THE NATIONSBANK CASE AND THE MISUNDERSTANDING OF STATISTICAL PROOF OF DISCRIMINATION

by

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On August 10, 1995, the Teamsters union released a study, finding that in 1993 NationsBank Corp., one of the country's largest home mortgage lenders and fastest growing banks, denied home loans to black applicants at least three times as often as it turned down white applicants of similar incomes in Atlanta, Baltimore, Dallas, and Washington, D.C. The study, which grouped loan applicants into three income categories, found NationsBank to have among the highest racial disparities in rejection rates of all mortgage lenders in each of the three income categories in all four cities, with the black rejection rate more than six times the white rate in certain instances. Generally, the racial disparities in mortgage rejection rates at NationsBank tended to be greater among higher income applicants than among lower income applicants. The study regarded the greater disparity among higher income applicants to be its most important finding because it contradicted NationsBank's claim that the large racial disparities stem from its aggressive marketing to low income black applicants.

The study acknowledges that NationsBank, which has been a strong supporter of the Community Reinvestment Act that requires banks to provide services to poor neighborhoods and had recently hosted a major community reinvestment conference, has a good reputation for combating racism. But the study faults the bank and its high-profile Senior Vice-President for Community Reinvestment, Catherine P. Bessant, for devoting substantial resources to promoting the bank's image and publicizing its commitment to minority lending, while the bank at the same

time maintains one of the worst records of racial disparity in mortgage rejection rates. The study suggests that the bank's efforts to promote its image as a socially conscious lender have been undertaken principally to deflect the attention of regulators while the bank continues the aggressive acquisition strategy that increased its deposit base from $6 billion in 1984 to $167 billion in 1994. Noting that the racial disparities found in the study are comparable to those found at Chicago's Northern Trust Company, against which the Justice Department had recently secured a $700,000 settlement under the Fair Housing and Equal Credit Opportunity Acts, the study concludes by calling for the Department of Justice also to consider NationsBank as a target for prosecution under those statutes.

Given the prominence of NationsBank and the provocative data presented in the Teamsters study, this is the kind of situation where one might expect the Justice Department to take an interest. Before the Justice Department had an opportunity to do anything, however, on September 21, 1995, eleven black rejected loan applicants brought a putative class action in the U. S. District Court for the District of Columbia on behalf of all black residents of the Washington area who have sought or will seek home mortgages from NationsBank and its subsidiaries. The plaintiffs are represented by the Washington Lawyers' Committee for Civil Rights and Urban Affairs, which last December released its own study of racial disparities in mortgage rejection rates at lenders in the Washington area. The Lawyers' Committee study also grouped applicants into three income categories, but used a weighting technique to adjust for income that yielded an overall disparity rather than a disparity within each category. The reductions in rejection rate ratios effected by the adjustment procedure were quite modest for all banks examined, a result the study's authors interpreted also to undermine the banks' claims that rejection rate disparities stemmed from aggressive marketing in low income minority neighborhoods. With regard to NationsBank, the study found that between 1990 and 1993, even adjusting for income, the lender denied black applicants loans at 4.5 times the white rate, the second worst record among large

lenders in the Washington area. The study also found that at NationsBank black applicants were more than eleven times as likely as white applicants to be denied loans because of poor credit ratings, by far the worst record of the banks studied.

Announcing the filing of the suit, counsel for the Lawyers' Committee would describe it as one of the largest lending discrimination suits ever filed by private plaintiffs and one that puts the banking world on notice that private parties will enforce fair lending laws just as vigorously as the Justice Department. The suit is brought not only under the Fair Housing and Equal Credit Opportunity Acts, but under the Civil Rights Act of 1866 as well. That statute authorizes compensatory and punitive damages, which the plaintiffs have sought in their complaint. And it allows plaintiffs to demand a jury trial, which they also have done. In the District of Columbia, the jury is likely to be predominantly or entirely black.

The case presented to those jurors will consist of the not unappealing accounts of the plaintiffs and other rejected loan applicants who believe that they were rather better credit risks than NationsBank seemed to think, and who also can explain how NationsBank's refusal to grant their mortgage application caused them to be unable to purchase a home that meant a great deal to them or otherwise adversely affected their lives. The case will also consist of the testimony of experts like those crafting the Teamsters and Lawyers' Committee studies, who will explain not only how very large the rejection rate disparities are, but how much larger those disparities are than at other banks. They will also testify as to how sophisticated statistical procedures show that it is inconceivable that such disparities could have occurred by chance.

Should plaintiffs prevail, there is reason to expect damage awards to be immense. The defendant, after all, is a bank and a huge bank at that. Other suits may follow in Atlanta, Baltimore, or Dallas, as well as in a host of other cities where studies undoubtedly will reveal similar racial disparities in rejection rates.

Blacks in the Washington area now have two good reasons to seek home loans at NationsBank. First, in the event that they are denied loans, they have some chance of participating in a damage award in the pending suit. Second, as a careful reading of the data in both the Teamsters study and the Lawyers Committee's own study reveals, there may be few places where a black loan applicant has a better chance of receiving a mortgage loan than at NationsBank.

The Teamsters Study

Readers of the press release or the executive summary on the Teamsters study would learn that the study found that in 1993, in terms of racial disparities in rejection rates, NationsBank ranked 57 out of 61 lenders in Atlanta, 50th out of 53 in Baltimore, 42nd out of 49 in Dallas, and 53rd out of 55 in Washington. After carefully reading the report, however, one might realize that those figures are not from the Teamsters study at all, but from a different study conducted by a different organization, the National Community Reinvestment Coalition (NCRC), and actually reflect the rejection disparities between whites and Hispanics as well as blacks. The NCRC figures apparently were used because they were simpler to present or slightly more provocative, though one can never entirely discount mere carelessness. The content of the Teamsters study has far more serious flaws, however, not least of which is the misunderstanding of the elementary mathematics underlying the patterns the study deemed most revealing.

To begin with, of course, studies that attempt to control for differences in income by grouping loan applicants into broad income categories never adequately control for income. Invariably, the group that is disproportionately represented in the lower income categories – and blacks are quite disproportionately represented in the lower income categories of loan applicants at NationsBank – tend also to be disproportionately concentrated in the lower ranges within each category. For example, among blacks and whites living in families with incomes between the poverty line and 200 percent of the poverty line, 54 percent of the blacks, compared with 44

percent of the whites, live in families with incomes below 150 percent of the poverty line. This means that within each income category, blacks have a lower average income than whites. And, as the data in the Teamsters study and other studies consistently show, the greater the applicant's income the greater the chance of securing a mortgage. Further, even among persons with exactly the same income, the more advantaged group will tend to have more of other factors that reflect creditworthiness. For example, the greater assets of whites earning the same income as blacks has been well-documented. Thus, it is to be expected that even studies considerably more sophisticated than that performed by the Teamsters will show some racial disparity in lending, and it is anyone's guess whether the disparity actually yielded by the study is larger than might be explained by factors not taken into account adequately or not taken into account at all.[1]

One might nevertheless ask whether the very size of the racial disparities in rejection rates at NationsBank indicates that something is amiss at NationsBank, or at least that something is more amiss at NationsBank than at other banks? And what about the fact, deemed so important by the study's author, that the disparities are greater in the higher income categories, thereby undermining the bank's main defense?

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[1] Though the pages that follow give much attention to the lower average incomes of black applicants to NationsBank than black applicants to other banks, it has to be recognized that the fact that blacks have lower average incomes than whites within each income category cannot alone account for the racial disparities within income categories observed at NationsBank and other banks. If that were the case, one would not find the consistent patterns where blacks have higher rejection rates in a higher income category than whites have in a lower income category.

Success and Failure

This is where things get more complicated and where we confront what is at once one of the most fundamental and one of the most widely misunderstood phenomena in mathematics. Anyone who thinks about it for a moment would probably understand that when two groups differ on average with regard to some characteristic related to an outcome such as the securing of credit, the greater the average difference, the greater will be the disparity between the rates at which the two groups secure the desired outcome (success) and the greater will be the disparity between the rates at which the two groups fail to secure the desired outcome (failure). What few understand, however, is how disparities between success rates and disparities between failure rates are affected by overall success rates and how the two disparities tend to vary inversely with one another depending on the overall success rates.

To understand how that works, imagine two demographic groups of 100 persons each where the two groups differ significantly on average test scores and where each group's test scores are more or less normally distributed – i.e., they fall under a curve that tends to be bell-shaped. Divide Group A (the higher-scoring group) into three categories according to test scores, with 30 persons in the High category, 40 in Middle, and 30 in the Low. Given its lower average scores, Group B will be divided up something like this: 20 in the High category, 30 in the Middle, and 50 in the low.

Suppose we set the cutoff score at a point where only the High category passes. The failure rate of Group B (80 percent) would be 1.1 times the failure rate of Group A (70 percent); and the pass rate of Group B (20 percent) would be 67 percent of the pass rate of Group A (30 percent).[2]

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[2] I could just as well portray the disparity between pass rates as the ratio of the white pass rate over the black pass, which would be 1.5 in the situation described. The courts and federal employment discrimination guidelines, however, generally describe the pass rate disparity in terms of the lower scoring group's pass rate over the higher-scoring group's pass rate, with a lower quotient reflecting a greater disparity. The choice makes no difference to the points addressed here.

If we reduce the cutoff score to the point where only persons in the Low category fail the test, Group B's failure rate drops to 50 percent, while Group A's failure rate drops to 30 percent. Thus, the disparity between failure rates increases, with the ratio of the failure rate of Group B to that of Group A rising from 1.1 to 1.7.

On the other hand, as a result of the lowering of the cutoff, Group B's pass rate rises to 50 percent while Group A's pass rate rises to 70 percent. Thus, the disparity between pass rates declines, with Group B's pass rate rising from 67 percent to 71 percent of Group A's pass rate.

The numbers above were chosen to provide a simple example. But the tendencies reflected in the numbers would hold in any circumstance where the distributions of scores for the two groups tend to be more or less normal. In fact, the tendencies will hold so long as the less-advantaged group makes up an increasing proportion of the persons left below the cutoff each time the cutoff is lowered. That situation will obtain when the distributions are normal, but it will also obtain anytime the distributions have more or less regular shapes. And while irregularities in the distributions may cause occasional departures from the described patterns where overall changes are very small, in most situations one observes in reality, rarely will the irregularities be sufficient to cause departures from the patterns when overall changes are large.

The pattern can also be readily observed in income data. If poverty were to decline such that all persons with incomes between the poverty line and 50 percent of the poverty line are raised from poverty, the disparity between the poverty rates of more poverty-prone groups, such as blacks and female-headed families, and less poverty-prone groups, such as whites and married-couple families, would increase. But the disparity between rates of avoiding poverty would decline.

Typically, when courts consider whether a test unfairly discriminates against minorities, they look to disparities in pass rates. And it is universally accepted that one way to lessen a discriminatory effect of such a test is to lower the cutoff score, thereby reducing the disparity in

pass rates, even though doing so increases the disparity in failure rates. It should be recognized, however, that the same result would occur if, instead of lowering the cutoff to allow persons with scores in the Middle category now to pass the test, education was improved sufficiently to enable everyone in the Middle category now to pass the test at the original cutoff. In this regard, it might be useful to consider that if the United States were to implement a successful campaign to promote literacy, the disparity between black and white literacy rates would likely decline, but the disparity between black and white illiteracy rates would likely increase.

Credit Disparities

Banks' lending criteria operate much like tests. At banks that have relatively lenient lending criteria, the black approval rate will tend to be closer to the white approval rate than at other banks, while the disparity in rejection rates will tend to be greater than at other banks. Thus, so long as the focus is on disparities in rejection rates, the banks whose creditworthiness "tests" would be deemed to have the least discriminatory effect, as that concept usually is understood, may instead be deemed to have the most discriminatory practices. They also tend to be the banks at which blacks are most likely to be able to secure loans.

A useful illustration of these tendencies can made be with the rankings on rejection rate disparities in the NCRC study mentioned at the outset. The study, styled "America's Worst Lenders! A comprehensive Analysis of Mortgage Lending in the Nations' Top 20 Cities," presents extensive tables showing NCRC's evaluations of various performance criteria, but little of the underlying data that might allow one to view that data from a different perspective. For example, for only a handful of lenders does it show the actual rejection rates for each group that might allow the observer to note the correlation between high rejection rate disparities and low rejection rates for both blacks and whites or between high rejection rate disparities and low acceptance rate disparities. But taking the data provided in tables attached to the Teamsters study (and allowing that the data include only blacks while the NCRC data also include Hispanics), we

can learn some interesting things about the lenders that NCRC ranked dead last on the basis of credit disparities in each city studied. In each of the four cities, the banks ranked as the very worst in terms of racial disparities in rejection rates – Wieland Financial Services in Atlanta, Loyola Federal Savings in Baltimore, Accubanc Mortgage Corporation in Dallas, and Navy Federal Credit Union in Washington – had black rejection rates ranging from 49 to 58 percent lower than the black rejection rates for all banks combined in the respective cities. The racial disparities in acceptance rates were also 36 to 46 percent lower at these banks than at all banks combined.

There has been increasing attention to the degree to which observed racial disparities in mortgage rejection rates tend to result from even-handedly applied criteria. A 1993 *Washington Post* series on lending discrimination, while making frequent reference to racial bias, ultimately appeared to recognize that the more serious problem was that traditional standards employed by banks in appraising loan applications tended to disadvantage blacks more than whites because blacks were disproportionately concentrated among applicants who could not meet the standards. That year members of the House Banking Committee also expressed concern that standard lending criteria tended to unfairly discriminate against minorities.

Attention to the observed disparate impact of lending criteria in these and other quarters led ten federal agencies involved with monitoring fair lending laws to issue a policy statement in March of 1994 placing greater emphasis on the "disparate impact" lenders' policies may have on minorities. The statement noted, for example, that minimum loan amounts may tend to have greater adverse effects on minorities, and indicated that where a disparate impact of such policies is found, banks will have to justify their use of the criteria causing the impact.

It is certainly true that standard lending criteria would be expected to have a disparate impact on black and other minority loan applicants, regardless of how such impact is measured. And, the more banks relax their criteria in response to the expressions of concern over that impact, the smaller would be the disparity in the rates at which blacks and whites receive loans – the

traditional measure of disparate impact. But those measures would be expected also to increase the disparity in rejection rates, subjecting the very banks that are most responsive to the concern about disparate impact to increased scrutiny.

The probable result of programs like the one NationsBank and the National Urban League jointly announced in mid-1993 to form committees to review contested mortgage rejections in 19 cities – if evenhandedly applied – will be to increase racial disparities in rejection rates while reducing disparities in acceptance rates. The extent to which that in fact occurs will depend on whether whites and blacks in like circumstances seek such review with equal frequency and whether the review process actually weeds out any bias that may exist, or whether the process merely causes some proportion of applicants to qualify after additional consideration. But an increase in rejection disparities ought not to be read as evidence that the programs have not been applied in good faith or, for that matter, that they have not worked.

Similarly, each of the actions that the Lawyer's Committee's complaint suggests that NationsBank ought to have taken in order to be more flexible in its review of the applications of the named plaintiffs, such as giving greater attention to compensating factors or being more receptive to explanations for credit problems – again, if evenhandedly applied – would be expected to increase the racial disparities in rejection rates on which the statistical aspect of the suit is based.

The lowering of interest rates, too, by making all applicants somewhat more mortgage-eligible, would be expected to increase racial disparities in rejection rates while reducing disparities in acceptance rates. In 1993, 30-year fixed-rate mortgage rates reached their lowest point more than in three decades. But when Home Mortgage Disclosure Act data for 1993 were released late the following year, showing modest rejection rate declines for all groups, the lack of progress in reducing rejection rate disparities was discussed without apparent recognition that the overall declines in rejection rates would be expected to increase the racial disparities and without any effort to examine the acceptance rate disparities. The Lawyers Committee study

(addressed more fully below) would regard it as "significant" that in 1993 racial disparities had actually increased at large lenders in the Washington area, though without apparent awareness of any connection to declining interest rates and without providing the actual rejection rates that would allow a determination of whether there also occurred the decreases in acceptance rate disparities that typically accompany an across-the-board greater availability of credit.

The tendency for disparities in failure rates to be high where overall failure rates is pretty universal. Indeed, as I sought to show in "The Perils of Provocative Statistics" (Public Interest, Winter 1991), in general, the rarer the occurrence of any condition – including poverty, mortality, academic failure – the greater will be the disparity in failing to avoid the condition and the smaller will be the disparity in succeeding at avoiding the condition. This holds for subgroups within larger populations and holds regardless of the reason that the condition is rare. For example, there are much larger disparities between the poverty rates of black and white married-couple families than between the poverty rates of the black and white single-parent families simply because poverty is so much less common among married-couple families; the racial disparities between rates of avoiding poverty, however, are much smaller among married-couple families.

With regard to mortgage lending in particular, for both blacks and whites, the higher the income, the lower will be the mortgage rejection rates. Thus, in the highest income category, where rejection is relatively rare, the racial disparity in rejection rates will tend to be greater and the racial disparity in acceptance rates will tend to be smaller.

This was the case reflected in the first nationwide racial data for conventional mortgages, released by the Federal Reserve in October 1991, which were divided according to four income categories. The higher the income, the greater was the overall acceptance rate, and the closer was the black acceptance rate to the white acceptance rate; but, the higher the income, the greater was the racial disparity in rejection rates. This also was the pattern observed for all lenders combined in each of the four cities in the Teamsters study. For example, in Atlanta, in the lowest income

category, the black rejection rate (25.9 percent) was 2.2 times the rate for whites (11.8 percent), while the black acceptance rate (74.1 percent) was 84 percent of the white rate (88.2 percent); for the highest income category, the black rejection rate (15.0 percent) was 3.2 times the white rejection rate (4.7 percent), while the black acceptance rate (85.0 percent) was 89 percent of the white rate (95.3 percent). A similar pattern existed in each of the other three cities.

In any event, in the case of NationsBank, the fact that the rejection rate disparities were greater in the highest income category was entirely to be expected. So, too, was a lower acceptance rate disparity, which in fact also was the case. But neither the greater rejection rate disparity in the highest income category found so meaningful in the Teamsters study, nor the lower acceptance rate disparity in that category that went unremarked in the study, proves anything at all about whether NationsBank discriminated against black loan applicants.

To be sure, there may be occasions when the described tendencies may not predominate. I have already noted the potential impact of irregularities in data. In addition, greater homogeneity among white and black borrowers in one income category or locality than another can reinforce the tendency for one type of disparity to be small and counter the tendency for the other type of disparity to be large in a particular circumstance. That one institution or locality discriminates, or discriminates more than others, can also have an effect countervailing to the described tendencies. But whether or not these tendencies predominate in every case, they are essential parts of the picture, and without understanding them it is impossible to draw meaningful conclusions about the observed patterns.

NationsBank

Now consider the Teamsters data on NationsBank in particular, keeping in mind the statistical tendencies just described. As one would expect, NationsBank's acceptance rate disparities are lower among the highest income group than the lowest income group in each city. The acceptance rate disparities are also much less provocative. In Washington, for example, in the highest income category, while the black rejection rate (12.3 percent) was 4.7 times the white rate (2.6 percent), the black acceptance rate (87.7 percent) was 90 percent of the white rate (97.4 percent).

But it does turns out that, in most cases, the disparity between black and white acceptance rates at NationsBank is somewhat greater than the average disparity for all banks. This difference, too, is rather less provocative than the difference between the rejection rate disparities at NationsBank and at other banks. For example, in Washington, in the highest income category, the black-white rejection rate ratio at NationsBank (4.7) was almost half again as high as at all banks combined (3.2); but the black-white acceptance ratio is only slightly lower at NationsBank (90 percent) than that found at all banks combined (91 percent).

Still, the fact is that the racial disparities between rejection rates and between acceptance rates are greater at NationsBank than the average for all other banks. The question, then, is whether this more likely occurs because NationsBank discriminates against black applicants or because there exist greater differences between the characteristics of black and white applicants at NationsBank than at other banks.

Certainly it would seem that if NationsBank successfully promotes its image in the black community, that would tend to cause marginal black applicants to apply more heavily to NationsBank, thereby reducing the average creditworthiness of black applicants to NationsBank relative to other banks. We have already disposed of the Teamster’s study's conclusion that NationsBank's claim that its large rejection rate disparities are related to the low income of its

black applicants is refuted by the fact that the rejection rate disparity is greater among applicants with higher incomes than applicants with lower incomes. But the study also attempted to discredit NationsBank's claim that it aggressively marketed in majority-black communities by demonstrating that in Atlanta NationsBank had a substantially higher rate of loan applications per housing unit in white neighborhoods than in black neighborhoods. Yet, absent reason to believe that one would expect the rate of mortgage applications per housing unit ought to be the same in black neighborhoods as in (usually more affluent) white neighborhoods, either in general or at NationsBank, the lower rate in black neighborhoods means nothing whatever about whether NationsBank aggressively markets in such neighborhoods.

Though the tables attached to the Teamsters study contained data allowing a calculation that would in fact be germane to whether NationsBank aggressively marketed in black neighborhoods – -that is, whether the black proportion of applicants to NationsBank was greater than at other banks – the study ignored such data. The data in the tables reveal, however, that the black proportion of loan applicants at NationsBank is substantially greater than at other banks in each of the four cities studied. It is greater by 61 percent in Atlanta, 76 percent in Baltimore, 127 percent in Dallas, and 28 percent in Washington. Thus, NationsBank's claim regarding aggressive marketing in black neighborhoods seems to be substantiated, and, as noted, it would seem to follow that this would cause NationsBank's black applicants to be on average somewhat less creditworthy than black applicants at other banks.

But the data in the tables provide even sounder reason to expect NationsBank's applicants to be on average somewhat poorer risks than at other banks in all four cities, as well as evidence that, in two cities, NationsBank's white applicants are on average somewhat better risks than at other banks. In Washington, NationsBank's black applicants tend to be more heavily concentrated in lower income categories than black applicants to other banks, while NationsBank's white applicants tend to be more heavily concentrated in higher income categories than applicants

to other banks. NationsBank's black applicants are 8 percent more likely to be in the lowest income category (54.3 percent compared with 50.4 percent) and 40 percent less likely to be in the highest income category (16.2 percent compared with 26.9 percent) than black applicants to other banks. By contrast, NationsBank's white applicants are 18 percent more likely to be in the highest income category (55.3 percent compared with 46.7 percent) and 21 percent less likely to be in the lowest income category (18.8 percent compared with 23.7 percent) than white applicants at other banks. A similar pattern is found in Baltimore. This suggests – and does so fairly strongly – that within each income category NationsBank's black applicants have somewhat lower average incomes, and its white applicants have somewhat higher average incomes, than the applicants of each race at other banks.

In Dallas and Atlanta, NationsBank's black applicants are also more concentrated in the lower income categories than applicants to other banks. In Dallas, NationsBank's black applicants are 40 percent more likely to be in the lowest income category (63.7 percent compared with 45.6 percent), and 86 percent less likely to be in the highest income category (14.1 percent compared with 26.2 percent) than black applicants to other banks. In Atlanta, the pattern is similar though much less pronounced. In neither city, however, do NationsBank's white applicants have income distributions noticeably different from white applicants to other banks. Thus, to varying degrees in all four cities, there are reasons to expect that NationsBank would have larger racial disparities between rejection rates and between acceptance rates than other banks in the same cities.

Whether or not NationsBank's special efforts to serve poor black communities wholly account for the observed larger racial disparities at NationsBank compared with other banks in these cities, it does seem that its effort to publicize its commitment and to support legislation like the Community Reinvestment Act have contributed to its being singled out in the report. In that regard it is interesting to note the comparison the study draws between NationsBank's record in

Atlanta and that of a lender named Colonial Mortgage in support of the study's claim that there is something significant in the fact that NationsBank's rejection rate disparities were greatest among the applicants with the highest incomes. The study points out that, whereas in Atlanta the black-white rejection ratio at NationsBank rises from 3.1 in the lowest income category to 6.2 in the highest, at Colonial Mortgage the ratio drops from 4.5 in the lowest income category to 1.5 in the highest.

Colonial Mortgage does have very low rejection and acceptance rate disparities. In the middle income category blacks are actually slightly more likely to receive loans than whites, and even in the lowest income category, the 4.5 black-white rejection ratio results simply from the happenstance that Colonial turned down 2 of its 12 black applicants in that category.

But there are more pertinent comparisons between these two lenders. For one thing, in Atlanta 16.7 percent of NationsBank's applicants were black compared with 3.5 percent of Colonial's applicants. And, whereas at NationsBank 54 percent of black applicants were in the lowest income category and 21 percent were in the highest, at Colonial Mortgage 23 percent were in the lowest income category and 59 percent were in the highest. Apart from what these figures may say about the reasons for the greater rejection rate disparities and acceptance rate disparities at NationsBank, they suggest that NationsBank is doing a great deal more to provide mortgages for Atlanta's black citizens, and especially its low income black citizens, than Colonial Mortgage. They also suggest that the study's unfavorable comparison of NationsBank with Colonial Mortgage is an unfortunate one.

Equally unfortunate is the evident targeting of NationsBank in large part because of the efforts it has made to portray itself as an institution desiring to do its best to serve low income minority borrowers. Whatever the motivations underlying those efforts, they have caused an unusually high number of low income black applicants to seek home mortgages from NationsBank. The great majority of those applicants got the mortgages they sought.

The Lawyers' Committee Study

If a careful examination of the data in the Teamsters study suggests that NationsBank's claim compares rather favorably with other lenders in the four cities studied, a similar review of the data in the Lawyers' Committee study suggests that, at least among large lenders in Washington, NationsBank may be just about the best place for a blacks to seek home mortgages.

The Lawyers Committee study calls itself "one of the most detailed and sophisticated examinations of racial disparities in marketing and underwriting by Washington, D.C. lending institutions ever undertaken." It was prepared with the assistance of the statistician who has been the Justice Department's principal expert witness on credit discrimination issues and the lawyer who has overseen most of the Justice Departments credit discrimination cases and who is now co-counsel in the Lawyers' Committee suit. But the case the study makes against NationsBank is a misleading one.

The study focused on the thirteen home mortgage lenders in the Washington area that from 1990 to 1993 turned down 100 or more black (or black and Hispanic applicants). It presented tables showing racial disparities in rejection rates both before and after adjusting for income, an adjustment accomplished by dividing and applicants into three income categories and giving weights to the disparities found in each category based on the proportion black applicants in the category made up of total black applicants. The study found NationsBank to have the highest ratio of black to white rejection rates without adjustment for income (5.35) and the second highest after adjustment for income (4.5). The adjustment caused similarly modest reductions of the rejection rate disparities for ten of the other lenders and slight increases for remaining two.

The study maintains that the adjustment is intended "to account for the possible imbalance of minorities among low income applicants who may face a higher likelihood of rejection." At no place does the study acknowledge that minorities are in fact substantially disproportionately represented among lower income applicants or present data allowing the reader to determine that

on his own. As shown above, tables in the Teamsters study indicate that, in 1993, 54 percent of black applicants compared with 19 percent of whites are in the lowest income category, and 16 percent of blacks compared with 55 percent of whites are in the highest income category.

A crucial problem with the Lawyers' Committee's adjustment procedure, as with the Teamsters study's analyses of disparities within each income category, is that the procedure does not address the income and other differences within each income category. And, as explained already, that blacks are disproportionately concentrated in lower income categories means also that they have lower average incomes within each income category, though they will differ from the whites in each income category in other respects as well.[3]

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[3] There are also analytical flaws with the Lawyers' Committee's adjustment procedure. If one is concerned with the degree to which the higher overall black rejection rates merely reflect the fact that black are disproportionately – that is, disproportionately relative to whites – represented in the income categories with high rejection rates, typically one would do any of the following: (1) weight the black rejection (or acceptance) rates within each category by the proportion whites within that category make up of total white applicants; (2) weight the white rejection (or acceptance) rate by the proportion black applicants in the category make up of total black applicants; or (3) weight rejection (or acceptance) rates of both groups on the basis of the proportion of total applicants in each category. Each procedure would be acceptable to epidemiologists, and each, by showing how things would look if blacks and whites were equally distributed among the three income categories but continued to have different rejection rates within each category, would cause reductions in both rejection rate disparities and acceptance rate disparities. That each set of weights would yield a somewhat different result would simply reflect the necessarily arbitrary choice of a baseline. And, if in fact blacks and whites were equally distributed among the three income categories, each procedure would result in no change whatever. Further, the end results would be the same whether one carried out the procedure on rejection rates or acceptance rates. That the direction of the changes would be the same regardless of the choice of weights, that there would be no change if there were no difference in the distributions, and that the results are the same whether one uses success rates or failure rates are each crucial elements of an appropriate adjustment procedure.

The procedure the Lawyers Committee used, which applies weights to the observed rejection rate disparities within each category based on the proportion black applicants in the category make up of total black applicants, is quite different. It does address the possibility that blacks and whites have the same rejection rates within each income category but blacks are disproportionately concentrated in the categories with the higher rejection rates; for if there were no rejection disparities within each category the procedure would yield no disparity after adjustment. But note, first, that the procedure does not actually adjust for the possibility that blacks are disproportionately represented in the lower income categories relative to whites, but only for the possibility that blacks are disproportionately represented in the lower income categories as opposed to being distributed equally among the three categories (i.e., one-third in each of the three categories). So the end result is a weighted average of the rejection disparities, with the weights based on the black distribution; but the adjustment in no manner takes into account the relative distribution of blacks and whites within each category. And, if in fact blacks and whites were equally distributed among the three income categories, the adjusted figure still would differ from the unadjusted figure, so long as that distribution was not that of one-third in each of the three categories; on the other hand, if blacks were distributed equally in each of three categories, the

The Lawyers' Committee study does, however, provide some information that allows meaningful comparison of NationsBank with the other twelve banks. Most obvious is the fact, unmentioned in the text of the study, that NationsBank's 17.5 percent black rejection rate is the third lowest among the thirteen banks studied. With regard to the disparities in acceptance rates that I have suggested are more important than disparities in rejection rates, at least in terms of traditional disparate impact analysis, unfortunately the study does not provide the underlying data that would allow examination of acceptance rate disparities within income categories or income-adjusted acceptance rate disparities. The unadjusted data for all applicants combined is nevertheless revealing.

Though NationsBank's unadjusted 5.35 ratio of the black rejection rate (17.5 percent) to the white rejection rate (3.3 percent) was the largest racial disparity in rejection rates, NationsBank had the fourth lowest racial disparity in acceptance rates. Only two of the three banks with lower acceptance rate disparities, NVR Mortgage and Maryland National Mortgage Co., had lower overall black rejection rates, 14.2 percent at NVR and 17.3 percent at Maryland National. (At the third bank, blacks were 50 percent more likely to be turned down than at NationsBank.)

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adjusted figure would not change from the unadjusted figure regardless of the way whites are distributed in the three income categories.

Second, while the reductions in disparities effected by the Lawyers' Committee's income adjustment do occur because minorities are disproportionately in the lower income categories (though, again, as a function of the disproportionate representation relative to equal distribution in each of the three categories, rather than disproportionate representation relative to the white distribution), the reductions occur only indirectly because the rejections rates are higher in those income categories. That is, the reductions occur because, as one would expect given the higher rejection rates in the lower income categories, the racial disparities in rejection rates are smaller in the lower income categories. But if the same procedure were carried out on disparities in acceptance rates, the higher acceptance rate disparities in the lower income categories would cause the disparities to increase. On the other hand, if the adjustments were carried out using weights based on the proportion whites in each category make up of total white applicants, the rejection rate disparities would increase, while the acceptance rate disparities would decline, as a result of the fact that whites are disproportionately concentrated in the higher income categories where rejection rate disparities are higher and acceptance rate disparities are lower.

It is worth briefly considering just how NationsBank compares with the two banks that had both lower overall acceptance rate disparities and lower overall black rejection rates. The Lawyers' Committee study does show that blacks are 10.1 percent of applicants to NVR and 9.0 percent of applicants to Maryland National, compared with 9.2 percent of NationsBank's. Not much can be made of this.

But while the Lawyers' Committee does not present data showing the types of black applicants to each bank, we can learn a little from the more extensive data presented in the Teamsters study, even though it covers only the year 1993 and uses somewhat different income categories. The tables show that in 1993, black applicants to NationsBank had substantially lower incomes than black applicants to NVR and Maryland National. That year, 54 percent of NationsBank's black applicants were in the lowest income category and 16 percent were in the highest. By contrast, only 21 percent of NVR's black applicants were in the lowest income category and 38 percent were in the highest; only 39 percent of Maryland National's black applicants were in the lowest income category and 20 percent were in the highest. Keeping in mind that the fact that the black applicants to NationsBank were disproportionately in the lower income categories, relative to the other two banks, means also that the average income of blacks was very likely lower within each income category as well, this suggests that blacks of every income level may have their best chance of having their loan application accepted at NationsBank of any of the three banks, and very possibly of all thirteen banks.

The prospects of having one's loan accepted, rather than the size of any acceptance rate disparity, usually would be the principal concern of a black loan applicant. It is nevertheless worth noting with regard to the other part of the equation by which NVR and Maryland National have lower acceptance rate disparities than NationsBank that the somewhat higher white acceptance rate at NationsBank may well be accounted for by the fact that NationsBank's white applicants have somewhat higher incomes than at the other two banks. At NationsBank, 55

percent of white applicants are in the highest income category compared with 45 percent at both other banks; only 19 percent of NationsBank's white applicants are in the lowest income category, while that figure is above 22 percent at both other banks.

The Lawyers Committee study also presented data on rejection rate disparities where the basis for the rejection was poor credit, the area where, according to the study, the Justice Department has typically found most discrimination to occur. A table presenting information on the four Washington area banks that provided information on reasons for rejection, and that rejected more than 100 black applicants because of poor credit, showed NationsBank to have by far the highest racial disparity in rejections on the basis of the applicant's allegedly poor credit, facts that would be noted in the Lawyers' Committee's complaint as well as the press release announcing the suit. Controlling for income, the black rate of rejections for poor credit was 11.2 times the white rate; none of the other three banks had a black-white rejection ratio higher than 3.7.

Yet, while nowhere mentioned in the text of the study, the table shows that blacks are rejected for poor credit in only 10.2 percent of cases at NationsBank, while blacks are rejected in no fewer than 24 percent of cases at the other three banks in the table. Thus, without consideration of the more complex issues addressed here, the table suggests that NationsBank may not be such a bad place for a black applicant to have his or her credit record reviewed fairly.

And, as one would expect, the ratio of the black-to-white rates of avoiding being rejected for credit at NationsBank (90 percent) is far higher – *i.e.*, the disparity is far lower – than at any of the other three banks, none of which had a ratio above 82 percent.

Odds Ratios

Perhaps forming some part of the basis for the Lawyers' Committee study to regard itself as sophisticated is the fact that the study also presents credit disparities in terms of odds ratios. In this context, the "odds" are the ratio of a group's rejection rate to its acceptance rate, and the "odds ratio" is the ratio of the black odds of rejection to the white odds of rejection. Thus, where the

black rejection rate is 20 percent and the white rate is 10 percent – a rejection ratio of 2.0 – the black odds are .25 (20 over 80) and the white odds are .11 (10 over 90); the odds ratio then would be 2.25. The study states that the use of odds ratios is intended to take into account both the relative rates of rejection and the magnitude of the difference, noting that, while the rejection ratio would be the same where the black and white rejection rates are 20 and 10 as where they are 10 and 5, the odds ratio would be greater in the former case.

Odds ratios do have an appeal to statisticians for a variety of reasons, including that the result is the same whether one focuses on success or failure and whether a study is prospective or retrospective and that odds ratios are the standard output of an adjustment procedure called logistic regression. Unfortunately, however, like comparisons of pass rates and failure rates, odds ratios too are affected by where the cutoff is set as well as the prevalence of a condition for reasons other than the setting of cutoffs. For example, when test cutoffs are set very low, the odds ratio is very high; when the cutoff is raised toward the middle of the distribution, the odds ratio drops; when it is raised further toward the top of the distribution, it rises again.[4] The data in the Teamster's study would generally yield higher odds ratios in the highest income category than in the lowest income category. But this is not because in some real sense the disparities are greater in the highest income category; rather, it is because in that category the rejections tend to be more relegated to the lower end of the distribution within the category, where odds ratios tend to be higher.

All one can really count on with the use of odds ratios is that they will invariably be greater than ratios of failure rates, since the group with the higher failure rate will necessarily also have the lower pass rate.[5] In the Lawyers' Committee study the odds ratios are usually greater than the

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[4] An example of how the odds ratio would change according to the movement of the cutoff under certain hypothetical conditions concerning two groups with differing test score distributions may be found in "The Perils of Provocative Statistics," *Public Interest*, no. 102, p.9 n.1.

[5] The use of odds ratios can sometimes be very misleading when mistakenly interpreted to mean relative likelihood, as in a widely discussed study of the affect of the race of the victim on death sentencing in Georgia. When relied on in an unsuccessful effort to overturn a death sentence for the killing of a white police officer in the Supreme

rejection rate disparity by a factor of no more than one. Even so, in its complaint and press release the Lawyers Committee would invariably rely on odds ratios while describing them as ratios of rejection rates, presumably in order to simply to make the disparities seem slightly larger. And as is the custom in descriptions of data aimed at emphasizing the size disparities, the phrase "more likely" is invariably over the technically correct "as likely" creating the impression of a still slightly larger disparity.[6]

The Lawyers' Committee's complaint describes the principal findings of its study and cites some additional statistical information. It notes that the racial disparity in rejection rates increased at NationsBank between 1992 and 1993 and declined somewhat in 1994, though, as in the study, without evident awareness of the connection of the these changes to declines in interest rates in 1993 or increases in 1994 and without providing data that would allow examination of the acceptance rate disparities that probably were changing in the opposite direction. The complaint also cites some findings from other studies, such as the finding from the NCRC study, though attributed to the Teamsters study, that NationsBank had the 53rd worst rejection rate disparity out of 55 lenders in the Washington area.

Court case of *McKleskey v. Kemp* (1987) and in later congressional efforts to enact a Racial Justice Act, as well as in countless commentaries on race and death sentencing, the study has invariably been viewed as showing that after controlling for numerous factors, a death penalty was 4.3 times as likely when the victim was white as when the victim was black. But, as the study's author has himself noted in a number of places, the 4.3 figure is an odds ratio, not a ratio of the relative chances of a death sentence. The author has estimated that the study shows an increase in likelihood of a death penalty when the victim is white of somewhere between 60 and 70 percent, rather than the 330 percent increase suggested by the 4.3 odds ratio.

[6] The small differences between the disparity figures I cite and those in the Lawyers' Committee's press release and complaint, as well as in some instances in the study itself, occur because the Lawyers' Committee usually cites odds ratios when it purports to describe relative likelihood. That probably confuses readers of the complaint, who are told that "in terms of likelihood of rejection," at 17.5 percent for blacks compared with 3.3 percent for whites – a ratio of 5.30 – black applicants "were 6.27 times more likely to be rejected." The consistent use of "more likely" where "as likely" is correct – two, after all, is two times one or 100 percent more than one, not two times more than one or 200 percent greater than one – is simply an irritating obstacle to any effort both to accurately describe data and to accurately describe what was said about data, without, as here, wasting space on clarifications.

But the bulk of the 96-page complaint is devoted to detailing the facts concerning the denials of loans to the eleven plaintiffs. All had problems in their credit histories. But all also had claims, for example, that the factors that had caused a bankruptcy were no longer present, that the health problems that caused some late payments have been corrected, that certain late payments were not the applicant's fault, or that the bank never allowed the applicant an opportunity to explain why some payments had been late. On information and belief, the complaint maintains, whites would have received loans in similar circumstances. And, assuming that persons of all races with like credit histories had, say, even a 10 to 20 percent chance of receiving credit, one ought to be able to find among the almost 14,000 whites in the area to whom NationsBank did grant mortgages at least a handful whose credit histories appear no better than those of the rejected black applicants. Such comparisons can be quite persuasive, and the logically irrefutable point that such comparisons prove nothing, since they can be made regardless of whether an employer discriminates, can be made to seem just a very likely story.

If the case goes to trial, it likely will be a long trial. Both sides will have many statistical experts, and plaintiffs by then will have numerous additional class members to explain how NationsBank did not give them the break that it might have given to white applicants and to describe the impact of the denial of credit on their material and emotional well-being. Because it will be a lengthy trial, it is likely that few jurors will hold high-paying jobs, which usually carry with them excuses for avoiding protracted jury service. Hence, it is all the more likely that the jury will be disproportionately composed of persons who may also have faced creditors and bank officials who seemed not as understanding of a few late payments as they could have been, and in circumstances where it was difficult not to wonder whether race had been somehow involved. In such a context, the testimony of individual rejected applicants may prove much more important than whether the weight of expert testimony shows that NationsBank is the worst enemy of the Washington's black community or its best friend.

As to where the Lawyers' Committee got the first eleven plaintiffs, there is a possible answer as to some. The complaint indicates that six were participants in a program that in 1993 NationsBank established with a community action organization called Association for Community Reform Now, or ACORN, to provide loan counseling for applicants for certain subsidized mortgage loan programs. One more good intention coming home to roost and a further message to the banking community that the beneficent path chosen by NationsBank is one fraught with perils.

Unlucky Stores

If the case against NationsBank results in a damage award of tens or hundreds of millions of dollars, which is well within the realm of possibility, it will not be the first instance of such an award where the plaintiffs relied on provocative statistical approaches that were both flawed and counterproductive. Nor is there much reason to expect it to be the last.

More than seven years ago, I explained in "Illusions of Job Segregation (*Public Interest*, Fall 1988), that despite the appearance of discrimination in situations where minorities or women hold most of an employer's low level jobs, typically a group's high representation in such jobs has nothing whatever to do with whether the employer discriminatorily fails to hire those workers into its better jobs. I pointed out, for example, that when in 1971 it was portentously observed that at AT&T "sex segregation was even more extensive than that observed in the nation at large," the statement meant no more than that AT&T was a telephone company. As such it had large numbers of operator and clerical jobs that were going to be overwhelmingly female regardless of whether women were discriminatorily excluded from other jobs. The only way actually to prove that an employer discriminated against minorities or women in hiring for its better job, I explained,

was to compare the composition of persons hired into the better jobs with the composition of the applicants for the better jobs, including the persons who were not hired at all.[7]

I pointed out, however, that "job segregation" or "assignment discrimination" theories were alluring because one could find patterns of seeming segregation in virtually any employer that hired large numbers of whites and minorities or men and women and because it was so much easier to base statistical analyses on the relatively limited number of persons who have been hired rather than to examine the actual applicant pool for the better jobs, including the many persons not hired at all. The availability of class members hired into the poorer jobs to provide anecdotal testimony and to share in the recovery for discrimination also contributed to the allure of job segregation theories. I maintained, however, that in significant part the focus was so often on patterns of perceived segregation simply because practically no one knew any better.

But that would change shortly, or so it would it would seem. The following year, in *Wards Cove Packing Co. v. Atonio*, the Supreme Court rejected plaintiffs' effort to prove that minorities were discriminatorily excluded from an employer's (more desirable) non-cannery jobs on the basis of the minorities' much higher representation in the (less desirable) cannery jobs. Despite what some would maintain was "an unsettling resemblance to aspects of a plantation economy," a majority of the Supreme Court recognized not only that internal comparisons of this

[7] In "Illusions of Job Segregation," I also attempted to show that any effort to prove that a group was or was not discriminatorily denied selection by looking only at characteristics of persons selected was flawed, at least in circumstances where the two groups have different average characteristics among applicants. In Table 4, at p. 60, I showed that the fact that one group is less qualified among persons selected does mean that the group was favored, since the group that is less qualified among applicants will be less qualified among persons selected even when there is substantial discrimination against it. This is pertinent to credit discrimination issues, since for similar reasons the fact that blacks granted mortgages have default rates no lower than whites, or even higher than whites, has been often cited as evidence that there is no credit discrimination against blacks or that blacks in fact have been favored. Yet, at NationsBank, as elsewhere, blacks are likely to have significantly higher default rates simply because they are disproportionately represented among the riskier applicants seeking loans and thus will be disproportionately represented among the riskier applicants granted loans regardless of whether or not the bank discriminates them.

nature could not prove discrimination, but that the plaintiffs' argument was an invitation to employers to avoid liability by hiring fewer minorities for the less desirable jobs.

The *Wards Cove* decision notwithstanding, however, in August of 1992, Judge Marilyn Hall Patel of the U. S. District Court for the Northern District of California issued a lengthy opinion, in the case of *Stender v. Lucky Stores*, finding that at its 188 stores in Northern California, Lucky Stores had discriminated in the "initial placement" of women. By that ruling, Judge Patel evidently had meant that women were not fairly considered for the Grocery Department in Lucky's supermarkets, where they made up about 35 percent of new hires. She reached that conclusion, however, not because women were shown to make up substantially more than 35 percent of persons seeking jobs in the Grocery Department, but because women were 84 percent of persons hired into the somewhat less desirable Deli-Bakery and General Merchandise Departments. Judge Patel also found that among the reasons punitive damages might be warranted against Lucky Stores was that its management had "abandon[ed] two affirmative action programs despite continued evidence of a gross gender imbalance in the Deli-Bakery and General Merchandise Departments." In other words, Lucky Stores should pay punitive damages because it knew it had too many women in those jobs and had decided not to do anything about it.

Lucky Stores tried unsuccessfully to take an interlocutory appeal. Then, faced with years of damage proceedings before it would have an appealable judgment, Lucky Stores gave in. In December of 1993 it agreed to pay 107.5 million dollars to settle all claims, though sparing itself the considerable attorneys' fees and years of adverse publicity that would have attended the protracted damage proceedings.

The *Lucky Stores* case was litigated by the Oakland California firm of Saperstein, Goldstein, Demchak & Baller, which *Business Week* termed "The Swat Team of Bias Litigation." The year before, the firm had helped secure a 105 million dollar recovery in settlement of claims of racial discrimination at 1700 Shoney's restaurants in 36 states. The principal claim in the case

was that blacks had been discriminatorily excluded from food server and other "front of the house" jobs, and there was alleged to be direct evidence of such exclusion. But with regard to how severe the exclusion had been, plaintiffs' expert argued that best single indicator of what the black representation in such jobs should have been absent discrimination was the black representation in other positions at Shoney's. Thus, the more blacks Shoney's had hired for cook and other "back of the house" jobs, the greater was its liability for putatively excluding blacks from the front of the house jobs.

In March of 1993, Barry Goldstein, a name partner in the Saperstein firm, and its chief lawyer on the *Shoney's* case, explained to the Equal Employment Opportunity Committee of the American Bar Association that when selecting its targets, in addition to identifying potential class members, the firm looks for statistical patterns within an employer's work force. He pointed out that a graduate student had been hired simply to count the number of minorities in different positions at Shoney's restaurants around the country, noting that retailers and restaurants are apt survey targets because of the visibility of their work forces.

In December of 1994, eight female current and former employees of The Home Depot represented by the Saperstein firm filed a putative class action in federal court in San Francisco charging that the hardware superstore had systematically discriminated against female employees and applicants at 99 of its stores in seven Western and Southwestern states. Among other things, the complaint charged that Home Depot's Western Division had segregated its employees into separate male and female work forces, with the female work force holding a disproportionate share of the lowest level positions that offered limited opportunity for advancement.

In July of 1995, eight female current and former employees of Publix Super Markets represented by the Saperstein firm filed a putative class action in federal court in Tampa alleging that the food chain segregates its jobs according to sex. If the court grants the plaintiffs' request to

certify the case as a class action, the case could cover 45,000 women in close to 500 stores in three states.

Apparently the firm maintains a list of potential targets that could include any number of grocery chains that, whether or not they exclude women from their better jobs, are likely to have concentrations of women in their poorer jobs little distinguishable from those that proved so damning to Lucky Stores, as well as other types of retailers that, whether or not they exclude women and minorities from their more remunerative, big-ticket sales jobs, are likely to have much higher concentrations of women and minorities in their salesclerk jobs. The firm circulates the list among women who have received money in its suits to solicit information on women who have had bad experiences with the listed companies.

There may of course be some actual discrimination at such companies in any number of practices. But both in the actual proof of the case and the effort to persuade the courts that the situations are similar enough at all facilities to justify class action treatment, little evidence will be as stark as the pervasive segregation of men and women into different kinds of jobs, whether in fact it means anything or not.

The cases the Saperstein firm has recently brought and will bring in the future, however, will be distinguished from the *Lucky Stores* case in two important respects. First, in order for Judge Patel to conclude that punitive damages were warranted in that case, she had to rule – erroneously, it would turn out, according to the Supreme Court's a 1994 in *Landgraf v. USI Film Products* – that the punitive damages provisions of the Civil Rights Act of 1991 applied retroactively. In future cases, by contrast, there will be no doubt as to the availability of punitive damages.

Second, in the *Lucky Stores* case, the plaintiffs had to persuade a federal judge of the probative value of a superficially appealing, if fundamentally illogical, statistical analysis. In

consequence of the Civil Rights Act of 1991, however, future cases are likely to be tried to a jury, where the superficial appeal of such an analysis is likely to have even greater sway.

In these circumstances, it will not be surprising if, as the Supreme Court observed in *Wards Cove*, employers give increasing thought to whether they may have too many minorities or women in jobs deemed not to be the most desirable, even if not wholly undesirable to the persons applying for them. Almost as pernicious, however, is the way awards like that in *Lucky Stores* have radically altered the framework of acceptable resolutions in discrimination against wealthy companies. Apart from greatly elevating the expectations of private plaintiffs and their counsel, such recoveries cause federal agencies to question whether they can continue to accept modest monetary awards to resolve even those cases where, all facts being known, it remains anybody's guess – or a jury's – whether discrimination actually occurred.

For there is much money to be had in discrimination cases today. For all one knows, there may be much discrimination as well. But the connection between the two is often a dubious one.