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Affirmative Action After the Civil Rights Act of 1991: The Effects of a "Neutral" Statute

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Affirmative action in employment has always been at the center of civil rights debates. When Title VII of the Civil Rights Act of 1964 was proposed, there was relatively minimal overt challenge to the premise that discrimination on the basis of race should be rendered unlawful. But legislators expended a great deal of time and energy debating whether affirmative action in employment would be required or allowed. Likewise, during the debates over civil rights policies in the 1970s and 1980s, few overtly questioned the legitimacy of the core prohibitions in our nation's employment discrimination laws. However, whether the subject was the statistically based enforcement efforts of the Carter Administration, or the Reagan Administration's later challenges to numerically based consent decrees, the debate about the legality of affirmative action in employment was overt and heated.

Oddly, notwithstanding the substantial controversy that surrounded the enactment of the Civil Rights Act of 1991[1] ("the Act"), the debate about its passage is almost deafeningly silent on the subject of affirmative action in employment. Opponents characterized earlier versions of the Act as "quota" bills. While they criticized proposals that might force employers to treat employees preferentially on the basis of race or gender, they did not purport to be seeking to outlaw or directly affect affirmative action in employment. Proponents of the Act denied that it was a "quota" bill. They argued that it did not require employers to treat employees preferentially on the basis of race or gender. Proponents clearly said that they did not purport to be affirmatively legislating in favor of, or otherwise directly promoting, affirmative action in employment. Thus, section 116 of the Act proclaims that

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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)).

"[n]othing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law."[2] And to the extent that the legislative history of the Act speaks to the subject of affirmative action, it largely purports to confirm that the Act begs the question of affirmative action in employment.[3]

In reality, however, the Act is anything but neutral on the subject of affirmative action in employment—that is, race or gender-conscious employment practices. Congress, for the most part, did not directly address the legal standards that courts should use in adjudicating whether particular affirmative action efforts are lawful. Even so, the Act is replete with provisions that bear on the ability and willingness of employers to engage in affirmative action for minorities and women, as well as on the costs and risks of their doing so. For example, several provisions of the Act arm opponents of affirmative action in employment with substantial new weapons for challenging such efforts.[4] In this way, the Act makes it more difficult and expensive for employers to engage in affirmative action. At the same time, several provisions of the Act make it riskier and more expensive for employers to take actions that are adverse to women and minorities.[5] Thus, the Act creates substantial new incentives for employers to institute and expand either formal or informal affirmative action efforts. While the cumulative effect of these provisions is uncertain, it is clear that the Act does indeed affect the subject of affirmative action in employment.

That the Act is not neutral to the subject of affirmative action cannot be seriously challenged. Why the Act's effects differ from

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2 42 U.S.C. § 1981 (Supp. III 1992).

3 *See, e.g.*, 137 CONG. REC. H9548 (daily ed. Nov. 7, 1991) (Rep. Hyde interpretive memorandum) ("This legislation does not purport to resolve the question of the legality under Title VII of affirmative action programs"); *id.* at H9530 (Rep. Edwards interpretive memorandum) ("[T]he legislation is not intended to change in any way what constitutes lawful affirmative action . . . ."); 137 CONG. REC. S15,477-78 (daily ed. Oct. 30, 1991) (Sen. Dole interpretive memorandum) ("This legislation does not purport to resolve the question of the legality under Title VII of affirmative action programs"); 137 CONG. REC. S15,320 (daily ed. Oct. 29, 1991) (statement of Sen. Hatch) ("This section expresses neither congressional approval nor disapproval of any judicial decision affecting court-ordered remedies . . . ."); 137 CONG. REC. S15,235 (daily ed. Oct. 25, 1991) (statement of Sen. Kennedy) ("[T]he bill is intended not to change the law regarding what constitutes lawful affirmative action and what constitutes impermissible reverse discrimination.").

4 *See infra* Part II.

5 *See infra* Part III.

its pretensions is a more debatable proposition. It could be that Congress just did not understand what it was doing. Alternatively, it could be that Congress was just being hypertechnical about what the statute addressed on its face as opposed to in its effects. Or, it could be that Congress was just unwilling to admit what it was doing with respect to affirmative action. I do not believe, however, that Congress was so uninformed, or so technical, or so disingenuous in this instance. Rather, I shall argue in this Article that Congress viewed the concept of "affirmative action" narrowly, merely embracing a certain kind of formal, institutionalized consideration of race or gender in applicant and employee selection. Congress genuinely did not see itself as legislating with respect to "affirmative action" as so defined.

Specifically, I shall argue that, in the Act, Congress viewed the concept of "affirmative action" as embracing only formal, institutionalized programs for the race or gender-conscious selection and advancement of women and minorities. Congress did not view other instances in which minorities or women receive preferential treatment as constituting "affirmative action." It viewed special efforts to recruit or train women and minorities and special scrutiny of practices that adversely affect women or minorities as mere "anti-discrimination" efforts which ensure that employee selection is based on "merit." Further, Congress viewed numerically based rules and standards for employee selection as impermissible "quotas." Only flexible, institutionalized programs which aim to assist minorities and women to obtain the skills and abilities necessary to qualify under traditional merit-based approaches to employee selection were considered by Congress to constitute "affirmative action" in employment. This Act did not purport to be setting the legal standards by which such programs would be judged, nor did it purport to require the establishment of such programs. In this way, the proponents and opponents of the Act were able to join together in representing that it did not affect affirmative action in employment.

In Part I of the Article, I briefly outline the law of affirmative action as applicable to race or gender-conscious employment action, as it existed prior to the passage of the Act. In Part II, I discuss the new weapons that the Act creates for opponents of race or gender-conscious employment action to use in challenging such efforts. In Part III, I discuss the substantial new incentives that the Act creates for employers to institute and expand upon race or gender-conscious employment efforts. And, in Part IV of

the Article, I offer my argument that, in addressing the subject of affirmative action, the Act relies on an extremely narrow definition of the concept and, as importantly, I offer an explanation as to why the statute does so.

I. THE LAW OF AFFIRMATIVE ACTION PRIOR TO THE CIVIL RIGHTS ACT OF 1991

The impact of the Act on race or gender-conscious employment action can be understood only in the context of the laws that governed affirmative action prior to the Act's passage. There were four principal laws: (1) Title VII of the Civil Rights Act of 1964;[6] (2) the equal protection components of the Constitution;[7] (3) section 1981, enacted as part of the Civil Rights Act of 1866;[8] and (4) Executive Order 11,246.[9]

A. Title VII Law

Title VII is the law under which much of the pre-Act debate about affirmative action and preferential treatment efforts has taken place. Applicable to almost all public and private employers, section 703(a) of Title VII literally forbids any discrimination in employment on the basis of race, color, religion, sex, or national origin.[10] Moreover, section 703(j) of the statute expressly states that "[n]othing contained in this title shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual."[11] While these provi-

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6 Pub. L. No. 88-352, 78 Stat. 255 (1964) (codified at 42 U.S.C. § 2000e); *see infra* Part I-A.

7 *See infra* Part I-B.

8 42 U.S.C. § 1981 (1988); *see infra* Part I-C.

9 Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), *reprinted as amended in* 42 U.S.C. § 2000e (1988); *see infra* Part I-D.

10 Section 703(a) of Title VII provides that:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . . ; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1988).

11 Section 703(j) provides that:

sions would seem to preclude any race or gender-conscious preferential treatment efforts by employers, the Supreme Court has nonetheless held, in two highly controversial decisions, that Title VII permits, but does not require, employers to engage in certain forms of affirmative action in employment.

In *Steelworkers v. Weber*,[12] the Court considered

> the legality of an affirmative action plan—collectively bargained by an employer and a union—that reserves for black employees 50% of the openings in an in-plant craft-training program until the percentage of black craftworkers in the plant is commensurate with the percentage of blacks in the local labor force.[13]

The Court held that "Title VII does not prohibit such race-conscious affirmative action plans."[14]

In reaching this conclusion, the Court relied on the rule "'that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.'"[15] On this premise, the Court stated that "[t]he prohibition against racial discrimination in §§ 703(a) and (d) of Title VII must . . . be read against the background of the legislative history of Title VII and the historical context from which the Act arose."[16] In doing so, the Court found that "Congress' primary concern in enacting the prohibition against racial discrimination in Title VII was . . . with 'the plight of the Negro in our economy.'"[17]

In particular, the Court found that "it was clear to Congress that '[t]he crux of the problem [was] to open employment oppor-

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> Nothing contained in this title shall be interpreted to require any employer . . . subject to this title to grant preferential treatment to any individual . . . because of the race, color, religion, sex, or national origin of such individual . . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2(j) (1988).

12 443 U.S. 193 (1979).

13 *Id.* at 197.

14 *Id.*

15 *Id.* at 201 (quoting Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892)).

16 *Id.*

17 *Id.* at 202 (quoting 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey)).

tunities for Negroes in occupations which have been traditionally closed to them,' and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed."[18] The Court then concluded that Title VII "cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts."[19] The Court went on to say that

> [i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[20]

The Court purported to find further support for this conclusion in the language and legislative history of section 703(j) of Title VII.[21] Noting that this section merely states that employers shall not be "required" to grant preferential treatment on the basis of race or gender, the Court found that "[t]he natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action."[22] It found this inference confirmed by legislative history which indicated that Title VII "could not have been enacted into law without substantial support from legislators . . . who traditionally resisted federal regulation of private business."[23] The Court concluded that this legislative history "fortifies the conclusion that Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action."[24]

In so ruling, the Court expressly declined to "define in detail the line of demarcation between permissible and impermissible affirmative action plans."[25] Instead, the Court merely held that the affirmative action program at issue in the case fell within the "area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicu-

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18 *Id.* at 203 (citation omitted).
19 *Id.* at 204.
20 *Id.*
21 *Id.* at 204-07.
22 *Id.* at 206.
23 *Id.*
24 *Id.* at 207.
25 *Id.* at 208.

ous racial imbalance in traditionally segregated job categories."[26] The Court found that, like the statute, the affirmative action plan in issue was "designed to break down old patterns of racial segregation and hierarchy," did not "unnecessarily trammel the interests of the white employees," did not "create an absolute bar to the advancement of white employees," and was a temporary measure intended to "eliminate a manifest racial imbalance," not to maintain a racial balance.[27]

The Court expanded upon *Weber* in *Johnson v. Transportation Agency*.[28] *Johnson* involved a lawsuit brought under Title VII by a male employee who was passed over in favor of a female employee for a promotion pursuant to gender-based preferences in the employer's affirmative action plan.

In evaluating that claim, the Court determined that the burden of proving the invalidity of the gender-based preference rested with the complaining male employee.[29] The Court noted that, under the traditional allocation of burdens of proof in Title VII cases, "[o]nce a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision."[30] The Court said that an employer's use of an affirmative action plan would be a proper, nondiscriminatory rationale. Accordingly, it concluded that, "[i]f such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid."[31]

Turning then to the question of whether the gender-based preference at issue was itself lawful, the Court first looked at whether considering the applicant's gender was "justified by the existence of a 'manifest imbalance' that reflected underrepresentation of women in 'traditionally segregated job categories.'"[32] The Court specified that a "manifest imbalance," adequate to support taking into account the applicant's gender, did not have to rise to the level of a *prima facie* case against the employer. The Court reasoned that to require such evidence could

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26 *Id.* at 209.
27 *Id.* at 208-09.
28 480 U.S. 616 (1987).
29 *Id.* at 626.
30 *Id.*
31 *Id.*
32 *Id.* at 631.

create a significant disincentive for employers to engage in affirmative action, since it would essentially require employers to compile evidence that could be used against them in Title VII suits. The Court determined that the affirmative action plan at issue, which set annual goals by reference to the percentage of women available in the qualified labor market, was justified by such a "manifest imbalance."[33]

The Court then considered whether the plan "unnecessarily trammeled the rights of male employees or created an absolute bar to their advancement."[34] In doing so, the Court noted that the plan did not set aside specific numbers of positions for women or automatically exclude any person from consideration. In addition, the Court stated that all the applicants for the position at issue had been minimally qualified and that promoting the female applicant did not unsettle any "legitimate, firmly rooted expectation" on the part of the competing male applicants.[35] Finally, the Court found that the plan was intended to achieve the permissible purpose of "attaining" a balanced workforce, rather than "maintaining" a permanent racial and sexual balance.[36] Accordingly, the Court found the affirmative action plan at issue to be lawful as "a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the . . . work force."[37]

Three Justices dissented, however. Echoing the dissent in *Weber*, the dissenting Justices argued that the Court in *Johnson* had departed from the plain meaning and purpose of Title VII. They further concluded that *Weber* should be overruled and that private, race-conscious affirmative action, not designed to remedy an employer's own past discriminatory practices, should be held unlawful under Title VII.[38]

B. The Constitution

Of course, the views of the dissenting Justices in *Johnson* did not prevail, and it is now clear that the pre-Act law of Title VII allowed substantial forms of voluntary race and gender-conscious

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33 *Id.* at 635-36.
34 *Id.* at 637.
35 *Id.*
36 *Id.* at 639-40.
37 *Id.*
38 *See id.* at 657 (White, J., dissenting); *id.* at 657-77 (Scalia, J., dissenting).

employment actions. Where public employers were concerned, however, Title VII was not the only law that governed the propriety and legality of such preferential treatment efforts. Public employers also had to comply with the commands of the Constitution. As the Court in *Johnson* recognized,[39] the law of affirmative action developed somewhat differently under the Constitution than under Title VII.

The Court first considered the constitutionality of an affirmative action program in *Regents of University of California v. Bakke*.[40] In that case, the University of California at Davis had reserved sixteen of the one hundred places in each year's entering class for minority applicants in its admissions program. A fragmented Court held that the program was unconstitutional.[41]

Justice Powell authored the critical opinion in *Bakke*. He found that "strict scrutiny" of the university's objectives was necessary.[42] He further found that the university's desire to increase the number of minority doctors was "facially invalid" because "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."[43] Moreover, while Justice Powell agreed that affirmative action might be justified as a remedy for previously identified constitutional or statutory violations, he did not accept that affirmative action could be justified by mere references to prior "societal discrimination."[44] And while he accepted that countervailing First Amendment concerns might justify a university's desire for a diverse student body, he found that a rigid, inflexible admissions policy like the one at issue in *Bakke* was not "narrowly tailored" to the goal of attaining "genuine diversity."[45] Rather, in his judgment, only a program in which "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet . . . does not insulate the

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39 *Id.* at 620 n.2; *see also id.* at 650-52 (O'Connor, J., concurring in the judgment).

40 438 U.S. 265 (1978). The issue had reached the Court earlier on a similar claim involving a law school's minority admissions program in DeFunis v. Odegard, 416 U.S. 312 (1974). However, because the plaintiff had been admitted to law school pursuant to a court order and had registered for his final quarter during the pendency of his appeal, the Court declared the case moot and did not reach the merits of the affirmative action issue. *Id.* at 319-20.

41 *Bakke*, 438 U.S. at 320 (Powell, J.); *id.* at 421 (Stevens, J., concurring in the judgment in part, dissenting in the judgment in part).

42 *Id.* at 320.

43 *Id.*

44 *Id.*

45 *Id.* at 315.

individual from comparison with all other candidates," would avoid the "fatal flaw . . . of [disregarding] individual rights as guaranteed by the Fourteenth Amendment."[46]

In *Wygant v. Jackson Board of Education*,[47] a four-member plurality of the Court applied Justice Powell's approach in *Bakke* to assess the constitutionality of a racially preferential layoff policy.[48] Like Justice Powell in *Bakke*, the plurality concluded that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."[49] Rather, the plurality concluded that there must be "convincing evidence that remedial action is warranted" by past discrimination of the state actor.[50] The plurality concluded that a preferential layoff protection system is not "narrowly tailored" to remedying such past discrimination since it "impose[s] the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives."[51] The plurality believed that less intrusive alternatives such as hiring goals or preferences, which "diffuse" the burden of affirmative action, should be used.[52]

In *City of Richmond v. J.A. Croson Co.*,[53] a majority of the Court endorsed the *Wygant* plurality's application of "strict scrutiny" analysis to race-conscious affirmative action by state actors. At issue in *Croson* was a minority business set-aside program that required prime contractors in city construction contracts to subcontract at least thirty percent of the dollar amount of the contracts

46 *Id.* at 317, 320.

47 476 U.S. 267 (1986).

48 *Id.* at 270-72. The plurality's opinion, written by Justice Powell, was joined by Chief Justice Burger and Justice Rehnquist. Justice O'Connor also joined the plurality's opinion with the exception of Part IV, which addressed the standard of review to be applied to a state's choice of means to accomplish a race-conscious purpose. The fifth vote came from Justice White in a separate opinion concurring in the judgment. *See id.* at 294-95 (stating that the school board's layoff policy has the same effect as discharging white employees and hiring blacks until the latter make up a suitable proportion of the workforce and "is equally violative of the Equal Protection Clause.") (White, J., concurring).

49 *Id.* at 276.

50 *Id.* at 277; *see also id.* at 286 ("The Court is in agreement that whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program . . . as long as the public actor has a firm basis for believing that remedial action is required.") (O'Connor, J., concurring).

51 *Id.* at 283.

52 *Id.* at 282-83.

53 488 U.S. 469 (1989).

to businesses that were at least fifty-one percent owned and controlled by minority group members.[54]

The Court in *Croson* found that, while statistics showed an apparent imbalance between the percentage of minorities in the general population and the percentage of minorities receiving prime construction contracts, there was "nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry."[55] Accordingly, the Court concluded that the city had failed to establish a "'strong basis in evidence for its conclusion that remedial action was necessary.'"[56]

The Court also faulted the city for not attempting to use non-racial means before resorting to an affirmative action program. The Court criticized the city for using rigid numerical quotas in the design of its program and for including minorities who had not suffered from the effects of past discrimination.[57] It thus found that the plan was not "narrowly tailored" to achieve a legitimate remedial objective.[58]

In short, the Court has interpreted the Constitution to impose substantially greater limits on voluntary race-based affirmative action efforts than Title VII has been read to impose. At least where state or local governments are involved,[59] a "manifest imbalance" is not a sufficient basis for race-based affirmative action efforts; instead, the Court requires evidence sufficient to establish a *prima*

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54 *Id.* at 477-78.

55 *Id.* at 500 (emphasis in original).

56 *Id.* at 500-02 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986)).

57 *Id.* at 507-08.

58 *Id.* at 508.

59 Thus far, the Court has subjected congressionally mandated affirmative action programs to an intermediate level of scrutiny. In Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), the Court upheld (5-4) certain minority preference policies of the FCC on the ground that they "'serve[d] important governmental objectives and [were] substantially related to achievement of those objectives.'" *Id.* at 564 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment)). The Court held that Congress and the FCC's "interest in enhancing broadcasting diversity" was an important governmental objective. *Metro Broadcasting*, 497 U.S. at 567. The Court then gave "great weight" to Congress' and the FCC's "joint determination" that the FCC's "minority ownership programs are critical means of promoting broadcast diversity." *Id.* at 579. Next, the Court held that Congress and the FCC's "goal" of achieving greater programming diversity was "'appropriately limited in extent and duration, and subject to reassessment and reevaluation by Congress prior to any extension or re-enactment.'" *Id.* at 594 (quoting *Fullilove*, 448 U.S. at 489 (opinion of Burger, J.)). Finally, the Court concluded that, because the FCC's programs did not upset settled expectations, and were neither quotas nor fixed set-asides, they did "not impose *undue* burdens on nonminorities." *Metro Broadcasting*, 497 U.S. at 597.

facie case of prior constitutional or statutory violations.[60] And merely being a "moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the . . . work force" apparently does not suffice. Preferential treatment may be accorded only after nonrace-based means have been considered. Even then, the plan must have some provision for attempting to limit its benefits to those minorities who have in some way suffered from the prior discrimination that is supposedly being remedied.[61]

C. Section 1981

These differences between the limitations imposed on race and gender-conscious affirmative action by Title VII and the Constitution do not necessarily mean that, before the passage of the Act, private employers had greater leeway in the affirmative action area than did public employers. While no other law limited the ability of private employers to discriminate in employment on the basis of gender,[62] section 1981 provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."[63] The Supreme Court has held that section 1981 applies to private as well as to public employers and, furthermore, that it prohibits racial discrimination in employment against whites as well as against blacks.[64] While the Court has reserved the question of how section 1981 applies in the context of preferential treatment programs,[65] all of the lower federal courts have held it applicable in one form or another.

Some courts have simply applied Title VII standards in the context of section 1981 challenges to race-conscious affirmative action plans.[66] In doing so, these courts found that "[u]nderlying

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60 *Croson*, 488 U.S. at 509.

61 *Id.* at 509-11.

62 The Supreme Court has not addressed the question of whether the constitutional analysis employed in *Croson* applies in the context of affirmative action plans that discriminate on the basis of gender. However, the Court of Appeals for the District of Columbia has seemingly applied a similarly stringent analysis in the gender context. *See* Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992).

63 42 U.S.C. § 1981 (1988).

64 McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976); *see also* Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975).

65 *McDonald*, 427 U.S. at 280 n.8.

66 *See, e.g.*, Edmonson v. U.S. Steel Corp., 659 F.2d 582, 584 (5th Cir. 1981); Setser v. Novack Inv. Co., 657 F.2d 962, 966-68 (8th Cir.) (en banc), *cert. denied*, 454 U.S. 1064 (1981); *cf.* Mozee v. American Commercial Marine Serv. Co., 940 F.2d 1036, 1051 (7th

the Civil Rights legislation of the 1860s and 1960s is the judgment that a just and harmonious society requires the eradication of racial discrimination."[67] They further found that "[d]ivergent standards under the two statutes would render employers unable to remedy some past discriminatory practices" and that, "by equating the affirmative action standards of Title VII with those of section 1981, we obviate the employer's risk of inconsistent obligations."[68] These courts concluded that "[t]o open the door for such plans under Title VII and close it under section 1981 would make little sense."[69]

Other courts, however, have imported constitutional standards into the analysis of whether race-conscious affirmative action plans violate section 1981.[70] The Supreme Court in *Bakke* looked to constitutional standards in determining whether Title VI of the Civil Rights Act of 1964 bars race-conscious affirmative action.[71] And the Court has elsewhere stated that section 1981 is best interpreted by reference to contemporaneous enactments such as the Fourteenth Amendment.[72] For these reasons, some courts have

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Cir.) ("The standards for proving Section 1981 liability closely parallel those for Title VII . . ."), *cert. denied*, 111 S. Ct. 713 (1991); Dougherty v. Barry, 869 F.2d 605, 614 n.8 (D.C. Cir. 1989) ("[A]lthough cases establishing this allocation of burdens generally involve Title VII, we see no reason . . . to treat Section 1981 different in this regard."); Berger v. Iron Workers Reinforced Rodmen Local 201, 843 F.2d 1395, 1412 n.7 (D.C. Cir. 1988) ("The standards and order of proof in Section 1981 cases have been held to be identical to those governing Title VII disparate treatment cases."), *clarified on reh'g*, 852 F.2d 619 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1105 (1989); Lowe v. City of Monrovia, 775 F.2d 998, 1010 (8th Cir. 1985) ("The same standards are used to prove both [§ 1981 and Title VII] claims."), *amended*, 784 F.2d 1407 (9th Cir. 1986); Lewis v. University of Pittsburgh, 725 F.2d 910, 915 n.5 (3d Cir. 1983) ("[§§ 1981 and 1983] claims require the same elements of proof as a Title VII action."), *cert. denied*, 469 U.S. 892 (1984).

67 *Setser*, 657 F.2d at 966.

68 *Id.* at 967.

69 *Id.*

70 *See, e.g.*, Stuart v. Roache, 951 F.2d 446, 455 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1948 (1992); Coral Constr. Co. v. King, 941 F.2d 910, 915-20 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 875 (1992); Michigan Road Builders Ass'n v. Milliken, 834 F.2d 583, 585 n.3 (6th Cir. 1987), *aff'd*, 489 U.S. 1061 (1989); Local Union No. 35 v. City of Hartford, 625 F.2d 416, 425 (2d Cir. 1980), *cert. denied*, 453 U.S. 913 (1981); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 692 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981).

71 *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) (opinion of Powell, J.); *id.* at 325 (Brennan, J., concurring in part and dissenting in part).

72 *See* General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 389 (1982) (looking to Reconstruction-era constitutional amendments in determining that § 1981, like the Fourteenth Amendment, does not allow disparate impact challenges).

concluded that constitutional standards under the Fourteenth Amendment should guide analysis of section 1981 challenges to race-conscious affirmative action efforts.[73]

Finally, we should remember that the four dissenting Justices in *Bakke* found that Title VI of the Civil Rights Act of 1964 bars all forms of race-conscious affirmative action.[74] Some lower federal courts had similarly suggested that section 1981 may provide legal protections beyond those conferred by the Fourteenth Amendment.[75] Thus, while research has not disclosed any cases actually holding that section 1981 bars all forms of race-conscious affirmative action in employment, the pre-Act law certainly provided the basis to argue that position.

D. Executive Order 11,246

While Title VII, the Constitution, and section 1981 create the basis for potential challenges to race and gender-conscious affirmative action efforts, by their terms, they do not require employers to engage in such affirmative action efforts.[76] In contrast, Executive Order 11,246[77] expressly requires covered employers to engage in certain affirmative action efforts.

Issued in 1965 by President Lyndon Johnson, Executive Order 11,246 provides that employers with government contracts or subcontracts "will not discriminate against any employee or applicant for employment," and further that the contractor "will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin."[78] The Executive Order does not explain the "affirmative action" requirement. Rather, the requirement is explained in an extensive set of orders, laws, regulations, and interpretations of the Secretary of Labor and the Office of Federal Contract Compliance Programs ("OFCCP").[79]

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73 *See supra* note 65.

74 *See Bakke*, 438 U.S. at 418 (Stevens, J., concurring in part and dissenting in part).

75 *See, e.g.*, Associated Gen. Contractors v. Coalition for Economic Equity, 950 F.2d 1401, 1412 n. 9 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1670 (1992); Associated Gen. Contractors v. City of San Francisco, 813 F.2d 922, 928 n.11 (9th Cir. 1987).

76 The threat of lawsuits under those laws by minorities and women, however, may pressure employers to do so.

77 Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), *reprinted as amended in* 42 U.S.C. § 2000e (1988).

78 *Id.*

79 *See, e.g.*, 41 C.F.R. § 60 (1992).

Under those orders, regulations, and interpretations, covered employers must create and maintain an "affirmative action compliance plan"—commonly known as an "AAP."[80] Among other things, the AAP must establish numerical hiring and promotion "goals" for employee job groups with respect to which the employer is "underutilized."[81] The AAP must also monitor employment practices for "adverse impact," to ensure that minorities and females are not being selected for hiring and promotion at less favorable rates than nonminorities and males.[82] And, the AAP must provide for the methodical review and analysis of various nonnumerical elements of the employment process, so practices that may exclude or fail to recruit minorities or women are eliminated.[83]

Importantly, the requirement of "goal" setting and monitoring for "adverse impact" does not purport to be a requirement that covered employers use racial or gender quotas in employee selection. Rather, the regulations make it clear that the employer is only required to use "good faith" efforts in seeking to accomplish its "goals," and expressly provide that this requirement "is not intended and should not be used to discriminate against any applicant or employee because of race, color, religion, sex or national origin."[84] However, the regulations plainly require covered employers to be conscious of race and gender in selecting employees. Moreover, the "affirmative action" obligation is broader than the nondiscrimination requirements of Title VII and other federal anti-discrimination laws. This fact may add to the pressures imposed on employers to treat minorities and women preferentially. Indeed, employers have frequently complained that government investigators and enforcement officials have tended to excessively emphasize meeting the numerical goals established under the Executive Order 11,246 program. Furthermore, employers complain that investigators disregard good faith efforts to hire and promote minorities and females.[85]

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80 *Id.* §§ 60-2.10 to 60-2.26.

81 *Id.* § 60-2.12.

82 *Id.* § 60-2.23(b)(3); *id.* §§ 60-3.3, 60-3.4.

83 *Id.* §§ 60-2.20 to 60-2.26.

84 *Id.* § 60-2.30.

85 C. Daniel Karnes, *The Legality of Preferential Treatment after* Weber, *reprinted in* OFCCP AND FEDERAL CONTRACT COMPLIANCE 53 (D. Copus and L. Rosenzweig eds., 1981); Bruce McLanahan, *The Equal Opportunity Obligations of Supply and Service Contractors, reprinted in* OFCCP AND FEDERAL CONTRACT COMPLIANCE, *supra*, at 172-73.

II. NEW CHALLENGES TO AFFIRMATIVE ACTION PROGRAMS CREATED BY THE CIVIL RIGHTS ACT

It is against this background that the supposed "neutrality" of the Act towards affirmative action must be judged. And, against this background, it is plain that the Act creates several new and profound bases for challenging affirmative action efforts of private and public employers.

A. Section 106

The most obvious new challenge to affirmative action efforts arises from section 106 of the Act.[86] That section provides that

> [i]t shall be an unlawful employment practice for [an employer], in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.[87]

This new prohibition will change a good deal of the affirmative action landscape, especially in the public and unionized sectors where testing is more heavily used.

It is well-documented that minorities, especially blacks, do not tend to perform as well as whites on general ability and other aptitude tests, including those used in employment.[88] Employers and testing agencies have frequently employed compensating strategies in order to adjust for this tendency. Sometimes they have employed "differential validation"—the practice of establishing different cut-off or passing scores for blacks and whites.[89] Other times they have employed "race-norming"—the practice of measuring test performance only against members of the same racial group.[90] Section 106 appears to make both practices unlawful.

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86 42 U.S.C. § 2000e-2(*l*) (Supp. III 1992).

87 *Id.*

88 Robert Belton, *The Civil Rights Act of 1991 and the Future of Affirmative Action*, 41 DEPAUL L. REV. 1085, 1107 (1992); *see also* Holly Hacker, *Adjusted Federal Employment Tests Stir Controversy*, L.A. TIMES, June 6, 1991, at A5; Sylvester Monroe, *Does Affirmative Action Help or Hurt?; Black Conservatives Say Their People Become Addicted to Racial Preferences Instead of Hard Work*, TIME, May 27, 1991, at 22; *Test Cases: How "Race Norming" Works*, NEWSWEEK, June 3, 1991, at 16. *See generally* Mark Kelman, *Concepts of Discrimination in 'General Ability' Testing*, 104 HARV. L. REV. 1158 (1991).

89 *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 435-36 (1975).

90 *See* Linda S. Blits & Jan H. Gottfriedson, *Employment Testing and Job Performance*,

An arguable ambiguity in section 106 will determine the overall reach of this new prohibition. The prohibition literally applies only to "employment related" tests. If the prohibition applies to all tests used in the employment context, it will prohibit differential validation and race norming of employment tests in all circumstances. On the other hand, if "employment related" refers to the standard for defending an employment practice that has a disparate impact, then the prohibition against differential validation and race-norming will apply only to employment tests that are "job related for the position in question and consistent with business necessity."[91]

There is support in the legislative history for both interpretations.[92] As a practical matter, however, even the more limited interpretation will largely eliminate differential validation and race-norming as affirmative action practices. It is unlikely that employers will want to differentially validate or race-norm a test and then run the risk that a court will find that the test satisfies the "business necessity" requirement of the statute. Thus, section 106 almost surely eliminates an affirmative action tool that employers in the past have used to fill job openings with individuals from a wider range of racial and ethnic groups than would ordinarily survive most testing systems.

B. Section 107

The second most obvious challenge to affirmative action arises out of section 107 of the Act.[93] This provision states that,

> [e]xcept as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.[94]

PUB. INTEREST, Winter 1990, at 18-20.

91 42 U.S.C. § 2000e-2(k)(1)(A)(i) (Supp. III 1992).

92 *Compare* 137 CONG. REC. S15,484 (daily ed. Oct. 30, 1991) (Sen. Danforth interpretive memorandum) (race-norming prohibition applies to a test that is determined to be employment-related) *with* 137 CONG. REC. S15,476 (daily ed. Oct. 30, 1991) (Sen. Dole interpretive memorandum) (race-norming prohibition applies to all tests).

93 42 U.S.C. § 2000e-2(m) (Supp. III 1992).

94 *Id.*

Section 107 nullifies in part the decision of *Price Waterhouse v. Hopkins*,[95] in which the Supreme Court held that employment decisions based on race, color, religion, sex, or national origin do not violate Title VII if the employer would have made the same decision in the absence of the discriminatory motive.

Read alone, section 107 might be understood to outlaw most, if not all, affirmative action efforts. Race, color, sex, or national origin is almost by definition "a motivating factor," even if not the exclusive factor, in all affirmative action decisions—or at least those involving preferential treatment. Thus, literally read, a statutory violation under section 107 would occur in almost every instance in which an employment decision was based on race or gender-conscious affirmative action. There is even a little support in the legislative history for this view of section 107.[96]

The problem with this view, however, is that section 107 expressly subordinates its prohibition to other provisions of the Act. Furthermore, section 116 of the Act provides that "[n]othing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law."[97] While one can argue that section 107 constitutes part of the "law" with which section 116 instructs that affirmative action must be "in accordance," that argument "is predicated on an internal inconsistency: that Congress sought to protect affirmative action in section 116 while outlawing it in section 107."[98] There is no reason to believe that Congress sought to act in such a contradictory fashion, much less to render section 116 such a dead-letter.

Indeed, the available evidence is to the contrary. As noted, the text of section 107 purports to subordinate itself to other provisions of the Act—including section 116. Moreover, the legislative history of section 116 states that the Act "does not purport to resolve the question of the legality under Title VII of affirmative

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95 490 U.S. 228 (1989).

96 *See* 137 CONG. REC. S15,476 (daily ed. Oct. 30, 1991) (Sen. Dole interpretive memorandum) ("[T]his provision is equally applicable to cases involving challenges to unlawful affirmative action plans, quotas, and other preferences."); 137 CONG. REC. H9547 (daily ed. Nov. 7, 1991) (Rep. Hyde interpretive memorandum) (same). *But see* 137 CONG. REC. H9529 (daily ed. Nov. 7, 1991) (Rep. Edwards interpretive memorandum) ("[T]his Section is not intended to provide an additional method to challenge affirmative action.").

97 42 U.S.C. § 1981 (Supp. III 1992).

98 Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 725 (9th Cir. 1992), *cert. denied*, No. 91-16519, slip op. (1993).

action programs."[99] For these reasons, the EEOC and the only court to address the issue to date have concluded that section 107 does not render preferential affirmative action programs violative of the Act.[100]

That section 107 does not render preferential affirmative action programs violative of the Act is not, however, to suggest that it will have no impact at all on the legality of affirmative action efforts. Section 107 may well provide the basis for the courts to hold that, contrary to *Johnson v. Transportation Agency*,[101] the burden of proving that affirmative action is lawful rests with the proponent of that action, the employer.

As noted above, the *Johnson* Court drew the somewhat oxymoronic conclusion that a race or gender-conscious affirmative action plan is a "nondiscriminatory rationale" for an employment decision. Accordingly, the Court held that mere consideration of race or sex in an employment decision is not a sufficient basis for shifting the burden of proving the validity of affirmative action to the employer. In contrast, in *Price Waterhouse*, the Court held that proof that race or sex was a substantial or motivating factor in an employment decision is sufficient to shift the burden of proving the validity of the decision to the employer. The three dissenters in *Price Waterhouse*, along with one of the concurring Justices, concluded that *Price Waterhouse* displaced the *Johnson* Court's ruling on the burdens of proof applicable in affirmative action cases.[102] While the plurality opinion purported to "disregard . . . the special context of affirmative action," it did not answer the charge of these four Justices either.[103]

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99 137 CONG. REC. S15,477-78 (daily ed. Oct. 30, 1991) (Sen. Dole interpretive memorandum); *see also* 137 CONG. REC. H9548 (daily ed. Nov. 7, 1991) (Rep. Hyde interpretive memorandum) (same); *id.* at H9530 (Rep. Edwards interpretive memorandum) ("[T]he legislation is not intended to change in any way what constitutes lawful affirmative action . . . "); 137 CONG. REC. S15,320 (daily ed. Oct. 29, 1991) ("This section expresses neither Congressional approval nor disapproval of any judicial decision affecting court-ordered remedies . . . ."); 137 CONG. REC. S15,235 (daily ed. Oct. 25, 1991) (statement of Sen. Kennedy) ("[T]he bill is intended not to change the law regarding what constitutes lawful affirmative action and what constitutes impermissible reverse discrimination.").

100 *See* EEOC Policy Guidelines, Daily Lab. Rep. (BNA) No. 131, at E-17; *Officers for Justice*, 979 F.2d at 725.

101 480 U.S. 616 (1987).

102 *Price Waterhouse*, 490 U.S. at 279 (O'Connor, J., concurring in the judgment); *id.* at 293 n.4 (Kennedy, J., dissenting). Interestingly, the other concurring Justice in *Price Waterhouse* was Justice White, who dissented in *Johnson* and voted there to overrule *Weber*.

103 *Id.* at 239 n.3.

The enactment of section 107 fortifies the argument that there is no logical answer to that charge. Section 107 essentially codifies the holding of *Price Waterhouse* that a plaintiff carries his or her burden of proof, sufficient to establish a Title VII violation, by showing that race or sex was "a motivating factor" in an adverse employment decision. In contrast to the *Price Waterhouse* plurality, section 107 does not purport to "disregard . . . the special context of affirmative action." The failure of section 107 to do so suggests that, absent qualification for an affirmative defense under another provision of the statute, such as the "BFOQ" defense, proof of race or sex as "a motivating factor" is indeed sufficient to establish a Title VII violation. While affirmative action may still be such a possible affirmative defense, the burden of proving the validity of the affirmative action would seem now to fall on the employer.

Indeed, section 116 provides that affirmative action that is "in accordance with law" may be "except[ed]" from section 107's conclusion that a Title VII violation is "established" by proof of race or sex being "a motivating factor." But the qualifying nature of the terms of both section 107 and section 116 suggests that affirmative action "in accordance with law" is the affirmative defense that qualifies section 107's prohibition. In short, while section 107 probably does not itself outlaw affirmative action efforts, when combined with section 116, it adds fuel to the burden-of-proof fire kindled by the dissenting and concurring Justices in *Price Waterhouse.*

C. Section 101(b)

Equally likely to fuel affirmative action fires, however, is new section 101(b).[104] That section overrules the Supreme Court's decision in *Patterson v. McLean Credit Union,*[105] which construed section 1981 as applying only to actions that involved the making or the enforcement of an employment contract.[106] Section 101(b) extends section 1981's prohibition on intentional race discrimination to all aspects of the employment relationship.[107]

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104 42 U.S.C. § 1981(b) (Supp. III 1992).

105 491 U.S. 164 (1989).

106 *Id.* at 176 (Section 1981's prohibition "extends only to the formation of a contract, but not to problems that may arise later from conditions of continuing employment.").

107 Section 101(b) provides: "For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of con-

As noted above, prior to the passage of the Act, some courts had held that Title VII affirmative action standards do not apply in section 1981 cases and that, instead, more rigorous standards apply. Indeed, after *Johnson* was decided, some members of the defense bar expected affirmative action litigants to turn to section 1981 as the basis for their claims. This was because the Supreme Court had not ruled on the standards applicable to such section 1981 claims and because the reasons offered in *Johnson* and *Weber* for interpreting Title VII to allow substantial voluntary affirmative action efforts arguably do not apply in the section 1981 context. The *Patterson* decision, however, greatly reduced the number of circumstances in which affirmative action litigants could rely on section 1981 as the basis for their "reverse discrimination" claims.

By overturning *Patterson* and extending section 1981 to all aspects of the employment relationship, the Act reloads the section 1981 gun for affirmative action plaintiffs. It thus reinvigorates a threat to affirmative action that, somewhat ironically, the Supreme Court had largely disabled prior to the passage of the Act.

D. Section 102

Section 1981 was in fact a special threat to affirmative action prior to the 1991 Civil Rights Act. In contrast to Title VII, section 1981 had been interpreted to allow for jury trials and compensatory and punitive damages.[108] Section 102[109] of the Act now authorizes jury trials and at least limited compensatory and punitive

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tracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

108 Johnson v. Railway Express Agency, 421 U.S. 454, 460 (1975).

109 42 U.S.C. § 1981a (Supp. III 1992).

damages in Title VII cases.[110] It thus makes Title VII a threat to affirmative action comparable to section 1981.

It should be obvious why the availability of compensatory and punitive damages creates a serious threat for potential affirmative action efforts. By raising the potential recoveries in Title VII cases, the Act provides additional encouragement for potential victims of affirmative action to initiate suit. Further, by raising the potential cost of challenges to affirmative action efforts, the Act provides

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110 Section 102 provides that:

(a) RIGHT OF RECOVERY.—
(1) CIVIL RIGHTS.—In an action brought by a complaining party under section [42 U.S.C. § 2000e-5] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under [42 U.S.C. § 2000-e2 or 2000e-3], and provided that the complaining party cannot recover under [42 U.S.C. § 1981], the complaining party may recover compensatory and punitive damages as allowed in subsection (b) . . . .
(b) COMPENSATORY AND PUNITIVE DAMAGES.—
(1) DETERMINATION OF PUNITIVE DAMAGES.—A complaining party may recover punitive damages under this section against a respondent . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.
(2) EXCLUSIONS FROM COMPENSATORY DAMAGES.—Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.
(3) LIMITATIONS.—The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—
(A) in the case of a respondent who has more than 14 and fewer than 101 employees . . . , $50,000;
(B) in the case of a respondent who has more than 100 and fewer than 201 employees . . . , $100,000; and
(C) in the case of a respondent who has more than 200 and fewer than 501 employees . . . , $200,000; and
(D) in the case of a respondent who has more than 500 employees . . . , $300,000.
(4) CONSTRUCTION.—Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1977 of the Revised Statutes [42 U.S.C. § 1981].
(c) JURY TRIAL.—If a complaining party seeks compensatory or punitive damages under this section—
(1) any party may demand a trial by jury; and
(2) the court shall not inform the jury of the limitations described in subsection (b)(3).

42 U.S.C. § 1981a.

additional discouragement to employers to engage in affirmative action, or at least affirmative action that is not plainly lawful.

Perhaps less obvious, but equally significant, is the effect that the Act's new jury trial provisions may have on the establishment, maintenance, and administration of race and gender-conscious affirmative action. The Act authorizes a jury trial in any case in which allegations of unlawful, intentional discrimination are involved. Almost by definition, challenged affirmative action efforts involve such allegations. The "victim" of affirmative action almost always alleges that the employer intentionally gave weight to race or gender in the employee-selection process. Affirmative action cases will thus almost always be subject to jury trials, which are exponentially more expensive for employers to defend and subject to risks and uncertainties that many employers deem unacceptable. In short, the jury trial provisions raise the costs and risks of defending challenges to race and gender-conscious affirmative action in employment. From this perspective, the jury provisions should provide additional discouragement to employers to engage in such efforts.

There is growing empirical evidence which suggests that the availability of compensatory and punitive damages and jury trials has a substantial affect on employer hiring patterns and the like.[111] There are at least two reasons to believe that the effect may be especially pronounced in the affirmative action context.

First, in contrast to the typical employment case, employers in affirmative action cases generally do not deny the plaintiff's claim that there was discrimination on the basis of race or gender. On the contrary, in affirmative action cases, employers typically admit that they discriminated on the basis of race or gender, and instead claim that the discrimination was justifiable, that is lawful under the *Weber* or *Croson* standards.

This creates a difficult situation. It is conventional wisdom in the criminal defense bar that it is easier to convince a jury that a client is innocent, than it is to convince a jury that a client killed in self-defense. Similarly, it is conventional wisdom in the employment defense bar that it is easier to convince a jury that discrimination did not occur, than to convince a jury that the discrimination was justifiable. Faced with an employee who as a consequence

111 *See* JAMES N. DERTOUZAS & LYNN A. KAROLY, LABOR-MARKET RESPONSE TO EMPLOYER LIABILITY 38-39 (1992).

of affirmative action is out of a job or a promotion or the like, an employer cannot be very sanguine about the likelihood that a jury will find that there is no "unnecessary trammeling" of the employee, and no "absolute bar" to his advancement. Indeed, sometimes the employer, in order to justify the affirmative action, must show the jury that there is "prima facie" evidence that it discriminated in the past against minorities or women. In those situations, the employer must be especially skeptical that even law-abiding juries will find still further discrimination against innocent applicants or employees to be the necessary and "narrowly tailored" remedy for that prior discrimination.

This last observation leads to the second point that, in the affirmative action context, it is especially possible that juries will not be so law-abiding. In this context, juries may not be willing to apply the law in the manner which the court instructs them. While polling data in this area can be deceiving, there are substantial indications that large sections of the population believe that ability should be the determining factor in employment decisions, and that minorities or women should not receive any preferential treatment in the selection process.[112] Moreover, the data indicates that "white males are growing bitter over perceptions that government-mandated affirmative action programs are leaving them behind."[113] Also, some minorities and women are critical of affirmative action "because they object to being 'labeled' a special, and by inference, an unqualified employee—regardless of talent."[114] Where so many people likely to serve on juries have such strong feelings that are in tension with the law, there is a real risk of jury nullification. Employers thinking about sponsoring and maintaining affirmative action and other preferential treatment efforts must take this risk into account.

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112 *See, e.g.*, Howard Fineman, *The New Politics of Race*, NEWSWEEK, May 6, 1991, at 22; Tom Kenworthy & Thomas Edsall, *Whites See Jobs On Line In Debate; Some Chicagoans Fear Reverse Bias*, WASH. POST, June 4, 1991, at A1; Seymour M. Lipset, *A Delicate Balance; Racial Quotas Are Offending Americans' Sense of Fair Play*, ATLANTA CONST., Aug. 18, 1991, at G1.

113 Bruce D. Butterfield, *Affirmative Action at a Crossroad; More and More Firms Question Programs*, BOSTON GLOBE, Apr. 4, 1992, at 1; *see also* Susan Schulman & Harold McNeill, *Affirmative Action Spawns a White Backlash*, BUFFALO NEWS, Nov. 30, 1992, at 1.

114 Butterfield, *supra* note 111, at 1; *see also* Reginald C. Govan, *Framing Issues and Acquiring Codes: An Overview of the Legislative Sojourn of the Civil Rights Act of 1991*, 41 DEPAUL L. REV. 1079 (1992); Kenworthy & Edsall, *supra* note 97; Sylvester Monroe, *Does Affirmative Action Help or Hurt?; Black Conservatives Say Their People Become Addicted To Racial Preferences Instead of Hard Work*, TIME, May 27, 1991, at 22.

III. NEW INCENTIVES FOR AFFIRMATIVE ACTION ARISING OUT OF THE ACT

That the Act creates these new potential challenges to affirmative action does not mean, however, that it is completely hostile to affirmative action in employment. On the contrary, several provisions of the Act create substantial new incentives for employers to engage in race and gender-conscious affirmative action efforts.

A. Section 105(a)

The most obvious provision creating new incentives for affirmative action in employment is section 105(a) of the Act.[115] This provision establishes the burdens and standards of proof applicable in disparate impact cases. These are cases in which facially neutral practices are alleged to discriminate unlawfully because of their "effect" as opposed to their "intent." Section 105(a) overrules, at least in part, the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*.[116]

In *Wards Cove*, the Court ruled on four distinct issues relating to the disparate impact doctrine. First, the Court held that a *prima facie* case of disparate impact may not properly be based on mere statistical disparities between the racial and gender compositions of the lower and upper levels of an employer's workforce, since in such cases "[t]he only practicable option for many employers would be to adopt racial quotas."[117] Rather, the Court said that the proper comparison is between qualified persons in the labor market and persons holding the jobs in issue.[118] Second, the Court ruled that, "[a]s a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack."[119] "To hold otherwise would result in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.'"[120] Third, the Court held that, "at the justification stage of such a

115 42 U.S.C. § 2000e-2(k) (Supp. III 1992).
116 490 U.S. 642 (1989).
117 *Id.* at 652.
118 *Id.* at 650-55.
119 *Id.* at 657 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992 (1988)).
120 *Id.*

disparate-impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."[121] The Court rejected calls for more rigorous judicial scrutiny on the ground that it would "almost inexorably lead to the use of numerical quotas in the workplace."[122] Finally, the Court held that, although the employer must produce evidence of its business justification for the challenged practice, the burden of persuasion remains with the plaintiff. The plaintiff must show either that the practice does not significantly serve the employer's legitimate goals, or that other practices without the adverse effect would do so just as well.[123]

Section 105(a) of the Act plainly does not disturb the Court's holding that internal workforce comparisons are not themselves generally sufficient to establish a *prima facie* case of disparate impact. Section 105(a) does not mention that holding and, by codifying the disparate impact theory, may be presumed to incorporate the Court's prior holdings about how *prima facie* cases of disparate impacts are properly established.[124] Equally plain is that the Act does overrule the Court's holding that the plaintiff bears the burden of persuasion throughout a disparate impact case. Once a practice is shown to cause a disparate impact, the Act clearly puts the burdens of production and persuasion on the employer "to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[125] Less clear, however, is whether section 105 alters the law with respect to the Court's other two holdings.

With respect to the holding that the plaintiff in a disparate impact case must identify the challenged practice and prove that it causes the alleged disparity, the Act requires the complaining party to "demonstrate that each particular challenged employment

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121 *Id.* at 659.

122 *Id.* at 653.

123 *Id.* at 659-61.

124 *See* Cannon v. University of Chicago, 441 U.S. 677, 699 (1979) ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them."); *see also* Holmes v. Securities Investor Protection Corp., 112 S. Ct. 1311, 1317-18 (1992); Johnson v. Home State Bank, 111 S. Ct. 2150, 2155 (1991) (relying on presumption that Congress intended statutory provisions to incorporate prior judicial precedent shedding light on the meaning of those provisions).

125 42 U.S.C. § 2000e-2(k)(1)(A)(i) (Supp. III 1992).

practice causes a disparate impact."[126] But section 105(a) goes on to state that, "if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice."[127] This additional provision could simply mean that, to the extent that an employer establishes an employment practice with multiple parts (a one hundred question intelligence test, for example), the complaining party need not show which particular part caused the disparate impact.[128] On the other hand, it could mean that the plaintiff need not show which among a group of practices has caused a disparate impact where, for example, the employer has not maintained the information that would allow the plaintiff to separate the effects of the individual practices within the group.[129] The former reading is consistent with *Wards Cove* and derives directly from the brief that the Solicitor General submitted in that case (as well as from concessions that the Administration made during the legislative debate).[130] The latter reading is flatly inconsistent with *Wards Cove* and would potentially allow the exception in section 105(a) to swallow the general rule set forth there.[131]

With respect to the holding that the dispositive inquiry at the justification stage is whether a challenged practice serves the legitimate employment goals of the employer in a significant way, section 105(a) certainly does not formulate the business justification standard in the same terms as did the *Wards Cove* decision. Section 105(a) requires the employer to demonstrate that "the challenged practice is job related for the position in question and consistent with business necessity."[132] Section 3(2) of the Act[133]

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126 *Id.* § 2000e-2(k)(1)(B)(i).

127 *Id.*

128 *See* 137 CONG. REC. S15,474 (daily ed. Oct. 30, 1991) (Sen. Dole interpretive memorandum); 137 CONG. REC. H9545 (daily ed. Nov. 7, 1991) (Rep. Hyde interpretive memorandum).

129 *See* 137 CONG. REC. S15,234 (daily ed. Oct. 25, 1991) (statement of Sen. Kennedy); 137 CONG. REC. H9528 (daily ed. Nov. 7, 1991) (Rep. Edwards interpretive memorandum).

130 *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 22 & n.33, Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (No. 87-1387); 137 CONG. REC. S15,319 (daily ed. Oct. 29, 1991) (statement of Sen. Hatch).

131 *See* 137 CONG. REC. S15,474 (daily ed. Oct. 30, 1991) (Sen. Dole interpretive memorandum); 137 CONG. REC. H9545 (daily ed. Nov. 7, 1991) (Rep. Hyde interpretive memorandum).

132 42 U.S.C. § 2000e-2(k)(1)(A)(i) (Supp. III 1992).

and the Interpretive Memorandum,[134] to which the Act points as its exclusive legislative history on this subject,[135] make it clear that section 105(a) was designed to codify the pre-*Wards Cove* definitions of the concepts of "business necessity" and "job related."[136] But the Court in *Wards Cove* purported only to be restating formulations of these concepts as set forth in its prior cases, and not to be changing their definitions or meaning.[137] Thus, by failing expressly to define the terms of "business necessity" and "job related," the Act leaves open the considerable possibility that the law as announced in *Wards Cove* is still the governing standard, even if *Wards Cove* itself cannot be cited as authority for this point.

There are, of course, arguments against this interpretation of the Act, and counterarguments to those arguments as well. Others have articulated these arguments and counterarguments[138] and it is not necessary to restate their analyses here. Rather, the point that deserves emphasis here is that the dispute is substantial and that the resolution of the controversy that underlies it will necessarily occur only over time and through the crucible of litigation. Indeed, the same is true of the arguments applicable to the proper interpretation of the "particularity" provision of section 105(a). The law in this area is simply no longer settled.

That the Act reopens disparate impact issues supposedly settled by *Wards Cove* reinvigorates many of the pressures that existed prior to *Wards Cove* for employers to use affirmative action efforts

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133 *Id.* § 1981.

134 137 CONG. REC. S15,276 (daily ed. Oct. 25, 1991).

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

136 *See id.* ("The purposes of this Act are . . . (2) to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in Griggs v. Duke Power Co., and in other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio.") (citations omitted); 137 CONG. REC. 15,276 (daily ed. Oct. 25, 1991) ("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.") (citations omitted).

137 *Ward's Cove*, 490 U.S. at 658-61.

138 *See* 137 CONG. REC. S15,474-76 (daily ed. Oct. 30, 1991) (Sen. Dole interpretive memorandum); 137 CONG. REC. S15,233-34 (daily ed. Oct. 25, 1991) (statement of Sen. Kennedy); 137 Cong. Rec. H9545-47 (daily ed. Nov. 7, 1991) (Rep. Hyde interpretive memorandum); 137 CONG. REC. H9528 (daily ed. Nov. 7, 1991) (Rep. Edwards interpretive memorandum); Robert Belton, *The Civil Rights Act of 1991 and the Future of Affirmative Action*, 41 DEPAUL L. REV. 1085, 1104-06 (1992); David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, 8 LAB. LAW. 849, 866-73 (1992); Lino A. Graglia, *Racial Preferences, Quotas, and The Civil Rights Act of 1991*, 41 DEPAUL L. REV. 1117, 1133-39 (1992); C. Ray Gullet, *The Civil Rights Act of 1991: Did It Really Overturn* Wards Cove?, 43 LAB. L.J. 462, 463-65 (1992).

as a means of warding off disparate impact suits. It may be, as some have argued, that the pressure for rigid and immediate quotas is reduced by the Act's apparent acceptance of the *Wards Cove* ruling on the general inappropriateness of using internal workforce comparisons in the *prima facie* case analysis. But, in light of the ambiguities that the Act creates on the "particularity," "business necessity," and "job related" issues, as well as the revised burden of proof rules that it establishes for disparate impact cases, the pressure remains strong on employers to integrate their workforces, to eliminate relevant statistical disparities, and to avoid use of selection practices or processes that adversely effect minorities and women. This is true even if there are substantial business justifications for using these selection practices and processes. Faced with such legal uncertainties and burdens of proof, employers can be expected, wherever reasonably possible, to take all possible action to prevent disparate impact suits and the potentially massive liabilities that such suits can generate. Race and gender-conscious affirmative action is one such preventive method.

It is true that, at least in some circumstances, affirmative action is not itself a defense to a disparate impact suit.[139] But it is more likely to be so where the "particularity" requirement is inapplicable—because, for example, the employer has designed its selection process to constitute a single, inseparable whole. Moreover, even if affirmative action is not technically a defense, it tends as a practical matter to discourage statistically based lawsuits and does so while generally allowing the employer to accomplish its ordinary business objectives—albeit at increased cost. Thus, section 105(a) of the Act will most probably promote race and gender-conscious affirmative action efforts by many employers.

B. Section 108

Another provision of the Act that is likely to encourage race and gender-conscious affirmative action efforts is section 108.[140] That section prohibits certain legal challenges to employment practices that purport to be implementing consent decrees.[141] It

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139 *See, e.g.*, Connecticut v. Teal, 457 U.S. 440 (1982).

140 42 U.S.C. § 2000e-2(n) (Supp. III 1992).

141 Section 108 states:

> (n)(1)(A) 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 that resolves a claim of employment

thus seeks to overrule the Supreme Court's decision in *Martin v. Wilks*.[142] In *Wilks*, the Court held that a person who is not party to an original suit may in a collateral proceeding challenge discriminatory provisions of a consent decree, even though the person had knowledge of the proposed decree's provisions and an opportunity to object to them prior to the decree's entry.[143]

Prior to *Wilks*, it was commonplace for employers seeking to settle class-action suits to agree to consent decrees that contained race and gender-conscious affirmative action provisions. Such decrees eliminated the threat of massive potential monetary liabilities and shifted some of the burden of the settlement to third-persons who were not active participants in the underlying class-action litigation. In fact, the lower courts encouraged such efforts by

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discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).
(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws-
(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had-
(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and
(II) a reasonable opportunity to present objections to such judgment or order; or
(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.
(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 the parties intervened;
(B) apply to the rights of parties to the action in which a 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
(D) authorize or permit the denial to any person of the due process of law required by the Constitution.
(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order . . . .

42 U.S.C. § 2000e-2(n).

142 490 U.S. 755 (1989).

143 *Id.* at 761.

barring so-called "collateral attacks" to these decrees by the third-persons who were adversely affected by them.[144]

By holding that such "collateral attacks" are permissible, *Wilks* endangered the practice of using affirmative action provisions in class-action settlements. While employers could still theoretically protect themselves by joining in the initial litigation all persons whose interests might be adversely affected by the proposed remedial provisions, as a practical matter, some employers prefer to let "sleeping dogs lie" and simply continue to fight the underlying class-action charges. Additionally, employers who still prefer to settle such cases would either have to pay large monetary settlements or accept the risk of potentially significant liabilities to the third-persons affected by them. In either event, *Wilks* deters the use of race and gender-conscious affirmative action provisions in settlements.

Section 108, however, frees employers from some of the substantial obstacles that *Wilks* created to the use of affirmative action provisions in consent decrees settling class actions. It precludes collateral challenges to such consent decrees by persons who have actual notice that their interests and legal rights may be adversely affected by their provisions. It also bars suit by those whose interests were adequately represented in a prior challenge to the orders "on the same legal grounds and with a similar factual situation."[145] Thus, section 108 encourages employers to continue to use race and gender-conscious affirmative action provisions as a means of settling class-action suits.[146]

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144 *See, e.g.*, Striff v. Mason, 849 F.2d 240, 245 (6th Cir. 1988); Marino v. Ortiz, 806 F.2d 1144, 1146-47 (2d Cir. 1986), *aff'd by an equally divided Court*, 484 U.S. 301 (1988); Thaggard v. Jackson, 687 F.2d 66, 68-69 (5th Cir. 1982), *cert. denied*, 464 U.S. 900 (1983); Stotts v. Memphis Fire Dept., 679 F.2d 541, 558 (6th Cir. 1982), *rev'd on other grounds sub nom.* Firefighters v. Stotts, 467 U.S. 561 (1984); Dennison v. Los Angeles Dep't. of Water & Power, 658 F.2d 694, 695 (9th Cir. 1981); Goins v. Bethlehem Steel Corp., 657 F.2d 62, 64 (4th Cir. 1981), *cert. denied*, 455 U.S. 940 (1982); Society Hill Civic Ass'n v. Harris, 632 F.2d 1045, 1052 (3rd Cir. 1980).

145 42 U.S.C. § 2000e-2(n)(1)(B)(ii) (Supp. III 1992).

146 It is, however, important to emphasize that section 108 only removes some of the obstacles created by *Wilks*. Section 108 does not purport to enact the sweeping "no collateral attack" rule that the lower courts applied prior to *Wilks*. Rather, section 108 is filled with qualifications and exceptions that will allow collateral challenges in a variety of circumstances. Moreover, Section 108 expressly specifies that it does not "authorize or permit the denial to any person of the due process of law required by the Constitution." 42 U.S.C. § 2000e-2(n)(2)(D) (Supp. III 1992). Since the decision in *Wilks* was grounded, at least in part, in such due process concerns, it is conceivable that the courts will interpret section 108 in a way that will leave much of *Wilks* in place.

C. *Section 102*

Even more likely to encourage preferential treatment and other such affirmative action efforts, however, is section 102 of the Act.[147] As noted above, that section authorizes jury trials and compensatory and punitive damages in Title VII cases.[148]

Section 102 significantly raises the stakes for employers in ordinary disparate-treatment litigation. By subjecting employers to jury trials in these cases, section 102 requires employers to incur higher costs in preparing for and defending against such claims. Jury trials also subject those claims to a decision-making process that many employers perceive to be less predictable and empathetic than that which existed under pre-Act practice. Moreover, because of the new compensatory and punitive damages provisions, section 102 exposes employers to greater potential liabilities in cases where liability may be found.

Increased race and gender-conscious affirmative action will be one likely response by many employers. While racial and/or gender balance is not a *per se* defense to a disparate-treatment claim, evidence of efforts to achieve such a balance is admissible by the defense.[149] More importantly, race and gender-conscious affirmative action eliminates potential minority or female plaintiffs. While such actions create potential white male plaintiffs, over the past thirty years employers have understandably tended to prefer to deal with the risk of occasional potential plaintiffs of this type than with the potential of more common (and perhaps more sympathetic) minority or female plaintiffs. Indeed, experienced human resources officials and employment lawyers know that, at least in the case of large corporate employers, informal "negative action" of this type—special protection of minority and female applicants and employees against adverse selection decisions—is pervasive. Indeed, this kind of "negative action" has been the most common form of race and gender-conscious affirmative action used by employers during the last twenty years. The Act only heightens the incentives for its use.

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147 42 U.S.C. § 1981a (Supp. III 1992).

148 *See supra* notes 56-89 and accompanying text.

149 *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 580 (1978).

IV. THE RATIONALE OF THE ACT'S APPROACH TO THE AFFIRMATIVE ACTION ISSUE

Contrary to the representations of the Act's sponsors and the warranties in the statute itself, therefore, the Act plainly is not "neutral" on the subject of affirmative action. This much seems impossible to dispute. More debatable is the reason that Congress had for saying one thing and yet doing another in this statute.

One explanation could be that members of Congress simply did not understand that the Act would have such significant effects on race and gender-conscious affirmative action in employment. However, this Act was debated for two full years. It was heavily lobbied by multifarious interests, and Congress had position statements and analyses about every conceivable effect of the Act. Indeed, the provisions discussed in this Article were the principal subjects of the legislative debate. In such circumstances, it seems implausible that members of Congress did not understand the likely effects of their actions.

Another explanation could be that members of Congress were simply being hypertechnical about what the Act says on its face as opposed to what its effects will be. With the exception of section 106's new prohibition concerning the differential validation and race-norming of employment tests, the Act arguably does not purport on its face to change the substantive legal standards applicable to the judicial and administrative review of affirmative action efforts. At least from this perspective, the Act does not affect affirmative action—or at least not the substantive legal standards applicable in adjudicating the lawfulness of particular affirmative action efforts. But early versions of the Act did not technically require employers to use "quotas"—they merely provided the legal basis for strongly pressuring employers to do so. Opponents were nevertheless quick to challenge those proposals on the basis of those effects. It seems unlikely that, at the same time that they were vigorously challenging the practical effects of legislative proposals in this regard, the opponents would have so quietly and compliantly accepted (or ignored) the practical effects of the Act on affirmative action in employment.

Yet another explanation could be that members of Congress were being disingenuous about the effects of the Act. In other words, because affirmative action is a highly controversial subject, members of Congress simply may have wanted to deny that their

actions implicated this subject. At least one commentator has taken this view of the action of Congress.[150] But the proponents and opponents of this controversial and divisive legislation were looking for any advantage that they could obtain in the legislative debate. It seems most unlikely that, in the context of such a rancorous and political situation, every one of the political adversaries would have silently accepted their opponents' disingenuousness about the Act's effects on affirmative action in employment. Indeed, given the finger-pointing that occurred about whether the Act was or was not a "quota" bill, it seems inconceivable that they would do so.

Thus, another explanation is necessary. That explanation must account both for the obvious effects that the Act has on affirmative action in employment, and for the seeming agreement among the legislative protagonists that the Act did not affect affirmative action efforts. The answer, I submit, may lie in the narrow and limited meaning that members of Congress gave to the concept of "affirmative action" in employment.

The concept of "affirmative action" in employment can have many meanings. It may simply refer to special efforts to recruit minority or female candidates. It may also refer to special evaluations of the effects of employment actions on minority and female applicants and employees, holding adverse effects on minorities and females to a higher standard of justification than is required for adverse effects on white male employees. Alternatively, it may refer to the establishment of institutionalized "goals" for the selection of minority and female applicants and employees, and to the use of either "good faith" efforts or outright race and gender-based preferences to accomplish these goals. And, finally, it may refer to the use of binding numerical rules or standards for the preferential selection of minority and female applicants and employees.

In the Act, members of Congress appear to have agreed implicitly that the concept of "affirmative action" refers only to the establishment of institutionalized "goals" for the selection of mi-

150 Graglia, *supra* note 138, at 1137 (arguing that the Act is "largely hypocritical or simply dishonest because it cannot openly state, but must conceal, the actual objective of its sponsors. The liberals' dilemma is and was that although they favor, or at least have no serious objection to, racial preferences and quotas—believing that the time has come to move beyond equality of opportunity to equality of results, and from individual rights to group rights—they are politically unable to state this openly. Indeed, they are compelled to declare their opposition to racial preferences.").

nority and female employees and the use of either "good faith" efforts or outright race and gender-based preferences to achieve those goals. When binding numerical rules for selection were at issue, the members of Congress called them "quotas" and agreed that Title VII should not generally permit them. Thus, section 106 explicitly bars the differential validation and race-norming of employment tests. Moreover, Congress repeatedly revised section 105 of the Act to overcome objections by the Bush Administration that it made the Act a "quota" bill. Likewise, upon considering provisions that would induce employers specially to recruit minorities and females and would require employers to use higher standards in considering actions that might adversely affect these groups, the members of Congress called them "anti-discrimination" provisions. They accepted or opposed them as desirable or undesirable on that basis. Thus, the debate about section 107 focused almost exclusively on whether the burden of proving causation in a discrimination case should be on the plaintiff or the defendant.[151] Likewise, the debate about section 102 focused almost exclusively on whether jury trials are appropriate vehicles for resolving discrimination cases, and whether compensatory and punitive damages are appropriate remedies therein.[152] The race and gender inducing effects of such provisions were ignored, apparently on the view that they do not constitute "affirmative action" and cannot be translated directly into "quota" provisions.

By contrast, when members of Congress used the term "affirmative action," they did so in the context of discussing formal, institutionalized approaches to race and gender-conscious selection of employees.[153] Indeed, in doing so, they expressly referred to

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151 *See, e.g.*, 137 CONG. REC. H4431-32 (daily ed. June 12, 1991) (statement of Rep. Schiff); 137 CONG. REC. H3949 (daily ed. June 5, 1991) (statement of Rep. Collins); *id.* at H3920 (statement of Rep. Fawell); 137 CONG. REC. H3835 (daily ed. June 4, 1991) (statement of Rep. Fish); 137 CONG. REC. S2260 (daily ed. Feb. 22, 1991) (statement of Sen. Simpson).

152 *See, e.g.*, 137 CONG. REC. S15,288 (daily ed. Oct. 28, 1991) (statement of Sen. Metzenbaum); 137 CONG. REC. S15,241-42 (daily ed. Oct. 25, 1991) (statement of Sen. Gorton); 137 CONG. REC. S15,155 (daily ed. Oct. 24, 1991) (statement of Sen. Mikulski); 137 CONG. REC. H3787 (daily ed. June 3, 1991) (statement of Rep. Stokes); 137 CONG. REC. H1666 (daily ed. March 12, 1991) (Rep. Michael interpretive memorandum).

153 *See, e.g.*, 137 CONG. REC. S15,477-78 (daily ed. Oct. 30, 1991) (Sen. Dole interpretive memorandum); 137 CONG. REC. H9548 (daily ed. Nov. 7, 1991) (Rep. Hyde interpretive memorandum); *id.* at H9530 (Rep. Edwards interpretive memorandum); 137 CONG. REC. S15,320 (daily ed. Oct. 29, 1991) (statement of Sen. Hatch); 137 CONG. REC. S15,235 (daily ed. Oct. 25, 1991) (statement of Sen. Kennedy).

the *Weber* and *Johnson* decisions and the type of "affirmative action" efforts that were in issue in those cases.[154]

The question arises, of course, as to why both proponents and opponents of the Act accepted this distinction between "affirmative action," on the one hand, and "quotas" and "anti-discrimination" provisions, on the other. The answer, I submit, may lie in the evolution that has occurred in our civil rights debates over the last thirty years.

When Title VII was first proposed back in the early 1960s, it was primarily justified as a response to the failure of the market. On moral and economic grounds, proponents of the legislation convincingly argued at the time that "merit" should be the determining factor in employment decisions. They argued that businesses that discriminated on the basis of race or gender were irrationally ignoring "merit."

Over the next decade, government prosecutors and representatives of minority and female groups began to challenge the ability of the market to lead even well-intentioned businesses to assess and select entirely on the basis of proper measures of merit. They started challenging even neutral employee selection processes that adversely affected minorities and women, and demanded substantial justifications for such processes.

In the context of this debate, it became increasingly acceptable: (1) to consider special efforts by employers to recruit and train minority and female employees as mere "anti-discrimination" measures; (2) to consider special scrutiny of practices that adversely affect minorities or women as a necessary component of an effective "anti-discrimination" program; and though rarely admitted, (3) to informally provide special consideration and protection for minority and female candidates in the evaluation of "merit" in order to avoid "discrimination." Such informal, reactive measures could not be characterized as "affirmative action" because they did not admit to departing whatsoever from the "merit" selection ideal.

Rather, in the context of this debate, "affirmative action" could be deemed to exist only where an employer affirmatively departed in some way from the "merit"-selection focus. Thus, "affirmative action" occurred when an employer elected to create a

154 *See, e.g.*, 137 CONG. REC. H9530 (daily ed. Nov. 7, 1991) (Rep. Edwards interpretive memorandum); 137 CONG. REC. S15,320 (daily ed. Oct. 29, 1991) (statement of Sen. Hatch).

formal, institutionalized plan for integrating minorities and females into its workforce without regard to the pre-existing distribution of skills and abilities in the available labor force. A plan of this type was not merely an "anti-discrimination" measure, but indeed constituted "affirmative action."

Of course, for political and other reasons, it was still necessary for government prosecutors and representatives of minorities and women to justify even "affirmative action" plans as at least respecting traditional merit selection principles. Thus, even the proponents of "affirmative action" efforts were outrightly unwilling to endorse informal—or, for that matter, formal but inflexible—numerical rules or standards for employee selection. Instead, they generally joined in objections to "quota" decisionmaking and instead advocated "goals," "good faith" efforts, and "plus factor" approaches to achieving these goals. By doing so, they could claim at least to be aspiring to traditional merit selection principles, and also deny that they were excluding "more qualified" white males from equal employment opportunities.

Viewed against this historical account, the treatment of "affirmative action" in the Act becomes comprehensible. With rare exception, the opponents of the Act were unwilling to question the employment discrimination laws themselves, or to challenge the principle of the disparate impact theory. Thus, the opponents could not characterize as "affirmative action" provisions that merely induced special recruiting efforts or increased scrutiny of employment practices that adversely affect minorities and women. In addition, the proponents of the Act, while viewing such reactive practices as essential "anti-discrimination" measures, were unwilling to question the "merit"-selection ideal. Thus, they could not openly defend any provision that directly appeared to involve or induce informal or inflexible numerically based selection efforts—that is "quotas"—and thus would not characterize them as "affirmative action." This left open only the question of how to treat flexible, but institutionalized, approaches to aiding minorities and women in the acquisition of necessary skills and ability—approaches which, while aspiring to traditional merit selection principles, confer preferential advantages. Both sides agreed that these approaches are "affirmative action" and that their legality should be addressed on another occasion, outside of this "civil rights" debate. While perhaps slightly disingenuous about the effects of the Act's provisions, this agreement reflected the narrow,

but consensus view about what type of policies constitute "affirmative action" in employment.

V. CONCLUSION

My objective in this Article has been neither to praise nor to criticize the Act's treatment of affirmative action efforts. Rather, it has been to expose the fallacy in the Act's claim of neutrality toward the subject, to identify how the Act actually affects affirmative action, and to analyze why the Act's pretensions are so different from its effects. By doing so, I hope that it will be easier for us to understand the connections between "anti-discrimination," "affirmative action," and "quota" provisions, and to more sensibly discuss the implications of such measures. Such a discussion is necessary if we are ever to achieve a consensus on "affirmative action" and avoid self-defeating approaches to the economic and social issues that anti-discrimination, affirmative action, and quota measures seek to address.