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## Burdens of Proof Under Title VII in the 90's: Wards Cove vs. The Civil Rights Act of 1990

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## **Abstract**

Equal employment opportunity ("EEO") law, despite a roaring start in the late 1960's and early 70's,<sup>1</sup> fell into a quiet decline in the 1980's, under the Reagan/Bush administrations.

**KEYWORDS:** civil, rights, act

# Burdens of Proof Under Title VII in the 90's: Wards Cove vs. The Civil Rights Act of 1990

By Kenni F. Judd\*

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## Introduction

Equal employment opportunity ("EEO") law, despite a roaring start in the late 1960's and early 70's,<sup>1</sup> fell into a quiet decline in the 1980's, under the Reagan/Bush administrations. Agency enforcement declined,<sup>2</sup> while scant attorneys' fee awards, coerced fee waivers and other difficulties discouraged private representation of EEO plaintiffs.<sup>3</sup> Last term, the United States Supreme Court rendered a series of significant EEO decisions.<sup>4</sup> These decisions substantially altered the

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1. During its first five years of existence, the EEOC investigated more than 8,000 charges of sex discrimination; in 1972, the number of charges filed was still increasing. H.R. REP. NO. 238, 92d Cong., 2d Sess., reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2139.

2. The EEOC filed seventy percent fewer cases in 1982 than in 1981. *Options for Conducting a Pay Equity Study of Federal Pay and Classification Systems, Hearings before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service*, 99th Cong., 2d Sess. 237 (1986) (testimony of Judy Goldsmith, President, National Organization for Women). Ms. Goldsmith attributes the decline to personnel and budget cuts overseen by President Reagan and to the appointment of "high level personnel who are hostile to effective enforcement." *Id.* at 236-37; *contra id.* at 662 (testimony of Clarence Thomas, Chair, EEOC) (most of the 10,000 EEO charges filed annually with the EEOC resolved within one year).

3. Terry, *Eliminating the Plaintiff's Attorney in Equal Employment Litigation: A Shakespearean Tragedy*, 5 LAB. LAW. (No. 1) 63 (Winter 1989); see also Bronner, *Civil Rights Act of 1990: Inside the Negotiations*, Boston Globe, July 23, 1990, National/Foreign Section, at 1 (judges appointed by Presidents Reagan and Bush perceived as less likely to rule in favor of discrimination victims); Weiner, *With Addition of Souter to Court, Conservative Bulwark is in Place*, Miami Herald, Oct. 14, 1990, at 18A (federal "bench has grown increasingly hostile to claims brought by women and minorities") (quote attributed to Nan Aron, Alliance for Justice).

4. The primary decisions targeted by the Civil Rights Act of 1990 are: Wards

framework for determining EEO cases by raising significant additional barriers to potential discrimination suits. Congress reacted by passing the Civil Rights Act of 1990, H.R. 4000, S. 2104 (1990), designed to restore and, in a few instances, strengthen the rights and remedies previously available to EEO plaintiffs.

Despite substantial amendments aimed at making the bill acceptable to the Bush administration,<sup>5</sup> the proposed Civil Rights Act continues to face the threat of a presidential veto. The veto threat is based primarily upon the Act's provisions concerning the burden of proof in cases based upon "unintentional" discrimination.<sup>6</sup> President Bush, and other opponents of the bill, claim that the bill will lead to the use of hiring quotas.<sup>7</sup> According to the bill's detractors, employers will institute hiring quotas to ensure that their work forces contain appropriate percentages of women and racial, ethnic or religious minorities to avoid potential litigation in which they would be required to demonstrate the job-related nature of their employment practices.<sup>8</sup> The bill's propo-

Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989) (burden of proof and evidentiary standards in disparate impact cases); Martin v. Wilks, 109 S.Ct. 2180 (1989) (finality of judgments mandating affirmative action programs); Lorange v. AT&T Technologies, 109 S.Ct. 2261 (1989) (statutes of limitations for challenging discriminatory seniority systems); Price Waterhouse v. Hopkins, 109 S.Ct. 1775 (1989) (burden of proof in mixed motive cases); Patterson v. McLean Credit Union, 108 S.Ct. 1419 (1988) (enforcement of contracts under section 1981).

5. See *infra* text accompanying notes 68-75. The initial version of the bill (H.R. 4000, 101st Cong., 2d Sess., introduced February 7, 1990) and the version which passed the Senate (S. 2104, 101st Cong., 2d Sess.) are included in an Appendix to this article. The Senate passed the amended bill by a 65-34 vote, despite the threatened presidential veto. *Senators OK Bill to Protect Civil Rights*, Miami Herald, July 19, 1990, at 1A, col. 1; Editorial, *Fill Civil-Rights Needs*, Miami Herald, August 2, 1990, at 20A, col. 1. The House of Representatives subsequently passed a substantially identical amended bill by a vote of 272-154. The Civil Rights Act of 1990, CONG. DIG. 196, 205 (August-September 1990).

6. See, e.g., *A Red Herring in Black and White*, N.Y. Times, July 23, 1990, at 14A; Edelman, *How Will the President Play His Civil Rights Card?*, Broward Review, June 19, 1990, at 2.

7. "The number one concern that has been voiced by the bill's opponents was the danger that the original language would result in hiring quotas." The Civil Rights Act of 1990, CONG. DIG. 196, 214 (statement of Senator Dodd); *Senators OK Bill to Protect Civil Rights*, Miami Herald, July 19, 1990, at 1A, 12A ("Most of the controversy" surrounding the bill comes from provisions overruling *Wards Cove*).

8. E.g., The Civil Rights Act of 1990, CONG. DIG. 196, 213 (statement of Senator Hatch). The bill's opponents have ignored the holding of *Connecticut v. Teal*, 457 U.S. 440 (1982), that a "bottom line" appropriate racial balance is no defense to a Title VII claim. The proposed Civil Rights Act does not purport to overrule *Teal*. Ad-

nents, on the other hand, claim that the bill, for the most part, simply re-establishes long-standing precedent concerning the burden of proof in such cases.<sup>9</sup> Advocates of the bill further stress the absence of any evidence that the standards to be restored by the bill have encouraged the use of quotas.<sup>10</sup> These burden of proof issues will be the primary focus of this article.<sup>11</sup>

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ditionally, at least some of the quota fears are based on misperceptions concerning the availability of compensatory and punitive damages. The bill permits such damages only in cases of intentional discrimination, not in adverse impact cases. *See* CONG. DIG. at 210 (statement of Senator Kennedy).

9. *E.g., Quota Hogwash—Bogus Objections to Civil-Rights Bill*, Seattle Times, July 24, 1990, at A6 [hereinafter *Quota Hogwash*]; Editorial, *Battle of the Minorities*, Miami Herald, May 28, 1990, at 14A, col. 1.

10. *A Red Herring in Black and White*, N.Y. Times, July 23, 1990, at 14A ("The best evidence of that danger [quota hiring] would be that from 1971 to 1989, many employers in fact adopted quotas. But the Administration cites no such evidence."); *Battle of the Minorities*, Miami Herald, May 28, 1990, at 14A ("When pressed to say when in the past these criteria had created such quotas, Mr. Thornburgh couldn't."); The Civil Rights Act of 1990, CONG. DIG. 196, 218 (statement of Senator Simon); *see also infra* notes 68-75 and accompanying text.

11. The proposed Civil Rights Act of 1990 also:

a. seeks to assure the availability of counsel to prospective plaintiffs by prohibiting settlements predicated upon fee waivers. This section simply provides that cases may not be settled, either by stipulation or dismissal, unless the parties or their counsel attest to the court that a waiver of all or substantially all attorney's fees was not compelled as a condition of the settlement. Such a provision is a necessary and predictable solution to the moral, ethical and financial dilemma facing the plaintiff's lawyer confronted with a settlement offer conditioned upon a waiver of fees. *See* Terry, *supra* note 3, at 71.

b. authorizes compensatory and punitive damage awards in cases of intentional discrimination. These remedies were previously available only to victims of race discrimination under section 1981, but not to Title VII or age discrimination claimants. According to Senator Graham, a ten-year study of intentional race discrimination cases found that no damages were awarded in 85 percent of the cases; the average award in the remaining fifteen percent of the cases was about \$40,000.00. The Civil Rights Act of 1990, CONG. DIG. 196, 220 (remarks of Senator Graham, D-FL). If cases involving allegations of intentional discrimination on other bases follow this pattern, the resulting litigation is unlikely to pose a critical problem for employers. Moreover, as Senator Kennedy put it, "[w]omen and minorities are not second-class citizens; they do not deserve second-class remedies under the civil rights laws." *Id.* at 208.

c. limits challenges to court-ordered affirmative action programs;

d. provides that the statute of limitations for challenging seniority systems begins to run when discriminatory effects occur, not when the systems themselves are first implemented;

e. modifies the holding of *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989),

## HISTORY OF EEO DEVELOPMENT

One of the earliest significant federal EEO statutes was enacted as part of the Civil Rights Act of 1964.<sup>12</sup> Title VII, as the statute came to be known, prohibited discrimination in employment on the basis of race, color, religion, sex or national origin.<sup>13</sup> Protections for older employees and for handicapped workers in the public sector followed; the frameworks developed in Title VII litigation were adapted for use in these new areas as well.<sup>14</sup>

### *Intentional Discrimination vs. Adverse Impact*

The simplest and most obvious form of discrimination prohibited by Title VII, intentional discrimination against members of a protected class, came to be known as "disparate treatment."<sup>15</sup> When Title VII became effective in mid-1965, intentional race and sex discrimination was rampant and, to a great extent, socially acceptable. Indeed, newspapers continued to run sex-segregated "help wanted" ads for several more years. Employers, and many segments of the public, saw nothing wrong in refusing to hire women or minorities for certain positions, or paying them less than white males for similar work.<sup>16</sup>

concerning mixed-motive cases of intentional discrimination, to provide that any significant reliance upon discriminatory motives constitutes a violation of the Act (see *infra* note 28); and

f. overrules *Patterson v. McLean Credit Union*, 108 S.Ct. 1419 (1988), by restoring Section 1981's application to the enforcement as well as the making and termination of employment contracts.

12. After the passage of the Civil Rights Act of 1964, several earlier statutes (included within the Civil Rights Acts of 1866 and 1871, now codified at 42 U.S.C. §§ 1981, 1983 and 1985) began to be used to fight employment discrimination. Not until 1968, however, did the Court permit section 1981 to be used against private employers. *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968). Other limitations continue to restrict the utility of these statutes, including the recent holding in *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989), one of the cases the proposed Civil Rights Act of 1990 would overturn.

13. 42 U.S.C. § 2000e-2 (1964).

14. *E.g.*, *Pena v. Brattleboro Retreat*, 702 F.2d 322 (2d Cir. 1983); *Wood v. Exxon Corp.*, 674 F. Supp. 1277 (S.D. Tex. 1987) (Title VII models of proof apply in cases under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-637(1988)).

15. *See, e.g.*, *Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977).

16. *Options for Conducting a Pay Equity Study of Federal Pay and Classification Systems, Hearings before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service*, 99th Cong., 2d Sess. 60-61

In time, the concept of intentional discrimination came to be publicly frowned upon, perhaps because of the enforcement of Title VII. Instances of blatant, clearly intentional discrimination declined. The overall problem of employment discrimination, however, had hardly been dented. By 1970, Congress recognized employment discrimination as "a far more complex and pervasive phenomenon," appropriately described in terms of "systems" rather than isolated intentional acts.<sup>17</sup> Even now, persistent patterns of job segregation separating white men from women and men of color,<sup>18</sup> and the ever-present wage gap,<sup>19</sup> suggest that employment discrimination remains a substantial factor in the modern American marketplace.<sup>20</sup>

In 1971, the Supreme Court recognized this dilemma and decided *Griggs v. Duke Power Co.*<sup>21</sup> In *Griggs*, the Court held that Title VII did not contain an intent requirement, but instead prohibited "not only overt discrimination but also practices that are fair in form, but discriminatory in practice."<sup>22</sup> As a result, the facially neutral criteria imposed by the *Griggs* employer—a high school degree requirement and intelligence/aptitude tests—were subject to challenge under Title VII because black employees and applicants were more often adversely affected by the requirements than were white employees and applicants. The *Griggs* Court went on to hold, however, that such facially neutral criteria, even if discriminatory in practice, were nevertheless permissi-

(1985) (testimony of Dennis Dresang, Chair, Wisconsin Task Force on Comparable Worth), 516-17 (statement by the Nat'l Federation of Fed. Employees), 594 (dissenting Statement of Mary Frances Berry and Blandina Cardenas Ramirez of the U.S. Comm. on Civil Rights); Blumrosen, *Wage Discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REFORM 399, 402-07 (1979); The Civil Rights Act of 1990, CONG. DIG. 196, 222 (August-September 1990) (remarks of Senator Reigle (D-Mich.) during July 18, 1990, Senate Floor Debate on S.2104).

17. S. REP. NO. 1137, 91st Cong., 2d Sess. 4 (1970) (Committee on Labor and Public Welfare). See generally M. E. GOLD, *A DIALOG ON COMPARABLE WORTH* (1983); D. J. TREIMAN & H. I. HARTMANN, *WOMEN, WORK AND WAGES* (1981).

18. LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN, *COMPARABLE WORTH: THE PAY EQUITY ISSUE* (Informational Bulletin LRB-84-IB-2, June 1984).

19. Nat'l Comm. on Pay Equity, Newsnotes 15 (Dec. 1989).

20. See generally Judd & Gomez-Mejia, *Comparable Worth: A Sensible Way to End Pay Discrimination, or the "Looniest Idea Since Looney Tunes"?*, in *NEW PERSPECTIVES ON COMPENSATION ADMINISTRATION* 61 (D. Balkin & L. Gomez-Mejia eds. 1987).

21. 401 U.S. 424 (1971).

22. *Id.* at 431.

ble if they were demonstrably job-related:

Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant.<sup>23</sup>

These types of cases, which do not require proof of discriminatory intent, are commonly called "adverse impact" cases.<sup>24</sup>

### *Models of Proof*

#### *Intentional Discrimination*

The standard model of proof for intentional discrimination (disparate treatment) cases became firmly established in *McDonnell Douglas Corp. v. Green*<sup>25</sup> and its progeny.<sup>26</sup> In these cases, the plaintiff must present a prima facie case of intentional discrimination.<sup>27</sup> The employer

23. *Id.* at 436.

24. In practice, many courts and commentators use terms such as "disparate impact" (probably a corruption of "disproportionate impact") and other labels to describe adverse impact cases. To avoid the confusion generated by the use of two such similar terms as "disparate treatment" and "disparate impact," this article will use only the term "adverse impact" in referring to cases based upon unintentional discrimination.

25. 411 U.S. 792 (1973).

26. *E.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

27. The precise parameters of the prima facie case will vary depending upon the type of allegedly discriminatory employment practice. In a hiring case, for example, a plaintiff would be required to demonstrate membership in a protected class, qualification for the position applied for, rejection, and subsequent efforts by the employer to fill the position with a person of similar qualifications. Promotion, compensation and discharge cases require similar but not identical proofs. Of course, in the rare case in which a Title VII plaintiff has compelling direct evidence of discrimination, he or she need not use the *McDonnell Douglas* model. *E.g.*, Bell v. Birmingham Linen Serv., 715 F.2d 1552, 1556-57 (11th Cir. 1983). In this day and time, however, most employers are too sophisticated to permit the availability of such direct evidence. *E.g.*, *id.* at 1556; see also LEDVINKA, NEW PERSPECTIVES ON COMPENSATION ADMINISTRATION 51, 55 (D. Balkin & L. Gomez-Mejia eds. 1987) ("[E]vidence of intent is usually hard to find. Managers know that differential treatment of men and women is illegal, and they



is then required to articulate a legitimate, non-discriminatory reason for the adverse employment action against the plaintiff. The articulation standard requires no quantum of proof; the employer need only state a non-discriminatory reason for the adverse employment action. The plaintiff must then prove that the employer's articulated reason is a pretext, masking a discriminatory intent. The burden of proving the employer's discriminatory intent remains at all times with the plaintiff.<sup>28</sup> With the exception of mixed motive cases,<sup>29</sup> this model of proof was not affected by last term's decisions, nor is it addressed by the proposed Civil Rights Act of 1990.<sup>30</sup>

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are unlikely to do, say, or write anything indicating that they are aware of any such treatment."); Weisberg, *Sex Bias 'Victory' May Really Be a Sham*, *Broward Review*, July 16, 1990, at 10, 11 ("employers have become increasingly sophisticated about concealing unlawful discrimination"); B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 15 (2d ed. 1983) ("Direct evidence of discriminatory motivation is now relatively unusual.").

28. *E.g.*, *Watson v. Forth Worth Bank and Trust*, 108 S.Ct. 2777, 2788-89 (1988). So-called "mixed motive" cases may be deemed a narrow exception to this rule. *See generally* *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989) (plurality opinion). In a mixed-motive case, where the plaintiff establishes that a discriminatory motive played some role in causing the adverse employment decision, the burden of proof shifts to the employer to prove, by a preponderance standard, that it would have made the same decision even if it had not been influenced by the discriminatory motive. If it can do so, it will not be found to have violated Title VII. *Id.* at 1787-92. The focus in a mixed motive case, however, is primarily on causation. The plaintiff is still required to prove the existence of discriminatory intent.

The proposed Act addresses this decision by clarifying the fact that any reliance at all upon discriminatory motives violates Title VII, even though available remedies may be limited if the employer can establish that it would have reached the same decision absent the improper motive. This section appears consistent with the position previously taken by the Eighth Circuit in *Bibbs v. Block*, 778 F.2d 1318, 1320-24 (8th Cir. 1985) (en banc). Four Circuits had previously required plaintiffs to prove "but for" causation, while five had shifted the burden of proof to the employer to show that it would have taken the same action regardless of the discriminatory factors. Of these, four required only a preponderance of the evidence, while one required clear and convincing proof. The Circuits had also been divided upon the issue of whether such a showing negated a violation of Title VII, or merely prevented the imposition of equitable relief such as reinstatement. *Price Waterhouse*, 109 S.Ct. at 1784 & n.2.

29. *See supra* note 28.

30. The Act does, however, expand the available remedies in this type of litigation to conform to the remedies available to victims of intentional race discrimination under section 1981. *See supra* note 11.

### *Adverse Impact*

In adverse impact cases, a different model of proof developed. The plaintiff's prima facie case required proof that the challenged criteria had a significantly disproportionate adverse impact upon otherwise qualified members of a protected class. Plaintiffs typically accomplished this proof through statistics comparing the percentage of protected class members in the relevant workforce to the percentage of qualified protected class members in the relevant labor market,<sup>31</sup> and showing that the imbalance was caused by the challenged practices.<sup>32</sup> In *Dothard v. Rawlinson*,<sup>33</sup> for example, women comprised almost 37 percent of the total labor force, but less than 13 percent of the state's correctional counselors. The reasons for the imbalance were minimum height and weight requirements which excluded far more women than men.<sup>34</sup>

Several tests developed to determine whether the adverse impact caused by a particular selection device was "significantly disproportionate," none of which has gained uniform acceptance. The EEOC guidelines proposed a "four-fifths" or "eighty percent" rule of thumb: a criterion is generally<sup>35</sup> deemed discriminatory if it results in a selection rate, for any protected class, of less than eighty percent of the rate of selection for the class with the highest selection rate under the same criterion.<sup>36</sup> Some courts have adopted this rule; others look to see if the differential exceeds two or three "standard deviations."<sup>37</sup> Still others

31. This segment of the plaintiff's case may not always be necessary, as evidenced by *Connecticut v. Teal*, 457 U.S. 440 (1982). See *supra* note 8.

32. *E.g.*, *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) ("[T]o establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern.").

33. 433 U.S. 321 (1977).

34. The height requirement, for example, disqualified about a third of all women, but only a little over one percent of all men. The weight requirement excluded 22.29 percent of women and only 2.35 percent of men. The combination of the two requirements excluded over forty percent of Alabama's female workers from the position in question. *Dothard*, 433 U.S. at 329-30.

35. The eighty percent rule is neither a safe haven nor an absolute minimum. Smaller disparities have been found discriminatory, and larger disparities have been found acceptable. 29 C.F.R. § 1607.4(D) (1990).

36. 29 C.F.R. § 1607.4(D), 1607.16(R) (1990).

37. A standard deviation is a statistical term describing some of the properties of a data distribution. Most populations, when measured for any particular property, will form a bell curve in which the majority of the population clusters around the average

simply judge the significance of the adverse impact on a case by case basis.<sup>38</sup>

If the plaintiff proved his or her prima facie case, the employer was then required to establish "business necessity." Business necessity has traditionally been treated as an affirmative defense, so that the burden of proof on that issue has been allocated to the employer. Accordingly, the employer has been required to demonstrate that the challenged criteria were important to successful job performance.<sup>39</sup> Prior to the Court's decision in *Wards Cove Packing Co. v. Atonio*,<sup>40</sup> an employer could justify the use of tests or other devices shown to have a discriminatory impact only by demonstrating through "professionally accepted methods," that the criteria were "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which the candidates are being evaluated."<sup>41</sup> If an employer established that the challenged practices were sufficiently job-related, the plaintiff was then given an opportunity to show that less discriminatory methods would accomplish the same purpose equally well.<sup>42</sup>

### *The Evolving Model of Proof in Adverse Impact Cases*

Last term, by a scant 5-4 majority, the Supreme Court decided *Wards Cove Packing Co. v. Atonio*.<sup>43</sup> The *Wards Cove* employers operated canneries in remote areas of Alaska during the summer "salmon run" season. Each cannery had two general types of positions: unskilled cannery jobs and skilled non-cannery jobs. At each cannery, the un-

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point, or "mean." The size of the population and the spread of its scores combine to determine the size of a standard deviation. Pure chance will cause a small percentage of the population to fall more than two standard deviations away from the average in each direction, but statisticians believe that a difference of more than three standard deviations indicates the presence of some distorting factor. See J. McCLAVE & P. BENSON, *STATISTICS FOR BUSINESS AND ECONOMICS* 491-92 (3d ed. 1985).

38. B. SCHLEI & P. GROSSMAN, *supra* note 27, at 98-99.

39. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 426 (1975) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971)).

40. 109 S. Ct. 2115 (1989).

41. *Albemarle Paper Co.*, 422 U.S. at 431; *accord Dothard*, 433 U.S. at 329.

42. *E.g.*, *Guardians Ass'n of the New York City Police Dept. v. Civil Serv. Comm.*, 630 F.2d 79, 110 (2d Cir. 1980). Few opinions have even reached this step, and in none of them has the plaintiff succeeded in demonstrating the viability of a less discriminatory alternative. B. SCHLEI & P. GROSSMAN, *supra* note 27, at 156-57.

43. 109 S. Ct. 2115 (1989).

skilled positions were filled predominantly by non-whites (Filipinos and Native Alaskans) hired through a local union, while the skilled positions were held primarily by whites, hired through other offices of the companies located on the mainland. The employers maintained separate dormitories and mess halls for the skilled and unskilled workers.<sup>44</sup>

The *Wards Cove* plaintiffs were a class of nonwhites who were or had been employed in unskilled cannery positions. They alleged that the employers used a number of hiring practices which adversely impacted their protected class: nepotism, a rehire preference, lack of objective hiring criteria, separate hiring channels, and a policy against promoting from within the workforce. The district court initially refused to apply adverse impact analysis to any of the employers' subjective practices, but the Ninth Circuit Court of Appeals, sitting en banc, reversed this holding. The Ninth Circuit panel determined that the plaintiffs had made a prima facie adverse impact case, and remanded the case to the district court for further proceedings with instructions that the employer bear the burden of proving that its discriminatory practices were job related.<sup>45</sup>

On *certiorari* review, the Supreme Court approved the application of adverse impact analysis to subjective employment practices, but reversed the Ninth Circuit's determination that the plaintiffs had established a prima facie case. The Court held that the plaintiffs' statistics did not compare the appropriate groups.<sup>46</sup> Having resolved the issue before it, the *Wards Cove* majority went on, in unabashed dicta,<sup>47</sup> to impose new evidentiary burdens upon adverse impact plaintiffs and to reallocate the burden of proof on the issue of business necessity.

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44. *Id.* at 2119-20.

45. *Id.* at 2120.

46. *Id.* at 2121-22.

47. The Court specifically admitted that "any inquiry into whether the disparate impact that any employment practice may have had was justified by business necessity" was pretermitted by its finding that the statistics relied on by the Ninth Circuit did not suffice to make out a prima facie case. *Id.* at 2124. The Court then continued, however, to address additional issues which were likely to surface upon remand. *Id.* *But see* County of Washington v. Gunther, 452 U.S. 161, 166 n.7 (1981) ("We are not called upon in this case to . . . lay down standards for the further conduct of this litigation.").

### *New Evidentiary Requirements and Shifting the Burden of Proof*

First, relying on dicta from the plurality opinion in *Watson v. Fort Worth Bank & Trust*,<sup>48</sup> the *Wards Cove* majority stated that adverse impact plaintiffs must "isolat[e] and identify the specific employment practices that are allegedly responsible for any observed statistical disparities."<sup>49</sup> Moreover, the *Wards Cove* standard will require proof that "each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites."<sup>50</sup> Adverse impact plaintiffs will never be permitted to challenge a group of employment practices as a whole.

The *Wards Cove* majority attempted to justify this ruling on the grounds that Title VII plaintiffs will have access to the records which most employers are required to keep concerning their employment practices under existing EEOC guidelines.<sup>51</sup> There are, however, many businesses which, although subject to Title VII, qualify for exemptions or exceptions to the record-keeping requirements of the guidelines. Ironically, the *Wards Cove* employers themselves had not kept any such records.<sup>52</sup>

Secondly, the *Wards Cove* majority, again relying upon dicta from the *Watson* plurality opinion, reallocated the burden of proof on the business necessity issue, thus implicitly overruling *Griggs* and the substantial body of case law applying the *Griggs* standard. According to the *Wards Cove* majority, the employer bears only the burden of pro-

48. 108 S.Ct. 2777 (1988). In *Watson*, a unanimous Court held that adverse impact analysis may be applied to subjective, as well as objective, employment practices, thus resolving a long-standing division among the federal circuit courts. A plurality consisting of Justices Rehnquist, White, O'Connor and Scalia then went on to discuss the allocation of the burdens of proof in adverse impact cases, thus laying the groundwork for the *Wards Cove* decision. Justices Stevens and Blackman frankly acknowledged that the issues discussed in the plurality opinion were unnecessary to the resolution of the question presented. *Id.* at 2787 n.1. Some commentators interpreted *Watson* as changing the rules of adverse impact analysis only when applied to subjective criteria, as in *Watson* itself. See, e.g., *When Doctrines Collide: Disparate Treatment, Disparate Impact, and Watson v. Fort Worth Bank & Trust*, 137 U. PA. L. REV. 1755 (1989). The *Wards Cove* Court, however, adopted the new analysis for use in all adverse impact cases. See *infra* notes 68-73 and accompanying text.

49. *Wards Cove*, 109 S.Ct. at 2125 (citing *Watson*, 108 S.Ct. at 2787).

50. *Id.*

51. *Id.* at 2125.

52. *Id.* at 2133 n.20 (Stevens, J., dissenting).

ducing evidence of a business justification for the challenged practices. The burden of persuasion, or proof, on this issue now falls on the plaintiff, who must demonstrate that the practice is not "job-related."

The *Wards Cove* majority avoided expressly overruling the voluminous body of precedent applying the *Griggs* standard, under which the employer bore the burden of proof of business necessity. They insisted that these cases "should have been understood to mean an employer's production—but not persuasion—burden."<sup>53</sup> The language of the Court's prior rulings, however, renders this evasion disingenuous.<sup>54</sup> *Griggs* has long been understood by both courts<sup>55</sup> and commentators<sup>56</sup> to allocate the burden of proving business necessity to the employer.

53. *Id.* at 2126.

54. *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) ("If the employer proves that the challenged requirements are job related . . ."); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) ("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.'"); *id.* at 407 ("if an employer does then meet the burden of proving that its tests are 'job related'"); *Griggs*, 401 U.S. at 431 ("If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."); *id.* at 432 ("Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.").

55. *E.g.*, *Powers v. Alabama Dep't of Educ.*, 854 F.2d 1285, 1292 & n.11 (11th Cir. 1988):

We are aware that four members of the Supreme Court recently have indicated that the burden of *proof* on the absence of business necessity rests with the plaintiff. *See Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777, 2790, 101 L.Ed. 2d 827 (1988). A plurality opinion, however, is not binding precedent, and in the meantime, we are bound by several decisions of this court (as well as the Supreme Court cases cited in the text) stating flatly that the employer bears the burden of *proving* that a practice is job-related.

(emphasis in original); *Allen v. Seidman*, 881 F.2d 375, 377 (7th Cir. 1989) (describing the term "business necessity" defense as a misnomer after *Wards Cove* because "the 'defense' does not require a showing of necessity and is no longer an affirmative defense"); *see also Chrisner v. Complete Auto Trans., Inc.*, 645 F.2d 1251, 1263 (6th Cir. 1981) ("Once the defendant in a Title VII disparate impact case has rebutted the plaintiff's prima facie case by proving a business necessity defense, the burden shifts back to the plaintiff.").

56. *E.g.*, LEDVINKA, *supra* note 27, at 53-55 ("If the court decides that the plaintiff has established a prima facie case, the burden of proof shifts to the defendant. The defendant's burden is to rebut by presenting evidence that the practice is job-related or a business necessity."); B. SCHLEI & P. GROSSMAN, *supra* note 27, at 81-92, & 17 (Supp. 1983).

## *Application of Wards Cove and Watson*

### *Isolating the Impact of Each Specific Practice*

The new evidentiary requirements established in *Wards Cove* may be devastating to many potential Title VII plaintiffs, particularly where statistical proof is involved. In many cases, it may be difficult or impossible to isolate the effects of one of a group of employment practices because two or more of the practices may be "multicollinear."<sup>57</sup> In *Griggs*, for example, it seems likely that the high school degree requirement eliminated many of the same individuals who would also have been eliminated by their scores on the intelligence/aptitude tests. A statistical model testing the effects of both practices simultaneously, therefore, could easily show that neither practice had a statistically significant impact on black applicants.<sup>58</sup> While there are statistical methods for detecting and correcting for such difficulties, they are far from foolproof.

Another potential problem arises in cases in which the employers, like those in *Wards Cove*, fail to keep the records necessary to permit detailed statistical analyses of each individual employment practice. Typical Title VII plaintiffs are in no position to maintain, or attempt to reconstruct, such records. The typical plaintiffs are not privy to those type of records because they typically do not hold upper management positions. Often these plaintiffs have lost their jobs and are no longer even authorized to be on the premises. Under *Wards Cove*, therefore, a Title VII plaintiff's cause of action may be destroyed by an employer's failure to keep adequate records—a result unlikely to be permitted in any other area of the law.<sup>59</sup>

Even more problematic are cases in which two or more practices combine to have a significant discriminatory effect even though no single practice, used alone, would do so.<sup>60</sup> Under *Wards Cove* and *Wat-*

57. See J. McCLAVE & P. BENSON, STATISTICS FOR BUSINESS AND ECONOMICS 491-92 (3d ed. 1985).

58. See *id.* at 491.

59. In many areas of the law, the burden of proof has been shifted from one party to another to combat such problems. 29 AM. JUR. 2D, EVIDENCE § 131, at 164-65 (2d ed. 1967); see also E. CLEARY, MCCORMICK ON EVIDENCE § 337, at 787 (1984); cf. *Bell v. Birmingham Linen Serv.*, 752 F.2d 1552, 1558 & n.13 (11th Cir. 1983).

60. "One can envision a situation in which there are two subjective practices, such as a performance rating by a supervisor and an interview, which work together to produce a significant adverse impact." *When Doctrines Collide: Disparate, Treatment Disparate Impact, and Watson v. Fort Worth Bank & Trust*, 137 U. PA. L. REV. 1755,

son, a group of practices will never be subject to challenge. Not even the *amicus* brief of the United States Solicitor General, submitted on behalf of the employers, urged this result. The Solicitor General's brief readily admitted that a complex, multi-factor selection test could be challenged as a whole, at least where it was not feasible to separate the effects of the individual factors.<sup>61</sup>

### *Proving Business Necessity*

As Justice Stevens noted in his *Wards Cove* dissent, business necessity has, since the 1971 *Griggs* decision, been regarded as an affirmative defense—a legal justification for the use of an employment practice despite its proven discriminatory effect.<sup>62</sup> As such, the burden of proof must fall on the defendant, as does the burden of proving all manner of affirmative defenses in various fields of law.<sup>63</sup> The *Wards Cove* majority, however, disregarded the defensive nature of the issue and instead analogized to the “articulation” and “pretext” standards used in disparate treatment cases.

The pretext standard serves as a means for determining the existence of discriminatory intent, which is a necessary element of proof in disparate treatment cases. If a specific, isolated adverse employment action was not motivated by discriminatory motive, then it was not discriminatory for purposes of Title VII, even if the victim happened to belong to a protected class.<sup>64</sup> An unfair or irrational employment decision, motivated by non-discriminatory reasons, does not violate Title VII. Pretext analysis, therefore, measures a necessary element of the plaintiff's case.

In impact cases, on the other hand, intent is not at issue. Impact analysis focuses upon widely-used employment practices which affect many employees, not on specific employment actions affecting only one employee. Business necessity does not come into play until after such a

1781 n.134 (1989).

61. *Wards Cove*, 109 S. Ct. at 2132 n.19 (Stevens, J., dissenting) (quoting the Solicitor General's brief at page 22).

62. 5 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1270-71, at 411-47 (2d ed. 1990).

63. See 29 AM. JUR. 2D, *Evidence* §§ 129-30, at 162-64 (2d ed. 1967); 23 FLA. JUR. 2D, *Evidence and Witnesses* §§ 67, 75, 94-95, 102-03 (1980).

64. Title VII prohibits “discrimination rather than simple arbitrariness or caprice.” *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 338 (4th Cir. 1983), *cert. denied*, 466 U.S. 951 (1984).



practice has been shown to discriminate against protected class members. Business necessity is then used to justify or excuse the established discrimination. Business necessity, therefore, unlike pretext analysis, fits the classic definition of an affirmative defense: It acknowledges the existence of a prima facie case, but offers a means of avoiding liability. Accordingly, the *Wards Cove* analogy between pretext and business necessity either mixes apples (elements) and oranges (defenses), or implies a hidden intent requirement—a requirement that facially neutral employment practices be used as a “mere pretext” to hide intentional discrimination—where there has been no such requirement for nearly twenty years.

### *The Civil Rights Act of 1990*

The proposed Civil Rights Act of 1990, as originally introduced in the House on February 7, 1990, addressed the *Watson/Wards Cove* opinions by expressly providing that Title VII plaintiffs may challenge a group of employment practices, defined as “a combination of employment practices or an overall employment process,” without being required to demonstrate which particular practice or practices caused the adverse impact.<sup>65</sup> Additionally, the initial version of H.R. 4000 specifically placed the burdens of both proof and production of business necessity on the employer.<sup>66</sup> Moreover, the original version of H.R. 4000 incorporated one of the Court’s most stringent characterizations of the business necessity defense: “essential to effective job performance.”<sup>67</sup>

These provisions provoked a storm of protests that the bill would require employers to use “quotas” to avoid racial, ethnic or gender imbalances in their work forces to avoid Title VII liability.<sup>68</sup> The revised

65. H.R. 4000, 101st Cong., 2d Sess. § 3 (Feb. 7, 1990) (amending 42 U.S.C. § 2000e).

66. *Id.* at § 4 (amending 42 U.S.C. § 2000e-3(k)).

67. *Id.* § 3 (amending 42 U.S.C. § 2000e(o)). This characterization of the business necessity defense was apparently drawn from *Dothard v. Rawlinson*, 433 U.S. 331, 332 n.14 (1977) (“[A] discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge.”). Most cases do not apply such a strict definition of business necessity, and use the term more or less interchangeably with the term “job relatedness.” *E.g.*, *Griggs*, 401 U.S. at 424.

68. *E.g.*, Kilpatrick, *Employee Provision Unfair—and Perverts Bias Fight*, *Miami Herald*, July 19, 1990, at A2; *see also Wards Cove*, 109 S.Ct. 2115, 2122 (1989).

bill, as passed by the Senate, eliminates much of the basis for such fears, but remains unacceptable to the Bush administration.<sup>69</sup> The revised bill<sup>70</sup> allows plaintiffs to challenge a discrete group of practices, but not to simply claim that the "overall employment process" discriminates. Moreover, multi-practice challenges can be blocked "if the court finds that the complaining party can identify, from records or other information of the respondent reasonably available[.]" the specific practice or practices responsible for the disproportionate adverse impact.<sup>71</sup> In that event, Title VII plaintiffs will be required to follow the *Wards Cove* standards in isolating the specific practices allegedly responsible for the adverse impact. Only when the effects of multiple employment practices are inextricably mingled, whether because of their inherent natures or because of inadequate employer records, will plaintiffs be permitted to proceed against the practices as a group. Because the employer controls both the practices used and the recordkeeping process,<sup>72</sup> such an exception seems both fair and reasonable, particularly when compared with the alternative. The revised bill also replaces the onerous "essential to effective job performance" definition of the initial bill with more detailed language, set forth below, coupled with a proviso that the bill's intent is to restore the *Griggs* "job related" standard. The detailed definitional section provides:

(o)(1) The term 'required by business necessity' means—

(A) in the case of [selection] practices . . . , 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.<sup>73</sup>

The revised bill, unlike its predecessor, goes on to describe the quantum of proof an employer must present to prevail on a business necessity defense:

69. Bronner, *Civil Rights Act of 1990: Inside the Negotiations*, Boston Globe, July 23, 1990, National/Foreign Section, at 1.

70. See Appendix following this article of S. 2104, 101st Cong., 2d Sess.

71. *Id.* at § 4(k)(1)(B)(iii).

72. "[I]t is the employer who designs and evaluates job requirements and possesses all the evidence and information relating to its own hiring practices." CONG. DIG., *supra* note 8, at 222 (statement of Senator Reigle).

73. See *supra* note 70, at § 3(o)(1).

(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.<sup>74</sup>

These provisions essentially restore and clarify the *Griggs* standard which, in eighteen years of application, has never been shown to cause any employer to resort to the use of a "quota" system.<sup>75</sup>

On July 31, 1990, the House Judiciary Committee reported H.R. 4000 to the House floor with revisions almost identical to those made by the Senate. The revised bill subsequently passed the House by a vote of 272-154.<sup>76</sup> Both versions of the bill expressly provide that they are not to be construed to require the use of quotas. The technical differences between the House and Senate versions of the proposed Act were easily reconciled via House-Senate conference, but the Act still could not avoid presidential veto.<sup>77</sup> The Act missed "veto-proof" status by only two votes in the Senate, but by twelve in the House.<sup>78</sup>

### Conclusion

There can be no doubt that *Wards Cove* and the other decisions targeted by the Civil Rights Act of 1990 represent a serious departure from an established body of precedent applying Title VII adverse impact analysis. The Court often attempts to underplay the importance of

74. *Id.* at § 3(o)(2).

75. *Quota Hogwash*, *supra* note 9; *Red Herring in Black and White*, *supra* note 6; Gerstel, *Threat of Racial Quotas Dogs Civil Rights Bill*, Washington News, July 19, 1990; Edelman, *supra* note 6; CONG. DIG., *supra* note 8, at 218 (remarks of Senator Graham from Senate floor debate of July 18, 1990) ("In a series of four hearings on the bill, the Senate Committee on Labor and Human Resources discovered no evidence to suggest that the *Griggs* standard—which this bill will return to—has led to quotas.").

76. CONG. DIG., *supra* note 8, at 205. The House version contains an additional subsection concerning the burden of proof in impact cases which expressly provides that a mere statistical imbalance in a workforce may not constitute a prima facie case of adverse impact discrimination.

77. N.Y. Times, Oct. 23, 1990, at 1A.

78. CONG. DIG., *supra* note 8, at 205; N.Y. Times, Oct. 23, 1990, at 1A.

its rulings by pointing to Congress' ability to overturn them.<sup>79</sup> Reliance upon that maxim in the case of last term's decisions, however, is as transparently inappropriate as the *Wards Cove* Court's denial that its decision reversed the voluminous body of case law applying the *Griggs* standard. Congress has had many opportunities to review the *Griggs* opinion since that case was decided in 1971. Its election not to do so constitutes at least tacit approval of the decision. Moreover, many commentators construe the 1972 amendments to Title VII as an express legislative approval of the *Griggs* doctrine.<sup>80</sup> The *Wards Cove* Court preempted Congress' prerogative by overruling established case law, thus forcing Congress to act to simply maintain the approved status quo. Such conduct is as much an example of judicial activism as many of the decisions derided by the Justices who, although allegedly subscribing to theories of judicial restraint, made up the *Wards Cove* majority.

Although it should not have been required to do so, Congress has now acted to restore the settled and approved application of Title VII. The proposed Civil Rights Act of 1990, despite the flood of rhetoric launched by its critics, does not deserve the notoriety it has gained. The most controversial provision of the bill does little more than restore long-standing, legislatively-ratified precedent in the field of EEO law. The *Griggs* standard, which the Act would restore, became known and understood by all participants in the employment law arena during its eighteen years of operation,<sup>81</sup> without resulting in the use of quota systems or crippling litigation. Passage of the Act will simply restore that familiar standard.

The *Watson/Wards Cove* standards, on the other hand, would deprive many deserving EEO plaintiffs of any opportunity for relief, and encourage the continued use of ineffective, discriminatory employment practices that cannot be shown to have any relationship to the jobs in question. To permit these decisions to stand would eviscerate the adverse impact doctrine and eliminate years of progress in the battle for

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79. See *Patterson v. McLean Credit Union*, 109 S.Ct. 2362, 2373 (1988); *Griggs*, 401 U.S. at 423.

80. See Halverson, *Title VII: Application of Impact Analysis to Subjective Employment Criteria—Watson v. Fort Worth Bank and Trust*, 108 S.Ct. 2777 (1988), 24 HARV. C.R.-C.L. L. REV. 264, 268 & n.27 (1989).

81. LEDVINKA, *supra* note 27, at 53 ("Personnel specialists are quite familiar with the concept of disparate impact, partly because so many personnel practices are undertaken with the best of motives but end up working to the disadvantage of some race, sex, or ethnic group.").

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85

equal employment opportunity for all qualified workers.

*Author's Note:*

As this article went to press, President Bush vetoed this bill, and the Senate failed, by one vote, to override the veto. The bill's sponsors, however, have already announced plans to reintroduce it in 1991.

## APPENDIX 1

### H. R. 4000

101st CONGRESS

2D SESSION

A BILL

To amend the Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

#### SECTION 1. SHORT TITLE.

This Act may be cited as the "Civil Rights Act of 1990".

#### SEC. 2 FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

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

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

(b) PURPOSES.—The purposes of this Act are—

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

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

#### SEC. 3. DEFINITIONS.

Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end thereof the following new subsections:

"(1) The term 'complaining party' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

"(m) The term 'demonstrates' means meets the burdens of production and persuasion.

"(n) The term 'group of employment practices' means a combination of employment practices or an overall employment process.

“(o) The term ‘required by business necessity’ means essential to effective job performance.

“(p) The term ‘respondent’ means an employer, employment agency, labor organization, joint labor-management committee, or those Federal entities subject to the provisions of section 717.”

**SEC. 4 RESTORING THE BURDEN OF PROOF IN DISPARATE IMPACT CASES.**

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

“(k) **PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE IMPACT CASES.**—

“(1) An unlawful employment practice is established under this subsection when—

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

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

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

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

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

**SEC. 5. CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES.**

(a) **IN GENERAL.**—Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by section 4) is further amended by

adding at the end thereof the following new subsection:

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

(b) **ENFORCEMENT PROVISIONS.**—Section 706(g) of such Act (42 U.S.C. 2000e-5(g)) is amended by inserting before the period in the last sentence the following: “or, in a case where a violation is established under section 703(1), if the respondent establishes that it would have taken the same action in the absence of any discrimination”.

**SEC. 6. FACILITATING PROMPT AND ORDERLY RESOLUTION OF CHALLENGES TO EMPLOYMENT PRACTICES IMPLEMENTING LITIGATED OR CONSENT JUDGMENTS OR ORDERS.**

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by sections 4 and 5) is further amended by adding at the end thereof the following new subsection:

“(m) **FINALITY OF LITIGATED OR CONSENT JUDGMENTS OR ORDERS.**—

“(1) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements a litigated or consent judgment or order resolving a claim of employment discrimination under the United States Constitution or Federal civil rights laws may not be challenged in a claim under the United States Constitution or Federal civil rights law—

“(A) by a person who, prior to the entry of such judgment or order, had—

“(i) notice from any source of the proposed judgment or order sufficient to apprise such person that such judgment or order might affect the interests of such person; and

“(ii) a reasonable opportunity to present objections to such judgment or order;

“(B) by a person with respect to whom the requirements of subparagraph (A) are not satisfied, if the court determines that the interests of such person were adequately represented by another person who challenged such judgment or order



prior to or after the entry of such judgment or order; or

“(C) if the court that entered the judgment or order determines that reasonable efforts were made to provide notice to interested persons.

A determination under subparagraph (C) shall be made prior to the entry of the judgment or order, except that if the judgment or order was entered prior to the date of the enactment of this subsection, the determination may be made at any reasonable time.

“(2) Nothing in this subsection shall be construed to—

“(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure;

“(B) apply to the rights of parties to the action in which the litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal government; or

“(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction.

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

## **SEC. 7. STATUTE OF LIMITATIONS; APPLICATION TO CHALLENGES TO SENIORITY SYSTEMS.**

(a) **STATUTE OF LIMITATIONS.**—Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended—

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

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

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

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

(b) **APPLICATION TO CHALLENGES TO SENIORITY SYSTEMS**—

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

#### **SEC. 8. PROVIDING FOR DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION.**

Section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g)) is amended by inserting before the last sentence the following new sentences: "With respect to an unlawful employment practice (other than an unlawful employment practice established in accordance with section 703(k))—

"(A) compensatory damages may be awarded; and

"(B) if the respondent (other than a government, government agency, or a political subdivision) engaged in the unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others, punitive damages may be awarded against such respondent;

in addition to the relief authorized by the preceding sentences of this subsection, except that compensatory damages shall not include backpay or any interest thereon. If compensatory or punitive damages are sought with respect to a claim arising under this title, any party may demand a trial by jury."

#### **SEC. 9. CLARIFYING ATTORNEYS' FEES PROVISION.**

Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)) is amended—

(1) by inserting "(1)" after "(k)";

(2) by inserting "(including expert fees and other litigation expenses) and" after "attorney's fee,";

(3) by striking out "as part of the"; and

(4) by adding at the end thereof the following new paragraphs:

"(2) A court shall not enter a consent order or judgment settling a claim under this title, unless the parties and their counsel attest that a waiver of all or substantially all attorneys' fees was not compelled as a condition of the settlement.

"(3) In any action or proceeding in which any judgment

or order granting relief under this title is challenged, the court, in its discretion, may allow the prevailing party in the original action (other than the Commission or the United States) to recover from the party against whom relief was granted in the original action a reasonable attorney's fee (including expert fees and other litigation expenses) and costs reasonably incurred in defending (as a party, intervenor or otherwise) such judgment or order."

**SEC. 10. PROVIDING FOR INTEREST, AND EXTENDING THE STATUTE OF LIMITATIONS, IN ACTIONS AGAINST THE FEDERAL GOVERNMENT.**

Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) is amended—

(1) in subsection (c), by striking out "thirty days" and inserting in lieu thereof "ninety days"; and

(2) in subsection (d), by inserting before the period " , and the same interest to compensate for delay in payment shall be available as in cases involving non-public parties".

**SEC. 11. CONSTRUCTION.**

Title XI of the Civil Rights Act of 1964 (42 U.S.C. 2000h et seq.) is amended by adding at the end thereof the following new section:

**"SEC. 1107. RULES OF CONSTRUCTION FOR CIVIL RIGHTS LAWS**

"(a) **EFFECTUATION OF PURPOSE.**—All Federal laws protecting the civil rights of persons shall be broadly construed to effectuate the purpose of such laws to eliminate discrimination and provide effective remedies.

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

**SEC. 12 RESTORING PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.**

Section 1977 of the Revised Statutes of the United States (42 U.S.C. 1981) is amended—

(1) by inserting "(a)" before "All persons within"; and

(2) by adding at the end thereof the following new subsection:

"(b) For purposes of this section, the right to 'make and enforce contracts' shall include the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges,

terms and conditions of the contractual relationship.”.

**SEC. 13. LAWFUL COURT-ORDERED REMEDIES, AFFIRMATIVE ACTION AND CONCILIATION AGREEMENTS NOT AFFECTED.**

Nothing in the amendments made by this Act shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law.

**SEC. 14. SEVERABILITY.**

If any provision of this Act, or an amendment made by this Act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected thereby.

**SEC. 15. APPLICATION OF AMENDMENTS AND TRANSITION RULES.**

(a) APPLICATION OF AMENDMENTS.—The amendments made by—

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

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

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

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

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

(6) section 12 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 4, 5, 7(a)(2) through (4), or 12, shall be vacated if, not later than 1 year after such date of enactment, a request for such relief is made.

(2) SECTION 6.—Any orders entered between June 12, 1989 and the date of enactment of this Act, that permit a challenge to an employment practice that implements a litigated or consent judgment or order and that is inconsistent with the amendment made by section 6, shall be vacated if, not later than 6 months

after the date of enactment of this Act, a request for such relief is made. For the 1-year period beginning on the date of enactment of this Act, an individual whose challenge to an employment practice that implements a litigated or consent judgment or order is denied under the amendment made by section 6, or whose order or relief obtained under such challenge is vacated under such section, shall have the same right of intervention in the case in which the challenged litigated or consent judgment or order was entered as that individual had on June 12, 1989.

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

## APPENDIX 2

101st CONGRESS  
2d Session

### S. 2104

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#### AN ACT

To amend the Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment, and for other purposes.

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Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

#### SECTION 1. SHORT TITLE.

This Act may be cited as the “Civil Rights Act of 1990”.

#### SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

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

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

(b) PURPOSES.—It is the purpose of this Act to—

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

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

#### SEC. 3. DEFINITIONS.

Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end thereof the following new subsections:

“(l) The term ‘complaining party’ means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

“(m) The term ‘demonstrates’ means meets the burdens of production and persuasion.

“(n) The term ‘group of employment practices’ means a

combination of employment practices that produces one or more decisions with respect to employment, employment referral, or admission to a labor organization, apprenticeship or other training or retraining program.

“(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.

“(3) This subsection is meant to codify the meaning of ‘business necessity’ as used in *Griggs v. Duke Power Co.* (401 U.S. 424 (1971)) and to overrule *Ward’s Cove Packing Co., Inc. v. Atonio* (109 S. Ct. 2115 (1989)).

“(p) The term ‘respondent’ means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining programs, including on-the-job training programs, or those Federal entities subject to the provisions of section 717 (or the heads thereof).”.

#### **SEC. 4. RESTORING THE BURDEN OF PROOF IN DISPARATE IMPACT CASES.**

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

“(k) **PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE IMPACT CASES.—**

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

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

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

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

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

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

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

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

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

“(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses an illegal drug as defined in Schedules



I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), 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 the race, color, religion, sex, or national origin.”

**SEC. 5. CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES.**

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

“(1) **Discriminatory Practice Need Not Be Sole Contributing Factor.**—Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a contributing factor for any employment practice, even though other factors also contributed to such practice.”

(b) **ENFORCEMENT PROVISIONS.**—Section 706(g) of such Act (42 U.S.C. 2000e-5(g)) is amended by inserting before the period in the last sentence the following: “or, in a case where a violation is established under section 703(1), if the respondent establishes that it would have taken the same action in the absence of any discrimination. In any case in which a violation is established under section 703(1), damages may be awarded only for injury that is attributable to the unlawful employment practice”.

**SEC. 6. FACILITATING PROMPT AND ORDERLY RESOLUTION OF CHALLENGES TO EMPLOYMENT PRACTICES IMPLEMENTING LITIGATED OR CONSENT JUDGMENTS OR ORDERS.**

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by sections 4 and 5) is further amended by adding at the end thereof the following new subsection:

“(m) **FINALITY OF LITIGATED OR CONSENT JUDGMENTS OR ORDERS.**—

“(1) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent

judgment or order resolving a claim of employment discrimination under the United States Constitution or Federal civil rights laws may not be challenged in a claim under the United States Constitution or Federal civil rights laws—

“(A) by a person who, prior to the entry of such judgment or order, had—

“(i) actual notice from any source of the proposed judgment or order sufficient to apprise such person that such judgment or order might affect the interests of such person and that an opportunity was available to present objections to such judgment or order; and

“(ii) a reasonable opportunity to present objections to such judgment or order;

“(B) by a person with respect to whom the requirements of subparagraph (A) are not satisfied, if the court determines that the interests of such person were adequately represented by another person who challenged such judgment or other prior to or after the entry of such judgment or order; or

“(C) if the court that entered the judgment or order determines that reasonable efforts were made to provide notice to interested persons.

A determination under subparagraph (C) shall be made prior to the entry of the judgment or order, except that if the judgment or order was entered prior to the date of the enactment of this subsection, the determination may be made at any reasonable time.

“(2) Nothing in this subsection shall be construed to—

“(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which they intervened;

“(B) apply to the rights of parties to the action in which the litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal government;

“(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

“(D) authorize or permit the denial to any person of the due process of law required by the United States Constitution.

“(3) Any action, not precluded under this subsection, that challenges an employment practice that implements and is within the scope of a litigated or consent judgment or order of the type referred to in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code.”.

## **SEC. 7. STATUTE OF LIMITATIONS; APPLICATION TO CHALLENGES TO SENIORITY SYSTEMS.**

(a) **STATUTE OF LIMITATIONS.**—Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended—

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

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

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

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

(b) **APPLICATION TO CHALLENGES TO SENIORITY SYSTEMS.**—

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

## **SEC. 8. PROVIDING FOR DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION**

Section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g)) is amended by inserting before the last sentence the following new sentences: “With respect to an unlawful employment practice (other than an unlawful employment practice established in accordance with section 703(k), or in the case of an unlawful employment practice under the Americans with Disabilities Act of 1990, other than an unlawful employment practice established in accordance with paragraph (3)(A) or paragraph (6) of section 102 of that Act, as it

related to standards and criteria that tend to screen out individuals with disabilities)—

“(A) compensatory damages may be awarded; and

“(B) if the respondent (other than a government, government agency, or a political subdivision) engaged in the unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others, punitive damages may be awarded against such respondent;

in addition to the relief authorized by the preceding sentences of this subsection, except that compensatory damages shall not include backpay or any interest thereon. Compensatory and punitive damages and jury trials shall be available only for claims of intentional discrimination. If compensatory or punitive damages are sought with respect to a claim of intentional discrimination arising under this title, any party may demand a trial by jury.”

#### **SEC. 9. CLARIFYING ATTORNEYS’ FEES PROVISION.**

Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)) is amended—

(1) by inserting “(1)” after “(k)”;

(2) by inserting “(including expert fees and other litigation expenses) and” after “attorney’s fee,”;

(3) by striking out “as part of the”; and

(4) by adding at the end thereof the following new paragraphs:

“(2) No consent order or judgment settling a claim under this title shall be entered, and no stipulation of dismissal of a claim under this title shall be effective, unless the parties or their counsel attest to the court that a waiver of all or substantially all attorneys’ fees was not compelled as a condition of the settlement.

“(3) In any action or proceeding in which any judgment or order granting relief under this title is challenged, the court, in its discretion, may allow the prevailing party in the original action (other than the Commission or the United States) to recover from the party against whom relief was granted in the original action a reasonable attorney’s fee (including expert fees and other litigation expenses) and costs reasonably incurred in defending (as a party, intervenor or otherwise) such judgment or order.”

#### **SEC. 10. PROVIDING FOR INTEREST, AND EXTENDING THE STATUTE OF LIMITATIONS, IN ACTIONS AGAINST THE FEDERAL GOVERNMENT.**

Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16)

is amended—

(1) in subsection (c), by striking out “thirty days” and inserting in lieu thereof “ninety days”; and

(2) in subsection (d), by inserting before the period “, and the same interest to compensate for delay in payment shall be available as in cases involving non-public parties, except that prejudgment interest may not be awarded on compensatory damages”.

#### **SEC. 11. CONSTRUCTION.**

Title XI of the Civil Rights Act of 1964 (42 U.S.C. 2000h et seq.) is amended by adding at the end thereof the following new section:

#### **SEC. 1107. RULES OF CONSTRUCTION FOR CIVIL RIGHTS LAWS.**

“(a) **EFFECTUATION OF PURPOSE.**—All Federal laws protecting the civil rights of persons shall be interpreted consistent with the intent of such laws, and shall be broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies.

“(b) **NONLIMITATION.**—Except as expressly provided, no Federal law protecting the civil rights of persons shall be construed to repeal or amend by implication any other Federal law protecting such civil rights.

“(c) **INTERPRETATION.**—In interpreting Federal civil rights laws, including laws protecting against discrimination on the basis of race, color, national origin, sex, religion, age, and disability, courts and administrative agencies shall not rely on the amendments made by the Civil Rights Act of 1990 as a basis for limiting the theories of liability, rights, and remedies available under civil rights laws not expressly amended by such Act.”

#### **SEC. 12. RESTORING PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.**

Section 1977 of the Revised Statutes of the United States (42 U.S.C. 1981) is amended—

(1) by inserting “(a)” before “All persons within”; and

(2) by adding at the end thereof the following new subsections:

“(b) For purposes of this section, the right to ‘make and enforce contracts’ shall include the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

“(c) The rights protected by this section are protected against

impairment by nongovernmental discrimination as well as against impairment under color of State law.”.

**SEC. 13. LAWFUL COURT-ORDERED REMEDIES, AFFIRMATIVE ACTION AND CONCILIATION AGREEMENTS NOT AFFECTED.**

Nothing in the amendments made by this Act shall be construed to require an employer to adopt hiring or promotion quotas on the basis of race, color, religion, sex or national origin: Provided, however, that nothing in the amendments made by this Act shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law.

**SEC. 14. SEVERABILITY.**

If any provision of this Act, or an amendment made by this Act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected thereby.

**SEC. 15. APPLICATION OF AMENDMENTS AND TRANSITION RULES.**

(a) APPLICATION OF AMENDMENTS.—The amendments made by—

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

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

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

(4) sections 7(a)(1), 7(a)(3) and 7(a)(4), 7(b), 8, 9, 10, and 11 shall apply to all proceedings pending on or commenced after the date of enactment of this Act;

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

(6) section 12 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 4, 5, 7(a)(2), or 12, shall be vacated if, not later than 1 year after such date of enactment, a request for such relief is made.

(2) Section 6.—Any orders entered between June 12, 1989

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

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

#### **SEC. 16. CONGRESSIONAL COVERAGE.**

Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000 et seq.) is amended by adding at the end thereof the following new section:

#### **SEC. 719. CONGRESSIONAL COVERAGE.**

“Notwithstanding any other provision of this title, the provisions of this title shall apply to the Congress of the United States, and the means for enforcing this title as such applies to each House of Congress shall be as determined by such House of Congress.”

Passed the Senate July 18 (legislative day, July 10), 1990.

Attest:

Secretary.