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Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation

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ARTICLES

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*Ronald D. Rotunda**

I. INTRODUCTION

The Civil Rights Act of 1991[1] provides an interesting case study of the importance and the ambivalence of legislative history, but it is much more than that. It reflects the apparent congressional preference for statutory ambiguity, which grows out of the need of many politicians to be all things to all people. The result is that Congress ends up delegating important law-making power to the courts, without supplying adequate standards for the exercise of that power. Subsequently, some of the same people who delegated this power will later complain that the courts, when interpreting these vague statutes, are inattentive to the congressional will, a will that Congress did not make known. As Will Rogers once said, "The minute you read something you can't understand, you can almost be sure that it was drawn up by a lawyer."

Several decades ago, as politicians and the general public were debating the merits of the Vietnam War, one person said, "We should just declare victory and leave." Participants from each side could then claim that they had won the war. In a sense, that anecdote shares an important similarity with the Civil Rights Act yof 1991. With its passage, each side declared victory. It is now left to the courts and the litigants to engage in the mopping-up operation, to determine what this new law really means. The parties are not unarmed in fighting these inevitable legal battles. The legislators thoughtfully left each party weapons for the fight, weapons in the form of vague statements in the legislative history. As I explain

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1 Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of 42 U.S.C. (Supp. III 1992)).

later, the courts should cautiously and guardedly approach this legislative history.

Our story begins during an eight-week period in the summer of 1989, when the Supreme Court handed down seven employment discrimination cases that interpreted various civil rights statutes in ways that were restrictive to plaintiffs.[2] Julius Chambers of the NAACP deplored the Supreme Court Term, calling it one of the worst "that we have experienced . . . in our lifetime and it has been and will be devastating to victims of employment discrimination."[3] Both houses of Congress responded to these decisions by passing the Civil Rights Act of 1990, reversing at least five of these Supreme Court employment discrimination cases. In addition, this proposed law explicitly provided for its retroactive application to fact situations that occurred before the bill became law and to cases then pending on appeal.[4]

Commentators called the 1990 Act "a dramatic and far-reaching retort to the Supreme Court."[5] However, it never became law because President Bush vetoed it on October 22, 1990. The Senate failed to override that veto by only one vote. Unlike horseshoes (or hand grenades), Congress gets no credit for coming close. To fail to override the veto by one vote is still a complete failure.

President Bush's veto message did not oppose the goal of eliminating discrimination, an antediluvian position to take. On the contrary, he called discrimination on the basis of race, national origin, sex, religion, or disability "worse than wrong. It is a fundamental evil that tears at the fabric of our society, and one

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2 Independent Fed'n of Flight Attendants v. Zipes, 491 U.S. 754 (1989); Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989); Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Lorance v. AT&T, 490 U.S. 900 (1989); Martin v. Wilks, 490 U.S. 755 (1989); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

In addition to these cases, § 102 of the Act, 42 U.S.C. § 1981a (Supp. III 1992), overruled a long line of precedents going back to Lehman v. Nakshian, 453 U.S. 156 (1981). *Lehman*, and cases in its wake, had held that there are no jury trials in Title VII cases. That is no longer the rule. *See infra* text accompanying note 9.

3 Julius L. Chambers, *Twenty-Five Years of the Civil Rights Act: History and Promise*, 25 WAKE FOREST L. REV. 159, 173 (1990); *see* Samuel Issacharoff, *When Substance Mandates Procedure:* Martin v. Wilks *and the Rights of Vested Incumbents in Civil Rights Consent Decrees*, 77 CORNELL L. REV. 189, 190 (1992).

4 Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 22 (1992); Michele A. Estrin, Note, *Retroactive Application of the Civil Rights Act of 1991 to Pending Cases*, 90 MICH. L. REV. 2035, 2035 (1992).

5 John J. Ross, *The Employment-Law Year in Review (1991-1992)*, *in* EMPLOYMENT LITIGATION 1992, at 2 (PLI Litig. & Admin. Practice Course Handbook Series No. 5137, 1992).

that all Americans should and must oppose."[6] But, in his view, the flaw of this proposed statute was that it created inducements for quotas. The bill, Bush said, "employs a maze of highly legalistic language to introduce the destructive force of quotas into our Nation's employment system."[7]

The Civil Rights Act of 1990 did not, in its own terms, provide for quotas. Opponents were concerned, however, that this bill created a labyrinth of complicated new procedural rules, providing for presumptions of discrimination whenever a plaintiff found a sufficient statistical disparity in the sexual, religious, ethnic, or racial makeup of the employer's work force. The new rules also shifted the burden of proof to the employer. Faced with these procedural disadvantages, opponents feared that employers would prefer to institute *de facto* quotas rather than litigate what the law actually meant:

> Primarily through provisions governing cases in which employment practices are alleged to have *unintentionally* caused the disproportionate exclusion of members of certain groups, [the Civil Rights Act of 1990] creates powerful incentives for employers to adopt hiring and promotion quotas. These incentives are created by the bill's new and very technical rules of litigation, which will make it difficult for employers to defend legitimate employment practices. In many cases, a defense against unfounded allegations will be impossible. Among other problems, the plaintiff often need not even show that any of the employer's practices caused a significant statistical disparity. In other cases, the employer's defense is confined to an unduly narrow definition of "business" necessity that is significantly more restrictive than that established by the Supreme Court in *Griggs* and in two decades of subsequent decisions. Thus, unable to defend legitimate practices in court, employers will be driven to adopt quotas in order to avoid liability.[8]

President Bush's veto message urged Congress to consider a new bill that he was proposing. The Administration bill, he argued, would meet the goal of overturning various Supreme Court decisions. Also, by rejecting "certain critical language," it would avert

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6 Message to the Senate Returning without Approval the Civil Rights Act of 1990, 1990 PUB. PAPERS II 1437, 1437 (Oct. 22, 1990).

7 *Id.* at 1438.

8 *Id.*

"years—perhaps decades—of uncertainty and expensive litigation."[9]

On the first day of the next Congress, Representative Brooks, joined by many other members of the House, introduced H.R. 1, the Civil Rights and Women's Equity in Employment Act of 1991.[10] This new bill added two 1991 Supreme Court decisions to the list of pro-employer decisions that the new legislation would correct.[11] After much debate, Congress produced the Civil Rights Act of 1991, which President Bush signed on November 21, 1991. The President warned that some provisions in Title III, purporting to require the courts to defer to congressional fact findings and other sections affecting members in the Executive Branch, raise constitutional concerns. He concluded, however, that the law on the whole promotes "the goals of ridding the workplace of discrimination on the basis of race, color, sex, religion, national origin, and disability," without "lead[ing] to quotas" or "creat[ing] incentives for needless litigation."[12]

Controversy arose immediately. Each side claimed victory.[13] Supporters of the earlier bill (as well as some of its opponents) accused the President of caving in, while supporters of the President praised the effort to protect civil rights without a bill that would create, encourage, or protect quotas. In the words of legal journalist Stuart Taylor, this was a "classic, convoluted legislative deal."[14] The people who pay the costs of such a deal are those whom the law regulates, both employers and employees.[15]

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9 *Id.*

10 H.R. REP. NO. 40, 102d Cong., 1st Sess., pt. 1, at 14, 16 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 554-55 [hereinafter H.R. REP. NO. 40].

11 West Va. Univ. Hosp. v. Casey, 111 S. Ct. 1138 (1991); EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227 (1991).

12 Statement on Signing the Civil Rights Act of 1991, 1991 PUB. PAPERS II 1504 (Nov. 21, 1991).

13 Ross, *supra* note 5, at 3; Bruce Fein, *Time Bombs In Rights Bill*, WASH. TIMES, Nov. 4, 1991, at E1 (Bush was outfoxed by the Democrats); C. Boyden Gray, *Civil Rights: We Won, They Capitulated*, WASH. POST, Nov. 14, 1991, at A23 (President Bush did not "cave" or "surrender" on quotas); William T. Coleman, Jr. & Vernon E. Jordan, Jr., *How the Civil Rights Bill Was Really Passed*, WASH. POST, Nov. 18, 1991, at A21 (arguing that Gray misrepresents the bill's strong protections); *see also* White House Announces Civil Rights Compromise Ending Two-Year Long Dispute, Daily Rep. for Executives (BNA) at A20 (Oct. 28, 1991) (quoting President Bush, "We didn't cave." "This is not a quota bill;" and Sen. Kennedy, "The administration retreated. They finally stopped playing the quota card.").

14 Stuart Taylor, *The Civil Rights Bill: Punt to the Courts*, LEGAL TIMES, Nov. 4, 1991, at 25.

15 The employees, in this case, can include employees of the House and Senate. In

The Civil Rights Act of 1991 has already resulted in a great deal of litigation which could have been avoided if Congress had only articulated its positions more clearly. I realize that it is often impossible for legislation to anticipate every possible scenario, but a basic fact is that Congress did anticipate—but chose to ignore—some important issues involving the 1991 Act.

The hard fact of political life is that, in order to draft a bill that can pass both Houses of Congress and garner a presidential signature, it is sometimes politic to leave some things unsaid. But that political decision is also a judgment to delegate those matters to the courts without much direction. If the courts respond by decisions that are not as favorable as Congress would have liked, or use rules of statutory interpretation with which Congress disagrees,[16] then Congress, rather than pointing the finger of blame to the courts, should look into the mirror.

Like planned obsolescence, planned ambiguity has unavoidable costs which the consumers of the product must pay. The inherent result of planned ambiguity in the 1991 Act is unnecessary make-work for lawyers. In particular, Congress chose not to define a crucial term used throughout employment discrimination cases—the defense of "justified by business necessity." Similarly, Congress did not articulate whether the new law should apply retroactively. Which provisions of the Act, if any, apply to alleged employment discrimination that occurred prior to the time that the Act became law? To what extent should the new law apply to cases already in the trial courts or pending on appeal? Congress chose not to deal with these questions as well. Perhaps we should not be too surprised. These are some of the same people who tell

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an unusual break with standard operating procedure, the House and Senate covered its own employees, though Congress applied special rules and procedures so that the protections that the law offers private employees, and the burdens that the law places on private employers, are greater than the protections and burdens that Congress is willing to place on itself. *See* § 117, 2 U.S.C. §§ 601, 1201-1224 (Supp. III 1992) (the House). Both the House and the Senate specifically reserved the power to change the law applicable to it by exercising its rule-making power, without having to pass any additional legislation. *Id.* § 117(a)(2)(C), §§ 314, 324(b).

Each House of Congress reserves the power to decide for itself the means of enforcement. H.R. REP. NO. 40, *supra* note 10, at 95-96, 1991 U.S.C.C.A.N. at 633-34.

16 The draft Civil Rights Bill proposed to codify various rules of statutory interpretation. *See* H.R. REP. NO. 40, *supra* note 10, at 87-89. 1991 U.S.C.C.A.N. at 625-27, discussing the "need to codify certain rules of statutory construction." *Id.* The enacted bill did not contain the proposed sections.

us that this country has too many laws, but they always know of at least one more law that should be passed.

The result of this ambiguity is increased and burdensome litigation for both employers and employees. The new law increases, rather than decreases, legal uncertainty. The unfortunate by-product of the mandated ambiguities of the 1991 Act is increased transaction costs in the form of litigation. If I may switch from the language of economics to the language of sports, Congress chose to punt.

Congress can certainly be specific if it wants to be, as illustrated by an ironic (that is, "ironic" in the sense of "paradoxical," not in the sense of "humorous") fact regarding the 1991 Act. *Wards Cove Packing Co. v. Atonio*[17] was the main decision that precipitated the congressional reaction. The plaintiffs in this case were approximately two thousand Asian-American cannery workers who, for nearly two decades, have been litigating race discrimination claims against their employers. The 1991 Act specifically excludes *Wards Cove* from its coverage.[18] This is the first time that Congress has ever engaged in a case-specific exclusion in any civil rights legislation.[19] Although Congress made clear that the new law does not apply to a particular pending case, as to other cases, it chose not to address the question of retroactivity.

Let us now consider the eight areas within the 1991 Act in which Congress reversed various Supreme Court decisions dealing with employment discrimination.

II. DISPARATE IMPACT CLAIMS

A. Background

Griggs v. Dukes Power Co.[20] was the first Supreme Court case to hold that an employer's facially neutral policy, instituted with no intent to discriminate, may violate Title VII of the Civil Rights Act of 1964 solely because that policy has a disproportionate im-

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17 490 U.S. 642 (1989).

18 Section 402(b), 42 U.S.C. § 1981 (Supp. III 1992). See *infra* note 85 for a full discussion of the special exception for *Wards Cove*.

19 *See* Grace M. Kang, *Workers Fight to Have Bias Suit Covered by 1991 Civil Rights Act*, WALL ST. J., Sept. 11, 1992, at B14. Wards Cove paid its Washington, D.C. lobbyists $175,000 to obtain this exemption. *Id.* Senator Brock Adams and Representative Jim McDermott have introduced the *Justice for Wards Cove Workers Act*, S. 1962 & H.R. 3748, 102d Cong., 1st Sess. (1991), seeking to strike this clause from the Civil Rights Act of 1991.

20 401 U.S. 424, 432 (1971).

pact on a protected class. As Chief Justice Burger explained in *Griggs*, "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups *and are unrelated to measuring job capability.*"[21] Thus, once a complainant showed disparate impact, the facially neutral employment practice at issue, such as a weight requirement or an aptitude test, was an unlawful violation of Title VII, unless "business necessity" required it.[22] If the employer mounts a successful "business necessity" defense, the complainant could then show that alternative, less discriminatory business practices could be used.[23] *Griggs* and its offspring enabled a number of plaintiffs to prevail in employment discrimination cases, even though they could not show intentional discrimination.

At first, the Court applied the *Griggs* rule to cases involving objective job requirements, such as height and weight restrictions, or facially objective, but arbitrary tests.[24] For example, a job requirement that employees be at least six feet tall has a disparate impact on women, who tend to be shorter than men. Unless business necessity justified this height requirement, Title VII prohibited it. Similarly, Title VII allows the employer to use an objective written test, even though the test has a disparate or disproportionate impact on a protected class of workers, *if* the test is validated. A test is validated if it is scientifically shown that the test is "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."[25]

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21 *Id.* at 432 (emphasis added).

22 Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); *accord* Dothard v. Rawlinson, 433 U.S. 321, 328, 331-32 n.14 (1977) (holding that Title VII eliminated "unnecessary barriers" that are not "essential to effective job performance").

23 H.R. REP. NO. 40, *supra* note 10, at 24-25, 1991 U.S.C.C.A.N. at 562-63.

24 Compare the Court's position here with Washington v. Davis, 426 U.S. 229, 244 (1976). In *Davis*, the Court agreed that a verbal, reading, and comprehension test, which had a disparate impact on black police candidates, would be invalid under Title VII because it had not been "validated." There was no scientific proof that the people who did better on the examination would be better police officers than the people who did less well on it. The majority concluded, however, that the Equal Protection or Due Process Clauses would not prohibit this test because it was racially neutral on its face and was not instituted for racially discriminatory purposes. *Id.* at 245-46.

25 *Albemarle*, 422 U.S at 431 (quoting, with approval, federal equal employment guidelines).

In 1988, the Court, with no majority opinion, expanded the *Griggs* rule so that it applied to *subjective* employment practices, such as job interviews, which are facially neutral, but can have a disparate impact on a protected class of workers.[26] In so doing, Justice O'Connor cautioned that:

> [t]he inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures . . . . [E]xtending disparate impact analysis to subjective employment practices has the potential to create a Hobson's choice for employers and thus to lead in practice to perverse results. If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met.[27]

Lower courts applied and expanded *Griggs*.[28] For example, in *Green v. USX Corp.*,[29] the Third Circuit considered a case where those in charge of hiring used multiple criteria that were so subjective that a complainant could not determine the weight given to any one criterion. Multiple interviewers each used their own subjective criteria, with few, if any, guidelines to follow. Top management made little effort to determine what criteria were being used and whether they were job related. Applicants for these unskilled entry-level positions were subjected to a hiring process in which age, sex, and relatives in the company were to be listed on the applications. Applicants who had relatives at the plant were put in one folder, and all other applicants in another. When positions came open, some applications were pulled from each file for interviewing. No one had ever failed to meet the minimum requirements (no experience necessary, willing to train, common sense, and a desire to work). The all-white interviewers hired only seventeen percent blacks, although nearly thirty percent of the applicants were black. The court agreed that it would be difficult or impossible to isolate and prove which factor or factors led to this result, but it rejected a rule that would preclude challenge to a multicomponent system. The court held that such a doctrine

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26 Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

27 *Id.* at 992-93 (O'Connor, J., for the plurality).

28 Alfred W. Blumrosen, *The Legacy of* Griggs: *Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 10-11 n.53 (1987).

29 843 F.2d 1511 (3d Cir. 1988), *vacated*, 490 U.S. 1103 (1989).

would be "wholly incompatible with *Griggs*."[30] Thus, even a complainant's failure to isolate and identify the cause of a disparate impact would not be fatal to plaintiff's case.

In June 1989, the Supreme Court decided *Wards Cove Packing Co., Inc. v. Atonio*.[31] Wards Cove operated Alaskan salmon canneries in which nonwhites (Chinese, Japanese, Samoan, Filipino, and Alaskan native) predominately held the low-paying, unskilled cannery jobs. Predominately white workers filled the skilled, noncannery positions. The nonwhite workers contended that company hiring and promotion practices created absolute barriers to the higher paying noncannery jobs. For example, the company did not announce noncannery openings to cannery workers, but relied on word of mouth for recruitment. This policy disadvantaged nonwhites, who were less likely to get the word. In addition, the nonwhite workers claimed racial slurs were pervasive and that the employer provided segregated room and board accommodations.

The Ninth Circuit held that the nonwhite workers made out a *prima facie* case of disparate impact in hiring. In so ruling, the court relied solely on statistics that showed a high percentage of nonwhite workers in cannery jobs and a low percentage in noncannery positions. The court further concluded that once the plaintiffs had shown disparate impact of an employment practice, the burden then shifted to the employer to prove the practice's business necessity.

A divided Supreme Court reversed. First, the Court held that plaintiffs do not make a *prima facie* case of disparate impact by comparing the percentage of nonwhite cannery workers to the percentage of *non*cannery workers who were nonwhite. Instead, the proper comparison is between "the racial composition of the at-issue jobs and the racial composition of the qualified population in the relevant labor market."[32] The employer, after all, hires its employees from the qualified population in the relevant market.

The majority reasoned that the court of appeal's method of comparison would lead to a proliferation of lawsuits against any employer with a racially imbalanced segment of its workforce. The threat of expensive litigation whenever there is racial imbalance would encourage many employers to adopt racial quotas, as less expensive than litigation. Thus, the Court concluded that plaintiffs

30 *Id.* at 1521.
31 490 U.S. 642 (1989).
32 *Id.* at 650.

must specifically show that identifiable practices have had a significantly disparate impact.

Next, the Court held that after the plaintiff establishes a *prima facie* disparate impact case with respect to specific employment practices, the plaintiff still has the burden of persuasion. The Court interpreted earlier decisions referring to an employer's "burden of proof," for the business justification defense, to mean a burden of production, not persuasion. The Court then explained:

> [I]f on remand [the workers] cannot persuade the trier of fact on the question of [the employer's] business necessity defense, [the workers] may still be able to prevail. To do so, [the workers] will have to persuade the factfinder that "other tests . . . would also serve the employer's legitimate interest[s]." . . . Moreover, "factors such as the cost or other burdens of proposed alternative selection devices are relevant."[33]

This standard was more favorable to employers than the test that many of the lower courts were applying because it raised the issue of alternative costs and "other burdens," which effectively gave the employer a second line of defense.

In comparison to the way that many lower courts had been applying *Griggs* and its progeny, *Wards Cove* altered the law of disparate impact analysis in three ways. First, it required a complainant to isolate and identify particular employment practices responsible for any disparate impact.[34] In contrast, the *Green* case, discussed earlier,[35] had considered it incompatible with *Griggs* to disallow challenges to multicomponent systems in which particular practices could not be identified as causing a distinct impact.[36]

Second, the Court set out a reasonableness standard for the business necessity test. The question is "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer"[37] The employer's business necessity must now be "reasonable" rather than "compelling." The Court rejected the requirement that the employer demonstrate that the challenged practice is "essential" or "indispensable" to the business. The majority, citing *Griggs* and similar precedent,[38] concluded

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33 *Id.* at 661 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 997, 998 (1988) (plurality opinion)).

34 *Id.* at 657.

35 *See supra* text accompanying footnotes 29-30.

36 Green v. USX Corp., 843 F.2d 1511 (3d Cir. 1988), *vacated*, 490 U.S. 1103 (1989).

37 *Wards Cove*, 490 U.S. at 658.

38 The Court also cited *Watson*, 487 U.S. at 997 (plurality opinion); New York City

that this "degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils," such as de facto quotas.[39] Lower courts that have adopted the requirement that the business necessity must be "compelling" have acknowledged that the employer has a significant burden of proof.[40]

Third, *Wards Cove* held that the employer has only the burden of production, not the burden of persuasion, in establishing an affirmative defense of business necessity. The House Report termed this "a dramatic departure from long-standing precedent."[41] Many defense practitioners had also thought that the employer had the obligation to justify the challenged practice.[42] Interestingly, President Bush did not object to putting the burden of proof on the defendant-employer as to the business necessity defense.[43]

B. Multiple Employment Practices Resulting in a Disparate Impact

The Civil Rights Act of 1991 rejects many, but not all, of the principles that the majority had adopted in *Wards Cove*. Section 105(a)[44] retains the requirement of *Wards Cove* that a complainant isolate particular practices causing disparate impact. It allows the parties, however, to view the entire decision-making process as one employment practice if the complaining party shows that one cannot separate the elements of an employer's decisionmaking process analytically. The Act is broad enough to cover the situa-

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Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979). Justice Stevens, dissenting in *Wards Cove*, agreed that *Griggs* allowed "any valid business purpose" as a defense. *Wards Cove*, 490 U.S. at 665 (Stevens, J., dissenting).

39 *Wards Cove*, 490 U.S. at 659.

40 Shortly after *Griggs*, the Fourth Circuit created a widely accepted test for business necessity. *Id.* The test provided that a challenged employment practice must effectively carry out a sufficiently compelling business purpose to override any racial impact. The court admitted that this balancing test placed a significant burden on employers. Robinson v. Lorillard Corp., 444 F.2d 791, 797-800 (4th Cir. 1971).

41 H.R. REP. NO. 40, *supra* note 10, at 29, 1991 U.S.C.C.A.N. at 567.

42 For example, N. Thompson Powers, a corporate attorney, testified: "I would concede that as a defense practitioner, I certainly thought that prior to *Watson* . . . and *Wards Cove* . . . once disparate impact was established, . . . I had the burden of justifying the challenged practice." *Hearings on 1990 Civil Rights Act Before the Comm. on Education & Labor*, 101st Cong., 1st Sess., at 649 (1990), *quoted in*, H.R. REP. NO. 40, *supra* note 10, at 28, 1991 U.S.C.C.A.N. at 566.

43 Memorandum for the President from Attorney General Richard Thornburgh, on the "Civil Rights Act of 1990," at 2 (Oct. 22, 1990) (on file with the *Notre Dame Law Review*).

44 42 U.S.C. § 2000e-2(k)(1)(B) (Supp. III 1992).

tion where interaction of two or more components in hiring or promotion causes the adverse impact. As in *Green*, hiring processes are often complicated, with ill-defined or ill-followed guidelines. In *Griggs* itself, two separate tests were required for employee advancement, yet the Supreme Court had not required data regarding the distinct impact of each test.

C. Burden of Proof

Sections 104 and 105 place the burden of proof on the defendant-employer, who must prove that its practices are job related and consistent with business necessity. These sections reject *Wards Cove* and instead provide that where an employee has shown that an employment practice causes a disparate impact, both the burden of production and the burden of persuasion shift to the employer. The employer then must show that the practice is both job-related and consistent with business necessity. Section 104 defines "demonstrates" to mean "meets the burdens of production and persuasion."[45] Congress emphasized that it thought that *Wards Cove* had changed the law, not merely clarified it, for section 105 provides that the demonstration required "shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice.'"[46] The Supreme Court decided *Wards Cove* on June 5, 1989.

The new law places the burden of proof on the defendant because it is the defendant, not the plaintiff, that usually has easy access to the necessary information. It is the employer, not the employee, who adopted the challenged practices, who is familiar with the proper requirements needed for the job at issue, who should be aware of the relative costs and benefits of the practices chosen, and who knows why it chose not to use alternative practices. In addition, because it is always difficult to prove a negative, it is too heavy a burden for the employer to prove that "there is *no* business justification *whatsoever* for an employment practice."[47]

D. Disparate Impact and the Role of Statistics

Congress did not change the *Wards Cove* rule regarding the proof of "disparate impact." In fact, the new law codifies the tests

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45 Id. § 2000e-2(m).

46 *Id.*

47 H.R. REP. NO. 40, *supra* note 10, at 30, 1991 U.S.C.C.A.N. at 568 (emphasis in original).

that the Court used in the *Wards Cove* majority and prior cases. First, there is an "unlawful employment practice" on the grounds of "disparate impact" only in the following circumstances: the plaintiff must demonstrate—has the burden of production and of persuasion—that the employer uses an employment practice that "*causes* a disparate impact on the basis of race, color, religion, sex, or national origin."[48] Second, the employer must fail to demonstrate that the challenged practice is related to the job and is consistent with "business necessity."[49]

E. Causation

Causation is crucial. If the employer demonstrates that an employment practice "does not cause the disparate impact," then the employer need not also show that "business necessity" justifies the practice.[50] If the plaintiff challenges several employment practices, then the plaintiff must demonstrate that "each particular challenged employment practice causes a disparate impact," unless the plaintiff can prove that the elements "are not capable of separation."[51] Only if the elements are inseparable, "may" the court analyze the decision-making process as one employment practice.

In proving causation, the plaintiff does not make a *prima facie* case of disparate impact "merely by showing that an employer had a smaller proportion of minority or women employees than existed in the population as a whole."[52] The House Report on the 1991 Act, in explaining that the Act does not change the law on this issue, quoted *Wards Cove* favorably when it said that the "proper comparison [is] between the racial composition of [jobs at-issue] and the racial composition of the qualified population in the relevant labor market."[53] If the employer is looking for unskilled workers, then it should be appropriate to compare the group selected to the general working age population. Otherwise, it is not proper to compare the general population to the group that the employer actually selects, because the employer does not draw the employees from the general population but from the *qualified*

48 *Id.*

49 42 U.S.C. § 2000e-2(k)(1)(A)(i) (Supp. III 1992) (emphasis added).

50 *Id.* § 2000e-2(k)(1)(B)(ii).

51 *Id.* § 2000e-2(k)(1)(B)(i).

52 H.R. REP. NO. 40, *supra* note 10, at 32, 1991 U.S.C.C.A.N. at 570.

53 *Id.* at 33, 1991 U.S.C.C.A.N. at 571 (quoting *Wards Cove*, 490 U.S. at 650 (quoting Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08 (1977))).

labor pool. Often, the court should look "to the proportion of the applicants who were minorities or women."[54]

F. The Failure to Define "Business Necessity"

A crucial concept in the application of this law is the term "business necessity." What does it mean? One of the specific articulated purposes of the new law is "to codify the concepts of 'business necessity and job related'" as enunciated by the Supreme Court case law prior to *Wards Cove*.[55] The Act does not define this critical phrase, however, although a section of the law refers to some legislative history to which courts are directed to refer.[56]

If the employment practice involved hiring, transfer, promotion, training, and the like, the House Report proposed defining "business necessity" as a practice that "must bear a significant relationship to the successful performance of the job."[57] In all other cases not relating to job selection, the House Report proposed that the practice in question "must bear a significant relationship to a significant business objective of the employer."[58]

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54 *Id.* at 33, 1991 U.S.C.C.A.N. at 571.

55 Section 3(2), 42 U.S.C. § 1981 (Supp. III 1992).

56 *Id.* § 105(b), 42 U.S.C. § 1981. Section 105(b) contains an unusual statutory provision, stating that:

> No statements other than the interpretive memorandum appearing at 137 Cong. Rec. S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provisions of this Act that relate to Wards Cove—Business necessity/cumulation/alternative business practice.

Id. At the appropriate place in the Congressional Record, one finds a three paragraph memorandum. The first paragraph states that it is a "final compromise" agreed to by "several Senate sponsors, including Senators Danforth, Kennedy, Dole, and the Administration." 137 CONG. REC. S15,276 (daily ed. Oct. 25, 1991). The last two paragraphs are no Rosetta Stone. They state:

> The terms "business necessity" and "job related" are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio.*
>
> When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, such as the height and weight requirements designed to measure strength in *Dothard* v. *Rawlinson*, the particular functionally-integrated practices may be analyzed as one employment practice.

Id. (citation omitted).

57 H.R. REP. NO. 40, *supra* note 10, at 34, 1991 U.S.C.C.A.N. at 572.

58 *Id.* at 34, 1991 U.S.C.C.A.N. at 572. This test would have been found in § 701(o), 42 U.S.C. § 2000e-2. The law, as enacted, added several subsections to § 701, but stopped at subsection "n." *See* 42 U.S.C. § 2000e (Supp. III 1992).

An example of an employment practice that does not relate to job selection would be a rule that all employees who work outdoors cannot use indoor toilet facilities. In a case where the employer had instituted such a rule, it had a disparate impact on female employees, who experienced medical problems from using unsanitary outdoor facilities.[59] The court prohibited the requirement because the employer was unable to prove that "the practice of furnishing unsanitary toilet facilities at the work site 'substantially promoted the proficient operation of the business.'"[60] The House Report cites this lower court case with approval, but the enacted version of the law does not consider the question.[61]

Because Congress was unable to agree to the proposal that the House Report presented, it did not define a crucial term in disparate impact cases. Instead, Congress left that issue to future litigation, and delegated to the Court the power to breathe life into the defense of "business necessity"—to either narrow its protective umbrella or expand it. It was Congress, not the Court, that created a vacuum and invited the judiciary to fill it. Congress could have overturned, modified, or elaborated on the *Wards Cove* test for "business necessity," but it did not do so. The only reason that the buck stops with the Supreme Court on this issue is that Congress chose to pass the buck.

Now, if one or more Congressmen criticize the Court for the way it later defines that term, the Congressmen should first criticize Congress for its avoidance of the issue. It is not logical for Congress to give the Court *carte blanche* power to deal with a problem, and then criticize that Court for exercising that power in a *carte blanche* way, anymore than it is not logical to give someone a blank check and then object that the amount the person wrote on that check was too large.[62]

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59 Lynch v. Freeman, 817 F.2d 380 (7th Cir. 1987). Compare this with EEOC v. Ball, 661 F.2d 531, 540-41 (6th Cir. 1981), where the court upheld an employer lunch policy that had a disparate impact on women. The employer showed that the demands of the jobs dominated by women required a lunch policy that was different than the lunch policy applied to other jobs.

The issue of non-selection employment practices that cause a disparate impact does not relate to the question of so-called "comparable worth" claims, which this civil rights law did not address. H.R. REP. NO. 40, *supra* note 10, at 37, 1991 U.S.C.C.A.N. at 575.

60 *Freeman*, 817 F.2d at 388.

61 H.R. REP. NO. 40, *supra* note 10, at 37, 1991 U.S.C.C.A.N. at 575.

62 Congressional silence also serves to delegate more law-making power to the agencies that have jurisdiction to enforce the law. The EEOC issued two memoranda on July 7, 1992, attempting to clarify the new law. *EEOC Staff Policy Memos Interpret 1991 Civil*

When Congress writes unnecessarily vague laws, it is not solving problems but creating them. It is a little like the new worker who was had been loafing most of the year. Realizing that it was almost time for a raise, the new worker asked an older worker: "Do you think that if I work really hard for the next two weeks, I'll get a good raise? "Well," the veteran worker replied, "you make me think of a thermometer in a cold room. You can make it register higher by holding your hand over it, but you won't be warming the room." The unnecessarily vague law is a superficial solution that does not solve the problem, just as holding your hand over the thermometer does not warm the room.

III. RACIAL HARASSMENT

The "business necessity" defense does not apply to cases of *intentional* discrimination on the basis of race, color, sex, national origin, or religion.[63] If an employer has requirements that are not discriminatory on their face, the results of these requirements may show a disparate impact. The law, however, simply forbids intentional discrimination outright, because there is never a business necessity to justify that. There may be some circumstances where a particular characteristic may be a bona fide occupational qualification. As Justice Marshall has noted, the bona fide occupational qualification in the context of a sex discrimination lawsuit is "applicable only to job situations that require specific physical characteristics necessarily possessed by only one sex."[64] For example, it is not sex discrimination for a theater to employ male actors to play male parts and female actors to play female roles.

Rights Act, 61 U.S.L.W. 2029 (July 14, 1992). These memoranda outlined its new policies on disparate treatment and compensatory and punitive damages. The first memorandum adopted a recent line of decisions upholding the employer if it discovers some basis *after* the fact that would have served as a legitimate, non-discriminatory reason for firing the employee (*e.g.*, résumé fraud discovered after a discriminatorily motivated discharge). Also, the EEOC stated that the Civil Rights Act of 1991 does not affect voluntary affirmative action programs. The EEOC said that the sliding scale of caps imposed under the Civil Rights Act of 1991 applied to each aggrieved employee. For a workplace with 15 to 100 workers, each worker proving job bias would be entitled to $50,000. EEOC Commissioner Joy Cherian said that its legal staff had "breathed fresh hope of relief for victims of sexual harassment, and also for victims of racial and ethnic harassment." *Id.*

63 42 U.S.C. § 2000e-2(k)(1)(c)(2) (Supp. III 1992).

64 Phillips v. Martin Marietta Corp., 400 U.S. 542, 544-46 (1971).

One of the primary laws dealing with intentional racial discrimination is section 1981.[65] Prior to the amendments in the 1991 Act, it provided:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[66]

This language has survived, with only minor changes, from the original Civil Rights Act of 1866.[67]

Most suits brought under section 1981 are employment discrimination suits. Prior to 1989, every federal court of appeals reaching the question had held that section 1981 prohibited discrimination at the formation of an employment contract and during the performance of the contract as well.[68]

In 1989, the Supreme Court decided *Patterson v. McLean Credit Union*[69] and ruled to the contrary. Ms. Patterson complained of "racial harassment."[70] She testified that her supervisor "periodically stared at her for several minutes at a time; that he gave her too many tasks, causing her to complain that she was under too much pressure; that among the tasks given her were sweeping and dusting jobs not given to white employees."[71] The supervisor told her that "blacks are known to work slower than whites."[72] Ms. Patterson also testified that her supervisor "criticized her in staff meetings while not similarly criticizing white employees."[73]

In *Patterson*, Justice Kennedy held that section 1981 does not prohibit racial harassment relating to the conditions of employment because

> [t]he right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the

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65 42 U.S.C. § 1981 (1988).

66 *Id.*

67 14 Stat. 27 (1866).

68 H.R. REP. NO. 40, *supra* note 10, at 90, 1991 U.S.C.C.A.N. at 628.

69 491 U.S. 164 (1989).

70 *Id.* at 178.

71 *Id.* (quoting Patterson v. McLean Credit Union, 805 F.2d 1143, 1145 (4th Cir. 1986)).

72 *Id.*

73 *Id.*

> contract relation has been established . . . . Such postformation conduct does not involve the right to make a contract, but rather implicates the performance of established contractual obligations.[74]

According to the Court, section 1981 does not govern conduct that was "postformation," that is, conduct after the contract had been formed. Instead, such matters are "more naturally governed by state contract law and Title VII."[75]

Section 101(2)(b) of the 1991 Act responds to *Patterson* by prohibiting discrimination on account of race and ethnicity even in the post-contract-formation period.[76] The Act applies specifically to conditions of work as well as to discriminatory hiring by defining "make and enforce contracts" to include "the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."[77]

Although the modern Supreme Court has applied section 1981 to private conduct without any state action,[78] Congress enacted a new subsection to codify this rule and make it clear that the protected rights are shielded from impairment by nongovernmental entities as well as from impairment under color of state law.[79]

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74 *Id.* at 188.

75 *Id.* at 177.

Ms. Patterson also testified that the supervisor passed her over for promotions because of her race, did not offer her training for higher level jobs, and denied her wage increases. The Court indicated that if the plaintiff had claimed that she was not promoted because of race, and the change of position would have entailed a new contract formation, then refusal of the employer to enter into that new contract would violate section 1981. *Id.* at 185. The Court remanded for further proceedings on these other issues. The trial court eventually dismissed Ms. Patterson's claims on the grounds that the promotion denied her was not "a new and distinct relation with her employer." Patterson v. McLean Credit Union, 729 F. Supp. 35, 36 (M.D.N.C. 1990).

McKnight v. G.M. Corp, 908 F.2d 104, 107-8 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1306 (1991), later held that *Patterson* applied retroactively to cases pending on appeal.

76 42 U.S.C. § 1981(b)-(c) (Supp. III 1992).

77 *Id.* § 1981(b).

78 Runyon v. McCrary, 427 U.S. 160 (1976); Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (reaffirming *Runyon*).

It is interesting that the House Report cited *Runyon*, but spelled it incorrectly. *See* H.R. REP. NO. 40, *supra* note 10, at 92, 1991 U.S.C.C.A.N. at 630 (referring to "Runyon v. McGrary [sic].")

79 42 U.S.C. § 1981(c). The *Patterson* Court considered, but unanimously rejected, a proposal to overrule *Runyon*, by reinterpreting § 1981 to impose a state-action requirement. *Patterson*, 491 U.S. at 173.

IV. RETROACTIVITY

In addition to expanding the scope of section 1981, Congress added a new section which provides for punitive damages in certain instances of *intentional* discrimination.[80] Congress, however, did not explain whether this new punitive damage provision is to apply retroactively to cases pending at the time the 1991 Civil Rights Act became law, or to conduct that occurred before the enactment of the law. The very last section of the law, section 402, simply states that, "[e]xcept as otherwise specifically provided, this Act and the amendment made by this Act *shall take affect upon enactment.*"[81]

The vetoed 1990 Civil Rights bill contained a clause making it retroactive.[82] The existence of that clause was one of the reasons that President Bush vetoed the 1990 bill.[83] Some commentators have argued that the failure of Congress to enact a specific clause stipulating retroactivity meant that Congress did not intend the law to be retroactive.[84] Moreover, some argue that it is unfair for Congress to provide for the retroactive application of *punitive* damages. The purpose of punitive damages is to *change* behavior, but it is not fair to apply the punitive damage remedy to actions that have already passed and were not illegal at the time at which they took place, that is, before the passage the 1991 Act. If the facts did not state a cause of action before the enactment of the 1991 Civil Rights Act, then subsequently enacted law should not apply retroactively to make improper that which was proper as of the time it occurred.

Others point to a clause that Congress wrote explicitly making the law not retroactive as to a narrow fact situation—the law will not apply to the workers who sued in *Wards Cove*, on remand.[85]

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80 42 U.S.C. § 1981a.

81 *Id.* § 1981 (emphasis added).

82 S. 2104, 101st Cong., 1st Sess. (1990).

83 137 CONG. REC. S15,383 (daily ed. Oct. 22, 1990).

84 *See* Gersman v. Group Health Ass'n, 976 F.2d 886, 890 (1992).

85 Section 402(b), 42 U.S.C. § 1981 (Supp. III 1992), specifically bars the application of the Act to disparate impact cases if the complaint was filed before March 1, 1975 and if the initial decision was rendered after October 30, 1983. *See supra* note 19. The purpose of these apparently arbitrary dates is to exclude the plaintiffs in *Wards Cove* from benefitting from the Civil Rights Act of 1991 on remand from the Supreme Court. The employer in that case lobbied Congress for the specific exclusion, which Congress granted, although the results in that case supposedly inspired Congress to enact new legislation to help the workers in *Wards Cove*. *See supra* note 19.

Thus, argue these other commentators, Congress must have intended that the law otherwise be retroactive.[86]

The only thing that is clear is that the legislators were unable to agree about this question, even though they were aware of it and had thought about it.[87] By leaving the issue vague, those who lost on this question in the halls of Congress might have a second chance to win in the courts.

It is an iron law of statutory interpretation that each litigant will almost always find some fragment or particle of legislative history that can be read to lend support to their claims. After you have heard two eyewitnesses separately describe the same auto accident, you start to worry about history. We should approach legislative history with the same degree of skepticism and apprehensiveness.

The fact that Congress was deliberately vague does not, of course, mean that the issue will go away. The courts will jump in where Congress fears to tread. When Congress avoids the question, it creates, in effect, a decision to delegate that issue to the courts. This is what happened. Like the student who procrastinates in doing her homework, the homework does not go away, and the student must still eventually do it. In the case of legislation, however, procrastination means that Congress (unlike the student) *may* be able to avoid entirely the need to decide the issue. Delay means that the judiciary will make the decision, at least initially. Congress will only have to deal with the problem, however, if enough legislators do not like the judiciary's solution.

In the case of the "business necessity" rule, the congressional decision to avoid a statutory codification of what that rule means is a decision that leaves courts struggling to create a meaning, perhaps overturning or restrictively interpreting prior case law on that issue. The congressional decision to be silent on the retroactivity issue is not really parallel because it does not involve the courts in interpreting a long series of cases in an effort to define

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86 *See* Davis v. City of San Francisco, 976 F.2d 1536 (9th Cir. 1992).

However, others treated the *Wards Cove* provision as proof that Congress generally did not intend that the law should be treated as retroactive. Senator Gorton, for example, is on record as saying that "the language in question does no more than reaffirm for one specific case the more general mandate of the bill that the civil rights amendments will be applied prospectively," in Gersman v. Group Health Ass'n, 975 F.2d 886, 890 (D.C. Cir. 1992).

87 In Rowe v. Sullivan, 967 F.2d 186 (5th Cir. 1991), the Fifth Circuit admitted: "[I]f there is anything clear about congressional intent, it is that Congress clearly intended to leave the question of retroactivity to others." *Id.* at 194.

a crucial term. The question of retroactivity is really an "either-or" decision. The Supreme Court, or the lower courts, if there is no split in the circuits, will decide that the law is either applied retroactively or is not applied retroactively.

Outside of the criminal context, where the Constitution forbids retroactive application,[88] there is no default rule of statutory interpretation, no uniform principle regarding the retroactive application of statutes.[89] A general rule always requiring prospective application would force Congress to take responsibility for the decision regarding the retroactive application of its laws. It would also reduce the litigation burden on the courts and the parties.[90] Instead, Congress chose what one court called "carefully crafted 'ambiguity as to whether Congress intended the Act to be generally retroactive.'"[91]

The fact that Congress presented the courts with an "either-or" decision does not absolve congressional avoidance of the issue. Rather, it makes congressional avoidance even more inexcusable. All Congress had to do was make a decision, and it would have saved a large number of litigants a great deal of money and time litigating a question to which there is often no simple answer. A simple legislative decision would have eliminated delay in the courts, reduced the costs to the litigants and to the judiciary, and asserted congressional responsibility. Instead, employers, employees, the EEOC,[92] and the courts, wrestled with the issue, with the

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88 U.S. CONST, art. I, § 10, cl. 1 ("No state shall . . . pass any . . . ex post facto law."); U.S. CONST., art. I, § 9, cl. 3 ("No . . . ex post facto law shall be passed [by Congress]."). *See generally,* 2 JOHN E. NOWAK & RONALD D. ROTUNDA, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.9(b) (2d ed. 1992).

89 On the civil side, the rules of statutory construction are complex. *See, e.g.,* Bradley v. Richmond Sch. Bd., 416 U.S. 696, 711 (1974) (Court held that courts should apply an act to pending cases unless the act provides expressly to the contrary or manifest injustice would result from retroactive application); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) (Court held that a law requires prospective application unless an act expressly provides for retroactive application).

90 *Cf.* Daniel Kinsella, *The Civil Rights Act of 1991 and the Retroactivity Muddle,* 80 ILL. B.J. 500 (1992).

91 Rowe v. Sullivan, 967 F.2d 186, 193 (5th Cir. 1992).

92 The EEOC issued a policy statement on December 27, 1991, interpreting the new law prospectively and ruling that it would not seek damages for events occurring before November 21, 1991. *Civil Rights Amendments Aren't Retroactive, EEOC Says,* 60 U.S.L.W. 2418 (Jan. 7, 1992); *see also EEOC Staff Policy Memos Interpret 1991 Civil Rights Act,* 61 U.S.L.W. 2029 (July 14, 1992). The courts have had a mixed reaction to the position of the EEOC. Vogel v. Cincinnati, 959 F.2d 594 (6th Cir. 1992) (EEOC policy reasonable); Rowe v. Sullivan, 967 F.2d 186, 194 (5th Cir. 1992) (same). *But see* Davis v. City of San Francisco, 976 F.2d 1536, 1555 (9th Cir. 1992) (court declines to defer to EEOC).

trial courts splitting on the question and most courts on the appellate level eventually deciding that the law is not retroactive.[93]

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93 Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992); *accord* Hicks v. Brown Group, 982 F.2d 295 (8th Cir. 1992), (holding that § 101(2)(b) does not apply retroactively).

Baynes v. AT&T Technologies, 976 F.2d 1370 (11th Cir. 1992), weighed the nature of the parties (private parties, "great national concern") and the nature of the parties' rights (substantive versus procedural or remedial). The court concluded that the substantive rights of private parties on issues of great national concern weighed against retroactivity.

The Seventh Circuit held that § 101(2)(b) was not retroactive in Mozee v. American Commercial Marine Serv., 963 F.2d 929 (7th Cir. 1992), and in Luddington v. Indiana Bell Tel. Co., 966 F.2d 225 (7th Cir. 1992). In dicta, *Mozee* proposed that there be a presumptive retroactive application of procedural amendments and a presumptive prospective application of substantive changes in the law. *Mozee*, 963 F.2d at 939. Of course, the distinction between "substance" and "procedure" is not all that clear, as any first year law student learns by the end of the first semester of civil procedure. Johnson v. Uncle Ben's, Inc., 965 F.2d 1363 (5th Cir. 1992) (against retroactivity); Rowe v. Sullivan, 967 F.2d 186 (5th Cir. 1992) (same).

Gersman v. Group Health Ass'n, 975 F.2d 886, 890 (D.C. Cir. 1992), also ruled against retroactivity, specifically referring to the "convoluted legislative history of this Act," and rejecting Davis v. City of San Francisco, 976 F.2d 1536 (9th Cir. 1992). *Davis* applied retroactively the Civil Rights Act with regard to the reimbursement of expert witness fees. *Id.* at 1549.

The number of court decisions on this one issue is astounding. As of January 1, 1993, the Lawyer's Committee for Civil Rights Under the Law listed over 200 cases. *See, e.g.*, Hughs v. Matthews, No. 92-1620, 1992 U.S. App. LEXIS 32119 (8th Cir. Dec. 8, 1992); Holt v. Michigan Dep't of Corrections, 974 F.2d 771 (6th Cir. 1992); Valdez v. San Antonio Chamber of Commerce, 974 F.2d 592 (5th Cir. 1992); Wilson v. University of Tex. Health Ctr., 973 F.2d 1263 (5th Cir. 1992); Huey v. Sullivan, 971 F.2d 1362 (8th Cir. 1992); Parton v. GTE North, 971 F.2d 150 (8th Cir. 1992); Wilson v. Belmont Homes, 970 F.2d 53 (5th Cir. 1992); Banas v. American Airlines, 969 F.2d 477; Artis v. Hitachi Zosen Clearing, 967 F.2d 1132 (7th Cir. 1992); Taylor v. Western & Southern Ins. Co., 966 F.2d 1188 (7th Cir. 1992); Rush v. McDonald's Corp., 966 F.2d 1104 (7th Cir. 1992); Williams v. Valentec Kisco, 964 F.2d 723 (8th Cir. 1992); Valdez v. Mercy Hosp., 961 F.2d 1401 (8th Cir. 1992); Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992); Smith v. Colo. Interstate Gas Co., 794 F. Supp. 1035 (D. Colo. 1992); Brown v. Amoco Oil Co., 793 F. Supp. 846 (N.D. Ind. 1992); Desai v. Siemens Medical Sys., 792 F. Supp. 1275 (M.D. Fla. 1992); Andrade v. Crawford & Co., 792 F. Supp. 543 (N.D. Ohio 1992); Garnder v. MCI Telecomuications, 792 F. Supp. 337 (S.D.N.Y. 1992); Assily v. Tampa Gen. Hosp., 791 F. Supp. 862 (M.D. Fla. 1992); Moore v. Burlington N. R.R. Co., 790 F. Supp. 781 (N.D. Ill. 1992); Craig v. Ohio Dept. of Admin. Servs., 790 F. Supp. 758 (S.D. Ohio 1992); Robinson v. Davis Memorial Goodwill Indus., 790 F. Supp. 325 (D.D.C 1992); Lute v. Consol. Freightways, 789 F. Supp. 964 (N.D. Ind. 1992); Sudtelgte v. Sessions, 789 F. Supp. 312 (W.D. Mo. 1992); Lee v. Sullivan, 787 F. Supp. 921 (N.D. Calif. 1992); Ribando v. United Airlines, 787 F. Supp. 827 (N.D. Ill. 1992); Andrade v. Crawford & Co., 786 F. Supp. 1302 (N.D. Ohio 1992); Croce v. V.I.P. Real Estate, 786 F. Supp. 1141 (E.D.N.Y. 1992); McCormick v. Consolidation Coal Co., 786 F. Supp. 563 (N.D. W. Va. 1992); Sample v. Keystone Carbon Co., 786 F. Supp. 527 (W.D. Pa. 1992); Reynolds v. Frank, 786 F. Supp. 168 (D. Conn. 1992); Aldana v. Raphael Contractors, 785 F. Supp. 1328 (N.D. Ind. 1992); McCullough v. Consol. Rail Corp., 785 F. Supp. 1309 (N.D. Ill. 1992); Parcell v. IBM Corp., 785 F. Supp. 1229 (E.D.N.C. 1992); Conerly

The Supreme Court has just accepted two cases to decide the retroactivity question.[94]

V. PROCEDURAL HURDLES TO THE VINDICATION OF CIVIL RIGHTS CLAIMS

Section 112 of the Civil Rights Act of 1991[95] provides that the statute of limitations for suits involving seniority systems begins to run from the time a plaintiff is affected. This provision overruled *Lorance v. AT&T Inc.*,[96] which had held that the statute ran from the time the seniority system was adopted.

The Department of Justice opposed the *Lorance* statute of limitations rule.[97] The statutory solution is fair to plaintiffs, who may not know that a seniority system affects them until it is applied to them, to defendants, who do not have to defend a seniority system until it is applied concretely, and to the judicial system, which need not rule on the system until the dispute is concrete. The *Lorance* rule, in contrast, encouraged the premature filing of lawsuits to contest objections to seniority systems that may be speculative.

Congress also did not decide the retroactivity question as to *Lorance*,[98] nor did Congress decide whether the *Lorance*[99] rule

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v. CVN Cos., 785 F. Supp. 801 (D. Minn. 1992); Hameister v. Harley-Davidson, 785 F. Supp. 113 (E.D. Wis. 1992); McLaughlin v. New York, 784 F. Supp. 961 (N.D.N.Y. 1992); Long v. Carr, 784 F. Supp. 887 (N.D. Ga. 1992); Joyner v. Monier Roof Tile, 784 F. Supp. 872 (S.D. Fla. 1992); Kimble v. DPCE, Inc., 784 F. Supp. 250 (E.D. Pa. 1992); Doe v. Board of County Comm'rs, 783 F. Supp. 1379 (S.D. Fla. 1992); Cook v. Foster Forbes Glass, 783 F. Supp. 1217 (E.D. Mo. 1992); Poston v. Reliable Drug Stores, 783 F. Supp. 1166 (S.D. Ind. 1992); Sanders v. Culinary Workers Union Local No. 226, 783 F. Supp. 531 (D. Nev. 1992); Burchfield v. Derwinski, 782 F. Supp. 532 (D. Colo. 1992); Saltarikos v. Charter Mfg. Co., 782 F. Supp. 420 (E.D. Wis. 1992); Futch v. Stone, 782 F. Supp. 284 (M.D. Pa. 1992); Goldsmith v. City of Atmore, 782 F. Supp. 106 (S.D. Ala. 1992); Grahm v. Bodine Elec. Co., 782 F. Supp. 74 (N.D. Ill. 1992); Great Am. Tool & Mfg. Co. v. Adolph Coors Co., 780 F. Supp. 1354 (D. Colo. 1992); EEOC v. Elgin Teachers Ass'n, 780 F. Supp. 1315 (N.D. Ill. 1991); Stender v. Lucky Stores, 780 F. Supp. 1302 (N.D. Calif. 1992); Khjandelwal v. Compuadd Corp., 780 F. Supp. 1077 (E.D. Va. 1992); King v. Shelby Medical Ctr., 779 F. Supp. 157 (N.D. Ala. 1991); Mojica v. Gannett Co., 779 F. Supp. 94 (N.D. Ill. 1991); Hansel v. Public Serv. Co., 778 F. Supp. 1126 (D. Colo. 1991).

94 Harvis v. Roadway Express, Inc., 973 F.2d 490 (6th Cir. 1992), *cert. granted*, No. 92-938, 1993 U.S. LEXIS 1760 (U.S. Feb. 22, 1993); Landgraf v. USI Film Prod., 968 F.2d 427 (1992), *cert. granted*, No. 92-757, 1993 U.S. LEXIS 1760 (U.S. Feb. 22, 1993).

95 42 U.S.C. 2000e-5(e)(2) (Supp. III 1992).

96 490 U.S. 900 (1989).

97 *See* Brief for the United States at 8, 24, Lorance v. AT&T, 490 U.S. 900 (1989) (No. 87-1428).

98 The Ninth Circuit avoided the retroactivity question in EEOC v. Local 350,

should apply to statutes other than Title VII, such as the Age Discrimination in Employment Act of 1967.

VI. THE RIGHTS OF NON-PARTIES TO CONSENT DECREES

In contrast to section 112 of the Civil Rights Act of 1991,[100] where Congress increased the procedural rights of prospective litigants adversely affected by actions of the employer in setting up a seniority system, section 108 reduces the rights of litigants. It seeks to take away their day in court. Section 108 provides that non-parties to consent decrees cannot challenge them under Title VII if they had notice and a chance to intervene or were adequately represented by others.[101] This rule overturns *Martin v. Wilks*,[102] which held that a judgment or decree does not bind a third party who is not a party to the litigation.

In *Wilks*, white firefighters sued the city and the personnel board, claiming that these two entities denied promotions to the whites in favor of less qualified black fighters. In this reverse discrimination case, the white firefighters argued that the city and the board, in reliance on certain consent decrees, were making promotion decisions that were unconstitutional and in violation of federal statutory law. The district court precluded the white firefighters from challenging employment decisions taken pursuant to various consent decrees, even though these firefighters had not been parties to the proceedings in which the decrees were entered.

Chief Justice Rehnquist, for the five-to-four majority, overturned the district court, affirmed the Eleventh Circuit, and ruled that the firefighters should have their day in court. The district court's decision "contravenes the general rule that a person cannot be deprived of his legal rights in a proceeding to which he is not a party."[103] Under the Federal Rules of Civil Procedure, if the city, or the personnel board, or the union, wanted to bind the

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Plumbers & Pipefitters, No. 90-16810, 1992 WL 373764 (9th Cir. Dec. 22, 1992), because the violation in that case was a continuing facially discriminatory system involving age discrimination. *Lorance* was inapplicable to this case because it only determines "when the limitations period begins to run in a lawsuit arising out of a seniority system not alleged to be discriminatory on its face or as presently applied." *Lorance*, 490 U.S. at 903.

99 *Cf.* EEOC v. City Colleges of Chicago, 944 F.2d 339, 343 (7th Cir. 1991).

100 42 U.S.C. § 2000e-5(e)(2) (Supp. III 1992).

101 *Id.* § 2000e-2.

102 490 U.S. 755 (1989); *see, e.g.*, Issacharoff, *supra* note 3.

103 *Wilks*, 490 U.S. at 759.

white firefighters (who were not parties to the consent decree), then they cannot obligate the white firefighters to intervene; instead, they must join them. The fact that the firefighters could challenge the consent decree as discriminatory did not mean that they would win. *Wilks* only gave them their day in court.

Congress concluded that mandatory joinder of affected parties was unreasonable.[104] Many employers and unions also supported overruling *Wilks*.[105] That is to be expected, because the only group that the new legislation adversely affects is the group that is effectively precluded from challenging an allegedly unconstitutional consent decree. Future cases may challenge, on procedural grounds, the constitutionality of this provision to the extent it precludes people from challenging a consent decree that affects them when they were not parties to it and did not receive proper notice.[106]

VII. MIXED MOTIVE DISCRIMINATION

In *Price Waterhouse v. Hopkins*,[107] the Court considered the situation where a challenged employment decision resulted from a mixture of legitimate and illegitimate motives.[108] The six-justice majority split four-to-four-to-one in its reasoning. Justice Brennan, for the plurality, rejected the position that the Justice Department advocated and concluded that, in a mixed-motive case, the plaintiff bears the burden of proving by direct evidence that an impermissible criterion was a "substantial factor" in the adverse employment decision. After that, the burden of persuasion shifts to the employer to establish, by a preponderance of the evidence, that the same decision would actually have been made even without the unlawful motive.[109] If the employer would have made the same decision, without taking plaintiff's sex or race into account, then the defendant avoids all liability. This principle is similar to the rule that the Court has applied in mixed motive cases brought directly under the Equal Protection Clause.[110]

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104 H.R. REP. NO. 40, *supra* note 10, at 53, 1991 U.S.C.C.A.N. at 591.

105 *Id.* at 51-52, 1991 U.S.C.C.A.N. at 589-90; *see also* Brief *amicus curiae* of EEOC, in Support of Petitioners, Martin v. Wilks, 490 U.S. 755 (1989) (No. 87-1614).

106 *See, e.g.*, Hansberry v. Lee, 311 U.S. 32 (1940).

107 490 U.S. 228 (1989).

108 *Id.* at 232.

109 *Id.* at 261, 276 (O'Connor, J., concurring); *cf.* Tyler v. Bethlehem Steel, 958 F.2d 1176, 1181-83 (2d Cir. 1992).

110 *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252,

Section 107(a) of the Civil Rights Act of 1991[111] reverses *Price Waterhouse*. It allows a plaintiff to prevail even if non-discriminatory motivations exist, and even if the employer would have taken the same action in spite of its discriminatory purpose. However, the Act limits the remedy in such cases.[112] The employer does not avoid all liability; instead, if the employer proves that it would have taken the same action (such as a refusal to promote the plaintiff) even in the absence of the improper motivating factor, then the court may grant declaratory relief, or an injunction, and attorney's fees and costs "directly attributable" to these claims. The court, however, cannot award any damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment.[113]

Thus, the new law authorizes the court to enjoin the employer from future discriminatory practices even if it could not order the defendant to promote the plaintiff. The reason why the court can order some relief, in appropriate circumstances, is to recognize that the plaintiff is really a "private attorney general" who is vindicating public rights, not just his or her private interests.

VIII. EXPERT WITNESS FEES

In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*,[114] the Court followed the traditional American rule and concluded that federal courts cannot award prevailing parties in civil cases more than thirty dollars per day in expert witness fees. *West Virginia University Hospital v. Casey*[115] applied this rule to the Civil Rights Attorneys' Fees Award Act of 1976,[116] because the law did not contain any explicit statutory authorization for reimbursement of expert witness fees. Yet, in many cases, the market rate for expert witnesses is routinely several hundred dollars per hour.

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270 n.21 (1977). On the other hand, if the state maintains a system for invidious purposes, the Court will find a violation of the Equal Protection Clause of the Fourteenth Amendment, even though the system was racially neutral when the state adopted it. Rogers v. Lodge, 458 U.S. 613, 616 (1982).

111 42 U.S.C. § 2000e-2(m) (Supp. III 1992).

112 Section 107 provides: "[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for an employment practice, even though other factors also motivated the practice." Id.

113 *See* § 107(b)(3), 42 U.S.C. § 2000e-5(g)(B)(i)(ii) (Supp. III 1992).

114 482 U.S. 437 (1987).

115 111 S. Ct. 1138 (1991).

116 42 U.S.C. § 1988 (1988).

In response to judicial requests for statutory authorization,[117] section 113 of the Civil Rights Act of 1991 provides that a court, "in its discretion," may award those who win civil rights suits reasonable expert witness fees as part of their attorney's fees.[118] Congress considered proposals to overturn other Supreme Court decisions dealing with attorneys' fees, but ultimately included none of them in the final version of the bill.[119]

IX. APPLICATION OVERSEAS

In *EEOC v. Arabian American Oil Co.*,[120] the Court refused to extend the protections of various civil rights statutes, including Title VII, to American citizens employed abroad by American companies. The Court also asked for more legislative guidance, which Congress provided in section 109 of the Civil Rights Act of

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117 *See, e.g.*, Denny v. Westfield State College, 880 F.2d 1465, 1471-72 (1st Cir. 1989).

118 42 U.S.C. § 1988 (Supp. III 1992).

Only the Ninth Circuit has ruled in favor of the retroactivity of any part of the Civil Rights Act of 1991, and did so in an expert witness fee case. Davis v. City of San Francisco, 976 F.2d 1536 (9th Cir. 1992) (holding that the provision of the Act providing for expert witness fees in employment discrimination cases applies retroactively).

In contrast, the Eighth Circuit specifically rejected the argument that § 113 should apply retroactively. *See* Huey v. Sullivan, 971 F.2d 1362, 1366 n.5 (8th Cir. 1992); Davis v. Tri-State Mack Distribs., 1992 WL 357795 (D. Ark. Dec. 8, 1992).

119 *See* Independent Fed.'n of Flight Attendants v. Zipes, 491 U.S. 754 (1989) (refusing to mandate attorneys' fees for plaintiffs who defend earlier obtained relief from collateral attack).

Congress also refused to reverse Marek v. Chesny, 473 U.S. 1 (1985), holding that the court may deny a successful civil rights plaintiff attorneys' fees incurred after the plaintiff rejected a pretrial offer of settlement, if the relief that plaintiff obtained is less than the offer.

Finally, Congress refused to overturn Evans v. Jeff D., 475 U.S. 717 (1986), stating that it was proper for the defendant, in settling the case, to require that the plaintiff's attorney waive his or her statutory right to attorneys' fees. If plaintiff secures nonmonetary relief, such as injunctive or declaratory relief, there is no *res* from which plaintiff's attorney can be paid. Defendant has every incentive to encourage plaintiff to waive the attorney's fees; the waiver does not harm plaintiff, who has won a successful settlement and who often cannot afford to pay attorneys' fees. The attorney has the ethical obligation to fight zealously for his or her client, not to fight just for the fees. The problem is that future plaintiffs will be hurt because future attorneys will be reluctant to undertake meritorious civil rights litigation, where success is likely, but the resultant attorney's fees may well be waived. Congress refused to reverse this case, though some state bars have published ethics opinions concluding that it is unethical for defense counsel to submit a settlement offer conditioning settlement on the waiver of plaintiff's attorney's fees. *See* THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 481-82 (5th ed. 1991).

120 111 S. Ct. 1227 (1991).

1991.[121] Section 109 extends Title VII and Americans with Disabilities Act protections to U.S. citizens employed in foreign countries by American owned or American controlled companies. To avoid any conflict in duties, the American law excludes any action that would violate the law of the foreign workplace.

X. JURY TRIALS IN TITLE VII CASES

Section 102[122] provides for jury trials in Title VII cases, overruling a consistent line of precedent going back over a decade.[123] It also provides for punitive damages but places various "caps" or limits on the amount of punitive damages that the jury may award. These caps set a maximum amount of the sum of compensatory and punitive damages and are a function of the number of employees.[124]

XI. CONCLUSION

The Supreme Court has had a crucial role to play in realizing the promise of civil rights for all Americans. The Court, and not Congress, has had the primary role in interpreting our Bill of Rights. But when we turn to the statutory framework within which Congress protects against *de facto* employment discrimination, Congress should not abdicate its role of making policy and protecting the statutory rights that it has previously created.

It is inevitable that, when interpreting statutes, the Court will sometimes make mistakes and fail to follow either the congressional will expressed in the statute or existing at the time that the Court renders its opinion. The expected response, in such cases, is for Congress to enact clarifying legislation, to "reverse" various Supreme Court decisions. There is nothing unusual or sinister about these interpretative fumbles, and we should not try to read too much into them.[125]

When Congress enacts clarifying legislation, it is reasonable for litigators, as well as the Court, to expect Congress to draft language that illuminates, simplifies, and, yes, even clarifies, previously veiled, enigmatic, or cryptic statutes. In enacting the Civil

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121 42 U.S.C. § 2000e-1 (Supp. III 1992).

122 *Id.* § 1981a(c)(1).

123 *See, e.g.*, Lehman v. Nakshian, 453 U.S. 156 (1981).

124 Interestingly, the law mandates that the judge "shall not inform the jury of the limitations described in subsection (b)(3)." 42 U.S.C. § 1981a(c)(2).

125 *But cf.* Rutherford, *supra* note 4.

Rights Act of 1991, Congress cleared up various problems in the law, but it also avoided solving two very important issues: first, the meaning of "business necessity," and, second, the question of the retroactive application of the various provisions that it was enacting.

Congress cannot always foresee problems. The genius of the common law system is that the courts can deal with these problems on a case by case basis. But lack of foresight is not the cause of the two main interpretative problems with the 1991 Act. In an effort to enact a law with many good provisions, Congress chose not to tackle two issues because the legislators could not agree on clarifying language. Instead, Congress relied on so-called "legislative history," which the lower federal courts dismissed as "convoluted,"[126] a "mine field,"[127] or intentionally "crafted" to be "ambigu[ous]."[128] When the legislators themselves caution the Court to "take with a large grain of salt"[129] the various statements inserted into the Congressional Record and carefully placed in the floor debates, we should not be surprised if the Supreme Court agrees.

When the Court requires Congress to speak with clarity, it is not usurping the legislative role. Instead, the judiciary is helping to implement it, because when Congress speaks clearly, it must take responsibility for what it does. The voters will know whom to praise or blame for the resulting legislative handiwork. It is true that vague legislation accompanied by selective legislative history allows each side in the legislative battle to tell its constituents that its interests had prevailed.[130] The constituents, however, have not won; instead, the politicians just gave them the right to file a law suit. Litigation becomes politics by another means. Instead of deciding whether the civil rights laws should apply retroactively, Congress debated what the courts would do if Congress did not

126 Gersman v. Group Health Ass'n, Inc., 975 F.2d 886, 890 (D.C. Cir. 1992).

127 *Id.* at 891.

128 Rowe v. Sullivan, 967 F.2d 186, 193 (5th Cir. 1992).

129 137 CONG. REC. S15,325 (1977) (statement of Sen. Danforth); *cf.* William T. Mayton, *Law Among the Pleonasms: The Futility and Aconstitutionality of Legislative History in Statutory Interpretation*, 41 EMORY L.J. 113 (1992)..

130 Jonathan Groner, *New Rights Act Ducks Crucial Issue*, 14 LEGAL TIMES 1, 18 (Dec. 9, 1991).

decide the issue.[131] When legislators intentionally avoid deciding the important questions, the increased transaction costs for the litigants accompany the increased burdens on the courts.

Similarly, if the Court relies on snippets of legislative history, focuses on vague statements made on the empty floor of the House or Senate, and makes law by interpreting what Congress did *not* enact rather than what Congress did enact, then the Court is aiding and abetting an undermining of the legislative process. It is easy for lobbyists, legislative staff, or solitary legislators to manufacture such "legislative history." These people read the same books and cases on statutory interpretation that the judiciary does. When the Court accepts manufactured legislative history, it aides those who thwart open procedures for enacting legislation.

The problems of interpretation that Congress created when it found itself unable to address certain important issues in the Civil Rights Act of 1991 should not obscure the important contributions of that law. I will not focus on them, for other commentators at this Symposium will highlight some of these provisions, and I should not invade their turf.

I close with one of the lovely stories that the late Justice Thurgood Marshall liked to tell. Like many of his stories, it had an important point. There once was an unfortunate gambler, who lost all of his money in Las Vegas. His luck was down, and when he went to the rest room, he discovered that there were all pay toilets, and he did not have even a quarter to his name. A stranger gave him a quarter and then left. As the unhappy gambler started to pick a stall, an occupant exited one, and left the door open. So the gambler saved his quarter. He felt that his luck was changing, so before he left Las Vegas, he put that last quarter into a slot machine, and hoped for a lucky break. It came; he won thousands and thousands of dollars, invested the money wisely, and eventually became a very wealthy man. Years later, he hired a private detective to find the man who gave him his first break, so he could reward and thank him. "You want me to find the fellow who, years ago, gave you the quarter?" asked the detective. "No," said the old man. "I don't want to thank the man who gave me charity; I want to thank the one who opened the doors."

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131 *Id.*

We have a long way to go before we will finally eliminate all the barriers to discrimination in employment. But there is some reason to hope. We should not overlook the fact that we are slowly making some progress, as our society seeks equality of opportunity. The long series of civil rights statutes in the last century and a quarter are about one thing: as Justice Marshall would say, they are not about charity; they are about opening doors.