The Civil Rights Act of 1991: An Examination of the Storm Preceding the Compromise of America's Civil Rights

Caryn Leslie Lilling

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlelj

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlelj/vol9/iss1/4

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Labor and Employment Law Journal by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
Lilling: The Civil Rights Act of 1991: An Examination of the Storm Preceding the Compromise of America's Civil Rights

I. Introduction

Equal opportunity in the workplace for all Americans is an unquestionable goal of the federal government. Unfortunately, significant differences in opinion exist among our lawmakers regarding the interpretation and implementation of this desirable result. Civil Rights has been a subject of intense controversy since the United...

States Supreme Court's 1989 Term. On February 7, 1990, the Civil Rights Act of 1990 (S. 2104 and H. R. 4000) was introduced in both the Senate and the House of Representatives for the purposes of revising Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866. Eight months and hundreds of hours of debating later, both Houses passed identical versions of the legislation. Regrettably, on October 22, 1990, President George Bush became the third President in American history to veto civil rights legislation of paramount importance to our nation. Two days later, in the Bill's final chance for life, the Senate failed to override the Presidential veto, 66 to 34, only one vote shy of the necessary two-thirds majority.

Among the many reforms that the Civil Rights Act of 1990 would have achieved, its most significant contribution would have been a response to the recent restrictive interpretation of employment discrimination laws by reversing, in whole or substantial part, six of the Supreme Court's bare majority decisions during its 1989 Term. Wards Cove Packing Company v. Atonio; Price Waterhouse v. Hopkins; Martin v. Wilks; Lorance v. AT&T

---

2. A majority of this Note will be devoted to assessing the impact of the Court's 1989 Term on employment discrimination law. In addition, the discussion will focus on how and why several of the Court's decisions need to be wholly or partially overturned by new civil rights legislation. For a listing of the major cases at issue, see infra notes 11-16 and accompanying text.


7. See S. 2104, supra note 1, 136 CONG. REC. H9552-55. The Civil Rights Act of 1990 was drafted for the purposes of:

(1) respond[ing] to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions; and

(2) strengthen[ing] existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.

Id. at 9552.


10. See S. 2104, supra note 1, § 2(b)(1), 136 Cong. Rec. at H9552.

11. 490 U.S. 642 (1989). See infra notes 78-96 and accompanying text (formulating a new burden and standard of proof for the justification of an employer's business practice after a prima facie case of disparate impact is established by the plaintiff).

12. 490 U.S. 228 (1989). See infra notes 150-160 and accompanying text (holding that if an employer can show that he would have made the same employment decision even in the absence of a discriminatory motive, he will not be held liable although he also possessed illegitimate reasons for his decision).
Compromise of Civil Rights

Technologies\textsuperscript{14}; Patterson v. McLean Credit Union\textsuperscript{15}; and Independent Federation of Flight Attendants v. Zipes\textsuperscript{16} severely hindered the ability of victims of employment discrimination to invoke federal civil rights protections. Moreover, the Bill addressed such subjects as compensatory and punitive damages in cases of intentional discrimination, jury trials, counsel fees, expert witness fees, and the statute of limitations applicable in Title VII cases.\textsuperscript{17} The overall impact of the Bill would have overturned or modified approximately fifteen of the Supreme Court's decisions since the mid-1970's.\textsuperscript{18} The Civil Rights Act of 1990 was the troubled voice of Congress indicating that the Court had forgotten the decades of struggle against the penetrating force of racism and sexism in the American workplace.

The veto of the Civil Rights Act of 1990 prompted the sharpest criticism that President Bush has endured from women, blacks and other minorities since taking office.\textsuperscript{19} In a three page veto message to Congress, Bush stated that "despite the use of the term 'civil rights' in the title of S. 2104, the bill actually employs a maze of highly legalistic language to introduce the destructive force of quotas into our Nation's employment system. S. 2104 creates powerful incentives for employers to adopt hiring and promotion quotas."\textsuperscript{20} President Bush, heeding the advice of his own civil rights commission and the counsel of state attorney generals, Dick Thornburgh and C. Boy-

\begin{itemize}
\item \textsuperscript{13} 490 U.S. 754 (1989). \textit{See infra} notes 176-190 and accompanying text (deciding that individuals who are not parties to an employment discrimination consent decree, that contain racial preferences, may attack the decree in a subsequent action).
\item \textsuperscript{14} 490 U.S. 900 (1989). \textit{See infra} notes 211-218 and accompanying text (stating that the statute of limitations for challenging a facially neutral, but intentionally discriminatory, seniority system begins to run from the date that the system was adopted, not from the date that the system was applied in fact to the individual plaintiff).
\item \textsuperscript{15} 491 U.S. 164 (1989). \textit{See infra} notes 244-252 and accompanying text (determining that 42 U.S.C. \textsection\textsection 1981 applies only in the making and not during the performance of contracts, such as in the instance of on-the-job racial harassment).
\item \textsuperscript{16} 491 U.S. 754 (1989) (holding that expert witness fees are generally not recoverable as part of costs).
\item \textsuperscript{17} \textit{See} S. 2104, \textit{supra} note 1, \textsection\textsection 7, 8, 9, 10, 136 CONG. REC. at H9553-54.
\item \textsuperscript{19} \textit{See} The Wash. Post, Oct. 23, 1990, \textsection 1, at A1.
\item \textsuperscript{20} 136 CONG. REC. S16,457 (daily ed. Oct. 22, 1990). For a further discussion of the Administration's concern regarding the possible implementation of hiring and promotion quotas \textit{see infra} note 38 and accompanying text.
\end{itemize}
den Gray, outlined the defects that made S. 2104 unacceptable. Although the congressional majority and the Administration were on common ground regarding several of the Bill’s important provisions, they differed on many other crucial issues, including the specificity of evidence needed to create a presumption of discrimination, the legal standard of “business necessity,” the ability to challenge consent decrees, the question of damages, and the recovery of attorneys fees. President Bush urged lawmakers to promptly pass his alternative bill which he offered to Congress on October 20, 1990. He maintained that his version of the Civil Rights Act would protect workers without imposing quotas. However, proponents of the congressional bill sharply criticized and rejected his proposal, calling it a “political sham that would stall the nation’s progress on racial and sexual equality.”

Despite the Presidential veto and the Senate’s inability to sustain an override, the advocates of civil rights reform were determined to amend the laws of employment discrimination. The Civil Rights Act of 1991 (“H.R. 1”) was refilled by House Democrats on January 3, as the first bill of the House of Representatives in the 102nd Congress. Opponents of the legislation regarded this second attempt as “nearly identical to, and with respect to damages, worse than the bill which was vetoed by the President.” On March 12, 1991, as a result of their dissatisfaction, the Administration introduced its own Civil Rights Act of 1991 (H.R. 1375 and S. 611) as an alternate proposal in both the House and Senate. In response to such a strong opposition, a bipartisan substitute version of H.R. 1, renamed the Civil Rights and Women’s Equity in Employment Act of 1991,

21. Id.; see infra notes 22-28 and accompanying text (listing the major points of contention between the congressional majority and the Administration).
23. Id.; see infra notes 113-136 and accompanying text.
24. Id.; see infra notes 191-210 and accompanying text.
25. Id.; see infra notes 275-297 and accompanying text.
26. Id.
32. See H.R. 1375, supra note 1, 137 Cong. Rec. at H1662-64; see also S. 611, supra note 1, 137 Cong. Rec. at S3022-23.
was introduced by House Democrat Brooks and House Republican Fish on June 4, 1991. It was intended as a compromise in order to prevent an automatic veto by the President. On June 5, 1991, the Brooks-Fish substitute passed the House by a vote of 273 to 158, and it remains the sixth and final version of H.R. 1. Although the substitute bill is somewhat similar to the previously vetoed legislation, several of its provisions have been amended in an attempt to make the bill more "palatable" to the opposition. Unfortunately, the Administration is far from satisfied with its revisions. On September 24, 1991, Senator Jack Danforth introduced the Senate's version of the Civil Rights Act of 1991, and still the Administration was not content. Finally, during the third week of October, President Bush met with Senator Danforth and indicated that he would accept a compromise bill as long as quotas would not be the inevitable result of the legislation. During the next several weeks, Senate members will debate and seek to finalize their bill's provisions while attempting to satiate the House as well as the Administration. Unless a suitable compromise, able to withstand a veto, can be reached by both House and Senate members, only a Senate override will be able to keep the legislation alive. Almost two years have elapsed since its original introduction, and our Government still cannot agree on how to fairly amend the laws of employment discrimination. Although our lawmakers acknowledge that civil rights reform is necessary,

33. See H.R. 1, supra note 1, 137 CONG. REC. at H3922-28.
34. Id. at H3958-59.
36. See 137 CONG. REC. H3932-36.
37. See S. 1745, supra note 1, (text in LEXIS, Legis library, bills file).
38. Although section 111 of H.R. 1, as proposed by the Brooks-Fish substitute, provides that nothing in the bill may be construed to "require, encourage, or permit an employer to adopt hiring or promotion quotas on the basis of race, color, religion, or national origin," and that the use of such quotas "shall be deemed to be an unlawful employment practice" under Title VII, the opponents of H.R. 1 are convinced that the implementation of quotas remain at the core of the civil rights bill. See H.R. 1, supra note 1, § 111, 137 CONG. REC. at H3924. Regardless of the language which forbids the use of quotas, the Administration and other opponents believe that the cumulative effect of the other provisions in H.R. 1, such as those regarding disparate impact cases and damages, will cause the employer to be left with only the alternative of "hiring and promoting by the numbers" in order to avoid lengthy and costly litigation. As a result, opponents of H.R. 1 believe that employers will be forced into hiring the minimally qualified person rather than the well, or over-qualified individual. See also 137 CONG. REC. H3944 (daily ed. June 5, 1991).
they do not share similar beliefs regarding how to achieve "fairness" in the American workplace. Their differing values and concerns are illuminated in the numerous versions of, and amendments to, the proposed legislation.\footnote{See supra note 1 and accompanying text (discussing the proposed civil rights laws).} By the time a compromise is reached and a civil rights act is passed, the Civil Rights Act of 1991 will neither be solely a reflection of what congressional champion civil rights reformers had intended, nor will it represent only the ideals of President Bush and his Administration.

This Note examines many of the significant provisions of the Civil Rights Act of 1991 as it has been proposed by both the House and the Administration. Neither bill in its current form is an acceptable alternative to either party. Although compromise and agreement may be reached among Senate, House and Administration members, it is useful to understand the true intentions, actual goals, and policy considerations of all parties in order to be able to assess and appreciate the bill once it is in its final form. Moreover, this Note will explore how and why reform is necessary, as well as address the similarities, controversial differences, and policy considerations raised by each proposal. Each section of the discussion will include an analysis and commentary of the relevant provisions proposed by the House and the President, in their respective bills, for civil rights reform.

Part II discusses the disparate treatment and disparate impact theories of discrimination.\footnote{See infra notes 56-147 and accompanying text.} The analysis focuses on the development of the disparate impact theory, including its controversial interpretation in the landmark case of \textit{Griggs v. Duke Power Company},\footnote{401 U.S. 424 (1971).} to the startling decision in \textit{Wards Cove Packing Company v. Atonio}.\footnote{490 U.S. 642 (1989).} This section addresses such issues as the definition of business necessity,\footnote{See infra notes 84-92, 113-130 and accompanying text.} the allocation of burdens of proof,\footnote{See infra notes 72-83, 108-112 and accompanying text.} and the specificity requirements for proving such discrimination.\footnote{See infra notes 93-96, 137-143 and accompanying text.}

Part III analyzes an employer's liability when he or she is motivated by both lawful and unlawful considerations when making business decisions.\footnote{See infra notes 150-174 and accompanying text.} The central issue is whether or not an employer may avoid a finding of liability, even though a discriminatory motive played a role in the employment decision, by proving that it would...
have made the same decision even if it had not taken the illegal criterion into account. This section explores the consequences of the *Price Waterhouse v. Hopkins* decision in such a mixed-motive circumstance.

Part IV addresses the importance of consent decrees. Many federal courts have been faced with the question of whether, and under what circumstances, nonlitigants should be permitted to attack the consent decree in a subsequent action. This section explores the systemic dissolution of the impermissible collateral attack doctrine, and the damaging effects on the strength of consent decrees as a result of the controversial *Martin v. Wilks* opinion.

Part V examines the statute of limitations period for filing a Title VII cause of action. The Supreme Court, in *Lorance v. AT&T Technologies*, addressed when the limitations period starts to run in the context of a seniority rule governing layoffs. Does the statute begin to run from the date that the individual knows, or has reason to know, that such a system has been adopted, or does the period commence when the system is applied to the person in question? Both Congress and the Administration assess this triggering point as well as the length of the period for filing such an action.

Part VI discusses the importance of 42 U.S.C. Section 1981 and outlines the chilling consequences that *Patterson v. McLean* has had on the statute’s effectiveness in banning intentional race discrimination. In *Patterson*, the Supreme Court narrowly interpreted section 1981 to apply only in the making, and not in the performance, of contracts. Both Congress and the Administration strongly believe that there is a compelling need to overturn this decision.

Part VII examines the implications of Title VII’s current remedial scheme, as well as explores the advantages and disadvantages of expanding possible remedies to include compensatory damages, punitive damages, and jury trials. Lastly, Part VIII recognizes that although there is a desperate need for reform, the ability to fairly and effectively balance the rights of the individual with those of the business community will be achieved only through a difficult and del-

---

47. 490 U.S. 228 (1989).
48. *See infra* notes 175-210 and accompanying text.
50. *See infra* notes 211-235 and accompanying text.
52. *See infra* notes 236-257 and accompanying text.
53. 490 U.S. at 911.
54. *See infra* notes 219-235 and accompanying text.
55. *See infra* notes 258-296 and accompanying text.
icate compromise.\textsuperscript{56}

II. JUDICIAL INTERPRETATION OF DISPARATE TREATMENT AND DISPARATE IMPACT

A. Griggs v. Duke Power Company \textit{through} Wards Cove Packing Company v. Atonio

Since the adoption of Title VII more than twenty-five years ago, the statute has been the subject of a myriad of judicial opinions.\textsuperscript{57} Two principle theories of discrimination exist under Title VII: disparate treatment and disparate impact.\textsuperscript{58} Disparate treatment under Title VII involves treating individuals differently on the basis of their race, color, sex, national origin, or religion.\textsuperscript{59} A disparate treatment case occurs most often when an individual plaintiff attempts to prove an intentional discriminatory motive of the employer, and the employer asserts a legitimate nondiscriminatory reason for the employment decision.\textsuperscript{60} In \textit{McDonnell Douglas Corporation v. Green}\textsuperscript{61} and its progeny,\textsuperscript{62} the Supreme Court fashioned a framework for the allocation and burden of proof in disparate treatment cases. First, the

\textsuperscript{56} See infra at part VIII of accompanying text.
\textsuperscript{58} Title VII does not define discrimination explicitly, but the Supreme Court has developed these two theories of discrimination.
\textsuperscript{60} See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n. 15 (1977) (articulating the conceptual theory of a disparate treatment case). The Court stated that:

\textit{[Disparate Treatment] is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.}

\textit{Id.}

\textsuperscript{61} 411 U.S. 792 (1973). Green, a black civil rights activist, protested that his discharge and the general hiring practices of his employer were racially motivated. \textit{Id.} at 794. As part of the protest, Green illegally stalled his car, along with other members of the Congress on Racial Equality, for the purpose of blocking access to the plant. \textit{Id.} at 795. In addition, Green engaged in an illegal lock-in, although it was uncertain to the extent that he had participated. \textit{Id.} When the employer advertised for replacement personnel, it rejected Green's application on the ground of his illegal conduct. \textit{Id.} Green subsequently filed a complaint with the EEOC charging violation of Title VII of the Civil Rights Act of 1964. \textit{Id.} at 795.

plaintiff must establish a prima facie case of disparate treatment.\footnote{McDonnell Douglas Corp., 411 U.S. at 802.} Second, the defendant must “articulate some legitimate, nondiscriminatory reason” for the employment action.\footnote{Id.} And third, the plaintiff must then prove that the defendant’s reason was a mere pretext for discrimination.\footnote{Id. at 804.} In 1989, in the controversial decision of \textit{Price Waterhouse v. Hopkins},\footnote{490 U.S. 228 (1989).} the Supreme Court held that where an employment decision resulted from a mixture of legitimate and illegitimate motives, this procedural framework is altered and the burden shifts to the employer to prove that it would have made the same decision even if it had not taken the discriminatory factor into account.\footnote{Id; see infra notes 150-160 and accompanying text (discussing the implications of mixed-motive discrimination).}

Without question, the single most important Title VII decision, both for the development of the law and its impact on the daily lives of American workers, is \textit{Griggs v. Duke Power Company}.\footnote{401 U.S. 424 (1971).} In a unanimous decision, the Supreme Court held that Title VII forbids not only disparate treatment but also practices which, though adopted without discriminatory intent, have a discriminatory effect on minorities and women.\footnote{Griggs, 401 U.S. at 427-28. For a thorough discussion of the development of the impact theory, see Blumrosen, \textit{Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination}, 71 Mich. L. Rev. 59 (1972).} This illegal discriminatory effect is

\begin{itemize}
  \item[63.] McDonnell Douglas Corp., 411 U.S. at 802.
  \item[64.] Id.
  \item[65.] Id. at 804.
  \item[66.] 490 U.S. 228 (1989).
  \item[67.] Id; see infra notes 150-160 and accompanying text (discussing the implications of mixed-motive discrimination).
  \item[68.] 401 U.S. 424 (1971). In \textit{Griggs}, a group of black Duke Power employees claimed that the company’s hiring criteria violated Title VII. The company required applicants for non-labor jobs to possess a high school diploma and pass two aptitude tests as a condition of employment in or transfer to jobs at the plant.\textit{Id.} “Neither was directed or intended to measure the ability to learn or perform a particular job or category of jobs.” \textit{Id.} at 427-28. These facially neutral criteria disproportionately excluded blacks from the higher paying jobs. \textit{Griggs}, 401 U.S. at 427-28. For a thorough discussion of the development of the impact theory, see Blumrosen, \textit{Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination}, 71 Mich. L. Rev. 59 (1972).
\end{itemize}
known as disparate or adverse impact. Title VII, the Court ruled, "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."70 One year later, in 1972, Congress explicitly ratified the Supreme Court's affirmation that Congress enacted Title VII to prohibit all forms of employment discrimination, not simply those which are intentionally discriminatory.71

Under Griggs and its progeny, analysis of a disparate impact case proceeds in three distinct stages.72 First, the complaining party is required to establish a prima facie case of discrimination by showing that the employment practice at issue "selects applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants."73 The complaining party has to demonstrate that the practice has an adverse impact on qualified applicants, unless the application process itself is flawed by discrimination, in which case disparate impact on qualified potential applicants is sufficient.74 Second, once the complaining party proves that the challenged employment practices excludes a number of qualified women or minorities, the burden shifts to the employer to prove that the practice is required by business necessity.75 Third, even if the employer satisfies the burden, "it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest."76 For eighteen years, the Griggs decision has had a remarkable impact on the American workplace. In hundreds of cases, federal courts have struck down discriminatory barriers to the participation of minorities and women in the workplace, and employers have voluntarily eliminated discriminatory practices in countless other instances.77

In 1989, a five-justice majority of the Supreme Court drastically cut back on the scope and effectiveness of the Griggs decision.

70. Griggs, 401 U.S. at 431.
72. These stages are set out in detail in the Supreme Court's 1975 decision in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).
73. Id. at 425.
75. See Griggs, 401 U.S. at 431-32. See infra notes 84-92, 113-130 and accompanying text (discussing the standard of business necessity).
76. Albemarle Paper Co., 422 U.S. at 425.
in *Wards Cove Packing Company v. Atonio.* The *Wards Cove* majority formulated a new burden and standard of proof to analyze the employer's response after a prima facie case is established. The Court held that after a showing of adverse impact, the employer only has the burden of "producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains at all times with the disparate impact plaintiff." Thus, the employer must only sustain the burden of production. Without question, the Supreme Court's 1989 Term reversed the *Griggs* allocation of proof which had been followed for almost two decades. It is clear that the *Wards Cove* allocation creates an unduly burdensome and inefficient hurdle for the plaintiff to overcome. In most instances the evidence regarding the existence of an adequate justification for an exclusionary practice is in the possession of the employer, the party who adopted the practice. The employer is far more familiar with its own operations and the proper requirements needed for the job at issue; the employer has control over the employment process; it selects the practices used to make an employment decision; and it is more likely to be aware of the relative cost and benefits of the practices used and of alternative practices that were not used to make the decision.

In *Griggs,* the Supreme Court devised a standard that the employer must satisfy in order to justify the use of a practice that, although is fair in form, has an adverse impact on women and minorities in operation. The Supreme Court held that in order to sustain a justification, "*[t]he touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.*" Chief Justice Burger not only used the exact phrase "business necessity,"

78. 490 U.S. 642 (1989). A class of non-white cannery workers brought a Title VII action against their employer, Wards Cove Packing Co. *Id.* at 647. The cannery consisted of two general types of employment: cannery jobs on the cannery line and noncannery jobs which fell into a variety of classifications. *Id.* The jobs on the cannery line were unskilled positions unlike the noncannery jobs. As a result, the cannery line jobs were filled mostly by non-whites. *Id.* The respondents alleged that a variety of improper hiring and promotion practices were responsible for the skewed stratification of the work force and therefore the company had denied them jobs on the basis of race. *Id.* at 647-48.

79. *Id.*
80. *Id.* at 659.
81. *Id.*
83. *Id.*
84. *Griggs,* 401 U.S. at 431.
85. *Id.* (emphasis added).
he also utilized such terms as "related to job performance,"86 "manifest relationship to the employment in question,"87 and "demonstrably a reasonable measure of job performance"88 as interchangeable phrases in the text of the opinion. In Ward's Cove, the majority set out a considerably more lenient standard, and in effect, repealed that which was articulated in the Griggs decision.89 The Ward's Cove ruling stripped an employee of the safeguards provided by the standard that had been repeatedly followed for approximately two decades in the American workplace. The Court in Ward's Cove stated that, "there is no requirement that the challenged practice be essential or indispensable to the employer's business for it to pass muster."90 While under Griggs, the touchstone was business necessity, under Ward's Cove "[t]he touchstone ... is a reasoned view of the employer's justification"91 to determine "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."92 The weak standard adopted by the Ward's Cove bare majority severely undermines the effectiveness of Griggs and Title VII.

Moreover, employment decisions are often times based on a multiple criteria of employment practices. Where a combination of more than one employment practice is used, and the resulting employment decision clearly has a disparate impact on qualified women or minorities, a complaining party may be unable to isolate which factor or factors is responsible for the disparate impact. Furthermore, in some instances adequate information may be available as to the effect of each practice, but it may be that a group of factors combine to produce the significant disparity without any one factor being responsible for the adverse impact. Before Ward's Cove, the Supreme Court had indicated in Griggs that there was no requirement for a complaining party to isolate and identify the specific employment practices or the extent to which they might have contributed to an employment decision with a proven discriminatory effect.93 In addition, several federal circuit courts have held that a plaintiff can prove disparate impact by demonstrating that the cu-

86. Id.
87. Id. at 432
88. Id. at 436.
89. See Ward's Cove, 490 U.S. at 642.
90. Id. at 659.
91. Id.
92. Id.
93. The court frequently referred to "practices" and "procedures," rather than identifying the specific employment practice at issue. Id. at 430-33.
cumulative effect of a multi-factor employment decision is discriminatory without identifying which factor was responsible for the decision.\textsuperscript{84} In \textit{Wards Cove}, however, the Court disregarded prior precedents. Instead, the Court held that a plaintiff has the absolute obligation to isolate which facet of a multi-factor employment decision is responsible for the disparate impact,\textsuperscript{96} and then he or she must demonstrate the severity of the impact, even when the employer failed to collect or retain the very data that would be needed to identify the specific factor or factors which are responsible for the disparate impact in the first place.\textsuperscript{96}

B. \textit{The Response of Congress, the Administration, and the Legal Community}

Both H.R. 1 and H.R. 1375 codify various forms of disparate impact analysis under Title VII and reverse, to differing degrees, the decision of \textit{Wards Cove}.\textsuperscript{97} However, the relevant provisions in each bill have few similarities. Prior to the introduction of the bipartisan substitute bill on June 5, 1991, the opponents of H.R. 1 enumerated several “imperfections” in the proposed legislation.\textsuperscript{98} These were the same objections which were first raised when S. 2104 was first drafted. First, there was sharp dissatisfaction with the proposed legal standard of “business necessity.”\textsuperscript{99} Second, opponents were unwilling

\textsuperscript{84} See, e.g., Powers v. Alabama Dep't of Education, 854 F.2d 1285, 1293 (11th Cir. 1988); Green v. USX Corp., 843 F.2d 1511, 1520-25 (3d Cir. 1988); Griffen v. Carline, 755 F.2d 1516,1523 (11th Cir. 1985).

\textsuperscript{96} \textit{Wards Cove}, 490 U.S. at 656.


\textsuperscript{99} \textit{Id.} The definition of business necessity has undergone considerable reform since the Civil Rights Act of 1990 was first introduced by members of the House and Senate. As originally drafted, the legislation defined business necessity to mean “essential to effective job performance.” S. REP. No. 315, 101st Cong., 2d Sess. 41 (1990). Although this standard was intended to restore the definition of business necessity as articulated in \textit{Griggs} and its progeny prior to the \textit{Wards Cove} ruling, opponents of the bill saw this as an attempt to supersede rather than codify the standard in \textit{Griggs}. The Committee received testimony expressing concern that the term “essential” was overly rigid and would therefore lead to the imposition of quotas. \textit{Id.} As a result the Committee agreed to drop the word “essential” from the definition and amended it to mean that “the challenged practice or group of practices must bear a substantial and demonstrable relationship to effective job performance.” H.R. REP. No. 644, 101st Cong., 2d Sess., pt. 1, at 53 (1990).

By the time the Civil Rights Act of 1990 was vetoed by President Bush, the definition of business necessity was codified by a two-prong approach. S. 2104, supra note 1, § 3(o)(1)(A),(B), 136 CONG. REC. at H9552. In the case of employment practices covered by
to accept the plaintiff's ability to "group" an endless number of employment practices under a claim of disparate impact without having

the first prong, business necessity meant that the practice or group of practices must bear a significant relationship to successful performance of the job. Id. at § 3(o)(1)(A). The first prong applied to all employment practices "involving selection." Id. Examples included, hiring, assignment, transfer, and promotion. Id. In determining whether this showing has been made by the employer, demonstrable evidence was required; unsubstantiated opinion and hearsay were not sufficient. Id. at § 3(o)(2). "The court may receive such evidence as statistical reports, validation studies, expert testimony, performance evaluations, written records or notes related to the practice or decision, prior successful experience and other evidence as permitted by the Federal Rules of Evidence." Id. The underlying practical question is whether use of the practice in dispute is significantly more likely to produce an effective work force than other, less discriminatory alternatives. Id.

The second prong of the business necessity defense was no less stringent a standard than that encompassed by the first prong and the evidentiary burdens were the same. Id. at § 3(o)(1)(B). It applied only in a limited category of cases where job performance was simply irrelevant. Examples included, plant closings, relocations, and rules relating to alcohol or tobacco use. Id. In those cases the employer could demonstrate business necessity by showing that the challenged practice bore a significant relationship to a significant business objective of the employer. Id. In this regard, the objective must have been a business objective and not a social, moral, political, religious, or other objective. Id.

The initial versions of H.R 1, including the definition of business necessity, were substantially similar to S. 2104. For a detailed discussion of the definition in the initial drafts of H.R. 1, see Note, The Defeat of the Civil Rights Act of 1990: Wading through the rhetoric in Search of a Compromise, 44 VAND. L. REV. 595 (1991).

Staunch supporters of the Administration's bill were adamantly opposed to the two-pronged definition of business necessity. The approach of trying to categorize practices into one box called selection and the other non-selection was deemed unprecedented and thought to be a catalyst for years of litigation as courts attempt to sort out which defense should apply in any given fact situation. See H.R. REP. NO. 40, 102d Cong., 1st Sess., pt. 1, at 132 (1991). Furthermore, opponents declared that no decision had ever required that an employment practice be justified through a showing of a "substantial and demonstrable relationship to effective job performance." Id. at 133. "A demonstrable evidence requirement seems to command that a federal court accept only a portion of the evidence that may be relevant to the issue before it. ..." Id.

This new standard, according to the Administration, was not a codification of any of the various formulations articulated in the Griggs decision. Id. at 132. Opponents believed that the bill restrictively eliminated any possible defense of selection procedures that did not hinge on successful job performance yet were reflective of quite legitimate policies. Id. Opponents stated that "the definition of business necessity ... is unnecessarily narrow, would have a negative impact on job-selection and test-validation procedures, and would eliminate numerous practices that evolved over the years." Id. at 133(quoting testimony on behalf of the American Psychological Association (APA) from the hearing on H.R. 1 which was held on March 5, 1991).

The bill compounds these problems immeasurably by requiring that employers prove this novel definition of business necessity with demonstrable evidence. [1] It makes very difficult to defend subjective criteria such as ambition, leadership abilities, good judgment, or the ability to work well with others. Seeking the best possible candidate for the job would become risky business, since that would no longer be a defense in a discrimination lawsuit. The search for excellence would be both illegitimate and illegal. ...
to identify the specific employment practice at issue or prove causation.\textsuperscript{100} And third, the Administration and congressional opponents strongly criticized the bill's remedial scheme.\textsuperscript{101} Although a cap was placed on punitive damages, compensatory damages remained unlimited.\textsuperscript{102} In essence, opponents of the bill feared that quotas would be the natural result of many of the provisions in the legislation, because employers would hire by "the numbers" in order to protect themselves against lengthy, complicated, and expensive lawsuits. As a result, the bipartisan substitute seeks to address these concerns in order to temper the opposition.\textsuperscript{103}

H.R. 1 and the alternative proposed by the Bush Administration intend the term "disparate impact" to retain the meaning it has been given by the courts in the line of cases extending from \textit{Griggs} up to the decision in \textit{Wards Cove}, and would therefore remain unchanged by the legislation.\textsuperscript{104} H.R. 1, unlike H.R. 1375, further specifies that "[t]he mere existence of a statistical imbalance in an employer's workforce on account of race, color, religion, sex, or national origin is not alone sufficient to establish a prima facie case of disparate impact violation."\textsuperscript{105} The complaining party may use statistics to make a prima facie case of disparate impact, but they must show that the challenged employment practice or group of practices results in the disparate impact.\textsuperscript{106} Proponents of H.R. 1375 regard this provision as irrelevant since it merely codifies the existing rule that "the proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified population in the relevant labor market."\textsuperscript{107}

There is little dispute among our lawmakers regarding who should bear the burden of proof in disparate impact cases. Both H.R.

\textsuperscript{102} Punitive damages could not exceed $150,000, unless the amount of compensatory damages awarded were greater than this maximum amount. In such an instance, the amount of punitive damages that could be awarded could be equal to the sum of compensatory damages and equitable monetary relief. Therefore, in practice, the $150,000 cap was considered to be a legal fiction if the awarded compensatory damages were greater. See S. 2104, supra note 1, § 8, 136 CONG. REC. at H9554.
\textsuperscript{104} See H.R. 1, supra note 1, § 102, 137 CONG. REC. at H3923; see also H.R. 1375, supra note 1, § 4, 137 CONG. REC. at H1663.
\textsuperscript{105} H.R. 1, supra note 1, § 101(c)(4), 137 CONG. REC. at H3923. A plaintiff cannot establish a prima facie case of disparate impact merely by showing that an employer had a smaller proportion of minority or women employees than existed in the population as a whole. H.R. REP. No. 40, 102d Cong., 1st Sess., pt. 1, at 32 (1991).
Hofstra Labor Law Journal

1 and H.R. 1375 disagree with the *Wards Cove* decision which stated that the burden of persuasion remains with the disparate-impact plaintiff. Both versions of the bill restore to the employer the burden of persuasion to justify employment practices which have a discriminatory impact. The proof of business necessity is intended to be an affirmative defense as to which the employer bears the burden of persuasion. There are several reasons for placing the burden on the employer. First, the employer has control over the practices used in making employment decisions, and it has selected the practice or practices involved. Second, the employer should be aware of the relative benefits of the practice(s) selected for use. And third, the employer should be aware of the alternative procedures and standards that are available, but not chosen. Thus, the employer is the party who is better able to efficiently satisfy the burden of proof.

Both H.R. 1 and H.R. 1375 seek to codify a fair yet practical definition of business necessity. However, there is sharp disagreement over the language which should be used to capture the standard for justifying the use of procedures which have a discriminatory impact on the grounds of race, sex, or national origin. The *Wards Cove* decision placed a nearly impossible burden on plaintiffs in cases involving nonintentional discrimination. H.R. 1 is intended to restore the original standards of the unanimous *Griggs* decision while providing flexibility to employers in hiring qualified workers. Since the original version of the congressional legislation, the language defining business necessity has undergone considerable reform in order to satisfy many of the concerns of the Administration while main-

108. See supra notes 72-83 and accompanying text (discussing the *Wards Cove* standard for the burden of proof in disparate impact cases).

109. See H.R. 1, supra note 1, § 102(1)(A), 137 Cong. Rec. at H3923; see also H.R. 1375, supra note 1, § 4, 137 Cong. Rec. at H1663.

110. Id.


112. Id.

113. See H.R. 1, supra note 1, § 101(o)(1),(2) 137 Cong. Rec. at H3923; see also H.R. 1375, supra note 1, § 2(n), 137 Cong. Rec. at H1663.

114. See infra notes 119-136 and accompanying text (discussing the conflicting formulations of the definition of business necessity).

115. See supra notes 78-83 and accompanying text (holding that the employer only has the burden of "producing evidence of a business justification for his employment practice. The burden of persuasion however, remains at all times with the disparate impact plaintiff."). 490 U.S. at 659.

116. See H.R. 1, supra note 1, § 101(o)(1),(2), ¶ 3, 137 Cong. Rec. at H3923, 3950; see infra notes 119-123 and accompanying text.
taining the spirit of the Griggs decision.\textsuperscript{117} H.R. 1 currently provides for a single standard to be applied to all employment practices in disparate impact claims, rather than one standard for selection practices and another standard for nonselection practices as outlined in the original bill.\textsuperscript{118} The term "required by business necessity" is defined by H.R. 1 to mean that "a practice or a group of practices must bear a significant and manifest relationship to the requirements for effective job performance."\textsuperscript{119} The requirements for effective job performance include such factors as attendance, punctuality, and not engaging in misconduct or insubordination.\textsuperscript{120} In addition, a provision has been carved out to bar the employment of any individual who "currently and knowingly uses or possesses an illegal drug. . . ."\textsuperscript{121} As long as the rule is not adopted with an intent to discriminate, the employer may consider such behavior to be an unlawful employment practice and therefore such an individual need not be hired.\textsuperscript{122} These additional considerations which go beyond the actual work task allow the business community to take into account other relevant factors so long as they are related to the actual employment in question.\textsuperscript{123} Employment requirements that are a reflection of an employer's biased objectives or preferences are not and should not be acceptable criteria.

H.R. 1375, on the other hand, provides that a practice which has a disparate impact can be successfully defended on the grounds of business necessity if the employer proves that such practice "has a manifest relationship to the employment in question or that the respondent's legitimate employment goals are significantly served by, even if they do not require, the challenged practice."\textsuperscript{124} This is a considerably more lenient standard than that proposed in both H.R. 1 and the Griggs decision.\textsuperscript{125} The definition proposed in H.R. 1375 is a codification of the Wards Cove standard.\textsuperscript{126} The Administration believes that the legal standard proposed by H.R. 1 is too difficult for companies to meet, and therefore this standard will compel com-

\textsuperscript{117} See supra discussion in note 99.
\textsuperscript{118} See H.R. 1, supra note 1, § 101(o)(1),(2) 137 CONG. REC. at H3923.
\textsuperscript{119} Id.; see supra notes 84-87 and accompanying text in order to make a comparison between the definition of business necessity in H.R. 1 and the standards that Chief Justice Burger used in the Griggs opinion.
\textsuperscript{120} See H.R. 1, supra note 1, § 101(f), 137 CONG. REC. at H3923.
\textsuperscript{121} Id. at § 101(C)(3).
\textsuperscript{122} Id.
\textsuperscript{124} H.R. 1375, supra note 1, § 2(n), 137 CONG. REC. at H1663 (emphasis added).
\textsuperscript{125} See supra notes 85-88, 118-123 and accompanying text.
\textsuperscript{126} See supra notes 89-92 and accompanying text.
panies to adopt quotas in order to avoid the possibility of long and expensive litigation. The proponents of H.R. 1375 have offered several reasons why their standard of business necessity is the proper one for codification. The Administration argues that “[t]he ‘manifest relationship test’ was first announced in the Griggs decision and has been used in virtually every Supreme Court decision concerning disparate impact decided after Griggs. The ‘significantly serves test’ is also nothing new and is simply an outgrowth of the Griggs manifest relationship test.” Supporters of H.R. 1375 further buttress their position by referring to the language of the Griggs opinion which states that, “Congress directed the thrust of [Title VII] to the consequences of employment practices, not simply the motivation.”

127. See 137 Cong. Rec. H3933 (daily ed. June 5, 1991) (opponents of H.R. 1 analyze the changes in its provisions since the bill was initially introduced in January).


However, the Administration is supports their position by claiming that the “significantly serves test” is an outgrowth of the Griggs standard. Clearly, the Griggs standard was intended to ensure that practices which have a discriminatory impact are justifiable only if they are related to the performance of the job. See supra notes 85-88 and accompanying text. Although the Administration prefers the language of “manifest relationship to the employment in question”; in practice these phrases have had an analogous meaning in almost all cases since Griggs. See infra notes 131-136. The Administration supports the notion that an employment practice may be justified if it significantly serves a legitimate employment goal of the employer even if it does not require the practice, by citing to only three cases, including Wards Cove. The other two cases, Beazer v. New York City Transit Auth., 440 U.S. 569 (1979) and Watson v. Fort Worth Bank & Trust, 484 U.S. 918 (1988) articulated this lenient standard approximately nine years apart from each other. In Beazer, the Court considered the legitimate goals of safety and efficiency. 440 U.S. at 569. The Court permitted the exclusion of methadone users, who had been in drug treatment programs for more than one year, from employment with the New York City Transit Authority. Id. Even with respect to non-safety-sensitive jobs the practice was deemed to be justified because the employer's legitimate goals were "significantly served by" the rule at issue even though the rule was not required by those goals. 440 U.S. at 587 n. 31. Nine years later in Watson, the Court permitted an employer to justify his subjective opinions and goals, regarding the denial of a promotion, by the business necessity standard as it was articulated in Beazer, 484 U.S. at 918. The Administration should not equate the standard in Griggs and its progeny with the standards in Wards Cove, Watson, and Beazer; clearly they are different. Although the Supreme Court may have sporadically strayed from the intent of the Griggs decision, that should not automatically mean that the Wards Cove standard of business necessity deserves to be codified.

Therefore, an employer may be seeking to attain legitimate goals, such as safety and efficiency, although the motivation for requiring the practice is not significantly related to an employee's performance of the job.\footnote{Beazer, 440 U.S. at 569.}

In response to the Administration's position, a recent study decisively refutes President Bush's claim that job performance is not the proper standard for codification.\footnote{See 137 CONG. REC. S12375 (daily ed. Aug. 2, 1991) (recent study prepared for the NAACP Legal Defense Fund by Fried, Frank, Harris, Shriver, & Jacobson clearly proves that prior to Wards Cove almost all disparate impact cases used a test of job performance).} It reveals that in almost all disparate impact cases from 1971 to 1989, employers were permitted to justify practices that had a discriminatory impact only when they demonstrated that such practices were significantly related to the ability to perform the job.\footnote{Id.} The study concluded that in only 8 out of 225 cases did the court apply a standard other than job performance.\footnote{Id.} In other words, the job performance standard was applied 96% of the time. The exact phrase "job performance" was utilized 34 times beginning with the \textit{Griggs} opinion, and in 15 other instances the court used phrases which were clearly equivalent.\footnote{Id.} Furthermore, under the job performance standard, employers won 28% of the time even where the challenged practice resulted in a significant discriminatory impact on women or minorities.\footnote{Id.} Therefore, the notion that the job performance standard is too high for employers to meet, and would therefore result in the adoption of quotas, is misguided. Lastly, in numerous other cases, the employer prevailed because the complaining parties were unable to make the required showing of a discriminatory impact.\footnote{Id.}

When a group of employment practices is challenged, instead of lumping them together as originally provided for in H.R. 1,\footnote{See supra note 100 and accompanying text. See also Note, The Defeat of the Civil Rights Act of 1990: Wading through the rhetoric in Search of a Compromise, 44 \textit{VAND. L. REV.} 595, 602-03 (1991).} the plaintiff must identify each discriminatory practice unless the court finds that the plaintiff, after diligent effort, is unable to do so from the employer's records or from other information of the employer reasonably available through discovery.\footnote{See H.R. 1, supra note 1, § 102(1)(B), 137 CONG. REC. at H3923.} And if a group of employment practices is challenged, H.R. 1 provides that the employer need
only defend against those practices which contribute in a meaningful way to the disparity.\textsuperscript{139} H.R. 1 reaffirms that an employer may rely upon relative qualifications or skills in making employment decisions, so long as the reliance is required by business necessity and therefore related to performance of the job.

H.R. 1375, on the other hand, does not allow for the grouping of practices in the assertion of a disparate impact claim, even if the plaintiff then identifies each practice in the cluster.\textsuperscript{140} Rather, the plaintiff must demonstrate that a particular employment practice is responsible for the disparate impact and then the burden is shifted to the defendant to show that the practice was required by business necessity.\textsuperscript{141} Proponents of H.R. 1375 argue that the overwhelming weight of past case law indicates that the Administration’s bill is the correct formulation of this principle.\textsuperscript{142} “The Supreme Court cases on disparate impact have, as a factual matter, involved particular practices, and the vast majority of circuit courts of appeals long ago expressly imposed this burden on plaintiffs.”\textsuperscript{143}

Finally, with respect to disparate impact analysis, H.R. 1 provides that if a defendant demonstrates that a practice or group of practices is in fact required by business necessity, a complaining party can still prevail by showing that another employment practice is available that has less of a disparate impact and would serve the respondent as well.\textsuperscript{144} However, the difference in impact between the two practices must be more than merely negligible.\textsuperscript{145} H.R. 1375, facially similar to H.R. 1, provides that a defendant can be held liable if the plaintiff demonstrates the existence of an alternative practice. However, “the alternative employment practice must be comparable in cost and equally effective in predicting job performance or achieving the respondent’s legitimate employment goals . . . and the respondent refuses to adopt such alternative.”\textsuperscript{146} Opponents of H.R. 1 argue that the congressional bill establishes an entirely new principle under which an employer would be \textit{per se} liable even if he or she did not know or could not have known about the alternative practice.\textsuperscript{147} Supporters of the Administration’s position argue

\textsuperscript{139} \textit{Id.} at § 102(C).

\textsuperscript{140} \textit{See H.R. 1375, supra note 1, § 4, 137 CONG. REC. at H1663.}

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} \textit{See H.R. REP. No. 40, 102d Cong., 1st Sess., pt. 1, at 134 (1991).}

\textsuperscript{143} \textit{Id.}

\textsuperscript{144} \textit{See H.R. 1, supra note 1, § 102(1)(A), 137 CONG. REC. at H3923.}

\textsuperscript{145} \textit{Id.}

\textsuperscript{146} \textit{See H.R. 1375, supra note 1, § 4, 137 CONG. REC. at H1663 (emphasis added).}

\textsuperscript{147} \textit{See H.R. REP. No. 40, 102d Cong., 1st Sess., pt. 1, at 137 (1991).}
that "[a]n employer, to be protected from liability [under H.R. 1],
would have to search the universe before implementing each and
every practice . . . to determine whether some other method would
accomplish the same purpose with less impact." Under the Ad-
ministration's bill, an employer is liable only if he or she intention-
ally and knowingly refuses to adopt an equally effective practice
which has less of a disparate impact.149

III. NONDISCRIMINATORY AND DISCRIMINATORY FACTORS IN A
SINGLE EMPLOYMENT PRACTICE, POLICY, OR DECISION

A. The Harsh Effects of Price Waterhouse v. Hopkins

The effectiveness of Title VII's ban on discrimination on the ba-
sis of race, color, religion, sex, or national origin has been severely
undercut by the recent Supreme Court decision of Price Waterhouse
v. Hopkins.160 In Price Waterhouse, Ann Hopkins sued her em-
ployer, an accounting firm, alleging that she was unlawfully denied a
promotion because of her sex.161 She had worked at Price
Waterhouse for five years when she was proposed for a partner-
ship.162 At that time, out of 662 partners, only 7 were women.163
Hopkins was the only woman out of 88 persons proposed for partner-
ship that year.164 Hopkins was denied the promotion despite the fact
that she had brought the firm more business than any of the 87 men
being considered for partnership at the time.165 She was told by one
partner that her professional problems would be solved if she would
"walk more femininely, talk more femininely, dress more femininely,
wear make-up, have her hair styled, and wear jewelry."166 However,
at the trial level, the court found that both her supporters and oppo-
nents indicated that she was "sometimes overly aggressive, unduly
harsh, difficult to work with and impatient with staff."

148. Id. at 137-38.
149. Id. at 137.
150. 490 U.S. 228 (1989).
151. Id. at 232.
152. Id. at 233.
153. Id.
154. Id. Forty-seven of these candidates were admitted to the partnership, 21 were re-
jected, and 20, including Hopkins, were held for reconsideration the following year.
155. Id. "In a jointly prepared statement supporting her candidacy, the partners in Hop-
kins' office showcased her successful 2 year effort to secure a $25 million contract with the
Department of State, labeling it 'an outstanding performance' and one that Hopkins carried
out virtually at the partner level." Id. at 233.
156. Id. at 235.
157. 618 F. Supp. 1109, 1113.
Where an employer is motivated by both lawful and unlawful considerations, the question becomes how large a part the discriminatory factor must play in the employment action before a court holds that the decision was made as a result of the illegal criterion. A number of appellate courts have taken the same view as the Department of Justice, which argued that Title VII was violated whenever a discriminatory motive played a part in an employment decision.\textsuperscript{158} Proof that an employer would have made the same decision for nondiscriminatory reasons, the Justice Department argued, did not erase the violation, but merely limited the appropriate remedy.\textsuperscript{159} The Supreme Court in \textit{Price Waterhouse} completely disregarded the reasoning of the appellate courts or the Justice Department. The plurality opinion by Justice Brennan stated that "[when] a plaintiff . . . shows that [her] gender played a motivating part in an employment decision, the defendant may avoid a finding of liability by proving that it would have made the same decision even if it had not [taken the plaintiff's gender into account]."\textsuperscript{160} The Court's holding in \textit{Price Waterhouse} strips a complaining party's protections against intentional employment discrimination by allowing such discrimination to escape sanction completely under Title VII. The effect of this decision is that a court is rendered powerless to end discriminatory abuse when a particular plaintiff brings a case and would have suffered the disputed employment action for some alternative, legitimate reason.

\section*{B. Response of Congress and the Lack Thereof by the Administration}

H.R. 1 amends Title VII to overrule this aspect of the \textit{Price

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Bibbs v. Block}, 778 F.2d 1318 (8th Cir. 1985); \textit{King v. Trans World Airlines, Inc.}, 738 F.2d 255 (8th Cir. 1984); \textit{Ostroff v. Employment Exchange Inc.}, 683 F.2d 302 (9th Cir. 1982); \textit{Nandy v. Barrows Co.}, 660 F. 2d 302 (9th Cir. 1981); \textit{Roberts v. Fri}, 20 F.E.P. Cases 1445 (D.C. Cir. 1980).
\item See \textit{Brief for the United States as Amicus Curiae} at 23-4, \textit{Price Waterhouse v. Hopkins}, 490 U.S. 228 (1989)(citations omitted). In its brief to the Supreme Court, the Justice Department explained that: it is proper to place the burden on the defendant to prove that a given employment decision would have been the same in a discrimination free environment. If the defendant makes such a showing, the plaintiff is made whole by an award of attorney's fees and an injunction against future discrimination. In effect, the defendant is ordered to cease discriminatory activity, which enhances the plaintiff's employment opportunities in the future. But the defendant need not hire, reinstate, promote, or provide backpay to plaintiff.
\item \textit{Price Waterhouse}, 490 U.S. at 244-45.
\end{enumerate}
\end{footnotesize}
This legislation provides that proof that an employer would have made the same employment decision in the absence of discriminatory reasons is relevant to determine not the liability for discriminatory employment practices, but only the appropriate remedy. H.R. 1 states that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for such employment practice, even though other factors also contributed to such practice." This standard would not make mere discriminatory thoughts actionable. Rather, to establish liability, the complaining party must demonstrate that the discrimination was an active, motivating factor in the employment decision rather than a passive, inoperative thought.

H.R. 1 clarifies that where a plaintiff proves that race, color, religion, sex, or national origin was a motivating factor for an employment practice, and an employer demonstrates that the same action would have been taken in the absence of the discriminatory motive, a court may not order the employer to hire, reinstate, promote or provide back pay to the complainant. This provision is consistent with the current text of Title VII, which provides that "no order of the court shall require the admission or reinstatement of an individual . . . if such individual . . . was refused . . . employment . . . for any reason other than [the] discrimination. . . ." If the presence of a motivating discriminatory factor is established in violation of Title VII alongside a legitimate nondiscriminatory reason, liability will be established. However, the relief that may be awarded includes injunctive or declaratory relief, compensatory damages, punitive damages, and attorney's fees. In response to concerns that damages might be awarded for injuries that are not directly attributable to the discrimination, H.R. 1 explicitly provides that "damages for a violation of may be awarded only for injury attributable to the unlawful employment practice."

161. See H.R. 1, supra note 1, § 103(a)(1), 137 CONG. REC. at H3923.
162. Id. at § 103(b).
165. Id.
166. Id. at § 103(b).
168. See H.R. 1, supra note 1, § 103(a)(1), 137 CONG. REC. at H3923.
170. H.R. 1, supra note 1, § 103(b), 137 CONG. REC. at H3923.
H.R. 1375 does not address the Price Waterhouse decision. Proponents of this alternate bill believe that H.R 1 will foreclose an employer's ability to rebut or refute the inference of discrimination by showing that the factor was not relevant because of the predominant weight of the legitimate factors. Opponents of H.R. 1 are particularly concerned that, "if a jury found that the violation had caused . . . mental anguish or distress, it could award compensatory and punitive damages, even though in fact the employee was being treated no differently than they would have been treated in the absence of any discrimination." Furthermore, supporters of H.R. 1375 have indicated that Price Waterhouse has actually turned out to be a very favorable decision for plaintiffs. Fifteen of the nineteen reported lower court decisions since Price Waterhouse have resulted in victories for the complaining party. Therefore, reversal of Price Waterhouse, according to the Administration, is not necessary.

IV. CHALLENGES TO CONSENT JUDGMENTS OR ORDERS

A. Martin v. Wilks: Stripping the Protections Provided by the Impermissible Collateral Attack Doctrine

Since the enactment of the Civil Rights Act of 1964, consent decrees have been utilized to foster resolution in a countless number of employment discrimination cases. These decrees often have had an adverse impact on the interests of persons other than the original litigants. However, the courts have had to balance the competing and equally compelling interests of affording an individual his or her

172. Id. Opponents of H.R. 1 view the bill as an attempt to transform Title VII from an employment discrimination statute into a tort statute.
174. Id. (referring to a Justice Department study that indicated Price Waterhouse was in practice a favorable precedent for plaintiffs).
175. See, e.g., Striff v. Mason, 849 F.2d 240 (6th Cir. 1988); Devereaux v. Geary, 765 F.2d 268 (1st Cir. 1985); Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982); Dennison v. City of Los Angeles Dept' of Water and Power, 658 F.2d 694 (9th Cir. 1981).

A consent decree is a hybrid between a private contract or settlement between parties and a judgment rendered by a court. The parties agree to the terms of a consent decree, and the court agrees to enforce it as a judgment. Kramer, Consent Decrees and the Rights of Third Parties, 87 Mich. L. Rev. 321, 324-25 (1988).

176. See infra notes 178-80 and accompanying text.
own day in court and bringing finality to litigation.\textsuperscript{177} Many federal courts have been faced with the question of whether, and under what circumstances, nonlitigants should be permitted rather than precluded from attacking the consent decree in a subsequent action.\textsuperscript{178}

Prior to the Supreme Court decision in \textit{Martin v. Wilks},\textsuperscript{179} a majority of the federal courts had eagerly supported the impermissible collateral attack doctrine and implemented restrictive rules precluding all challenges to a Title VII consent decree once it had been entered by a court.\textsuperscript{180} Barring challenges to consent decrees is advantageous for several reasons. First, if the decrees are subject to perpetual challenge, their effectiveness is severely undermined and judicial resources are wasted by the relitigation of settled claims.\textsuperscript{181}

\textsuperscript{177} See H.R. Rep. No. 40, 102d Cong., 1st Sess., pt. 1, at 50 (1991). "Indeed, the principle of a day in court is meaningless without a second, equally important principle—that of finality of judgments." \textit{Id.}

\textsuperscript{178} \textit{Id.}

\textsuperscript{179} 490 U.S. 755 (1989). In \textit{Wilks}, seven white firefighters in Birmingham, Alabama filed a complaint for injunctive relief. They claimed that a consent decree illegally discriminated against them since they were denied promotions in favor of less qualified black candidates as a result of the city's compliance with the decree. \textit{Id.} at 758. The district court, 28 FEP Cases 1834 (N.D. Ala. 1981), denied relief, finding that the white plaintiffs knew at an early stage of the proceedings that their rights could be adversely affected. \textit{Id.} The Eleventh Circuit affirmed both the denial of intervention and the denial of injunctive relief. United States v. Jefferson County, 720 F.2d 1511, 1519-20 (11th Cir. 1983). In doing so, the Eleventh Circuit indicated that the firefighters could file a separate Title VII suit to challenge specific violations of their rights. \textit{Id.} at 1518. Soon after, several other groups of white firefighters and other city employees brought lawsuits, claiming that they were being denied promotions pursuant to the decree because of their race. See 490 U.S. at 760. After trial on some of those claims, the district court dismissed those claims on two grounds. \textit{Id.} First, the court ruled that since the decrees were lawful and the promotions were required by the decrees, there was no illegal discrimination against the white firefighters. \textit{Id.} Second, the court ruled that the decrees were not susceptible to collateral attack by persons who were aware of the earlier litigation who failed to intervene in a timely fashion. \textit{Id.} On appeal, however, the Eleventh Circuit reversed, allowing the collateral attack. \textit{In re} Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492 (11th Cir. 1987). The Supreme Court affirmed the Eleventh Circuit's ruling. 490 U.S. at 761.

\textsuperscript{180} \textit{Wilks}, 490 U.S. at 762-3 n. 3.

\textsuperscript{181} See H.R. Rep. No. 40, 102d Cong., 1st Sess., pt. 1, at 51-3 (1991). \textit{Wilks} does not only subject future decrees to perpetual challenge; existing decrees are equally endangered. The absurdity of the \textit{Wilks} rule in this respect is demonstrated by Birmingham Mayor Richard Arrington, Jr. in his testimony before the Committee regarding that city's litigation, which began in 1974:

We face yet another trial sometime this year on the validity of a consent decree, the validity of which was confirmed in 1981 and again in 1985. In that trial, we will be defending the decree against the same parties who challenged it in 1981 and 1985, and who are making the identical arguments they made in 1981 and in 1985. . . . [A] third successful defense of the decree, even if affirmed on appeal, will not likely end this taxpayer financial debacle.

\textit{Id.} at 54 n. 47 (citing \textit{Civil Rights Act of 1990: Hearings on H.R. 4000 Before the House Comm. on Education and Labor and the House Judiciary Subcomm. on Civil and Constitu-
Second, the impermissible collateral attack doctrine encourages voluntary settlement of employment discrimination litigation.\textsuperscript{185} Third, by allowing repetitive challenges of a consent decree, every potentially interested person has to be joined as an additional party, no matter how remote his or her interest might be, in order to achieve any measure of finality in the resolution of an employment discrimination suit.\textsuperscript{188} This would be extremely expensive, impractical and a waste of judicial resources.\textsuperscript{184} Fifth and finally, the impermissible collateral attack doctrine protects a defendant from conflicting judgments by preventing the possibility of inconsistent obligations and the threat of contempt findings from two separate courts.\textsuperscript{189}

The Supreme Court, in \textit{Martin v. Wilks}, rejected the rule as well as the reasoning followed by the circuit courts.\textsuperscript{186} Although the Court recognized that a large number of the Federal Courts of Appeals barred persons from filing an untimely lawsuit that challenged a consent decree,\textsuperscript{187} the Court rejected the restrictive rule barring collateral attacks and adopted an opposite and expansive rule.\textsuperscript{188} The Court held that nothing in Title VII or the Federal Rules of Civil Procedure bars a person who has failed to intervene in an employment discrimination suit from filing a subsequent lawsuit to challenge hiring and promotion decisions made pursuant to the consent

\textsuperscript{182}. \textit{See} H.R. REP. No. 40, 102d Cong., 1st Sess., pt. 1, at 51 (1991). One of Title VII's goals is the encouragement of voluntary settlements as the preferred means of resolving employment discrimination disputes. \textit{See} Firefighters v. Cleveland, 478 U.S. 501, 515 (1986); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); 29 C.F.R. § 1608.1(b). The \textit{Wilks} rule allows a new employment discrimination suit to be filed against the employer every time the employer hires or promotes an individual pursuant to an approved court decree, permitting litigation to continue for years. \textit{Wilks}, 490 U.S. 755. Why would an employer ever agree to settle a Title VII case by means of a consent decree if the \textit{Wilks} rule remains the law?\textsuperscript{183} 
\textit{See} Wilks, 490 U.S. at 765-68. Each and every potential litigant would have to be served with a summons and would be required to obtain counsel in order to participate in the full proceeding. Furthermore, many of those joined would not have intervened in the litigation if the consent decree had the ability to remain unchallenged. \textit{See also} H.R. REP. No. 40, 102d Cong., 1st Sess., pt. 1, at 53-54 (1991).

\textsuperscript{184}. This is particularly true where relief is sought against long-term systemic discrimination as was the case in \textit{Wilks}.

\textsuperscript{185}. \textit{Id.} at 54 (1991). For example, a successful third party attack will invalidate the original consent order, and the defendant will have to seek modification. If the judge who originally entered the consent decree declines to modify it, the defendant will have irreconcilable obligations and will be subject to contempt citations by one or both of the courts. \textit{See} \textit{The Defeat of the Civil Rights Act of 1990: Wading through the rhetoric in Search of a Compromise}, 44 VAND. L. REV. 595 (1991).

\textsuperscript{186}. \textit{Wilks}, 490 U.S. at 767-69.

\textsuperscript{187}. \textit{Id.} at 762 n.3.

\textsuperscript{188}. \textit{Id.} at 761-3.
decree.\textsuperscript{189} A five justice majority stated that where allegedly race conscious promotion decisions were being made as a result of the operation of a prior consent decree, white individuals, who were not party to the proceedings which resulted in the entry of the decree, could bring suit alleging that the denial of promotions to them was due to impermissible considerations of race.\textsuperscript{189}

**B. Diametrically Opposed Responses in the Proposed Bills by Congress and the Administration**

H.R. 1 responds to both the overly restrictive rule that precludes all collateral attacks on consent decrees, and the overly expansive rule that permits a limitless number of collateral attacks as evidenced by the *Wilks* decision. H.R. 1 is intended to promote the speedy and final resolution of employment discrimination cases while ensuring that nonparties, who may be adversely affected by a court decree, have an adequate opportunity to challenge the decree.\textsuperscript{190} H.R. 1 promulgates three rules in order to provide uniform guidelines for when a challenge to a consent decree should be precluded.\textsuperscript{191} First, a challenge to a decree is prohibited when the challenger has actual notice of the decree, its potential effects, and a reasonable opportunity to object prior to the entry of the decree.\textsuperscript{192} The notice required is not provided by a particular party

\textsuperscript{189} Id. at 767. The court pointed out that Rule 24 of the Federal Rules of Civil Procedure prescribes permissive rather than mandatory intervention, and thus the appropriate mechanism to bind a party by judgment or consent decree is the mandatory joinder provision of Rule 19(a). Id. at 764. Rule 19(a) provides that a person who has an interest in the subject of the action must be joined if the person's absence either may impair the ability to protect that person's interest or may subject existing parties to a "substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest." Fed. R. Civ. P. 19(a).

\textsuperscript{190} See 490 U.S. at 769 (affirming the decision of the Eleventh Circuit Court of Appeals, see 490 U.S. at 761).


\textsuperscript{192} Id.

\textsuperscript{193} See H.R. 1, supra note 1, § 104 (A)(i),(ii), 137 Cong. Rec. at H3923. Both elements of this preclusion rule, actual notice and a reasonable opportunity to object, are derived from, and are consistent with, the fundamental requirements of the due process clause. The landmark case describing the nature of these requirements is *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). There the court stated that:

[a]n elementary and fundamental requirement of due process is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case, these conditions are reasonably met, the constitutional requirements are satisfied.
or by the court itself. Rather, it may come from any source, provided that the notice adequately apprises the recipient that the decree may have an impact on his or her interests and that an opportunity to object is available. Second, a challenge to a decree is precluded when the court determines that the interests of the challenger were already adequately represented by another person who did in fact challenge the decree. Lastly, a challenge to a decree will be denied when the court determines that reasonable efforts were made to provide notice to interested persons.

H.R. 1 enumerates a handful of exceptions to the preclusion rules already discussed. The rules do not alter an individual’s right to intervene in an action pursuant to Rule 24 of the Federal Rules of Civil Procedure. If an individual desires to challenge an employment practice that is enforced by a court decree, the right to intervene in the proceeding is maintained. However, the court determines whether intervention is appropriate under Rule 24. Furthermore, the preclusion rules do not apply to the “rights of parties to the action in which the litigated or consent judgment or order was entered, or to members of a class represented or sought to be represented in such action, or to members of a group on whose behalf relief was sought in such action by the Federal Government.” The preclusion rules do not prevent challenges to a court decree if it was obtained through collusion or fraud, or is transparently invalid, or was entered by a court that lacked subject matter jurisdiction. Finally, these rules do not permit the judicial system to deny any individual

\[194\] See Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 14 (1978); Boddie v. Connecticut, 401 U.S. 371, 378 (1971). Determinations as to whether a particular type or form of notice meets the requirements of this rule are to be made by the court on a case by case basis.

\[195\] See H.R. 1, supra note 1, § 104 (B), 137 CONG. REC. at H3923. The term “adequately represented” is intended to have an analogous meaning to that of the term’s use in Rule 23 of the Federal Rules of Civil Procedure. “Due process permits the preclusion of other litigants if their interests are sufficiently close to the interests of the parties.” See Kramer, Consent Decrees and the Rights of Third Parties, 87 MICH. L. REV. 321, 350 (1988).


\[197\] See H.R. 1, supra note 1, § 104 (2), 137 CONG. REC. at H3923.

\[198\] Id. at § (2)(A).

\[199\] Id.

\[200\] Id. at § (2)(B).

\[201\] Id. at § (2)(C). The term “transparently invalid” is intended to mean an agreement that is unlawful on its face. H.R. REP. NO. 40, 102d Cong., 1st Sess., pt. 1, at 59 n. 51 (1991).


\[194\] at 314-15.

\[195\] at § 104 (B).

\[196\] at § 104 (C).

\[197\] at § (2)(A).

\[198\] at § (2)(B).

\[199\] at § (2)(C).
the due process of law that is required by the United States Constitution.\footnote{203}

By stark contrast, H.R. 1375 codifies the Supreme Court's decision in \textit{Martin v. Wilks}.\footnote{204} As a result, only the persons who were parties to a consent decree will be bound by it.\footnote{206} Opponents of H.R. 1 strongly believe that \textit{Wilks} is consistent with the due process principle that everyone is entitled to his day in court. Therefore, the Administration argues that individuals should not be bound by a consent decree in which they had no opportunity to participate and might not have had actual notice.\footnote{206} Although in a theoretical vacuum this may be a strong argument, in practice it is one of the weaker arguments set forth by the Administration. Not only is the long-standing concept of finality of judgments being ignored, more importantly employers would be discouraged from voluntarily entering into these beneficial arrangements.\footnote{207} Employers would be subject to countless lawsuits if the decree could be challenged over and over again; therefore, there would be no incentive for an employer to foster resolution in a case of employment discrimination. A stronger argument set forth by the opponents of H.R. 1 is that it is difficult for an individual to anticipate how his or her interests will be affected by the decree at a future date, and therefore the option to challenge a decree should always be available.\footnote{208} Moreover, the expense of hiring a lawyer may not be worth the mere anticipation of discrimination without some further, actual indication.\footnote{209} As an alternative, proponents of H.R. 1375 argue that the mechanism of joinder is available to prevent the repetitive challenge to these decrees.\footnote{209} This notion is completely inconsistent with prior arguments which purport that individuals cannot anticipate how their interests will be affected in the future, and that hiring a lawyer may not be worth the expense if they have only a remote interest in the outcome.

204. See H.R. 1375, supra note 1, § 5, 137 Cong. Rec. at H1663.
205. \textit{Id}.
209. Opponents of H.R. 1 argue that the right to challenge a consent decree is consistent with the overturning of Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989), see \textit{infra} notes 217-227 and accompanying text. In both instances, the legislation of H.R. 1375 does not require individuals to speculate about how their employment status may be impaired at a future date, but rather allows the employment practice to be challenged when their interests are actually affected. H.R. Rep. No. 40, 102d Cong., 1st Sess., pt. 1, at 140 (1991).
of the litigation. Why would these same individuals, who do not realize how their interests may be affected in the future and who may have only a remote interest in the decree, decide to join the present litigation by the mechanism of joinder?

V. JUDICIAL INTERPRETATION OF THE STATUTE OF LIMITATIONS AND THE RESPONSE OF CONGRESS AND THE ADMINISTRATION

A continuing violation of a discriminatory policy or practice may permit a victim to file a timely charge even if the initial act occurred outside the 180/300 filing limitation. A continuing violation is a series of discriminatory acts constituting a related course of conduct or the maintenance of an unlawful policy or system. In Lorance v. AT&T Technologies, the Supreme Court was presented with a continuing violation theory in the seniority system context. The plaintiffs in Lorance alleged that a seniority rule governing layoffs had been adopted for the purpose of discriminating against women. The rule, which was adopted in 1979, was first applied in 1982 in order to demote Lorance and the other two plaintiffs. The plaintiffs claimed that the 1979 seniority provision was the product of a “conspir[acy] to change the seniority rules, in order to protect incumbent male testers and to discourage women from promoting into traditionally male tester jobs.” The Supreme Court addressed the issue of when the limitations period begins to run for filing charges that challenge a facially neutral, but intentionally discriminatory, seniority system. Does the limitations period start to run from the date that an individual knows or has reason to know that such a seniority system has been adopted, or does the period begin to run when the seniority system is applied to the plaintiff in question? A divided Supreme Court held that where an employer adopts an employment rule for allegedly discriminatory reasons, the limitations period begins to run as soon as the rule is adopted, not

211. See Rossein, EMPLOYMENT DISCRIMINATION LAW AND LITIGATION, § 12.4(4) (1990). Under 42 U.S.C. § 2000e-5(e) (1988), a charge must be filed with the EEOC within 180 days of the alleged unfair employment practice unless the complainant has first instituted proceedings with a state or local agency, in which the period is extended to a maximum of 300 days. Id.
212. Id.
214. Id. at 903. The three women filed Title VII charges in 1983 with the Equal Employment Opportunity Commission (hereinafter EEOC), and after the EEOC issued right-to-sue letters, the petitioners filed in the District Court for the Northern District of Illinois. Id.
215. Id. at 902.
216. Id. at 903.
217. Id.
from the date that the seniority system is applied to the complaining party.\textsuperscript{218}

The Committee and the Administration believe that there is a need for legislation to overrule the \textit{Lorance} decision.\textsuperscript{219} "The \textit{Lorance} rule produces unnecessary litigation, and causes needless strain on employment relationships."\textsuperscript{220} "The Court [in \textit{Lorance}] restrict[ed] Federal civil rights protections in a manner that was inconsistent with the intent of Congress."\textsuperscript{221} If an employee were forced to anticipate the harm of a seniority system, he or she would be forced to sue his employer before he had suffered any real injury and perhaps would never have suffered any injury at all.\textsuperscript{222}

H.R. 1 overturns \textit{Lorance} by providing that the statute of limitations for filing a Title VII charge begins to run from the date on which an unlawful employment practice "occurred or has been applied to affect adversely the person aggrieved, whichever is later."\textsuperscript{223} This will assure that the Title VII limitations period will not begin to run so soon that it becomes difficult or impossible for a victim of discrimination to obtain the protection of the law. Clearly, this provision of the bill amending Title VII extends beyond the seniority system context and applies to many other discriminatory and inequitable employment practices.\textsuperscript{224} By adopting a rule that is applicable to all claims, the Committee intends to foster voluntary settlement rather than encourage unnecessary litigation.\textsuperscript{225}

H.R. 1375 provides that the limitations period for challenging a discriminatory seniority system begins to run when "a seniority system is adopted, when an individual becomes subject to a seniority system, or when a person aggrieved is injured by the application of a seniority system. . . ."\textsuperscript{226} The scope of the provision is limited to the seniority system context; therefore, it provides only a shell of the protection than that of its counterpart in H.R. 1.\textsuperscript{227} Proponents of H.R. 1375 argue that a seniority system is of particular concern with

\begin{thebibliography}{9}
\bibitem{218} Id. at 911.
\bibitem{219} See infra notes 220-229 and accompanying text.
\bibitem{221} Id. at 61.
\bibitem{222} Id. at 61 (citing Brief for the United States at 8, 24, \textit{Lorance} v. AT&T Technologies, Inc., 490 U.S. 900 (1989) (No. 87-1428)); \textit{see also} Johnson v. General Electric, 840 F.2d 132, 136 (1st Cir. 1988)(stating that "[i]t is unwise to encourage lawsuits . . . before it is even certain that injuries will occur at all.").
\bibitem{223} H.R. 1, \textit{supra} note 1, § 105(a)(2), 137 CONG. REC. at H3924.
\bibitem{225} Id.
\bibitem{226} H.R. 1375, \textit{supra} note 1, § 7, 137 CONG. REC. at H1663.
\bibitem{227} Id.
\end{thebibliography}
respect to the statute of limitations, since such a system can be adopted years before it has an impact on an employee's rights.\textsuperscript{228} The Administration's position is that other discriminatory employment practices do not pose such delayed impact problems as seniority systems; therefore, Title VII should be amended only with respect to such systems and should not change the current law with respect to all other claims.\textsuperscript{229}

Not only does H.R. 1 amend the triggering point of the statute of limitations, it also provides for an extension of Title VII's limitation period.\textsuperscript{230} Title VII currently states that an employment discrimination claim must be filed within 180 days following the alleged unlawful practice or within 300 days if the complainant has instituted proceedings with a state or local agency.\textsuperscript{231} At the same time, 42 U.S.C. Section 1981, which bars intentional race discrimination, allows victims a considerably longer time period to commence an action. Generally the time period in which a complaining party must institute an action is two to three years.\textsuperscript{232} Therefore, under current law, those commencing an action for race discrimination under Section 1981 have a marked advantage over those women, minorities, and members of other protected groups who must file their claims within 180 days rather than within two years. Employment discrimination is not often easily recognizable when the practice is neutral on its face, and once the infringement on one's rights is recognized, it takes additional time to seek an appropriate remedy. Settlement without litigation can only be encouraged if there is enough time to attempt a peaceful remedy before having to institute court proceedings. Six months is not enough time to encourage voluntary settlement if the complaining party risks losing his right to have his case adjudicated. Thus, six months is not an adequate time period for an individual to realize and rectify the discrimination.

H.R. 1 amends Title VII to lengthen the limitations period for filing employment discrimination charges from 180 days to 540 days

\textsuperscript{229} Id.
\textsuperscript{230} See H.R. 1, supra note 1, § 105(a)(1), 137 CONG. REC. at H3924; see infra notes 233-35 and accompanying text.
\textsuperscript{231} See 42 U.S.C § 2000e-5(e) (1988).
\textsuperscript{232} Since section 1981 does not explicitly provide for a limitations period, courts have looked to analogous state statutes of limitations. State statute of limitations, while it varies by state, is typically two or three years. See e.g., Goodman v. Lukens Steel Co., 482 U.S. 656 (1987)(two years); Runyon v. McCrary, 427 U.S. 160 (1976)(two years); Gordon v. Nat'l Youth Work Alliance, 675 F.2d 356 (D.C. Cir. 1982)(three years).
(18 months). H.R. 1375, on the other hand, does not provide for any extension of the filing period, and proponents of the Administration's bill argue that the lengthening of the period will not only hinder the settlement process, it will also be disadvantageous to the employer because documents will be lost and memories will fade. These concerns have been addressed by the Committee. They have stated that numerous employment discrimination claims have been brought under section 1981, and there has been no evidence that the two year limitation period interferes with the settlement process or creates any evidentiary difficulties.


For over a century, the Civil Rights Act of 1866, 42 U.S.C. Section 1981 has protected black and other minority Americans from racial discrimination in public and private contractual relations. Section 1981 provides in pertinent part that:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . .

In the past two decades, section 1981 has emerged as one of our nation's most important employment discrimination laws. The statute is of particular importance for many reasons. First, section 1981 is the only federal law banning race discrimination in all contracts. As such, it has been a critically important tool used to strike down racially discriminatory practices in a wide variety of situations, including in the employment discrimination context. Second, unlike Title VII, which applies only to employers with 15 or more employees, section 1981 covers employers of all sizes. Thus, it is the

233. See H.R. 1, supra note 1, § 105(a)(1), 137 CONG. REC. at H3924.
235. Id.
239. Id. at 91 (listing instances such as jury service, voting rights, access to country clubs, admissions to schools and hospitals, and rental housing).
only federal law banning race discrimination applicable to the 3.7 million firms with fewer than 15 employees.\footnote{241} Third, section 1981 authorizes courts to choose to award equitable relief, compensatory damages, or in appropriate cases, punitive damages as well.\footnote{242} Finally, the statute of limitations in section 1981 cases is the applicable state tort statute of limitations, usually two years, while the statute of limitations in Title VII cases is only 180 days.\footnote{243}

In 1989, the Supreme Court sharply restricted the safeguards of section 1981 in \textit{Patterson v. McLean Credit Union}.\footnote{244} The Court adopted a very narrow interpretation of section 1981 by holding that the provision applies only to discrimination in "the formation of a contract, . . . not to problems that may arise later from the conditions of continuing employment."\footnote{245} As a result, post-contract formation conduct, such as racial harassment is no longer prohibited by section 1981. In \textit{Patterson}, the court relied on the fact that the type of conduct it held not to be actionable under section 1981 was already prohibited by Title VII.\footnote{246} The Court reasoned that because the conduct was forbidden by Title VII, there was no need to broadly interpret section 1981 to cover the same conduct. The court further stated that "the right to make contracts does not extend . . . to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions."\footnote{247}

Prior to the \textit{Patterson} ruling, every federal court of appeals had held that section 1981 prohibits not just discrimination at the formation of an employment contract, but discrimination during the per-

\begin{itemize}
\item \footnote{243} See supra at note 211 and accompanying text.
\item \footnote{244} 491 U.S. 164 (1989). In May of 1972, Brenda Patterson, a black woman, was hired by McLean Credit Union as a teller and a file coordinator. \textit{Id.} at 169. In July of 1982, Brenda was laid off. After her termination, she filed an action claiming that her employer, in violation of 42 U.S.C. § 1981, had harassed her, failed to promote her, and discharged her, all because of her race. \textit{Id.} Both the District Court and Court of Appeals held that the plaintiff's claim of racial harassment was not actionable under section 1981. \textit{Id.}
\item While instances of racial harassment may implicate the terms and conditions of employment under Title VII . . . and of course may be probative of the discriminatory intent required to be shown in a § 1981 action . . . racial harassment itself is not cognizable under § 1981 because racial harassment does not abridge the right to make and enforce contracts.
\item \textit{Id.} at 170 (citing the Court of Appeals decision at 805 F.2d 1143, 1145-46 (1986)).
\item \footnote{245} \textit{Id.} at 176.
\item \footnote{246} \textit{Id.} at 177, 179-80.
\item \footnote{247} \textit{Id.}
\end{itemize}
formance of the contract as well.\textsuperscript{248} As a result of \textit{Patterson}'s limited holding, many victims of race discrimination may not obtain compensatory or punitive damages under section 1981 and thus may lack any means to obtain relief for the harms they have sustained. Under Title VII, remedies are currently limited to equitable relief, such as reinstatement and up to two years back pay.\textsuperscript{249} These remedies are often inappropriate for intentional discrimination since many victims remain in their jobs, and thus suffer no loss of income.\textsuperscript{250} Therefore, no adequate deterrent exists to prevent these highly offensive forms of discrimination. Since \textit{Patterson}, hundreds of claims of race discrimination have been dismissed by federal courts as a result of this decision.\textsuperscript{251} Most importantly, individuals who comprise a workplace of fewer than 15 employees have been stripped of their protections against race discrimination.\textsuperscript{252}

Both H.R. 1 and H.R. 1375 overrule the narrow and destructive
decision in *Patterson v McLean Credit Union*. Both bills provide that the right to “make and enforce contracts” free from race discrimination includes “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.” Both H.R. 1 and H.R. 1375 amend section 1981 so that it would prohibit racial discrimination in all aspects of employment. In addition, both bills codify the long prevailing standard in *Runyon v. McCrary* that section 1981 covers private as well as governmental conduct. As a result, racial employment discrimination can be combatted by claims of harassment, discharge, demotion, promotion, and transfer under 42 U.S.C. Section 1981.

VII. TITLE VII REMEDIES IN CASES OF INTENTIONAL DISCRIMINATION

A. The Current Remedial Scheme Under Title VII: Is it Adequate?

Title VII does not authorize the recovery of compensatory or punitive damages in cases of intentional discrimination on the basis of gender, religion, or national origin. Rather, the remedial structure provides for equitable relief, including injunctive relief, reinstatement or hiring, with up to two years' back pay in such employment discrimination cases. At the same time, federal civil rights

253. See H.R. 1, supra note 1, § 110, 137 CONG. REC. at H3924; H.R. 1375, supra note 1, § 6, 137 CONG. REC. at H1663.
254. Id.
255. Id.
257. Id.
261. The relief provision in Title VII provides:
If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice . . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . ., or any other equitable relief as the court deems appropriate.
law under 42 U.S.C. Section 1981 permits the recovery of an unlimited amount of compensatory, and in some instances, punitive damages in cases of intentional race discrimination.\textsuperscript{261} No matter how demoralizing the circumstances, victims of intentional gender and religious discrimination cannot receive compensatory or punitive damages.\textsuperscript{262} Moreover, Title VII contains a mitigation clause that often may neutralize the deterrent effect of the back pay award. It provides that "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable."\textsuperscript{263} Courts have stringently interpreted this clause to mean that the plaintiff must exercise reasonable efforts to seek employment of an equivalent nature or the complainant will not be entitled to any back pay.\textsuperscript{264}

The Committee believes that Congress should not differentiate between victims of race and all other victims of discrimination.\textsuperscript{265} Victims of sexual or religious harassment often endure terrible humiliation, pain, and suffering while on the job. The distress often manifests itself in emotional disorders and medical problems, which in turn cause victims of discrimination to suffer substantial medical expense as well as other economic losses.\textsuperscript{266} Since Title VII does not permit recovery of compensatory and punitive damages, not only are victims unable to make themselves whole for their losses, they are also discouraged from seeking to exonerate their civil rights.\textsuperscript{267}

The factual scenario in Zabkowicz v. West Bend Company,\textsuperscript{268} is illustrative of the inadequacies of Title VII's current remedial scheme. The plaintiff was subjected to continuous sexual harassment

\begin{itemize}
\item \textsuperscript{261} See Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460 (1975).
\item \textsuperscript{262} See infra at note 260.
\item \textsuperscript{263} 42 U.S.C. § 2000e-5(g) (1988).
\item \textsuperscript{264} See Ford Motor Co. v. EEOC, 485 U.S. 219, 232 (1982).
\item \textsuperscript{266} See Brooms v. Regal Tube Co., 44 F.E.P. Cas (BNA) 1119, 1122 (N.D. Ill. 1987), aff'd in relevant part, 881 F.2d 412 (7th Cir. 1989); Abrams v. Baylor College of Medicine, 805 F.2d 528, 535 (5th Cir. 1986).
\end{itemize}

There is little incentive for a plaintiff to bring a Title VII suit when the best that she can hope for is an order to her supervisor and to her employer to treat her with the dignity she deserves and the costs of bringing her suit. One can expect that a potential claimant will pause long before enduring the humiliation of making public the indignities which she has suffered in private . . . when she is precluded from recovering damages for her perpetrators' behavior.

\textit{Id.}

\textsuperscript{268} 589 F. Supp. 780 (E.D. Wis. 1984), aff'd in part, rev'd on other grounds, 789 F.2d 540 (7th Cir. 1986).
for a period of more than three years. According to Zabkowicz's testimony before the Committee, during those three years her co-workers regularly exposed themselves in front of her, propositioned her, and posted dozens of obscene drawings of her having sex with other people or with animals. As a result of this constant egregious behavior, she suffered from vomiting, severe nausea, diarrhea, and cramping. When the complainant was pregnant her doctor advised her that for the sake of her health and the health of her child she had to take a medical leave of absence from work. The court concluded that she was the victim of "sustained, vicious, and brutal harassment" which was both "malevolent and outrageous" and which harmed her health. Although the court was willing to acknowledge this offensive behavior, they could award her only $2,736 in back pay for her two month absence from work during her pregnancy. Unfortunately, instances of sexual harassment in our society occur quite frequently in the workplace. Without the protective cloak of compensatory and punitive damages, all too often victims will be left without adequate remedies for their injuries. An employer, without the threat of substantial monetary liability, will not be discouraged from intentionally discriminating since the potential penalties are not severe enough to serve as a deterrent for their offensive and inexcusable actions.

B. Congress and the Administration Sharply Disagree on How to Revise Title VII's Remedial Scheme

H.R. 1 would dramatically alter the current remedial scheme by permitting courts to award compensatory damages, jury trials, and punitive damages for intentional violations of Title VII. Compensatory damages may be awarded for harms such as humiliation, pain and suffering, psychological and physical abuse, medical expenses, and other relevant out-of-pocket expenses. Punitive damages may be awarded if the defendant engaged in the unlawful practice with malice, or with reckless or callous indifference to the federally pro-

269. Id.
271. Id.
272. Id.
274. Id.
275. See H.R. 1, supra note 1, § 106, 137 CONG. REC. at H3924.
Compromise of Civil Rights

tected rights of others. The amount of punitive damages, however, shall not exceed $150,000 or an amount equal to the sum of compensatory damages awarded and the equitable monetary relief, whichever is greater. Proponents of H.R. 1 believe that individuals who are subject to intentional gender or religious discrimination, for example, finally deserve the same opportunity to be made whole as those in the case of racial discrimination. Lastly, to protect the rights of all persons under the Seventh Amendment, the bill also stipulates that in cases where compensatory or punitive damages are sought under Title VII, any party may demand a trial by jury.

It is important to recognize that jury trials and damages would not be an option in disparate impact or mixed motive cases. This new remedial scheme would only be applicable in disparate treatment instances, and therefore it would not impose an unfair burden on employers since they already assume the burden in cases of intentional race discrimination. Although there is a chance that a small business employer may be held liable for a large sum of monetary damages, this possibility should not be a justification for intentional and offensive discrimination. The threat of being liable for money damages is the most effective deterrent that the system can impose in order to defeat such egregious harms. Therefore, the employer is encouraged to prevent such discriminatory behavior before it occurs. Back pay, the only monetary remedy under Title VII, is not only an ineffective deterrent, it is often times a non-existent punishment. Employees who are subject to such harassment often remain on the job, and as a result, they lose their right to any compensation.

The Administration is strongly opposed to the remedial scheme set forth in the congressional bill. The Administration’s bill amends Title VII to codify a cause of action for workplace harassment on the basis of race, sex, color, religion, sex, or national origin as does H.R. 1; however, the bill requires that an employee must first attempt to resolve the alleged harassment through an employer inter-

277. H.R. 1, supra note 1, § 106(B), 137 CONG. REC. at H3924.
278. Id. at § 106(2)(A), (B).
280. See H.R. 1, supra note 1, § 106(B), 137 CONG. REC. at H3924.
281. Id.
282. See Riverside v. Rivera, 477 U.S. 561, 575 (1986) (stating that “the damages a plaintiff recovers contribute significantly to the deterrence of civil rights violations in the future”).
284. See supra at notes 268-274 and accompanying text.
nal mechanism which is designed to effectively address such problems within 90 days. As the bill allows for the recovery of equitable relief, although the maximum that can be awarded is $150,000. As an alternative a plaintiff can also choose to seek prompt preliminary injunctive relief from the court in order to stop the demoralizing activity. H.R. 1375 does not expressly provide for jury trials; however, in the unlikely event that a court requires a jury trial on the issue of liability, the judge will determine the amount of monetary damages.

The Administration has set forth several reasons why the congressional expansion of Title VII remedies is neither justifiable nor prudent. First, the Administration believes that the $150,000 cap that is placed on punitive damages is misleading because that cap can be inflated if the amount of compensatory damages awarded, including pain and suffering plus equitable relief (back pay), is greater than $150,000. Therefore, the cap would act as a floor rather than a ceiling, and an employer could be held liable for hundreds of thousands or even millions of dollars. The threat of enormous liability will prompt employers to "correct" any imbalances in the workplace by hiring and promoting by the numbers rather than by individual merit. Second, the Administration argues that "Title VII will be transformed from a statute rightfully oriented to the quick resolution of disputes and prompt reinstatement of the employee to his or her proper position—with quick economic relief for lost wages—to a litigation generating machine which will only benefit lawyers. . . ." Title VII, the proponents of H.R. 1375 argue, was enacted for the goals of ending the discrimination, resolving the underlying dispute through efforts of conciliation with the assistance of the EEOC, repairing the employment relationship, reinstating the employee into his or her rightful position, and providing for equitable remedies, including lost wages, lost benefits, and attorneys fees. The Administration believes that these remedies provide adequate deterrence, and there is no need to expand Title VII for the purpose of punishing the employer through tort-like remedies of

285. See H.R. 1375, supra note 1, § 8(3), 137 Cong. Rec. at H1663.
286. Id. at § 8(m)(1).
287. Id. at § 8(i).
288. Id. at § 8(m)(2).
289. See 137 Cong. Rec. at H3944.
290. See supra at note 38.
292. Id. at 144.
compensatory and punitive damages. And third, the Administration argues that 42 U.S.C. Section 1981, which provides for compensatory and punitive damages, is a "broad civil rights statute" passed by Congress shortly after the Civil War to prevent racial discrimination in the making and enforcement of contracts in a wide variety of situations. Opponents of H.R. 1 clearly maintain that section 1981 was not and is not intended to be an employment discrimination statute.

Indeed, it was not until the early 1970's, a hundred years after its enactment, that the courts judicially decided that the law even applied to private-sector employment discrimination. The law's proper applicability to employment discrimination has, thus, never been thoroughly considered by Congress. Indeed, if the cry of "parity" is to be the standard before which all other arguments must fall, then one might ask the proponents of H.R. 1 why section 1981 should necessarily be the standard by which "proper" remedies are measured.

VIII. Conclusion

The Civil Rights Act of 1991 is sorely needed to remedy the numerous and inconsistent judicial interpretations of employment discrimination law. Moreover, victims of intentional and demoralizing employment discrimination deserve a remedial scheme under Title VII which provides adequate compensation for their injuries. Whether the inconsistencies will be decided in favor of the business community or in favor of the individual is the pressing issue surrounding the debate over this legislation. Without question, a suita-

293. Id.
294. See supra at note 239.
295. "No existing labor law statute provides for punitive and compensatory damages. Most are limited to, as in Title VII, injunctive relief and lost pay and benefits. . . ." Id. at 146.
297. H.R. REP. No. 40, 102d Cong., 1st Sess., pt. 1, at 146-47(1991). In response to the opponents of H.R. 1, it should be noted that when 42 U.S.C. § 1981 was enacted over 100 years ago, Congress did not anticipate, let alone consider, section 1981 as a tool to gain access into private country clubs; however, the statute has been used for this and many other unanticipated purposes which were not considered at the time of its codification. See supra note 137. The statute does not provide an all-inclusive list of instances in which its protections may be invoked; therefore, there is no justifiable reason why the statute should not be used in the employment discrimination context. Title VII had been in effect for only 10 years at the time of the Supreme Court's decision in Johnson. The Court realized that Title VII does not always provide an adequate remedy for victims of discrimination.
ble compromise must be reached in order to combat the inequities of the current statutory and judicial framework. Compromise, however, when utilized in the political and economic arena is often an ineffective solution. Furthermore, the use of compromise in the context of civil rights legislation is often an unsettling notion. It is frightening to the individual who seeks protection, and it is disturbing to the business community which desires the freedom to run its operations as it deems efficient and profitable. However, in this case, compromise is clearly the only viable alternative. Neither bill in its current form is acceptable to either polarized group. More importantly, neither bill in its current form will be embraced by both the employees and employers. One of these groups will suffer if either proposal is codified. Therefore, it is important to understand each party's viewpoint, in order to appreciate their mutual concessions.

The formation of a fair and effective compromise bill will not be an easy task. However, the consequences of not having new civil rights legislation will be far more damaging than the effects of reaching a middle ground between the two factions. Both Congress and the Administration should take steps toward agreement; however, each must be willing to recognize the merit behind the other's arguments. It is vital that civil rights laws adequately protect individuals from discriminatory employment practices on the basis of race, color, gender, religion, or national origin. Yet, of equal importance, is the right of the business community to freely engage in employment decision-making processes without being constantly threatened by the prospect of long and prohibitively expensive litigation.

Caryn Leslie Lilling