Reconciling Fairness and Racial Preference

Susan Grover
William & Mary Law School, ssgrov@wm.edu
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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 against affirmative-action provisions in decrees and 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 challenge 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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Susan Grover is assistant professor of law at the College of William and Mary's Marshall-Wythe School of Law.
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 more than a re-statement 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).

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

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