University of Baltimore Law Review

Volume 20
Issue 2 *Spring 1991*

Article 2

1991

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UNIVERSITY OF BALTIMORE LAW REVIEW

Volume Twenty **Spring 1991** **Number Two**

CAUSATION IN EMPLOYMENT DISCRIMINATION ANALYSIS: A PROPOSED MARRIAGE OF THE *CROSON* AND *WARDS COVE* RATIONALES

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I. INTRODUCTION

With the passage of Title VII of the Civil Rights Act of 1964,[1] Congress sought to eliminate discrimination in employment practices based on race, color, religion, sex, or national origin.[2] While earlier civil rights legislation prohibited discrimination under color of state law,[3] or was limited solely to racial or ethnic discrimination,[4] Title

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1. Pub. L. No. 88-352, §§ 701-16, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-16 (1988)).
2. Section 703(a) of Title VII states:

> It shall be an unlawful employment practice for an employer—
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> (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, because of such individual's color, religion, sex, or national origin; or
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> (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).

In addition, section 703(h) states in pertinent part:

> Notwithstanding any other provisions of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discrimination [sic] because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

Id. § 2000e-2(h).

These provisions apply to discrimination against "nonminorities" such as males and whites. *See infra* note 237. In addition, at least one case has held that the Title VII prohibition against racial discrimination includes claims made by darker-skinned blacks against lighter-skinned blacks. *See* Walker v. Secretary of the Treasury, 472 F. Supp. 670 (N.D. Ga. 1990).

3. 42 U.S.C. § 1983 (1988).
4. 42 U.S.C. §§ 1981-82 (1988).

VII regulates purely private decision-making in a broad array of situations.[5] Many prior employment practices which had previously withstood judicial scrutiny are now exposed to a new series of attacks.

Title VII proscribes intentional discrimination based on enumerated factors.[6] Situations in which ostensibly innocent and race-neutral policies or practices have the effect of disfavoring minorities[7] or other protected groups,[8] however, are not clearly addressed by the language of the statute.[9] This uncertainty was addressed in the seminal case of *Griggs v. Duke Power Co.*,[10] which set the stage for a series of cases that gradually defined the scope of judicial review of employment and promotional practices that appeared to be racially neutral but resulted in discrimination against minorities.

In the wake of *Griggs*, many employers, private and public, instituted programs or policies to reduce adverse impact. Such attempts to comply with the spirit of Title VII and the mandate of *Griggs* spanned the spectrum of solutions from flat quotas to sophisticated "assessment centers." Although the myriad approaches were aimed at increasing minority hiring or promotion, these plans have been subjected to the same scrutiny as the discriminatory practices they sought to remedy.

A recent series of Supreme Court cases has reinforced the rights of nonminorities to challenge "affirmative action"[11] programs and has created a more difficult standard for finding adverse impact. In *Martin v. Wilks*,[12] the Court allowed persons who were not parties to prior litigation to later challenge consent decrees that resulted

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5. Title VII was also extended to cover public employment discrimination by the Equal Employment Opportunity Act of 1972. *See* Pub. L. No. 92-261, § 11, 86 Stat. 111 (codified as amended at 42 U.S.C. § 2000e-16(a) (1988)). Title VII was not intended to incorporate the commands of the fifth and fourteenth amendments to the United States Constitution. United Steelworkers of Am. v. Weber, 443 U.S. 193, 206 n.6 (1979).
6. *See supra* note 2.
7. The term "minority" is often defined to include blacks, Spanish-speaking persons, Orientals, Native Americans, Eskimos, and Aleuts. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 478 (1989).
8. *See* Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987) (ancestry or ethnic characteristics).
9. *See generally* Sharf, *Litigating Personnel Measurement Policy*, 33 J. Voc. Behav. 235 (1988).
10. 401 U.S. 424 (1971).
11. "Affirmative action" is a shorthand reference to plans or programs which are designed to break down old patterns of racial discrimination and open employment opportunities in occupations traditionally closed to minorities. Although discrimination may exist against minorities and nonminorities alike, affirmative action plans are generally limited in their scope to aiding an historically disadvantaged group.
12. 490 U.S. 755 (1989).

from that litigation. In *City of Richmond v. J.A. Croson Co.*,[13] the Court required a specific showing of past discrimination to justify a remedial affirmative action program.

During the same term as *Martin* and *Croson*, the Court decided *Wards Cove Packing Co. v. Atonio*.[14] In *Wards Cove*, a majority of the Court confirmed a plurality decision from the prior term in *Watson v. Fort Worth Bank & Trust*,[15] holding that an employer does not have the burden of proving a business necessity for the employment practice in question. Instead, the employer is required only to come forward with evidence of such a business necessity. Perhaps more important, *Wards Cove* indicated for the first time that a plaintiff challenging an employment practice must show more than a mere statistical disparity in hiring or promotional practices. A plaintiff must now show a causal relationship between the challenged practice and the discriminatory outcome.

What was not addressed by these recent decisions is the interrelationship of the new standards. In particular, when a challenge is made to an affirmative action program under the new *Croson* standard, must an employer who is attempting to show past discrimination which justifies its plan now conform to the more stringent *Wards Cove* causal relationship requirement? Additionally, how do the shifting burden requirements of *Watson* and *Wards Cove*, which appear to place the lion's share of the burden on the party attempting to prove discrimination, apply in the context of cases challenging affirmative action? These are questions which have not been answered by the courts. They are the focus of Section IV E of this Article.

In order to fully understand the ramifications of these recent cases, it is important to review a number of key issues and concerns regarding Title VII law. Section I discusses both adverse treatment and adverse impact claims. A complete understanding of these two approaches is essential to analyzing the *Croson* and *Wards Cove* decisions. Adverse treatment, discussed in Section II A, involves intentional discrimination against a person or group. This is proved by showing particular acts of discrimination, by showing the individual was passed over for hiring or promotion (often referred to as *McDonnell Douglas*[16] analysis) or by showing a pattern or practice of discrimination. Adverse impact analysis, discussed in Section II B, does not rely on a showing of particularized or intentional discrimination. Rather, it allows for a showing of statistical disparity as a substitute for the evidence necessary under adverse treatment

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13. 488 U.S. 469 (1989).
14. 490 U.S. 642 (1989).
15. 487 U.S. 977 (1988).
16. *See infra* notes 23-27 and accompanying text.

analysis. Additionally, prior to the 1988 Supreme Court term, the employer was faced with the burden of persuasion to justify its actions.

The discussion of remedies in Part III provides an important backdrop for the analysis in Part IV, particularly with respect to *Croson*. The court-ordered remedies discussed in Part III A provide an understanding of what courts are (or were) willing to do to correct past discrimination. Consent decrees and voluntary affirmative action programs, discussed in Parts III B and III C respectively, deal with what employers are willing to do without a court mandate, and in some cases without review and approval by a court. All three types of remedial actions are open to more significant attack after the 1988 Supreme Court decisions.

Part IV provides a discussion of *Martin v. Wilks*, *Croson*, *Watson*, and *Wards Cove*. Part IV E presents a novel and untested marriage of *Croson*'s standards for establishing past discrimination and *Wards Cove*'s apparent rejection of adverse impact that could result in a significant change in the way courts deal with the legality and constitutionality of voluntary affirmative action programs.

II. TRADITIONAL ANALYSIS

A. Adverse Treatment

Before and after the Supreme Court's decision in *Griggs*, discriminatory employment actions have been subject to challenge under various theories of adverse treatment.[17] Instead of examining statistical underrepresentation in particular employee or promotional groups, adverse treatment analysis is based upon allegations of particularized, intentional discriminatory practices.[18] Three distinct forms of adverse treatment analysis have emerged: (1) particular discriminatory actions based on improper or illegal motivation; (2) situations in which no reason is specified but in which improper or illegal intent is suspected; and (3) pattern or practice.

Particular discriminatory actions based on improper or illegal motivation is the standard form of adverse treatment. "The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin."[19] In order to establish a prima facie case, the plaintiff may rely on direct evidence such as invidious statements by the employer about a job or promotion.[20]

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17. Adverse treatment may also be referred to as disparate treatment.
18. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656 (1989).
19. Harris v. Marsh, 679 F. Supp. 1204, 1278 (E.D.N.C. 1987).
20. *See id.* at 1279 (citing Holmes v. Bevilacqua, 794 F.2d 142, 147 (4th Cir. 1986); Moore v. City of Charlotte, 754 F.2d 1100, 1105 (4th Cir. 1985), *cert. denied*, 472 U.S. 1021 (1985)).

Direct evidence may also include general racial slurs by the employer which may be indicative of a racially motivated employment decision.[21]

In many situations, however, direct evidence of discriminatory intent is not available, but it is suspected.[22] In *McDonnell Douglas Corp. v. Green*,[23] the Supreme Court devised a framework for analyzing adverse treatment claims where traditional indicia of discriminatory intent do not exist.[24] The plaintiff's initial burden is met by showing the following: (1) that he belongs to a racial minority;[25] (2) that he applied and was qualified for a job for which the employer was seeking applicants;[26] (3) that despite his qualifications, he was rejected; and (4) that after his rejection, the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications.[27] This framework is commonly referred to as the *McDonnell Douglas* analysis.

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21. *See* Miles v. MNC Corp., 750 F.2d 867, 875-76 (11th Cir. 1985).
22. The "careful employer" may attempt to cloak discriminatory employment decisions by being circumspect in his dealings with employees, saying all the right things about employment decisions and providing complete documentation to support all employment decisions. This danger is especially present in smaller organizations where fewer employment decisions will be required, thereby making the use of statistical comparisons less effective. Even in a larger setting, however, the use of complex criteria and extensive categorization may make the detection and proof of discriminatory motives difficult. Additionally, even in a large organization, if the person discriminated against is a member of a particularly small minority group (such as a member of a small religious group or any ethnic group which is a small percentage of the local population), statistical evidence may be meager or nonexistent.
23. 411 U.S. 792 (1973).
24. Although the *McDonnell Douglas* factors are usually used, a plaintiff may still make a prima facie case by presenting circumstantial evidence that gives rise to an inference of discrimination. *See, e.g.*, Warren v. Halstead Indus., Inc., 802 F.2d 746, 753 (4th Cir. 1986) (general pattern of racial discrimination within the employer's workforce); Young v. Lehman, 748 F.2d 194, 197 (4th Cir. 1984) (irregular or suspect employment practices), *cert. denied*, 471 U.S. 1061 (1985).
25. *McDonnell Douglas*, 411 U.S. at 802. The *McDonnell Douglas* analysis has also been applied to allegations of reverse discrimination. *See* Johnson v. Transportation Agency, 480 U.S. 616, 626 (1987); Parker v. Baltimore & O.R.R., 652 F.2d 1012, 1017 (D.C. Cir. 1981).
26. *Id.* The *McDonnell Douglas* analysis has been modified to apply to cases involving discharge. The application requires a showing that the plaintiff was: (1) a member of a protected class; (2) qualified for the position held; (3) discharged; and (4) replaced by a person outside the protected class. *See* Lee v. Russell County Bd. of Educ., 684 F.2d 769, 773 (11th Cir. 1982).
27. *Lee*, 684 F.2d at 773. The fourth requirement guards against claims where the employer simply decides to do away with a job or restructures the business in a way that changes the standards or job requirements. Of course, if such a restructuring is only a pretext for discrimination, it may still be subject to attack.

A third method that a plaintiff can use to make a prima facie case is to demonstrate a pattern or practice of adverse treatment. Rather than focusing on particular acts, pattern or practice cases look at a broader array of employment decisions, often considering the end results of hiring or promotional processes.[28] Pattern or practice cases tend to merge with the analytical framework found in adverse impact cases because both approaches are concerned with comparisons based on some minority status.[29] Unlike adverse impact cases, however, in which statistical disparity establishes a per se Title VII violation, the disparity is only evidence of intent to discriminate because pattern or practice cases are still within the adverse treatment rubric.[30]

Once a plaintiff has established a prima facie case, the employer must come forward with a legitimate, nondiscriminatory reason for its action.[31] Although such a reason must be business related,[32] it does not necessarily have to constitute a business necessity.[33] Courts will not supplant their own judgment for that of the employer,[34] and

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28. *See, e.g.*, Segar v. Smith, 738 F.2d 1249, 1274 (D.C. Cir. 1984) (challenge to employment system); United States v. Jacksonville Terminal Co., 451 F.2d 418, 438 (5th Cir. 1971) (prima facie neutral policies alleged to have been instruments for perpetuating racial discrimination), *cert. denied*, 406 U.S. 906 (1972).
29. *See Segar*, 738 F.2d at 1266; *see also* Rivera v. City of Wichita Falls, 665 F.2d 531 (5th Cir. Unit A 1982) (pattern or practice demonstrated by using standard deviation analysis).
30. *See Jacksonville Terminal*, 451 F.2d at 441-42. While the practical significance of such a distinction is not always evident, one clear difference is the admissibility of the employer's discriminatory practices prior to the enactment of Title VII. Generally, pre-Act actions are not relevant in Title VII cases. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 310 (1977); United Airlines, Inc. v. Evans, 431 U.S. 553, 560 (1977). *But see* Culpepper v. Reynolds Metals Co., 421 F.2d 888, 890 n.1 (5th Cir. 1970) (pre-Act discrimination may be considered if it is a basis for present discrimination); *infra* notes 84-94 and accompanying text (the "seniority system" cases). In pattern or practice cases, such evidence may be considered. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 340-41 (1977); *Jacksonville Terminal*, 451 F.2d at 445-46.
31. *See* Harris v. Marsh, 679 F. Supp. 1204, 1283 (E.D.N.C. 1987).
32. *See* Jennings v. Tinley Park Community Consol. School Dist. No. 146, 796 F.2d 962, 968 (7th Cir. 1986), *cert. denied*, 481 U.S. 1017 (1987); Abrams v. Baylor College of Medicine, 581 F. Supp. 1570, 1579 (S.D. Tex. 1984), *aff'd in relevant part*, 805 F.2d 528 (5th Cir. 1986). An exception may be a practice of nepotistic hiring. *See Harris*, 679 F. Supp. at 1285 n.130 (even where such hiring is not done for business reason, it is not necessarily racially motivated).
33. *See Harris*, 679 F. Supp. at 1285; *see also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 257 (1981) (employer need only articulate lawful reasons for its actions).
34. *See, e.g.*, Furnco Constr. Corp. v. Waters, 438 U.S. 567, 570-71 (1978) (hiring system in which a foreman hired bricklayers based upon his personal knowledge of their work may be valid).

poor or erroneous subjective judgment does not, in and of itself, indicate that the reason was a pretext for discrimination.[35] Of course, judicial decisions cannot be so arbitrary or irrational that they fail to support any legal motivation.[36] Although the employer's burden is merely one of production,[37] the employer must present evidence that is clear, specific, and legitimately contradicts the plaintiff's presumption.[38] In essence, this phase is designed to frame the dispute with sufficient clarity to allow the plaintiff to have a full and fair opportunity to show a pretext.[39]

After the employer comes forward with a facially valid, nondiscriminatory reason for the employment decision in question, the plaintiff is called upon to show that the reason is a mere pretext.[40] The types of evidence used may include direct evidence, statistical comparisons,[41] a departure by the employer from normal practices,[42] and a discriminatory employment atmosphere.[43] The evidence used in demonstrating a pretext is similar, if not identical, to the evidence

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35. *See Harris*, 679 F. Supp. at 1290.
36. *See id.* at 1285. At the stage where the factfinder is required to consider the employer's proffered justification for its action, the factfinder is essentially asked to judge the credibility of the parties, especially the employer's credibility regarding its motivation. If the factfinder does not believe the employer, a verdict for the plaintiff is required at that stage in the proceedings. *Id.* at 1284.
37. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Harris v. Marsh, 679 F. Supp. 1204, 1283 (E.D.N.C. 1987).
38. *See Burdine* at 254-55. If the employer fails to provide an explanation meeting these criteria, the plaintiff should be entitled to judgment as a matter of law. *See* Clark v. Library of Congress, 750 F.2d 89, 101 (D.C. Cir. 1984).
39. *See Burdine*, 450 U.S. at 255-56. As a practical matter, this information will almost certainly be elicited during the discovery stage of the proceedings.
40. *See id.* at 256. If mixed motives are involved, the plaintiff must show that the legitimate reason alone would not have resulted in the same employment decision. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989); *cf.* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (addressing first amendment rights).
41. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973); Warren v. Halstead Indus., Inc., 802 F.2d 746, 753 (4th Cir. 1986); Mozee v. Jeffboat, Inc., 746 F.2d 365, 372 (7th Cir. 1984); Minority Employees at NASA v. Beggs, 723 F.2d 958, 962 (D.C. Cir. 1983); Payne v. Travenol Labs., 673 F.2d 798, 820 (5th Cir. 1982). Conversely, the existence of a balanced work force, while not conclusive, may be evidence that no pretext exists. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 580 (1978); *cf.* Connecticut v. Teal, 457 U.S. 440 (1982) (rejecting "bottom line" parity as a defense in the context of adverse impact analysis).
42. *McDonnell Douglas*, 411 U.S. at 804-05 (referring to the employer's general policy and practice).
43. *See id.* at 804; Holsey v. Armour & Co., 743 F.2d 199, 207-08 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985).

that is presented to establish a prima facie case.[44] If the factfinder is convinced after weighing all the evidence that the reasons proffered by the employer are a pretext,[45] then the plaintiff will prevail.[46]

B. Adverse Impact

Unlike adverse treatment cases, which concern intentional discrimination, adverse impact cases are aimed at addressing facially neutral employment practices that have the effect of discriminating against minorities. As previously discussed, the seminal adverse impact case was *Griggs v. Duke Power Co.*,[47] in which the Supreme Court provided a simple and concise statement of this new standard for reviewing employment actions.[48]

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44. The presentation of evidence need not necessarily occur in two distinct steps. A plaintiff may use all of their "ammunition" in establishing a prima facie case; then the plaintiff may refer to the evidence already presented in arguing for a finding that the employer's reasons are pretextual. On the other hand, a plaintiff may make a strategic choice to withhold some evidence to be used as a rebuttal to the employer's justification defense. For example, if a strong showing of statistical disparity exists, coupled with an employer's departure from ordinary procedure, a plaintiff may withhold direct evidence in order to deflate the employer's attempted explanations. In using such a tactic, however, the plaintiff runs the risk that not enough evidence will be presented to establish a prima facie case.
45. It is important to note that, in the context of Title VII cases, "pretext" is something of a term of art, and it should actually be read to mean "pretext for discrimination." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973)). An employer who gives a false reason for its action is not necessarily hiding a discriminatory reason. For example, an employer could be hiding nepotistic practices it finds embarrassing, or it could be disguising breaches of a collective bargaining agreement. In Clark v. Huntsville City Bd. of Educ., 717 F.2d 525 (11th Cir. 1983), the Eleventh Circuit required that a plaintiff must show not only that the employer did not rely on its proffered reason, but also that it relied on race. *Id.* at 529. Such a standard implies that indirect evidence alone cannot establish a plaintiff's pretext burden because indirect evidence would only show the first *Clark* requirement, not the second. Establishing in an affirmative manner that the employer did rely on race would almost always require some direct evidence, which seldom exists.
46. Harris v. Marsh, 679 F. Supp. 1204, 1286 (E.D.N.C. 1987). Different combinations of evidence will tend to provide stronger support than reliance on a single source because impeachment becomes more difficult as diverse indicia point to the same conclusion. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 338-39 (1977) (statistical evidence bolstered by more than forty specific instances of discrimination which "brought the cold numbers convincingly to life").
47. 401 U.S. 424 (1971).
48. Although *Griggs* was the first Supreme Court case to apply the "facially neutral but discriminatory in effect" analysis to employment decisions, the general concept certainly was not new. *See, e.g.*, Harper v. Virginia Bd. of Elections,

In *Griggs*, the employer replaced a high school diploma requirement[49] with an aptitude test.[50] Overt policies of racial discrimination which had existed in the past had ceased, and there was no further evidence of intentional discrimination.[51] Noting that section 703(h) of Title VII[52] authorized employment tests that are not "designed, intended or used to discriminate because of race,"[53] the Supreme Court rejected a requirement that discriminatory intent be shown, but held that adverse consequences (or impact) would be sufficient to create a prima facie case.[54] Because there was no evidence that either the diploma requirement or the employment tests bore a "demonstrable relationship to successful performance of the jobs for which it was used," the Court held that Title VII prohibited their use.[55]

Thus, *Griggs* completely redefined the meaning of employment discrimination[56] by doing away with the requirement that a plaintiff show intent on the part of the employer. Further, by undermining the notion that scoring differentials on invalidated tests may be the result of educational differences, the Supreme Court held that the lower scores were a result of the invalid testing and not indicative

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383 U.S. 663, 666, 668-69 (1966) (voting fee); Louisiana v. United States, 380 U.S. 145, 154-55 (1965) (voter literacy requirement); McLaughlin v. Florida, 379 U.S. 184 (1964) (law prohibiting interracial cohabitation was held to be invalid under the fourteenth amendment).

49. *Griggs*, 401 U.S. at 427. The requirement applied to the lowest paying jobs, where blacks were concentrated. *Id.* However, prior to the institution of the high school diploma requirement, whites in higher paying jobs performed satisfactorily, thereby providing an empirical indication that the requirement was not job related. *Id.*
50. *Id.* at 428. The test proved to be more stringent than the high school diploma requirement because it screened out approximately 50% of the high school graduates. *Id.* at 428 n.3.
51. *Id.* at 428-29. In fact, the company financed two-thirds of the tuition cost to help undereducated employees. *Id.* at 432.
52. *See supra* note 2.
53. *Griggs*, 401 U.S. at 433 (quoting § 703(h) of Title VII) (emphasis in original).
54. *Id.* at 432. The Court found further support for its conclusion through congressional intent and the Equal Employment Opportunity Commission (EEOC) guidelines which are used in determining the presence of discriminatory practices. *Id.* at 433-36.
55. *Id.* at 431.
56. *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (1983) (arguing that *Griggs* is the most important fair employment case ever decided); Blumrosen, *The Group Interest Concept, Employment Discrimination, and Legislative Intent: The Fallacy of Connecticut v. Teal*, 20 HARV. J. ON LEGIS. 99 (1983) (asserting that nearly a quarter of the minority labor force of 1980 was in a better occupation than they would have been under the occupation distributions of 1965).

of unqualified applicants.[57] *Griggs*, however, left unresolved many questions regarding the application of appropriate standards, statistical comparisons, defenses, and employers' burdens. This section discusses the considerable progeny of *Griggs* in order to more fully develop an understanding of the state of adverse impact analysis prior to the Supreme Court's 1988 Term.

1. *General Standards of Review*

At the outset, it is important to note that *Griggs* dealt with a Title VII claim[58] and that it did not discuss allegations based on constitutional violations. While there may be some overlap in causes of action when both equal protection and Title VII claims exist,[59] the standards used in analyzing such claims differ. In *Washington v. Davis*,[60] the Supreme Court noted that, while adverse impact may be relevant, it was not per se unconstitutional and did not establish an equal protection violation.[61] Thus, when discrimination claims are based on constitutional protections,[62] *Griggs*-type adverse impact analysis is for the most part inapplicable,[63] being limited to claims brought under Title VII.[64]

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57. Such an argument was attempted in Penn v. Stumpf, 308 F. Supp. 1238 (N.D. Cal. 1970), but it was rejected under an analysis similar to that which emerged in *Griggs*. *Penn*, 308 F. Supp. at 1242. A large number of testing experts believe that intelligence tests incorporate racial bias. *See* Snyderman & Rothman, *Science, Politics and the IQ Controversy*, 83 PUB. INTEREST 79, 79-87 (1986).
58. *Griggs*, 401 U.S. at 425.
59. *See supra* notes 3-5 and accompanying text.
60. 426 U.S. 229 (1976).
61. *Id.* at 239-41.
62. The prospect of non-Title VII cases is most likely limited to cases in which the plaintiff fails to meet the statutory 180-day filing deadline provided in 42 U.S.C. § 2000e-5(e) for Title VII claims.
63. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65, 269-70 (1977). *But see* Bratton v. City of Detroit, 704 F.2d 878, 883 n.15, *modified*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); Chance v. Board of Examiners, 458 F.2d 1167, 1176 (2d Cir. 1972).
64. Although Title VII now encompasses most public employment, there still may be some incentive to bring § 1983 claims because Title VII claims require exhaustion of the administrative process before the Equal Employment Opportunity Commission (EEOC). *See* Local 179, United Textile Workers v. Federal Paper Stock Co., 461 F.2d 849, 850-51 (5th Cir. 1972). After conducting its investigation, and absent any settlement or conciliation, the EEOC will make a finding as to the existence and extent of discrimination. Even if the EEOC determines that there is no reasonable cause to believe the charge of discrimination is true, what is commonly referred to as a "right to sue" letter will be issued, after which the complainant must file any federal district court action within ninety days. *See* 42 U.S.C. § 2000e-5(b) and (f)(1). Additionally, if no action has been taken by the EEOC within 180 days from the filing of

A second important consideration is that, because adverse impact analysis is dependent on statistical comparisons, excessive subjectivity in the decision-making process is, standing alone, insufficient to establish a prima facie case.[65] However, subjective decisions cannot be used to mask discriminatory employment decisions,[66] and a statistically disparate impact may be found when subjective decision-making is involved.[67]

Related to this consideration is the Supreme Court's rejection of "bottom line" analysis in determining the existence of adverse impact. The leading case on this point is *Connecticut v. Teal*,[68] in which a promotional examination produced adverse impact within the purview of the *Griggs* analysis.[69] Before trial, the employer granted promotions based upon considerations of performance, supervisors' ratings, seniority, and affirmative action goals in general. This process resulted in a black promotion rate of 22.9% and a white promotion rate of 13.5%.[70] The employer then argued that these results precluded the plaintiffs from establishing a prima facie case. The employer's argument was that the statistics for nonminority promotions were a defense to accusations of discrimination.[71]

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charges, a right to sue letter with no finding either way may be requested. 42 U.S.C. § 2000e(f)(1). Generally, the administrative requirements do not pose serious impediments to pursuing litigation. For example, a finding of "no cause" by the EEOC is not an employer's defense to a subsequent lawsuit. Robinson v. Lorillard Corp., 444 F.2d 791, 800-01 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). Although EEOC actions are not barred by prior non-EEOC arbitration, as shown by Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-54 (1974), the outcome of the arbitration may be accorded greater weight if the arbitration fully assessed the Title VII considerations. *Id.* at 60 & n.21. Although EEOC conciliation measures are not required as a prerequisite to litigation, Dent v. St. Louis-S.F. Ry., 406 F.2d 399, 403 (5th Cir. 1969), the EEOC administrative process can be quite slow and lethargic, which may be the prime reason why litigants may consider other avenues when available.

65. *See* Harris v. Marsh, 679 F. Supp. 1204, 1307-08 (E.D.N.C. 1987). The court also discussed subjectivity as to adverse treatment. *Id.* at 1305-06. In fact, subjectivity may be a necessary element to some employment decisions. *See, e.g.*, Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974) (mayoral appointments to a panel charged with selecting school board member); Zahorik v. Cornell Univ., 729 F.2d 85, 92-93, 96 (2d Cir. 1984) (tenure of university professors).
66. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 231-32 (5th Cir. 1974) (citing such things as failure to request promotions, lack of job vacancies, lack of motivation, voluntary refusal of training, and others as subjective decisions which cannot mask discrimination).
67. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990-92 (1988); *Pettway*, 494 F.2d at 241.
68. 457 U.S. 440 (1982).
69. *Id.* at 443-44.
70. *Id.* at 444.
71. *Id.* at 447 n.7.

In rejecting this "bottom line" defense, the Court held that a racially balanced workforce does not immunize an employer against specific acts of discrimination.[72] While the employer admittedly promoted a more than proportionate share of minorities, this did not change the fact that an invalidated examination resulted in harm to certain individuals.[73]

In a similar vein, in *Washington v. Davis*,[74] the lower court had compared the percentage of minority recruits in the District of Columbia Police Force (forty-four percent) to the number of minority twenty to twenty-nine year olds within a fifty-mile radius, the general population group from which applicants came.[75] While that "bottom line" comparison indicated an absence of adverse impact, the Court found that the relevant comparison was between the number of blacks failing versus the number of whites failing.[76] In the correct comparison, the Court found that the failure rate for blacks was four times that of whites.[77]

It is also important to note that as a general rule, adverse impact cases will be limited to consideration of discriminatory practices that postdate the effective date of Title VII. In *Hazelwood School District v. United States*,[78] the Court upheld an employer's defense that apparently discriminatory impact was due to pre-Act hiring, rather than post-Act practices.[79] Also, in *United Airlines, Inc. v. Evans*,[80] a stewardess was illegally forced to resign prior to the effective date of Title VII, and subsequently she was rehired without retroactive seniority.[81] The Court ruled that the pre-Act discrimination could not

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72. *Id.* at 454. This implies elements of adverse treatment by virtue of the focus on specific acts of discrimination, rather than limiting the inquiry to statistical comparisons. Yet the framework of *Teal* is that of adverse impact because it involved a standardized employment test. Therefore, while the teaching of *Teal* is that post-test manipulations to achieve bottom line parity cannot be used to cover over the effects that a discriminatory test has on individuals, it also raises questions regarding affirmative action programs that seek to artificially repair the effects of discriminatory practices. *Cf. infra* notes 281-296 and accompanying text (discussion regarding *post hoc* test manipulation).
73. *See Teal*, 457 U.S. at 449-51.
74. 426 U.S. 229 (1976).
75. *Id.* at 235.
76. This analysis invokes issues similar to those raised regarding the proper choice of population groups to be compared. *See infra* notes 100-107 and accompanying text.
77. *Id.* at 237. The Supreme Court reversed based on fifth amendment and constitutional issues and not because of any Title VII violations. *Id.* at 242.
78. 433 U.S. 299 (1977).
79. *Id.* at 310.
80. 431 U.S. 553 (1977).
81. *Id.* at 554-55.

be used as a basis for the claimed present harm of loss of seniority.[82] An exception to the general rule is where pre-Act discrimination persists in a more overt form after the effective date of Title VII's application.[83]

A caveat exists regarding pre-Act considerations involving seniority systems that predate the effective date of Title VII's application and which have the effect of perpetuating present discrimination. The Supreme Court addressed this issue in *International Brotherhood of Teamsters v. United States*.[84] In *Teamsters*, employment benefits, such as bidding rights and layoff protections, were determined by the employee's seniority in his particular position, either as a "city driver" or in the financially more desirable position of "line driver."[85] If a city driver transferred to a line driver position, his seniority date for purposes of bidding rights and layoff protection began anew.[86] While these provisions affected minorities and non-minorities alike, pre-Act hiring practices resulted in a disproportionate denial of line driver positions to blacks and Spanish-surnamed persons.[87]

The Supreme Court clearly recognized the discriminatory effect of this pre-Act seniority system.[88] The Court, however, further noted that § 703(h) of Title VII afforded seniority systems some degree of immunity.[89] After a review of the section's legislative history,[90] the Court concluded that an otherwise neutral, legitimate seniority system which existed prior to the effective date of Title VII and which perpetuated past inequities would not be struck down absent a showing that it was intended to serve a discriminatory purpose.[91]

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82. *Id.* at 560. This decision was founded in part upon the fact that the plaintiff did not file a complaint based upon her earlier required resignation within a timely manner.
83. *See* Bazemore v. Friday, 478 U.S. 385, 401-02 (1986) (applying "multiple regression analysis" to pre-Act factors and concluding that the discrimination had continued past the effective date of the Act); Harper v. Mayor of Baltimore, 359 F. Supp. 1187, 1195-96 (D. Md.), *modified sub nom.* Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973) (finding that discrimination in the 1950s was a valid consideration when examining discrimination which was continuing into the 1970s).
84. 431 U.S. 324 (1977).
85. *Id.* at 343-44.
86. *Id.*
87. *Id.* The plaintiffs argued that, as a result of the pre-Act system, they were "locked" into less desirable jobs because their only other choice was to transfer and lose their seniority. *Id.*
88. *Id.* at 349-50.
89. *Id.* at 350. For text of § 703(h), see *supra* note 2.
90. *Teamsters*, 431 U.S. at 350-52.
91. *Id.* at 353-54; *see also* Pullman-Standard v. Swint, 456 U.S. 273, 277-79, 288-89, 291-93 (1982) (remanding the case for further determination as to whether sufficient facts showing discriminatory intent existed); American Tobacco Co. v. Patterson, 456 U.S. 63, 75-76 (1982) (applying the same intent requirement to post-Act seniority systems).

Thus, consistent with the dichotomy between pattern and practice adverse treatment and adverse impact, seniority systems which perpetuate past adverse impact will be upheld, but those which perpetuate past intentional discrimination will not.

An exception to the rejection of seniority systems which perpetuate past discrimination may be found in cases where a particular job was a prerequisite to advancement. In *Cotton v. Hinton*,[92] the Fifth Circuit upheld a requirement that an employee must hold a specified "prerequisite job" before filing for a "critical job" because training necessary for "critical jobs" was obtained from the "prerequisite jobs."[93] However, courts will not automatically defer to such claims. Instead, the court will inquire into the legitimacy of a business requirement that the job serve as a prerequisite.[94]

2. *Establishing Adverse Impact*

Within the parameters of these general standards, the next inquiry addresses what evidence is required to show adverse impact of a sufficient degree to establish a prima facie case. The most common way of showing adverse impact is to examine hiring or promotional populations in order to determine whether the EEOC's "four-fifths rule" has been met. The "four-fifths rule" states that a selection device has an adverse impact if a selection rate for any race, sex, or ethnic group is less than four-fifths (or eighty percent) of the rate of the group with the highest selection rate.[95]

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92. 559 F.2d 1326 (5th Cir. 1977).
93. *Id.* at 1333. The court upheld the system notwithstanding the fact that 109 of 183 employees in prerequisite jobs were black. *Id.*
94. *See, e.g.*, United States v. N.L. Indus., Inc., 479 F.2d 354, 366 (8th Cir. 1973) (rejecting a claimed business purpose because there was no logical line of progression between job categories); United States v. Jacksonville Terminal Co., 451 F.2d 418, 450-51 (5th Cir. 1971) (rejecting managerial convenience as a sufficient justification), *cert. denied*, 406 U.S. 906 (1972).
95. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607, 1607.4(D) (1990) [hereinafter Uniform Guidelines]. Section 1607.4(D) states:

> A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates

The comparison is not between the *number* of nonminorities and minorities passing (or promoted or hired), but between the *percentage* of nonminorities passing and the percentage of minorities passing.[96] Knowing that 100 whites pass and ten blacks pass is insufficient information to apply the "four-fifths rule." One must also know the total of each group that took the test. If 1000 whites and 115 blacks took the test, given the above pass rates, the white pass rate is 10% and the black pass rate is 8.69%. Since 8.69 is nearly 87% of 10, it meets the four-fifths (or 80%) requirement. However, if 1000 whites and 103 blacks took the test, the white pass rate is still 10%, but the black pass rate is now 7.69%. Since 7.69 is less than 77% of 10, it does not meet the four-fifths requirement.[97] The "four-fifths rule" does not require strict adherence, and it is not legally binding.[98] Rather, it is a "rule of thumb" that must be considered in light of such confounding factors as sample size and actions which might have discouraged minority applications.[99]

Population statistics are another factor used to determine if minorities are adversely impacted in the work force. The problem with the use of population statistics, however, is deciding which population group is appropriate for comparison. For example, should all females in the United States be compared or is the proper focus

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> to be atypical of the normal pool of applicants from that group. Where the user's evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact.

Id.

96. Passing or not passing may not always be the relevant criterion. A ranked examination list that is nondiscriminatory as to its pass rate, but which clusters minorities near the bottom of the list, may be discriminatory. *See* Kirkland v. New York State Dep't of Correctional Serv., 711 F.2d 1117, 1122 (2d Cir. 1983) (although an 88% pass rate of minorities and a 92% pass rate of nonminorities satisfied the "four-fifths rule," there was a prima facie case of discrimination because the rank-ordering system of the applicants who passed the test resulted in only 9.3% of the minorities getting promoted), *cert. denied*, 465 U.S. 1005 (1984).
97. For application of the rule, *see, e.g.*, United States v. Paradise, 480 U.S. 149, 159-60 & n.10 (1987) (four-fifths requirement not satisfied); Guardians Ass'n v. Civil Serv. Comm'n, 630 F.2d 79, 85 (2d Cir. 1980) (four-fifths requirement not satisfied), *cert. denied*, 452 U.S. 940 (1981); Friend v. Leidinger, 588 F.2d 61, 66 (4th Cir. 1978) (four-fifths requirement satisfied).
98. *See* Clady v. County of Los Angeles, 770 F.2d 1421, 1428 (9th Cir. 1985), *cert. denied*, 475 U.S. 1109 (1986).
99. *Id.*; *see also infra* note 106 (actions discouraging minority applications); *infra* note 132 (sample size).

on the city, county, or state where the job exists? This dilemma is not easily resolved and the courts have not, and probably cannot, set forth a general standard. Usually, this decision will depend upon the case in question. When the alleged discriminatory factors are easily identified by demographic data, however, general population statistics usually will pose no problem.

In *Dothard v. Rawlinson*,[100] the Supreme Court held that height and weight requirements for correctional counselors in Alabama prisons had a discriminatory impact on females.[101] The Court noted that although women comprise 36.89% of the State of Alabama's labor force, only 12.9% of the correctional counselor positions were filled by women.[102] The Court also noted that the height requirement would eliminate 33.29% of the women in the United States from consideration, compared with only 1.28% of the males, and that the weight requirement would eliminate 22.29% of the women, compared with 2.35% of the males.[103]

Similarly, in *League of United Latin American Citizens v. City of Santa Ana*,[104] the city had imposed a height requirement which adversely affected Mexican-Americans.[105] Although the height requirement had been suspended, the court feared that its prior use as a threshold requirement may have served as a deterrent to applications by Mexican-Americans.[106] Therefore, the court relied on general city population statistics in holding that the height requirement was discriminatory.[107]

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100. 433 U.S. 321 (1977).

101. *Id.* at 326-27, 331. The Court ultimately upheld the requirements because they represented a bona fide occupational qualification. *Id.* at 334-37. The requirements imposed a minimum height of five feet two inches and a minimum weight of 120 pounds. *Id.* at 324 n.2.

102. *Id.* at 329.

103. *Id.*

104. 410 F. Supp. 873 (C.D. Cal. 1976).

105. *Id.* at 879, 882.

106. *Id.* at 893-94. Other courts have considered the prospect that a comparison of hiring rates may be skewed by the fact that minorities may have become discouraged by past discriminatory practices, and therefore simply do not apply for the jobs in question. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 363-64, 367-69 (1977); United States v. Hayes Int'l Corp., 456 F.2d 112, 119 (5th Cir. 1972).

Conversely, it should be noted that easier access to the hiring process by referrals from friends and relatives does not necessarily violate Title VII. *Hayes*, 456 F.2d at 119-20. Such factors could skew statistics in the opposite direction, creating an appearance of adverse impact in applications that may not exist. *Cf. Uniform Guidelines*, *supra* note 95 (special recruiting programs that result in an atypical pool of applicants do not constitute adverse impact under the "four-fifths" rule).

107. *League of United Latin Am. Citizens*, 410 F. Supp. at 882, 896-98. The court

One commentator has urged a more generalized reliance on population statistics as a whole[108] because the comparison of pass rates of minorities and nonminorities is statistically insufficient.[109] Although such an approach may be feasible in cases such as *Dothard* and *League of United Latin American Citizens*, it would be difficult to use, if not unworkable, when dealing with tests administered for a particular job. Such an approach could require administering the test on a random sample,[110] and the "randomness" of the sample would then be open to attack.[111] Further, those taking the sample test may be uninterested, or unable to meet some nondiscriminatory job criteria, thereby skewing the results.

Assuming the propriety of general population comparisons regarding employment tests, such comparisons may be particularly problematic when the selection is highly discretionary and involves a small number of people. In *Mayor of Philadelphia v. Educational Equality League*,[112] a challenge was made to the mayoral selection of a panel charged with the selection of school board members.[113] Nine of the panel members were the highest ranking members of various city organizations.[114] The plaintiffs sought to compare the minority representation on the panel (15%) to the city's black population (34%) and black student population (60%).[115] The Supreme Court found that these comparisons were irrelevant and that the relevant comparison was between the minority representation on the panel and the minority representation of the highest officials of the

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relied on the city population statistics rather than the entire county statistics because the city was the relevant community serviced. The court also looked at such factors as the need to achieve racial balance, the increased efficiency of hiring city residents, and the increased stake city residents had in the area they would be servicing. *Id.* at 896-97. The court relied on general population statistics, rather than labor force statistics, because general population statistics are sufficient to create a prima facie case. It is the burden of the defendant "to define the job and its qualifications, and to determine the quality of the testing techniques . . . to determine the qualifications of the applicants." *Id.* at 897-98; *see also Teamsters*, 431 U.S. at 342 n.23 (using a comparison of the general minority population statistics to find discriminatory exclusion of blacks from the preferred "line driver" positions).

108. Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L. REV. 793, 794-95 (1978).
109. *Id.* at 805-06.
110. Of course, it would be impossible to obtain absolute statistics without requiring virtually the entire population to take the test.
111. Paradoxically, the *Griggs* adverse impact analysis could be used to attack the sample.
112. 415 U.S. 605 (1974).
113. *Id.* at 606-07.
114. *Id.* at 607-08.
115. *Id.* at 611.

city organizations included in the categories from which the mayor made his choices.[116]

Another method of establishing a statistical demonstration of adverse impact is standard deviation analysis. Standard deviation analysis accounts for the probability that any given statistical comparison could be the result of chance. In *Castaneda v. Partida*,[117] a grand jury selection case, the Court provided a concise explanation of the application of standard deviation analysis:

> If the jurors were drawn randomly from the general population, then the number of Mexican-Americans in the sample could be modeled by a binomial distribution. . . . Given that 79.1% of the population is Mexican-American, the expected number of Mexican-Americans among the 870 persons summoned to serve as grand jurors over the 11-year period is approximately 688. The observed number is 339. Of course, in any given drawing some fluctuation from the expected number is predicted. The important point, however, is that the statistical model shows that the results of a random drawing are likely to fall in the vicinity of the expected value. . . . The measure of the predicted fluctuations from the expected value is the standard deviation, defined for the binomial distribution as the square root of the product of the total number in the sample (here 870) times the probability of selecting a Mexican-American (0.791) times the probability of selecting a non-Mexican-American (0.209). . . . Thus, in this case the standard deviation is approximately 12. As a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist. The 11-year data here reflect a difference between the expected and observed number of Mexican-Americans of approximately 29 standard deviations. A detailed calculation reveals that the likelihood that such a substantial departure from the expected value would occur by chance is less than 1 in [10 to the 140th power].[118]

Because this approach necessarily involves the comparison of populations, the appropriate type of population must be chosen at the outset. In *Castaneda*, where parameters for prospective jurors

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116. *Id.* at 620-21.
117. 430 U.S. 482 (1977).
118. *Id.* at 496-97 n.17 (citations omitted).

were relatively few,[119] the analysis could have been flawed if a legitimate, nondiscriminatory requirement skewed the populations involved.[120] For example, if jurors were required to be citizens who had reached the age of majority, and a highly disproportionate share of the relevant minority population comprised either aliens or minors, then standard deviation analysis based on general population groups could be flawed. Therefore, the analysis should be limited to the percentage of the relevant minorities meeting the legal requirements.

Standard deviation analysis is not limited to situations in which selection is based on demographic requirements. It may also be used to ascertain adverse impact regarding hiring[121] or promotional[122] practices, as well as any other employment-related actions.[123] Particularly where employment or promotional tests are concerned, an analytical cousin of standard deviation known as standard error of measurement may prove useful. Like standard deviation, standard error of measurement is designed to predict the likelihood that chance may have resulted in the outcome. Standard error of measurement, however, is particularly well suited for evaluation of testing procedures where elements of reliability and validity come into play.[124]

Still another method of comparison, which is used less often than the others, is the multiple regression analysis. This method

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119. A prospective juror was required to "be a citizen of Texas and of the county, be a qualified voter in the county, be 'of sound mind and good moral character,' be literate, have no prior felony conviction, and be under no pending indictment, 'or other legal accusation for theft or of any felony.'" *Id.* at 485 (quoting TEX. CODE CRIM. PROC. ANN. art. 19.08 (Vernon 1977)).
120. Such an analysis may at times beg the question because the very factors which arguably delimit standard deviation analysis may themselves be unjustified. For example, if there was no legitimate justification for requiring jurors to be voters, then the requirement could operate to discriminate against Mexican-Americans if a disproportionately high number of Mexican-Americans are not registered voters. The fact that the result is coincidental should not matter under adverse impact analysis. The conclusion of this consideration is that if an illegitimate factor which may be neutral on its face, but which has a discriminatory effect, can be isolated, standard deviation analysis may be used to demonstrate the impact of that factor.
121. To the extent that the standard deviation analysis is based on valid population comparisons, its universality would achieve the kind of general population comparisons urged by Shoben. *See supra* notes 108-109 and accompanying text.
122. Standard deviation analysis may be best tailored for application to promotional tests because all applicants are usually considered to be "qualified" for the job, and the tests are used as a ranking device. Therefore, the confounding factors that may be found in general populations are not present. The same may be said of the application of the "four-fifths rule" to promotional examinations.
123. *See, e.g.*, Rivera v. City of Wichita Falls, 665 F.2d 531, 536 n.7 (5th Cir. Unit A 1982) (pattern or practice of adverse treatment).
124. For a more in-depth discussion of standard error of measurement, see *infra* text accompanying notes 219-226.

"measures the discrete influence independent variables have on a dependent variable such as salary levels."[125] Independent variables include race, age, education level, and experience levels.[126] The proper choice of independent variables determines the validity of the process because if a legal and relevant variable is overlooked, the process may yield a false result.[127]

Once the independent variables have been selected, a computer "measures the impact of each [independent] variable upon the dependent variable by holding all other [independent] variables constant."[128] In one case the court found that salary variations ranging from $1119 to $1934 per year were attributable to race.[129] The court indicated that the odds of this discrepancy occurring by chance were well over one in 1000, and the court considered a one-in-twenty ratio as statistically significant.[130]

3. *Defenses and Shifting Burdens*

Once the plaintiff has established a prima facie case, the defendant can attempt to demonstrate that the plaintiff's statistics are flawed[131] or that they involve a statistical base that is too small to be meaningful.[132] Absent such a "threshold" defeat of the plaintiff's case, the employer must justify the employment practice. The Su-

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125. Segar v. Smith, 738 F.2d 1249, 1261 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985). *See generally* Finklestein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 COLUM. L. REV. 702 (1980); Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 737 (1980).
126. *Segar*, 738 F.2d at 1261.
127. *Id.* Although the analysis does not have to include all possible independent variables, the failure to include variables will affect the probativeness of the analysis. Bazemore v. Friday, 478 U.S. 385, 400 (1986).
128. *Segar*, 738 F.2d at 1261. The analysis will also measure the probability that the result could occur by chance and the degree to which the procedure as a whole explains observed disparities in the dependent variable. *Id.*
129. *Id.* at 1262.
130. *Id.* The defendants attempted to use what they called "cohort analysis," which compared salary increases and promotions of employees who started the same year and at the same grade level. *Id.* at 1263. This approach was rejected because it did not account for other variables and the statistical sample was too small. *Id.* at 1264.
131. The error may be due to such factors as erroneous collection of data, tabulation errors, and failure to follow scientifically acceptable procedures. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 996-97 (1988) (O'Connor, J., plurality); Dothard v. Rawlinson, 433 U.S. 321, 331 (1977).
132. *See* Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620-21 (1974) (thirteen-member panel of high ranking officials is too small for statistical purposes); Contreras v. City of Los Angeles, 656 F.2d 1267, 1273 n.4, 1275 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982) (Spanish surnamed applicants for accounting test too small for statistical purposes).

preme Court has made clear that the employer's burden is one of production only and that the burden of persuasion remains with the plaintiff at all times.[133] The plaintiff can dispute the justification by arguing that it is a pretext for discrimination.[134]

Employers are generally successful in demonstrating the business necessity of specific pre- or post-employment circumstances such as an employment prerequisite.[135] Acceptance of such nontest criteria is extremely likely to occur in cases involving police. In *Davis v. City of Dallas*,[136] the Dallas Police Department imposed: (1) an educational requirement of forty-five college credits; (2) a requirement that a candidate not have used marijuana recently and not have used it excessively at any time; and (3) a requirement that a candidate have no more than three hazardous traffic violations in the preceding twelve months and no more than six hazardous traffic violations in the preceding twenty-four months.[137] Although these standards had an adverse impact on blacks, the court held that they had a "manifest relationship" to employment needs.[138] Specifically, the court found that the education requirement was valid because the position of police officer is a professional position and involves significant public responsibility.[139] The court then found that marijuana use was empirically shown to indicate a tendency toward future use, a decreased willingness to enforce the laws and a decrease in public trust.[140] As to a hazardous driving record, the court found it to be predictive of future problems.[141] In addition, *Davis* noted that when the risk of a wrong employment decision could result in further significant negative results, the employer's burden is lessened.[142]

The greatest debate in adverse impact cases centers around hiring and promotional tests.[143] Courts will often take a deferential approach

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133. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989).
134. *Id.* at 660.
135. *See, e.g.*, Friend v. Leidinger, 588 F.2d 61, 64-65 (4th Cir. 1978) (upholding criteria considering prior garnishment of an applicant's wages and the number of vehicular accidents in which the applicant had been involved). *But see supra* notes 100-107 and accompanying text.
136. 777 F.2d 205 (5th Cir. 1985).
137. *Id.*
138. *Id.* at 207-08.
139. *Id.* at 211. *Davis* used empirical studies to support its conclusion. *Id.* at 219-22.
140. *Id.* at 224-25.
141. *Id.* at 225-26.
142. *Id.* at 213 (quoting Spurlock v. United Airlines, Inc., 475 F.2d 216, 219 (10th Cir. 1972)); *see also* New York Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979) (methadone users prohibited from employment as transit workers).
143. *See generally* Bentz, *Comments on Papers Concerning Fairness and Employment Testing*, 33 J. VOC. BEHAV. 388 (1988); Gottfredson & Sharf, *Foreword, Fairness in Employment Testing*, 33 J. VOC. BEHAV. 225 (1988); Schmidt,

to review of such tests.[144] The EEOC *Uniform Guidelines* set forth standards for judging these tests.[145] Because the *Uniform Guidelines* are rarely satisfied, however, courts will often rely on the general concepts of the *Guidelines* rather than implementing a strict application.[146]

Generally, courts have validated tests in several ways.[147] One method is to show that the test is content valid. Content validity seeks to measure a candidate's knowledge, skill, and ability[148] after

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Problems of Group Differences in Ability Test Scores in Employment Selection, 33 J. VOC. BEHAV. 272 (1988).

144. *See, e.g.*, Zahorik v. Cornell Univ., 729 F.2d 85 (2d Cir. 1984) (university tenure); Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982) (accountants); United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977) (national teacher examinations), *aff'd*, 434 U.S. 1026 (1978).

145. *Uniform Guidelines*, *supra* note 95, § 1607.14. Since the standards are too lengthy to set forth in their entirety, some generalized statements of the standards follow. Validity studies should be based on a review of information of the job that includes a job analysis. § 1607.14(A). Criterion studies should measure important or critical work behavior based on a representative sample, and a statistical relationship between selection procedure scores and criterion measures should be computed. § 1607.14(B)(3)-(5). Such selection procedures should be reviewed for their operational feasibility, including proper cut-off scores or appropriateness for rank ordering. § 1607.14(B)(6). Interestingly, subsection B(8) includes "fairness" as a consideration, which is defined in terms of adverse impact on members of one race, sex, or ethnic group. Therefore, a test may be per se invalid if it has adverse impact, thus rendering the concept of validity studies meaningless. Content validity studies may be used if it is technically feasible to measure knowledge, skills, or abilities which are necessary prerequisites to successful job performance. § 1607.14(C)(1). Again, job analysis, a development of selection procedures, and the use of representative samples are required. § 1607.14(C)(2)-(4). If the scores will be used to generate ranked lists, a relationship between a higher score and better job performance must be shown. § 1607.14(C)(9). Construct validity, which requires empirical validation, may be used if important work behaviors are identified, and a relationship to the procedure and job performance, as measured by these work behaviors, can be shown. § 1607.14(D)(1)-(3).

146. *See* Clady v. County of Los Angeles, 770 F.2d 1421, 1430-31 (9th Cir. 1985), *cert. denied*, 475 U.S. 1109 (1986); Guardians Ass'n v. Civil Serv. Comm'n, 630 F.2d 79, 92-93, 110 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981).

147. When discussed in the literature, and especially in judicial opinions, the procedures are often called by various names and sometimes intermingled. The best approach is simply to determine how the procedure works, as discussed herein, and evaluate it accordingly. The names used herein are those used by the EEOC *Uniform Guidelines*.

148. The test should not measure skills that will be learned on the job because this does little to predict a candidate's ability. Instead, it only finds those who possess some prior similar experience, often with a result that causes adverse impact. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 434 (1975); *Guardians Ass'n*, 630 F.2d at 92. This can sometimes create a dilemma, especially under the EEOC *Uniform Guidelines*. A test that is too general may

identifying the factors necessary for job performance; the court then ascertains whether the test accurately measures these factors.[149] The test must provide a meaningful scoring mechanism; otherwise, its predictive value may be insufficient to meet validity requirements.[150]

A second approach is criterion validity. Instead of measuring more general skills, this method seeks to measure actual tasks that will be performed on the job.[151] Because such an approach measures these specific attributes, it is especially prone to testing abilities that will be learned on the job. Criterion validity, therefore, should be limited to jobs in which specific, narrowly defined skills are involved.[152]

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not be job-related, but a test that is more specific may actually be measuring skills that will be learned on the job. *Guardians Ass'n*, 630 F.2d at 92-93.

149. *See, e.g.*, Rivera v. City of Wichita Falls, 665 F.2d 531, 537 (5th Cir. Unit A 1982) (content valid Early American History test can cover the Boston Tea Party but not the bombing of Pearl Harbor); *Guardians Ass'n*, 630 F.2d at 83-84, 89 (employer performed extensive job analysis and identified conduct that was related to and representative of the job of a policeman); Jackson v. Nassau County Civil Serv. Comm'n, 424 F. Supp. 1162, 1171-72 (1976) (test need not go into minute detail: adequate measurement of general abilities is sufficient). *See generally* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 1016-17 (1982).

150. *See, e.g., Guardians Ass'n*, 630 F.2d at 95, 100-06 (rank ordering may be rejected if the lines drawn by the test procedure are so minor in light of the test's predictability that they may yield misleading results).

151. *Uniform Guidelines*, *supra* note 95, § 1607.14(B).

152. The tests consider factors which are the opposite of general traits (such as intelligence, aptitude, judgment, and leadership). The archetype of a skill-specific examination is a typing test, where the only skills measured are speed and accuracy. Such a test for a word processor would be almost impervious to an adverse impact attack because it bears a manifest relationship to the job. However, where a broad array of skills and abilities is required, such as with the police officers in *Guardians Ass'n*, 630 F.2d at 89, 95, 98, the Court will accept approaches that test representative job duties with a procedure or methodology that is similar to the job process. One such approach is an "in-basket" exam, where a candidate may be asked to deal with an average day's problems and tasks. If important aspects are measured and the procedure is not too unrelated to the job, the test will likely pass muster for jobs involving complex tasks. *Id.* at 99.

A similar approach involves the so-called "assessment centers," in which candidates are observed in situations which are intended to simulate real life conditions they would encounter on the job. In *Firefighters Institute for Racial Equality v. City of St. Louis*, 616 F.2d 350 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981), candidates for promotion to the rank of captain were shown a simulation slide show. Then candidates were required to evaluate the situation, to present a firehouse lecture, and to interact with an interviewer playing the part of a firefighter in a personal confrontation. *Id.* at 360. However, this test failed because the defendant failed to present validation studies or other empirical evidence of validity. *Id.* at 360-61.

A third method of test validation is construct validation. This is an empirical approach that attempts to demonstrate that, in practice, tests that purported to choose the best candidates did in fact choose the best candidates.[153] The advantage of such a procedure is that, if a proper data base exists, its results may be the most apparent, especially to the layman untrained in psychometrics. Obtaining the proper data base is what presents the most problems in this type of validation. The *Uniform Guidelines* warn that this method is extremely difficult, time consuming, and costly.[154] A validity procedure that demonstrates that the people chosen perform well only provides half of the relevant information because there is no showing that those not chosen would not have performed just as well, or even better. For example, suppose a test of 100 persons chooses ten and eliminates ninety. To conduct a pure construct validation study, all 100 persons should be placed in the job in question. If the ten who passed perform demonstrably better than the ninety who failed, then the test is empirically validated. As a practical matter, such a study can seldom be performed in the work place and is relegated to controlled studies[155] in a clinical setting.[156]

Although there are no hard and fast standards for judicial review of employment tests, some generalizations are possible. General aptitude tests will almost always fail because they do not closely duplicate actual duties to be performed or measure important job characteristics.[157] Likewise, the requirement of a high school diploma

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153. *See generally Uniform Guidelines*, *supra* note 95, § 1607.14(D). Validation may be accomplished to some measure by comparing scores with subjective supervisory ratings, provided that such ratings are precise enough to adequately measure what the tests purport to measure. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 432-34 (1975).

154. *Uniform Guidelines*, *supra* note 95, § 1607.14(D)(1).

155. Controlled studies could require content or criterion validation themselves. *Id.*

156. *See* Bartholet, *supra* note 149, at 1018. The closest a workplace study may come to achieving construct validity is to examine success rates or probationary employees as compared to their relative ranking on the test in question. *Cf. Guardians Ass'n*, 630 F.2d at 90 n.10. Such an approach only validates the ranking of the group selected, and requires an assumption that the ranking which resulted in nonselection of those with lower scores is similarly valid. While there may be no particular reason to believe there would be a breakdown in the validity of lower rankings, if the test does incorporate a racial bias that tends to cluster minorities near the bottom, then the validation procedure may never have the opportunity to prove the test empirically wrong or right.

157. *See, e.g.*, Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1338 (2d Cir. 1973) (written hiring examination for police officers), *cert. denied*, 421 U.S. 991 (1975); Arrington v. Massachusetts Bay Transp. Auth., 306 F. Supp. 1355, 1358-60 (D. Mass. 1969) (general aptitude test); Bartholet, *supra* note 149, at 952 (noting that the late sixties and early seventies saw a wholesale outlawing of employment tests). *But see*

will often be rejected because any required reading or writing requirements may be demonstrated absent a diploma.[158]

Various considerations may save a test of questionable validity from complete rejection. If the test is only one factor considered when making the employment decision, or if the process includes waiver provisions, then courts may be more willing to accept the criteria in question.[159] The degree of adverse impact or the harshness of the decision (i.e., nonpromotion versus discharge) may also be relevant considerations.[160]

The final step in the analytical process, which may permit the plaintiff to prevail even in the face of a validated selection procedure, allows the plaintiff to show that an equally effective procedure would result in less adverse impact.[161] It is unclear what a plaintiff must do to meet this requirement. This is apparent in light of judicial statements that the employer is not required to choose a procedure with the least adverse impact,[162] and may even consider such items as monetary concerns when choosing a procedure.[163]

III. REMEDIES FOR EMPLOYMENT DISCRIMINATION

Remedial action in the face of established or suspected employment discrimination may be court-ordered, pursuant to a judicial finding or by consent of the parties. While a court has the power to enjoin the use of a discriminatory process,[164] its powers do not end there, thus allowing for a broad range of remedial relief. Likewise, parties will often enter into consent decrees in which, at some point after the institution of litigation, they will agree to the implementation and/or discontinuation of particular practices or procedures. How-

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Gottfredson, *Reconsidering Fairness: A Matter of Social and Ethical Priorities*, 33 J. VOC. BEHAV. 293, 295-301 (1988) (supporting "g-factor" tests, which purport to measure general intelligence).

158. *See* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 237 (5th Cir. 1974).

159. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 331 n.13 (1977) (waiver provision); Schmidt, *supra* note 143, at 283-85 (supervisor ratings and oral interviews as other factors).

160. *See* Seymour, *Why Plaintiffs' Counsel Challenge Tests*, 33 J. VOC. BEHAV. 345 (1988).

161. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). This issue is rarely addressed in the case law, probably because the validation process itself entails some showing of the necessity of the procedure to the decision-making.

162. *See* Clady v. County of Los Angeles, 770 F.2d 1421, 1432 (9th Cir. 1985), *cert. denied*, 475 U.S. 1109 (1986); Guardians Ass'n v. Civil Serv. Comm'n, 630 F.2d 79, 110 (2d Cir. 1980).

163. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 661 (1989); *Clady*, 770 F.2d at 1432.

164. 42 U.S.C. § 2000e-5(g) (1989).

ever, action by an employer to eliminate or correct past discriminatory practices is by no means limited to that effected through litigation. Rather, employers will often not only eliminate discriminatory practices, but will also take steps to affirmatively adjust for past discrimination because of moral or societal obligation or to avoid the threat of future litigation.[165]

A. Court-Ordered Relief in Contested Cases

A general theory in fashioning relief is to attempt to return victims of discrimination to their "rightful place," *i.e.*, the employment position they would have held but for the discriminatory acts.[166] This remedy is restricted by the requirement that the interests of the other employees be considered.[167] In addition, the "rightful place" theory is generally limited to actual victims of discrimination.[168]

Beyond such "victim-specific" remedial action, courts may give relief to an identified class which has suffered the effects of discrimination. One way in which courts will effect such class-wide remedies is through hiring or promotion "goals."[169] For example, courts can require that for each white promoted, a black will also be promoted[170] until a specified percentage is reached.[171] Courts may not trammel the interests of whites or other nonminorities, however, by displacing them from a currently held position, barring their promotion, or

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165. J. FEILD, AFFIRMATIVE ACTIONS: A FRESH LOOK AT THE RECORD TWENTY-TWO YEARS AFTER THE BEGINNING (1983); ORGANIZATION RESOURCES COUNSELLORS, CEO SURVEY ON NUMERICAL MEASURES (1984).

166. *See, e.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747, 767-68 (1976) (seniority); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 247-49 (5th Cir. 1974) (promotion procedures).

167. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 374-76 (1977). *But see Franks*, 424 U.S. at 774.

168. *See* Firefighters Local 1784 v. Stotts, 467 U.S. 561, 578-79 (1984).

169. In reality, these "goals" are quotas. However, courts often avoid the use of the term quotas, especially after the Supreme Court's condemnation of quotas in Regents of the University of California v. Bakke, 438 U.S. 265 (1978). For a discussion of *Bakke*, see *infra* text accompanying notes 259-268.

170. *See* United States v. Paradise, 480 U.S. 149, 171 (1987); Crockett v. Green, 534 F.2d 725, 717 (7th Cir. 1976); Morrow v. Crisler, 491 F.2d 1053, 1056 (5th Cir. 1974); Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir. 1971) (en banc).

171. The percentage is generally based on the percentage of the minority group in the general population, *see Paradise*, 480 U.S. at 179-80; *Crockett*, 534 F.2d at 718, or to the percentage of minorities in some other relevant category, *see, e.g.*, Griffin v. Carlin, 755 F.2d 1516, 1526 (11th Cir. 1985) (promotional register); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 173 (3d Cir.) (craft areas), *cert. denied*, 404 U.S. 854 (1971). The length of the application of class-wide remedies may be contingent upon the employer creating nondiscriminatory procedures. *See Paradise*, 480 U.S. at 178.

depriving them of other vested rights, such as seniority.[172] Of course, any minorities hired or promoted must be qualified.[173]

Occasionally courts have declined to implement mandatory hiring goals if less severe remedies will be equally effective.[174] In determining whether a less severe, more flexible approach will be equally effective, a court may examine the employer's history of discrimination and any existing efforts to eliminate discrimination.[175]

Relief may also include an award of back pay. In the context of Title VII cases, back pay is not necessarily a punitive measure,[176] but is necessary to make a party whole.[177] Likewise, the award of attorney's fees may be allowed, often more as a necessity to encourage meritorious cases rather than as a punitive measure.[178] As with hiring quotas, courts may decline to award back pay after considering good faith on the part of the employer.[179] In addition to back pay for individual victims of discrimination, courts have also ordered class-wide back pay, especially when it would be difficult to reconstruct individualized relief.[180]

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172. *See, e.g., Paradise*, 480 U.S. at 182 ("absolute bar" to promotion); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 281-84 (1986) (Powell, J., plurality opinion) (displacement from currently held position); Ford Motor Co. v. EEOC, 458 U.S. 219, 239-40 (1982) (seniority).

173. *See Paradise*, 480 U.S. at 183.

174. *See* Thompson v. Sawyer, 678 F.2d 257, 294-95 (D.C. Cir. 1982) (strictly defined hiring and promotional quotas can be set based upon specifications and reasonable timetables but developing impartial hiring and promotional goals may be a better remedy); Sledge v. J.P. Stevens & Co., 585 F.2d 625, 646-47 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979) (the court said the ordered injunction was the appropriate remedy, not a detailed quota system as ordered by the lower court).

175. *See* Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 448-50 (1986) (Brennan, J., plurality); Segar v. Smith, 738 F.2d 1249, 1294 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985).

176. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975). Such an award may have the effect of coercing compliance. *See id.* at 417-18.

177. *See id.* at 418.

178. *See id.* at 415.

179. Courts have declined to award back pay because of the unsettled nature of the law. *See* Kober v. Westinghouse Elec. Corp., 480 F.2d 240, 249 (3d Cir. 1973); United States v. N.L. Indus., Inc., 479 F.2d 354, 378-80 (8th Cir. 1973). Additionally, if an employer offers a complainant a job or promotion at the pay rate which the complainant is seeking, but without offering retroactive seniority, this will toll the employer's future liability for back pay. Ford Motor Co. v. EEOC, 458 U.S. 219, 232-34 (1982). Such a policy promotes the goal of making curative job offers, *id.* at 228, speeds up resolution of the cases, *id.* at 228-29, and still allows a plaintiff to pursue a claim for retroactive seniority, *id.* at 233-34.

180. *See* Segar v. Smith, 738 F.2d 1249, 1294 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 256-57 (5th Cir. 1974). *Segar* noted that although class-wide back pay may

As with applicable standards in establishing cases based on constitutional rather than Title VII violations,[181] judicial remedies purporting to address equal protection violations are subject to a different standard of review from those remedies aimed at Title VII violations.[182] In *Local 28 Sheet Metal Workers*,[183] the Court noted the variety of equal protection standards to which it had alluded in the past, and concluded with a synthesis of prior statements. Justice Brennan, announcing the Court's plurality opinion, found that the judicial relief, which established a percentage goal to remedy past failures, was narrowly tailored to a compelling governmental interest.[184]

A second important distinction between constitutional claims and Title VII actions is the extent to which relief will be made retroactive; where Title VII remedies are concerned, courts are likely to limit the scope of the order to providing relief for those actions occurring after the effective date of Title VII's applicability.[185] Unlike considerations of "intent," or even adverse impact in general,[186] both of

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benefit a few nonvictims, "the employer, as a proven discriminator, must bear that risk." *Segar*, 738 F.2d at 1291.

181. *See supra* text accompanying notes 58-64.

182. *See, e.g.*, Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 479-81 (1986) (Brennan, J., plurality) (noting that, although the Court had not decided on a standard, the relief in question was narrowly tailored to serve a compelling governmental interest and that this was the most rigorous test). In *Sheet Metal Workers'*, Justice Brennan cited cases that highlighted the various approaches taken by the Court in selecting the proper standard to apply when analyzing the constitutionality of race-conscious remedial measures: "narrowly tailored" to achieve a "compelling governmental interest," Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (opinion of Powell, J.); *id.* at 284-87 (O'Connor, J., concurring in part and concurring in the judgment); "a most searching examination," Fullilove v. Klutznick, 448 U.S. 448, 491 (1980) (opinion of Burger, C.J.); "necessary to the accomplishment of [a substantial state] interest," Regents of the University of California v. Bakke, 438 U.S. 265, 305 (1978) (opinion of Powell, J.); "substantially related to achievement of [important governmental] objectives," *Bakke*, 438 U.S. at 359 (opinion of Brennan, J., joined by White, Marshall and Blackmun, JJ.).

A great number of statements regarding applicable standards can garner no more than plurality opinions. *See, e.g.*, Watson v. Fort Worth Bank & Trust, 467 U.S. 977 (1988); United States v. Paradise, 480 U.S. 149 (1987); *Sheet Metal Workers*, 478 U.S. 421 (1986); *Wygant*, 476 U.S. 267 (1986); *Fullilove*, 448 U.S. 448 (1980); *Bakke*, 438 U.S. 265 (1978). *See also* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

183. Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986).

184. *Id.* at 480-81.

185. *See supra* notes 78-83 and accompanying text.

186. *See* James v. Stockham Valves & Fittings Co., 559 F.2d 310, 356 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978). Pettway v. American Cast Iron Pipe

which may utilize pre-Act statistics to infer discriminatory actions in the present, relief will not be extended to such pre-Act discrimination.

When ordering relief, courts will often exercise continuing jurisdiction over the defendant's employment procedures to ensure compliance with the court's order.[187] Additionally, courts may require pre-approval of a particular employment test or, in the course of a review of past practices, pre-approval of an examination that will subsequently replace them.[188]

B. Consent Decrees

Consent decrees contain elements of a contractual agreement as well as a court order.[189] As with court-ordered remedies in contested cases, consent decrees may incorporate hiring goals or quotas.[190] The resulting relief then is not always limited to the actual victims of discrimination.[191]

In approving a consent decree, a court usually will conduct a hearing to inquire into the legality, reasonableness, and fairness of the proposed agreement.[192] Absent fraud or collusion, a court will often refuse to second guess the agreement of the parties because of

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Co., 494 F.2d 211, 263-64 (5th Cir. 1977). A court may include a provision allowing plaintiff's counsel to inspect employment records. *See* Russell v. American Tobacco Co., 528 F.2d 357, 364 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976).

187. *See* Morrow v. Crisler, 491 F.2d 1053, 1056-57 (5th Cir.), *cert. denied*, 419 U.S. 895 (1974).

188. *See* Arnold v. Ballard, 390 F. Supp. 723, 731-33 (N.D. Ohio 1975).

189. *See* Williams v. Vukovich, 720 F.2d 909, 920 (6th Cir. 1983). A consent decree may be modified by the courts "should 'changed circumstances' subvert its intended purposes." *Id.* at 920. Courts may also order remedial actions when an employer violates a consent decree. *See, e.g.*, Turner v. Orr, 759 F.2d 817, 822-23 (11th Cir. 1985) (pursuant to provision in decree that allowed special master to order relief for violations of the decree, special master ordered promotion and back pay).

190. *See, e.g.*, Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 510 (1986) (specifying the number of minorities to be promoted); Youngblood v. Dalzell, 804 F.2d 360, 363-64 (6th Cir. 1986) ("double filling" every sixth vacancy with a white and a black candidate), *cert. denied*, 480 U.S. 935 (1987).

191. *See Local No. 93*, 478 U.S. at 516; Howard v. McLucas, 871 F.2d 1000, 1011 n.10 (11th Cir.), *cert. denied*, 493 U.S. 1002 (1989). In addition, consent decrees may serve as a basis for attempting resolution of other pending suits. *See* United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 836-37 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

192. *See* Williams v. City of New Orleans, 729 F.2d 1554, 1559 (5th Cir. 1984) (en banc); Williams v. Vukovich, 720 F.2d 909, 921 (6th Cir. 1983); United States v. City of Miami, 614 F.2d 1322, 1333 (5th Cir. 1980).

the preference for voluntary settlement of Title VII employment discrimination suits.[193]

On appeal, the criteria for determining the validity of a consent decree are similar to standards of review of court-imposed remedial action. Courts may consider the propriety of hiring or promotional goals in relation to the percentage of the minority community or labor pool,[194] whether the agreement trammels nonminority interests,[195] the duration of the provisions,[196] whether the agreement remedies past discrimination,[197] and whether it benefits only qualified persons.[198]

While interested parties may intervene to be heard regarding their objections to a consent decree,[199] they are not entitled to intervention by right.[200] This is true even though the consent decree may affect preexisting contractual rights.[201] The consent of interested parties is not required because the consent decree does not enjoin them or require action by them.[202]

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193. *See Williams v. City of New Orleans*, 729 F.2d at 1559; *Williams v. Vukovich*, 720 F.2d at 923; *United States v. City of Miami*, 614 F.2d at 1331. Where the government is the plaintiff, the danger of an unfair agreement is lessened. *Id.* at 1332. Besides conserving judicial and executive resources, a voluntary agreement increases the prospect of voluntary compliance. *Id.* at 1333.
194. *See Williams v. City of New Orleans*, 729 F.2d at 1562; *Williams v. Vukovich*, 720 F.2d at 917; *United States v. City of Miami*, 614 F.2d at 1339; *cf. Howard*, 871 F.2d at 1003 n.5 (analyzing target positions to which blacks probably would have been promoted absent discrimination, and then making promotions to those positions alternating between blacks and whites); Kirkland v. New York State Dep't of Correctional Serv., 711 F.2d 1117, 1129 (2d Cir. 1983) (comparing the percentage of minority promotions to the percentage of blacks on a ranked promotional list).
195. *See* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 578-79 (1984). Delay in promotion of nonminorities is not a sufficient reason to invalidate a consent decree. *See* Youngblood v. Dalzell, 804 F.2d 360, 364-65 (6th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987); *Kirkland*, 711 F.2d at 1134-35.
196. *See Kirkland*, 711 F.2d at 1135-36; *United States v. City of Miami*, 614 F.2d at 1340.
197. *See United States v. City of Miami*, 614 F.2d at 1339.
198. *See id.* at 1340.
199. *See, e.g.*, Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 506 (1986) (union); *Stotts*, 467 U.S. at 566 (union); Williams v. City of New Orleans, 729 F.2d 1554, 1556 (5th Cir. 1984) (en banc) (individuals); *United States v. City of Miami*, 614 F.2d at 1326-27 (fraternal organization); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 839-40 (5th Cir. 1975) (plaintiffs in other suits who may be affected by the consent decree and who are displeased with the terms of the consent), *cert. denied*, 425 U.S. 944 (1976).
200. *See Allegheny-Ludlum*, 517 F.2d at 843.
201. *See, e.g.*, EEOC v. AT&T, 556 F.2d 167, 170 (3d Cir. 1977) (collective bargaining agreement).
202. *See Local No. 93*, 478 U.S. at 529-30.

C. *Voluntary Affirmative Action Programs*

Voluntary affirmative action programs reflect an employer's independent decision to implement procedures to remedy past discrimination.[203] Like judicial decrees, however, voluntary programs cannot unnecessarily trammel the interests of nonminorities,[204] although they may call on nonminorities to share some of the burden of remedial action.[205]

Probably the best known form of affirmative action is one involving hiring or promotion "goals" or "quotas." Such a plan was the subject of notoriety as a result of the Supreme Court's decision in *Regents of the University of California v. Bakke*.[206] In *Bakke*, despite disagreement as to the basis for the conclusion, the Court struck down the use of bare quotas.[207]

However, this is not to say that any quota plan must necessarily fail. At least initially, quota plans survived in the wake of the *Bakke* decision.[208] For example, in *Smith v. Harvey*,[209] the St. Petersburg Fire Department required an extensive set of prerequisites before its "one-for-one"[210] affirmative action promotional plan would take effect. First, there had to be a finding of underutilization of minorities or females in both the relevant job and category. Second, the last promotion made had to be of a male or a white. Third, a qualified minority or female had to be available to fill the position. Fourth, there had to be no exceptions to justify a deviation.[211] The court subjected the plan to strict scrutiny and found it constitutional in light of several factors. The plan was to continue only until a racial and gender-based balance was achieved. Further, the court approved the plan because of its flexibility and its narrow remedial

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203. An employer is not required to wait for an employment procedure to be challenged before imposing remedial or "affirmative" action. *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 209 (1979).
204. *See id.* at 208.
205. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280-81 (1986) (Powell, J., plurality). Generally, a denial of a future opportunity, as opposed to a deprivation of a present benefit or right, will be upheld. This is especially true where there is no complete bar to nonminority hiring. *See id.* at 282.
206. 438 U.S. 265 (1978). For a brief review of *Bakke*, see *infra* text accompanying notes 259-268.
207. *See Bakke*, 438 U.S. at 271 (Powell, J., plurality).
208. *Bakke* did not eliminate quota systems altogether. Rather, it required as a prerequisite a judicial, legislative, or administrative finding of constitutional or statutory violations, with continuing oversight by the relevant governmental body. *Id.* at 307-08. Additionally, a nonquota system, where race is only a consideration, survives *Bakke*. *Id.* at 316-17.
209. 648 F. Supp. 1103 (M.D. Fla. 1986) (mem.).
210. That is, for each nonminority promoted, a minority would be promoted. *Id.*
211. *Id.* at 1106.

purpose. The fact that it did not displace whites, preclude whites from being promoted, and was valid only after a showing of past discrimination were all important factors to the court.[212]

Related to hiring or promotional quotas are minority "set-aside" programs, which impose goals or quotas on governmental contracting.[213] While the specific terms and conditions of the programs vary, they all require that a given percentage[214] of contracts awarded by a governmental entity be set aside for minority business enterprises.[215] As with other voluntary quota programs, minority set-aside programs must be narrowly tailored, must be premised on findings of past discrimination, and cannot trammel the interests of nonminorities.[216] Such programs will be more likely to withstand judicial scrutiny if they are flexible, if they incorporate waiver provisions that do not lock a governmental entity into a contract that is financially uncompetitive,[217] and as long as they do not put the entity in the position

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212. *Id.* at 1108-15. In *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the Supreme Court upheld a voluntary affirmative action program that included a 50% training quota. *Id.* at 198-200. The Court distinguished *Weber* from *Bakke* because *Bakke* involved the discrimination in federal assistance provisions of Title VI. *Id.* at 207 n.6.

213. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (local government); Fullilove v. Klutznick, 448 U.S. 448 (1980) (federal government); Michigan Rd. Builders Ass'n v. Milliken, 834 F.2d 583 (6th Cir. 1987), *aff'd mem.*, 489 U.S. 1061 (1989) (state government).

214. The percentage share is usually in the range of five to thirty percent. *See, e.g.*, *Fullilove*, 448 U.S. at 453-54 (10%); *Michigan Rd. Builders*, 834 F.2d at 584 (7% for minorities and 5% for females); Associated Gen. Contractors v. City of San Francisco, 813 F.2d 922, 924 (9th Cir. 1987) (30% for minorities and 10% for females); Ohio Contractors Ass'n v. Keip, 713 F.2d 167, 168-69 (6th Cir. 1983).

215. A "Minority Business Enterprise" is generally defined as a business with at least 50% minority ownership or with at least 51% of the stock owned by minority group members. *See Fullilove*, 448 U.S. at 454; *Michigan Rd. Builders*, 834 F.2d at 585.

216. *See* South Fla. Chapter of Associated Gen. Contractors of Am., Inc. v. Metropolitan Dade County, 723 F.2d 846, 851-55 (11th Cir.), *cert. denied*, 469 U.S. 871 (1984).

217. *See Keip*, 713 F.2d at 174; Joyce v. McCrane, 320 F. Supp. 1284, 1291 (D.N.J. 1970). A task force appointed by the Board of Estimates of the City of Baltimore to review the constitutionality of Baltimore's minority set-aside program noted the flexibility of set-aside plans. For example, if the bids are excessive, the Board of Estimates usually rejects the bids and requires that the contract be rebid. M. MILLEMANN & M. CHIBUNDU, PUBLIC COMMENT DRAFT REPORT OF THE TASK FORCE TO STUDY THE CONSTITUTIONALITY OF THE BALTIMORE CITY MBE AND WBE PROGRAM 29 (1989). The report noted that in practice, the majority of the value of the city's contracts was not subject to the set-aside provisions, whether because of exception, waiver, or other exemption. *Id.* at 29-31. Baltimore's set-aside program is codified at BALTIMORE CITY, MD., CODE art. 1, §§ 217-19 (Supp. 1989).

of entering into contracts which in some way conflict with other legislation.[218]

One final approach used to validate voluntary affirmative action programs is known as standardization. This approach seeks to eliminate differences in performance appraisals that exist between groups.[219] A helpful explanation appears in a brief filed on behalf of the City of Chicago in *United States v. City of Chicago*:[220]

> [I]f a college entrance examination were given to two groups of candidates on two separate dates, different forms of the test (i.e., different sets of test questions) might be given to avoid unfair advantage to the second group of candidates . . . .
>
> . . . [L]et us say that the mean score for candidates taking Form A of the test was 80, and that the standard deviation was 5. This would mean that 68% of [the] candidates scored between 75 and 85 (the mean score of 80, plus or minus the standard deviation of 5), that 95% of [the] candidates scored between 70 and 90 (plus or minus two times the standard deviation), and that 99% of [the] candidates scored between 65 and 95 (plus or minus three standard deviations).
>
> On Form B, let us suppose, the mean score was 75 and the standard deviation was 7. This would mean that 68% of the candidates scored between 68 and 82, that 95% scored between 61 and 89, and that 99% scored between 54 and 96. . . .
>
> . . . [O]ne must either assume that one group of candidates was substantially worse than the other group, or that Form A of the test was easier than Form B. Absent any evidence supporting the former assumption, one must make the latter assumption and conclude that, despite efforts to make the two tests the same, Form A was actually an easier test. Under these circumstances, a score of 85 on Form A is not the same as a score of 85 on Form B. Thus, to make

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218. *See, e.g., Associated Gen. Contractors*, 813 F.2d at 925-28 (municipal ordinance invalid because it violated city charter).

219. *See* United States v. City of Chicago, 752 F. Supp. 252 (N.D. Ill. 1990). Standardization may be made race neutral by standardizing scores according to the evaluator or may be race conscious by standardizing the scores according to race. *See* Supplemental Brief for the City of Chicago in Support of Its Motion for Modification of the Injunctive Order Regarding Sergeant Promotions at 10-11, 13-15 (filed June 22, 1988, in United States v. City of Chicago, No. 73 C 2080 (N.D. Ill.)) [hereinafter Supplemental Brief for the City of Chicago]. Standardization can also be accomplished by standardizing according to test form. *Id.* at 5-9.

220. Supplemental Brief for the City of Chicago, *supra* note 219.

fair comparisons among candidates from both groups, standardization of scores is necessary.[221]

While the example given uses comparisons between a homogeneous group of test takers on two different tests, in the context of affirmative action related to employment tests the differences described would be between two racial groups taking the same test. In other words, what might be observed is that white candidates had a mean score of eighty with a standard deviation of five, while black candidates taking the same test had a mean score of seventy-five with a standard deviation of seven. The City's brief continued its explanation of standardization as follows:

> The process of standardizing scores is a two step process. First, scores are converted to what statisticians call "Z-scores" or "standard scores." A Z score gives a candidate's relative standing within his or her own group. The formula for computing a Z score is:
>
> $$\text{Z Score} = \frac{\text{Raw Score minus Mean}}{\text{Standard Deviation}}$$
>
> . . . .
>
> The second step of the process involves converting Z scores to more recognizable standard scores, using the same mean and the standard deviation for both groups of candidates. The formula for doing so is:
>
> Standardized score = (Z Score × Standard Deviation) + Mean.[222]

Because the Z scores are given the same mean and standard deviation, the differences that exist between racial groups are eliminated.[223]

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221. *Id.* at 5-7.
222. *Id.* at 7-8.
223. For example, if the scores are standardized to a mean of 75 and a standard deviation of 10, the results will be as follows: for the Z score of 1, the formula will be 1 times 10, plus 75 for a standardized score of 85; and for the Z score of 1.4, the formula will be 1.4 times 10, plus 75, for a standardized score of 89. Therefore, after standardization, the black candidates' ranks will be higher than the white candidates'.

    The standardization plan promulgated by the City of Chicago resulted in the following mix of candidates in the top 500, the number of expected promotions to be made from the sergeants list: 332 whites (66.4%), 138 blacks (27.6%), 30 hispanics (6%); 442 males (84.4%) and 78 females (15.6%). Supplemental Brief for the City of Chicago, *supra* note 219, at 24. Although the plan was aimed at hispanics and females, blacks still did better than before standardization. *Id.* Noting that "[s]tandardization is a statistical methodology that permits a more meaningful comparison of the relative performance scores of candidates drawn from two or more groups," the District Court for the Northern District of Illinois upheld the plan. United States v. City of Chicago, No. 73 C 2080, slip op. at 6 (N.D. Ill. Nov. 21, 1988) (mem. order).

A second but related method of standardization is "within group scoring," which equalizes scores based on their percentile ranking within a particular group.[224] In this method, the raw scores are converted into group-based percentile ranks which reflect an applicant's standing with reference to his or her own racial group. This method effectively erases average group differences in test scores.[225] Applicants are then referred to the hiring or promotional authority ranked according to their percentile comparisons, rather than their raw scores.[226]

In *Bushey v. New York State Civil Service Commission*,[227] the Civil Service Commission observed test results that failed the "four-fifths rule."[228] As a result, it converted the scores of both minorities and nonminorities by equating or "normalizing" them, thereby increasing the minority pass rate to fifty percent without removing any of the nonminorities from the eligibility list.[229] In *Bratton v. City of Detroit*,[230] the Sixth Circuit reviewed a voluntary affirmative action program. A hybrid standardization procedure was used in *Bratton* where two lists were created but were not adjusted to reflect frequency distributions based on differences in performance among racial

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224. *See generally* Delahunty, *Perspectives on Within-Group Scoring*, 33 J. VOC. BEHAV. 463 (1988).

225. *See* NATIONAL RESEARCH COUNCIL, FAIRNESS IN EMPLOYMENT TESTING: VALIDITY GENERALIZATION, MINORITY ISSUES AND THE GENERAL APTITUDE TEST BATTERY 86 (1989).

226. *Id.* at 251. The effects of within group scoring can be seen in the following example. On a test with a perfect score of 100, 3 white candidates (A, B, and C) and 3 black candidates (X, Y, and Z) receive the following raw scores:

white candidates	*black candidates*
A - 97	X - 88
B - 94	Y - 87
C - 89	Z - 84

If the highest score in each group is 100% then the following chart indicates the percentile rankings of each candidate within the group:

white candidates	*black candidates*
A - 97 = 100%	X - 88 = 100%
B - 94 = 96.9% (94/.97)	Y - 87 = 98.9% (87/.88)
C - 89 = 91.7% (89/.97)	Z - 84 = 95.4% (84/.88)

Using the raw scores, the rank order is A, B, C, X, Y, Z. If four promotions are made, then the promotion rate for whites will be 100%, and the promotion rate for blacks will be 33.3%. Therefore, the results will yield an adverse impact under the EEOC's *Uniform Guidelines* "four-fifths rule" because 33.3 is less than four-fifths of 100. However, if the rank order is determined by the percentage amount assigned to each candidate, the result is: A, X, Y, B, Z, C. Now, two whites and two blacks are promoted, the promotion rate for each group is 66.7%, and the "four-fifths rule" is satisfied.

227. 733 F.2d 220 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117 (1985).

228. *Id.* at 222-23.

229. *Id.*

230. 704 F.2d 878 (6th Cir. 1983).

groups.[231] Instead, promotions were made alternately off of each list in order to achieve a fifty-fifty ratio.[232] The fifty-fifty ratio was based on the general population.[233] Perhaps the simplest post-test type of standardization was used in *Kirkland v. New York State Department of Correctional Services*,[234] where the average point disparity between races was calculated, then that number was added to the score of each minority.[235]

IV. ALLEGATIONS OF REVERSE DISCRIMINATION

A. Challenges Prior to the 1988 Term

Prior to *Martin v. Wilks*,[236] claims of reverse discrimination[237] certainly were not unknown. Such attacks generally fell into one of two categories. The first category consisted of nonminority intervenors challenging a court order, whether issued pursuant to a contested case or a consent decree. The second category was comprised of individuals challenging provisions of some affirmative action program.[238] Whatever the nature of the challenge, reverse discrimination cases have as an underlying theme a party who feels that his or her rights or opportunities are adversely affected by some action aimed at benefiting a minority or group of minorities.[239]

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231. *Id.* at 882.
232. *Id.*
233. *Id.* at 893.
234. 628 F.2d 796 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981).
235. *Id.* at 797-98. This approach could result in several statistical problems. For instance, blacks could achieve a score greater than the test's maximum. Also, a disproportionate number of minorities could be moved into the promotable ranges with the possible result of trammeling the interests of nonminorities.
236. 490 U.S. 755 (1989).
237. "Reverse discrimination" is a convenient shorthand for referring to cases in which a member of a nonminority class, usually a male and almost always a white, claims discrimination based on race and/or sex. In fact, it is no different from any other form of discrimination. The Supreme Court has made it clear that the same standards apply to alleged discrimination against nonminorities as minorities. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 71-72, 81 (1977).
238. This category could conceivably overlap with situations in which the program resulted from an employer's attempts to comply with a court order. The most significant of such cases is *Martin v. Wilks*, 490 U.S. 755 (1989). *See generally infra* text accompanying notes 297-307.
239. Ryanen, *Commentary of a Minor Bureaucrat*, 33 J. VOC. BEHAV. 379, 382-86 (1988) (postulating that there has been a change in the Civil Rights Act from protecting the right of individuals to be free from discrimination to preferential treatment of racial, ethnic, or gender groups).

1. *Challenges to Consent Decrees By or On Behalf of Nonminorities*

Consent decrees are often subject to challenge by nonminorities who feel adversely affected by the terms of the decree or by unions or fraternal organizations on behalf of nonminorities.[240] When a consent decree is challenged, the intervenors have the burden to show "unusual adverse impact" at the fairness hearing.[241] As a practical matter, this may be a difficult burden to meet in light of the fact that a consent decree often provides relief which would not have been available to the parties had they proceeded to trial.[242] Of course, to the extent that an agreement which is not legally defensible affects the rights of third parties, it may be struck down or modified.[243]

Although a challenger seeking to set aside a consent decree bears a heavy burden, such hearings may be more intense than in other types of cases in which a consent order is challenged because the decree may have a significant effect on third parties.[244] Review may be even more exacting when private litigants are involved, as opposed to a suit by a governmental entity, because financial considerations may affect private plaintiffs' decision to settle.[245]

When determining whether to enforce a consent decree against a challenge, the court is limited to the "four corners" of the agreement. The court may not speculate as to what the parties would have intended regarding missing provisions.[246] This is not to say that courts may not modify consent decrees if the original provisions are inequitable or unfair[247] or because of changed circumstances.[248]

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240. *See supra* note 199. These third parties are not necessarily nonminorities. *See, e.g.*, Williams v. City of New Orleans, 729 F.2d 1554, 1556 (5th Cir. 1984) (en banc) (females and hispanics).

241. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 779 n.41 (1976). Trial courts are apparently given fairly broad latitude in dealing with reverse discrimination claims because the standard of appellate review is abuse of discretion. *See Williams v. City of New Orleans*, 729 F.2d at 1558-59.

242. *See* Paradise v. Prescott, 767 F.2d 1514, 1529 (11th Cir. 1985), *aff'd sub nom.* United States v. Paradise, 480 U.S. 149 (1987); EEOC v. Safeway Stores, Inc., 611 F.2d 795, 799 (10th Cir. 1979), *cert. denied*, 446 U.S. 952 (1980).

243. *See, e.g.*, Williams v. Vukovich, 720 F.2d 909, 926 (1983) (striking down a consent decree that precluded future challenges if the black pass rate on an unvalidated examination was 55% of the white pass rate).

244. *See, e.g., Williams v. City of New Orleans*, 729 F.2d at 1560-61 ("searching examination") (quoting Fullilove v. Klutznick, 448 U.S. 448, 491 (1980)); United States v. City of Miami, 664 F.2d 435, 441 nn. 10, 11 & 12 (5th Cir. 1981) (en banc) (per curiam) (analogizing review to that involved in class actions, stockholders' derivative suits, and bankruptcy proceedings).

245. *See id.* at 1590.

246. *See* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 574-76 (1984).

247. *See, e.g.*, McAleer v. AT&T, 416 F. Supp. 435, 439-40 (D.D.C. 1976) (modi-

2. *Challenges to Voluntary Affirmative Action Programs*

Any analysis of judicial review of voluntary affirmative action programs should begin with *Fullilove v. Klutznick*.[249] This is not because of the particular program involved, but because *Fullilove* represents somewhat of an exception to the general rules governing judicial review of affirmative action programs. In *Fullilove*, the Supreme Court reviewed a claim of reverse discrimination based on the Public Works Employment Act of 1977 which provides minority set-asides for public works projects.[250]

After engaging in an extensive review of the provision's legislative history,[251] the Court made a particular point that it has to defer to Congress when examining the constitutionality of legislation by Congress, because Congress is a "co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States.'"[252] Distinguishing the case from one in which the Court was asked to review a decision of a single judge or governmental entity,[253] the Court discussed the unique position of Congress caused by its spending power, the Commerce Clause, the Necessary and Proper Clause, and its power to enforce the equal protection guarantees of the Fourteenth Amendment.[254] With this backdrop, the Court examined the means chosen by Congress to achieve goals which were within its unique purview. The Court stated that "[i]n no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power."[255] After reviewing numerous aspects of the legislation,[256] the Court held that the provision would withstand whichever

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fying consent decree so that males denied promotions in favor of females were awarded monetary damages).

248. *See, e.g.*, EEOC v. Safeway Stores, Inc., 611 F.2d 795, 800 (10th Cir. 1979) (quoting United States v. Swift & Co., 286 U.S. 106, 119 (1932)) (noting that the change must result in a "'hardship so extreme and unexpected' as to make the decree oppressive"), *cert. denied*, 446 U.S. 952 (1980).

249. 448 U.S. 448 (1980).

250. 42 U.S.C. § 6705(f)(2) (1988). This section provides standard set-aside provisions including a requirement that 10% of the amount of each grant be expended for minority business enterprises, which are defined as privately owned businesses with at least 50% ownership or at least 51% stock ownership of publicly owned businesses by citizens who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts. *Id.*

251. *Fullilove*, 448 U.S. at 456-73.

252. *Id.* at 472 (quoting U.S. CONST. art. I, § 8, cl. 1).

253. *Id.* at 473.

254. *Id.* at 473-77.

255. *Id.* at 480 (quoting National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 603 (1949)).

256. The Court held that consideration of race was permissible, 448 U.S. at 482-

of the *Bakke* standards chosen to guide a reviewing court.[257]

Thus, even a cursory reading of *Fullilove* will reveal the unique position of Congress to enact remedial legislation, and its importance to the Court's conclusion. However, one need not guess at the special nature of the *Fullilove* reasoning because, after *Fullilove*, certain Justices explicitly pointed out the uniqueness of the ruling. The decision in *Fullilove* does not apply to affirmative action which was not created by Congressional enactment.[258]

The *Bakke* decision proscribed the use of straight quotas as a criterion of affirmative action programs that were not specifically remedial in nature. *Bakke* involved a challenge to the University of California at Davis medical school policy of creating a special admissions program, which reserved a predetermined number of places for minorities.[259] Given the confusing array of pluralities and crisscrossing standards,[260] it is not surprising that *Bakke* has created more confusion than resolution.[261]

84; that "a sharing of the burden" by nonminority businesses which lost opportunities is not impermissible, *id.* at 484-85; that the legislation's "underinclusiveness" (*i.e.*, its failure to include all disadvantaged groups) did not render it improper, *id.* at 485-86; and that the legislation's "overinclusiveness" (*i.e.*, its bestowing of benefits on businesses which may not have previously suffered from discriminatory actions) was not fatal, especially in light of the legislation's waiver and exemption provisions, *id.* at 486-89.

257. *Id.* at 492.

258. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 491 (1989) (O'Connor, J., plurality) ("our treatment of an exercise of congressional power in *Fullilove* cannot be dispositive" when addressing a state or local plan). Whether the standard of review is the same for private employers is somewhat unclear. *See* Bushey v. New York State Civil Serv. Comm'n, 733 F.2d 220, 227 n.8 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117 (1985) (indicating they were not the same); United Steelworkers of Am. v. Weber, 443 U.S. 193, 200-01 (1979) (implying a distinction when it stressed that the case did not allege a constitutional violation or state action, but only a Title VII violation).

259. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 256, 269-70 (1978).

260. Justice Powell filed the plurality opinion. *Id.* at 269. Justices Brennan, White, Marshall, and Blackmun concurred in the judgment in part and dissented in part. *Id.* at 324. Justice White filed a separate opinion, *id.* at 379, as did Justices Marshall, *id.* at 387, and Blackmun, *id.* at 402. Justice Stevens, who concurred in the judgment in part and dissented in part, filed an opinion in which the Chief Justice, Justice Stewart, and Justice Rehnquist joined. *Id.* at 408.

261. *See, e.g.*, South Fla. Chapter of Associated Gen. Contractors, Inc. v. Metropolitan Dade County, 723 F.2d 846, 850 (11th Cir.) ("[n]o clear consensus emerged from the court's decision"), *cert. denied*, 469 U.S. 871 (1984); Bratton v. City of Detroit, 704 F.2d 878, 885 (6th Cir. 1983) ("there appears to be no agreement on the nature of the governmental interest which must be at stake . . . nor on the standard under which the method employed to achieve that interest is to be reviewed"), *cert. denied*, 464 U.S. 1040 (1984); United States v. City of Miami, 614 F.2d 1322, 1337 (5th Cir. 1980) ("We frankly admit

A number of concepts now familiar in analyzing discrimination cases, however, did emerge from *Bakke*. First, remedial action must be based on some finding, whether judicial, administrative or legislative, of a constitutional or statutory violation against the group in question.[262] Societal discrimination alone will not justify remedial actions.[263] Second, and most germane to this section, the Court upheld the consideration of race as a factor,[264] but rejected quotas per se.[265] Consistent with *Bakke*, when courts review voluntary plans which avoid specific racial goals or quotas, but instead are more flexible and are only conscious of race, the requirement of a finding of past discrimination appears to be eased.[266] This is not to say that racial distinctions may be used overtly for what is perceived to be "benign" societal purposes.[267] Likewise, a plan that may pass constitutional or Title VII scrutiny on its face may be invalidated if it is applied in a discriminatory manner.[268]

Just as hiring or contracting provisions that create minority preferences without a specific finding of discrimination may be held unconstitutional, so too will affirmative action programs that artificially attempt to prevent otherwise legal layoffs of minorities. In *Wygant v. Jackson Board of Education*,[269] the Supreme Court examined layoff provisions that generally favored school teachers with the most seniority but incorporated an exception that precluded "a greater percentage of minority personnel [from being] laid off than the current percentage of minority personnel employed at the time

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that we are not entirely sure what to make of the various *Bakke* opinions. In over one hundred and fifty pages of U.S. Reports, the Justices have told us mainly that they have agreed to disagree.").

262. *Bakke*, 438 U.S. at 307-08 (Powell, J., plurality).
263. *Id.* at 310 (Powell, J., plurality).
264. *Id.* at 316-18 (Powell, J., plurality).
265. *Id.* at 319-20 (Powell, J., plurality).
266. *See* Johnson v. Transportation Agency, 480 U.S. 616 (1987). A showing of conspicuous imbalance in traditionally segregated job categories may suffice to justify consideration of one's minority status. *Id.* at 630. This imbalance need not necessarily rise to the level required to establish a prima facie adverse impact case. *Id.* at 652. Johnson may be distinguishable because it involved a gender-based decision, which is generally subject to a lesser standard of scrutiny than a race-conscious choice. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 243-46 (1989). However, *Johnson* did refer to *Weber*, 443 U.S. 193 (1979), which involved minority quotas. *Johnson*, 480 U.S. at 630.
267. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976) (rejecting a policy of dismissing whites for stealing but not blacks).
268. *See, e.g.*, Lilly v. City of Beckley, 797 F.2d 191, 195 (4th Cir. 1986) (finding that adoption of a formal plan did not save the informal decision based on improper racial factors). As a practical matter, such situations will primarily address individualized decisions, although a series of "informal" decisions may give rise to a pattern or practice claim.
269. 476 U.S. 267 (1986).

of the layoff."[270] As a result of the provision, when layoffs became necessary in 1974, a tenured nonminority was laid off, while a probationary black teacher was not.[271]

While agreeing that the provision was unconstitutional, the Court was unable to garner a majority to agree on the particularized analysis to be applied. Justice Powell's plurality opinion, joined by Chief Justice Burger and Justice Rehnquist, applied a heightened level of scrutiny to the provision. This heightened level of scrutiny required the remedy to be narrowly tailored to the purpose to be accomplished.[272] The Powell plurality included language requiring a showing of prior discrimination by the relevant governmental entity in order to justify an affirmative action program.[273] Justice O'Connor agreed that the program was not sufficiently narrowly tailored,[274] but she rejected a necessity of contemporaneous findings of discrimination.[275] Justice White concurred in the result, apparently focusing on the fact that the plan discharged whites who would otherwise be retained in order to make room for blacks, none of whom had been shown to be victims of discrimination.[276] Aside from stating that this was a violation of the Equal Protection Clause, he offered little more insight into his reasoning.

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270. *Id.* at 270.

271. The Board of Education originally ignored the provision, laying off the probationary employee instead. *Id.* at 271. A federal court suit by two laid-off employees was dismissed for want of federal jurisdiction because there was no showing of pre-1972 discrimination to justify a constitutional claim and they failed to file EEOC claims as required by Title VII. *Id.* In a subsequent state court action, the Jackson City Circuit Court upheld a breach of contract claim and required the Board to abide by the minority preference provision, finding it constitutionally permissible as a remedy for past societal discrimination. *Id.* at 272.

272. *Id.* at 279-80. This increased level was especially necessary in view of the fact that whites were laid off, implying a lesser standard of scrutiny may be proper when nonminorities suffer less harm. *Id.* at 281-82. The practical significance of this standard is that it requires an inquiry to determine whether a less restrictive means may achieve a similar remedial purpose. *See id.* at 280 n.6, 283-84; *see also id.* at 273 (noting that the level of scrutiny is the same for classifications which discriminate against minorities or nonminorities).

273. *Id.* at 274-75. *But see* United Steelworkers of Am. v. Weber, 443 U.S. 193, 198 n.1 (1979) (noting historical discrimination). *Weber*, however, involved private rather than governmental affirmative action. *Id.* at 200-01.

274. *Wygant*, 476 U.S. at 294 (O'Connor, J., concurring in part and concurring in judgment).

275. *Id.* at 290-91. The distinction seems minor because Justice O'Connor noted the unanimity of the Court regarding the permissibility of a plan which was not limited to remedying specific instances of discrimination, *id.* at 287, and agreed that "societal discrimination" not traceable to a governmental entity's own actions was an insufficient basis for affirmative action, *id.* at 288.

276. *Id.* at 295.

In a similar vein, affirmative action programs may be susceptible to attack if they require acceptance of unqualified minorities in favor of qualified nonminorities.[277] These programs may still be valid, however, if they include minority training programs in an effort to achieve a balanced workforce.[278] Likewise, creating separate institutional settings in a effort to remedy past societal discrimination, or perceptions of inferiority, will generally be held unconstitutional.[279] Unless there is a showing that the class-based remedy directly benefits members of the class that is disproportionately burdened, the program or plan will not survive constitutional scrutiny by the courts.[280]

In the context of employment tests, voluntary programs may fail if they involve post-test manipulations of the scoring mechanism in an attempt to salvage a test with adverse impact. One of the strongest statements against such an approach was in *Hammon v. Barry*.[281] Although the pre-employment test for fire fighters had an adverse impact,[282] there was no showing that the tests were invalid.[283] Notwithstanding this fact, the Director of the Office of Human Rights required a hiring preference for minorities.[284] Because blacks who passed the test were not represented on the rank ordered list in proportion to the percentage who took the test, the department did away with rank ordering[285] and established hiring quotas.[286] In rejecting the provision, the circuit court noted that past discrimination did not justify the procedure.[287] The District of Columbia court specifically rejected the plan as not being narrowly tailored to cure the violation as required and thus rejected the attempt at a post-test "fix."[288] If the test was invalid, the remedy should have been to replace the test with a new, valid one, rather than continuing with a bad test remedied after the fact.[289]

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277. *See* Associated Gen. Contractors of Mass., Inc. v. Altschuler, 490 F.2d 9, 18 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974).
278. *See, e.g.*, United Steelworkers of Am. v. Weber, 443 U.S. 193, 199, 209 (1979) (upholding a plan to include 50% minorities in training programs).
279. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 727, 733 (1982) (lawsuit by males challenging a nursing college policy excluding males).
280. *Id.* at 728.
281. 813 F.2d 412 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1036 (1988).
282. *Id.* at 416, 428.
283. *Id.* at 430.
284. *Id.* at 414.
285. *Id.* at 417.
286. *Id.* at 419 n.14.
287. *Id.* at 423, 428 n.32 (rejecting discrimination in the 1950s as a consideration).
288. *Id.* at 430.
289. *Id.* The court also noted that the remedy did not consider alternatives, *id.* at 429, and was not narrowly tailored, *id.* at 430.

Likewise, in *San Francisco Police Officers Ass'n v. City of San Francisco*,[290] a three-part test involving multiple choice, written, and oral examinations was found to result in adverse impact.[291] When the multiple choice and written portions of the test were used as a pass/fail screening device, and the oral scores were used to rank the candidates, the adverse impact was eliminated.[292] Although the EEOC *Uniform Guidelines* support the consideration of alternate methods of using a test procedure to reduce adverse impact, and although the parties agreed that the revised scoring procedure was as job-related as the initial method, the court nonetheless struck down the city's *post hoc* change of the scoring procedure. This decision was based primarily upon the finding that the reweighting trammelled the interests of nonminorities.[293] In reaching this conclusion, the court noted that the process was result-oriented, with race and gender serving as the deciding factors. Therefore, the court found it appropriate to apply a heightened level of scrutiny.[294] In striking down the procedure, the court noted that not only was it insufficiently contoured to the desired goal,[295] but that such post-test changes misled applicants because they would have prepared differently had they known the relative importance of the three segments.[296]

The lesson of such cases is that post-examination shortcuts will not be upheld. Rather, a test must either be validated or a new test must be devised. While such *post hoc* fixes may be acceptable, and in fact necessary where temporary judicial remedies are involved, they will not be allowed as part of an ongoing means to adjust for a discriminatory test.

B. Martin v. Wilks

Unlike plaintiffs in prior reverse discrimination cases, the plaintiffs in *Martin v. Wilks*[297] were neither party intervenors in a lawsuit nor individuals challenging a voluntary affirmative action program. Rather, the plaintiffs were white firefighters who alleged that they were discriminated against when they were denied promotions in favor of less qualified blacks pursuant to consent decrees entered

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290. 812 F.2d 1125 (9th Cir. 1987), *vacated*, 842 F.2d 1126, *rev'd*, 869 F.2d 1182 (1988), *cert. denied*, 493 U.S. 816 (1989).
291. *Id.* at 1127.
292. *Id.*
293. *Id.* at 1130-31.
294. *Id.*
295. *Id.* at 1131-32.
296. *Id.* at 1132.
297. 490 U.S. 755 (1989).

into in a previous, unrelated proceeding.[298] The trial court rejected the plaintiffs' claims, finding that the city was required to comply with the consent decree.[299]

On appeal, the Eleventh Circuit reversed and remanded the case with directions that the consent decree be reexamined, suggesting that the operative law governing voluntary affirmative action programs be applied.[300] The Supreme Court granted certiorari and affirmed the Eleventh Circuit, acknowledging the maxim that persons not parties to a proceeding could not be bound by its outcome.[301] Although the majority of the circuits had held that a plaintiff's failure to intervene, when he knew or should have known that the litigation may affect his rights, would bar a subsequent "collateral attack," the Supreme Court expressly rejected this position.[302]

The Court noted that persons whose rights might be affected should be joined as parties by the original litigants and that persons not joined should not be penalized because the original litigants failed to join them.[303] Many possible future plaintiffs could be difficult, however, if not impossible, to identify because they might not even be employees at the time of the original action. The Supreme Court recognized this weakness but rejected it as a basis for disallowing subsequent challenges.[304] Furthermore, the Court was unpersuaded that the prospect of future litigation posed a significant concern because the "breadth of a lawsuit and concomitant relief may be at least partially shaped in advance through Rule 19 to avoid needless clashes with future litigation."[305]

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298. *Id.* at 760. Prior to the entry of the consent decree, the court held hearings and published notices in local newspapers. *Id.* at 759. The firefighters association objected, and seven firefighters who were not parties in *Martin* sought intervention. The district court denied their request, and the denial was subsequently affirmed. United States v. Jefferson County, 720 F.2d 1511 (11th Cir. 1983).

299. *Martin*, 490 U.S. at 759.

300. *Id.* at 761.

301. *Id.*

302. *Id.* at 762-63. In the previous term, the Court upheld the Second Circuit's refusal to allow a collateral attack by non-parties against a consent decree regarding discriminatory employment tests. Marino v. Ortiz, 806 F.2d 1144 (2d Cir. 1986), *aff'd by an equally divided Court*, 484 U.S. 301 (1988) (per curiam). Although *Martin* apparently overrules *Marino*, it only makes a passing reference to *Marino*. *Martin*, 490 U.S. at 762-63 n.3.

303. *Martin*, 490 U.S. at 762-67.

304. *Id.*

305. *Id.* at 768. This assumes that disgruntled plaintiffs will see the wisdom of a court order and refrain from filing suit. It also does not account for the less thoroughly considered result which sometimes is found in consent decrees. *See generally* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (consent decree that did not address layoffs could not later be modified by the

Standing alone, *Martin v. Wilks* is a significant case because it makes clear that judicial action, whether pursuant to a contested case or limited to affirmance of a consent decree,[306] will forever be subject to later attack by nonparties.[307] As discussed in the two sections which follow, however, two opinions handed down by the Supreme Court earlier during the same term imply an even greater role for *Martin* in the realm of reverse discrimination claims.

C. *City of Richmond v. J.A. Croson Co.*

In *City of Richmond v. J.A. Croson Co.*,[308] the Supreme Court noted probable jurisdiction in light of the Court's decision in *Wygant v. Jackson Board of Education*[309] to consider the striking down of Richmond's affirmative action program regarding minority contractors.[310] Specifically, the Court reviewed the city's ordinance[311] requiring prime contractors performing work under city construction contracts to subcontract at least thirty percent of the contract's dollar

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court to abolish the standard seniority system). FED. R. CIV. P. 19(a) provides:

> Persons to be Joined if Feasible.
>
> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and the joinder of that party would render the venue of the action improper, the party shall be dismissed from the action.

306. While the challenged employment action in *Martin* was based on a prior consent decree, *Martin*, 490 U.S. at 759, the Court clearly included prior action pursuant to a contested case in the scope of its analysis, *id.* at 766-68.
307. The Court did not address the prospect of successive waves of attack by new litigants based on theories that had already failed. The dissenting opinion of Justice Stevens, with whom Justices Brennan, Marshall and Blackmun joined, did allude to such a prospect, as well as the risk of inconsistent results. *Id.* at 783-85 (Stevens, J., dissenting). Although repetitive lawsuits would probably become frivolous in time, the prospect of inconsistent rulings could exacerbate, or at least do nothing to retard, a string of future lawsuits.
308. 488 U.S. 469 (1989).
309. 476 U.S. 267 (1986).
310. *Croson*, 488 U.S. at 477.
311. RICHMOND, VA., CITY CODE § 12-156(a) (1985).

amount to "Minority Business Enterprises."[312] The plan declared that it was remedial in nature, and it expired after approximately five years.[313] As in *Fullilove v. Klutznick*,[314] the Richmond plan authorized waivers in appropriate circumstances.[315] Although a denied contractor could protest under the Richmond procurement policies, the Court found that there was no direct administrative appeal from a decision regarding whether to grant a waiver.[316]

The backdrop of the plan included a study which indicated that, while 50% of Richmond's population was black, only 0.67% of the city's prime construction contracts had been awarded to minority businesses from 1978 to 1983.[317] Additionally, a variety of contractors' associations had no minority businesses in their membership.[318] However, at the public hearing on the plan, no evidence of direct discrimination was presented. Witnesses also testified that minority contractors were not available.[319] Testimony indicated that only 4.7% of the construction firms in the United States were minority owned and that 41% of those were in California, New York, Illinois, Florida, and Hawaii.[320] Additionally, testimony indicated that representatives of local contractors' organizations were actively seeking minority contractors.[321]

In response to an invitation to bid on a city project, the respondent, J.A. Croson Co., sought bids from subcontractors to perform plumbing work.[322] After several unsuccessful attempts, Croson received an expression of interest from only one minority subcontractor. When the subcontractor was unable to obtain financing and did not submit a bid, Croson requested a waiver of the thirty percent set-aside.[323] Upon learning of the waiver request, the subcontractor submitted a bid to Croson that increased the total bid price by seven percent.[324] The waiver request was denied, and the city decided to rebid the project.[325] Thereafter, Croson sued under 42

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312. *Croson*, 488 U.S. at 477. A "Minority Business Enterprise" must be at least fifty-one percent owned and controlled by minority group members. *Id.* at 478 (quoting RICHMOND, VA., CITY CODE § 12-23 (1985)).
313. *Id.* at 478 (citing RICHMOND, VA., CITY CODE § 12-158(a) (1985)).
314. 448 U.S. 448 (1980).
315. *Croson*, 488 U.S. at 478 (quoting RICHMOND, VA., CITY CODE § 12-157 (1985)).
316. *Id.* at 479 (citing RICHMOND, VA., CITY CODE § 12-126(a) (1985)).
317. *Id.* at 479-80.
318. *Id.* at 480.
319. *Id.*
320. *Id.* at 481.
321. *Id.*
322. *Id.* at 481-82.
323. *Id.* at 482.
324. *Id.* at 482-83.
325. *Id.* at 483.

U.S.C. § 1983, arguing that the Richmond ordinance was unconstitutional on its face and as applied.[326] Both the District Court for the Eastern District of Virginia and the Fourth Circuit upheld the statute, according deference to the city's legislative decisions, consistent with the deference accorded to Congress by the Supreme Court in *Fullilove v. Klutznick*.[327] The decisions were based upon the findings that the ordinance was reasonable in light of past discrimination.[328] In light of *Wygant v. Jackson*,[329] the Supreme Court vacated and remanded for further consideration.[330]

On remand, the Fourth Circuit found the plan unconstitutional on two counts. First, the plan was premised on findings of broad, societal discrimination, rather than discrimination within the city of Richmond.[331] Second, even if a compelling interest existed in the form of prior discrimination,[332] the thirty percent quota was not narrowly tailored.[333]

In affirming, a plurality of the Court distinguished its decision in *Fullilove v. Klutznick*. The plurality noted that *Fullilove*, which did not rely on strict scrutiny, involved congressional action.[334] The plurality stated that the Fourteenth Amendment enlarged congressional power but restricted the power of the states.[335] Therefore, while Congress has a positive grant of power to effect general remedial action,[336] states or localities are required to premise remedial

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326. *Id.*
327. 448 U.S. 448 (1980).
328. *Croson*, 488 U.S. at 483-84.
329. 476 U.S. 267 (1986) (Powell, J., plurality). *Wygant* rejected societal discrimination as a basis for voluntary affirmative action by a governmental entity. *Id.* at 274-75 (Powell, J., plurality).
330. *Croson*, 488 U.S. at 485 (citing J.A. Croson Co. v. City of Richmond, 478 U.S. 1016 (1986) (mem.)).
331. *Id.* (quoting J.A. Croson v. City of Richmond, 822 F.2d 1355, 1358 (4th Cir. 1987) (quoting *Wygant*, 476 U.S. at 274 (Powell, J., plurality))).
332. For cases indicating that past discrimination creates a compelling or strong governmental interest, see, e.g., United Steelworkers of Am. v. Weber, 443 U.S. 193, 204-05, 208 (1979) (private affirmative action); Associated Gen. Contractors v. City of San Francisco, 813 F.2d 922, 935-36 (9th Cir. 1987) (government action falling more heavily on a single group); Associated Gen. Contractors v. Altschuler, 490 F.2d 9, 18 (1st Cir. 1973) (long history of discrimination).
333. *Croson*, 488 U.S. at 486.
334. *Id.* at 486-87 (O'Connor, J., plurality).
335. *Id.* at 490 (O'Connor, J., plurality).
336. While not specifically mentioning judicial remedies, the nature of the Court's analysis certainly could preclude judicial remedies not premised on specific findings, and should, by its import, apply similarly to consent decrees entered into by private parties and approved by the courts. *Id.*

action on a finding of prior discrimination in the area to which the remedy is applied.[337]

Against this backdrop, the plurality reaffirmed prior decisions applying the same standard of review to all racial classifications, whether they harmed or benefited any particular minority group.[338] The Court then searched for findings of discrimination in Richmond that would justify its set-aside program. A majority of the Court held that past discrimination in the construction industry was too general[339] and that there was "nothing approaching a prima facie case of a constitutional or statutory violation by 'anyone' in the Richmond construction industry."[340]

Significantly, the majority stated that the use of statistical disparities, which existed in this case, has little probative value when special qualifications are needed to fill particular jobs.[341] While this proposition had some prior support in *Mayor of Philadelphia v. Educational Equality League*,[342] and was the central focus of *Wards Cove Packing Co. v. Atonio*,[343] it was somewhat of a departure from the analysis of *Griggs v. Duke Power Co.*[344] and its progeny, especially where discrimination in hiring was involved. These cases regularly compared the percentage of minorities in a relevant hiring area with the percentage of minorities hired.[345] Demonstrating plaintiffs' qualifications was not necessary to establish a prima facie case, rather it was incumbent on the employer to show its practices discriminated based on qualifications.[346] Only in cases of adverse treatment, where intentional discrimination was alleged, were plaintiffs required to show as part of their initial burden that they were qualified.[347]

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337. *Id.* at 491-92 (O'Connor, J., plurality). Such prior discrimination could include situations where the government was a "passive participant" in local industry discrimination. *Id.* Similar prerequisites have been noted in school desegregation cases. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 414, 417 (1977) (rejecting "cumulative violations" as a basis for justifying systemwide restructuring); Milliken v. Bradley, 418 U.S. 717, 744-45 (1974) (requiring a specific showing of interdistrict segregation before setting aside district boundaries).
338. *Croson*, 488 U.S. at 493-94 (O'Connor, J., plurality).
339. *Id.* at 498-99.
340. *Id.* at 500 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274-75 (1986)).
341. *Id.* at 501-02.
342. 415 U.S. 605, 620 (1974).
343. 490 U.S. 642 (1989).
344. 401 U.S. 424 (1971).
345. *See supra* notes 100-107 and accompanying text.
346. *See Wards Cove*, 490 U.S. at 668-69 n.14 (Stevens, J., dissenting). However, the majority in *Wards Cove* indicated that the employer need only come forward with an explanation of the relevancy of its qualifications. *Id.* at 659.
347. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

Whether a more explicit revision of the *Griggs* standard will occur remains to be seen. In any event, the *Croson* majority rejected the assumption that the scarcity of minority contractors was due to any specific or generalized discriminatory practices.[348] In particular, the majority speculated that blacks simply may be drawn to occupations other than construction.[349] Additionally, the plurality noted that without a showing of a discriminatory cause of the low minority involvement in the construction industry, the government could not justify its treatment of its citizens on a racial basis.[350]

The majority further analyzed the means chosen by the city of Richmond to relieve presumed inequality[351] by noting that it had failed to consider alternatives more directly related to the causes of lack of minority participation, such as the lack of capital.[352] The Court also rejected the thirty-percent quota because such a quota presumed the existence of sufficient minority business enterprises to meet the requirement.[353]

D. Wards Cove Packing Co. v. Atonio

When the Supreme Court delivered its opinion in *Wards Cove Packing Co. v. Atonio*,[354] the reaction of the legal community was immediate.[355] *Wards Cove* had the effect of creating a new burden

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348. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 502-03 (1989).
349. *Id.* at 503.
350. *Id.* at 510-11 (O'Connor, J., plurality). Again, this conclusion seems to redefine the *Griggs* conclusion that adverse impact does not require a showing of actual discriminatory acts and that the statistical situation alone establishes a prima facie case.
351. Since the Court's ultimate holding is based on its rejection of the "objective" prong of the analysis, the discussion of the "means" prong appears to be dicta, or as the Court characterized its discussion, "observations." *See id.* at 507.
352. *Id.*
353. *Id.* at 507-08. Implicit in this holding is the prospect that a nonquota program that considers race as a factor might pass constitutional muster. However, such a conclusion would necessitate a revision of the analysis regarding the use of statistical comparisons, which was not supported by a majority in *Croson*. This conclusion was suggested by the plurality of the Court which recognized the prospect of race-neutral devices even absent evidence of discrimination. *Id.* at 509-10.
354. 490 U.S. 642 (1989).
355. Much of the reaction was unfavorable. *See, e.g.*, NAT'L L.J., June 26, 1989, at 1 ("very clear, unmistakable signal of hostility to civil rights"); WASH. POST, June 14, 1989, § 1, at A4 ("extremely damaging"); L.A. TIMES, June 5, 1989, at A2, col. 2 ("blow to minorities"). From an employer's point of view, however, the decision was welcomed. *See, e.g.*, N.Y. TIMES, Oct. 27, 1989, at B7, col. 3; WASH. TIMES, Aug. 1, 1989, at F3; L.A. TIMES, June 21, 1989, § 2, at 6, col. 4.

on the plaintiff alleging adverse impact, requiring a more specific showing of cause and effect between a particular employment practice and resulting discrimination.

In *Wards Cove*, Filipino and Alaska native cannery workers brought a Title VII suit for discrimination. The plaintiffs alleged that the Wards Cove Packing Company's hiring and promoting practices denied them more desirable jobs as noncannery workers.[356] The claims were advanced under both adverse treatment and adverse impact theories.[357]

The "cannery jobs" were unskilled positions which were filled primarily by Filipinos and Alaska natives.[358] In contrast, the "non-cannery jobs," which were "skilled positions," paid more than cannery positions, and were filled primarily by whites.[359]

The United States District Court for the Western District of Washington rejected both the adverse treatment and adverse impact claims.[360] The Ninth Circuit initially affirmed the decision,[361] but subsequently withdrew its opinion to review the case en banc.[362] In its en banc opinion, the Ninth Circuit recognized the conflict between the federal circuits regarding the propriety of applying adverse impact analysis to subjective hiring decisions like those at issue in *Wards Cove*.[363] The Ninth Circuit returned the case to the panel[364] for reconsideration in light of its decision that adverse impact analysis could be applied to subjective employment practices if a causal connection were shown between the practice and the impact.[365] The panel then found that, by using the en banc opinion's standard, the plaintiffs had made out a prima facie case under an adverse impact

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356. *Wards Cove*, 490 U.S. at 646-48. These practices included nepotism, a rehire preference, lack of objective hiring criteria, separate hiring channels, an English language requirement, and a practice of not promoting from within. *Id.* at 647.
357. *Id.* at 648.
358. *Id.* at 647.
359. *Id.*
360. *Id.* at 648.
361. Atonio v. Wards Cove Packing Co., 768 F.2d 1120 (9th Cir. 1985).
362. Atonio v. Wards Cove Packing Co., 787 F.2d 462 (9th Cir. 1985).
363. Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1480 n.1 (9th Cir. 1987) (en banc). This decision predated *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988). In *Wards Cove*, hiring officials exercised their subjective judgment in determining whom to hire because no specific tests or objective criteria existed. *Wards Cove*, 810 F.2d at 1479.
364. *Wards Cove*, 810 F.2d at 1480.
365. *Id.* at 1482. Under the standard set forth in the court's en banc decision, a plaintiff would be required to show a significant adverse impact upon a protected class, to identify the specific employment practices responsible, and to show a causal relationship between the identified practice and the adverse impact. *Id.*

theory.[366] The case was then remanded for consideration of any business necessity defense.[367] Noting that the case raised questions on which the Supreme Court had been evenly divided in *Watson v. Fort Worth Bank & Trust*,[368] the Supreme Court granted certiorari.[369]

A review of *Watson* is warranted to understand the significance of *Wards Cove*. In *Watson*, a black bank employee complained that her superior's decision on four separate occasions to promote a white instead of her constituted racial discrimination.[370] The plaintiff contended that adverse impact analysis could be applied to subjective decisions where no particular tests or other objective criteria were involved.[371]

A majority of the Court agreed that subjective employment decisions were susceptible to analysis under the adverse impact theory because discretionary decisions, while not intended to discriminate, might nevertheless discriminate as a result of lingering stereotypes and prejudices.[372] The Court also noted that, if adverse impact analysis was not applied to subjective decisions, employers could simply circumvent the mandates of *Griggs* by replacing objective tests with ill-defined, subjective criteria.[373]

However, the Court could not agree on what evidentiary standards should apply when reviewing adverse impact claims directed at subjective decision-making. A plurality opinion by Justice O'Connor, joined by the Chief Justice and Justices White and Scalia, noted the difficulty in providing *Griggs*-type "validation" of discretionary, and often subtle and complex, employment decisions.[374] Especially when statistical comparisons work against the employer, a danger would exist that the employer might resort to quotas to guard against

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366. Atonio v. Wards Cove Packing Co., 827 F.2d 439, 449 (9th Cir. 1987). The district court's rejection of the adverse treatment claims was left undisturbed. *Wards Cove*, 490 U.S. at 649 n.4.
367. *Wards Cove*, 490 U.S. at 649.
368. 487 U.S. 977 (1988).
369. *Wards Cove*, 490 U.S. at 649-50.
370. *Watson*, 487 U.S. at 982-83.
371. *Id.* at 982-84. Both the trial court and the Fifth Circuit examined the claim using adverse treatment analysis. *Id.* at 983-84.
372. *Id.* at 990-91. In *Watson*, evidence was presented that the plaintiff was told at one point that "the teller position was a big responsibility with 'a lot of money . . . for blacks to have to count.'" *Id.* at 990. It is also noteworthy that there is sometimes a fine line between subjective and objective criteria. For example, many "objective" employment tests will involve subjective elements. *See* Harris v. Marsh, 679 F. Supp. 1204, 1304 (E.D.N.C. 1987). This would be especially true when tests include "assessment center" concepts. *See supra* note 152.
373. *Watson*, 487 U.S. at 990.
374. *Id.* at 991-92 (O'Connor, J., plurality).

adverse impact attacks.[375] Owing to this concern, the plurality provided what it called "a fresh and somewhat closer examination of the constraints that operate to keep that analysis within its proper bounds."[376]

These "constraints" require the plaintiff first to identify a specific employment practice, rather than show a statistical disparity in the workforce.[377] Second, the plaintiff must show a causal relationship between the identified practice and a statistically significant adverse impact on a protected group.[378] It was unclear from this opinion how a plaintiff could meet its burden when the employer uses a battery of subjective considerations which are not clearly defined and which have vague, highly discretionary criteria.[379]

The plurality made clear that the employer need only defend by showing a business necessity, which appears to be a less onerous task than validation of a test.[380] Significantly, the employer never bears the burden of proof, but only a burden of producing evidence that its practices are based on legitimate business needs.[381] It is unclear how minimal this burden is intended to be.

Although he agreed with the general proposition that disparate impact analysis should be applied to subjective employment decisions,[382] Justice Blackmun, in a separate opinion joined by Justices Brennan and Marshall, argued that the plurality had essentially transformed adverse treatment analysis into adverse impact analysis.[383] Justice Blackmun focused primarily on the plurality's refusal to shift the burden of proof to the employer.[384] Justice Blackmun also expressed concern regarding the "causation" requirement im-

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375. *Id.* at 992-93 (O'Connor, J., plurality). Such a fear is not purely speculative. Even in cases examining objective tests that resulted in adverse impact, employers have resorted (or attempted to resort) to shortcuts in order to stave off challenges. *See, e.g., supra* notes 68-73 and accompanying text (post-test "bottom line" adjustments); *supra* notes 219-226 and accompanying text (post-test banding).

376. *Watson*, 487 U.S. at 994 (O'Connor, J., plurality).

377. *Id.* (O'Connor, J., plurality).

378. *Id.* at 994-95 (O'Connor, J., plurality). Since the Court specifically used the term "protected group," it is unclear whether such analysis would apply equally to reverse discrimination claims. *But see supra* note 237.

379. *See Watson*, 487 U.S. at 1009-10 (Blackmun, J., concurring in part and concurring in the judgment).

380. *Id.* at 997 (O'Connor, J., plurality).

381. *Id.* (O'Connor, J., plurality).

382. *Id.* at 1000 (Blackmun, J., concurring in part and concurring in the judgment).

383. *Id.* at 1001-02 (Blackmun, J., concurring in part and concurring in the judgment).

384. *Id.* at 1000-04 (Blackmun, J., concurring in part and concurring in the judgment).

posed by the plurality.[385] In any event, *Watson* failed to establish clear guidelines endorsed by a majority of the Court for evaluating allegations of adverse impact due to subjective decisions.

Wards Cove provided an affirmation of the *Watson* plurality decision by a majority of the Court.[386] In *Wards Cove*, the Court withdrew from prior acceptance of statistics alone as a basis for adverse impact. Further, the language of *Wards Cove* could be read to extend this analysis to objective employment criteria, the genesis of which appeared in the *Watson* plurality.

In finding that the plaintiffs had made out a prima facie case of discrimination in hiring noncannery workers, the Ninth Circuit had compared the percentage of minority workers in the cannery workforce with the percentage in the noncannery workforce.[387] The Supreme Court rejected this approach because there had been no showing that the cannery workers were qualified for noncannery jobs. Instead, the Court indicated that the absence of minorities in noncannery positions could be due to the dearth of qualified minority applicants.[388] Furthermore, the Court found an overrepresentation of minorities in cannery jobs because the employees were supplied by a predominantly nonwhite union.[389]

Having reached this conclusion, the Court remanded the case to the district court for further inquiry to determine whether some other indicia of adverse impact may be found in any of Wards Cove's employment practices.[390] Before doing so, however, the Court offered standards for conducting that review. It is in this discussion that a majority of the Court affirmed the *Watson* plurality.

The *Wards Cove* Court began by explicitly affirming Justice O'Connor's statement in *Watson* that the "plaintiff's burden . . . goes beyond the need to show that there are statistical disparities."[391] Turning the *Connecticut v. Teal*[392] rejection of "bottom line" analysis

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385. *Id.* at 1006-08 (Blackmun, J., concurring in part and concurring in the judgment).

386. Justice Kennedy did not participate in the *Watson* decision. *Id.* at 981. The *Wards Cove* majority was composed of the *Watson* plurality with the addition of Justice Kennedy. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

387. *Wards Cove*, 490 U.S. at 650-51.

388. *Id.* at 651-52. Noncannery jobs included accountants, electricians, doctors, and engineers. *Id.* at 651. Although some noncannery jobs were unskilled and were similar in skill requirements to cannery jobs, it did not affect the Court's analysis. *Id.* This analysis ties in with the causal connection analysis because, unlike the inquiry of *Griggs* and its progeny, a reason for the absence of minorities in the jobs must now be shown, *i.e.*, causality must be established.

389. *Id.* at 654.

390. *Id.* at 655.

391. *Id.* at 656 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (O'Connor, J., plurality)).

392. 457 U.S. 440 (1982).

on its head, the Court stated that a "Title VII plaintiff does not make out a case of disparate impact simply by showing that, 'at the bottom line,' there is racial *imbalance* in the work force," rather, a causal relationship must be shown between a specific practice and discriminatory effects.[393]

Assuming that the plaintiffs are able to make out a prima facie case, the employer must demonstrate a business justification.[394] As the plurality in *Watson* stated, and as the *Wards Cove* majority affirmed, however, the burden of proof does not shift to the employer.[395] Interestingly, the Court observed that if the employer demonstrates a business necessity, the plaintiffs may still show that other devices would serve the same purposes, thereby proving the employers were using their tests "merely as a 'pretext' for discrimination."[396] This implies that the burden to show less discriminatory means was in some way governed by the more difficult pretext requirement.[397] In addition, the opinion contained an implicit deference to employers' decisions when it stated that "[c]ourts are generally less competent than employers to restructure business practices."[398] Significantly, the *Wards Cove* analysis was not limited to subjective job decisions. The opinion specifically identified the objective job criteria in question.[399] Yet the Court made no attempt to reconcile its decision with *Griggs*, which required no causation between the employment practice and the disparate impact. *Wards Cove* could conceivably be distinguished from *Griggs* because the lower court's decision in *Wards Cove* was based on improper statistical comparisons. Also, the causation requirement may mean only that a particular employment practice be singled out for attack,

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393. *Id.* In *Connecticut v. Teal*, the Court held that a racially neutral work force does not immunize an employer against specific acts of discrimination. *See supra* notes 68-73 and accompanying text.
394. *Wards Cove*, 490 U.S. at 659.
395. *Id.*
396. *Id.* (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)). However, *Albemarle* was not a disparate treatment case involving the "pretext" element, but rather involved employment tests. *Albemarle*, 422 U.S. at 427-28. The reference in *Albemarle* to pretext came via a quote from McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973). *Albemarle*, 422 U.S. at 425. Immediately following the *McDonnell Douglas* reference, the *Albemarle* Court stated that "[i]n the present case, however, we are concerned only with the question whether Albemarle has shown its tests to be job related." *Id.*
397. The pretext evidence will often be the same as that presented to establish a prima facie case. At the prima facie stage, however, the plaintiff need only meet a lower threshold requirement; at the pretext stage, he must convince the trier of fact.
398. *Wards Cove*, 490 U.S. at 661 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978)).
399. *Id.* at 647-48.

rather than requiring a showing of exactly what it is about that practice that discriminates. However, two segments of dicta in *Wards Cove* indicate otherwise.

First, the Court clearly indicated that the absence of minorities may be due to the lack of *qualified* minority applicants.[400] However, there is no indication as to how a court should determine who is a qualified applicant. Arguably, if an applicant fails the employer's employment test—perhaps the very test under attack—the applicant may be deemed unqualified.[401] Arguably the dicta in *Wards Cove* may allow the existence of this circular reasoning to justify this type of employment criteria.

Second, *Wards Cove* specifically stated that a failure to achieve a "bottom line" racial balance alone did not make out a case of adverse impact.[402] This single statement seems to significantly undermine *Griggs* and its progeny. If mere racial imbalance no longer will establish a prima facie case, then one must ponder just what will establish a plaintiff's case.

In the context of *Wards Cove*, the only conclusion to be drawn is that the plaintiff must explain *why* an identified practice causes discrimination, i.e., he must show causation. The import of this decision will most likely become apparent in the course of its application to future situations. A particular question, and the final topic of this analysis, is the effect *Wards Cove* may have on claims of reverse discrimination.

E. A New Standard For Reverse Discrimination: The Marriage of Croson and Wards Cove

Whether the 1988 term of the Supreme Court represents a time of major upheaval in discrimination law, or whether the potentially landmark language of *Croson* and *Wards Cove* will be interpreted narrowly so as to reduce their impact, remains to be seen. However, the stage most certainly is set for what could be a redefinition of discrimination law. This is true not only because of the impact of the two decisions on their own, but because of a new analysis that could be accomplished by a synthesis of the standards articulated in *Croson* and *Wards Cove*.

The focus of such re-analysis should be in the realm of reverse discrimination cases. *Croson*, in rejecting societal discrimination as a justification for an affirmative action program, required a finding

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400. *Id.* at 651-52.

401. Such a conclusion would be consistent with the Court's mandated deference to employer judgment regarding the business necessity of a particular practice. *See id.* at 661.

402. *Id.* at 656-57.

of particular instances of discrimination.[403] The next question is what standard should be applied to a finding of such prerequisite discrimination. It is at this point that *Wards Cove*, with its "causality" requirement, may be invoked.

At the outset, a brief discussion of the Civil Rights Act of 1991[404] is warranted. While the Act reverses the burden of proof holdings of *Watson* and *Wards Cove*,[405] the provisions do not address *Wards Cove's* language in reference to causation. The Act's findings make a reference to *Wards Cove's* weakening the scope and effectiveness of federal civil rights protection.[406] Other provisions of the 1991 Act, however, indicate that the changes effectuated relate to reapportioning the burdens of proof as to job relation and business necessity.

Section 3, addressing the purposes of the Act, specifically refers to the desire of Congress to codify "the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*"[407] The provisions do not address *Wards Cove's* causation analysis, and *Croson* is mentioned nowhere in the Act. Rather, the Act seems more designed to actually reinforce the kind of causality requirement discussed herein. Section 105, for example addressing disparate impact, states:

> (B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice *causes* a disparate impact, except that if the complaining

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403. *See supra* notes 338-340 and accompanying text.
404. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1992).
405. *Id.* at § 105(k)(1)(A), which states:
> (k)(1)(A) An unlawful employment practice based on disparate impact is established under the title only if—
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
>
> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

In addition, subsection (C) states "The demonstration referred to by subparagraph A(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternate employment practice.'" June 4, 1989 was the day before *Wards Cove* was decided.

406. *Id.* at § 2(2). *See also* § 3(3) (reference to confirming statutory guidelines for the adjudication of disparate impact suits under Title VII).
407. *Id.* at § 3(2).

> 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.
> (ii) If the respondent demonstrates that a specific employment practice does not *cause* the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.[408]

The Act goes on to state:

> It shall be an unlawful employment practice for a respondent, 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.[409]

This provision appears to be aimed at the sort of post-test manipulations discussed *supra*. Rarely are such measures used to disadvantage minorities; rather, they are more commonly a part of a perceived affirmative action program, aimed at remedying observed statistical disparities. Limiting these measures is consistent with a requirement that actual causes of discrimination be identified, because once identified such causes may be eliminated, a desirable alternative to superficial *ad hoc* repairs.

The relevant portions[410] of the Civil Rights Act of 1991 focus more on the shifting burdens than on requirements of causation, and do not address discrimination claims of non-minorities.[411] Therefore, there is little in the 1991 Act to delimit or define the cumulative effect of *Wards Cove* and *Croson*.

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408. *Id.* at § 105(1)(B)(i) and (ii) (emphasis added). *See also* language of § 105(k)(1)(A)(i), *supra* note 405.
409. *Id.* at § 106(1).
410. The Civil Rights Act of 1991 addresses numerous other issues, such as the expansion of 42 U.S.C. § 1981's coverage (sec. 101); compensatory and punitive damages in cases of intentional discrimination (sec. 102); and the limiting of subsequent challenges to consent decrees (sec. 108), apparently aimed at modifying the effect of *Martin v. Wilkes*, 490 U.S. 755 (1989), discussed *supra* notes 297-307 and accompanying text.
411. Indeed, it is questionable how the burden of proof provisions would affect "reverse discrimination" claims. The defendant's burden to prove a business necessity of a race-driven process may be impossible, particularly in light of the accompanying provisions of § 105(1), discussed *supra* notes 407-408 and accompanying text. However the burden is shifted, it is not likely to make the reverse discrimination plaintiff's task any more difficult than it was before the passage of the Act.

While no cases to date have specifically observed the prospect of such a linking together of *Croson* and *Wards Cove*,[412] a two-pronged hypothetical application of this analysis is helpful in illustrating what effect it may have on the future of affirmative action programs and reverse discrimination litigation. For example, in *Howard v. McLucas*,[413] the Eleventh Circuit addressed a challenge to a consent decree which called for 240 race conscious promotions to 38 target positions.[414] The consent decree resulted from a prior lawsuit alleging various statistical disparities between blacks and whites.[415] These statistical comparisons were particularized and were much more specific than any generalized societal discrimination.

In rejecting the intervenors' challenges to the consent decree, the court made several observations concerning findings of past discrimination:

> Before a public employer such as the government embarks on an affirmative action program, it must have "convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination." . . . [W]hen a public employer's affirmative action program or a consent decree providing race-conscious relief is challenged as unconstitutional, the district court "must make a factual determination that the [public] employer had a strong basis in evidence for its conclusion that remedial action was necessary."[416]
>
> . . . .
>
> Once the public employer "introduces its statistical proof as evidence of its remedial purpose, thereby supplying the [district] court with the means for determining that [it] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the nonminority [employees] to prove their case; they continue to bear the ultimate burden of persuading the [district court] that the [public employer's] evidence did not support an inference of prior discrimination

412. *See infra* notes 413-429 and accompanying text.
413. 871 F.2d 1000 (11th Cir. 1989), *cert. denied*, 493 U.S. 1002 (1990). The opinion was dated April 27, 1989, prior to *Wards Cove*, but subsequent to *Croson*, which was decided January 23, 1989.
414. *Howard*, 871 F.2d at 1003.
415. For example, the average grade of white employees from 1973 to 1975 was 2.5 grades higher than that of blacks. Although blacks comprised 15% of the work force, 86% of janitors were black and 81% of laborers were black. *Id.* at 1002. Blacks also received lower supervisory ratings, and standard deviation analysis showed a lower promotion rate. *Id.* at 1002-03.
416. *Id.* at 1006-07 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (Powell, J.)).

> and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently 'narrowly tailored.'"[417]

Based on this analysis, the *Howard* court concluded that the statistical disparities which existed between blacks and whites were a sufficient predicate for the employer's voluntary agreement to the terms of the consent decree.[418]

Had there been no *Wards Cove* opinion, the analysis in *Howard* would probably be complete. The prior findings of discrimination were specific. The race-conscious promotions were narrowly tailored because they were aimed at remedying a particular number of promotions that according to standard deviation analysis should have gone to blacks.

However, after *Wards Cove*, a second step must be added to the analysis. This step requires a showing that not only were there statistical disparities along racial lines in prior employment decisions, but that these disparities were the result of some specific discriminatory practice.[419] Thus, if *Howard* had been decided after *Wards Cove*, the court arguably could not have satisfied itself with the mere observation of statistical disparities. Rather, it would have been required to probe deeper to ascertain that some discriminatory factor *caused* the statistical disparities before accepting them as a basis for voluntary affirmative action.

This hypothesis has not been tested or applied in any cases reported to this point. In *Evans v. City of Evanston*,[420] the Seventh Circuit remanded a case dealing with physical agility tests for further consideration in light of *Wards Cove*. The focus of the remand, however, was on the city meeting its burden of production of a business necessity.[421] Additionally, many courts have cited *Wards*

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417. *Id.* at 1006-07. (quoting *Wygant*, 476 U.S. at 293 (O'Connor, J., concurring in part and concurring in the judgment)).
418. *Id.* at 1000. There were no other bases for the allegation of prior discrimination.
419. *See supra* notes 391-393 and accompanying text. While there was also reference to the questionable nature of statistical disparities alone in the *Croson* decision, those statements may have been distinguishable prior to *Wards Cove* as applying to situations where special qualifications were required. *See supra* note 359 and accompanying text. No such qualifier was discussed in the *Wards Cove* opinion.
420. 881 F.2d 382 (7th Cir. 1989).
421. *Id.* at 384, 386. Such tests may survive a causation requirement because it may be clearly demonstrated that a difference in physical strength exists between the sexes. However, this may not constitute a business necessity. A number of other cases have also cited *Wards Cove* for its "burden" analysis. *See* Williams v. Giant Eagle Mkts., Inc., 883 F.2d 1184, 1192 (3d Cir. 1989); Bartek v. Urban Dev. Auth., 882 F.2d 739, 742 (3d Cir. 1989); Allen v. Seidman, 881 F.2d 375, 377 (7th Cir. 1989); Gagne v. Northwestern Nat'l Ins. Co., 881 F.2d 309, 313 (6th Cir. 1989); Birdwhistle v. Kansas Power & Light Co., 723 F. Supp. 570, 574 (D. Kan. 1989).

Cove for its discussion regarding the need to compare appropriate groups of employees when searching for adverse impact.[422]

In *Tennessee Asphalt Co. v. Farris*,[423] one of the few opinions addressing reverse discrimination after *Wards Cove*, the Sixth Circuit vacated a lower court decision and remanded the case for further consideration in accordance with *Croson*, but it made no mention of *Wards Cove*. In *American Subcontractors Ass'n v. Atlanta*,[424] a pre-*Wards Cove* decision, the Georgia Supreme Court struck down a minority set-aside program under *Croson*, and it included language that would certainly be consistent with *Wards Cove's* causality requirement:

> Witnesses for the city, when examined about these studies, suggested a host of non-racial factors affecting the under-utilization of black contractors such as: lack of insurance and bonding capability, lack of cash flow because "the city doesn't pay very swiftly," and practices of not making information available to all bidders prior to contracting. It is likely that these factors face a member of any racial group attempting to establish a new business enterprise.[425]

Probably the case which has come the closest to recognizing an analytical interaction between *Croson* and *Wards Cove* was *United States v. City of Buffalo*.[426] In *City of Buffalo*, the plaintiff-intervenors challenged the continued viability of court-ordered hiring goals.[427] The court noted that the basis of the attack was the two recent decisions in *Croson* and *Wards Cove*.[428] The court also provided further discussion of the need to refer to these two cases in regard to decisions of when the hiring goals must terminate. In *City*

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422. *See* Edwards v. Johnson County Health Dep't, 885 F.2d 1215, 1223-24 (4th Cir. 1989); Bruno v. W.B. Saunders Co., 882 F.2d 760, 773 n.2 (3d Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990); Crader v. Concordia College, 724 F. Supp. 558, 562 n.6 (N.D. Ill. 1989); Jackson v. Harvard Univ., 721 F. Supp. 1397, 1430 (D. Mass. 1989); United States v. Louisiana, 718 F. Supp. 525, 532 (E.D. La. 1989); Harris v. District of Columbia Comm'n on Human Rights, 562 A.2d 625, 632 (D.C. 1989); Guyan Valley Hosp., Inc. v. West Virginia Human Rights Comm'n, 382 S.E.2d 88, 91 (W. Va. 1989). Only *Guyan* hinted at any causality requirement, stating that a plaintiff makes his case by "identifying a particular hiring practice that has caused statistical underrepresentation." *Id.*
423. No. 87-5588 (6th Cir. Aug. 15, 1989). *See also* Podberesky v. Kirwan, No. 91-2577, slip op. at 9 (4th Cir. Jan. 31, 1992) (rejecting a reference to the sheer number of black students enrolled as a basis for the present vestiges of discrimination necessary to justify a race-driven scholarship program).
424. 376 S.E.2d 662 (Ga. 1989).
425. *American Subcontractors*, 376 S.E.2d at 665.
426. 721 F. Supp. 463 (W.D.N.Y. 1989).
427. *Id.* at 464-65.
428. *Id.* at 465.

of Buffalo, it is more likely that the plaintiff-intervenors were citing the two cases for their analysis of the need to compare relevant populations, rather than asserting an application of a causation requirement to findings of discrimination required by *Croson*.

Therefore, while a number of cases have addressed a causation requirement in light of *Wards Cove*, none has applied the requirement to reverse discrimination cases. Since the significant change in the law created by *Croson* and *Wards Cove* has resulted in prior case law providing minimal guidance regarding the impact of these cases,[429] support must be found elsewhere for the hypothesis that *Wards Cove* causality may be integrated into the *Croson* analysis. A more complete discussion of each step in the analysis is warranted.

1. *The Wards Cove Causation Requirement*

The underlying premise of the proposition that *Wards Cove* creates an interactive analytical result with *Croson*, is that *Wards Cove* does indeed impose a causation requirement when reviewing evidence of discrimination. The Court's discussion of causation in *Wards Cove* certainly points to a conclusion that the Court intended causation to be as demanding a requirement as the term implies.[430]

In addition, several cases have addressed "causation" in accordance with the *Wards Cove* decision. Some of these cases focus on a requirement that a specific discriminatory employment practice be *identified*, which may in fact be less stringent than a true causation requirement. For example, in *Crump v. Dulmison, Inc.*,[431] the District Court for the Middle District of Georgia noted that the "plaintiff must first identify 'the specific employment practice that is challenged.'"[432] However, the court also rejected "bottom line" disparity, and it noted that "the plaintiff has failed to offer statistical evidence of sufficient kind or degree to establish that the practice(s) in question has caused or resulted in fewer blacks than whites participating in on-the-job training opportunities."[433] This statement may be viewed more as an indictment of the statistics produced rather than as a failure of causation per se, especially in light of the fact that the

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429. *See, e.g.*, Howard v. McLucas, 871 F.2d 1000, 1006 (11th Cir. 1989) (noting shortly before *Wards Cove* was decided that the "Supreme Court has yet to establish the standard by which to review equal protection challenges to governmental affirmative action programs"); Milwaukee County Pavers Ass'n v. Fiedler, 707 F. Supp. 1016, 1022 (W.D. Wis. 1989) (noting that cases decided before *Croson* were of "limited usefulness").

430. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656 (1989).

431. 714 F. Supp. 1200 (M.D. Ga. 1989).

432. *Id.* at 1205 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (O'Connor, J., plurality)).

433. *Id.* at 1205.

court's use of the verb "resulted."[434] Likewise, in *Lowe v. Commack Union Free School District*,[435] the Second Circuit noted that it was questionable whether a discriminatory practice had been identified.[436] The court went on, however, to point out that even if a practice had been identified there was no showing that the practice caused any exclusion of applicants for jobs.[437]

A number of other cases have articulated a causation requirement which is clearly not tied to a mere need to identify a particular discriminatory practice. For example, in *Harris v. Lyng*,[438] the District Court for the District of Columbia noted that, notwithstanding the potential for discrimination by an all-white Personnel Assignment Committee, the plaintiff "failed to show the necessary causal connection between the [committee's] actions and any claimed discrimination."[439] In *EEOC v. Carolina Freight Carriers Corp.*,[440] the District Court for the Southern District of Florida noted that there was inadequate proof that the bar against hiring persons with criminal convictions "caused the alleged disparities between races."[441]

If the *Wards Cove* causation requirement is as strict as these cases have interpreted it to be, then it appears to overrule the *Griggs* standard. *Wards Cove*, however, made no mention of *Griggs*. An explanation for this seemingly troublesome result may be found in a more careful reading of *Griggs*. Nowhere in *Griggs* did the Court offer any particular guidance for determining adverse impact. Instead, it simply acknowledged the existence of such a cause of action.[442] In *Griggs*, the Court did imply that causation was not at issue because it rejected a high school diploma requirement and the use of general intelligence tests.[443] The effect of a diploma requirement, however, may be readily ascertained by observing the percentage of minorities without diplomas in the relevant work force, thereby establishing that the diploma requirement "causes" a discriminatory outcome. Furthermore, the Court made reference to its prior findings that because of historically inferior education levels for blacks, certain

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434. *Id.*
435. 886 F.2d 1364 (2d Cir.), *cert. denied*, 494 U.S. 1026 (1990).
436. *Id.* at 1370.
437. *Id.* at 1370-71; *see also* Mallory v. Booth Refrigeration Supply Co., 882 F.2d 908, 912 (4th Cir. 1989); Lu v. Woods, 717 F. Supp. 886, 890 (D.D.C. 1989).
438. 717 F. Supp. 870 (D.D.C. 1989).
439. *Id.* at 875 (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650 (1989)).
440. 723 F. Supp. 734 (S.D. Fla. 1989).
441. *Id.* at 751. To some extent, this may be the result of a lack of adequate statistical information. *See also* Hill v. Seaboard Coast Line R.R., 885 F.2d 804, 811 (11th Cir. 1989) (subjective criteria for railroad supervisor position).
442. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
443. *See id.*

tests relating to educational levels may be discriminatory.[444]

If *Griggs* did not address what kind of showing must be made to establish a prima facie case of discrimination; i.e., causation or mere observable discrepancies, it is properly limited to holding that discrimination may be established without producing evidence of a discriminatory intent.[445] Consistent with *Griggs*, a plaintiff may show discrimination without intent, but now must show the cause of discrimination.[446]

This is not to say that a causation requirement would not have a significant impact on employment discrimination law. In the realm of an adverse treatment case which relies on specific indicia of discriminatory intent, as opposed to consequences from which implications may be drawn,[447] *Wards Cove* may have minimal importance. An adverse treatment case which focuses on particular discriminatory acts will, by its nature, point toward the "cause" of the discriminatory outcome, especially when anecdotal evidence is involved.

A greater likelihood of a shift in analysis exists in adverse treatment cases relying on either the *McDonnell Douglas* analysis[448] or pattern or practice analysis.[449] In the *McDonnell Douglas* analysis, no clearly articulated reason for the employment action exists. Rather, intentional discrimination is presumed by virtue of the fact that an applicant was qualified and was passed over for hiring or promotion.[450] In such a case, no evidence of a particular cause or causal relationship is presented, and even evidence that an employer's alleged justification for the action is pretextual will not tend to demonstrate causality. Similarly, pattern or practice analysis is aimed at showing discriminatory *effects*, rather than causes, and like adverse impact analysis, it is particularly reliant on statistical comparisons.[451] Therefore, the effect of adding a causation element to the *McDonnell Douglas* and pattern or practice analyses would be significant.

However, *Wards Cove* did not appear to apply to adverse treatment cases because it dealt with an adverse impact claim.[452] In

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444. *Id.* at 430 (citing Gaston County v. United States, 395 U.S. 285 (1969) (involving literacy tests)). General intelligence tests, however, are intended to operate independently from education experience. *See* Gottfredson & Sharf, *Foreword, Fairness in Employment Testing*, 33 J. VOC. BEHAV. 225 (1988). Therefore, *Griggs* may arguably still imply a rejection of a causality requirement.
445. *See supra* notes 53-55 and accompanying text.
446. This analysis would call into question the continued viability of the EEOC *Uniform Guidelines*. *See supra* notes 95-96 and accompanying text.
447. *See generally supra* text accompanying notes 19-21.
448. *See generally supra* text accompanying notes 22-27.
449. *See generally supra* text accompanying notes 28-30.
450. *See supra* notes 25-27 and accompanying text.
451. *See supra* notes 28-29 and accompanying text.
452. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 646 (1989).

addition, several courts have rejected the application of *Wards Cove* to adverse treatment cases.[453] Nevertheless, even if the causation element of *Wards Cove* were to be applied to adverse treatment cases, it may be argued that inferential adverse treatment still survives because the inferences serve only as evidence of discrimination, rather than establishing per se discrimination.[454] Indeed, such a distinction may be applied to *Griggs*' adverse impact analysis, which would be consistent with the "burdens" discussion in *Watson* and *Wards Cove*. Further, this would also represent a kind of "fine tuning" of the earlier analysis.

If *Wards Cove* should indeed be read to establish a causation requirement, then it is clear that, at the very least, it infuses a new element into discrimination analysis. Although implementation of a causation requirement is significant enough to appreciably alter a great deal of case law regarding employment discrimination, the Court provided little comment in *Wards Cove* to the extent of the decision's reach. However, valuable guidance on the effect of a causation requirement in employment discrimination in general, and reverse discrimination in particular, may be derived from examining the Court's decision in a manner less precise and more subtle than simply focusing on the language of the decision. Such an analysis entails a consideration of the underlying purposes the Court may have been attempting to achieve.

2. *Social Engineering Versus Judicial Restraint*

In the way it deals with various problems, or in declining to address particular questions, the Supreme Court is often in a position to affect issues which go beyond mere points of law and reach into important aspects of society. Certainly the realm of employer/employee relations is one such area that is an integral aspect of most peoples' lives. Employment decisions often involve intangibles and imponderables such as charisma, personal contacts, temperament, compatibility, and any array of other symbiotic elements beyond manageable judicial standards. Yet, these very factors may be used as a guise for unconstitutional discrimination, calling on the courts to intercede and strike a balance between social aspects of employment relations which are beyond meaningful scrutiny, and rules of law that compel judicial monitoring.

How the Supreme Court intends to draw this balance may shed some light on the future of *Wards Cove*'s effect on reverse discrim-

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453. *See* Rendon v. AT&T Technologies, 883 F.2d 388, 390 n.1 (5th Cir. 1989); West Virginia Inst. of Technology v. West Virginia Human Rights Comm'n, 383 S.E.2d 490, 494 n.8 (W. Va. 1989).

454. *See supra* note 30.

ination cases. If the "causation" requirement is intended to place a greater burden on those alleging discrimination, including the employer seeking to justify its affirmative action program, the effect is one of social engineering. The Court may step in to redirect societal relationships in a manner which, in this case, would likely favor nonminorities. Many employers have not only accepted affirmative action programs, but encourage them, viewing them as a social good.[455] Any attempt by the Court to set standards and draw distinctions in such cases may result in a curtailment in such programs. The question is whether the Court should insert itself into such societal relationships.

Alternately, if *Wards Cove* stands for the proposition that absent a clear showing of some cause of discrimination the Court will defer to the judgment of employers, then the result is a laissez faire approach. Therefore, unless a clearly racial animus exists against either minorities or nonminorities, the courts will not direct the employer in its chosen employment practices. This would also include not getting involved in an employer's plan for affirmative action.

While there may be merit to the laissez faire interpretation of how *Wards Cove*'s causation requirement may be applied in reverse discrimination cases,[456] most indicia point to the role of *Wards Cove* as cutting back on the legacy of *Griggs* and, to some extent, Title VII. The most significant factor is the Court's decision in *Croson,* decided several months before *Wards Cove.* In *Croson*, the Court noted that special qualifications may justify rejecting statistical disparities.[457] *Croson* also rejected generalized societal discrimination as a basis for affirmative action.[458] Such factors, difficult to measure and to quantify, easily could have led the Court in *Croson* to conclude that establishing a basis for affirmative action was not a task appropriate for the courts. Instead, in rejecting the affirmative action program, the Court noted that one could not assume that the observed disparity was not due to blacks being drawn to other occupations.[459]

Such analysis, even put forth with the most benign intentions, may have the effect of perpetuating racial stereotypes. For example, while the Court may have been willing to assume that blacks tradi-

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455. *See supra* note 165.

456. For example, in both *Watson* and *Wards Cove*, the Court made reference to its prior acknowledgement in *Furnco Constr. Corp. v. Waters* that courts are less competent than employers to restructure business practices. *See supra* notes 380 and 398 and accompanying text.

457. In *Wards Cove*, the Court also identified nondiscriminatory causes for minority underrepresentation. *See supra* notes 387-389 and accompanying text.

458. *See supra* notes 339-340 and accompanying text.

459. *See supra* note 348.

tionally were not drawn to the construction industry, it would have been instructive to observe how the Court would have dealt with a quota plan in a company in which a disproportionate number of whites were employed in jobs or occupations stereotyped as employing primarily blacks. Whatever the outcome of such analysis, it necessarily involves the Court injecting itself into sociological decisions for which no readily apparent solutions exist and for which judicially manageable standards may be difficult to develop. Rather than retreating from social issues, the *Croson* Court expressed no reticence in striking down the plan.

A second consideration regarding the Court's role involves a comparison of *Wards Cove* with situations in which the Court affirmatively withdrew from attempting a judicial resolution. The Court's occasional invocation of the doctrine of non-justiciability was explained by Chief Justice Hughes:

> In short, the question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of the Government. The questions they involve are essentially political and not justiciable. They can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment.[460]

Such a withdrawal from deciding nonjusticiable questions is particularly appropriate when the Court lacks access to the information necessary to make a reasoned determination.[461] This appears to be the case in determining the causes of underrepresentation of minorities in occupations. However, the Court has actively involved itself in decisions for which no clear judicial standards exist.

In *Wards Cove* there was no clear indication by the Court that it intended to adopt a laissez faire approach to employment discrim-

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460. Coleman v. Miller, 307 U.S. 433, 453-54 (1939).

461. *See* Sharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 567 (1966).

ination issues.[462] With the exception of an almost passing reference regarding deference to employers,[463] the Court involved itself in a review of statistics, burdens, and labor pools.[464] The Court was clear in its identification of the causation requirement, stating unequivocally that: "[f]irst is the question of causation in a disparate-impact case."[465] Such an aggressive approach to judicial review is diametrically opposed to those situations in which the Court has retreated from judicial interference because of nonminority justiciability or a lack of manageable standards.

Another consideration in arguing that *Wards Cove* was intended to effect social change is the decision of the Court a week after *Wards Cove* in *Martin v. Wilks*.[466] In *Martin*, the Court expanded the ability of individuals to challenge consent orders aimed at aiding minorities.[467] While such a decision would not necessarily be inconsistent with a laissez faire approach, it certainly supports a view of *Wards Cove* and a general attitude on the part of the Supreme Court of favoring the reverse discrimination plaintiff. One could argue that because *Martin* deals with procedural issues, it does not address the underlying substance of the employment discrimination controversy. However, the dissenters in *Martin*—Justices Stevens, Brennan, Marshall, and Blackmun—were the same dissenters in *Wards Cove*. Therefore, while it may be coincidence that the Justices who disagreed with the *Wards Cove* rationale also viewed the procedural issues in *Martin* differently, it appears more likely that *Martin* represented the same ideological split that was present in *Wards Cove*.[468]

3. *New Standards in Reverse Discrimination Cases*

Assuming that the coupling of the *Croson* and *Wards Cove* analyses is to be applied to reverse discrimination cases, three considerations regarding reverse discrimination should be addressed. First, how will a reverse discrimination plaintiff establish a prima facie case? Second, how will the burdens be apportioned throughout

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462. When the Court has declined to decide an issue, it has been explicit in indicating its decision not to get involved. *See, e.g.*, Colegrove v. Green, 328 U.S. 549 (1946) (congressional districting); Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (constitutional guarantee of a republican form of government).

463. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 661 (1989).

464. *Id.* at 650-61.

465. *Id.* at 656.

466. 490 U.S. 755 (1989).

467. *See supra* notes 297-307 and accompanying text.

468. This conclusion is supported by the dissent's discussion of the necessity of whites to share the burdens necessary to redress past wrongs. *Martin*, 490 U.S. at 791-92 (Stevens, J., dissenting). Such factors address the underlying substantive issues and should be unrelated to the procedural issue before the court.

the various stages of the litigation? Third, what is necessary for an affirmative action program to withstand scrutiny in light of the *Wards Cove* causation requirement?

4a. *The Reverse Discrimination Plaintiff's Prima Facie Case*

One consideration that has yet to be discussed is just what a nonminority must do to show that his employment status was affected (whether legally or illegally) by a race-conscious program or set of criteria. *Wards Cove* rejected mere statistical comparisons.[469] Both the *Croson* and *Wards Cove* cases severely limited the relevancy of general group comparisons.[470]

Generally, the same standards apply to reverse discrimination cases as to other discrimination suits.[471] There is no reason to assume that the rationale of *Croson* and *Wards Cove* should not, therefore, apply similarly to the nonminority plaintiff who asserts that they were discriminated against because of their race. Somewhat paradoxically, this conclusion could ultimately have the effect of forcing courts into a laissez-faire role. If reverse discrimination plaintiffs are held to a lesser standard, then courts are clearly involved in social engineering by actively aiding nonminorities over minorities. To the extent that nonminorities face the same difficulties as minorities in showing they were discriminated against, however, the result could be to allow employers greater leeway in implementing affirmative action programs and to decrease judicial intervention when such plans are at issue.

As a practical matter, many reverse discrimination plaintiffs may face little or no hurdle in demonstrating that they were adversely affected by race-conscious hiring. Many affirmative action plans are the result of expressly articulated policies, such as minority set-aside programs, explicit quotas, or situations in which test scores have been manipulated to lessen or eliminate adverse impact.

More difficult questions may arise concerning employment decisions. If employers are allowed to escape judicial scrutiny by implementing sufficiently subjective criteria, a careful employer may maintain its affirmative action program under the cloak of vague, ill-defined criteria.[472] On the other hand, it may be argued that any consideration of race as a factor, unless as a specific remedy for specific prior discrimination, is impermissible. Consideration of a person's nonminority status as a reason to hire or promote is equally inappropriate. Therefore, the same standards should apply to reverse

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469. *See supra* notes 386-389 and accompanying text.
470. *See supra* notes 339, 388-389 and accompanying text.
471. *See supra* note 237.
472. *See supra* note 22; *supra* notes 266, 372 and accompanying text.

discrimination as to discrimination. Accordingly, even generalized criteria such as those in the Harvard plan[473] may be subject to attack.

4b. *Burdens in Reverse Discrimination Cases*

Closely related to the importance of the establishment of a prima facie case is defining where the burdens lie. Both *Watson* and *Wards Cove* indicate that the burden of proof always remains with the plaintiff. Therefore, it is logical to assume that the same should be true in a reverse discrimination case. An underlying and subtle distinction that exists in reverse discrimination cases, however, may affect how the usual apportioning of burdens may operate. Particularly after the 1988 Term, the employer has only to articulate a business reason for its employment decision.[474] It may be argued in the reverse discrimination case that the employer has only to "articulate" past discrimination to justify its affirmative action, with the burden remaining on the plaintiff. However, this premise could also be translated into a requirement that in a reverse discrimination case, the plaintiff challenging the plan need only articulate a nondiscriminatory basis for the employment practice which the employer previously believed to be discriminatory. This argument could then be valid to show pretext on the part of the employer and therefore invalidate the plan.

An illustration of these two possibilities may be helpful. The challenged situation involves an affirmative action plan calling for minority promotions on a one-for-one basis with nonminority promotions. The basis for the plan is a past statistical underrepresentation of minorities in the positions involved and a reliance on promotional ratings from predominantly white supervisors. If the burden is to remain with the nonminority plaintiff who is challenging the plan, he must prove that the prior underrepresentation was *caused* by some factor which was unrelated to race and that lower supervisory evaluations for minorities were directly attributable to actual performance. This would call on the reverse discrimination plaintiff to *prove* what the employer must only *articulate* in a traditional discrimination case. Once placed in this framework, it appears more likely that such a burden of proof should not rest with the reverse discrimination plaintiff. Particular support for this conclusion is found in the Supreme Court's role as an engineer of social change and particularly the manner in which the Court addressed the situation in *Croson*. The rejection of population comparisons and the assumption that blacks may have been drawn to other jobs leads one

473. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 316-19, 321-24 (1978) (Powell, J., plurality).

474. *See supra* note 394.

to conclude that a similar analysis in the above example would result in a minimal burden being placed on the reverse discrimination plaintiff.

In such a situation, the reverse discrimination plaintiff must only articulate a possible nondiscriminatory "cause" of the observed discrepancies. Examples may be a lack of interest in the job,[475] a need for subjective decision-making because the job is one of public trust,[476] the existence of a test validation,[477] or, in the extreme, poor judgment by the employer which is not discriminatory but is in an area in which the courts should not interfere.[478] Since there is no requirement in a reverse discrimination case of showing that alternate employment practices may have existed,[479] such a showing by the employer would be insufficient to justify its program. Thus, the employer bears the burden of persuading the factfinder that the discriminatory results had a discriminatory *cause*, as required by *Wards Cove*. In this manner, the framework discussed above is maintained when examined in light of the shifting burdens.

The employer is then placed in the difficult position of demonstrating that it acted improperly in past employment decisions. This may range from demonstrating a discriminatory animus[480] to showing lack of care in preparing a test; this amounts to arguing that the employer's prior policies were mere pretexts for discrimination.

4c. *Evidence that Will Justify the Affirmative Action Program*

Assuming that employers bear the burden of proving discrimination that is an adequate predicate to the affirmative action plan, the final question is what kind of evidence will sufficiently support such a showing. *Croson* made clear that the Court rejects general societal discrimination as a basis. *Wards Cove* paved the way for a requirement that a causal relationship be shown between an employment practice and a discriminatory outcome before affirmative action is instituted. If the implementation of these standards results in a

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475. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 503 (1989) (construction industry).
476. *See, e.g.*, Davis v. City of Dallas, 777 F.2d 205, 211 (5th Cir. 1985) (police officers).
477. *See generally supra* text accompanying notes 148-156.
478. *See, e.g., supra* note 144 (employment tests). However this deference could be read to include deference to the employer's decision regarding the need for affirmative action. *See generally* text accompanying notes 445-459.
479. *See supra* note 162.
480. It is unclear what would prevent an employer from producing witnesses to assert racial biases in prior decision-making, even in situations where such bias had not in fact existed.

requirement that cannot be met by employers, however, it raises doubts as to whether such a stringent standard is workable and whether such a standard was what was truly envisioned by the courts. Therefore, such an analysis is not just an academic exercise, but it is a necessary element in testing the hypothesis that calls for the marriage between *Croson* and *Wards Cove*.

A number of methods for demonstrating adverse impact may satisfy the *Wards Cove* causality requirement. For example, multiple regression analysis[481] may satisfy a causality requirement. This is true not so much because such an analysis identifies a discriminatory "cause" but because it eliminates other nondiscriminatory elements as accounting for the apparently discriminatory result. By process of elimination, only the discriminatory "cause" remains. The analysis will then truly identify the degree of certainty with which the "cause" can be said to be related to the effect.[482]

Standard deviation analysis[483] is similar to that part of multiple regression analysis which calculates the improbability that the result was due to chance. However, it does not specifically eliminate other nondiscriminatory causes of the outcome. While such an analysis is stamped with a scientific imprimatur, it may not meet a true causality requirement. If differences in hiring or promotional statistics are due to differences in labor pools or job interest, for example, standard deviation may not reflect such a result. Although such generalizations may perpetuate stereotypes, it may nonetheless be true that some ethnic groups are uninterested in certain job categories because of differing socialization or background. Even more innocent causes may create an appearance of discrimination.

A hypothetical may demonstrate the point. Suppose an inner city area which is predominately hispanic. Some of the younger generation may be upwardly mobile; they may tend to enter professions and leave the city. Others may be more interested in perpetuating the family businesses and thus remain in the inner city. The result may be a statistical underrepresentation of hispanics in the professions in the city that exists not because of discriminatory reasons but because of a social trend in which those who are upwardly mobile leave the city. If the statistical analysis accounts for such

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481. *See generally supra* text accompanying notes 125-130.

482. The high probability identified by multiple regression analysis really does no more than isolate a discriminatory cause and demonstrate a correlation between the cause and the outcome. While the same may be said of EEOC's "four-fifths rule," *see generally supra* text accompanying notes 95-99, multiple regression analysis injects an element of scientific assurance that, in the long run, may make it acceptable.

483. *See generally supra* text accompanying notes 117-124.

factors, it should survive. Otherwise, it suffers from the possible infirmities that were fatal in *Croson* and *Wards Cove*.

Another example of the type of analysis that should pass a causality test is implicated in *United States v. City of Buffalo*.[484] Although *City of Buffalo* found a police examination invalid under Title VII (albeit under pre-*Wards Cove* standards), it did make reference to language analysis by a linguistic expert.[485] Although the purpose was to validate the test, a similar linguistic analysis may be used to demonstrate a bias against minorities which is not sufficiently business-related. This same approach is demonstrated by an employment test in which applicants are required to unscramble four letters to spell the correct answer "coat;" the word "taco" is incorrect. The test may discriminate against hispanics because they may tend to pick "taco" as the answer.[486]

A final consideration regarding this issue is the role that prior court orders or court-approved consent decrees have in justifying affirmative action. In *Croson*, the Supreme Court discussed what prior findings were required before race-conscious remedies could be employed.[487] The question remains as to whether prior judicial orders or findings will satisfy the requirements.

Unlike generalized legislative findings or conclusions by private employers, court decrees, especially those in contested litigation, will usually be the result of a more intense inquiry. In this sense, they will more likely survive as the basis in affirmative action programs, which was what was envisioned by *Martin v. Wilks*. However, there are no reasons why the admonitions of the Supreme Court in *Croson* should not apply with equal force to court-ordered relief. For example, if a court finds only a generalized atmosphere of discrimination in a place of employment, without any particularized showing of injury, it may not be justified in awarding specific relief. Likewise, if the discriminatory impact may be demonstrated only by reference to group comparisons, assuming that minorities are interested in the jobs in question, court-ordered affirmative action may not be justified.

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484. 457 F. Supp. 612 (W.D.N.Y. 1978).

485. *Id.* at 624.

486. G. Buntin, Remarks at a Hearing Before the Baltimore City Council (June 14, 1989); *cf.* JENSEN, BIAS IN MENTAL TESTING 635-714 (1988) (discussing culture-reduced test techniques). Difficult questions may be raised when the ethnic characteristic does indeed affect the employee's ability to perform the job. For example, if height or weight requirements were shown to be job-related, which may be possible under *Wards Cove's* relaxed standards, they may survive, even though they may be demonstrably causally related to an ethnic group.

487. *See supra* notes 338-345 and accompanying text.

The same analysis should apply when considering *Wards Cove*. Although several opinions have indicated otherwise,[488] there is no logical reason why a court should be excused from finding a causal relationship between the discrimination and the effect. Additionally, if an employer wishes to use a judicial finding or enter into a consent decree, this causation requirement should also be met. Further support may be found in the fact that affirmative action may go beyond what the court could require.[489] Therefore, if voluntary programs are subject to the requirements of *Croson* and *Wards Cove*, court orders should also be so bound.

V. CONCLUSION

A great many developments and refinements in discrimination law have occurred since the original passage of Title VII of the Civil Rights Act, particularly in the wake of *Griggs v. Duke Power Company*. What appeared to be a solid and firmly defined body of case law was upset in 1989 by two major decisions, *Croson* and *Wards Cove*. The significance of these opinions is multiplied, particularly in the realm of reverse discrimination cases, when these two decisions are joined to create a single analytical framework that injects a causation requirement between a discriminatory act and an apparently discriminatory outcome in order to validate an affirmative action plan. While specific recognition of such an approach has yet to emerge in current case law, the hypothesis is supported by the language of numerous decisions, general tenets of justiciability, and the effect of such a change. Even though these decisions may have reordered much of the prior law, a causation requirement does not create an unattainable standard. It still requires a framework of proof and burdens consistent with prior case law. The prospect of a true emergence of an analytical marriage between *Croson* and *Wards Cove* is therefore manageable. Whether the courts will take such a course can only be ascertained with the passage of time.

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488. U.S. v. City of Buffalo, 721 F. Supp. 463, 467 (W.D.N.Y. 1989) stated that neither *Croson* nor *Wards Cove* "altered the broad power of federal district courts to implement relief that operated both retrospectively to redress past discrimination and prospectively to ensure that it does not recur." *Cf.* Huguley v. General Motors Corp., 128 F.R.D. 81, 88 (E.D. Mich. 1989) (discussing *Wards Cove* in the context of consent decrees).

489. *See* Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 690 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981).