III. FEDERAL STATUTES AND REGULATIONS

A. Civil Rights Act, Title VII

Statute of Limitations. — Over forty years after the passage of Title VII of the Civil Rights Act of 1964,[1] that title's statute of limitations remains a "procedural battleground,"[2] despite the Supreme Court's having revisited the statute of limitations on several occasions. Last Term, in *Lewis v. City of Chicago*,[3] the Supreme Court held that the later application of a policy with a disparate impact constituted a discriminatory "use" of the policy. In a factual situation reminiscent of *Ricci v. DeStefano*,[4] the Court addressed whether a challenge brought by a group of minority firefighters to the City of Chicago's use of a standardized test was brought within the statute of limitations. While the Court's decision was consistent with the language and purpose of Title VII, it highlighted the fact that only Congress can resolve Title VII's conflicting jurisprudence.

Title VII of the Civil Rights Act prohibits discrimination by employers on the basis of "race, color, religion, sex, or national origin."[5] This prohibition covers both disparate treatment, where employers engage in intentional discrimination, and disparate impact, where facially neutral employment policies disproportionately affect minority employees.[6] Plaintiffs alleging employment discrimination under Title VII must file charges with the Equal Employment Opportunity Commission (EEOC) within three hundred days of the allegedly discriminatory act or their claims become time-barred by the statute of limita-

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[1] 42 U.S.C. §§ 2000e to 2000e-17 (2006).

[2] 2 BARBARA T. LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1749 (C. Geoffrey Weirich ed., 4th ed. 2007).

[3] 130 S. Ct. 2191 (2010).

[4] 129 S. Ct. 2658 (2009). In *Ricci*, the City of New Haven, Connecticut, administered promotional exams for the city's firefighters. *Id.* at 2665. Minority candidates scored poorly on the exams — out of the nineteen candidates immediately eligible for promotion, only two were Hispanic and there were no African Americans, while those two groups represented twenty percent and twenty-three percent of all exam takers, respectively. *Id.* at 2666. The City did not certify the exam results due to concern regarding the adverse impact on minority candidates and the associated legal liability. *Id.* at 2671. The seventeen white firefighters and one of the Hispanic firefighters who passed the exam but were not promoted filed suit against the City of New Haven, alleging that the City violated both the Equal Protection Clause and the disparate treatment prohibition of Title VII. *Id.* In a 5–4 decision, the Supreme Court held that before an employer may intentionally discriminate to remedy an "unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the . . . discriminatory action." *Id.* at 2677. The *Ricci* decision "entrenche[d] the Court's colorblind approach to antidiscrimination law." *The Supreme Court, 2008 Term — Leading Cases*, 123 HARV. L. REV. 153, 283 (2009) [hereinafter *2008 Leading Cases*].

[5] 42 U.S.C. § 2000e-2(a)(1).

[6] *Id.* §§ 2000e-2(a), -2(k)(1)(A)(i).

tions.[7] Title VII's statute of limitations was previously the subject of judicial scrutiny in *Ledbetter v. Goodyear Tire & Rubber Co.*,[8] where the Court held that pay discrimination claims under Title VII are time-barred if the pay-setting decision was made outside of the statutory period.[9] In response to the subsequent public outrage, Congress modified the statute of limitations for salary discrimination cases by passing the Lilly Ledbetter Fair Pay Act of 2009.[10] Two years after *Ledbetter*, the *Ricci* Court upheld the claims of a group of white firefighters challenging the City of New Haven's decision to discard test results due to fear of disparate impact litigation.[11] *Lewis* presented the Court with a combination of the procedural statute of limitations question from *Ledbetter* and the substantive factual situation regarding disparate impact claims in firefighters' examinations from *Ricci*.

In 1995, more than 26,000 individuals completed a written examination in application for work at the Chicago Fire Department.[12] After grading the examinations, the City of Chicago divided the candidates into three categories based on their scores. Candidates who scored at least 89 out of 100 points were considered "well qualified."[13] Candidates who scored between 65 and 88 points passed the examination and were categorized as "qualified."[14] Those scoring below 65 points failed the examination.[15] On January 26, 1996, the City issued a press release to announce that it would begin hiring candidates from the "well qualified" category.[16] Mayor Daley lamented that "after all our efforts to improve diversity [including racial], these test results are disappointing."[17] The City sent notifications to each group of candi-

[7] *See id.* § 2000e-5(e)(1) ("A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . ."). The limitation period is extended to three hundred days if the proceeding has been initiated in a state such as Illinois that has an agency dedicated to processing employment discrimination claims. *Id.*

[8] 127 S. Ct. 2162 (2007).

[9] *Id.* at 2172 ("We therefore reject the suggestion that an employment practice committed with no improper purpose and no discriminatory intent is rendered unlawful nonetheless because it gives some effect to an intentional discriminatory act that occurred outside the charging period.").

[10] Pub. L. No. 111-2, 123 Stat. 5 (resetting the statutory period on discrimination claims with each issued paycheck). The Lilly Ledbetter Fair Pay Act was the first major bill that President Obama signed into law after taking office. *See* Gail Collins, Op-Ed., *Lilly's Big Day*, N.Y. TIMES, Jan. 29, 2009, at A27.

[11] Ricci v. DeStefano, 129 S. Ct. 2658, 2664–65 (2009).

[12] *Lewis*, 130 S. Ct. at 2195.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *See id.*

[17] Lewis v. City of Chicago, 528 F.3d 488, 490 (7th Cir. 2008) (alteration in original) (internal quotation marks omitted).

dates.[18] "Qualified" candidates were informed that they had passed the examination but were not likely to be hired based on the number of "well-qualified" candidates.[19] However, the City informed the "qualified" candidates that it would keep their names on the eligibility list in case the "well-qualified" applicant pool was exhausted.[20] The first class of applicants was randomly selected from the "well-qualified" candidate list on May 16, 1996.[21]

Crawford Smith, an African American candidate who was not hired after scoring in the "qualified" range, filed a charge of discrimination with the EEOC on March 31, 1997.[22] Five additional minority candidates filed discrimination charges.[23] The EEOC sent right-to-sue letters to each plaintiff on July 28, 1998.[24] The district court certified a class consisting of more than six thousand African American "qualified" candidates.[25]

The district court rejected the City's summary judgment motion, holding that the plaintiffs' claims were not time-barred.[26] The City argued that the alleged discriminatory action occurred when the City notified "qualified" candidates that they would not likely be hired and the Mayor's press release provided notice of the examination's disparate impact on African American candidates.[27] These events occurred outside of the three-hundred-day statutory filing period.[28] However, the district court held that the plaintiffs had "established a continuing violation" such that the discrimination was ongoing and did not fall outside the statute of limitations.[29] Following an eight-day bench trial, the district court ruled in favor of the plaintiff class.[30] The court issued an injunction prohibiting further use of the test scores, ordered the City to immediately hire 132 randomly selected class members who

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[18] *Lewis*, 130 S. Ct. at 2195–96.

[19] *Id.*

[20] *Id.* at 2196. Following the City's announcement, the media reported that "the City expected to hire only about 600 of the 1782 applicants in the 'well qualified' category in the next three years, implying that no one in the 'qualified' category would be hired." *Lewis*, 528 F.3d at 490.

[21] *Lewis*, 130 S. Ct. at 2196.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] Lewis v. City of Chicago, No. 98C5596, 2000 WL 690313, at *13 (N.D. Ill. May 25, 2000).

[27] *Id.* at *4.

[28] *Id.*

[29] *Id.* at *5. The continuing violation theory "stems from cases in which the employer has an express, openly espoused policy that is alleged to be discriminatory." *Id.* at *4 (quoting Selan v. Kiley, 969 F.2d 560, 565 (7th Cir. 1992)).

[30] Lewis v. City of Chicago, No. 98C5596, 2005 WL 693618, at *1 (N.D. Ill. Mar. 22, 2005). The plaintiffs included both the class of African American "qualified" applicants and the African American Fire Fighters League of Chicago, Inc. *Lewis*, 130 S. Ct. at 2196 n.2.

had been classified as "qualified," and awarded back pay for the remaining class members.[31]

The Seventh Circuit reversed. The court held that the plaintiffs' claims accrued when the plaintiffs were placed on the "qualified" hiring list and that the claims were therefore time-barred because that event was outside the three-hundred-day filing window.[32] The court compared the statute of limitations in disparate impact cases to that in disparate treatment cases, where the "charging period begins when the discriminatory decision is made, rather than when it is executed."[33] The court rejected the plaintiffs' claim that the statute of limitations should be determined differently in disparate impact cases, finding that "[t]he difference between the two types of discrimination case[s] is not fundamental."[34] Applying the Supreme Court's decision in *Delaware State College v. Ricks*,[35] the court determined that if the later application of a discriminatory employment policy followed automatically from the enactment of the policy, it does not constitute a "fresh act of discrimination."[36] The court found that "[t]he plaintiffs were injured, and their claim accrued, when they were placed in the 'qualified' category of the hiring list on the basis of their score in the firefighters' test; for that categorization delayed indefinitely their being hired."[37] Since the plaintiffs knew that the test produced a discriminatory disparate impact within three hundred days of the announcement of the test results, and there were no special circumstances to extend the statute of limitations, the court held that the plaintiffs' claims were not timely.[38]

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[31] *Lewis*, 130 S. Ct. at 2196. In a later proceeding, the district court granted the City a stay pending appeal. *See* Lewis v. City of Chicago, No. 98C5596, 2007 WL 1686975, at *3 (N.D. Ill. June 7, 2007). The court noted that "the issue was not clear-cut then and time has made it only less clear." *Id.* at *2 (citing Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007)). The court found that there would be significant irreparable injury to the City should it hire and train candidates "who, but for the injunction, would have no right to be hired." *Id.* Injury to the plaintiff class could be more easily resolved through damages. *Id.*

[32] Lewis v. City of Chicago, 528 F.3d 488, 492 (7th Cir. 2008).

[33] *Id.* at 490 (citations omitted).

[34] *Id.* at 491.

[35] 449 U.S. 250 (1980). In *Ricks*, a professor at Delaware State College was notified that after one year his contract would no longer be renewed. *Id.* at 252–53. Ricks sued at the end of the year when his contract was not renewed. *Id.* The Court rejected the plaintiff's claim that the filing was timely, holding that the adverse employment action occurred upon notification of the decision and not at the end of Ricks's tenure. *Id.* at 258, 262.

[36] *Lewis*, 528 F.3d at 491.

[37] *Id.* at 493.

[38] *Id.* at 493–94. The plaintiffs conceded that they could have filed their claims within the first three hundred days. *Id.* at 494. They failed to do so because they thought that the statute of limitations would restart with each hiring decision. *Id.*

The Supreme Court reversed, holding that the plaintiffs' claims were not time-barred.[39] Writing for a unanimous Court, Justice Scalia first addressed the timing determination under Title VII. Justice Scalia noted that, because the division of candidates into categories occurred outside of the charging period but the practice of using the divisions occurred within the charging period, "[t]he real question, then, is not whether a claim predicated on that conduct is *timely*, but whether the practice thus defined can be the basis for a disparate-impact claim *at all*."[40] The Court focused on the disparate impact section of Title VII,[41] which was enacted following the Court's decision in *Griggs v. Duke Power Co.*[42] Under the disparate impact provision, a plaintiff must show that the employer "uses a particular employment practice that causes a disparate impact" on a prohibited basis.[43] While Title VII does not explicitly define what constitutes an "employment practice," the Court interpreted the provision to include the City's "use" of the test results.[44] Since the application of the testing results occurred within the charging period, the Court held that the City used a discriminatory employment practice each time it made a selection based on the test results.[45]

The Court next considered whether the plaintiffs had shown that there was a "present violation" within the charging period. The Court noted that the City was entitled to treat the decision to adopt a cutoff score as lawful since no timely challenge had been filed.[46] However, the Court rejected the City's claim that since "the exclusion of petitioners when selecting classes of firefighters followed inevitably from the earlier decision to adopt the cutoff score, no new violations could

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[39] *Lewis*, 130 S. Ct. at 2197.

[40] *Id.*

[41] Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074–75 (codified at 42 U.S.C. § 2000e-2(k) (2006)).

[42] 401 U.S. 424 (1971). Prior to congressional enactment of a disparate impact provision, Title VII did not expressly prohibit employment practices that resulted in a discriminatory disparate impact. *See Lewis*, 130 S. Ct. at 2197; 1 LINDEMANN & GROSSMAN, *supra* note 2, at 113 ("[P]rior to *Griggs* there had not been a single reported decision using the phrase 'adverse impact' or 'disparate impact,' and the *Griggs* Court relied on no lower court decisions as precedent for the theory it announced."). Title VII makes it illegal for an employer "to limit, segregate, or classify his employees or applicants for employment 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" the protected characteristics. 42 U.S.C. § 2000e-2(a)(2). However, in *Griggs*, the Court held that this provision "proscribe[d] not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs*, 401 U.S. at 431.

[43] 42 U.S.C. § 2000e-2(k).

[44] *Lewis*, 130 S. Ct. at 2198.

[45] *Id.* ("Although the City had adopted the eligibility list (embodying the score cutoffs) earlier and announced its intention to draw from that list, it made use of the practice of excluding those who scored 88 or below each time it filled a new class of firefighters.").

[46] *Id.* at 2199 (citing United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977)).

have occurred."[47] The Court distinguished prior disparate treatment cases that the City had argued stood for the proposition that "present effects of prior actions cannot lead to Title VII liability."[48] Since disparate treatment cases require proof of discriminatory intent, "present" instances of discriminatory treatment cannot be proven without evidence of "present" discriminatory intent.[49] However, disparate impact claims do not require discriminatory intent, so later uses of the policy cause "present effects [resulting from] present discrimination" as opposed to past discrimination.[50] The Court rejected the Seventh Circuit's conclusion that disparate treatment and disparate impact claims have the same procedural reach since they are both aimed at preventing employment discrimination.[51] In doing so, the Court refused to "rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended."[52]

The Court concluded by addressing the practical implications of its decision. In considering the alternative outcomes, the Court noted that "both readings of the statute produce puzzling results."[53] Under its holding, "[e]mployers may face new disparate-impact suits for practices they have used regularly for years."[54] These potential new cases may create evidentiary difficulties, as documents relating to the business necessity of a given policy may no longer be available.[55] Alternatively, the City's interpretation of the statute of limitations would give employers impunity to continue to use policies that produce a discriminatory disparate impact.[56] In evaluating the alternative approaches, the Court noted that its duty is to enforce the law and not to "assess the consequences of each approach and adopt the one that produces the least mischief."[57] The Court cautioned that if the effect of the Court's

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[47] *Id.* at 2198.

[48] *Id.* at 2199; *see, e.g.*, Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2169 (2007); Lorance v. AT&T Techs., Inc., 490 U.S. 900, 907–08 (1989); Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980); *United Air Lines*, 431 U.S. at 558.

[49] *Lewis*, 130 S. Ct. at 2199.

[50] *Id.*

[51] *Id.* at 2199–2200.

[52] *Id.* at 2200.

[53] *Id.*

[54] *Id.*

[55] *Id.* The business necessity defense is available to employers who can affirmatively show that there is a business justification for a policy that creates a disparate impact. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (concluding that there must be a "demonstrable relationship to successful performance of the jobs for which it was used"). Since the business necessity defense is an affirmative defense, the burden of proof lies with the employer. *See id.* at 432.

[56] *Lewis*, 130 S. Ct. at 2200.

[57] *Id.*

decision was unintended by Congress, "it is a problem for Congress, not one that federal courts can fix."[58]

The Court's holding in *Lewis* effectively extends the statute of limitations indefinitely for facially neutral employment policies that remain in use. *Lewis* provides further evidence that Title VII's conflicting jurisprudence can only be resolved by Congress, and has clear implications for employees, employers, and Congress. For employees, the decision reduces the burden of bringing disparate impact claims relative to the burden of disparate treatment claims. For employers, the decision sends a clear message that existing employment policies need to be reevaluated in order to avoid future discrimination claims, as employers can no longer rest assured that old policies are not subject to litigation.[59] For Congress, the decision reiterated the Court's discontent with Title VII's unclear statutory language by urging Congress to clarify Title VII's reach.

The *Lewis* decision is an important victory for employees because it makes disparate impact claims more widely available to plaintiffs. In distinguishing between disparate treatment and disparate impact claims, the Court has effectively made the statute of limitations comparatively longer for plaintiffs bringing disparate impact claims than for those bringing disparate treatment claims.[60] The Court's differentiation between disparate impact and disparate treatment claims is textually reasonable in light of the fact that Title VII disparate treatment claims require proof of intent and disparate impact claims do not.[61] Because intent is an element of a disparate treatment claim, the occurrence of discriminatory intent must be proven during the statutory period in order for the claim to be actionable.[62] In *Ledbetter*, the Court applied this principle to a claim of sex-based pay discrimination. The Court held that a discriminatory intent in setting a salary cannot be

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[58] *Id.* The Court's call for Congress to reform Title VII is reminiscent of the public response to the *Ledbetter* decision, which led to congressional action.

[59] A longer statutory filing period is contrary to the intended purpose of Title VII's short statute of limitations, which is supposed to ensure that objections to employment policies are brought promptly. *See* Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2170–71 (2007) ("This short deadline reflects Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation.").

[60] The fact that *Lewis* will likely result in the increased availability of disparate impact discrimination claims is particularly noteworthy given that Justice Scalia authored both the Court's opinion in *Lewis* and a separate concurrence in *Ricci*. In *Ricci*, Justice Scalia hypothesized that the disparate impact cause of action is unconstitutional. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring) ("Whether, or to what extent, are the disparate-impact provisions of Title VII . . . consistent with the Constitution's guarantee of equal protection?"); *see also 2008 Leading Cases*, *supra* note 4, at 287 ("A colorblind Constitution, highly suspicious of any race-based action, is in severe tension with a law *requiring* race-based action to remedy mere disparate impact."). The constitutionality of disparate impact litigation was not at issue in *Lewis*.

[61] 1 LINDEMANN & GROSSMAN, *supra* note 2, at 109–10.

[62] *See Ledbetter*, 127 S. Ct. at 2170–71.

extended to subsequent paychecks that are issued as a matter of procedure and without any discriminatory intent.[63] Since disparate impact claims rely solely on the effects of employment policies, however, no intent is required. Consequently, plaintiffs with disparate impact claims can bring suit in response to the continued use of time-barred policies while disparate treatment plaintiffs cannot.

The difference between disparate impact and disparate treatment claims makes the varying application of the statute of limitations counterintuitive. Disparate impact claims permit employees to challenge facially neutral employment practices in which the discriminatory intent is either hidden or nonexistent.[64] Instead of searching for proof of discriminatory intent, disparate impact plaintiffs can point to statistical differences in the relative employment benefits of the protected class under an employment policy.[65] Theoretically, disparate impact plaintiffs are more likely to be put on notice of the discriminatory employment practices because the disparate impact on minority groups is often more visible than discriminatory intent.[66] Victims of disparate treatment, such as Lilly Ledbetter, may be less likely to promptly discover that they have a valid discrimination claim because intent to discriminate is often accompanied by purposeful attempts to hide the discriminatory treatment. Yet *Lewis* extends the statute of limitations for the plaintiffs who are more likely to be put on notice of discriminatory conduct.

In light of the lengthened statute of limitations, the pressure from *Lewis* to reevaluate longstanding employment practices requires employers to more frequently confront the *Ricci* decision. In *Ricci*, the Court held that an employer could only affirmatively act to remedy a disparate impact violation if it has a "strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the . . . discriminatory action."[67] Prior to *Lewis*, employers could

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[63] *See id.* at 2169–70.

[64] *See* Lewis v. City of Chicago, 528 F.3d 488, 492 (7th Cir. 2008) ("[A]nother way of looking at the disparate impact approach is that it is primarily intended to lighten the plaintiff's heavy burden of proving intentional discrimination after employers learned to cover their tracks." (quoting Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161, 1164 (7th Cir. 1992)) (internal quotation mark omitted)).

[65] Title VII does not provide any guidance on how to prove disparate impact. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006) ("An unlawful employment practice based on disparate impact is established . . . if . . . a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin . . . .").

[66] This does not mean that it is easier for plaintiffs to prove disparate impact, only that plaintiffs are more likely to be aware of the discriminatory practices.

[67] Ricci v. DeStefano, 129 S. Ct. 2658, 2677 (2009).

avoid the *Ricci* dilemma[68] on older employment policies because legal challenges would be barred by the statutory filing period. Now that these policies are no longer time-barred, employers must grapple with the *Ricci* decision on a far greater number of policies.

The Court's decision highlights the conflict between disparate impact and disparate treatment causes of action — illustrating that employers may be forced to risk litigation under one cause of action in order to avoid litigation under the other.[69] The combination of the Court's decisions in *Lewis* and *Ricci* puts employers in a precarious double bind, in which they bear the burden of both acting and not acting. A conscientious employer that would like to avoid litigation after *Lewis* will affirmatively evaluate its existing policies for potential instances of disparate impact liability. If an employment policy is found to have a potentially disparate impact, the employer must decide if further action is necessary. On the one hand, if the employer decides to retain the policy, the policy could be challenged under *Lewis* if it is still in "use." In order to avoid liability, the employer has the burden to show that there is a business necessity for the policy.[70] On the other hand, if the employer decides to discard the policy, it could be challenged under *Ricci* for any resulting disparate treatment.[71] In order to avoid liability, the employer has the burden to show that there is a "strong basis in evidence" that it will be subject to disparate impact liability.[72] With employers facing a veritable catch-22, further litigation can be expected to grapple with the implications of the *Lewis* decision.

While the Court's recent decisions have been the direct cause of this liability double bind, it would be unfair to imply that the Court should shoulder the full burden of this criticism. Title VII's statutory framework fails to adequately address both the procedural and substantive nature of disparate treatment claims. This lack of textual guidance is typical of Title VII; due to a series of political compromis-

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[68] *Id.* at 2699 (Ginsburg, J., dissenting) ("Yet the Court today sets at odds the statute's core directives. When an employer changes an employment practice in an effort to comply with Title VII's disparate-impact provision, the Court reasons, it acts 'because of race' — something Title VII's disparate-treatment provision generally forbids." (citation omitted)).

[69] *See id.* at 2682 (Scalia, J., concurring) ("The difficulty is this: Whether or not Title VII's disparate-treatment provisions forbid 'remedial' race-based actions when a disparate-impact violation would *not* otherwise result — the question resolved by the Court today — it is clear that Title VII not only permits but affirmatively *requires* such actions when a disparate-impact violation *would* otherwise result.").

[70] *Lewis*, 130 S. Ct. at 2198.

[71] Since neutral policies that result in a disparate impact against minorities by definition disadvantage minority employees, the elimination of those policies would often require a nonneutral replacement policy that may result in a disparate treatment claim by nonminority candidates. *See, e.g.*, *Ricci*, 129 S. Ct. 2658.

[72] *Id.* at 2677.

es, the legislation was "poorly written and delegate[d] a great deal of responsibility for the development of doctrine to the courts."[73] As a result, changes to Title VII have originated primarily with the courts rather than with Congress. When the Court accepted disparate impact claims in *Griggs*, there was no express statutory authority for such claims.[74] It was only twenty years later, after a series of Supreme Court opinions limiting disparate impact claims,[75] that Congress codified the availability of disparate impact claims in the Civil Rights Act of 1991.[76] Similarly, Congress followed the Court's lead when it passed legislation resetting the statute of limitations for discrimination in pay to counteract the Court's decision in *Ledbetter*.[77] In both situations, Congress merely implemented a short-term fix that was designed to counteract current Title VII judicial trends.

Whether Congress will respond to the dilemma created for employers under *Lewis* is uncertain. *Lewis* was pro-employee and therefore did not command the public attention that prompted congressional action after *Ledbetter*. To respond to the Court's decision in *Lewis*, Congress has two options. Congress could place a band-aid on the problem, as it did in reaction to *Ledbetter*, by restricting the statute of limitations to disparate impact claims arising from testing situations like those in *Lewis* and *Ricci*. Alternatively, Congress could overhaul

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[73] Note, *The Civil Rights Act of 1991: The Business Necessity Standard*, 106 HARV. L. REV. 896, 897 (1993). The Civil Rights Act of 1991 initially included strong language supporting disparate impact claims by plaintiffs. *See id.* at 896. This version passed in both the House and the Senate, but there was insufficient support to override President George H.W. Bush's veto. *Id.* In order to pass the legislation, "Congress . . . water[ed] down the language of the bill, leaving the Act susceptible to widely differing interpretations." *Id.* at 897.

[74] *See supra* note 42.

[75] Congress might never have codified the availability of disparate impact claims were it not for a series of cases decided during the Court's 1988 Term that limited the ability of employees to prevail in disparate impact suits. *See* Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1328 (1989) ("Recently, the Supreme Court watered down the 'business justification' defense and shifted the burden of proof to the plaintiff, so we can expect disparate impact cases to decline."); *The Civil Rights Act of 1991: The Business Necessity Standard*, *supra* note 73, at 896.

[76] Pub. L. No. 102-166, § 105, 105 Stat. 1074, 1074–75 (codified at 42 U.S.C. § 2000e-2(k) (2006)). The Civil Rights Act of 1991 failed to resolve many of the problems associated with disparate impact claims. Notably, the statute did not define what behavior constitutes an "employment practice." *Lewis*, 130 S. Ct. at 2198.

[77] The Lilly Ledbetter Fair Pay Act of 2009 is limited in two respects. First, it only resolves the problem of pay discrimination claims' being time-barred; it does not address any other forms of employment benefits. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5. Second, the Act only resets the statutory period with each new paycheck, so an individual must have worked for the employer within the statutory period to bring a claim. *See id.* Although the Lilly Ledbetter Fair Pay Act could be interpreted as a rejection of the Court's decision in the *Ledbetter* case, as opposed to an indication of the deficiencies of Title VII, the Court's decision in *Ledbetter* would not have been possible had Title VII better outlined the applicable statute of limitations.

Title VII's statute of limitations requirements to clarify when later applications of a discriminatory employment practice are considered a "use" of the policy. This clarification could be done by explicitly stating whether later applications of a policy can be subject to disparate impact claims, or by extending the statute of limitations for all disparate impact claims. Until Congress clarifies the statutory language of Title VII, courts will continue to apply interpretations to the statute that are contradictory and that Congress likely did not intend.

B. *Civil Rights Attorney's Fees Award Act*

Performance-Based Enhancements. — In the American legal system, each party to litigation is generally responsible for paying its own attorney's fees.[1] However, Congress enacted a statutory exception to the American Rule when it passed the Civil Rights Attorney's Fees Awards Act of 1976[2] (§ 1988), which allows for the award of "reasonable" attorney's fees to the prevailing party in civil rights litigation.[3] The Act was intended to facilitate the private enforcement of civil rights legislation by encouraging competent counsel to represent civil rights plaintiffs who might otherwise not be able to pay for their services.[4] Last Term, in *Perdue v. Kenny A. ex rel. Winn*,[5] the Supreme Court held that an award of attorney's fees under the Act could be enhanced due to the attorney's superior performance, but only in extraordinary circumstances.[6] The Court overturned a $4.5 million enhancement to a $6 million fee award because the district court did not provide a sufficiently specific explanation of how it calculated the performance enhancement.[7] But although the Court purported to leave open the possibility that a fee award could be enhanced on the basis of performance quality,[8] it has effectively precluded performance enhancements altogether. The Court should have done explicitly what it has done effectively and barred performance-based enhancements to lodestar awards outright.

In 2002, nine foster children brought a class action in the Superior Court of Fulton County, Georgia, on behalf of a class of foster children

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[1] *See* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717–18 (1967); John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, LAW & CONTEMP. PROBS., Winter 1984, at 9 (providing a history of the American Rule).

[2] Pub. L. No. 94-559, 90 Stat. 2641 (1976) (codified as amended at 42 U.S.C. § 1988(b) (2006)).

[3] *See* 42 U.S.C. § 1988(b).

[4] *See* S. REP. NO. 94-1011, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913; *see also* City of Riverside v. Rivera, 477 U.S. 561, 576–78 (1986).

[5] 130 S. Ct. 1662 (2010).

[6] *Id.* at 1669.

[7] *Id.* at 1670, 1675.

[8] *See id.* at 1674.