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THE CIVIL RIGHTS ACT OF 1991, TWENTY-FIVE YEARS AFTER

The Incomplete Codification of Title VII's Disparate Impact Standards
and the Uncoupling of the ADEA from Title VII Precedent

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On Friday, November 15, 1991, the United States Senate confirmed my nomination by President George H. W. Bush to serve as general counsel of the EEOC. I took the oath of office on the following Tuesday, November 19th. Two days later, President Bush signed the Civil Rights Act of 1991 during a ceremony in the White House Rose Garden. I attended.

One year earlier, the President had vetoed the Civil Rights Act of 1990, a bill touted by its proponents as the restoration of civil rights laws. The pressure to sign the bill was intense. President Bush stated, "The temptation to support a bill – any bill – simply because its title includes the words 'civil rights' is very strong…. But when our efforts, however well-intentioned, result in quotas, equal opportunity is not advanced but thwarted. The very commitment to justice and equality that is offered as the reason why this bill should be signed requires me to veto it."

The President explained that his problem was the way the bill preserved Title VII's disparate impact paradigm. He highlighted two concerns. First, the 1990 bill did not require that a plaintiff show that any of the employer's practices caused a significant statistical disparity in many cases. Second, the bill contained a definition of "business necessity" that was significantly more restrictive than the standard from the Supreme Court's 1971 decision in *Griggs* v. *Duke Power Company* and "two decades of subsequent [Supreme Court] decisions." The President was concerned that employers would replace reasonable selection procedures with racial quotas to avoid costly court fights and EEOC entanglements.

After the Senate failed to override the President's veto by a single vote,[1] the President directed his White House counsel to work with Senate and House Democrats to reach a bipartisan agreement on revisions to the disparate impact amendment.

[1] *See* 136 CONG. REC. S16,589 (daily ed. Oct. 24, 1990).

On October 23, 1991, Clarence Thomas was sworn in by Justice Byron White as the 106th Justice of the United States Supreme Court. Thomas's confirmation hearings had a profound effect on the civil right bill. The proceedings had produced high drama, and sparked racial controversy. Thomas's supporters believed that extreme efforts were made to destroy his reputation because his adversaries could not countenance replacing Justice Thurgood Marshall with a black conservative. Thomas also thought this. He saw himself as a man with "different ideas" who did not "kowtow to an old order," points he made forcibly to the Senate. Emotions ran high.[2] Some Republican senators worried about the perception that their party opposed civil rights. For this reason as much as any other, a compromise was quickly reached, and the Civil Rights Act became law on November 21, 1991, just in one month after Thomas's confirmation.

Two days after Thomas's confirmation, October 25, 1991, the Bush Administration had announced its support for an amended civil rights bill (Senate Bill 1745). The same day, Senator Danforth of Missouri introduced the amendment in the Senate with the statement, "we are ready … to reestablish the consensus on civil rights." It was understood that the Senate would vote to pass the bill on Monday, October 27 or Tuesday, October 28 with no "mischief making" amendments allowed. The Senate did not reconvene until October 29, with an agreement that it would consider only technical, non-substantive amendments to the pending bill.

I was most interested in the so-called technical amendment that was to be offered by Senator Kennedy. I had studied the compromise bill on October 25, and saw that the provision that authorized the recovery of compensatory and punitive damages for Title VII disparate treatment violations contained a definitional section that, reasonably interpreted, barred the recovery of compensatory and punitive damages in cases brought by the EEOC or the U.S. Department of Justice. This seemed to be an oversight or drafting glitch.

I alerted EEOC chair, Evan Kemp, and EEOC vice chair, Ricki Silberman. At Evan's request, I telephoned Jeff Blattner on Senator Kennedy's Judiciary Committee staff. Over the course of two conversations, Blattner told me that Senator Kennedy would introduce an amendment to correct the bill, provided commission leaders first sent a letter of congratulations to Senator Kennedy for obtaining passage of the Act. That afternoon, a letter from Chairman Kemp was delivered to Senator Danforth, congratulating *him* for his efforts on reaching consensus on the civil rights bill and advising him of the problem with the damages provision. An identical letter was sent to Senator Kennedy on October 28.[3] Senator Kennedy placed his letter in the Congressional Record, and proposed an amended to modify the damages provision. The "technical amendment" passed by unanimous consent.[4]

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[2] Philip S. Runkel, The Civil Rights Act of 1991: A Continuation of the Wards Cove Standard of Business Necessity, 35 Wm. & Mary L. Rev. 1177, 1199 (1994).

[3] It is my recollection that these letters were sent on the same date. I have a copy of the letter to Senator Danforth dated October 25, 1991. However, the Congressional Record gives the date of the letter to Senator Kennedy as October 28, 1991.

[4] Many years later, a lawyer who had participated in advising on the bill told me that the damages provision had been intentionally written to exclude courts from awarding damages in lawsuits brought by the EEOC and the DOJ.

Over the last 25 years, the amendments contained in the Civil Rights Act of 1991 have proven significant in only a few respects. Plainly, the provisions that influence the amount of money that is recoverable by an individual plaintiff have been paramount, as has been the provision that grants Title VII and ADA jury trials. They have increased the settlement value of cases and the risks to defendants of a trial. The Act's repudiation of the Supreme Court's opinion in *Wards Cove Packing* has restored claims based on business decisions with non-discriminatory motives, but which fall more harshly on members of a particular protected group. Absent the amendment, it seems likely that disparate impact theory would have become a means to prove intentional discrimination by inference in class cases rather than a distinct way to impose liability for innocent acts.

In this paper, I discuss two questions that I identified in 1993 in an article published in the Stetson Law Review.[5] First, what are the governing principles for a Title VII disparate impact case? And second, did the Civil Rights Act of 1991 establish different standards for Title VII and the ADEA? But, before I reach these questions, I touch briefly on other changes that resulted from the Act.

I. Overview of the 1991 Amendments

The preamble to the 1991 Act, called "Findings and Purpose of the Civil Rights Act of 1991," states that the Act's purpose is to provide appropriate remedies for harassment and intentional discrimination, and to clarify authority and guidelines for disparate impact lawsuits. It further states that the Act is a response to recent decisions of the Supreme Court "in order to provide adequate protection to victims of discrimination." However, the only Supreme Court opinion mentioned in the preamble is *Wards Cove Packing Co. v. Atonio*, which, I think, signals the centrality of that opinion to the decision by Congress to amend the employment discrimination laws. *Wards Cove Packing* had redefined, and rearranged, the burden of proving "business necessity" justification in a Title VII disparate impact case.

The 1991 Act amended five statutes and responded to eight Supreme Court opinions. Amended were Title VII, the Americans with Disabilities Act (itself newly enacted and not yet in effect), the Age Discrimination in Employment Act of 1967; the Civil Rights Act of 1866; and the Civil Rights Attorney's Fees Awards Act of 1976. In addition to *Wards Cove*, the Court opinions addressed and in some respects superseded by the Act are *Patterson v. McLean Credit Union* (holding, in the employment context, that the protections of 42 U.S.C. § 1981 against race discrimination extend only to refusals to hire and to a limited extent refusals to promote), *Price Waterhouse v. Hopkins* (holding that "once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability … by proving that it would have made the same decision even if it had not allowed gender to play such a role" (plurality)), *Martin v. Wilks* (holding that an individual is not precluded from challenging requirements of a consent decree unless a party to the decree), *EEOC v. Arabian American Oil Co*. (holding that Title VII does not protect U.S. citizens abroad), *Lorance v. AT&T Technologies, Inc*. (holding that the time period for challenging a decision controlled by a provision of a seniority system runs from the date of adoption of the provision),

[5] Donald R. Livingston, The Civil Rights Act of 1991 and EEOC Enforcement, 23 Stetson Law Review 53 (1993).

Library of Congress v. Shaw (holding that interest is not recoverable in Title VII cases against the federal government), and *West Virginia Univ. Hospitals, Inc. v. Casey* (holding that expert witness fees under the Civil Rights Fee Awards Act of 1976 are limited to $30 per day).

A. The Scope of Claims under 42 U.S.C. § 1981

From 1975 until 1989, 42 U.S.C. §1981 was more plaintiff-friendly than Title VII for individuals seeking redress for race discrimination in employment. The courts interpreted §1981 to provide a federal remedy against race discrimination in employment,[6] permit jury trials, and authorize the recovery of uncapped compensatory and punitive damages, with a much longer period than exists under Title VII to assert a claim, and without the requirement that an administrative charge be filed or that a notice of right to sue be obtained.[7] This changed when in *Patterson v. McLean Credit Union* the Supreme Court interpreted §1981 to prohibit employment discrimination only during the formation of the employment contract. Post-formation conduct, such as racially discriminatory firing, demotion, transfer, assignment or working conditions was not prohibited. The 1991 Act changed this by expanding §1981 to prohibit race discrimination during the course of employment.

B. Monetary Damages and Jury Trials

Title VII's emphasis on "make whole relief" limited a plaintiff's monetary recovery to claims for lost wages, usually in the form of back pay. Jury trials were not permitted. The Act changed this.

The 1991 amendments provided that Title VII and ADA plaintiffs can recover compensatory and punitive damages for intentional discrimination, within statutory limits between $50,000 and $300,000, depending on the number of employees working for the employer. If compensatory or punitive damages are requested, either party may demand a jury trial. The damages are not available for disparate impact violations. Accordingly, Title VII disparate impact cases are tried to the judge and not to a jury.

C. Race Norming and Within Group Scoring of Tests

The Act prohibits practices known as "within group scoring" and "race norming" of selection devices, including tests. The Act makes it unlawful to adjust or use different cutoff scores on employment tests on the basis of race, sex or national origin. This had immediate consequences. Within three weeks of passage of the Act, the U.S. Department of Labor terminated the use of race-based within group conversion adjustments to General Aptitude Test Battery (GATB) scores used to make selection or referral decisions.

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[6] *See* Donald R. Livingston & Samuel A. Marcosson, The Court at the Crossroads: *Runyon*, Section 1981 and the Meaning of Precedent, 37 Emory Law Journal 951 (1988).

[7] However, Section 1981 was interpreted to bar only intentional discrimination; disparate impact claims were not authorized.

D. Mixed Motive

Section 107 of the Act responded to *Price Waterhouse v. Hopkins* by amending Title VII to provide that a statutory violation occurs any time an employment decision is motivated by an impermissible factor. However, if the employer can demonstrate that that it would have made the same decision in the absence of the impermissible factor, the court may award declaratory and injunctive relief, and attorney's fees, but may not award damages or require reinstatement, hiring, or promotion.

E. Challenges to Consent Decrees

Martin v. Wilks[8] confirmed the general principle that a person who is not a party to a lawsuit is not bound by a judgment in the case. As sensible as this rule is, it creates some challenges when a judgment, by consent decree or otherwise, creates promotion or hiring preferences that disadvantage nonparties. Congress addressed this in Title VII cases by amending Title VII to add section 703(n).

Under Section 703(n) of the Act, a person with notice of a court order that resolves a claim of employment discrimination, and who had an opportunity to object, cannot challenge an employment practice that implements the order. The employment practice also cannot be challenged by a person whose interests were adequately represented in the lawsuit. A person adequately represents another if he or she raised the same legal grounds and had "a similar factual background" as the person who seeks to challenge the practice. The amendment does not apply to the rights of members of a group on whose behalf the EEOC sought relief. Actions that challenge a practice that implements a court order, but are not precluded by the amendment, must be brought in the court that entered the order, and, if possible, before the original judge.

F. Extraterritorial Coverage

The Act amended the definition of "employee" in section 701(f) of Title VII and section 101(4) of the ADA to extend protection to United States citizens working overseas for United States companies.

G. Challenges to a Seniority System

Another of the Title VII amendments provides that a provision in a seniority system can be challenged within the EEOC charge filing period beginning on any of three dates: the date of adoption of the seniority provision, the date the individual becomes subject to the provision, or the date an injury is caused by application of the provision to the individual.

H. Recovery of Expert Witness Fees by Prevailing Party

The 1991 Act amended Section 706(k) of Title VII to provide for the recovery of expert fees as part of an attorney's fee award, making expert fees available to prevailing plaintiffs in the same manner as attorney's fees.

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[8] 490 U.S. 755 (1989).

I. ADEA's Statute of Limitations Replaced by Longer Charge-Filing Period

The Civil Rights Act amended several parts of the ADEA. One was the requirement that an ADEA lawsuit be filed within two years of the violation, or three years if the plaintiff can demonstrate that the violation was willful. To a large extend, the Act harmonized ADEA and Title VII procedures. Under the amendment, the EEOC must provide notice to the charging party upon termination of the EEOC's investigation. A charging party can sue anytime beginning 60 days after having filed a timely ADEA charge with the EEOC and ending 90 days after receipt of the EEOC's notice.

J. Alternative Dispute Resolution

In a senseless waste of time, Congress enacted a meaningless provision that expresses approval of arbitration, mediation, and settlement conferences "to the extent authorized by law."

K. Retroactivity of New Title VII Damages

Congress intentionally left to the courts the question of whether the new Act applies to pre-Act conduct. This was far more foolish than the ADR provision. This was a wasteful, irresponsible decision. Motions were filed in every federal court to add or bar compensatory and punitive claims in pending cases. In what seemed like the same instant, every federal court decided *de novo* complicated issues concerning the retroactive application of statutes. Finally, on February 22, 1993, the Supreme Court announced that it had granted petitions for writ of certiorari on the question in *Landgraf v. USI Film Products*[9] and *Rivers v. Roadway Express, Inc.*[10] The EEOC dove into the fray.

On April 19, 1993, the EEOC rescinded its policy that it would not seek the new damages for pre-Act conduct. Eleven days later, on April 30, 1993, the EEOC joined the *amicus curiae* brief of the United States to argue that the damages provisions *do apply* retroactively to pre-Act conduct. The Supreme Court disagreed.

II. Incomplete Codification of Title VII's Disparate Impact Standards

The 1991 Civil Rights Act began with the 1974 hiring and promotion practices of a salmon cannery that operated during salmon season in remote parts of Alaska. The cannery utilized temporary workers in unskilled cannery jobs that were filled predominantly by nonwhite Filipinos and Alaska Natives. It also had temporary skilled jobs that were filled predominantly by white workers, who were hired during the winter months from the companies' headquarters office.

Some of the Filipinos and Alaska workers sued. They alleged that Wards Cove's hiring and promotion practices kept them out the better paying jobs. They identified nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, and a practice of not promoting from within as being responsible for racial stratification of the workforce.

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[9] 511 U.S. 244 (1994).

[10] 511 U.S. 298 (1994).

When the case was considered by the Supreme Court in 1989 as *Wards Cove Packing Company v. Atonio*, the controlling principals for proving a disparate impact violation were well known but imprecise. Once a plaintiff demonstrated that a facially neutral selection practice disproportionately selected non-minorities, the plaintiff would prevail unless the employer demonstrated that the practice was job-related or required by business necessity. The terms "job-related" and "business necessity" seemed to be used interchangeably in court opinions based on a passage from *Griggs v. Duke Power Co.*: "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." [11] If the challenged practice was shown to be job-related, the plaintiff would still prevail if she proved that another selection method, without a similarly undesirable racial effect, would also serve the employer's legitimate interest.[12]

The Ninth Circuit Court of Appeals found that the Filipino and Alaska plaintiffs had demonstrated disparate impact with "statistics showing a high percentage of nonwhite workers in the cannery jobs and a low percentage of such workers in the non-cannery positions." But, the Supreme Court reversed. The Court reasoned that the plaintiffs had failed to show a statistically significant difference between the racial composition of the qualified persons in the labor market and the persons holding the at-issue jobs. In other words, the racial stratification at Wards Cove was not relevant because of percentage of nonwhites was different in the labor market for unskilled cannery jobs than in the labor market for the skilled non-cannery jobs.

I think it fair to say that the opinion in *Wards Cove* sparked outrage from the political left. But, it wasn't the holding that caused a clamor. It was the way the court reasoned the burden of proof and phrased the business justification question that was controversial.

The Court reasoned that the burden of persuasion on the employer's business justification rests with the plaintiff. This holding was a departure from existing precedent. It was superseded by the 1991 amendments.

The Court phrased the business justification question – the "dispositive issue" in a disparate impact case – as "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." This too was superseded by the amendments.

The holding from *Wards Cove* was codified in some respects. *Wards Cove* held that the plaintiff must prove causation by isolating and identifying "the specific employment practice … responsible for any observed statistical disparities" (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988). The plaintiffs' argument that the upshot of nepotism, separate hiring channels, rehire preferences, and "subjective decision making" in the hiring process had a disparate impact on nonwhites "will not suffice," said the Court. The plaintiffs must show that "each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites." Only after the plaintiff proves that a specific employment practice causes a disparate impact does the case shift to the business justification for the use of the

[11] 401 U.S. 424 (1971).

[12] *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

practice. This holding was codified in the 1991 Act. This codification was a victory achieve by the administration as a result of the Presidential veto of the 1990 Act.[13]

A. Disparate Impact Requires the Plaintiff to Demonstrate that a Specific Employment Practices Causes an Observed Disparity

The 1991 Act codified disparate impact by adding new sections to Section 701 of Title VII. As codified in the 1991 Act, a plaintiff must "demonstrate[] that a respondent uses a *particular* employment practice that causes a disparate impact." 42 U.S.C. § 2000e-2(k)(1)(A)(i) (emphasis added). Subsequently, in interpreting this rule from *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (plurality), the Supreme Court stated that "is not a trivial burden." *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 101 (2008). It is not enough to "point to a generalized policy that leads to" disparate impact. *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 241 (2005).

There is only one circumstance in which the amendment allows the plaintiff to avoid showing "that each particular challenged employment practice causes a disparate impact." 42 U.S.C. § 2000e-2(k)(1)(B)(i). That is when the plaintiff "can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis." *Id*.

It is not enough to point to an aggregation of discrete elements simply because they "share a common characteristic." *Davis v. Cintas Corp.*, 717 F.3d 476, 496 (6th Cir. 2013). "[T]he language that deals with the 'employment practice' is entirely in the singular, not the plural," in Title VII, and this "syntax would be strange if a plaintiff could bundle a number of discrete steps of a multi-phase hiring process together, based on a common characteristic." *Id*. The 1991 amendment thus mandates that the plaintiff isolate and identify which particular employment practice causes the disparate impact that it alleges—or prove that the elements are incapable of separation.

B. Burden of Proof on Business Necessity

The primary reason for the disparate impact amendment was to place the burden of proving business necessity squarely on the employer, thereby legislatively overriding a holding from *Wards Cove Packing v. Atonio*.

[13] The failed 1990 Civil Rights Act provided a confusing set of rules that governed when a plaintiff could or could not prove disparate impact by "demonstrate[ing] that a group of employment practices results in a disparate impact," and included special discovery rules that prevent certainty about applicable causation standards until litigation discovery was completed. A practice could also be challenged if it made more than a "trival or insubstantial contribution to the disparate impact." *See* Conference Report on S. 2104, Civil Rights Act of 1990, CONG. REC, H 9554 – 9556, Oct. 12, 1990.

C. What is "Business Necessity?"

The bill vetoed by President Bush, the Civil Rights Act of 1990, included a definitional section that defined "required by business necessity." If the challenged employment practice involved selection (such as hiring or promotion) the practice "must bear a significant relationship to successful performance of the job." Any other practice "must bear a significant relationship to a significant business objective of the employer." The Senate bill had offered "Plant closings or bankruptcy" as examples of "other practices."

One of the most troublesome aspects of the proof standard, from an employer's perspective, was an evidentiary rule that was included in the bill: In deciding whether the "standards … for business necessity have been met, unsubstantiated opinion. . . [is] insufficient; demonstrable evidence is required," such as "statistical reports, validation studies, expert testimony, [and] prior successful experience…." To the employer community, this was a repudiation of *Griggs*, which authorized a ruling for the defendant if a practice has a "manifest relationship" to the job.

In *Watson*, the Supreme Court had split 4-3 on the type of proof required to show business necessity. Four justices, in an opinion authored by Justice O'Conner and joined by Justices Rehnquist, Scalia, and White, stated that formal validation is not required, particularly where the linkage between a selection requirement and the job is obvious. Three justices, in an opinion written by Justice Blackmun and joined by Justices Brennan, and Marshall, stated that proof of linkage is required. Justice Stevens withheld opinion on the issue and Justice Kennedy took no part in consideration of the case. Justice Blackmun's opinion rejected Justice O'Connor's notion that the court can assess job-relatedness with common sense. Blackmun conceded that common sense plays "a role" in assessing business necessity; but he would require one of several methods to establish a linkage between the selection practice and job performance, with the method varying with the type and size of the business in question, as well as the particular job for which the selection process is employed. These methods include the results of studies, the presentation of expert testimony, and employer's prior successful experience. Partially as a result of the Presidential veto of the Civil Rights Act of 1990, the conflicting formulations in the O'Connor and Blackmun opinions have never been resolved or reconciled.

The 1991 Act does not contain a definition of business necessity. Instead, it relies on an interpretative memorandum that leaves the definition an open question. As a political compromise, the 1991 Act limits relevant "legislative history" to a memorandum published in the Congressional Record on October 25, 1991.[14] Prior to this, both sides had loaded the Congressional Record with competing formulations of the then current state of the law. The interpretative memo states only that "[t]he terms "business necessity" and "job related" are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)."[15] Could anything be more circular? When the Wards Cove

[14] 137 CONG. REC. S15,276 (daily ed. Oct. 5, 1991).

[15] In its entirety, the interpretative memorandum reads:

> The final compromise on S. 1746 agreed by several Senate sponsors, including Senators Danforth, Kennedy, and Dole, and the Administration states that with respect to

opinion stated that "business necessity" means "serv[ing], in a significant way, the legitimate employment goals of the employer," the opinion cited *Griggs* "and other Supreme Court decisions prior to *Wards Cove*."

III. Uncoupling of the ADEA from Title VII Precedent

During the deliberations that preceded the enactment of Title VII in 1964, Congress rejected proposed amendments that would have included older workers among the classes protected from employment discrimination. In 1967, the ADEA was passed. Except for substitution of the word "age" for the words "race, color, religion, sex, or national origin," the language of §4(a)(2) of the ADEA, 29 U.S.C. § 623(a)(2), is identical to that found in §703(a)(2) of Title VII. Other provisions of the ADEA also parallel Title VII.

Accordingly, the ADEA was interpreted in lockstep with Title VII, in most cases.[16] This began to change with passage of the 1991 Act. Since then, the Supreme Court has repeatedly given import to statutory differences between the ADEA and Title VII. A quote from the 2008 opinion in *Federal Express Corp. v. Holowecki* is typical: "[courts] must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination."[17]

The reason is simple. Congress is presumed to legislate purposefully when language in one statute is excluded from another.[18] Thus, the rule that ADEA interpretations should follow those of Title VII does not apply where there are differences in statutory language. Courts will not ascribe these differences to a simple mistake.

So what happened in the 1991 Act that resulted in language differences between two statutes with similar purposes? The answer is found in two drafting decisions. First, Congress made the decision to supersede Supreme Court opinions in Title VII cases by amending Title VII

Wards Cove – Business necessity/cumulation/alternative business practice – the exclusive legislative history is as follows:

> The terms "business necessity" and "job related" are intended to reflect the concepts enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).
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> When a decision-making process includes particular, functionally-integrated practices which are components of the same criteria, standard method of administration, or test, such as height and weight requirements designed to measure strength in *Dothard v. Rawlinson*, 433 U.S. 321(1977) the particular, functionally-integrated practices may be analyzed as one employment practice.

[16] In *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985), the Supreme Court stated that because the substantive provisions of the ADEA were borrowed "*in haec verba*" from Title VII, interpretations of Title VII apply equally in the context of age discrimination in most cases.

[17] 552 U.S. 389 (2008).

[18] *Russello. V. United States*, 464 U.S. 16, 23 (1983).

but not the ADEA. And, second, Congress amended the ADEA in other respects,[19] foreclosing – or certainly weakening – arguments that Congress's failure to address the ADEA in other sections of the 1991 Act was an oversight.

A. Disparate Impact: Burden of Proof for Causation

Relying on Title VII's "identical text" the Supreme Court in *Smith v. City of Jackson*, had little difficulty concluding that a disparate-impact theory should be cognizable under the ADEA.[20] As noted above, the 1991 Act amended Title VII to codify *Wards Cove's* causation standard, but to override the Court's holding on burden of proof. The consequence was predictable. The ADEA and Title VII impose the same burden on the plaintiff for proving disparate impact, but the defense to proven disparate impact differs.

As previously discussed, the causation standard applicable to a Title VII disparate impact claim was codified by the 1991 Act. A Title VII plaintiff must prove that a "particular employment practice … causes disparate impact," unless a constellation of practices "are not capable of separation for analysis," in which case the "whole process" can be analyzed as "one practice." The same rule is applicable to ADEA cases, but the rule is derived from *Wards Cove*, which was extended to the ADEA in 2005 in *Smith v. City of Jackson,* which relied on the general rule that similar language in different statutes with similar purposes have the same meaning.

B. Disparate Impact Defense: Business Necessity

However, *the defense* to demonstration of disparate impact now varies significantly between Title VII and the ADEA. Because the disparate impact amendments in the 1991 Act applied only to Title VII, the Supreme Court has stated that "*Wards Cove*'s pre-1991 interpretation [of the defense to disparate impact]… remains applicable to the ADEA." *Smith v. City of Jackson*, 544 U.S. 228 (2005). Well, not quite. The Court actually said that Wards Cove remains applicable where ADEA language is "identical" to the language in pre-amended Title VII.

Unlike Title VII, the ADEA's general prohibitions against age discrimination is subject to an exception where the differentiation is based on reasonable factors other than age.[21] This creates an affirmative defense that is different from the business necessity defense under Title VII. Under the ADEA, the defendant need prove only that the practice that causes the disparate impact is "reasonable." The "more plainly reasonable the employer's 'factor other than age' is, the shorter the step for that employer from producing evidence raising the defense, to persuading the fact-finder that the defense is meritorious." *Meacham v. Knolls Atomic Power Lab*., 554 U.S. 83 (2008).

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[19] The 1991 Act amends the ADEA to make the ADEA's lawsuit filing period equivalent with Title VII's.

[20] However, focusing on one slight but significant difference in language, the Eleventh Circuit ruled on October 5, 2016 that the ADEA, unlike Title VII, does not authorize disparate impact hiring claims. *Villarreal v. R. J. Reynolds*, (Cite).

[21] 29 U.S.C. §623(f)(1).

C. Disparate Impact Against Applicants

Title VII specially provides a disparate impact cause of action to applicants for employment. It is far less clear that the ADEA does so.

Section 4(a)(2) of the ADEA makes it unlawful for an employer "to limit, segregate, or classify *his employees* 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 age."[22] A comparison to the text and history of the contrasting provision found in the ADEA and in Title VII of the Civil Rights Act[23] supports the conclusion reached on October 5, 2016, by the 11th Circuit in *Villarreal v. R.J. Reynolds*,[24] that Congress chose not to make it an unlawful employment practice for employers to adopt hiring practices that may have a disparate impact on applicants by age. Judge Rosenbaum, writing a concurring opinion, reached this result by contrasting the relevant language of the ADEA and Title VII. Whereas Congress in 1972, amended Title VII's disparate impact provision - Section 703(a)(2) – making it unlawful to for an employer to "limit, segregate, or classify his employees or applicants for employment," it did not add "applicants to employment" to ADEA's § 4(a)(2), which continues to forbid only certain limitations, segregation, or classification of "employees."

D. Mixed Motive

The 1991 Act responded to *Price Waterhouse* by amending Title VII to authorize discrimination claims where improper consideration was "a motivating factor" for an adverse employment decision.[25] In *Gross v. FBL Financial Servs. Inc.*, the Court refused to extend this mixed motive rule to the ADEA. The Court had explained that it has never held that this burden-shifting framework applies to ADEA claims. The Court stated, "Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor, and "Congress neglected to add such a provision to the ADEA when it amended Title VII… even though it contemporaneously amended the ADEA in several ways." The Court repeated the now familiar principle from earlier opinions – "When Congress amends one statutory provision but not another, it is presumed to have acted intentionally" – then added something new: "negative implications raised by disparate provisions are strongest" when the provisions were "considered simultaneously when the language raising the implication was inserted."[26]

IV. Conclusion

See you at the 50th Anniversary of the Civil Rights Act of 1991!

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[22] 29 U.S.C. § 623(a)(2) (emphasis added).

[23] 42 U.S.C. § 2000e-2(a)(2).

[24] No. 15-10602.

[25] 42 U.S.C. § 2000e-2(m); § 2000e-5(g)(2)(B).

[26] *Quoting Lindh v. Murphy*, 521 U.S. 320, 330 (1997).