Do as We Say or Do as We Do?: How the Supreme Court Law Clerk Controversy Reveals a Lack of Accountability at the High Court

Robert M. Agostisi
Brian P. Corrigan

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NOTES

DO AS WE SAY OR DO AS WE DO?: HOW THE SUPREME COURT LAW CLERK CONTROVERSY REVEALS A LACK OF ACCOUNTABILITY AT THE HIGH COURT

I. INTRODUCTION

For the latter part of the last century, Americans enjoyed the protection of numerous federal laws against employment discrimination. This protection began as a spartan set of laws and, over time, has developed into a significant body of law affording employees protection against nearly all recognizable forms of discrimination. At present, there are eleven primary federal labor laws safeguarding the American employee's right to be free of discrimination in obtaining employment, during employment, and in termination of employment. Arguably, the cornerstone of this legislation is Title VII of the Civil Rights Act of 1964 ("Title VII" or "Act").

Until 1995, these laws did not apply to any employees of the three branches of the United States government. The Legislature was immune from the law it enacted; the Executive Office was free from the provisions of the law it enforced; yet, the Judiciary remains partially exempt from the laws it serves to interpret. This unique privilege of the Supreme Court will be explored in detail herein.

This Note will begin by briefly examining the development of Title VII and its associated provisions. Next, the extension of this law to the

3. Likewise, this was the state of affairs until the Presidential and Executive Office Act was enacted. See Presidential and Executive Office Act, 3 U.S.C. §§ 401-471 (1994 and Supp. II 1996).
legislative and executive branches will be studied. The focus of this
Note, a call for the application of Title VII to the judicial branch, will
follow. Specifically, we will scrutinize the United States Supreme Court
Justices’ hiring practices of law clerks against the backdrop of Title VII.
A discussion about the current attempts to extend Title VII to the Court
will follow. The most prominent movement in this area has been House
Resolution 1048, submitted in the 106th Congress. However, as written,
this bill is an insufficient remedy. Finally, the Note will conclude with
suggestions as to how this controversial problem may be rectified while
keeping within the bounds of the Constitution, the terms and intent of
Title VII, and fundamental notions of justice and equality.

This Note is not meant and should not be taken as an endorsement
of affirmative action. Nor should it be viewed as a critique of the same.
Simply put, this Note has nothing to do with affirmative action.

The purpose of this Note is to demonstrate how a loophole in Title
VII allows federal jurists, Supreme Court Justices in particular, to avoid
specific laws that the other two branches of the federal government, as
well as the entire private sector, must follow. Proponents of affirmative
action can appreciate this effort to illustrate the importance of injecting
minority input and perspective into a small group comprised mostly of
young, white male lawyers who occupy a highly influential position in
our government. Opponents of affirmative action may also appreciate
bringing the Justices within the purview of Title VII, since it just may
provide them with a new perspective when they create and review case
law on the topic. In other words, perhaps forcing the Justices to live by
the same laws they interpret for the rest of us will provide them with a
better understanding of the burdens placed on private employers by the
Act. In any event, the authors view this Note as a bi-partisan statement
regarding governmental accountability, and nothing more.

II. TITLE VII AND SUBSEQUENT LEGISLATION

Employees first obtained a private cause of action against
employers for employment-based discrimination when Congress passed
Title VII. The Act is designed to ensure equal employment opportunities
by proscribing those employment practices which discriminate on the
basis of “race, color, religion, sex, or national origin.” Specifically, its
goal is to “remove barriers that have operated in the past to favor an

identifiable group of white employees over other employees. Title VII prohibits not only those employment practices that overtly discriminate, but also those which tend to have a discriminatory effect. To this end, even those practices which are not intended to promulgate any form of discrimination may, nonetheless, be prohibited if they “operate invidiously to discriminate.”

Regrettably, Title VII was not without its shortcomings. Originally, the Act did not extend coverage to any federal, state, or local government employees. In 1972, Congress took its first step toward making governmental employers accountable for employment discrimination by enacting the Equal Employment Opportunity Act (“EEOA”). The EEOA amended Title VII and expanded the Act’s coverage to give certain federal employees the same protections against employment discrimination as private-sector employees. “A principal goal of the amending legislation... was to eradicate ‘entrenched discrimination in the Federal Service.’” Despite the fact that federal employment discrimination was already prohibited by law, Congress enacted the EEOA due to mounting criticism of the Civil Service Commission’s complaint procedure, and the general inability of federal

7. See id. at 431. The Griggs Court held that employment practices which are “neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.” Id. at 430.
8. Id. at 431.
9. See H.R. REP. NO. 92-238, at 3 (1971) (“Despite the commitment of Congress to the goal of equal employment opportunity for all our citizens, the machinery created by the Civil Rights Act of 1964 is not adequate.”). The House Report stated that even though there had been moderate improvements made in minority hiring since 1964, “minority groups are not obtaining their rightful place in our society.” Id. at 4.
12. See 42 U.S.C. § 2000e-16(a). This section provides in part:
   All personnel actions affecting employees or applicants for employment... in executive agencies as defined in section 105 of title 5... and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service... shall be made free from any discrimination based on race, color, religion, sex, or national origin.
14. See Brown, 425 U.S. at 825. The Court noted that “federal employment discrimination clearly violated both the Constitution and statutory law...” Id. (citations omitted).
15. Before the 1972 amendments to Title VII, discrimination charges “were handled parochially within each federal agency.” Id. Even if outside examiners were brought in to conduct independent examinations, their findings were merely “recommendations that the agency was free
employees to access the courts and obtain judicial relief. Consequently, a procedure was established for federal employees to bring employment discrimination claims. The authority to hear and investigate such claims is vested in the Equal Employment Opportunity Commission ("EEOC" or "Commission"). Previously, the EEOC's main function under Title VII was conciliatory in nature. The EEOA:

> remedied the failure to include effective enforcement powers in Title VII by... empower[ing] the Commission, after it has exhausted the procedures for achieving voluntary compliance, to issue complaints and hold hearings, to issue cease and desist orders against discriminatory practices, and to seek enforcement of its orders in Federal Courts.

In section 2000e-16(c), the EEOA gave aggrieved federal employees the opportunity to report discriminatory action and to file private suits in federal district court after exhausting administrative remedies. This marked the first time that the federal government...
waived its sovereign immunity with regard to employment discrimination claims. The EEOA also demonstrated that “Congress clearly intended to give public employees the same substantive rights and remedies that had previously been provided for employees in the private sector . . . .”

When Congress amended Title VII in the EEOA, it intended to rectify the “emphasis on voluntariness ... [which had] proven to be most detrimental to the successful operation of Title VII.” When Title VII was originally passed:

It was thought that a scheme which stressed conciliation rather than compulsory processes would be more appropriate for the resolution of this essentially “human” problem. Litigation, it was thought, would be necessary only on an occasional basis in the event of determined recalcitrance. Experience, however, has shown this to be an oversimplified expectation, incorrect in its conclusions.

Congressional skepticism of “voluntary” and “parochial” methods of eliminating employment discrimination led to the EEOA’s passage in 1972. Congress clearly espoused the view that any system of self-governance in the area of employment discrimination was unacceptable, since it did nothing to remedy the “systems and effects” that generally characterized the problem. Consequently, Congress authorized the EEOC to enforce its findings in federal court. To this end, the Act served to create a level of accountability that did not previously exist for both private and public sector employers alike.

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Rules of Civil Procedure, the Court stated “the EEOC need look no further than § 706 [of Title VII] for its authority to bring suit in its own name for the purpose ... of securing relief for a group of aggrieved individuals.”

22. See Brown, 425 U.S. at 827 (“In many cases, the [aggrieved] employee must overcome a U.S. Government defense of sovereign immunity ...”). The Brown case also quotes a statement made during the EEOA’s floor debate by Senator Cranston, co-author of the EEOA: “‘[f]or the first time, [the bill would] permit Federal employees to sue the Federal Government in discrimination cases.’” Id. at 828.


25. Id. at 8.

26. See id. at 8-9; see also Brown, 425 U.S. at 825 (noting that a hearing examiner “had no authority to conduct an independent examination, and his conclusions and findings were in the nature of recommendations that [a government agency] was free to accept or reject”) (citation omitted).

27. See H.R. REP. NO. 92-238, at 8.

28. See id. at 5.
A. The Congressional Accountability Act of 1995

"[Congress] can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together." 29 Although James Madison penned these words over two hundred years ago, 30 Congress seemingly did not appreciate this fundamental notion until recently. In 1995, Congress that recognized it should not enjoy immunity from the laws it enacts and subsequently passed the Congressional Accountability Act ("CAA"). 31 Under the CAA, eleven workplace laws were made applicable to Congress. 32

The CAA, the first law passed by the 104th Congress in January 1995, was seen as a major triumph in the Republican’s newly introduced Contract with America. 33 The CAA ended a one-hundred year Congressional custom of enacting laws which created rights against both private and public employers, while simultaneously excluding their application towards Congress. 34 A movement to end this practice began in the early 1970s with the issuance of a Report by the Joint Committee on Congressional Operations regarding the constitutional immunity of congressional members. 35 The movement continued to produce substantial discourse, but no significant action was taken. 36

30. See id.
32. See 2 U.S.C. § 1302. The eleven laws are: The Fair Labor Standards Act of 1938, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, the Family Medical and Leave Act of 1993, the Occupational Safety and Health Act of 1970, Chapter 71 (law pertaining to federal service labor-management relations) of Title 5, Employee Polygraph Protection Act of 1988, Worker Adjustment and Retraining Notification Act, the Rehabilitation Act of 1973, Chapter 43 (pertaining to veterans’ employment and re-employment) of Title 38. See id.
33. See James J. Brudney, Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees, 36 HARV. J. ON LEGIS. 1, 1 (1999).
On the first day of the 104th Congress, the new Republican majority will immediately pass the following major reforms, aimed at restoring the faith and trust of the American people in their government: First, require all laws that apply to the rest of the country also apply equally to the Congress.
34. See Brudney, supra note 33, at 5.
1. Legislative History of the “CAA”

Despite the fact that the problems the CAA sought to redress were identified many years earlier, the CAA itself has relatively little legislative history and “was the fastest that a new Congress [had] sent legislation to the White House since March 1933.” Even though there is little legislative history, the Act traveled a long road in Congress. Senator Charles Grassley (R-Iowa), the chief proponent of the CAA, first sought to bind Congress under the same laws it applies to businesses through the Americans with Disabilities Act of 1990 (“ADA”), but found little success.

The following year, Senator Grassley sought congressional inclusion under the Civil Rights Act of 1990. On the Senate floor, Grassley posed the following question to his peers: “If civil rights bills are alleged to be crucial in the fight against discrimination, why is Congress not joining in that fight other than in the capacity of saying it is good for everyone else, but it is not good for us?” This inquiry yielded a fate similar to Grassley’s previous attempt.

Grassley’s next opportunity to apply anti-discrimination law to Congress arose during the debates on the Family and Medical Leave Act. However, after being assured consideration during the upcoming Civil Rights Act of 1991 debate, he withdrew his proposition. Senator Grassley’s efforts to gain support for his amendment were well-timed because of the check bouncing scandal in the House of Representatives and the on-going Clarence Thomas/Anita Hill hearings. The public gradually began to realize that if Hill had been a Congressional

40. See id. at 37-38 (explaining the problems that Sen. Grassley encountered).
41. See id.
42. 136 CONG. REC. S9369 (daily ed. July 10, 1990) (Sen. Orrin Hatch (R-Utah) (questioning the morality of the Senate acting as if it is above the law); 125 CONG. REC. 10,591 (daily ed. May 10, 1979) (Sen. John Glenn (D-Ohio) (referring to Congress as “the last plantation”).
43. See id. at 37-38 (observing that his amendment was tabled by a vote of 63-26).
44. See id.
45. See id.
46. See id. at 38-39.
employee, she would not have been afforded the same legal remedies as a private sector employee. Thus, the belief that Congress was capable of meaningful self-regulation was cast into doubt. Through compromise, and with the support of various interest groups, newspapers, and President George Bush, Senator Grassley eventually witnessed the application of laws, such as the Civil Rights Act of 1964 and the ADA to Congress.

Following this accomplishment, Congress, in 1992, formed the Joint Committee on the Organization of Congress to address the issue of the legislative branch’s compliance with federal laws. This Senate Committee deferred to the Report of the Senate Task Force on Congressional Coverage, whose recommendations were “weaker than current Senate rules[,]” according to Senator Grassley. Subsequently, on May 4, 1994, Senator Joseph Lieberman (D-Conn.) and a number of other co-sponsors introduced the CAA to the Senate. In the interim, the House passed similar legislation by a vote of 427-4.

The diligent and persistent efforts of the proponents of the CAA kept the legislation “in the public eye, especially by making it an election issue.” This ensured its priority in the following term. The bill, absent hearings and committee votes, was adopted on January 4, 1995 by a 429-0 vote. In turn, the Senate passed the bill by a 98-1 vote. On January 23, 1995, President Clinton signed the bill into law.

47. See id. at 39.
49. See id. at 38 (recognizing that supporting groups included the National Federation of Independent Businesses, the National Taxpayers Union, the U.S. Business and Industrial Council, and the Citizens for Congressional Reform).
51. See Bush Reflects on Congress, WALL ST. J., Oct. 28, 1991, at A16. The President pushed Congress to “submit to the laws it imposes on others . . . and do so by year’s end.” Id. In addition, he cautioned that the branch’s practices “create[d] the appearance and reality of a privileged class of rulers who stand above the law.” Id.
52. See Grassley, supra note 39, at 39-40.
53. See id. at 41; see also H.R. Con. Res. 192, 102d Cong. (1991) (establishing the Committee).
54. Grassley, supra note 39, at 42.
55. See id. at 43; see also S. 2071, 103d Cong. (1994) (enacted).
57. Grassley, supra note 39, at 44.
58. See id.
B. Presidential and Executive Office Act

After extending coverage of federal labor laws to Congress, the next logical step to ensure that the federal government lives by the same laws as private employers, was to extend their application to the two remaining branches. Towards that end, the eleven anti-discrimination labor laws incorporated into the CAA were extended to cover "(A) each office, agency, or other component of the Executive Office of the President; (B) the Executive Residence at the White House; and (C) the official residence (temporary or otherwise) of the Vice President." At this point, the extension of these laws to the judicial branch seemed all but inevitable.

C. Where is the Judicial Accountability Act?

If Congress abides by the laws it enacts, and the Executive by the laws it enforces, then should it not follow that the United States Supreme Court act in accordance with, and under the purview of, the laws it interprets? Despite the clarity and common sense of this proposition, the Judicial Conference, a committee acting as the decision-making body and mouthpiece for the federal courts on this issue, has strongly resisted the extension of these laws to the Judiciary.

A provision of the CAA required the Judicial Conference to draft a report which included recommendations it "[had] for legislation... provid[ing]... employees of the judicial branch the rights, protections, and procedures under [labor and employment] laws, including administrative and judicial relief consistent with those protections afforded to congressional employees through the CAA. However, the Conference's Report ("Report" or "Judicial Conference Report") resisted such legislation to preserve the Judiciary's autonomous role in

61. See O'Reilly, supra note 37, at 3.
63. Id. §§ 401(a)(4)(A)-(C).
64. See Ronald D. Rotunda, Resurrecting Federalism Under The New Tenth and Fourteenth Amendments, 29 TEX. TECH. L. REV. 953, 965 (1998) ("[A]s a general policy, if we all lived under the same laws, particularly the judges, they would have a better sense of how to interpret them.").
65. See REP. OF THE PROCEEDINGS OF THE JUD. CONF. OF THE UNITED STATES (Dec. 1996) [hereinafter JUDICIAL CONFERENCE STUDY] ("[T]he Judicial Conference conclude[d] that legislation is neither necessary nor advisable in order to provide judicial branch employees with protections comparable to those provided to legislative branch employees under the CAA.").
the federal government. Leonidas Ralph Mecham, director of the Administrative Office of the United States Courts, added in defense of the Report that "Congress usually has chosen not to micro-manage or unnecessarily bureaucratize the day-to-day management of the courts, instead leaving court management to the judges."68

Is this to suggest that if judges are bound by federal legislation aimed at preventing bias and discrimination in employment, the consequences will be a runaway bureaucracy hampering the effective administration of justice? If so, then this is at odds with the position taken by the Judicial Conference just one year earlier in its "Long Range Plan for the Federal Courts"69 issued in 1995. The Report stated that "bias, in all of its forms, presents a danger to the effective administration of justice in federal courts."70

In response to the Judicial Conference's rejection of the suggestion that the Judiciary come under the same umbrella of federal labor laws as the other two branches and the private sector, Senator Grassley stated: "If followed, these recommendations would make the Judiciary the only remaining branch of the federal government that is not required to live with this country's labor laws."71 Grassley added that "this indicates that the Judiciary believes that its work is more important than the work of any other American business or branch of government."72

Chief Judge Julia Gibbons of the U.S. District Court for the Western District of Tennessee disagrees with Grassley and insists that "[t]he judicial branch is committed to providing the general protections of the CAA laws in a manner that preserves judicial independence and the decentralized administration of the federal courts."73 Senator Grassley responded by noting that "[i]f the Judiciary is truly interested in providing the protections of these labor laws... it will not object to legislation that creates an independent office that implements and

67. See JUDICIAL CONFERENCE STUDY, supra note 65, at 20 ("The judiciary's approach to the CAA reflects two complementary goals: a commitment to providing judicial branch employees with the protection of the CAA laws, coupled with the fundamental need to preserve judicial independence and the decentralized administration of the federal courts."); see also Bruce D. Brown, Judiciary Says No to Workplace Rules, LEGAL TIMES, Jan. 6, 1997, at 10.
70. Id. at 113 (quoting REP. OF THE PROCEEDINGS OF THE JUD. CONF. OF THE UNITED STATES, at 64 (Sept. 1992)).
71. Grassley, supra note 39, at 49.
72. Id.
73. Brown, supra note 67, at 10.
enforces the actual laws that apply to the rest of the country."

III. THE SITUATION TODAY

A. The Current Law

Over twenty years ago, the Judicial Conference passed a resolution requiring federal courts to adopt and implement affirmative action plans. The result was the Model Equal Employment Opportunity Plan ("Model Plan"), which articulated the Conference's policy of "providing equal employment to all persons regardless of their race, sex, color, national origin, religion, age . . . or handicap." It required each court to "promote equal employment opportunity through a program encompassing all facets of personnel management including recruitment, hiring, promotion, and advancement." In the Model Plan, law clerks are included within the scope of its coverage, as the Plan extends to "all court personnel including judges' staffs and court officers and their staffs."

Under the Model Plan, complainants must first file a written complaint stating the facts giving rise to their claim, as well as the relief they are requesting. The claim must then be filed with the court's Equal Employment Opportunity ("EEO") Coordinator within fifteen days of the alleged incident. Significantly, the EEO coordinator and the chief judge are given complete discretion to determine if and how to proceed, resolve, and remedy a complaint. Since the provisions of the complaint procedure do not speak to the available remedies, presumably the EEO coordinator and chief judge, have total discretion as to the appropriate

74. Id.
76. See id.
77. Id. (quoting REP. OF THE PROCEEDINGS OF THE JUD. CONF. OF THE UNITED STATES; JUD. EQUAL EMPLOYMENT OPPORTUNITY PROGRAM—MODEL EQUAL EMPLOYMENT OPPORTUNITY PLAN B-5 (1980, revised 1986)).
78. Id. (quoting REP. OF THE PROCEEDINGS OF THE JUD. CONF. OF THE UNITED STATES; JUD. EQUAL EMPLOYMENT OPPORTUNITY PROGRAM—MODEL EQUAL EMPLOYMENT OPPORTUNITY PLAN B-5 (1980, revised 1986)).
80. See Rhinehart, supra note 75, at 598-99.
81. See id.
82. See id. at 599.
Compared to the length of time afforded to employees under Title VII to file a complaint, the Model Plan's fifteen-day deadline seems excessively short. Considering the reservations one may have about filing a complaint against a federal judge, the fifteen-day statute of limitations is only one example of the inadequacy of the present internal complaint system.

Employees of the Judiciary seeking relief in employment discrimination matters must rely solely upon this mechanism. There is no access to the federal courts via Title VII or other anti-discriminatory federal legislation. However, when employees possess the option, and opportunity, to sue under federal labor laws in federal court, internal complaint mechanisms are desirable from an employee's standpoint. To the extent that internal grievance procedures work it is because you have the option of suing in federal court.... If you don't have that, there is no accountability.

B. The Current Controversy

In 1882, Justice Horace Gray became the first Supreme Court Justice to hire a law clerk. Justice Gray was also known to refer to his clerks as "his boys." Perhaps this represents the true starting point of a controversy which has only began to take shape recently. In March 1998, USA Today published the first demographic account of clerks hired by United States Supreme Court Justices throughout their respective terms. The results showed that of the 394 clerks hired by the current Justices, merely 1.8% were African-American, 1% were Hispanic, 4.5% were Asian, 24.3% were women, and no Native

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83. See id.
84. 42 U.S.C. § 2000e-5(e)(1) (stating that the length of time to file a complaint is 180 days).
85. See Rhinehart, supra note 75, at 599.
86. See Brown, supra note 67, at 12 (discussing a plaintiffs attorney's opinion that "the inability of judicial employees to bring cases in federal court under Title VII... diminishes the effectiveness of the system").
87. Id. (quoting Lynne Bernabei, a partner at Bernabei & Katz in Washington, D.C.).
88. See Mark R. Brown, Gender Discrimination in the Supreme Court's Clerkship Selection Process, 75 Or. L. Rev. 359, 361 n.12 (1996).
American had ever been hired as a Supreme Court clerk. According to a USA Today article, Chief Justice William Rehnquist, and Justices Scalia, Kennedy, and Souter have never hired an African-American clerk. The article further revealed that Justice Scalia had the poorest record of minority-hiring among Justices, having never hired a minority law clerk.

The subsequent series of articles appearing in USA Today describing the Court's hiring practices unleashed a wave of national controversy. However, undaunted by mounting criticism, the Justices did little to change their hiring practices during the next term. Civil rights groups and leaders, bar associations, and members of Congress have since urged the Justices to meet with them to discuss hiring policies, but to no avail. Most of these efforts have focused on the Chief Justice, but he has opted to forego a meeting with any of these groups.

In October 1998, Representative Jesse Jackson Jr. (D-Ill.) introduced House Resolution 591, a measure designed to "express[ ] the sense of the House of Representatives that the Supreme Court of the
United States should improve its employment practices with regard to hiring more qualified minority applicants to serve as clerks to the Justices. The proposed resolution placed emphasis on the Court's "shameful record" of hiring minority and women clerks, and referenced the latest study. Further, the resolution recommended that the Supreme Court implement a recruiting procedure to ensure diversity among law clerks. Proponents of the resolution in Congress have promised to "raise this issue as a matter of national concern until [they] can see that the numbers have changed." However, the Court has maintained that clerk selection is merely a reflection of the available "pool" of top law school graduates, rather than of the personal preferences of the individual Justice. The next section explores this "pool" of graduates, the arguments surrounding its use, and the role of law clerks in the modern Supreme Court.

1. The "Old-Boy Network" and the Modern Clerk

There are two arguments proffered by the Supreme Court with respect to its hiring practices. The first places blame for a poor hiring record on the non-diversified labor pool that produces most Supreme Court law clerks (dubbed the "old-boy network" by critics). The second argument contemplates some of the constitutional implications surrounding the use of corrective legislation. Currently, the system of clerk selection favors the upper-echelon of law schools. It has been reported that forty percent of the clerks are from only Harvard and Yale. Moreover, a system exists by which

99. Id. at 2.
100. See id. The study, performed after Mauro's March 1998 article, found that of the 428 law clerks hired by the current Justices, "(1) only 1.6 percent were African-American; (2) only 1.2 percent were Hispanic-American; (3) 4.2 percent were Asian-American; (4) none were Native-American; and (5) only 25.2 percent were women." Id.
101. See id. at 2-3.
103. See id. ("In explaining the low number of minorities hired as Supreme Court law clerks, Chief Justice William Rehnquist blamed the 'pool' of top law school graduates the court [sic] draws from.").
105. See discussion infra Section III.B.2.
106. See Mauro, supra note 92, at 12A.
107. See Mauro, Rehnquist, supra note 102, at 4A. Further, the vast majority of students come from one of five schools: Harvard, Yale, Columbia, Stanford, and the University of Chicago. See
clerks are "fed" from lower federal court judges to Supreme Court Justices. 108 "Supreme Court clerks tend to have held clerkships with one of a dozen or so federal appellate judges known as the High Court's "feeder" judges." 109 Some Justices are quick to pass blame onto the "feeders" for the lack of diversity existing among the Supreme Court clerks, 110 and point a finger at law schools themselves for providing the limited pool from which to select qualified minority and women candidates. 111 Apparently though, this has not stopped the Justices from recruiting from these schools, which, in many cases, happen to be their alma maters. 112 Supreme Court Justices are also known to favor specific geographic regions when making their hiring decisions. 113

Critics of the system maintain that, cumulatively, the sources from which Justices recruit clerks create a "perpetual color line" that is not easily dismantled. 114 Others believe that the type of discrimination occurring in the Justices' chambers is "institutional" and that the hiring system only perpetuates its existence. 115 Currently, minorities make up approximately 20% of law school students, and women make up approximately 49.4% of the Fall 2000 first year class. 116 Critics suggest that these statistics reflect the true "labor pool" from which Justices may hire, and that the number of clerks should generally coincide with

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Mauro, Corps, supra note 92, at 12A.
109. Id. at 36. Some of the more conspicuous "feeders" include Judge Laurence Silberman (D.C. Cir.), Chief Judge Richard Posner (7th Cir.), and Judge Patricia Wald (D.C. Cir.). See id.
110. See Tony Mauro, Thomas Said to be Frustrated by Lack of Minority Clerks, USA TODAY, Aug. 5, 1998, at 1A. Justice Thomas indicated to Randy Jones, President of the National Bar Association, that he placed most of the responsibility for the low number of minority Supreme Court clerks with the federal appeals court judges who 'feed' their law clerks to the high court. See id.
111. See Editorial, Supreme Court, supra note 96, at 14A ("[Chief Justice] Rehnquist . . . says that as the demographics change, so will the number of minorities selected for clerkships. In other words, a lack of diversity in the labor pool defends a lack of diversity in employment.").
112. See Norris, supra note 104, at 774.
113. See id. at 774-75 (providing a list of Justices with the law schools and geographic regions they predominantly hired from).
114. See Editorial, Supreme Court, supra note 96, at 14A.
115. The term "institutional" refers to an employment practice which is deeply embedded within the construct of a particular institution. See Jane Byeff Korn, Institutional Sexism: Responsibility and Intent, 4 TEX. J. WOMEN & L. 83, 101-02 (1995) (explaining that discrimination can be perceived as an institutional phenomena, but such a perception is "a convenient aid to the denial process"). "It puts the burden on the institution and turns attention away from the individuals who make up the institution." Id. at 102.
Some critics have observed that if Justices O'Connor and Ginsburg are capable of finding qualified women to clerk for them, despite under-representation in the "elite" law schools, then other Justices should have no problem finding qualified minorities. The Supreme Court's justifications might not suffice if it were subject to the federal anti-employment discrimination laws. Indeed, there is a possibility that if the Supreme Court were a private employer, it may be subject to a "disparate impact" discrimination claim.

In response to mounting criticism of their employment practices, some Justices have tried to publicly downplay the importance and impact of their clerks. Justice Stevens explained in late 1997 that "[t]he Justices work very hard...[t]he idea that the clerks do all the work is nutty." In accordance with this sentiment, Justice Scalia called the proposition "laughable." However, even Justice Stevens admits that clerks have assumed a much greater role in today's Supreme Court jurisprudence. It is ironic that Justice Scalia would choose the word "laughable," as he once noted that "[e]ach one of those clerks knows the particular case four times better than I do." Moreover, Justice Scalia was the first Justice in Supreme Court history to admit complete reliance on a law clerk when drafting an opinion.

While Supreme Court Justices undoubtedly control and direct the "design" of their opinions, clerks are often the ones who first put ink to

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117. See Editorial, Supreme Court, supra note 96, at 14A ("[B]ecause of the nature of the [hiring] network, it overwhelmingly favors whites, which this year constitute 97% of the Supreme Court's clerks, although minorities constitute almost 20% of 1997's law grads.").

118. See Gatland, supra note 108, at 36. Mark Brown, a law professor at Stetson University College of Law, explained, "I look at [Justices Ginsburg and O'Connor], who are pretty much models [for hiring female clerks]. If they can hire women, what about the other ones? USA Today found that 40 percent of Ginsburg's and 43 percent of O'Connor's clerks were women." Id.

119. See discussion infra Section IV.B.2.

120. Mauro, Justices, supra note 90, at 1A.

121. Justice Antonin Scalia, Address at Hofstra University School of Law (Oct. 12, 1998). Justice Scalia was heard to make this comment in response to a question posed by a student during a speech delivered to entering first year law students. Both authors were in attendance.

122. See Mauro, Justices, supra note 90, at 1A. Justice Stevens acknowledged this when he stated that "I had a lot less responsibility [as a Supreme Court law clerk] than some of the clerks now. They are much more involved in the entire process now." Id.

123. See Norris, supra note 104, at 770-71 (footnote omitted).

paper. In some cases, Justices have been known to grant free reign to their clerks on first drafts. This is no small detail, as lower courts nationwide scrutinize every word of a Supreme Court opinion. 

However, the most impressive and important power of the clerks lies in their ability to determine which cases come before the High Court. The advent of the “cert pool,” a device by which a single law clerk reviews and summarizes incoming petitions for a pool of Justices and recommends whether certiorari should be granted, endows clerks with an “awesome responsibility.” Some commentators believe that the “cert pool” is the primary culprit behind a prejudice in favor of non-commercial cases, since commercial cases may seem less exciting to clerks. Former Independent Counsel Kenneth Starr, once a clerk to Chief Justice Burger, has noted that “[s]electing 100 or so cases from the pool of 6,000 petitions is just too important to invest in very smart but brand-new lawyers.” Other renowned judges have noted that “[t]he difference between having clerks that are merely good and ones that are awesome can be the difference between a bad year and a wonderful one.”

Whether the power of clerks in today’s Supreme Court is substantial, fictional, or merely exaggerated, there is at least a strong perception of power that pervades. In 1998, Congressman Meeks (D-N.Y.) (on behalf of himself, Congressman Conyers (D-Ill.), and Congressman Jackson) submitted House Resolution 591 to the United States House of Representatives. The resolution focused solely on the

125. Mauro, Justices, supra note 90, at 1A.
126. See id. Even though Justices Breyer, Souter, Scalia and Stevens are reportedly more involved with the actual writing of first drafts, “[Chief Justice] Rehnquist and [Justices] O’Connor, Kennedy, Ruth Bader Ginsburg and Clarence Thomas are said to give their clerks free reign with first drafts fairly often.” Id.
127. See id. Michael Dorf, a law professor at Columbia University and former clerk for Justice Kennedy, explained that “[i]n the broad sweep of the law, the effect of clerks is negligible, but it is true that, sometimes, you will see lower courts deciding a case [based] on their interpretation of a phrase written by a clerk.” Id.
128. See id. (describing how this began in 1972, when the Court was faced with a growing caseload).
129. See id. (noting that some clerks “describe screening last-minute death row appeals as the most awesome responsibility they have”).
130. See Mauro, Justices, supra note 90, at 1A.
131. Id.
132. Norris, supra note 104, at 766 n.4 (quoting Alex Kozinski, Confessions of a Bad Apple, 100 YALE L.J. 1707, 1708 (1991)).
133. See, e.g., Mauro, Justices, supra note 90, at 1A (“They are the most powerful, least known young lawyers in America. They are the law clerks of the Supreme Court.”).
budding controversy surrounding the Justices' hiring practices.Crafted mainly to express the House's sense of dissatisfaction with the Court's record of minority and female hiring among clerks, the resolution called on the Justices to improve their employment practices. In support of its argument, the resolution cited the most recent statistical data. It also cataloged different issues arising before the Court which minorities have a vested interest in, such as: workplace discrimination, death penalty appeals, police brutality, and affirmative action. Despite its status as a mere "resolution," House Resolution 591 was nonetheless groundbreaking in that it was the first direct criticism, by any branch of government, of the Supreme Court's hiring practices. There would be more significant criticism to follow.

2. The Constitutionality of Corrective Legislation

As previously stated, the Congressional Accountability Act includes a provision whereby the Judicial Conference of the United States was directed to prepare and submit a report to Congress concerning the applicability of federal labor laws to the federal Judiciary. Although the purpose of this provision was to permit the Judiciary to determine how it could best be covered, the Report instead recommended that the Judiciary remain outside the scope of the federal labor laws. Citing the "fundamental need to preserve judicial independence and the decentralized administration of the federal courts," the Report concluded that best way to adhere to the principles and spirit of the labor laws, and the CAA, was through self-regulation.

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135. See id.
136. See id. It was resolved that: "(1) the United States Supreme Court should move in an expeditious manner to improve its employment practices with regard to hiring more qualified minority applicants to serve as clerks; and (2) the United States Supreme Court should implement recruiting procedures to ensure that diversity is emphasized and not undermined." Id.
137. See id.
138. See id.
139. Although the CAA contemplated a method by which the country's labor and employment laws could be applied to the judicial branch, there was no direct admonishment of the current Court's employment practices. See 2 U.S.C. §§ 1301-1438.
141. See JUDICIAL CONFERENCE STUDY, supra note 65. In response to the Conference's recommendations, Senator Grassley remarked: "Not surprisingly, I am skeptical of the study's findings." See Grassley, supra note 39, at 49.
142. JUDICIAL CONFERENCE STUDY, supra note 65, at 20.
143. See id. at 15 ("The primary goals of the [J]udiciary in addressing potential changes to current policies are to retain enforcement within the judicial branch structures that have been
However, upon examination of the Supreme Court’s own words, it does not appear that an encroachment upon “judicial independence” will occur if the courts fall under a legislatively-devised regulatory scheme. Moreover, the Report’s concern over “separation of powers” problems obscures the true issue: judicial immunity and its limits.

The Judicial Conference’s Report claims that the application of the federal labor laws to the Judiciary would be more than just an imposition. It concludes that the independent judicial decision-making function of Article II courts would be severely impaired if the very laws which judges interpret apply to themselves as employers. To this end, the Report states that “[a]lthough independence in administrative matters cannot be absolute, the judicial branch must have control over its employee and workplace management in order to ensure both the independence, and the appearance of independence, of its decisions.”

Furthermore, the Judicial Conference notes that “[j]udicial autonomy in hiring law clerks and other judicial staff . . . are the types of administrative and managerial tasks that contribute in a significant way to the preservation of an independent judiciary.” Unfortunately, the report does not explain how. Presumably, this has something to do with a Supreme Court case which illustrated the difference between the judicial and administrative functions of judges.

In Forrester v. White, the Supreme Court broached the issue of absolute judicial immunity to civil suits. In this case, a federal judge was being sued for employment discrimination. The Court explained the significance of judicial immunity by noting that “[i]f judges were personally liable for erroneous decisions, the resulting avalanche of suits, most of them frivolous but vexatious, would provide powerful

144. See id. at 20.
145. See id. at 15.
146. See id. at 3-4 (“The judicial branch is a separate and co-equal branch of government under the United States Constitution. It must retain autonomy with respect to internal administration, including the ability to address the personnel, workplace safety, and accessibility issues raised in the CAA laws.”).
147. JUDICIAL CONFERENCE STUDY, supra note 65, at 4.
148. Id. at 4.
150. See id. at 219. The case centered around a former probation officer (Forrester) who alleged that she was demoted and dismissed by her employer (Judge Howard Lee White, of the Seventh Judicial Circuit of Illinois and presiding Judge of the Circuit Court of Jersey County in Illinois) because of her sex, in violation of her civil rights under 42 U.S.C. § 1983 and the Equal Protection Clause of the 14th Amendment. See id. at 221-22.
151. See id.
incentives for judges to avoid rendering decisions likely to provoke such suits.’ However, the Court held that judges were not absolutely immune from civil suits filed against them, and “limited absolute judicial immunity to those acts which are truly judicial acts and are not simply administrative acts.” Forrester reaches this conclusion by utilizing the “functional” approach to immunity questions, whereby the Court examines the “nature of the functions with which [a judge] has been lawfully entrusted,” and whether those functions are adversely affected by “exposure to particular forms of liability . . . .” The Court also determined “that Judge White was acting in an administrative capacity when he demoted and discharged [Probation Officer] Forrester.”

The implications of this are considerable, because it means that “[a] judge is not taking a judicial act when he fires his personnel. He is acting as an employer who is also a judge.” Presumably, a judge is acting as an employer when he hires personnel. This case made it clear that absolute immunity, which “is justified and defined by the functions it protects and serves, not by the person to whom it attaches[,]” was not to provide protection for judges who make employment decisions concerning their own staff. Clearly, these types of decisions are not judicial in nature or function, and judges should not be shielded from private suits when they operate invidiously to discriminate. Accordingly, it would seem as though the employee, through the EEOC, should also have the ability to file employment discrimination suits for these same acts of discrimination against judges who operate in violation of Title VII.

The Judicial Conference’s Report also argues that the hiring of law

152. Id. at 226-27.
154. Forrester, 484 U.S. at 224.
155. Id. at 229.
156. Morrison, 877 F.2d at 465 (emphasis added).
157. See Forrester, 484 U.S. at 228. “Difficulties have arisen primarily in attempting to draw the line between truly judicial acts, for which judicial immunity is appropriate, and acts that simply happen to have been done by judges.” Id. at 227.
158. Id. at 227 (emphasis in original).
159. See New Alaska Dev. Corp. v. Guetschow, 869 F.2d 1298, 1302 (9th Cir.1989). The court identified several factors to determine if an act is judicial in nature:
   (1) the precise act is a normal judicial function; (2) the events occurred in the judge’s chambers; (3) the controversy centered around a case then pending before the judge; and (4) the events at issue arose directly and immediately out of a confrontation with the judge in his or her official capacity.
   Id. at 1302.
clerks is especially important in preserving judicial autonomy.\textsuperscript{160} Perhaps this is due to the significant role law clerks serve, and the import of the administrative functions they perform, in today's Supreme Court jurisprudence. Yet, \textit{Forrester} expressly recognized that limitations on judicial immunity must be imposed, even where a particular administrative function is an integral part of our legal system.\textsuperscript{161} Therefore, it is difficult to argue that a clerk's position is so utterly crucial to the system that their hiring is actually a "judicial process."\textsuperscript{162}

Finally, the Report gives brief mention to "separation of powers concerns" and possible corrective legislation.\textsuperscript{163} Specifically, the Report maintains that the legislative branch, in forming the Office of Compliance, elected to retain enforcement authority due to such concerns, and that the judicial branch "needs internal enforcement for the same reasons."\textsuperscript{164} Despite the fact that none of these concerns were actually listed in the Report, the argument is significant nonetheless. That is because if corrective legislation were ever to be passed through Congress, the Supreme Court might formulate a separation of powers argument as its rationale for striking the law down. However, it has been noted that "the separation of powers does not require 'three airtight departments of government.'"\textsuperscript{165} The Supreme Court has explained that the "legitimate needs" of one branch of government can and should

\textsuperscript{160} \textit{See JUDICIAL CONFERENCE STUDY, supra note 65, at 4.}

\textsuperscript{161} \textit{See Forrester, 484 U.S. at 229.}

'[Judge White's] acts—like many others involved in supervising court employees and overseeing the efficient operation of a court—may have been quite important in providing the necessary conditions of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative. . . . [A] judge who hires or fires a probation officer cannot meaningfully be distinguished from a district attorney who hires and fires assistant district attorneys, or indeed from any other Executive Branch official who is responsible for making such employment decisions. \textit{Such decisions, like personnel decisions made by judges, are often crucial to the efficient operation of public institutions . . . yet no one suggests that they give rise to absolute immunity from liability in damages under § 1983.}"

\textit{Id.} (emphasis added).

\textsuperscript{162} \textit{See generally Meek v. County of Riverside, 183 F.3d 962 (9th Cir. 1999)} (holding that the firing of a court commissioner was an administrative decision). In this case, it was claimed that a court commissioner (unlike Forrester) played an "inherent role" in the judicial process, and that the decision to fire a commissioner was "inherently judicial." \textit{See id.} at 966. The Ninth Circuit rejected this analysis, noting that the appellants could "point to no case in which a court evaluated the nature of the services provided by a fired employee to determine whether the decision to terminate was judicial." \textit{Id.}

\textsuperscript{163} \textit{JUDICIAL CONFERENCE STUDY, supra note 65, at 15.}

\textsuperscript{164} \textit{Id. at 15.}

occasionally outweigh the competing interests of another "[i]n a manner that preserves the essential functions of each branch." Indeed, judges' "judicial functions" cannot be impaired unless they are acting within their official capacities as judges, and the Forrester Court made it clear that employment-based decisions are not judicial in nature. Therefore, the "essential functions" of Article III courts are not disturbed by judges' administrative decisions, and the "essential functions" of the Judiciary are clearly preserved if, and when, Congress chooses to pass legislation pertaining to those administrative decisions.

Congress has not retained complete enforcement authority over employment discrimination claims by legislative staffers. While, indisputably, the centerpiece of the CAA is the Office of Compliance, staffer still maintain the option of bringing an action in federal court. This ensures a certain measure of accountability within the Office of Compliance. However, judicial branch employees are not afforded a similar option. The procedures prescribed by the Judicial Conference for handling employment discrimination claims do not provide for an alternative venue for judicial staffers. At no point does a claim actually leave the judiciary for adjudication elsewhere. Instead, final appellate authority lies with the presiding judge in each particular district, so these judges are essentially judging their peers.

166. United States v. Nixon, 418 U.S. 683, 707 (1974). Further, "'[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.'" Id. (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952)).

167. See, e.g., Ex parte Virginia, 100 U.S. 339, 348 (1880). Here, the Court upheld an indictment against a judge for unlawfully discriminating on the basis of race in selecting trial jurors. See id. 348-49.

168. See Grassley, supra note 39, at 46.

169. See id. at 46-47. After conciliatory efforts to resolve a complaint have failed, the CAA allows congressional employees to either request an administrative proceeding, or bring a civil action. See id. at 47 ("The administrative proceeding involves the filing of a formal complaint with the Office of Compliance, an administrative hearing, and review by the Office of Compliance's Board of Directors."). Further, and more importantly, the decision made in the administrative proceeding can be appealed to the Court of Appeals for the Federal Circuit. See id.

170. See JUDICIAL CONFERENCE STUDY, supra note 65, at 6. Under the current system, an employee or job applicant initiates a complaint by filing it with the court's designated EEO Coordinator. See id. The Coordinator then investigates the complaint, and seeks an informal resolution. If such a resolution is not possible, the Coordinator then "prepares a report describing findings and recommendations, explaining how the complaint was resolved, and stating any corrective actions to be taken." Id. If the complainant is not satisfied with the EEO Coordinator's resolution, he or she can request a review by the chief judge of the particular court. The chief judge may hold a hearing on the matter, and issue a final decree. See id.

171. See id.
The Judicial Conference purports to be concerned with the "conflict of interest or appearance of a conflict of interest" that would arise if labor laws were applied to the Judiciary. Inexplicably though, the Judicial Conference does not seem concerned with potential conflicts of interest that may arise when judges, who work together, judge each other. Further, the Chief Justice of the Supreme Court heads the Judicial Conference and appoints all members of Judicial Conference Committees. Therein lies part of the problem—the current Chief Justice's hiring record of minority and women law clerks is suspect, to say the least.

If the Judiciary sincerely wishes to adhere to the spirit of the labor laws, then following the rules laid down by corrective legislation should not be problematic. Moreover, if the Judicial Conference guidelines truly provide comparable protection for employees, as claimed, then applying the country's labor laws to the judicial branch should be no great imposition.

IV. THE FIGHT TODAY

A. The Judicial Branch Employment Non-Discrimination Act of 1999

The Justices of the United States Supreme Court hired thirty-four law clerks to assist them in adjudicating the cases on the Court's docket for the 1999-2000 term. Of these clerks, two were African-American and three were of Asian decent. Remarkably, this constitutes the greatest number of minority law clerks hired in recent times by the Court. In response to the increase in these numbers, Randy Jones, former President of the National Bar Association, stated: "It's clear that our effort has had a positive effect on the hearts of [sic] minds of the Justices .... But we are far from done on this issue." Hillary
Shelton, the NAACP's Washington lobbyist agreed, "[t]here's forward movement, but we're not satisfied, by any means[]." Similarly, Representative Jackson was less than pleased with the overall number of minority applicants hired by the Supreme Court.

The over-all picture of equal opportunity at the Supreme Court is still woefully out of focus. We cannot trust the voluntary "good faith efforts" of a 'states' rights' Chief Justice who entertains other lawyers by singing Dixie. We don't want a more perfect states' rights Supreme Court. We want a Supreme Court that will interpret the law in such a way as to give us "a more perfect Union." We must institutionalize in the law the obligation of the Supreme Court to provide equal opportunity and non-discrimination for all Americans.181

These comments were delivered on the floor of the House of Representatives on October 4, 1999, the same day the Supreme Court commenced its 1999-2000 term.182 Jackson, as previously stated, played a role in bringing the controversial hiring practices of Supreme Court clerks to the attention of 105th Congress in 1998 via House Resolution 591. On March 10, 1999, the Congressman, with the support of forty fellow representatives, introduced House Resolution 1048 to the 106th Congress, which was referred to the House Judiciary Committee.183 He stated:

My legislation requires that the Supreme Court and the entire Judicial Branch of the federal government comply with the laws they currently interpret for others. With my legislation the Supreme Court can no longer merely say, "Do as I say." They will have to legally comply with, "Do as I do."184

This bill seeks to write the final chapter and close the book on this subject, by extending the federal non-discrimination laws to the judicial branch.185 While it is true that the Justices of the Supreme Court have no

180. Id.
182. See id.
184. Equal Justice Under the Law, supra note 181 (emphasis added).

The entire Executive Branch of government is subject to Title VII of the 1964 Civil Rights Act. When the Republicans became the majority in the House and the Senate in 1994, they brought the Legislative Branch under Title VII. Only the Judicial Branch of
initial say in whether remedial legislation is enacted to address their hiring of law clerks, they do not appear to believe that their hiring practices are a cause for concern.

**B. Title VII**

1. EEOC Action or Private Action

Any action brought by an aggrieved employee under Title VII must commence solely by filing a charge, under oath, with the Equal Employment Opportunity Commission. After the charge has been filed, the EEOC must notify the respondent within ten days and then conduct an investigation into the complaint, which will result in a determination as to whether or not the charge is true. Should the investigation indicate the charge lacks reasonable cause, the EEOC must dismiss it and notify the complainant, who may then bring a private action within ninety days.

If the EEOC investigation indicates there is reasonable cause, it must seek to eliminate the wrongful practice "by informal methods of conference, conciliation, and persuasion." In those cases where that method is an ineffective remedy to the alleged illegal employment practice, the EEOC may then commence an action against the respondent in the appropriate federal district court.

If the EEOC fails to file suit within 180 days from the date the charge was filed, the charging party may request permission to sue individually. The party then has ninety days to begin an action.

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187. See id.
188. See id. § 2000e-5(f)(1); see also McDonell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973) (holding that an EEOC finding that reasonable cause does not exist is no bar to a private lawsuit).
2. Disparate Impact Under Title VII & Equal Protection Under the Fifth and Fourteenth Amendments

Disparate impact discrimination, which falls under Title VII, prohibits employment practices that clearly favor one protected group over another, regardless of any intention to discriminate. The Supreme Court first recognized this doctrine in 1971 in *Griggs v. Duke Power Co.* and has since expanded and clarified the doctrine through a number of subsequent decisions. To establish a *prima facie* case of disparate impact discrimination, the plaintiff must: (1) identify the specific employment practices or selection criteria being challenged; (2) show disparate impact; and (3) prove causation. The defendant/respondent has the opportunity to justify the challenged employment practice by offering proof discrediting the plaintiff’s statistics or introducing their own statistics showing that no disparity exists. The employer may also present evidence that the challenged practice is part of a legitimate business necessity and it is job related. Thereafter, the plaintiff has the opportunity to cast doubt on these explanations.

Congress, concerned that the Supreme Court was misinterpreting the statute regarding the defendant’s burden, amended Title VII through the Civil Rights Act of 1991, and, in so doing, overruled the Supreme Court’s decision in *Wards Cove Packing Co. v. Atonio.* The amendment provides:

An unlawful employment practice based on disparate impact is established under this [Title] only if—

193. Id. at 430-33.
195. See Watson, 487 U.S. at 994-97.
196. See id. at 996-97.
197. See id. at 997-1000; Griggs, 401 U.S. at 432. The burden the defendant bears, with respect to showing business necessity, has been subject to alteration by the Supreme Court since 1971. However, this judicial modification has been resolved by Congress through the Civil Rights Act of 1991. See infra note 200 and accompanying text.
198. See Watson, 487 U.S. at 998.
(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.200

Before addressing the equal protection argument against federal government employers (i.e., federal courts), it should be noted that an employee of any state or municipality is shielded against denial of equal protection under the Fourteenth Amendment by 42 U.S.C. § 1983.201 Specifically, this law protects employees against employers who deprive them “of any rights, privileges, or immunities secured by the Constitution and laws ....”202 Clearly, equal protection under the Fourteenth Amendment is implicated in this broad coverage, but this offers no remedy to an employee of the federal government, as this law expressly applies only to “any State or Territory or the District of Columbia.”203

If a federal employee seeks to bring an equal protection claim against the government, it must be framed in terms of the Fifth, not the Fourteenth Amendment. Recognizing this, the Supreme Court stated that “[i]t is also true that the Due Process Clause of the Fifth Amendment [in addition to the Fourteenth] contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups.”204 The clear benefit of a Title VII disparate impact action over an equal protection claim is that the former has no requirement that the plaintiff establish intent on the part of the employer.205 The Court, in addressing the distinction between a Title VII action and an equal protection action added: “Our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.”206

The authors’ attempt to obtain empirical data as to the numbers of minorities at the top of the class at the highest ranked law schools in the

202. Id.
203. Id.
205. See Griggs, 401 U.S. at 432 (“Congress directed the thrust of the [Civil Rights] Act to the consequences of employment practices, not simply the motivation.”) (emphasis in original).
206. Id. (emphasis in original).
country (i.e., a potential "relevant labor pool") was fruitless. This may be an essential factor to take into consideration in forming a disparate impact charge under the present system of hiring Supreme Court law clerks. However, as we submit and substantiate later, there are several possible alternatives to this system. Additionally, with regard to the present system, it is quite possible that "[t]he application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory." While it could prove difficult for federal law clerks to identify the relevant labor pool in a disparate impact claim, this alone should not serve as an impediment to commencing such an action. Indeed, it is often difficult to determine the actual relevant labor pool in a disparate impact claim. Unfortunately, however, this is not the only problem that federal law clerks may face if they ultimately choose to file suit.

C. The Judicial Branch Employment Non-Discrimination Act of 1999 & The Problem With Using Title VII as the Vehicle to Right the Wrong

If Representative Jackson’s bill were to become law, as written, an inherent internal conflict in the Judiciary would result. This is because his bill relies on the remedial processes of Title VII. If "conference, conciliation, and persuasion" fail, the only available avenue for relief would be the courts. The problem with this system, in the context of law clerks seeking redress, is the potential for injustice, even if only in the form of an appearance of impropriety. District court judges will find themselves being asked to decide whether their peers have engaged in discriminatory hiring practices. A more difficult and arduous task arises when a presiding judge is asked to consider the legal propriety of the hiring practices of those jurists who sit to oversee the propriety of his or her work. The irony inherent in this approach necessitates an alternative solution to this problem.

207. See Diehl v. Xerox Corp., 933 F. Supp. 1157, 1165 (W.D.N.Y. 1996) ("Under the disparate impact theory, proof of a disparity is demonstrated through statistical analysis which compares the impact of a particular employment action on a protected class as compared to the impact upon qualified employees in the relevant labor pool.").
V. PROPOSED SOLUTIONS—THEIR POTENTIAL PROBLEMS

A. The National Dean’s List & Medical School Matching Systems

One reason why the current law clerk hiring system continues to disappoint is because there is little consensus about how to fix it. Most commentators agree that the system has major faults, but the implementation of a “fair” system is an issue that remains unresolved. Some would-be reformists continue to advocate a system whereby the Justices would voluntarily change their hiring practices. There is some evidence to suggest that this is possible. In the last hiring term, two African-American and three Asian clerks were hired by the Court. Also, twelve women were among the thirty-four new clerks. This substantial increase in the percentage of minority hirings seems to be indicative of progress.

However, the Court’s hiring statistics only came to light recently, so this may be just a maneuver intended to allay the critics, as opposed to real progress. Justices are human and not immune to criticism. It is far more likely that the recent wave of bad press was what inspired the minority hiring “spree,” rather than some sudden revelation on the part of the Justices. Who can say, or guarantee, that they will not revert back to former practices? Will the President of the NAACP have to get arrested on the Court steps, every term, to ensure equal employment opportunity? It seems as though relying on voluntary, good faith efforts of judges does not imbue accountability, and, therefore, should not be considered a viable option.

Other reformists have proffered various matching systems to link law students with particular judges. One such system would allow the deans of each of the nation’s accredited law schools to nominate one outstanding member of the graduating class for a Supreme Court clerkship. Some believe that this “national dean’s list” will broaden the
pool of applicants from which Justices choose their clerks.216

This system is not without its critics.217 It has been noted that the "national dean’s list" could actually produce a less-diverse field of applicants.218 Presumably, the deans would select their prize pupils, providing no guarantees that this practice will promote diversity in any form.219 Moreover, the system would probably take away too much discretion from the Justices, who should have a wide array of students from which to choose. For example, if there are only a few minorities on the list, it could significantly inhibit a Justice’s ability to conduct a broad search for qualified minority candidates. Furthermore, judges and deans might reasonably disagree over who is properly qualified for a Supreme Court clerkship. After all, hiring criteria differs from employer to employer. Who a law school dean believes to be a formidable candidate may very well be viewed otherwise by a sitting Supreme Court Justice. Also, the relationship between judge and clerk can be an intensely personal one.220 It is important that judges maintain a large selection of students from which to choose, lest the quality of our nation’s jurisprudence suffer.

Another system that is beginning to gain momentum is based on the system used for matching medical students with doctors and hospitals. Under this approach, students would be able to choose a list of judges that they would like to work for, while judges are able to select a similar list of students.221 The ensuing “match” would determine where the student would clerk.222 While this system sounds promising, it, like the

but at least they couldn’t say they couldn’t find qualified applicants.” Id.

216. See id. Speaking in support of the national dean’s list, Justice Brennan explained, “‘I think the minority problem would take care of itself if they would widen the pool.’” Id.

217. See, e.g., Jeff Bleich & Kelly Klaus, White Marble Walls and Marble White Males, 46 FED. LAW. 24, 25, 28 (Sept. 1999). “[D]elegating ‘kingmaker’ (or ‘queenmaker’) authority to law school deans might, if anything, produce a less-diverse applicant pool.” Id. at 28.

218. See id. at 28.

219. See id.

220. See, e.g., Patricia M. Wald, Selecting Law Clerks, 89 MICH. L. REV. 152, 153 (1990) (“The judge-clerk relationship is the most intense and mutually dependent one I know of outside of marriage, parenthood, or a love affair.”).

221. See id. at 160-61.

222. See id. at 161.

The system works like this: applicants apply to any program they are interested in; interviews are conducted completely independently of the match. But no offers can be made during the specified interview time. By a predetermined date, each applicant submits a Rank Order List [of judges they would like to work for]. The judges, in turn, submit similar lists of their ‘true preferences.’ . . . Each judge would receive acceptances from her highest ranked applicants who have not already received offers from judges that the applicants prefer. A match between an applicant and a judge would constitute a binding commitment.
national dean’s list, comes with no guarantees. For the system to work properly, all judges would need to participate. If some judges were to opt out of the medical model and carry on with the current system, the remainder of those judges utilizing the medical model would be disadvantaged since the “cream” of each graduating class would be skimmed off first. The problem with these pragmatic approaches is that it seems unlikely, at least at this point, that all judges would implement an unfamiliar and possibly unpalatable system that is bound to limit their applicant pool.

**B. A Better Solution**

Much of the focus surrounding potential solutions to the problem at hand has been unduly centered around the pool of applicants, whereas, the focus should be on the Justices themselves. The Justices maintain that the top-tier law schools, and feeder judges, do not produce a diversified field from which to choose. Yet, according to a 1999 study, the two most commonly tapped schools for clerks, Harvard and Yale, had minority-enrollment rates of twenty-four percent and thirty-one percent, respectively. Still, white males are the overwhelming favorites to land one of the much-coveted positions. From this, we glean that a system of accountability must be imposed upon the Court, so that they are no longer “above” or “set apart from” the laws of this nation.

Accordingly, we propose the following corrective legislation. While House Resolution 1048 is a valiant effort and noble cause, its shortcomings seriously limit its effectiveness. Although we agree that Title VII should apply to the Judiciary, the current remedies for a Title VII violation are, as outlined above, contextually impractical. We propose a variation of the traditional EEOC suit, so that if a clerk or applicant wishes to bring a discrimination claim, he or she will have the option of pursuing it either in the same branch, or a different branch of government. In this sense, the system proffered here more closely resembles the existing congressional system. This proposed solution allows an aggrieved applicant or employee to pursue a discrimination claim within or outside the legislative branch. Similarly, judicial branch

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223. See Gatland, *supra* note 108, at 37. Further, the same study revealed that the minority-enrollment rates at Columbia, the University of Chicago, and Stanford are 34%, 20%, and 31% respectively. See *id.* The female-enrollment rate at all five schools ranges between 42% and 45%. *See id.*

224. See *Equal Justice Under the Law, supra* note 181.
employees should still be able to pursue a claim within that branch. Theoretically, this could mean that a district court judge could be presiding over the case of a circuit court judge, or even a Supreme Court Justice. The benefits of such a suit for the applicant/employee include, inter alia, pecuniary damages. However, it cannot be ignored that this route may present certain negative career ramifications for an incoming applicant. Further, the applicant/employee may reasonably believe that he or she would receive a more objective trial in another branch of government, where a judge would not be asked to judge his or her peers, or superiors, in a matter that would inevitably affect his or her own hiring practices. The following is an alternative proposal that does not involve bringing suit in district court.

If a clerk or applicant feels that he or she has been discriminated against unlawfully, he or she could still initiate a proceeding by filing a claim with the EEOC in Washington. It is unnecessary for a separate office to be created within or outside of the EEOC, as it is best equipped to deal with these kinds of claims. EEOC attorneys are best suited, via their training and experience, to separate the legitimate claims from the frivolous ones. They are familiar with the intricate details of federal anti-discrimination laws, and have great investigatory tools at their disposal. Indeed, the first part of our proposal necessitates the use of these resources to “weed out” those claims that are frivolous and/or unprovable. However, if the EEOC determines, after thorough investigation, that a claim of discrimination against a federal Justice or judge has merit, and attempts at mediation fail, the EEOC shall rectify the situation by presenting its findings to a House Subcommittee on the Judiciary in Congress.

In the House Subcommittee, which would be part of the greater House Judiciary Committee, the EEOC would present its case against a Justice/judge, much the same way it would present an employment

225. The authors recognize that many critics would find such a regulatory scheme to be violative of the Separation of Powers Doctrine. Indeed, Senator Grassley encountered similar obstacles while pushing the CAA through Congress. See, e.g., Grassley, supra note 39, at 46. Senator Grassley wanted the Office of Compliance to adopt executive branch regulations, “but Separation of Powers concerns . . . made many of [his] colleagues reluctant, if not opposed, to living under the [e]xecutive [b]ranch system.” Id. Nonetheless, the CAA established that the regulations be “as similar to the [e]xecutive [b]ranch regulations as possible.” Id. Moreover, it is difficult to argue that the judicial or legislative branches cannot occasionally be subjected to executive branch regulation. If Congress can pass laws affecting judges’ administrative functions, then the executive branch should be empowered to enforce such legislation. Furthermore, it seems sensible to say that “self-regulation, when not conducted by a disinterested and neutral third party, does not constitute credible regulation at all.” Id. at 36.
discrimination claim in court. The Commission would call witnesses and present evidence, and the Justice or judge would have the opportunity to defend against the accusations by calling his or her own witnesses, presenting evidence, and through cross-examination. After all the evidence has been presented, the Subcommittee would have the option of: (a) dismissing the claim outright; or (b) concluding that some form of employment discrimination has taken place.

If the House Subcommittee concludes that a Title VII violation has in fact occurred, the first step would be to put the Justice or judge on notice by placing him on a form of “probation” for a specified period of time. During the “probationary period,” the Justice or judge would have an opportunity to improve his or her hiring record. The EEOC would issue specific goals and objectives for the Justice or judge to follow during this time. After the probationary period ends, the Subcommittee would reconvene and do one of three things:

1) Conclude that the Justice or judge has satisfactorily complied with the terms of the probation, and warn such Justice or judge that he or she can be put back on probation if he or she regresses into past hiring practices; or

2) Conclude that the Justice or judge has made substantial, but insufficient progress, and place such Justice or judge back on probation for another specified period of time. This probationary period would be shorter, however (with no Justice or judge placed on probation more than twice); or

3) Conclude that the Justice or judge has directly disobeyed the terms of the probationary period, and refer the matter to the full Judiciary Committee to determine what sanctions should be imposed.

In most cases, the appropriate sanction would be either censure or monetary fines. However, the Judiciary Committee should also be permitted to refer the matter to the full House of Representatives to consider impeachment as an appropriate sanction for repeated violations committed by Justices or judges in determined acts of recalcitrance. While this is a serious, and surely controversial remedy, we think it important for the nation’s highest judicial officers to live by the same laws they interpret for the rest of us. Simply put, Justices must be prepared to judge—and be judged—for there to be any measure of accountability. The Constitution may grant judges and justices lifetime posts, but it does not give them carte blanche to disregard the laws of this country. They are only to maintain their posts during times of “good
Behaviour and employment-based discrimination is abhorrently poor, and completely unacceptable behavior. We, as a nation, have an appreciable interest in eliminating entrenched discrimination once and for all, and what more fitting place to begin than our Judiciary.

Robert M. Agostisi* & Brian P. Corrigan**


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