discrimination which may then be rebutted by the defendant.[49]

By holding that the plaintiffs must show more than racial stratification of the workforce with statistical proof, the Supreme Court reinterpreted the *Griggs* standard.[50] However, the Court altered the *Griggs* standard by adding the second subpart of causation. Under *Wards Cove*, even if the plaintiff makes the proper statistical showing, the second subpart of the prima facie case requires a showing of causation by "isolating and identifying the specific employment practices that are allegedly responsible for any observed disparities" and showing that the specific practice "did in fact cause" the observed disparity.[51]

Once the plaintiff has made out at prima facie case, the employer has an

42. *Id.* at 2120.

43. *Id.* at 2128 n.4 (Stevens, J., dissenting). It was indicated that the facilities for the non-White workers were inferior leading Justice Stevens to comment that this situation "bear(s) an unsettling resemblance to aspects of a plantation economy." *Id.*

44. Antonio v. Wards Cove Packing Co., 827 F.2d 439 (9th Cir. 1987).

45. *Id.* at 445.

46. *Wards Cove*, 109 S. Ct. at 2127.

47. "The ultimate burden of proving that discrimination has been caused by a specific employment practice remains with the plaintiff *at all times*." *Id.* at 2125-26 (quoting Watson v. Ft. Worth Bank & Trust Co., 487 U.S. 977, 997 (1988) (emphasis in *Wards Cove*)).

48. *Wards Cove*, 109 S. Ct. at 2125-26.

49. As noted by Justice Stevens in the dissent, the purpose of this presumption is to "eliminat[e] the most common nondiscriminatory reasons for the plaintiff's rejection." *Id.* at 2130 (Steven, J., dissenting).

50. Justice Stevens agreed that it would have been appropriate for the majority to have ended its opinion at this point and remanded to the district court. *Wards Cove*, 109 S. Ct. at 2127 n.3 (Stevens, J., dissenting).

51. *Wards Cove*, 109 S. Ct. at 2124 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988)).

opportunity to offer a justification for the challenged practice.[52] Under the reasoning from *Griggs* and *Albemarle*, a prima facie showing of disparate impact shifted the burden to the employer to show the policy was based on business necessity.[53] The *Wards Cove* decision changed three things. First, the burden that shifts to the employer was changed from one of proof to one of production.[54] Second, the touchstone is no longer business necessity, but is lowered to a showing that the challenged practice significantly serves "the legitimate employment goals of the employer."[55] The Court indicated a rejection of the *Dothard* standard by stating "there is no requirement that the challenged practice be essential or indispensable to the employer's business."[56] These alterations effectively place the burden on the plaintiff—the party with the least access to the evidence—to prove that the practice does *not* serve the employer's legitimate goals.[57]

Finally, if the employer produces evidence to justify the practice under this lower standard, the plaintiff could prevail under *Griggs* by showing that an alternative practice would achieve the same goal without disparate impact.[58] The *Wards Cove* decision limits this option by requiring that the alternative device must be "equally effective" and be of no greater cost or burden to the employer as the challenged practice.[59] In addition, the burden of proof remains on the plaintiff to make this showing.[60] Thus, the *Wards Cove* decision narrows the application of civil rights legislation in cases of employment discrimination and makes it difficult for plaintiffs to prevail with claims of disparate impact.

III. THE CIVIL RIGHTS ACT OF 1991

The Civil Rights Act of 1991 is a direct congressional response to *Wards Cove* and other Supreme Court decisions which limit the scope of civil rights legislation in employment. The original Act was vetoed by President Bush who claimed the Act encouraged employer's to adopt racial quotas.[61] The Act was revised and reintroduced in the Senate by Senator Danforth in 1991.[62] Several compromises were made on the Act between Congressional Democrats, Republicans, and the Bush administration before the compromise bill passed the Senate on October 28, 1991 and passed the House on November 7, 1991.[63] President Bush signed the Act into law on November 21, 1991 in a Rose Garden ceremony.[64]

52. *Wards Cove*, 109 S. Ct. at 2125.
53. *Griggs*, 401 U.S. at 431; *Albemarle*, 422 U.S. at 425.
54. *Wards Cove*, 109 S. Ct. at 2126.
55. *Id.* at 2126.
56. *Id.*
57. *See* Judith Reed, *The Immediate Fallout of Wards Cove*, 7 N.Y.L. SCH. J. HUM. RTS. 75-79 (1990).
58. *Wards Cove*, 109 S. Ct. at 2126.
59. *Id.* at 2127.
60. *Id.* at 2126.
61. Devroy, *supra* note 5, at A1. The President claimed that the Act as originally worded would "create powerful incentives" for employers to adopt racial "quotas." It was President Bush's premise that employer's would attempt to hire employees on the sole basis of race to avoid discrimination lawsuits. *Id.*
62. Devroy, *supra* note 7, at A1.
63. *Id.*
64. *Id.* Although the version the President signed was not substantially different from the text of

A. *Provisions*

The Civil Rights Act of 1991[65] is actually an amendment to the Civil Rights Act of 1964 enacted to prevent the erosion of federal civil rights laws. Specific sections of the Act overturn the *Wards Cove* decision and clarify "provisions regarding disparate impact actions."[66] Section 2 of the Act reads in part: "Congress finds that the decision of the Supreme Court in *Wards Cove* (sic) has weakened the scope and effectiveness of Federal civil rights protections."[67] Further, Section 2 outlines the purposes of the Act which are to "overrule the treatment of business necessity as a defense in *Wards Cove* and to codify the meaning of business necessity used in *Griggs v. Duke Power Co.*"[68] and "to provide statutory authority and guidelines for the adjudication of disparate impact suits under Title VII of the Civil Rights Act of 1964 . . . ."[69]

Section 3(a) of the Act establishes in part:

> An unlawful employment practice based on disparate impact is established under this title only if . . . a complaining party demonstrates that a particular employment practice or group of employment practices results in a disparate impact on the basis of race . . ., and the respondent fails to demonstrate that such practice is required by business necessity . . . .[70]

Section 3 also allows the plaintiff to establish a case even after the employer shows a business necessity for the challenged practice by demonstrating "that a different available employment practice . . . which would have less disparate impact . . . would serve the respondent as well."[71] The final provision of Section 3 states that the "mere existence of a statistical imbalance in the work force . . . is not alone sufficient to establish a prima facie case."[72]

Section 5 establishes the definitions of key terms in the Act. Two important issues are resolved by this section. First, the term "demonstrates" is defined to include the "burdens of production and persuasion."[73] This returns the burdens of proof to their status before the *Wards Cove* decision. Second, the business necessity defense by definition must "bear a manifest relationship to requirements for effective job performance" for employment selection practices, and must "bear a manifest relationship to a legitimate business objective of the employer" for other employment decisions.[74]

These definitions in conjunction with the provisions in Section 3 serve to return to the *Griggs* standard by shifting the burden of proving business necessity back to the employer, and by returning to the *Griggs* "successful job per-

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the bill he vetoed, no "allegation of quotas" was made against the Civil Rights Act of 1991. Commentators have speculated that President Bush wanted a symbolic domestic victory which was not clouded by racial issues. It was ironic that President Bush praised the new version of the Act and signed it in a rose garden ceremony. Indeed, the ceremony was perfect for a photographic opportunity. *Id.*

65. S. 1207, *supra* note 2. The entire Act is actually divided into three different sections: S. 1207, S. 1208, and S. 1209.
66. *Id.* at S. 1208.
67. *Id.* at § 2(a).
68. *Id.* at § 2(b)(1).
69. *Id.* at § 2(b)(2).
70. *Id.* at § 3(a).
71. *Id.*
72. *Id.* at § 3(a).
73. *Id.* at § 5(a)(m).
74. *Id.* at §§ 5(a)(o)(1) and 5(a)(o)(2).

formance" test.[75] The rationale for these provisions is that the employer is in a better position to bear this burden since employers have easier access to employment records and workplace policies.[76] Thus, the provisions of the Act overturn the *Wards Cove* decision and prevents the Supreme Court from effecting a change in course for civil rights in employment discrimination through *Wards Cove*.

Although the Bush administration claimed this Act encouraged employers to adopt racial quotas,[77] the current version of the Civil Rights Act of 1991 explicitly disapproves of numerical quotas and states:

> [N]othing in Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*) shall be construed to require or encourage an employer to adopt hiring or promotion quotas; or to prevent an employer from hiring the most effective individual for a job."[78]

Further, during the 18-year period between *Griggs* and *Wards Cove*, employers did not resort to the adoption of quotas in order to comply with *Griggs*.[79] Thus, there should be no legitimate concern that the return to the *Griggs* standard would encourage such quotas.[80]

B. *Penalties*

The provisions in the Civil Rights Act of 1991 explicitly overturn the *Wards Cove* decision and return to the *Griggs* standard for establishing a defense based on business necessity.[81] Other sections in the bill can change the nature of disparate impact suits by expanding the damages available under Title VII. Prior to the enactment of the Civil Rights Act of 1991, Title VII limited a plaintiff's recovery to equitable damages, including back pay, attorney's fees, and injunctive relief.[82]

The Civil Rights Act of 1991 allows successful plaintiffs to recover compensatory damages in cases of intentional discrimination in addition to back pay, attorney's fees, and injunctive reinstatement.[83] Moreover, punitive damages are awardable under the Act if the employer has engaged in discriminatory conduct "with malice, or with reckless indifference to the federally protected rights of an aggrieved individual; and the penalty is necessary to

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75. *Id.*

76. Melvin J. Hollowell, *The Civil Rights Act of 1990 and 1991*, 70 MICH. BAR J. 530, 532 (1991).

77. *Id.* at 532 (quoting J. Sununu, Letter to U.S. Senator Edward M. Kennedy (July 10, 1990)). The letter stated the Bush administration's concern that the Act "as now crafted, will . . . compel businesses to adopt quota policies in hiring and promotion as the only or best defense against the likelihood of legal action." *Id.*

78. S. 1208, *supra* note 2, at § 7(a)(2).

79. This factor has led many proponents of the Act to argue that President Bush vetoed the original Act of 1990 using quotas as a device of racial politics. *See* Devroy, *supra* note 7, at A1.

80. Also it has been noted that the Supreme Court generally disfavors strict racial quotas. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). In *Croson*, the Court held that a minority set-aside program was invalid as a general remedy against racial discrimination absent a finding of local discriminatory practices. Justice O'Connor's plurality opinion stated, "[A]n amorphous claim of past discrimination in a particular industry cannot justify the use of an unyielding quota." *Croson*, 488 U.S. at 724.

81. *Id.* at § 5(b). Section 5(b) states that it was the intent behind this Act to "codify the meaning of business necessity used in *Griggs v. Duke Power Co.*, (sic) and overrule the treatment of business necessity in *Wards Cove Packing Co. v. Antonio*, with respect to an employment practice." *Id.*

82. 42 U.S.C. §§ 2000(e)(5) (1964).

83. S. 1209, *supra* note 2, at § 3(a) and § 3(b).

deter . . . such discriminatory practices in the future."[84] Several factors are outlined to consider in the imposition of punitive damages.[85] The Act also allows for jury determination of the compensatory and punitive damage awards.[86]

An important compromise limits the damages for nonpecuniary losses, such as emotional pain and suffering, and limits punitive damages to $50,000 for employers of 16 to 100 people, $100,000 for employers of 101 to 200 people, and $300,000 for employers of 501 or more.[87] The Bush administration generally endorsed the expansion of the damage remedies, but argued for damages limitations.[88]

This particular portion of the Act could favor plaintiffs who file Title VII suits. The potential for large verdicts is present with the allowance of punitive damages which may provide a substantial deterrent against racial discrimination. In fact, one conservative who opposed other provisions in the Act stated "[I]f you want to truly harm businesses that engage in discrimination, the only way to do it is with money."[89]

The Civil Rights Act of 1991 considerably expands damage remedies in employment discrimination suits. Prior to the Act, the Supreme Court concluded that relief available under Title VII was merely equitable in nature.[90] The Court stated in *Albemarle* that "the purpose of Title VII is to make persons whole for injuries suffered (due) to unlawful discrimination" and that the "injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed."[91]

The addition of damage remedies may provide a greater incentive for attorneys to represent plaintiffs in discrimination cases. This added factor is important since many of the cases are taken on a contingency basis and attorney's fees awarded in such litigation are paid only after the case is concluded.[92] The potential for substantial compensatory and punitive damage awards encourages plaintiffs to file suits and provides financial incentive for attorneys to represent Title VII plaintiffs. Further, the threat of large monetary awards provides a financial disincentive for employers to intentionally continue discriminatory practices. By providing such an incentive to plaintiffs

84. *Id.* at §§ 3(a) and 3(c). The term "punitive damages" is not used in the language of the Act. Instead the term "equitable penalty" is used.

85. These factors include: the nature of the discriminatory practices, the efforts of the employer to instruct employees about employment discrimination, the nature of employer programs to prevent discrimination, lawful affirmative action programs, availability of an internal grievance procedure, whether the employer made a prompt investigation of discriminatory practices, efforts to correct the discriminatory practice, the size of the employer, and the effect of punitive damages on the economic survival of the employer. *Id.* at § 3(c).

86. *Id.*

87. *Id.* at §§ 3(b)(3) and (3)(c)(3).

88. Ware, *supra* note 17, at 39 n.206.

89. *Id.* (quoting Clint Bolick, director of the conservative Landmark Legal Foundation Center for Civil Rights, in Steven Holmes, *Costs, Not Quotas, Worry Some Foes of Rights Bill*, N.Y. TIMES, May 27, 1990, sec. 4, at 4).

90. *Albemarle*, 422 U.S. at 416.

91. *Id.* at 418-19.

92. *See* Ware, *supra* note 17, at 40-43. Ware notes that Title VII suits are extremely long and expensive for both plaintiffs and employers.

For example, the suit in *Wards Cove* was originally filed by workers in 1974. It was over fifteen years before the Supreme Court ruled against the plaintiffs; thus, no attorneys fees were awarded under Title VII. 109 S. Ct. 2115, 2116.

and attorneys, the allowance of compensatory damages, punitive damages, and a right to a jury trial expands the power of Title VII as a weapon against employment discrimination.

IV. THE PROMISE OF SUBSTANTIVE IMPACT

The Civil Rights Act of 1991 has the purpose of strengthening the civil rights of individuals against employment discrimination. Now that the Act has become law, it is important to look at whether it can fulfill its purpose with a substantive impact on the current state of employment discrimination. Predictions of the impact of this Act can be based on the historical effects of past civil rights legislation.

A. *The Limited Strategy of Equal Employment Laws: The Case of Title VII of the Civil Rights Act of 1964*

As discussed above, Title VII is the core protection in the Civil Rights Act of 1964.[93] When it was originally passed, supporters of Title VII envisioned that the statute would eliminate most of the racial and sexual barriers to equal employment opportunities.[94] The years which have followed the enactment of Title VII have proven this vision to be overly-optimistic. Employment discrimination is alive and well in America today, 27 years after the enactment of Title VII, as evidenced by statistics cited previously and by anecdotal evidence of job discrimination.

Scholars and legal writers are divided on the effectiveness of Title VII against employment discrimination. Several studies have indicated that the passage of Title VII did have a substantial impact by attacking the most egregious forms of discrimination in the workforce, whereas more subtle forms of discrimination continued.[95] In particular, Title VII opened up positions in manufacturing industries which formally denied jobs to Blacks.[96] However, Blacks and women only gained access to low-wage and low-skilled jobs within these industries which limited the impact of Title VII. In fact, one study concluded that most of the formal barriers to advancement were broken down by 1975.[97] Since then, the wage gap between Black and White workers has continued to grow because the number of low-skilled positions in manufacturing industries has decreased.[98] Also, Blacks are still severely underrepresented among professionals, managers, and other white-collar jobs.[99]

From such studies, a general conclusion can be drawn that Title VII has had a limited impact by opening up certain labor markets to minorities after 1965; however, a strong resistance exists to further advancement in skilled jobs, management, and the professions. The limited effect of Title VII serves

93. 42 U.S.C. §§ 2000(e)-2000(e)-17 (1964).

94. Ware, *supra* note 17, at 6 (pointing to Francis J. Vass, *Title VII: Legislative History*, 7 B.C. L. REV. 431 (1966)).

95. John J. Donohue, *The Impact of Federal Civil Rights Policy on the Economic Status of Blacks*, 14 HARV. J.L. & PUB. POL'Y 41, 43-48 (1991).

96. *Id.* at 48.

97. *Id.*

98. *See* Eleanor Norton, *The End of the Griggs Economy: Doctrinal Adjustment for the New American Workplace*, 8 YALE L. & POL'Y REV. 197 (1990).

99. BELL, *supra* note 11, at 591.

as an example that the Civil Rights Act of 1991 will also have a limited effect on employment discrimination.

B. *Modern Employment Discrimination: A Heritage of Slavery*

The resistance to the effects of civil rights legislation such as Title VII is a result of persistent attitudes which originated during slavery. Racial attitudes have been retained by American society and have managed to escape the effects of legislation aimed at preventing employment discrimination.

The most important of these underlying ideas is the notion of racial superiority. The origins of this attitude can be traced back, even before the slave trade began, to the sixteenth century when Europeans initiated a merchant trade with the West African coast.[100]

In conjunction with the slavery system, American law legitimized the idea that Black slaves were property and, as such, were inferior.[101] During the Jim Crow era, segregation and racial prejudice continued with the idea that social separation mirrored the "natural differences of the races."[102] The same reasoning which supported separation of the races in restaurants and schools supported the exclusion of Blacks from certain jobs in unions and corporations.[103] As industries grew, jobs which were unskilled and required manual labor became defined as "black jobs" and employment patterns were established which have continued until the present.[104]

Even though the American economy has gone through revolutionary changes since colonial times, the ideas and attitudes of racial superiority have remained unchanged. These attitudes have become institutionalized in the corporate employment structure and present a powerful barrier to equal employment opportunities. These pervasive attitudes have resisted changed for over four hundred years and cannot be changed in individuals or institutions through legislation alone. Only education, experience, and exposure to diversity can chip away at these internalized attitudes which form the basis for racial bias. The Civil Rights Act of 1991 provides incentives to file suits in response to specific instances of employment discrimination; however, the Act will not have a substantive impact unless it can change the attitudes of racial bias that lead to job discrimination.

V. CONCLUSION

The Civil Rights Act of 1991 has been the center of controversy and political debate for over two years. The dispute continues even now that the Act has been signed into law over the interpretation and enforcement of the

100. *See* JOHN WORK, RACE, ECONOMICS, AND CORPORATE AMERICA 15-27 (1984); Work states that Europeans originated the ideas of racial and class superiority during the feudal system of the Middle Ages. These Europeans developed a false sense of racial superiority since they viewed West African cultures as primitive even though these societies had complex socio-economic institutions including states with laws, armies, and courts; *see also* CLARICE STASZ, THE AMERICAN NIGHTMARE 56-58 (1981).

101. *See* BELL, *supra* note 11, at 20-24. Even the United States Constitution contains several references indicating the inferiority of slaves. For instance, Article I, Section 2. Clause 3 contains the "three-fifths provision" which counts black slaves as only three-fifths of a person. *Id.* at 22.

102. *Id.* at 59.

103. *See* WORK, *supra* note 100, at 29-39.

104. *Id.* at 39.

Act.[105] A review of the background of the Act shows that its primary purpose is to overturn the Supreme Court decisions which would limit claims of employment discrimination by making it harder for plaintiffs to prevail against employers. The provisions of the Civil Rights Act of 1991 overturn the decisions of the Supreme Court, such as *Wards Cove*, and prevent the erosion of civil rights in employment.

The damage remedies allowed under the Act provide financial incentives for plaintiffs and attorneys who ultimately prove cases of intentional job discrimination. These added damage remedies will serve as a financial disincentive for employers to use discriminatory practices. However, the Civil Rights Act of 1991 represents symbolic legislation which can only have a limited impact against the racial attitudes that have survived as a legacy of slavery. Until these attitudes reflect equality in terms of employment opportunity, legislation such as the Civil Rights Act of 1991 is only a small step towards a goal of equality in employment.

W.E.B. DuBois stated back in 1903 that "the problem of the twentieth century is the problem of the color-line."[106] Perhaps, current civil rights legislation will not end racial employment discrimination, but the Civil Rights Act of 1991 represents a small step in the direction of equal employment opportunity—a step in the right direction.

> "Goodbye," said the Cheshire cat. As Alice watched, he began to disappear from his tail until all that remained were his smiling teeth, which lingered for some time.
>
> LEWIS CARROLL[107]

BY REGINALD V. SPEEGLE*

105. The Bush administration continues to send mixed signals. Controversy erupted on the day the Civil Rights Act of 1991 was signed when an executive order was issued then rescinded by the President's office which would have scaled-back affirmative action programs within the federal government. President Bush contended that this order was issued by mistake. Further, the Bush administration favors a narrow interpretation of the Act by federal officials who enforce the Act. Critics argue that such enforcement is at odds with the intent of the Act. Devroy, *supra* note 62, at A1.

106. W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 13 (1973).

107. CARROLL, *supra* note 1.

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