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Reconciling Fairness and Racial Preference

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ANALYSIS

Reconciling Fairness and Racial Preference

If an affirmative-action plan is to work, it cannot be subject to endless challenges by white men who disagree with its goals. Yet these complainants have a right to a day in court. The pending civil-rights bill can accommodate both principles.

BY SUSAN GROVER

"Individuals who believe their rights have been violated are entitled to their day in court," President George Bush declared earlier this spring, speaking of white males who feel aggrieved by affirmative-action plans.

"[E]mployers who seek to comply with the law by remedying past discrimination [should not be subjected] to a never-ending stream of litigation and potential liability," wrote Justice John Paul Stevens in a dissenting Supreme Court opinion last year.

Both the president and the justice are correct, and therein lies a headache: balancing the rights of white employees against the rights and interests of minority employees and employers who attempt to remedy race discrimination through race-conscious hiring and promotion. Indeed, whether and when whites should be allowed to bring *reverse*-discrimination suits to challenge consent decrees and litigated judgments arising out of earlier *race*-discrimination suits is one of the more controversial questions raised by the civil-rights bill now before Congress.

The answer provided by the proposed Civil Rights Act of 1990—to bar such challenges outright in most cases—is, by and large, fitting. Without such bars, endless reverse-discrimination suits against affirmative-action hiring and promotion provisions in decrees and judgments will prevent the resolution of race-discrimination cases.

Still, the bill's opponents have a valid concern: binding those who were not parties and who had never even heard about the earlier suit threatens to violate basic principles of fairness.

The debate was spawned last year by the Supreme Court's decision in *Martin v. Wilks*, 109 S. Ct. 2180 (1989). Before this decision, federal courts generally barred white employees who did not intervene in an employment-discrimination suit brought by minority employees under Title VII of the Civil Rights Act of 1964 from later challenging any race-conscious order arising out of the suit. In *Wilks*, the high court struck down this judge-made "impermissible collateral attack" rule.

The majority opinion, written by Chief Justice William Rehnquist (the dissent was Justice Stevens', quoted above), held that white employees who are not parties to a suit are not obliged to intervene; instead, the original parties must bring the white employees into the suit (through the joinder provisions of the Federal Rules of Civil Procedure). Only then can the white employees, as parties, be bound by the outcome of the case.

It sounds simple—but the notion that joinder of white employees is a realistic solution to the problem of interminable reverse-discrimination litigation is disingenuous. In fact, after *Wilks*, there are no practical limits on the ability of white employees to challenge affirmative action.

If the original parties to the original race-discrimination suit—the one brought by minority employees—follow the *Wilks* drill and join all white employees, the prospect of a settlement that will actually bind all parties is unlikely. This is because a 1986 Supreme Court decision held that even white employees who are parties to a suit are not bound by a consent decree unless *they* consent to the terms of the decree. Joinder and an opportunity to be heard are not enough to bind them.

Thus, there is *nothing* parties to a Title VII suit can do to ensure that an affirmative-action plan will go into and remain in effect. The aftermath of *Wilks* has already been a wave of collateral attacks across the country.

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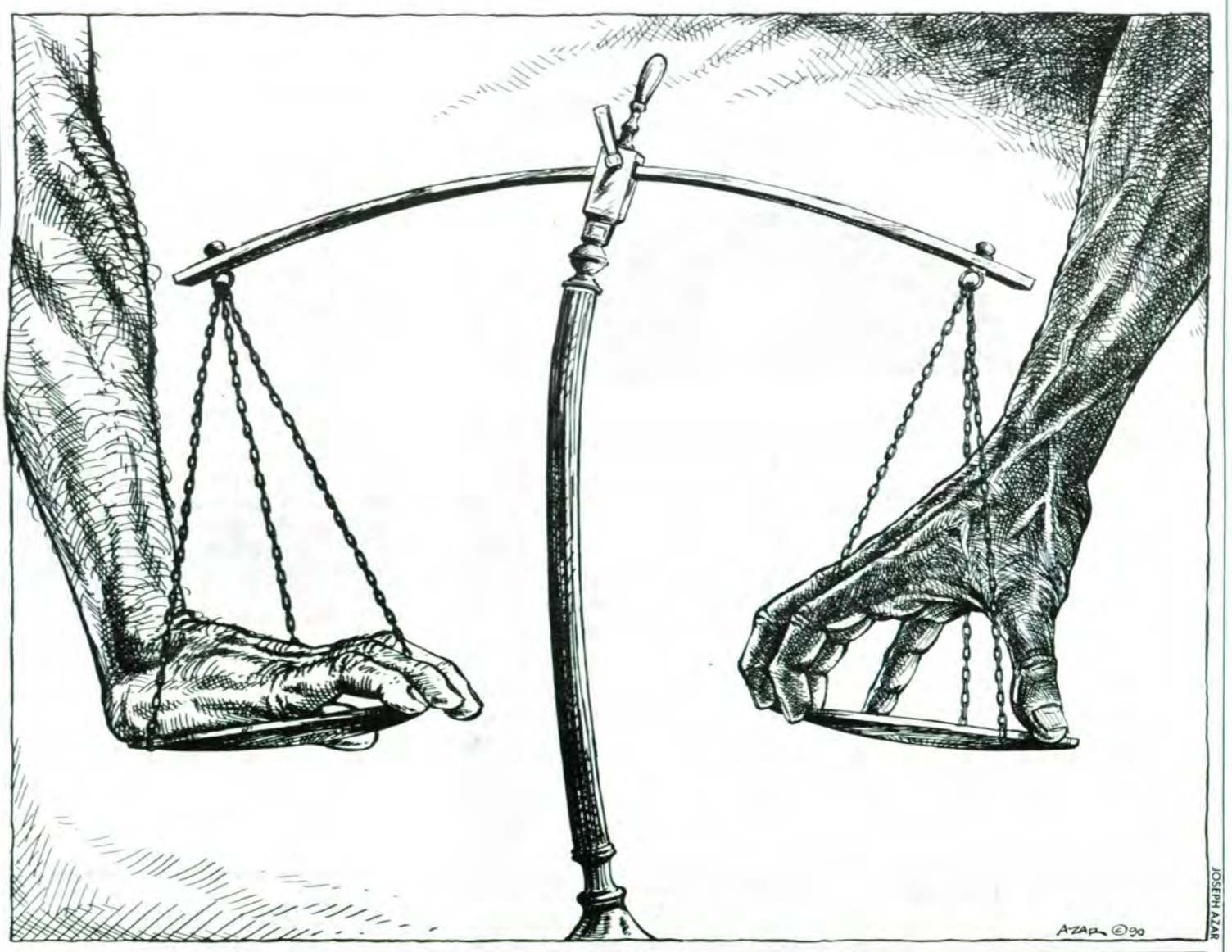

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The proposed Civil Rights Act of 1990 responds to this vexing problem by adopting the impermissible collateral attack doctrine as statutory law. Under the bill, three categories of employees would be barred from bringing reverse-discrimination suits challenging affirmative-action plans arising out of Title VII cases:

- *Category 1:* Those with sufficient notice and an opportunity to object at the time the decree or judgment was entered.
- *Category 2:* Those whose interests were sufficiently represented in the original suit by a person who challenged the decree or judgment.
- *Category 3:* Those *without* actual notice if the court determined before entering the decree or judgment that reasonable efforts had been made to give notice to interested people. The bill states, without specifying procedures, that the notice should be consistent with the "constitutional requirements" of due process.

The first and second categories are reasonable and sufficiently clear; the third is problematic.

The constitutional standard for binding persons who did not receive notice of a suit was established by the Supreme Court in *Mullane v. Central Hanover Trust,* 339 U.S. 306 (1950). In that case, the Court said it would apply a "reasonable-under-the-circumstances" test to the issue. In the context of race-conscious remedies for employment discrimination, this test would seem to require both that the best possible effort was made to notify the absentees and that the interests of the absentees were protected in the original litigation.

If Category 3's reference to "constitutional requirements" is read to incorporate this *Mullane* standard into the bill, then that category would be no more than a restatement of Category 2. If, however, Category 3 has any independent meaning, it must mean that unnotified persons whose interests were not adequately represented by parties in the first suit may nonetheless be bound. That flies in the face of *Mullane,* however, and would result in binding absentees who had absolutely no idea—and no reason to know—that the original suit was under way and whose interests were not represented before the court (such as individuals who were not employees at the time of the suit).

Retooled 'Fairness Hearing'

A good solution to this due-process problem would be to devise a new type of "fairness hearing"—a variation on the hearing that traditionally precedes entry of a consent decree—specifically to protect the absent, unrepresented Category 3 individuals. The hearing would be required both for cases that are settled and for those that are litigated to final judgment.

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In a traditional fairness hearing, the court may hear from certain non-parties, such as white employees, who are likely to be affected by a consent decree. Such hearings should focus on whether the proposed decree comports with the requirements of *United Steelworkers v. Weber,* 443 U.S. 193 (1979), *Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986), and other Supreme Court cases governing voluntary affirmative-action plans.

Under *Weber,* voluntary affirmative action must be a response to "a manifest imbalance" in "traditionally segregated job categories" and may not "unnecessarily trammel the rights of the majority."

Permitting open-ended collateral challenges nullifies the positive effects of Title VII.

Wygant and other precedents require that, in the case of court-ordered or governmental affirmative action, the discrimination must have been committed by the employer rather than by society at large.

A retooled fairness hearing would ensure that the court receives the benefits of advocacy addressing these legal/fairness standards on behalf of the absent Category 3 individuals, despite the absence of an adequate representative. If this were achieved, a ban on subsequent reverse-discrimination suits by these employees would be justified.

The difficulty, of course, is in creating a mechanism that protects the interests of non-parties who are by definition not only absent, but also unrepresented. Possible approaches to developing such a mechanism are:

- *Human intervention.* An amicus, such as the Equal Employment Opportunity Commission (where the EEOC is not a party), could be appointed by the court to argue on behalf of unnamed people potentially affected. A major question, of course, is who would pay.
- *Structural correction.* Judges might follow specific guidelines crafted by an entity like the EEOC, an independent commission, or an office within the judiciary in assessing affirmative-action plans. One problem with this alternative is that the best-intentioned judge may miss a point an interested litigant would uncover. For this reason, the guidelines would have to reflect the results of careful study of real cases, so that the court would be alerted to arguments that might have been made if an interested party were there to make them.
- *Legality check.* The judiciary could employ a centralized system for expert review of consent decrees. The EEOC, when not a party, might serve in this capacity or might coordinate such a system. One problem with this alternative is expense, although money could be saved if think tanks and academic institutions could be signed up to provide expertise on a *pro bono* basis.
- *Legal presumption.* A presumption could be worked into the fairness hearing *against* approval of the consent decree or judgment in question. The prime difficulty with this is that it would undermine a heretofore clearly expressed congressional preference for settlements.

None of these is perfect, but neither is endless litigation over consent decrees. Permitting open-ended collateral challenges nullifies the positive institutional effects of Title VII; prohibiting challenges by white employees who were absent and unrepresented when an affirmative-action plan was implemented takes too much from the majority to protect the minority. The solution is not Justice Rehnquist's wholesale rejection of the collateral-attack rule, but a new system that includes real and enforceable protections of the majority. □