

Legislated Lawlessness on Civil Rights

"If you like laws and sausages, you should never watch either one being made."
(attributed to Otto Von Bismarck)

In October, 1991, after two years of rancorous debate, Congress passed and the President signed the Civil Rights Act of 1991. All sides took credit for having demonstrated their commitment to civil rights. Moreover, everyone reported with satisfaction that the compromise bill was not a "quota" bill.

Although some civil rights and other national leaders proclaimed a new national consensus on civil rights, the only consensus among scholars, journalists, lawyers, and others who scrutinized the Act was that the new law was ambiguous and confusing. For example, the Act clearly states that hiring practices leading to disproportionate results by race or sex ("disparate impact") are discriminatory unless an employer can demonstrate the "business necessity" of the hiring practice. Yet the law fails to define the term "business necessity," except to refer to a string of previous Supreme Court decisions (before *Wards Cove v. Atonio*¹) in which the meaning of the term remained largely unsettled. Moreover, although the law explicitly claims "to codify the concepts of 'business necessity' and 'job related' [as] enunciated by the Supreme Court" in those decisions, its own language on business necessity departs from them. Whereas under those decisions "job relatedness" is evidence of "business necessity," the new law disjoins the two terms. An employer must show that a challenged practice is "job related for the position in question *and* consistent with business necessity" (emphasis added). Among other ambiguities, the Act also leaves unclear which of its provisions, if any, are retroactive.

The greatest confusion in the new Civil Rights Act, however, concerns not

the definition of critical terms, but the intended effect of the law itself. The law is confusing, even self-contradictory, on the central and most divisive issue in civil rights today, the use of preferential treatment in employment. One section of the Act explicitly prohibits the consideration of race, sex, or religion in hiring or promotion. A practice is unlawful, it says, "when ...race, color, religion, sex, or national origin was a motivating factor for [that]...practice, even though other factors also motivated the practice." But another section of the Act apparently gives its blessing to the consideration of race and sex: "Nothing in...this act shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law." Whether "in accordance with the law" refers to the new law itself or to past Supreme Court decisions upholding particular uses of race and sex in hiring and promotions (or to something else) is left unclear. The difference is crucial, for the new law's ban on race- and gender-conscious practices would prohibit many affirmative action plans and consent decrees, while past Supreme Court decisions might exempt them from the ban.

It is of course true that all new laws, no matter how carefully written and thoughtfully deliberated, are considered more or less obscure and equivocal until their meaning has been rendered and fixed by a series of particular court decisions. Some degree of imprecision, hence uncertainty, is unavoidable in any public law, particularly one as broad in its purpose as the 1991 Civil Rights Act.

Last year's civil rights law, however, is different. Following an unfortunate

recent legislative practice, it is deliberately obscure. Congress and the President, like the Republicans and Democrats in Congress, were deeply divided over the basic principles to be embodied in the bill. Some favored a group rights approach, emphasizing equal results; others a traditional individual rights approach, emphasizing equal opportunity. While the former were often accused of supporting quotas, the latter were just as often accused of ignoring discrimination. Despite these differences, each side felt politically constrained to enact civil rights legislation - but without appearing to have capitulated to the other side. The lawmakers therefore fashioned a bill that embraced all sides, and whose self-contradictions were concealed by intentional obscurity.

The resulting bill - a mixture of ambiguities, inconsistencies, and omissions - was one that each side could plausibly claim reflected its intent. Democrats justifiably claim that the new law makes it easier to sue employers for discrimination (and win) when they don't hire enough women and members of minority groups. Republicans can claim, with equal justification, that certain forms of preferential treatment (for example, race norming and other forms of race conscious scoring and use of tests) are now illegal.

The major source of the law's confusion is that both sides have tacitly agreed to maintain a politically expedient myth about equality in employment. The myth is that it is possible to bar preferential treatment and at the same time eliminate disparate impact. The truth they avoid is that equal opportunity often leads to unequal, not equal, results. Employment data indicate that prohibiting race and sex preferences virtually guarantees disparate impact, while prohibiting disparate impact usually requires using race and sex preferences.

The reason for the conflict between equal opportunity and equal results is that the race and sex composition of the most qualified job applicants typically does not mirror the race and sex composition of the population. For various reasons, blacks, Hispanics, and certain other minorities tend to come to the labor market with weaker job-related skills and abilities than do Asians and whites. Similarly, women often arrive in the job market with somewhat different job-related goals and constraints than do men. Although educators frequently emphasize these disparities when seeking

public funding to eliminate them, proponents of both sides in the civil rights debate have generally ignored them. One side fears losing its claim to equal results; the other side fears being labeled "racist" or "sexist." The burden of the employment myth has fallen chiefly on employers, who must deal with a contrary reality. Now, with the passage of the new civil rights law, their difficulty has greatly increased. Since the Supreme Court's 1971 *Griggs v. Duke Power Co.*² decision, disparate impact in hiring has

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constituted prima facie evidence of employment discrimination, relieving plaintiffs of the necessity of proving an employer's *intent* to discriminate. Employers could rebut this presumption of discrimination only by demonstrating the "business necessity" of the hiring procedure in question, or, more specifically, its "manifest relation to the employment in question."

Such a demonstration, however, has been costly and sometimes impossible. Moreover, the requirements for "a manifest relation to the employment in question" have never been clear or consistent. The Supreme Court, from *Griggs* on, has provided only a general definition of "manifest relation," deferring to federal agencies and employment testing experts for guidance on

specific requirements. Thus, the adjudication of disparate impact cases has usually turned not on law, or even on business practice, but rather on highly technical, arcane, and ever-changing issues in the science of employment testing - a science which, it should be added, is (probably predictably) becoming increasingly politicized as some proponents seek to advance their political agenda in the use of abstruse new technical arguments.

Rather than risk potential litigation (and unfavorable publicity), many employers since *Griggs* have hired by the numbers. Whether openly or secretly, they have "corrected" their color - and gender-blind hiring number by using quotas (euphemistically "targets" or "goals"), different hiring standards for women and minorities, and other forms of preferential treatment, most recently in the name of work force "diversity". Even employers who could defend their selection procedures have often chosen to balance their work forces by race and sex to avoid litigation.

While the new civil rights law increases the pressure on employers to hire by the numbers to avoid disparate impact, it also makes it far more dangerous for them to yield to that pressure. The new law places employers in a double-bind by making it easier for plaintiffs to sue and prevail (and collect large damages) when work forces are unbalanced by race or sex, while preventing employers from using race or sex as "a motivating factor" in hiring or promotion decisions.

First, in disparate *impact* cases, the law's new standard for demonstrating business necessity is more confusing and probably more demanding. It requires employers to "demonstrate that the challenged practice is job related for the position in question *and* [not 'or'] consistent with business necessity." Whereas under *Griggs* employers could show business necessity by showing job-relatedness, under the new law employers (presumably) will have to show business necessity in addition to job-relatedness whatever "business necessity" may now mean. Moreover, compounding the confusion, the law also fails to define the term "position," which it substitutes for the previous term "employment." This change suggests that employers might now have to demonstrate the job relatedness of a challenged practice, not for the class of jobs in question, but for the particular position being filled - a much more stringent and perhaps impossible

standard.

Second, and this is even more important, the law establishes new remedies in Title VII disparate *treatment* cases that increase the likelihood that plaintiffs will sue employers and win. For the first time, the law allows plaintiffs in Title VII disparate treatment cases to seek punitive as well as compensatory damages and to recover fees for experts as well as lawyers. It also introduces jury trials, which traditionally favor employees over employers, to determine both

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liability and damages. Employers should take no comfort from the fact that punitive damages are limited to disparate treatment claims. Already plaintiffs' lawyers have begun to remove the distinction between intentional and unintentional discrimination, by arguing that, given what is known about the "problems" of employment tests, use of tests known to have disparate impact amounts to evidence of intentional discrimination. Although employers are often able to rebut charges of "problems" with their tests, rebuttals are usually highly technical and less likely to convince a jury than a judge.

While increasing the likelihood that employers will be sued, will lose, and will pay more for work place imbalance, the law also prohibits them from using race or sex as "a motivating factor" in any employment practice, even if "other factors also motivated the practice," to avoid such imbalance. Ironically, this prohibition on all forms of race and sex preference was placed in the 1991 civil rights bill by Democrats at the behest of feminists, who sought

to nullify the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*³. In that case an employer declined to promote a woman to firm partnership at least partly because of sex stereotyping. The Court ruled that the employer could defend its failure to promote her only if it showed that it would have made the same decision had it not taken her gender into account. The provision in the law was meant to eliminate that defense. In so doing, however, it outlaws racial preference in favor of women and minorities as well as bias against them. Employers now become just as liable for intentionally favoring women and minorities as for intentionally or unintentionally disfavoring them. Reverse discrimination, previously the easiest solution to disparate impact, has now been made a risky practice.

A law should enable people to know their rights, duties, and obligation. But the new civil rights law leaves precisely these things in doubt. Employers are damned if they do and damned if they don't. Confronted with a law that seems to require just what it prohibits, employers face the unhappy prospect of having to choose which section of the new law to violate or evade.

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(FOOTNOTES)

1. *Wards Cove Packing Co. v. Atonio* 490 U.S. 642 (1989)

2. *Griggs v. Duke Power Co.* 401 U.S. 424 (1971)

3. *Price Waterhouse v. Hopkins* 490 U.S. 228 (1989)

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