Reconciling Fairness and Racial Preference

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**ANALYSIS**

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"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 hiring and promotion 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 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. Joiner 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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LEGAL TIMES • WEEK OF JULY 2, 1990

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 would adequately protect 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 (EEOC) or a think tank, 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 consider 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 an argument that might have been made if an interested party were there to make it.
- **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.