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Overview: Civil Rights in the 1990s—Title VII and Employment Discrimination

The End of the Griggs Economy: Doctrinal Adjustment for the New American Workplace

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In the quarter century since its passage, the Civil Rights Act of 1964 has left unmistakable evidence of the power of law to change deeply entrenched patterns of discrimination. In the early years the Supreme Court interpreted the statute expansively, lest Title VII of the Act fail in its difficult mission of ensuring equal employment opportunity for all American workers. Recently, though, the jurisprudential climate that fostered the growth of Title VII has changed. This change culminated in a spate of decisions last summer in which the Supreme Court turned on Title VII and the Civil Rights Act of 1866.[1]

The most devastating blow came in *Wards Cove Packing Co. v. Atonio*, which required plaintiffs to bear the burden of persuasion throughout disparate impact employment discrimination suits.[2] Understandably, civil rights groups have made overturning *Wards Cove* a central goal of recent legislative efforts to amend Title VII. The

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1. Patterson v. McClean Credit Union, 109 S. Ct. 2363 (1989); Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989); Martin v. Wilks, 109 S. Ct. 2180 (1989); Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989); Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989).

2. 109 S. Ct. 2115, 2126-27 (1989).

Civil Rights Act of 1990 imposes proof burdens more favorable to disparate impact plaintiffs.[3] In the likely event Congress restores what the Supreme Court took away last year, civil rights advocates will have scored an impressive victory. I shall argue here, however, that the Civil Rights Act of 1990 will leave an equally important task undone: adjusting Title VII to ensure that it protects workers in America's new service and information-based economy. Although the burdens placed on Title VII by changes in the American economy are less obvious than the results of recent judicial retrenchment, they represent a challenge of equal magnitude.

I.

The primary vehicle of equality for most Americans has not been statutory law, but an expanding economy. The fundamental assumption of discrimination law is that minorities and women will be able to compete fairly in the workplace if the law bars invidious discrimination. Excluded groups would then be in a position like that of other Americans for whom economic forces have tended to erase discrimination. Based on this experience, American lawmakers have assumed that economic opportunity is the most effective weapon against discrimination. In its assault on private discrimination in American society, Congress addressed employment discrimination first.[4]

The landmark Title VII cases arose in heavy manufacturing and other smokestack industries. Employers in these settings traditionally hired white working-class males and did not generally need workers with specific skills or advanced education.

Griggs v. Duke Power Co.,[5] decided in 1971, is the classic case from this old economy, what I shall call the Griggs Economy. In *Griggs*, black workers challenged the use of standardized tests in screening applicants. The holding in *Griggs* stands at the center of modern discrimination law: tests and other quantifiable, "objective" job

3. H.R. 4000 and S. 2104, 101st Cong., 2d Sess. 136. *See* CONG. REC. S 1018 (daily ed., Feb. 7, 1990). Section 4 of the proposed Act would overrule the proof burdens set out by the Court in *Wards Cove*.

4. Title VII was the first major statute to prohibit discrimination by private parties and was considered the centerpiece of the Civil Rights Act on its passage in 1964, Pub. L. No. 88-352, 78 Stat. 241, 253-66 (1964) (codified as amended at 42 U.S.C. § 2000e to 2000e-17 (1982)). Only later did Congress prohibit discrimination in electoral administration (Voting Rights Act, P.L. 89-110, 79 Stat. 437 (Aug. 6, 1965), 42 U.S.C. §§ 1973dd et seq. (1982)) and housing (Fair Housing Act, P.L. 90-284, 82 Stat. 73 (April 11, 1968), 42 U.S.C. §§ 3601 et seq. (1982)).

5. 401 U.S. 424 (1971).

qualifications that disproportionately exclude minorities and women are subject to heightened scrutiny and require special justification.[6] Today, however, Griggs workplaces are giving way to an economy driven by services, information, and high technology. *Watson v. Fort Worth Bank and Trust*,[7] decided in 1987, epitomizes this shift. The Court there applied the *Griggs* disparate impact model to supervisor evaluations and experience requirements of bank tellers, subjective job criteria typical of service industries.[8] But *Watson* offered false hope that statutory interpretation would enable Title VII to work in the new economy as it had in the Griggs Economy. As the Court's decisions last year made painfully clear, *Watson* was the precursor of a judicial retreat that has rendered *Griggs* ineffective even in the old workplace from which it came.

Title VII doctrine, like all legal doctrine, bears the imprint of the world from which it emerged. Congress and the courts fashioned Title VII for the Griggs Economy, the industrial economy of post-war America, which proved critical to the statute's successes in battling employment discrimination. The Griggs Economy demanded the skills of a workforce that had historically been excluded from the workplace—black men qualified to do manufacturing work. As the case law reveals, the black male industrial worker became the paradigm for the disparate impact plaintiff[9]. This was no accident. Black men represented a large group barred by racial prejudice from jobs for which they were manifestly qualified. These jobs, in mining, paper, steel, and heavy manufacturing, were typical of the Griggs Economy and ideal for disparate impact analysis. They required workers with little formal education and few specific skills. Workers could quickly acquire the necessary skills on the job. The jobs were often in unionized industries that offered high wages. Despite centuries of discrimination in employment and education, most Blacks were qualified for these jobs. Naturally, the disproportionate exclusion of Blacks from the workplace supported an inference that employers had discriminated unlawfully. Moreover, employers had difficulty justifying such exclusionary practices as a business necessity for jobs that had few prerequisites.

During the 1970s, however, the Griggs Economy stagnated. Economic growth rates declined dramatically. The U.S. was hit with

6. *Id.* at 429-36.
7. 487 U.S. 977 (1988).
8. *Id.* at 2786-87.
9. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

several recessions. Smokestack industries failed to compete effectively with foreign competition. Numerous plants closed, which left many manufacturing workers permanently unemployed. At the same time, service sector employment burgeoned. Demand increased for highly paid workers in the financial services and electronics industries. Low-wage jobs in the service sector also proliferated. These jobs demanded subjective qualifications that were more likely to exclude minority and women employees. Today, it is clear that the Griggs Economy workplace, where Title VII had done its best work, will not offer the best source of economic opportunity for minorities and women in the future.

II.

Despite these economic changes, Title VII doctrine remains tied to the Griggs Economy. Service and technological jobs were, of course, plentiful during the 1960s and 1970s. However, the Title VII case law of the 1970s developed in the manufacturing sector, where an insufficient representation of a group of qualified workers easily suggested racial discrimination. Even as the Griggs Economy declined, employment discrimination doctrine continued to develop in an industrial setting. One reason was that the extraordinary amount of time necessary to prepare and conduct complicated Title VII litigation. Because of the difficulties of discovery and proof in employment discrimination cases, Title VII suits rival antitrust litigation in their prodigious length. Consequently, the 1970s saw a steady stream of Griggs Economy cases that arose from employment practices of the 1960s.[10] Similarly, there was a corresponding lag in litigation from the expanding service industries. Only in the past few years have cases from the new economy tested the premises embodied in *Griggs*.

It is not surprising then that *Watson*, the first disparate impact case challenging subjective job qualifications, did not reach the Supreme Court until 1987. Suits involving subjective qualifications more often lent themselves to disparate treatment analysis. Service sector employers most likely to use subjective criteria—such as the bank in *Watson*—tend to organize workers in smaller units. The duties of employees in these industries frequently vary from job to job. In

10. For example, plaintiffs in *Albemarle Paper* filed their discrimination suit in 1966, nine years before the Supreme Court decided their case. 422 U.S. at 408.

addition, the number of workers subject to the same hiring and promotion standards is often too small to sustain a class action, the predominant form of disparate impact litigation. Plaintiffs from the service sector naturally preferred familiar disparate treatment analysis to the uncharted territory of disparate impact and subjective job criteria.

Moreover, subjective job qualifications intuitively lead courts and litigants to look for discriminatory intent. For example, if a black car rental agent challenges an unfavorable evaluation of her customer relation skills, the plaintiff is more likely to allege conscious, deliberate discrimination on the part of the employer than if she had been denied a construction job on the basis of a standardized test. Similarly, the defendant in such a case will likely have greater success in casting the dispute as a mere personality clash between worker and boss in which neither race nor sex played any part. Such a case will hinge on discrimination in *particular* employment relationships rather than on the possibility that the subjective performance criteria, although facially neutral, unfairly burden minorities and women generally. Given disparate impact's inadequacy in the new economy, it is not surprising that suits challenging subjective criteria often take an alternative course.

III.

Before the mid-1980s, lawyers and scholars did not appreciate that the disparate impact model would inevitably extend to the subjective employment standards of the service economy. *Watson* made the extension, but in so doing crippled disparate impact theory as applied both to objective and subjective criteria. The plaintiff in *Watson* initially brought her suit under a claim of disparate treatment, not disparate impact. The setting was a bank, the paradigmatic workplace of the new economy. Bank employees require cognitive skills and the ability to work with the public. Subjective criteria may be the only way an employer can assess such qualities.

Clara Watson, a black woman, had been hired as a teller and promoted to "commercial teller." She then failed in four separate attempts to obtain supervisory positions. In each case, the supervisor who denied Watson the promotion and the worker who got the promotion were white.[11] The bank's promotion criteria were typical of

11. Watson, 487 U.S. at 982.

new economy jobs: prior experience as a teller and supervisor, collegiality, and excellent performance ratings. Where supervisors have the best knowledge of their own staff, evaluations made on the basis of these criteria often appear credible. Consequently, the bank succeeded in establishing legitimate and nondiscriminatory reasons for its promotion decisions, thus defeating Watson's disparate treatment claim. Watson then invoked a disparate impact theory. Under the bank's rating procedure, supervisors had full discretion to make subjective evaluations, but were given no guidance about the content of relevant criteria. These open-ended, subjective evaluations and the disproportionately low number of Blacks in supervisory positions together suggested that promotion decisions were discriminatory.

The Court applied disparate impact analysis to Watson's claim, but it exacted a heavy price in return. The plurality lifted the burden of proving a business necessity from defendants, leaving plaintiffs to prove that employment criteria are not job-related. At the same time, the plurality lowered the business necessity standard, making it more difficult for plaintiffs to bear the burden they just assumed.[12] In *Wards Cove Packing Co. v. Atonio*, a five-justice majority ratified the new burden of proof and the more lenient business necessity defense set out in Justice O'Connor's plurality opinion in *Watson*.[13]

The ultimate effect of *Watson* on Title VII should be a lesson to the supporters of effective employment discrimination law. At the time *Watson* was decided, litigants and scholars concentrated almost exclusively on whether *Griggs* would apply to subjective criteria. Supporters of equal opportunity urged that the extension of disparate impact analysis in *Watson* was necessary for the survival of Title VII. Unfortunately, this urgency obscured the fact that lawyers and scholars had not answered the most critical question: not *whether* disparate impact should apply, but *how* will it apply in the new economy? The assumption that the Court could simply superimpose *Griggs* on subjective criteria proved dangerously optimistic.

IV.

Whether disparate impact can make the transition from the Griggs Economy to the new economy ultimately depends on the definition of the business necessity standard. The Court in *Griggs*

12. *Id.* at 998-99.
13. Wards Cove, 109 S. Ct. at 2123-26.

deliberately set a high standard in order to counter the exclusionary "headwinds" of selection criteria unrelated to the relevant job.[14] Under *Griggs*, employers were forced to justify or jettison job qualifications that had a demonstrated disparate impact on minorities and women. This exacting business necessity standard led employers to reform their recruitment and selection methods. Job openings, which had formerly gone to insiders (who tend to come from groups already employed), were now posted openly. New standardized tests, more likely to measure relevant skills, were adopted. Over the past two decades, the business necessity standard has removed many discriminatory obstacles from the workplace.

Now, in the workplace of the new economy, we must devise a new business necessity standard. Jobs in banks and insurance companies, for example, often require skills (like the ability to deal with clients) that can be measured only subjectively. Case law is remarkably free of attempts to articulate how disparate impact might apply.[15] In the absence of readily available alternatives to supervisor evaluations and similar techniques, courts have been reluctant to overrule the employer's judgment.[16] Worse, some courts have indicated that disparate impact theory is inappropriate for subjective qualifications.[17] Techniques for validating subjective qualifications are not yet as sophisticated or convincing as those used to test objective employment criteria. Lawyers must fill this methodological and doctrinal gap.

Sponsors of the Civil Rights Act of 1990 have taken the first steps in revitalizing the business necessity standard, but the standard faces the same difficulty in Congress that it faced in the Court. Many legislators fiercely oppose the stringent "essential to effective job performance" standard contained in the pending Civil Rights Act.[18] These opponents fear that such a high hurdle will force employers who cannot justify their selection criteria to adopt quotas in order to fend off lawsuits.[19] Some proponents of disparate impact

14. Griggs, 401 U.S. at 432.

15. Before *Watson*, a marginal discussion in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), was the only Supreme Court treatment of the issue. The Court there noted the flaw in supervisor evaluations that lacked established criteria for assessing job performance. 422 U.S. at 432-33.

16. *See* Watson, 487 U.S. at 999.

17. *See, e.g.*, Pouncy v. Prudential Ins. Co., 668 F.2d 795 (5th Cir. 1982).

18. H.R. 4000, S. 2104, § 4.

19. In *Wards Cove*, the Court invoked the same fear as a justification for making the business necessity standard more lenient. *See, e.g.*, Wards Cove, 109 S. Ct. at 2122 (observing that a high standard may make quotas the only "practicable option" for employers faced with disparate impact suits).

encourage a high standard for just that reason.[20] Because "quota" is an even dirtier word than "liberal" in contemporary American politics, advocates of the current legislation deny that the proposed business necessity standard will encourage quotas.[21] Compromise on the business necessity standard, however, may prove inevitable.

Unfortunately, the difficulties posed by application of disparate impact analysis to subjective qualifications are serious and complex. They will not succumb to the most obvious legislative solutions alone. We must overcome the complexity of these issues and make disparate impact theory work in the new economy. The rapid growth of the service, information, and high technology industries assures that subjective job criteria will remain prevalent. More than objective criteria, subjective standards present opportunities for racial and sexual stereotyping and other forms of conscious and unconscious discrimination. Unless the appropriate doctrinal tools are developed, the inability of plaintiffs to prove unlawful discrimination in the new economy may turn these opportunities into incentives.

We cannot escape the fact that subjective employment decisions will remain necessary in the new economy. We must, however, respond effectively to economic change by devising new, persuasive techniques for validating subjective criteria. This work is already proceeding. Current debate over the business necessity standard will likely advance it. The Civil Rights Act of 1990, however, cannot do the job alone. Equally essential is a new theoretical foundation for the disparate impact model that will allow Title VII to serve workers in the new economy as it served those in the Griggs Economy.

20. *See* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 1026-27 (1982)(urging the use of quotas on the ground that subjective criteria are impossible to validate effectively). For another view of the relationship between quotas and the business necessity standard, see Blumrosen, *The Group Interest Concept, Employment Discrimination, and Legislative Intent: The Fallacy of Connecticut v. Teal*, 20 HARV. J. LEG. 99, 133-35 (1983)(suggesting a lower business necessity standard where minorities and women are employed in proportion to their numbers in the workforce).

21. *See* Testimony of William T. Coleman, Jr. (Chairman, NAACP Legal Defense Fund) before the Senate Committee on Labor and Human Resources, Feb. 23, 1990.