2005

The Ghost of Wards Cove: The Supreme Court, the Bush Administration, and the Ideology Undermining Title VII

Amos N. Jones
Campbell University School of Law, ajones@campbell.edu

D. Alexander Ewing

THE GHOST OF *WARDS COVE*: THE SUPREME COURT, THE BUSH ADMINISTRATION, AND THE IDEOLOGY UNDERMINING TITLE VII

*Amos N. Jones**
*D. Alexander Ewing***

I. INTRODUCTION

Rony Civil of Avon Park, Florida, was fired in 2000 from his job as a quality control technician for Florida's Natural Growers, a major produce company.[1] Florida's Natural employed Civil between 1993 and 2000. During that time he worked his way up from fruit runner to quality control technician.[2] Civil, who is black and Haitian, suspected racial discrimination as the motivation for his termination.[3] He filed a lawsuit in federal court against Florida's Natural and its parent company, Citrus World.[4] The *Lakeland Ledger* of Florida reported his ordeal:

> According to Civil, his problems began in 1997, after Florida's Natural hired Larry Mundy as a supervisor and put him in charge of Civil's department. Civil alleged Mundy had humiliated him with racial and ethnic slurs and denied him a promotion because of his background. Mundy, according to the lawsuit, called black employees "boy" and other racial slurs, called Civil "the Haitian" and worse, and, on occasion, told Civil he would like to "ship him back from where he came from." One of Civil's co-workers testified that Mundy referred to Civil as a "monkey" and asked her to lie about Civil's work performance. Civil alleged that Mundy drove

* J.D. Candidate, Harvard Law School, 2006. M.S., Columbia University Graduate School of Journalism, 2003. B.A., Emory University, 2000. I wish to thank my parents for their encouragement.

** J.D. Candidate, Harvard Law School, 2006. A.B., Harvard University, 2003. I wish to thank Professor Elizabeth Bartholet for helping to shape my thinking about employment discrimination and for her comments about my contribution to this Article. I also wish to thank my family, especially my parents, Aunt Lynne, and Eli, for their endless support. Finally, thank you to Jen for being wonderful.

1. Jeff Scullin, *Worker Keeps Racial Bias Case Alive: Odds Seem Stacked in Employers' Favor, but Battle Enters Round 3*, LEDGER (Lakeland, Fla.) Apr. 26, 2004, at B1.
2. *Id.*
3. *Id.*
4. *Id.*

> other black employees out of the department and told co-workers he wanted to get rid of Civil, too.[5]

Civil accused company officials of looking the other way after he reported the harassment and alleged that he was fired in retaliation for circulating a petition seeking better pay for off-season workers.[6] In 2004, the U.S. Circuit Court of Appeals for the Eleventh Circuit in Atlanta reversed a lower court's summary judgment decision, finding that Civil had enough of a case to go before a jury.[7] Civil asked for his job back, about $140,000 in back pay, punitive and compensatory damages, and legal fees.[8]

In light of the gradual disappearance of protections in the law of employment discrimination, Rony Civil is unusually fortunate. Employment plaintiffs today face a legal system that is skeptical of, if not hostile to, their plight. Over the last two decades, judges have become reluctant to question a company's personnel policies and practices.[9] This reluctance, combined with a priority of judicial efficiency even as the number of employment discrimination lawsuits grows, has made federal district courts increasingly willing to grant employers' motions for summary judgment. As is evident in the newsworthiness of Rony Civil's victory in the Eleventh Circuit, appellate courts rarely overturn such summary judgments, discouraging many employees from filing employment discrimination lawsuits and lawyers from taking cases in the first place. After forty years of employment-discrimination jurisprudence flowing from Title VII of the Civil Rights Act of 1964, the black-letter laws governing employment discrimination have changed very little. In fact, the same precedents once used to aid victims of discrimination are still technically the law. Nevertheless, the professional conduct of most judges applying these laws is much different from that which characterized the late 1960s and early 1970s.

Although courts no longer seem concerned with Title VII's mandate of equal employment opportunity, the disparities in employment opportunity that Title VII sought to eradicate have persisted. Statistics also suggest that bias is not simply a problem at the entry level. In 1995, for example, though white men made up only 43% of the workforce, they held between 95% and 97% of the senior manager, vice-president, and higher positions in Fortune 500 service firms and Fortune 1,000 industrial firms.[10] While it may be true that factors other than racial bias help to explain these statistics, the statistics strongly suggest that Title VII is far from achieving its goal of equal employment opportunity.

Two ideas that surfaced in *Wards Cove Packing Co. v. Atonio*,[11] a decision in which a conservative majority overturned some of the most constructive elements of disparate impact doctrine, have been fundamental in the transformation of employment law as it is applied in the judicial and executive branches. Primarily, the majority's holding reflected the

---

5. *Id.*
6. Scullin, *supra* note 1, at B1.
7. *Id.*
8. *Id.*
9. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).
10. *See* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 96 (2003).
11. 490 U.S. 642 (1989).

notion that racism in the workforce is no longer a problem deserving serious action. Secondarily, the majority made clear its retrospective understanding of merit and desire to maintain the status quo. In response to *Wards Cove*, Congress passed the Civil Rights Act of 1991 to clarify aspects of disparate impact discrimination law that the Court's holding muddled or overruled. Though the 1991 Act did resuscitate disparate impact, its reforms were largely ineffective because they failed to confront *Wards Cove*'s ideological underpinnings. Moreover, the ambiguity of the 1991 Act left judges able to implement the spirit, if not the letter, of *Wards Cove*. Today the Bush Administration embraces similar detrimental ideas about the prevalence of racism in the modern workforce and the notion of retrospective merit. Influenced by the views of the Bush Administration and much of the current judiciary, the doctrine is poised to continue withering while the legitimate claims of discrimination victims go unheard.

This Article opens with a brief discussion of the purposes of Title VII's two doctrines, disparate impact and disparate treatment. In order to contextualize *Wards Cove*, the Article outlines the significance of disparate impact doctrine for modern employment plaintiffs as well as the trend that led to its dissolution. *Wards Cove* then is considered, its ideological underpinnings unpacked and its impact described. The Article then explains that the holding of *Wards Cove* was able to survive the Civil Rights Act intended to overrule it. Next, the relevance of *Wards Cove* to current and future judges is discussed. Finally, the Article argues that the Bush Administration embodies the *Wards Cove* ideology, exposing how the decision has affected several aspects of employment law controlled by the executive and judicial branches, affirmative action, and the Equal Employment Opportunity Commission.

II. PRELUDE TO *WARDS COVE*: TRENDS IN EMPLOYMENT DISCRIMINATION LAW

A. Origins and Purposes of Title VII

The Civil Rights Act of 1964 was a legal manifestation of the civil rights movement. It sought to eradicate police terrorism,[12] church bombings,[13] child killings,[14] and other systematic assaults[15] imposing a burden that denied black citizens access to the American Dream.[16] Congress enacted

12. HOWELL RAINES, MY SOUL IS RESTED: THE STORY OF THE CIVIL RIGHTS MOVEMENT IN THE DEEP SOUTH 208–09 (1977).
13. *Id.* at 56, 154–55.
14. *Id.*
15. JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS 1954–1965 122 (1987).
16. *See* President John F. Kennedy, Radio and Television Report to the American People on Civil Rights (June 11, 1963), *available at* http://www.jfklibrary.org/j061163.htm (noting that "[t]he Negro baby born in America today, regardless of the section of the nation in which he is born, has about one-half as much chance of completing a high school as a white baby born in the same place on the same day, one-third as much chance of completing college, one-third as much chance of becoming a professional man, twice as much chance of becoming unemployed, about one-seventh as much chance of earning $10,000 a year, a life expectancy which is 7 years shorter, and the prospects of earning only half as much.").

Title VII, the statute proscribing employment discrimination because of race, gender, religion, or national origin, as part of an effort to combat discrimination in the workforce and create equal employment opportunity.[17] During its first decade, the statute prohibited only disparate treatment, prohibiting only those adverse employment decisions that a plaintiff could prove were the result of animus caused by an employee's membership in a protected group.[18]

In *McDonnell Douglas Corp. v. Green*[19] the Supreme Court established a four-part structure for showing a *prima facie* case in disparate treatment theory.[20] Under the *McDonnell Douglas* criteria, a plaintiff must demonstrate that he or she is part of a protected group, applied for a job that an employer was seeking to fill, and was rejected despite his or her qualifications, and that the employer continued to seek an applicant with the plaintiff's qualifications.[21] Once the plaintiff has met his or her burden, the employer must demonstrate that the employment action taken was for a legitimate business reason.[22] After the employer has asserted a business reason for the employment action, the plaintiff must demonstrate that the employer's reasons were merely pretextual in order to prevail against a challenge.[23]

In its 1971 decision in *Griggs v. Duke Power Co.*,[24] the Court articulated disparate impact theory as intended to challenge facially neutral employment practices that nonetheless had disproportionately adverse effects on protected groups.[25] The *Griggs* Court recognized that an employer's requirement of passing intelligence tests and obtaining a high school diploma for promotion to a low-level supervisory position had no real connection to the skills required for the position.[26] The Court announced that while such employment practices might not have been aimed at a particular group, they nevertheless served as "arbitrary and unnecessary barriers to employment. . . ."[27] *Griggs* also allowed that an employer may rebut a statistical disparity by proving that the employment practice is a "business necessity."[28] The Court's holding in *Albemarle Paper Co. v. Moody*[29] built upon *Griggs* and made clear that an employee could rebut an employer's showing of business necessity by demonstrating that a nondiscriminatory practice would be equally effective.[30] As will be shown, *Wards Cove* marked a significant departure from these precedents.

17. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 763–64 (1976); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800–01 (1973); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 245–46 (1964).
18. *See, e.g.*, Slack v. Havens, 522 F.2d 1091, 1095 (9th Cir. 1975).
19. 411 U.S. 792 (1973).
20. *Id.*
21. *Id.* at 802.
22. *Id.* at 802–03.
23. *Id.* at 804.
24. 401 U.S. 424 (1971).
25. *Id.* at 430–36.
26. *Id.* at 433.
27. *Id.* at 431.
28. *Id.* at 425.
29. 422 U.S. 405 (1975).
30. *Id.* at 425.

B. The Supreme Court's Evaporating Commitment to Disparate Impact

While courts are not the sole catalyst for equal employment opportunity, they are empowered to send messages to employers about what types of employment practices are acceptable. In the earliest years following the Civil Rights Act of 1964, the Supreme Court attempted, through its enforcement of Title VII, to blaze a trail toward eradicating racial hierarchies in the workforce. The Court did so by sending strong signals to lower courts about the meaning of Title VII and the action it required. As the Court wrote in *Griggs v. Duke Power Co.*, the purpose of Title VII was to "achieve equality of employment opportunities and remove barriers. . . ."[31]

In *Moody*, an early Title VII case, a district court denied back pay to a class of black disparate impact plaintiffs who had been locked into low-level jobs by an arbitrary seniority system.[32] The Court reversed and ordered the lower court to "fashion the most complete relief possible."[33] More importantly, *Moody* charged district courts to enforce aggressively disparate impact doctrine.[34] The Court made clear that trial courts had "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."[35] The Court explained that the Civil Rights Act of 1964 was designed to eradicate "a historic evil of national proportions" and that "[a] court must exercise [its] power 'in light of the large objectives of the Act.'"[36] The Court continued its trend of protecting victims of discrimination under Title VII into the early 1980s. In *Connecticut v. Teal*[37] the Court held that an employer could not cure the ills of a facially discriminatory employment policy by merely promoting enough minorities to give the appearance of non-discrimination.[38] In reaching its conclusion, the Court quoted language from *Griggs* and reasserted its commitment to Title VII's goal of equal employment opportunity.[39]

In recent decades the Court's commitment to "the large objectives of the Act" has dissipated. *Watson v. Fort Worth Bank & Trust*[40] foreshadowed *Wards Cove* in some respects. Though the Court held for the plaintiff and extended disparate impact theory to subjective hiring and promotion practices,[41] the plurality, which included Justices O'Connor and Scalia, made clear its belief that a disparate impact plaintiff retained the burden of persuasion at all times—even after he or she made the *prima facia* case.[42] While the *Wards Cove* Court's decision to overrule crucial aspects of disparate impact doctrine had troubling implications for the clarity of Title VII jurisprudence, the most significant aspect of the holding was the

31. *Griggs*, 401 U.S. at 429–30.
32. *Moody*, 422 U.S. at 408–09.
33. *Id.* at 416.
34. *Id.*
35. *Id.* at 418.
36. *Id.*
37. 457 U.S. 440 (1982).
38. *Id.* at 442.
39. *Id.* at 446.
40. 487 U.S. 977 (1988).
41. *Id.* at 991.
42. *Id.* at 987.

change in attitude it reflected. In *Wards Cove*, the Court cautioned lower courts to "proceed with care" before striking down an employment practice that has a disparate impact on non-whites.[43] The Court's instruction to tread lightly contrasted starkly to the emboldening charge that it had issued only fourteen years earlier in *Moody*. Furthermore, *Wards Cove* obliterated the viability of disparate impact doctrine, a doctrine the Court once had hoped would combat employment practices that "have operated in the past to favor an identifiable group of white employees. . . ."[44] The Court's new attitude toward disparate impact is largely a reflection of their belief that racism is no longer "a historic evil of national proportions."[45]

III. *WARDS COVE*: COMPETING VIEWS OF EMPLOYMENT DISCRIMINATION

The Supreme Court's dialogue in *Wards Cove* sheds light on the attitudes of the current judiciary and presidential administration and colorfully amplifies the differences between the view that employment discrimination is an ongoing endemic problem requiring aggressive enforcement and the view that it is an isolated wrong only occasionally sufficient to compel some remedy at law. Apparently fearing an employer's use of racial quotas and the potential difficulties in justifying subjective employment practices, the Court in *Wards Cove* liberalized the requirements of the employer's business justification defense by rejecting the standard that the challenged practice be essential to the employee's job performance.[46]

A. Majority View: Discrimination Is Isolated and Uncommon, So Plaintiffs Should Bear All Burdens

A majority of the *Wards Cove* Court held that the appropriate burden for a defendant to rebut a plaintiff's *prima facie* case of discrimination under disparate impact theory is one of production while the ultimate burden of persuasion remains with the plaintiff.[47] While the Civil Rights Act of 1991 almost immediately superseded some aspects of *Wards Cove*,[48] the decision nonetheless embodies the two distinct views that characterize administrative policy and the judiciary's attitude toward discrimination doctrine.

The *Wards Cove* majority paid close attention to the *Watson* plurality's statement that the ultimate burden of persuasion in a disparate impact case remains with the plaintiff at all times.[49] The Court reasoned that placing a burden of production on the defendant conformed with existing allocations of burdens in federal courts generally, and with similar allocations

43. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 661 (1989).
44. Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).
45. Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975).
46. Erik R. Sunde, Note, *Civil Rights—Title VII Disparate Impact Theory—Employer's Burden of Rebutting Prima Facie Case Under Disparate Impact Theory is One of Production While Ultimate Burden of Persuasion Remains with Complainant*, 21 ST. MARY'S L.J. 1081, 1092–93 (1990).
47. *Wards Cove*, 490 U.S. at 659.
48. *See* Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k) (1994).
49. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989).

in disparate treatment cases specifically.[50] While the Court acknowledged that its previous decisions could be read as indicating that a defendant's burden included both production and persuasion, the majority abandoned that reading, holding that the earlier decisions should have been read to provide for a shifting of the burden of production only.[51] Ultimately, the Court held that the language of Title VII indicated that the burden of persuasion must always remain on the plaintiff.[52]

B. Dissenting View: Still Systemic and Endemic, So Burden-Shifting Should Remain

Two dissenting opinions countered the reasoning and result in *Wards Cove*. Justice Stevens's biting dissent accused the majority of judicial activism for departing from the meaning and purpose of Title VII.[53] He also criticized the majority's requirement of specific causation in a plaintiff's *prima facie* case.[54] Noting congressional intent as expressed in *Griggs*, Justice Stevens characterized the business necessity defense as affirmative in nature, thus requiring the burdens of both production and persuasion on the defendant.[55] Justice Stevens further observed that the *Watson* plurality, which the *Wards Cove* majority used to support its new rule that plaintiffs retain the burden of persuasion, relied on no authority whatsoever for its proposition.[56] Justice Stevens reasoned that after a plaintiff establishes a *prima facie* showing of discriminatory effect similar to a showing of injury in an ordinary civil trial, a defendant can escape liability only by persuading the trier of fact that the act was justifiable or excusable; he distinguished the allocation of burdens in disparate treatment cases by emphasizing the intentional nature of the discrimination involved.[57] Justice Stevens criticized the majority for neglecting to explore the interplay between the differing allocations of proof in disparate treatment and disparate impact theories, criticized the majority's characterization of the business justification defense as existing somewhere along a continuum between essential to the business and a "mere insubstantial justification," and

50. *Id.* at 659–60. To support its proposition governing allocations of proof in federal courts, the Court cited FED. R. EVID. 301, which states:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Id. at 659–60.

51. *Wards Cove*, 490 U.S. at 660.
52. *Id.* at 656–60.
53. *Id.* at 662–63 (Stevens, J., dissenting).
54. *Id.* at 670–73 (Stevens, J., dissenting).
55. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. at 670 (Stevens, J., dissenting) (noting that business "justification is a classic example of an affirmative defense.").
56. *Id.* at 672 n.18 (Stevens, J., dissenting).
57. *Id.* at 670 (Stevens, J., dissenting).

argued that the majority had rejected a consistent statutory construction of congressional intent.[58]

In a separate dissent, Justice Blackmun bemoaned the fact that the plurality opinion in *Watson*, providing for a burden of production for the defendant, had now become law and that the majority had thus rejected a longstanding allocation of burdens of proof in disparate impact cases.[59] He concluded by questioning the majority's continuing belief in the existence of racial discrimination against nonwhites in American society, writing:

> The harshness of these results is well demonstrated by the facts of this case. The salmon industry as described by this record takes us back to a kind of overt and institutionalized discrimination we have not dealt with in years: a total residential and work environment organized on principles of racial stratification and segregation, which, as Justice Stevens points out, resembles a plantation economy. This industry long has been characterized by a taste for discrimination of the old-fashioned sort: a preference for hiring nonwhites to fill its lowest level positions, on the condition that they stay there. The majority's legal rulings essentially immunize these practices from attack under a Title VII disparate-impact analysis. Sadly, this comes as no surprise. One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was.[60]

Both retrospective and forward-looking, Justice Blackmun's dissent harkened to 1980s cases curtailing affirmative action and reflected the Congressional resolve that would result in passage of the Civil Rights Act of 1991.

C. Majority View: Turning a Blind Eye to Racism and History

The portion of Justice Blackmun's dissent quoted above suggests a strong connection between the majority's apparent willingness to overlook racism and their failure to examine the history of segregation at the cannery in *Wards Cove*. Cases prior to *Wards Cove* took into account the history of segregation and racism that had helped to create discriminatory practices. In *Moody* the Court found "the question of job relatedness must be viewed in the context of the plant's operation and history of the testing program."[61] The Court then discussed the history of "overt segregation" and the denial of promotions of blacks to management positions before holding that the defendant's validation failed to demonstrate job-relatedness.[62] In *Griggs* the Court had noted that blacks in North Carolina had "long received inferior educations" and that the employer's practice of promoting only workers who passed intelligence tests and received high school diplomas had created an arbitrary barrier to economic advance-

58. *Id.* at 671–73 (Stevens, J., dissenting).
59. *Id.* at 678–79 (Stevens, J., dissenting).
60. *Wards Cove*, 490 U.S. at 662 (Blackmun, J., dissenting) (citation omitted).
61. Albemarle Paper Co. v. Moody, 422 U.S. 405, 427 (1975).
62. *Id.* at 409.

ment.[63] The Court also had made clear that the purpose of disparate impact was to root out the discriminatory consequences that may have remained despite the employer's best intentions.[64]

The Court's willingness to look at the history of employment practices in *Griggs* and *Moody* indicates that the Court once gave credence to the notion that employment inequalities were, at least in part, the product of previous racist employment practices. The Court also once took seriously its own charge to eradicate the effects of past discrimination. In contrast, in *Wards Cove* there seemed to be little question that the racial composition of the workforce was the product of prior racist hiring practices.[65] In fact, the company's practice of importing white managers to supervise nonwhite/native workers and housing them in separate, unequal quarters reportedly bore a striking resemblance to exploitation that flourished under imperialism.[66] Nevertheless, the majority turned a blind eye to history, and in so doing endorsed a racist status quo at the expense of equal opportunity. The fact that the *Wards Cove* Court did not find the employer's history of race discrimination relevant to its inquiry is telling of their view that racism in the workforce is no longer a problem warranting serious action.

D. *Retrospective Merit and* Wards Cove

One's conceptualization of merit is pivotal in how one devises a strategy to address the problem of employment discrimination. A significant Note in the *Harvard Civil Rights-Civil Liberties Law Review* recently conceptualized the two competing views of merit suggested in *Wards Cove*: "Whereas a prospective model considers past achievements as relevant but imperfect proxies for future performance, a retrospective model accepts badges of success as the equivalent of merit itself."[67] Those who adhere to a retrospective model of merit will be much more likely to uphold the status quo as a way of rewarding those who have thrived under the pre-existing employment practice. Hence, the majority's failure to consider the discriminatory history of the defendant's plant was not coincidental; rather, it was a reflection of their belief that prior discrimination is not relevant. In contrast, the prospective model of merit that *Griggs*, *Moody*, and *Teal* embody discounted retrospective merit by pointing out that the status quo is the product of a racist employment system that systematically favored whites over minorities.[68] By re-shaping doctrine in a manner that ignores relevant histories of racism, defers to employers' business goals, and actively seeks to preserve the status quo, the Supreme

63. *Griggs*, 401 U.S. at 430.
64. *Id.*
65. *Wards Cove*, 109 U.S. at 662 (Blackmun, J., dissenting).
66. *Id.*
67. Nicole J. DeSario, *Reconceptualizing Meritocracy: The Decline of Disparate Impact Discrimination Law*, 38 HARV. C.R.-C.L. L. REV. 479, 485 (2003).
68. *See* Connecticut v. Teal, 457 U.S. 440, 445–46 (1982); Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).

Court has shifted from the prospective definition of merit to a retrospective definition.[69]

IV. A GHOST IS BORN: HOW *WARDS COVE* SURVIVED THE ACT MEANT TO OVERRULE IT AND CONTINUES TO THREATEN TITLE VII

In an attempt to clear up confusion about Title VII and revive impact doctrine two years after the *Wards Cove* decision, Congress enacted the Civil Rights Act of 1991. The Act allowed impact plaintiffs to recover punitive damages for disparate treatment.[70] The Act also indicated that, despite the *Wards Cove* Court's holding, an employer would have to demonstrate business necessity in order to avoid Title VII liability for disparate impact.[71] Nevertheless, the Act codified a great deal of doctrinal ambiguity. Above all, the 1991 Act failed to address the most significant part of the *Wards Cove* holding, the Court's commitment to a retrospective notion of merit and the idea that employment discrimination is no longer a problem warranting serious attention. When Congress drafted the Civil Rights Act of 1991, it should have revived the notion embraced by *Griggs* and *Moody* that courts ought to play an active role in eradicating arbitrary barriers to the economic advancement of women and minorities; instead, it left a statutory silence that casts a long shadow over employment discrimination law. The ambiguities in the 1991 Act enable the judiciary and the current presidential administration to suit employment discrimination law to their own views about race and merit, thereby undermining the goal of equal employment opportunity set forth in Title VII of the Civil Rights Act of 1964.

A. Technical Ambiguities in the Civil Rights Act of 1991

Although the Act failed to clear up many aspects of Title VII, Congress was unequivocal about its desire to roll back most of *Wards Cove*. In fact, the drafters included multiple explicit expressions of their intent to codify pre–*Wards Cove* jurisprudence. The terms of § 703(K)(1)(A) announced that the concept of "alternative employment practice" would be "in accordance with the law as it existed on June 4, 1989," the day before *Wards Cove* was handed down.[72] Indeed, subsequent courts have recognized that "[o]ne of the primary purposes of the Act was 'to codify the concepts . . .

69. *See Teal*, 457 U.S. at 445–46; *Griggs*, 401 U.S. at 429–30. DeSario argues persuasively that although the Court created the disparate impact doctrine under a prospective model of meritocracy, it shortly began to chip away at the doctrine's precepts and shift to a retrospective model. *See* DeSario, *supra* note 67. Deference to the retrospective definition is particularly problematic for plaintiffs in upper-level jobs, whose employers courts appear to favor. *See* Elizabeth Bartholet, *Application of Title VII to Jobs in Higher Places*, 95 HARV. L. REV. 947, 978–80 (1982) (exposing tendency of judges to defer to employers in prestigious jobs). Professor Bartholet argues that judges identify with such employers and therefore defer to their decisions. *Id.* at 979. This deference stems from the benefits that judges have acquired from selection systems similar to those that characterize other upper-level jobs. *Id.*

70. *See* Civil Rights Act of 1991, 42 U.S.C. § 1981a (1994).

71. *See id.* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994).

72. *See id.* 42 U.S.C. § 2003e-2(k)(1)(C) (1994).

enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, and in the other Supreme Court decisions prior to *Wards Cove*.'"[73]

When it codified pre–*Wards Cove* decisions, the 1991 Act failed to clarify significant ambiguities in disparate impact doctrine. Since these ambiguities pre-dated *Wards Cove*, the 1991 Act essentially codified them. Perhaps the most glaring failure was that Congress did not give courts any guidance as to what type of statistics should be used for proof in the disparate impact context. The *Wards Cove* Court broke from the letter and spirit of the statistical analysis of its own precedent in *Griggs* and *Bazemore v. Friday*.[74]

In *Griggs*, the first disparate impact case, the employer used a high school diploma and an intelligence test as a criterion for promotion to higher-paying jobs at its assembly plant. The Court relied on statistics from the 1960 Census that were unrelated to the employer in the case but that were part of a pattern of racial hierarchy Congress intended Title VII to eradicate.[75] The Court found that only 12% of blacks graduated from high school in North Carolina, while more than two and a half times as many whites achieved the same level of education.[76] The Court also looked at the requisite intelligence tests and found that 58% of white workers passed, compared to only 6% of blacks.[77] The *Griggs* Court reasoned from those statistics that the plaintiffs had proved their *prima facia* case and shifted the burden to the defendant to justify the tests and statistical disparity.[78] In *Bazemore*, however, the Court rejected the Court of Appeals' holding that the failure of a class of plaintiffs to include "all measurable variables" in their regression analysis made the regression "unacceptable as evidence of discrimination."[79] The Court found that "[a] plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence."[80] Instead, the Court emphasized, statistics must be read within a factual context.[81]

In *Wards Cove*, rather than engaging in a *Griggs*-like disparate impact statistical analysis and examining the percentages of non-white workers promoted compared with white workers promoted, the Court chose to employ a different type of analysis, which it justified by citing *Dothard v. Rawlinson*.[82] The Court declared that the relevant pool of workers for comparison was not the workers actually working in the cannery, but the percentage of non-white workers employed as supervisors as compared to the percentage of qualified non-whites in the population of potential applicants.[83] The Court found that the relevant applicant pool was not the area

73. Lanning v. Southeastern P.R. Transp. Auth., 181 F.3d 478, 487 (3d. Cir. 1999).
74. 478 U.S. 385 (1986).
75. Griggs v. Duke Power Co., 401 U.S. 424, 431, n.6 (1971).
76. *See id.*
77. *See id.*
78. *See id.* at 431.
79. *Id.* at 400.
80. *Id.*
81. *Id.*
82. 433 U.S. 321 (1977); *see* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 651 n.6 (1989).
83. *See Wards Cove*, 490 U.S. at 655.

where the cannery was located, but Washington, where the defendant hired its managers.[84]

Rather than examining the plaintiff's statistics in context, the *Wards Cove* Court actually broke with precedent to find statistics supporting the outcome it desired. Had the Court conducted a *Griggs*-like analysis, it would have found the number of non-white workers employed compared to the number of non-white workers in management grossly deficient. In sum, not only did the *Wards Cove* Court fail to follow the precedent of the *Griggs* and *Bazemore* statistical analyses; it also chose a path in direct conflict with the spirit of those cases by making no effort to examine patterns of discrimination that extended beyond the particular employer in the case.

It is important to note that the *Wards Cove* Court rested its statistical analysis on dicta in *Dothard* as well as other disparate impact and systematic discrimination precedent.[85] Hence, there is a strong argument that the choice of statistics in the context of disparate impact predated *Wards Cove* and was therefore codified by the 1991 Act. Thus, courts after the Act are free to do as the Supreme Court did in *Wards Cove*—selectively determining which statistics to use to discern whether a hiring practice has a disparate impact. Because contemporary courts generally exercise discretion in favor of employer-defendants, this subjectivity will remain problematic for employees seeking redress for Title VII violations.

Further frustrating an interpretation of the statute, the Act's terms proscribe an investigation of legislative history.[86] The limited legislative intent that the drafters provided stated simply that Congress wanted to return to the standard set forth in *Griggs* and its progeny.[87] The drafters' stated intent to return to pre–*Wards Cove* jurisprudence does not necessarily resolve the ambiguity. As subsequent courts have discussed, though *Griggs* coined the terms "job-related" and "business necessity," the Court was unclear in articulating what exactly constituted business necessity, and an examination of *Griggs'* progeny leaves a range of possibilities.[88] For example, in *Washington v. Davis*,[89] the Court found that a mere "positive relationship" between Test 21 and the requirements of being a police officer justified a police academy's use of the exam to screen candidates.[90] In *Moody*, the Court probably gave the most illuminating definition of business necessity. It found that the practice must be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."[91] Yet, the *Dothard* Court did not include *Moody*'s illuminating definition in its discussion of business necessity. Instead, the Court announced that an employment practice must be "job related," but failed to give life to the term.[92]

84. *See id.* at 651–53.
85. *See id.* at 651 n.6.
86. Lanning v. Southeastern P.R. Transp. Auth., 181 F.3d at 478, 488 (3d. Cir. 1999).
87. *See id.*
88. *See id.* at 487.
89. Washington v. Davis, 426 U.S. 229 (1976).
90. *Id.* at 231.
91. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 406 (1975).
92. Dothard v. Rawlinson, 433 U.S. at 321, 329 (1977).

Cases since the 1991 Act indicate that merely codifying pre–*Wards Cove* jurisprudence without identifying specific aspects of the jurisprudence has failed to resolve crucial issues such as the meaning of business necessity. The Third Circuit's decision in *Lanning v. Southeastern Pennsylvania Transportation Authority*[93] demonstrates that lower courts have grappled with what Congress meant by a return to the cases that preceded *Wards Cove*.[94] The court found that "a discriminatory cutoff score on an entry-level employment examination must be shown to measure the minimum qualifications necessary for successful performance of the job in question in order to survive a disparate impact challenge."[95] In contrast, the dissent articulated the belief that the phrase "consistent with business necessity" in the 1991 Act included a lower standard when public safety could be implicated.[96] On its way to reaching this conclusion, the court also noted the split among circuit courts over the business necessity requirement, which resulted from the imprecise drafting of the 1991 Act.[97] Ultimately, a judge interpreting "job-related and consistent with business necessity" will be able to search through the cases preceding *Wards Cove* and find a standard that suits the result he or she wishes to effect.

B. Normative Failures of the Act

Despite Congress's effort to overturn *Wards Cove*, the 1991 Act's failure to declare a strong normative intent clearly compromises its value to victims of employment discrimination. As the Court declared in *Teal*, *Griggs*, and *Moody*, the 1964 Act's objective was to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees. . . ."[98] Though Congress could have taken the opportunity to reassert the significance of Title VII and put to rest the idea of retrospective merit and the notion that employment discrimination is no longer a problem warranting serious attention, lawmakers failed to do so. Their omission will permit the ghost of *Wards Cove* to haunt Title VII.

Four decades after the momentous passage of the Civil Rights Act of 1964, the shadows of slavery and segregation loom as impediments to equal opportunity and economic advancement for minorities. Meanwhile, as *Wards Cove* indicates, courts are more willing to turn a blind eye to an employer's history of discrimination. Given Congressional intent to return to the *Griggs* jurisprudence, it would have been logical for lawmakers to codify the most important aspect of the case, the notion that employment discrimination is a serious problem warranting immediate action. Congress could have noted the Court's holding in *Bazemore* and advised courts that history matters and that judges need not demand an exacting degree of statistical perfection from disparate treatment plaintiffs.

93. 181 F.3d 478 (3d Cir. 1999).
94. *See id.* at 488.
95. *Id.* at 481.
96. *Id.* at 497.
97. *See id.* at 488.
98. *See* Connecticut v. Teal, 457 U.S. 440, 448 (1982); Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).

Lawmakers' failure to set forth a clear directive about statistics and employment history is indicative of the 1991 Act's failure to take a normative stance on the role of Title VII.

C. The Practical Significance of the Act's Shortcomings: Disparate Impact and Modern Employment Plaintiffs

As the case of Rony Civil illustrates, overt racism is still a significant problem in the workforce meriting serious attention. Yet, due in part to the awareness of racial issues brought about by the civil rights movement, many Americans are simply less likely to harbor racial animus. Even if an employer does harbor racial animus, he or she is less likely to express those feelings openly because doing is socially unacceptable and liability is feared.[99] While many employment decisions are undoubtedly the product of racial animus, employers' conscious efforts to create diverse, even politically correct workplaces mean that employees are much less likely to be able to produce the strong evidence of intent necessary for a disparate treatment claim.[100] Disparate impact remains important to employment plaintiffs because the discrimination they face in the modern workplace is more likely to be subtle or even unconscious discrimination.

Even though employees today are less likely to face overt discrimination than they battled prior to the civil rights movement, people tend to harbor unconscious biases and stereotypes that, despite the best of intentions, may affect employment decisions.[101] Research suggests that rather than acting on conscious animus, employers are motivated by unconscious biases that stem from a basic human cognitive tendency to process information and impressions about people in categories.[102] These biases may be especially problematic because employers tend to be unaware that they are in fact sorting people into categories.[103] In addition, many employers who honestly believe in equal employment opportunity may still make employment decisions based on "unconscious negative [racial] feelings when they are able to justify their actions in non-racial terms."[104] Furthermore, some employers tend to favor members of their own group because it fulfills their basic need to feel good about themselves.[105]

Empirical studies on minority hiring indicate bias still plays a role in critical employment decisions. A study responding to thousands of classified ads in Chicago and Boston newspapers found that fictitious white job applicants were much more likely to be called for an interview than equally

99. *See* Green, *supra* note 10, at 92.
100. *Cf.* Vickie Shultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2087–90 (2003). Although Shultz's article focuses on measures that employers have taken to prevent sexual harassment, it is logical to infer that employers' increasing efforts at workplace sensitivity brought about by Title VII have had a chilling effect on racially inappropriate comments.
101. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995).
102. *See id.* at 1212.
103. *See id.* at 1214–15.
104. Green, *supra* note 10, at 97.
105. *See* Green, *supra* note 10, at 99.

qualified fictitious black job applicants.[106] While it is likely that some of the fictional equally qualified minority applicants were rejected for conscious discriminatory reasons, it is also likely that many were rejected by employers who had every intention of providing equal employment opportunity. A strong disparate impact doctrine is important in reducing discrimination in the modern workplace because it does not require a demonstration of intent.

Impact doctrine is also likely to become more important because the current Supreme Court has demonstrated a distrust of statistics in the disparate treatment context that earlier courts did not. In *Teamsters v. United States*[107] the Court found statistics of gross disparity between the number of blacks employed in certain positions and the number of blacks in the relevant workforce to be probative of discrimination.[108] The *Teamsters* Court noted that statistics showing racial imbalance were probative because they were "often a telltale sign of purposeful discrimination. . . ."[109] In contrast, in *Price Waterhouse v. Hopkins*,[110] which was handed down in the same year as *Wards Cove*, the plaintiff was the only woman up for partner and there were very few women partners in the firm, which employed thousands.[111] Despite apparent discrepancies, a discussion of statistics was conspicuously absent. Instead, examining the gross statistical disparities as probative of discrimination, the Court relied on statements about the plaintiff's failure to conform to her gender stereotype.[112] The distrust of statistics that surfaced in *Hopkins* suggests that plaintiffs who rely on employment statistics to demonstrate discrimination will have to rely on disparate impact.

Finally, disparate treatment has become an insufficient cause of action for plaintiffs because courts in recent years have exhibited a willingness to find that groups alleging disparate treatment were simply not interested in the job in question.[113] In *E.E.O.C. v. Sears, Roebuck & Co.*[114] the Supreme Court found no discrimination where a Title VII defendant asserted that the under-representation of female employees in the sales department was due to a lack of interest.[115] The defendant in *Sears* suggested women did not want the position because they preferred to take jobs that allowed them to spend more time at home raising children.[116] Courts' willingness to accept the lack-of-interest defense is problematic because it accepts the stereotypes, conscious or unconscious, that may have led to the under-representation in the first place. And, as shall be suggested below, since judges may be subject to conscious or unconscious biases, the same

106. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Brendan More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, at 2, *available at* http://gsb.uchicago.edu/pdf/bertrand.pdf (last visited Apr. 26, 2005).
107. 431 U.S. 324 (1977).
108. *Id.* at 339–40 n.20.
109. *Id.*
110. 490 U.S. 228 (1989).
111. *Id.* at 233.
112. *Id.* at 234–35.
113. *See, e.g.*, E.E.O.C. v. Sears, Roebuck & Co., 839 F.2d 302, 321 (7th Cir. 1988).
114. 839 F.2d 302 (7th Cir. 1988).
115. *See id.* at 321–22.
116. *See id.*

stereotyping that created the alleged discrimination may also play a role in the court's fact finding.

In sum, if Title VII still provides any hope of redress for discrimination victims in the modern workplace, it would be more likely to come through disparate impact theory. Yet, the shortcomings of the Civil Rights Act of 1991 and the *Wards Cove* ideology have jeopardized even this shred of hope.

VI. PRESIDENT BUSH'S *WARDS COVE* VIEWPOINT: DOWNPLAYING DISCRIMINATION AND PURSUING POLICIES ON ELUSIVE ASSUMPTIONS OF MERIT

President Bush already has nominated judges overtly committed to rolling back civil rights laws.[117] He opposed affirmative action, incorrectly identifying as a quota a University of Michigan system that was under review by the Supreme Court.[118] Despite faulting education problems instead of racial discrimination as the problem most harmful to black Americans, President Bush refused to fund his No Child Left Behind education initiatives, which were passed by Congress to raise standards and achievement for all children.[119] He de-prioritized the Civil Rights Division of the Justice Department, discouraging the kind of aggressive legal advocacy encouraged under President Clinton.[120]

President Bush's nominee to become chairman of the U.S. Commission on Civil Rights, Gerald. A. Reynolds, embodies the view forwarded by the *Wards Cove* majority and the Bush Administration that racism is no longer a problem. Reynolds is forty-one years old and black, but he is not

117. *See* R. Jeffrey Smith, *Judge's Fate Could Turn On 1994 Case; Pickering Fought to Reduce Sentence for Cross-Burning*, WASH. POST, May 27, 2003, at A1 (noting that Bush appointed Mississippian Charles Pickering through a recess appointment after Pickering testified in his confirmation hearing for a seat on the Fifth Circuit Court of Appeals that as a trial judge, Pickering threw out cases alleging sex or race discrimination on the job, assuming that they all lacked merit. Pickering was criticized for his role in a cross-burning case in which he went out of his way to lower a defendant's sentence from seven years to twenty-seven months).

118. Neil A. Lewis, *Bush and Affirmative Action: The Overview; U.S. Says Michigan System Is Equivalent to a Quota*, N.Y. TIMES, Jan. 17, 2003, at A1 (reporting that on Martin Luther King, Jr.'s birthday, Bush announced his opposition to the University of Michigan admissions process by filing two *amicus* briefs in the Supreme Court, minutes before the midnight deadline). The Supreme Court explicitly rejected his position in its subsequent opinions in *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Gratz v. Bollinger*, 539 U.S. 244 (2003).

119. Report of Committee on Education & The Workforce, Democratic Caucus, *Enhancing College Opportunities*, Apr. 1, 2004 (reporting that in his FY 2005 budget, Bush underfunded the legislation by $9.5 billion and arguing that, given the past three years' shortfalls, America's schoolchildren now face a $27 billion shortfall).

120. *See generally* House Democratic Budget Committee, *Bush Budget: Truth & Consequences*, Feb. 7, 2003; House Democratic Budget Committee, *Summary and Analysis of the President's 2004 Budget*, Mar. 1, 2004; House Democratic Budget Committee, *Summary and Analysis of the President's 2005 Budget*, Feb. 7, 2003 (reporting that under Attorney General John Ashcroft, the Justice Department's civil rights division has been effectively closed, as Ashcroft has brought only sixteen lawsuits in three years compared to twenty-four in the last three years of the Clinton administration, while abandoning substantial lawsuits and settlements begun by prior administrations) (quoted at http://www.johnkerry.org).

sure he has personally experienced racial discrimination.[121] Ironically, Reynolds, who once described affirmative action as "a big lie," has been charged with leading a forty-seven-year-old advisory panel with a storied history of encouraging the government to combat discrimination.[122] While acknowledging that discrimination still exists, the regulatory lawyer so far has sharply criticized traditional civil rights organizations, alleging that they overstate the problem.[123]

A. Doctrinal Ambiguity and the Significance of the Bush Administration's Judicial Appointments

Although the 1991 Act has been successful in some respects, Congress failed to give stern direction and clear rules to the judiciary that had strayed from the doctrine, and indeed its own precedent, to undermine impact doctrine. The 1991 Act's ambiguities create more opportunities for judicial discretion in the context of disparate impact. This is significant because courts' increasing tendency to grant summary judgment in employment discrimination suggests that judicial discretion will be dispositive in many actions. Conservative judges like Charles Pickering will continue to fill the courts at least through 2008, and probably will exploit ambiguities in a manner reflecting their notions about retrospective merit and their beliefs that racism is no longer a serious problem in the workforce.

Wards Cove stands as an example of how an unsympathetic Court will undermine impact doctrine if doctrinal ambiguities present the opportunity. In *Wards Cove* the Court overturned a finding of disparate impact where an employer's hiring practice resulted in hiring almost exclusively non-whites for low-level positions and almost entirely white workers for supervisory positions in an Alaskan cannery.[124] As explained above, the Court used statistics in a manner contrary to precedent to reach its conclusion. The Court also supplanted the business necessity requirement, established in *Griggs*, with its own less strenuous requirement that the discriminatory practice be consistent with a legitimate business goal.[125] Furthermore, the Court added the requirement that a plaintiff demonstrate that any alternative business practice must be equally effective and comparable in terms of costs with the discriminatory practice.[126] In short, *Wards Cove* is a road map for how judges may evade disparate impact in the absence of a firm directive.

---

121. Randal C. Archibold, *Shift Toward Skepticism for Civil Rights Panel*, N.Y. TIMES, Dec. 10, 2004, at A22. Article quoted corporate lawyer as having said:

> I just assume somewhere in my life some knucklehead has looked at me and my brown self and said that they have given me less or denied me an opportunity. But the bottom line is, and my wife will attest to this, I am so insensitive that I probably didn't notice.

Id. at A22.

122. *Id.*
123. *See id.*
124. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 653–55 (1989).
125. *See id.* at 661.
126. *See id.*

Judges' sympathies and unconscious biases may detract from the effectiveness of impact doctrine. As subtle and unconscious discrimination remains a dominant threat to Title VII's goal of equal opportunity, plaintiffs will need to rely more than ever on disparate impact doctrine. Judges are subject to subtle conscious and unconscious biases that are similar to the biases that may lead to employment discrimination in any given case.[127] Ambiguous law gives judges an opportunity to manifest such conscious and unconscious biases.[128] Commentators suggest that judges tend to interpret Title VII's protections "as generalized rules of fairness, bearing increasingly less resemblance to the anti-racist, anti-sexist political ideologies from which they emerged."[129] In the wake of the 1991 Act, courts will have substantial leeway in determining a given case. The tendency to interpret Title VII statutes in terms of basic fairness indicates that judges may be less likely to find discrimination in the absence of intent.

B. Elusive Assumptions of Merit and the President's Commitment to Overturning Affirmative Action

Another force contributing to the desire to downplay impact doctrine is the general wish to stop considering numbers as a measure of progress, most notably embodied in opposition to affirmative action plans. President Bush's own desire to abolish affirmative action evidences his firm engagement in a retrospective view of merit. In explaining his concept of "affirmative access" to replace affirmative action, for example, he pointed out that he signed into law a Texas bill requiring that the top 10% of graduates from Texas high schools be automatically accepted in any public university in the state, pledged to "strip bureaucratic regulation, such as high permitting and licensing fees, which disproportionately hurt minority-owned businesses," and vowed to "break up federal procurement contracts to allow minority-owned businesses to compete for or partner with more experienced firms as subcontractors."[130] While President Bush said he would "reward companies making aggressive efforts to involve minority-owned businesses through subcontracting and mentoring programs,"[131] he made clear by 2003 that he eschewed such efforts' taking the form of traditional affirmative action.[132]

---

127. *See* Linda Hamilton Krieger, *Afterward: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 486 (2000) (arguing that judges will implement their natural biases when a statute or law allows discretion to do so).
128. *See id.*
129. *See id.* at 485.
130. *Vice President Gore and Governor Bush Tell What They Would Do For Blacks*, EBONY, Nov. 2000, at 132. Bush stipulated that:

> I support what I call "affirmative access"—not quotas or double standards, because those divide and balkanize, but access—a fair shot for everyone. For example, I signed legislation in Texas requiring the top 10 percent of graduates from Texas high schools to be automatically accepted in any public university in Texas.

Id. at 132.
131. *Id.*
132. *See* Lewis, *supra* note 118.

The problems created by retrospective definitions of merit are manifold. For one thing, the persistence of segregation in the American workforce may be attributed to purposeful discrimination superimposed over seemingly neutral employment criteria, which would have a disproportionate effect on minority applicants while giving the appearance that no bias exists.[133] An often-cited 2002 study found, for instance, that applicants with stereotypical white names received one callback for every ten résumés disseminated, while applicants with identical credentials but stereotypical black names received one callback for every fifteen résumés.[134] More importantly, uninformed notions of meritocracy justify a status quo that erroneously assumes that Americans operate within a functioning meritocracy—that individual qualifications are quantifiable, separable from social context, and relevant for differentiating individuals, even though this view has been seriously called into question in much of the scholarly literature on racism.[135]

C. Undermining the Effectiveness of Equal Employment Opportunity Commission

Title VII's administrative agency is the Equal Employment Opportunity Commission (the "E.E.O.C.").[136] If an individual has a complaint of discrimination against an employer, he or she has 180 days to file a grievance with the E.E.O.C.[137] If the time limit has passed, an extension may be granted at the discretion of the court.[138] The E.E.O.C. has broad powers to effectuate conciliation agreements and may intervene in civil actions against non-governmental agencies.[139] In addition to its administrative capacity, the E.E.O.C. has authority to file a civil suit against an employer in federal district court in the event that non-judicial remedies fail.[140] District courts have wide discretion to administer equitable relief for proven wrongs, including the ability to order an employer to rehire an aggrieved party and to award back pay.[141]

As an administrative agency, the E.E.O.C. is located within the executive branch. In general, the E.E.O.C. interprets various employment dis-

133. Scholars have identified "subtle" and "unconscious" biases as "today's most prevalent type of discrimination." Krieger, *supra* note 101, at 1164.
134. Bertand & Mullainathan, *supra* note 106, at 2.
135. *See* DeSario, *supra* note 67, at 481–82 (presenting the contention that segregated, impoverished neighborhoods provide inferior educational opportunities, which in turn make the attainment of recognized employment credentials more difficult for the affected individuals, and summarizing that this line of reasoning challenges the premise of American society as meritocracy by arguing that achievement is more a product of social context than a reflection of individual ability); *accord* Georgette C. Poindexter, *Beyond the Urban-Suburban Dichotomy: A Discussion of Sub-Regional Poverty Concentration*, 48 BUFF. L. REV. 67, 80 (2000), and Erin E. Byrnes, *Unmasking White Privilege to Expose the Fallacy of White Innocence: Using a Theory of Moral Correlativity to Make the Case for Affirmative Action Programs in Education*, 41 ARIZ. L. REV. 535, 553 (1999).
136. 42 U.S.C. § 2000e-4(a) (2005).
137. *Id.* § 2000e-5(e).
138. *Id.*
139. *Id.* § 2000e-4(g)(4), (6).
140. *Id.* § 2000e-5(f)(1).
141. 42 U.S.C. § 2000e-5(g)(1) (2005).

crimination statutes and applies its interpretation through litigation.[142] The co-laboring of the E.E.O.C. and the executive branch is reflected in the functions taking place at the Department of Justice and at the Commission.[143] The E.E.O.C., through a Carter administration reorganization, took over a number of discrimination areas that had been under executive departments and agencies.[144] Thus reorganized, the E.E.O.C. was dubbed the "lead agency" in employment discrimination and was authorized to strategize the enforcement function of eighteen governmental agencies with Title VII enforcement power.[145] This authority included the power to require all governmental agencies to file affirmative action plans to the E.E.O.C.[146] Through the agency's designation as lead coordinator and its assumption of power from purely executive entities, E.E.O.C. operations are intertwined with executive branch authority.[147]

The reorganization was formulated by then-E.E.O.C. chair Eleanor Holmes Norton, who, frustrated with the E.E.O.C.'s lack of power, pushed for the Commission to integrate formally its operations with executive departments and agencies.[148] Despite reservation among some officials in the Carter administration who feared that the reorganization might symbolically and unfortunately lift the E.E.O.C.'s quasi-independent veneer, Norton persisted because she already considered the E.E.O.C. "an agency in the executive branch and not a traditional independent agency."[149] Whether Congress agreed is unclear, but without comment, the House and Senate oversight committees allowed Norton's reorganization to take effect.[150] Congress appears to have felt no need to protect the E.E.O.C.'s structural independence.[151]

Indicative of skepticism toward those who claim to have been victims of employment discrimination, the Bush Administration effectively has cut funding of the E.E.O.C.[152] President Bush weakened the organization, eventually appointing in recess an E.E.O.C. vice chairman with a record of in-

142. Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273 (1993) (summarizing U.S. Commission on Civil Rights, Federal Enforcement of Equal Employment Requirements 10–11 (1987)).
143. *Id.* at 285.
144. *Id.* at 285–86.
145. *Id.* at 286.
146. *Id.* (citing U.S. Commission on Civil Rights, Federal Enforcement of Equal Employment Requirements 10–11 (1987)).
147. Devins, *supra* note 142. Devins also notes that "[d]irect E.E.O.C. involvement with the executive is also a by-product of Department of Justice authority to separately enforce and interpret employment discrimination laws." *Id.*
148. *Id.* at 295.
149. *Id.* (citing interviews with Norton and Days).
150. *Id.*
151. *Id.*
152. Reed Abelson, *Effectiveness and Consistency of E.E.O.C. Are Questioned*, N.Y. TIMES, Aug. 2, 2001, at C7 (reporting that the agency's budget for the 2001–02 year was $303 million and that Bush's request of $310 million for the next year was an amount that would not cover the expected increases in costs of real estate and employees). *Accord* House Democratic Budget Committee 2003, *supra* note 120 (adding that the Equal Employment Opportunity Commission has received only token increases, and Bush proposes that the U.S. Commission on Civil Rights operate through 2005 at $1 million below 2002 funding levels).

action on discrimination, Naomi Churchill-Earp. The National Association for the Advancement of Colored People reported that between fiscal year 1990 and fiscal year 2000, 174 E.E.O. complaints were filed under Churchill-Earp's tenure as director of the National Institutes of Health's Office of Equal Opportunity. After pursuing all 174 complaints, Churchill-Earp did not find a single case of employment discrimination by the agency.[153]

President Bush's indifference to the E.E.O.C. was carried out even as the Supreme Court apparently strengthened the agency. In 2002, the Court overturned a lower court's decision about binding arbitration. In *E.E.O.C. v. Waffle House, Inc.*[154] the Court critiqued the practice by which many employers required workers to agree to arbitration for employment disputes, signing away their rights to sue.[155] In a 6-3 decision the Supreme Court ruled that the E.E.O.C. is not bound by "arbitration-only" agreements between workers and their employers.[156] The Court seemed to agree with the plaintiffs that the consequential difference in bargaining power could make arbitration inherently unfair and that, if signing such an agreement was required for employment, then the practice might be coercive. Justice Thomas, dissenting, complained that employers were left at a disadvantage if workers are "allowed two bites at the apple."[157] The majority enabled the E.E.O.C. to sue even where an employee had relinquished the right to sue under the Americans with Disabilities Act, the Age Discrimination in Employment Act, and Title VII of the Civil Rights Act of 1964.

Yet, under the second Bush administration, the E.E.O.C. is unlikely to exercise to the fullest this authority, or any other legal extensions of protections of workers against employment discrimination. This prediction is supported not just by Bush's record manifesting the view of the *Wards Cove* majority—that burdens should fall entirely on the plaintiff because discrimination is no longer a serious problem—but also by his clear embrace of a definition of merit that has proved unfit to fight employment discrimination.

VII. CONCLUSIONS

The Civil Rights Act of 1991 may have overruled some aspects of *Wards Cove*, but the official downplaying of discrimination and acceptance of retrospective views of merit have persisted. The normative and technical ambiguities in the 1991 Act will enable the unfortunate *Wards Cove* ideology to continue to have a powerful effect on Title VII law. Though the E.E.O.C.'s enforcement powers have been expanded, employment plaintiffs are unlikely to reap the benefits of their power in the near future. Clinging to a demonstrably indifferent attitude toward the problem of discrimination and specifically to retrospective views of merit, the Bush

153. *NAACP lays out case against Churchill-Earp*, Federal Human Resources Week Vol. 8, No. 48 (Apr. 8, 2002) (noting that "[t]he NAACP contended that the absence of discrimination findings 'raises some very serious questions as to the effectiveness of the EEO program at NIH.'").
154. 534 U.S. 279 (2002).
155. *Id.* at 284–89.
156. *Id.* at 289.
157. *Id.* at 310.

administration has declined to confront the problem of employment discrimination in the United States. With diminished intellectual and financial resources devoted to the problem in all branches of the federal government, and a withered disparate impact doctrine, aggrieved employees considering action against their employers may sensibly perceive themselves as being where they were at the end of 1989, if not at the beginning of 1964.