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CIVIL RIGHTS ACT OF 1991

MAY 17, 1991.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BROOKS, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING AND ADDITIONAL VIEWS

[To accompany H.R. 1 which on January 3, 1991, was referred jointly to the Committee on Education and Labor and the Committee on the Judiciary]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1) to amend the Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

SUMMARY AND PURPOSE

H.R. 1, the Civil Rights Act of 1991, has two primary purposes. The first is to respond to recent Supreme Court decisions by restoring the civil rights protections that were dramatically limited by those decisions. The second is to strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.

HEARINGS

H.R. 1 was the subject of hearings before the Subcommittee on Civil and Constitutional Rights on February 7 and 28 and March 7, 1991.

COMMITTEE VOTE

On March 19, 1991, a reporting quorum being present, the Committee on the Judiciary ordered H.R. 1 reported to the full House by a recorded vote of 24 to 10.

DISCUSSION

BACKGROUND AND NEED

H.R. 1, the Civil Rights Act of 1991, is designed to restore and strengthen civil rights laws that ban discrimination in employment. The bill responds to a number of recent decisions by the United States Supreme Court that sharply cut back on the scope and effectiveness of these important federal laws. In addition, the legislation fill certain gaps in Title VII of the Civil Rights Act of 1964 to ensure that all persons enjoy full and adequate protection against employment discrimination.

The Act overrules the Supreme Court's 1989 decision in *Patterson* v. *McLean Credit Union,* 109 S. Ct. 2363 (1989), which held that an 1866 statute guaranteeing all persons "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens" (42 U.S.C. Section 1981) does not prohibit racial harassment on the job and other forms of race discrimination occurring after the formation of a contract. Section 12 of the Act amends Section 1981 to reaffirm that the right "to make and enforce contracts" includes the enjoyment of all benefits, privileges, terms and conditions of the contractural relationship. By restoring the broad scope of Section 1981, Congress will ensure that all Americans may not be harassed, fired or otherwise discriminated against in contracts because of their race.

The Act also overrules key aspects of the Supreme Court's decision in *Wards Cove Packing Co.* v. *Atonio,* 109 S. Ct. 2115 (1989). For eighteen years following the unanimous landmark decision in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), Title VII had been contrued to place on employers the burden of proving that employment practices with a "disparate impact," (i.e., facially netural practices that operate to exclude qualified women and minorities disproportionately) were required by business necessity. Instead, under *Wards Cove,* victims of discrimination must prove that the discriminatory practices are not significantly related to a legitimate business objective. Sections 3 and 4 of the Civil Rights Act of 1991 restore the *Griggs* rule.

In *Price Waterhouse* v. *Hopkins,* 109 S. Ct. 1775 (1989), the Supreme Court ruled that an employment decision motivated in part by prejudice does not violate Title VII if the employer can show after the fact that the same decision would have been made for nondiscriminatory reasons. Section 5 of the Act responds to *Price Waterhouse* by reaffirming that any reliance on prejudice in making employment decisions is illegal. At the same time, the Act

makes clear that, in considering the appropriate relief for such discrimination, a court shall not order the hiring, retention or promoting of a person not qualified for the position.

In *Martin* v. *Wilks,* 109 S. Ct. 2180 (1989), the Supreme Court held that persons who sat on the sidelines while a consent decree settling a job discrimination suit was approved by a federal district court could later challenge the decree in a separate lawsuit. Section 6 of the Act responds to *Martin* v. *Wilks* by encouraging the giving of notice to persons who might be adversely affected by a proposed court order, and by affording them a reasonable opportunity to challenge the order. But it would bar subsequent lawsuits challenging the court order, except under certain circumstances.

In *Lorance* v. *AT&T Technologies,* 109 S. Ct. 2261 (1989), the Supreme Court held that the statute of limitations for challenging discriminatory seniority plans begins to run when the plan is adopted, rather than when the plan is applied to harm the plaintiff. As a result, persons who are harmed by discriminatory seniority plans may be forever barred from bringing suit even before the injury occurs. Section 7 of the Act overrules *Lorance* and permits person to challenge discriminatory employment practices when those practices actually harm them.

Section 8 of the Act amends Title VII to grant victims of intentional discrimination the right to recover compensatory damages, and, in egregious cases, punitive damages as well. These remedies are now available for victims of race discrimination under Section 1981. The Act makes them available for sex, religious and ethnic discrimination under Title VII as well.

Sections 7 and 10 of the Act extend the statute of limitations in Title VII employment discrimination cases from 180 days to 2 years. In addition, in cases against the federal government, the period for filing suit following final agency action would be extended from 30 days to 90 days.

To overrule the Supreme Court's 1986 decision in *Library of Congress* v. *Shaw,* 478 U.S. 310 (1986), the Act amends Title VII to permit prevailing plaintiffs in job discrimination cases against the federal government to recover interest to compensate for delays in obtaining relief.

Section 9 of the Act includes provisions responding to a series of Supreme Court decisions cutting back on the availability of attorney's fees for prevailing parties in Title VII actions.

In response to *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.,* 482 U.S. 437 (1987), the Act confirms that Title VII permits prevailing plaintiffs to recover the reasonable costs incurred for experts who assist them in their case.

In response to *Independent Federation of Flight Attendants* v. *Zipes,* 109 S. Ct. 2732 (1989), the Act makes clear that parties who prevail in job discrimination cases may recover the reasonable attorney's fees they incur in defending the relief obtained in the original proceeding against a subsequent challenge.

In response to *Evans* v. *Jeff D.,* 475 U.S. 717 (1986), the Act provides that a job discrimination may not be settled through a court order or stipulation of dismissal unless the parties or their counsel attest to the court that a waiver of all or substantially all attorney's fees was not compelled as a condition of the settlement.

To overrule the Supreme Court's decision in *Marek* v. *Chesny*, 473 U.S. 1 (1985), the Act provides that plaintiffs who reject an offer of settlement more favorable than what is thereafter recovered at trial will not be barred from recovering attorney's fees incurred for services performed after the offer is rejected.

Section 11 of the Act also codifies well established rules of construction reaffirming the intention of Congress that civil rights laws must be interpreted consistent with the intent of such laws and construed broadly to provide equal opportunity and effective remedies.

RELATIONSHIP TO OTHER LAWS MODELED AFTER TITLE VII

A number of other laws banning discrimination, including the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq. and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et seq., are modeled after, and have been interpreted in a manner consistent with, Title VII.[1]

The Committee intends that these other laws modeled after Title VII be interpreted consistently in a manner consistent with Title VII as amended by this Act. For example, disparate impact claims under the ADA should be treated in the same manner as under Title VII. Thus, under the ADA, once a plaintiff makes a prima facie case of disparate impact, the burden then shifts to the defendant to demonstrate business necessity, using the same standards as under Title VII. This was the clear intent of the Committee during its consideration of the ADA.[2]

Similarly, mixed motive cases involving disability under the ADA should be interpreted consistent with the prohibition against all intentional discrimination in Section 5 of this Act.

Certain sections of Title VII are explicitly cross-referenced in Subsection 107(a) of the ADA, to ensure that persons with disabilities have the same powers, remedies and procedures as under Title VII. This would include having the same remedies and statute of limitations as Title VII, as amended by this Act, and by any future amendment. This issue was specifically addressed by the Committee during its consideration of the ADA.[3]

SECTION-BY-SECTION ANALYSIS

Following is a section-by-section analysis of the Civil Rights Act of 1991 as ordered reported by the Committee.

Section 1.—Short Title

This section establishes a short title for the Act, which is the "Civil Rights Act of 1991."

Section 2.—Findings and Purposes

This section sets forth the findings and purposes of the Congress in enacting the Civil Rights Act of 1991.

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[1] For additional discussion of the relationship between Title VII and the ADEA, see the section-by-section analysis of Section 17.

[2] See Report on H.R. 2273, the Americans with Disabilities Act, Committee on the Judiciary, H.R. Rep. No. 101-485, Part 3, at 42, n. 32.

[3] See Id. at 48.

Section 3.—Definitions

This section provides additional definitions to Title VII for the terms "complaining party," "demonstrates," "group of employment practices," "required by business necessity," and "respondent."

Group of employment practices.—The bill defines the definition of "group of employment practices," to mean a combination of employment practices that produce one or more employment decisions. This responds to the concern that a plaintiff could challenge all of an employer's practices that have a discriminatory or a disparate impact, but which at the outset of a suit cannot easily be pleaded with specificity.

Required by business necessity.—The definition of "required by business necessity" is discussed in Section 4, below.

Respondent.—The definition of "respondent" clarifies the types of labor-management committees which may be subject to lawsuits under Title VII (*e.g.,* those which are involved in selecting individuals for job training programs).

Section 4.—Restoring the Burden of Proof in Disparate Impact Cases

Sections 3 and 4 of the Act add new provisions to Title VII to overrule several aspects of the *Wards Cove* decision and to restore the prior *Griggs* rule in disparate impact cases.

In 1972, Congress reaffirmed the *Griggs* holding that Title VII was enacted to prohibit all forms of employment discrimination, not simply those actions or practices which are intentionally discriminatory.[4] As Chief Justice Burger observed, "Congress . . . placed on the employer the burden of showing" that an employment practice which has a discriminatory effect is justified by business necessity.[5]

Since 1971, the *Griggs* decision has had an extraordinarily positive impact on the American workplace. In hundreds of cases, federal courts have struck down unnecessary barriers to the full participation of minorities and women in the workplace, and employers have voluntarily eliminated discriminatory practices in countless other instances.

Section 3 amends Section 701 of Title VII to add definitions for certain terms used in the bill. Section 4 adds a new Subsection 703(k) to restore the *Griggs* rule.[6]

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[4] In support of the 1972 amendments to extend Title VII to state and local governments, Congress reaffirmed that employment discrimination was pervasive, complex and rooted in "employment systems" and "various institutional devices":

> Employment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs. The literature on the subject is replete with discussions of the mechanics of seniority and lines of progression, perpetuation of the present effects of earlier discriminatory practices through various institutional devices, and testing and validation requirements. H.R. Rept. No. 238, 92d Cong., 1st Sess. 8, reprinted in Legislative History of the Equal Employment Opportunity Act of 1972, at 68.

[5] *Griggs,* 401 U.S. at 431 (emphasis added). Similar formulations have repeatedly been used by the Supreme Court. For example, in *Albemarle Paper Co.* v. *Moody,* the Court emphasized that an employer must "meet the *burden of proving* that its tests are 'job related.'" 422 U.S. at 425 (emphasis added). In *Dothard* v. *Rawlinson,* the Court insisted that an "employer *prov[e]* that the challenged requirements are job related." 433 U.S. at 329 (italic added).

[6] Section 4 of the bill sets forth the rules governing all disparate impact cases brought under Title VII, including those brought against the federal government under section 717 of Title VII.

Burden of proof

For eighteen years following the *Griggs* decision, the employer in a disparate impact case indisputably bore the burden of demonstrating that a practice shown by the complaining party to have a disparate impact was required by business necessity. In *Wards Cove*, the Supreme Court overruled this aspect of *Griggs*, holding that while the employer has the burden of producing evidence justifying an employment practice shown to have a disparate impact, "the burden of persuasion . . . remains with the disparate-impact plaintiff." 109 S.Ct. at 2126.[7]

Subsection 703(k)(1) is intended to overrule this part of the *Wards Cove* decision and would restore to the employer the burden of justifying practices shown to have a disparate impact. Subsection 703(k)(1)(A) provides that an unlawful employment practice based on disparate impact is established when a complaining party [8] demonstrates [9] that an employment practice results in a disparate impact, and the respondent [10] fails to demonstrate that such practice is required by business necessity. Experience in hundreds of cases between 1971 and 1989 demonstrated that this was a fair and workable rule.

The pre-*Wards Cove* allocation of the burden of proof is fully consistent with general legal principles. Once a plaintiff establishes that an employment practice has a disparate impact, he or she has proved that the practice has a discriminatory effect. Title VII does not prohibit all practices wth a discriminatory effect, only those that are not justified by business necessity. "Such a justification," as Justice Stevens observed in his dissenting opinion in *Wards Cove*, "is a classic example of an affirmative defense" for which a defendant always bears the burden of proof. 109 S.Ct. at 2131. See Fed. R. Civ. P. 8(c).[11]

The practical reasons for placing the burden of proving business necessity on the employer are obvious: the employer has control over the employment process, selects the practices used to make an employment decision, and is more likely to be aware of the relative costs and benefits of the practices used and of the alternative practices that were not used in making the employment decision. The Committee believes that it confounds logic to place on a job appli-

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[7] Numerous federal courts of appeals have recognized that this aspect of *Wards Cove* represented a dramatic departure from long-standing precedent. In *Hill* v. *Seaboard Coast Line Railroad Co.*, 885 F.2d 804, n.12 (11th Cir. 1989), the U.S. Court of Appeals for the Eleventh Circuit commented that "[t]he Supreme Court's decision in *Wards Cove* made clear that the employer merely has the burden of production . . . and overruled the existing law in this circuit on this issue." The Seventh Circuit took a similar view in an opinion by Judge Richard Posner:

> *Wards Cove* . . . modified the ground rules that most lower courts had followed in disparate-impact cases. Before *Wards Cove* it was generally believed that if the plaintiff in a Title VII case showed . . . that a criterion . . . was disproportionately excluding members of a group protected by the statute, . . . the burden shifted to the employer to persuade the judge . . . that the criterion . . . was necessary to the effective operation of the employer's business . . . *Wards Cove* returns the burden of persuasion to the [employee], while leaving the burden of production on the employer. *Allen* v. *Seidman*, 881 F.2d 375, 377 (7th Cir. 1989) (citations omitted).

[8] The term "complaining party" is defined in Subsection 701(l) of Title VII.

[9] The term "demonstrates" is defined in new Subsection 701(m).

[10] The term "respondent" is defined in new Subsection 701(p).

[11] It is not unusual for a federal statute to stipulate that once a prima facie case is established, the burden of proof is on the party seeking to offer a justification. *See, e.g.*, 15 U.S.C. § 13(b) (once case of discrimination is shown under Robinson-Patman Act, burden is on person charged with violation to show justification).

cant or employee the burden of demonstrating the absence of business necessity for a discriminatory employment practice when the employer, who selected that practice in the first place, has ready access to all of the relevant information.

The Committee notes that placing the burden of proof on employers to establish business necessity in disparate impact cases is not inconsistent with the allocation of burden of proof in disparate treatment cases, as set forth in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), and *Texas Dept. of Community Affairs* v. *Burdine,* 450 U.S. 248 (1981).

First, plaintiff's burden of proof is not the same in treatment and impact cases. The burden of proof in establishing a prima facie disparate impact case is considerably more difficult than the burden of proof in establishing a prima facie case of individual disparate treatment. A prima facie disparate treatment case may be established, for example, by demonstrating that the complaining party belongs to a racial minority or is a woman; that he or she applied and was qualified for a job for which the employer was seeking applicants; that, despite his or her qualifications, the applicant was rejected; and that after the rejection, the position remained open and the employer continued to seek applications from persons with the complaining party's qualifications. *McDonnell Douglas,* 411 U.S. at 802.

By contrast, to establish a prima facie disparate impact case, a complaining party must demonstrate that an employment practice or group of employment practices resulted in a disparate impact on qualified minorities or women. As former Transportation secretary William T. Coleman, Jr. noted, it is not sufficient merely to show:

> that an employer had a smaller portion of minority employees than existed in the population as a whole . . . [P]roof of a prima facie case requires two additional types of evidence. First, the plaintiff must ordinarily show what impact the requirement actually had on individuals who applied for the position at issue or took the disputed test. Plaintiffs may look to some other broader pool only if the application process itself is tainted by discrimination, or if there is no application process at all. Second, the plaintiff must show what impact the disputed practice had on *qualified* actual or potential applicants. Of course in any disparate impact case the plaintiff, by definition, is challenging the legitimacy of one or more qualifications insisted upon by the employer, but where there are qualification requirements of undisputed legitimacy, a plaintiff must ordinarily take them into account in establishing a prima facie case. (Italic original, footnotes omitted.)[12]

Second, in a disparate treatment case, once the complaining party demonstrates discriminatory intent, the case is over—the complaining party prevails.[13] By contrast, in a disparate impact

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[12] The Civil Rights Act of 1990: Joint Hearings on H.R. 4000 Before the Committee on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the House Committee on the Judiciary, 101st Cong., 2d Sess. 70, vol. 1, at 446.

[13] In those instances where the employer has articulated a legitimate, nondiscriminatory reason for the employment decision, the complaining party must have demonstrated that the purported reasons were in fact a pretext for a discriminatory decision.

case, once a complaining party has demonstrated that a challenged practice or group of practices operates to exclude qualified persons on the basis of race, color, religion, sex or national origin, the employer may escape liability altogether by showing that the practice or group of practices is required by business necessity.

Third, it is not true that the burden of proof always remains on the plaintiff in disparate treatment cases. An employer asserting that sex, national origin or religion is a bona fide occupational qualification also bears the burden of proof as to that defense.[14] And Subsection 701(j) of Title VII declares that an action which burdens a religious belief or practice is unlawful "unless *an employer demonstrates* that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."(Italic added.)

Business necessity

Where a complaining party demonstrates that an employment practice or group of employment practices results in a disparate impact, Section 4 of the Act requires that the respondent demonstrate that such practice or group of practices "is required by business necessity." Subsection 3(o) of the bill contains a definition of the term "required by business necessity," the purpose of which is to codify the meaning of "business necessity" as used in *Griggs*, to restore the established legal rules that prevailed under *Griggs* and to overrule the Supreme Court's treatment of business necessity in *Wards Cove.*[15]

In the years since 1971, the *Griggs* rule has been applied in hundreds of cases. The definition of business necessity adopted by the Committee, in response to *Wards Cove*, is intended to prevent any weakening of the standard that must be met by employers whose practices have operated to exclude from job opportunities significant numbers of qualified persons on the basis of race, color, religion, sex or national origin. Two decades after Chief Justice Burg-

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[14] *Gunther* v. *Iowa State Men's Reformatory,* 612 F.2d 1079, 1085–86 (8th Cir.), cert. denied, 446 U.S. 966 (1980); *Weeks* v. *Southern Bell Tel. & Tel.,* 408 F.2d 228, 235 (5th Cir. 1969); see *Dothard* v. *Rawlinson,* 433 U.S. 321, 333 (1977).

[15] The majority opinion in *Wards Cove* clearly disavowed any requirement of business necessity, stating:

> [T]here is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster. 109 S.Ct. at 2126.

While under *Griggs*, the "touchstone" was "business necessity," under *Wards Cove,* "[t]he touchstone . . . is a reasoned review of the employer's justification" to determine "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." Id. at 2125–26.

Thus, under the new rule articulated by the majority in *Wards Cove,* the business purpose served by an employment practice—for hiring or promotion—need not be necessary, essential or even important. Under *Wards Cove,* any purpose—so long as it is legitimate and not "mere[ly] insubstantial"—will suffice. Id. at 2126.

Furthermore, lower federal courts have recognized that *Wards Cove* significantly reduced the justification required for an employment practice shown to cause a disparate impact. Writing for the Seventh Circuit in *Allen* v. *Seidman,* Judge Posner observed that *Wards Cove* permitted the use of any practice that excludes women or minorities so long as it is not unreasonable, and added that:

> *Wards Cove* . . dilutes the "necessity" in the "business necessity" defense . . . [T]he "business necessity" defense [is] now a misnomer, since the "defense" does not require a showing of necessity and is no longer an affirmative defense." 898 F.2d 375, 377 (7th Cir. 1989).

er's unanimous ruling in *Griggs*, opportunities for minorities and women in the American worlplace continue to be limited by practices "that are fair in form, but discriminatory in operation." *Griggs*, at 431.

The Committee finds that placing the burden on the employer of proving that a practice or group of practices which has a disparate impact is nonetheless required by business necessity is appropriate. Unlike cases of intentional discrimination which may affect just one person, disparate impact cases arise only where the challenged employment practice or group of practices has resulted in a large number of decisions or actions which disproportionately disadvantage or exclude persons on the basis of race, color, religion, sex or national origin.

This type of systemic barrier to fair employment, which the Court struck down in *Griggs*, has been a major part of the problem of illegal job discrimination in this country. The *Griggs* rule and its requirement that the employer must prove business necessity have correspondingly played a major role in opening many job opportunities for the first time to women, blacks and other minorities. The Committee intends to return to *Griggs*.

The Act's definition of business necessity fairly and accurately reflects the prevailing law under *Griggs*. It provides a two-pronged approach to the defense of business necessity.

The first prong applies to all employment practices "involving selection," and the Act itself lists examples of the practices included in this group. They are hiring, assignment, transfer, promotion, training, apprenticeship, referral, retention, or membership in a labor organization. Although this list is not intended to be exhaustive, and should be construed as such,[16] these are the primary employment practices involving selection.

In all instances, the practices listed—as well as any other employment practice involving selection—must be justified under the first prong of the business necessity definition. This is regardless of whether a respondent articulates another, non-selection purpose for the practice. Most of the employment practices challenged under the *Griggs* rule over the past 20 years are included in the list of practices involving selection, and the Committee anticipates that the vast bulk of disparate impact cases will fall under this prong.

The second prong applies to other employment practices not covered by the first prong. The definition of business necessity in the second prong applies to a very limited category of employment practices in which job performance is simply irrelevant. Examples of practices which fall in this category include plant closings and relocations. In those situations the challenged practice must bear a "significant relationship to a significant business objective of the employer."

The first prong

In the case of employment practices covered by the first prong, business necessity means the practice or group of practices must

[16] An example of an employment practice which involves selection, but is not listed, is recruitment.

bear "a significant relationship to successful performance of the job." In determining whether this showing has been made by the employer, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. These two requirements reflect the two fundamental doctrines that are central to the business necessity defense.

First, presumptions or preconceptions about the usefulness of an employment practice are insufficient to establish business necessity; evidence that demonstrates the relationship in fact between the disputed practice and successful job performance is required. The concept of requiring demonstrable evidence is taken directly from the *Griggs* decision. At page 431, the Court ruled that a "demonstrable relationship to successful [job] performance" is required. Thus, where the employer does not introduce sufficient evidence to demonstrate the existence of a "significant relationship to successful performance of the job," a court cannot make findings of business necessity based upon some "common sense" notion that the disputed practice would advance business interests.

In demonstrating that a practice is required by business necessity, an employer is permitted by Subsection 701(o)(2) to introduce any evidence relevant and admissible under the Federal Rules of Evidence. Thus, for example, the reference in this subsection to statistical reports or validation studies does not mean that an employer is precluded from offering other types of evidence which it believes demonstrates a significant relationship to successful job performance or, under the second prong, to a significant business objective of the employer.

Second, the employer must prove that the practice or group of practices bears a significant relationship to successful performance of the job. This language is also taken directly from the *Griggs* decision, at page 426. This means both that the correlation between the practice and successful job performance must be a strong one, and that use of the disputed practice or group of practices produces workers who effectively perform important aspects of the job. In short, as the Supreme Court said in *Griggs*, Title VII permits an employer to use practices that have a disparate impact if they are required by business necessity, but the law prohibits "unnecessary barriers to employment" when the barriers operate to discriminate on the basis of race or other impermissible classifications.

The prevailing pre-*Wards Cove* law regarding the meaning of and the method of proving business necessity is exemplified by the Uniform Guidelines on Employee Selection Procedures.[17] The Uniform Guidelines were promulgated by the Department of Justice, the Department of Labor, the EEOC, and the then Civil Service Commission. They have remained in effect for more than a dozen years under three Presidents and five Attorneys General. The Uniform Guidelines were—

> built upon court decisions, the previously issued guidelines of the agencies, and the practical experience of the agencies, as well as the standards of the psychological profes-

[17] Codified at 28 CFR § 50.14 (1989) (Department of Justice).

sion. These guidelines are intended to be consistent with existing law.[18]

The Uniform Guidelines represent the interpretation of *Griggs* applied by the federal government in enforcing Title VII. Its provisions embody the legal principles that were accepted and applied prior to *Wards Code*, and which the Committee intends to restore.

When Title VII was first enacted, Congress expressly rejected a proposed amendment that would have insulated from legal challenge all "professionally developed ability test[s]." [19] The amendment was defeated precisely because it would have exempted employers from an obligation to demonstrate that a disputed test in fact led to significantly enhanced job performance.

The requirement that there be a demonstration of business necessity in fact derives from *Griggs* as well. The employer in *Griggs* sought to justify its test and high school degree requirements by offering the testimony of a company vice president that "the requirements were instituted on the company's judgment that they generally would improve the overall quality of the work force." 401 U.S. at 431. The Supreme Court dismissed that testimony as falling far short of a "meaningful study of [the] relationship [of the requirements] to job performance ability." *Id.* at 431.[20]

The test and high school degree requirements in *Griggs* were condemned by the Supreme Court because neither was "shown to bear a *demonstrable* relationship to successful performance of the jobs for which it was used." [21] Similarly, in *Albemarle*, the official who had selected one of the disputed tests explained that he had done so because of a personal belief that it would benefit plant operations. The company also offered testimony that two other tests had been "locally validated," although plant officials could recall no details of how that had occurred, and the employer introduced no records documenting the asserted validation process.[22] Again the Supreme Court dismissed out of hand those unsubstantiated justifications.

The pre-*Wards Cove* law also made it clear that the evidence offered to show the business necessity of an employment practice must address directly the necessity of the practice for the particular job for which it is utilized. The Supreme Court stressed in *Griggs*, "[w]hat Congress has commanded is that any test used must measure the person for the job and not the person in the abstract." 401 U.S. at 436. Similarly, in *Albemarle*, the Supreme Court stated that the "message" of the *Griggs* case was

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[18] Uniform Guidelines, § 1(c).

[19] 110 Cong. Rec. 11251 A(1964). Under the terms of the rejected amendment it would have been sufficient that the test was "*designed* to determine or predict whether [an] individual is suitable or trainable with respect to his employment," regardless of whether the test *in fact* was an accurate predictor of job performance.

[20] This requirement of an actual demonstration of business necessity has been codified in the Uniform Guidelines on Employee Selection Procedures. *See, e.g.*, section 9(A), which rejects certain types of evidence as inherently inadequate to support a claim of business necessity:

> Under no circumstance will the general reputation of a test or other selection procedures, its author or its publisher, or casual reports of its validity be accepted in lieu of evidence of validity. 28 CFR, sec. 50.14 (1989).

[21] 401 U.S. at 431 (emphasis added); see also id. at 436 (Congress has forbidden selection devices with an adverse impact "unless they are *demonstrably* a reasonable measure of job performance") (italic added).

[22] 422 U.S. at 428 & n. 23.

> That discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant *to the job or jobs for which candidates are being evaluated.*" *Id.* at 431 (quoting the EEOC's 1970 Guidelines, 29 CFR, § 1607.4(c)). (italic added.)

The Court in *Albemarle,* thus insisted, that, save in extraordinary circumstances, evidence that a given test was required to measure effective job performance for a specific position would not ordinarily be sufficient to prove that the same test would be valid for a different job. 422 U.S. at 431–32.

Similarly, an employer may not establish business necessity for the use of a requirement for a lower position merely by adducing evidence that the requirement significantly enhances overall job performance for a different, higher position.

> The fact that the best of [the] employees working near the top of a line of progression score well on a test does not necessarily mean that that test, or some particular cutoff score on the test, is a permissible measure of the minimal qualifications of new workers entering lower level jobs. In drawing any such conclusion, detailed consideration must be given to the normal speed of promotion, to the efficacy of on-the-job training in the scheme of promotion, and to the possible use of testing as a promotion device, rather than as a screen for entry into low level jobs. *Id.* at 434.

A demonstration of business necessity must deal not only with the subject matter of the test or job requirement, but also with the manner in which it is used. The passage from *Albemarle,* quoted in the previous paragraph makes clear, for example, that proof of business necessity must address the particular cutoff score used on a test. It is not sufficient to justify a strength requirement for firefighters that firefighter activities require physical strength. The critical issue in such a case is what degree of strength is actually required for successful job performance. Similarly, if using relative performance on a particular test has a disparate impact, an employer who wants to use relative performance on the test in making employment decisions may do so if the employer demonstrates that use of the test in this manner is required by business necessity.

Albemarle also held that " 'differential validation' as to racial groups" would be done where "feasible." 422 U.S. at 435. Such a requirement comes into play, for example, where qualified black workers fail a test at a higher rate than whites who are equally good workers. Such a test is not required by business necessity.

Thus, 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. In other words, are the employees selected by means of the test or other job requirement significantly more likely to be effective workers than the employees who would have been selected if the

test or requirement were not used, or were used in a less discriminatory manner?

Actual job performance may encompass a variety of considerations, such as productivity and work quality. To demonstrate that a practice bears a significant relationship to successful job performance, it is not sufficient that the practice be related to some insignificant aspect of job performance; the aspect of job performance measured by the practice must be important when assessed in the context of the employee's total duties. This requirement is consistent with the Court's insistence in *Albemarle* that a practice be predictive of "*important* elements of work behavior," [23] and with the emphasis throughout the Uniform Guidelines on "important" and "critical" aspects of actual job performance.[24]

Section 4 restores the *Griggs* requirement that an employer demonstrate the existence of "business necessity" to justify an employment practice with a disparate impact. In order to assure that the Act achieves the intended purpose of restoring pre-*Wards Cove* law, the Act includes a definition of business necessity to eliminate the possibility that the term will be construed in a manner inconsistent with *Griggs* and its progeny.

The purpose of this definition is not to formulate a standard of business necessity different or more stringent than what prevailed prior to *Wards Cove*.[25] It is to assure that "business necessity" will not be construed to adopt the standard set by the *Wards Cove* majority—merely to mean that the "challenged practice serves, in a significant way, the legitimate employment goals of the employer." 109 S.Ct. at 2125–26. This definition fails to describe the burden envisioned in *Griggs*.

The language—bears "a significant relationship to successful performance of the job" and "demonstrable evidence is required"—comes from the *Griggs* decision itself. The Committee adopted this formulation to make clear that, in defining business, necessity, it intends to recapture the standard contained in *Griggs*.

The second prong

The second prong of the business necessity defense applies only to a narrow category of cases which are not covered by the first prong. It is no less stringent a standard than that encompassed by the first prong and the evidentiary burdens are the same. The second prong will apply only in a limited category of cases where job performance is simply irrelevant. In those cases the employer can demonstrate business necessity by showing that the challenged practice bears a significant relationship to a significant business objective of the employer.

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[23] 422 U.S. at 431 (italic added).

[24] *See* Uniform Guidelines, §§ 5(B), 14(B)(2), 14(B)(3), 14(C)(2), 14(D)(2), 15(B)(3), 15(C)(3), 15(D)(3).

[25] Indeed, in a number of cases applying the *Griggs* business necessity test, lower courts have reviewed particular employment practices which had a disparate impact on minorities or women, and concluded that the practices were justified as necessary to effective job performance. See, e.g., *Hamer* v. *City of Atlanta,* 872 F.2d 1521, 1533–34 (11th Cir. 1989) (promotional examination); *Hawkins* v. *Anheuser-Bush, Inc.,* 697 F.2d 810, 815 (8th Cir. 1983) (educational requirements); *McCosh* v. *City of Grand Forks,* 628 F.2d 1058, 1062 (8th Cir. 1980) (promotion policy).

In this regard, the objective must be a business objective and not a social, moral, political, religious or other objective.[26] Further, while financial survival of the business, if demonstrated in accordance with the requirements in Section 4, would, of course, be a "significant business objective," cost savings alone are not. This comports with the long-standing rule that cost is not a permissible factor in defense of a Title VII violation. Cf. *City of Los Angeles* v. *Manhart,* 435 U.S. 702, 717 (1978). As such, the second prong restors the law which existed prior to *Wards Cove* regarding employment practices not related to job performance.

Lesser discriminatory alternatives

The final clause of Subsection 703(k)(1) codifies the pre-*Wards Cove* law with regard to the "lesser discriminatory alternative" doctrine and makes the bill's treatment of disparate impact claims complete. It clarifies that, if a defendant demonstrates that a practice or group of practices is required by business necessity, a plaintiff can still prevail by showing that other practices with less disparate impact would serve the respondent as well. By demonstrating that a less discriminatory alternative exists, the plaintiff has succeeded in rebutting the employer's contention that business necessity has required its reliance on the particular practice or group of practices which resulted in a disparate impact on the basis of race, color, religion, sex or national origin.

The Supreme Court announced this doctrine in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425 (1975), where it held that:

> If an employer does then meet the burden of proving that its tests are "job-related" 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 in "efficient and trustworthy workmanship."

Since the Court's holding in *Albemarle,* the demonstration of a "less discriminatory alternative" has been consistently viewed as the final stage in determining whether an employment practice or group of practices has led to unlawful discrimination. This stage, however, is only reached after the respondent has succeeded in demonstrating business necessity.

Subsection 703(k)(1) thus makes clear that there are three stages of analysis in disparate impact cases. First, the plaintiff has the initial burden of demonstrating the discriminatory impact of the practice or group of practices being challenged. Second, if the plaintiff makes this showing, the defendant must demonstrate that the practice is required by business necessity to overcome a determination that the practice is unlawful. Finally, if the defendant meets this burden of demonstrating business necessity, the plaintiff may still prevail by showing that other practices with less disparate

[26] If the very essence of the business is, for example, political or religious, as a political party or church, then the significant goals may be political or religious. In the usual business, however, the function of the business will be the manufacture of a particular product or the provision of a particular service. The fact that the president of the company and/or its board of directors share a particular religious or political goal and would like to use the company to further that goal will not make it a significant goal for that business.

impact would serve the respondent as well. This test governed before the decision in *Ward Cove* and is restored by this legislation.

Group of practices

Subsection 703(k)(1)(B)(iii) provides that when a complaining party makes a claim challenging a group of employment practices that have a disparate impact, and the court finds that the complaining party can identify, from records or other information of the respondent reasonably available (through discovery or otherwise), which specific practice or practices contributed to the disparate impact, the complaining party is required to demonstrate which specific practice or practices within the group contributed to the disparate impact. The respondent is then required to demonstrate business necessity only as to the specific practice or practices demonstrated by the complaining party to have contributed to the disparate impact.

Thus, where it is clear after discovery that a complaining party can identify the specific practice or practices that contributed to the disparate impact, without undue burden or expense, from records or other information of the respondent, the complaining party cannot at trial maintain a challenge to the group of employment practices as a whole. However, where the complaining party cannot reasonably identify, without undue burden or expense, the specific practice or practices that contributed to the disparate impact, the complaining party can maintain a challenge to the group of practices as a whole.

Subsection 703(k)(1)(B) is intended to overrule the treatment of the group of practices issue in *Wards Cove.*

Statistical imbalance

Subsection 703(k)(4) reffirms that the mere existence of a statistical imbalance in an employer's workforce is not alone sufficient to establish a prima facie case of disparate impact violation.

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.[27]

In order to make a prima facie case, the plaintiff must show that a specific employment practice, or group or combination of practices, results in a disparate impact. This provision reaffirms the case law that has been in place since *Griggs* and that what constitutes disparate impact remains unchanged.

The Court in *Wards Cove* continued the proper showing of a prima facie case. Under the majority opinion, a low percentage of minorities or women in a particular job is not by itself, without more, sufficient to make a prima facie case. The Court held "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." *Wards Cove,* 109 S.Ct. at 2121, quoting

[27] In fact Section 703(j) of Title VII, 42 U.S.C. 2000e–2(j), specifically prohibits an interpretation of Title VII which would require preferential treatment of an individual because of a statistical imbalance between the number or percentage of persons of any race, color, religion, sex or national origin employed in a particular position as compared to the number or percentage of persons in the community as a whole.

Hazlewood School Dist. v. *U.S.*, 433 U.S. 299, 307–08 (1977). In *Wards Cove*, the Court noted that for relatively unskilled jobs, general population figures may be appropriate, but the plaintiff would have to prove that the jobs at issue were in fact unskilled. In some circumstances it may be more appropriate for the court to look to the proportion of applicants who were minorities or women.

Thus, statistics may still be used to make a prima facie case of disparate impact. Indeed, such cases usually rely on statistics. But statistics must meet the requirements of the law. Mere statistical imbalance without more will not suffice to establish a prima facie case. The relevant comparison is between the qualified labor pool and the group actually selected. Simple reference to the population at large will generally be insufficient.

Scope of the provision

Under Title VII, a disparate impact claim can be brought when a facially neutral employment practice or group of employment practices adopted without discriminatory intent is demonstrated to have a disparate impact based on race, color, sex, religion, or national origin. Such a practice or group of practices violates Title VII, unless the emloyer demonstrates that the practice or group of practices meets the requirement of business necessity. Thus, practices—such as strength standards, tests, education requirements, leave or other personnel policies, or other subjective or objective evaluation procedures or other practices—that have a disparate impact on the basis of race, color, religion, sex or national origin may be invalidated where they are not demonstrated to bear a significant relationship to successful performance of the job.

Subsection 703(k)(2) reaffirms that a demonstration that an employment practice is required by business necessity may be used as a defense only against a disparate impact claim. The purpose of this subsection is to make clear that business necessity is never a defense to facial discrimination or disparate treatment on the basis of race, color, gender, national origin or religion in violation of 42 U.S.C. §§ 2000e(k) and 2000e–2 *et seq.* Instead, Congress set out the narrower bona fide occupational qualification ("BFOQ") defense, 42 U.S.C. § 2000e–2(e)(1), as a defense to facial gender, national origin and religious discrimination.[28] See *Price Waterhouse* v. *Hopkins*, 109 S.Ct. at 1786.

Section 5.—Clarifying Prohibition Against Impermissible Consideration of Race, Color, Religion, Sex or National Origin in Employment Practices

Section 5 overturns one aspect of the Supreme Court's decision in *Price Waterhouse* v. *Hopkins*, 109 S.Ct. 1775 (1989), by adding a new subsection, 703(l), to Title VII. It provides that an unlawful employment practice is established when a complaining party demon-

[28] The BFOQ defense has, from its inception, been recognized as extremely stringent. As Justice Marshall's concurring opinion in *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 544 (1971), aptly observes, in the context of sex discrimination, the BFOQ exception is "applicable only to job situations that require specific physical characteristics necessarily possessed by only one sex." Id. at 545–46. Justice Marshall cited with approval the example in the Equal Employment Opportunity Commission regulations on BFOQ, 29 CFR, section 1604.2(a)(2), that it is permissible to employ actors and actresses for certain roles based on their gender. Id. at 546.

strates that sex, race, color, religion, or national origin was a contributing factor for an employment practice, even though other factors also contributed to such practice.

When enacting the Civil Rights Act of 1964, Congress made clear that it intended to prohibit *all* invidious consideration of sex, race, color, religion, or national origin in employment decisions.[29] However, the Court's decision in *Price Waterhouse,* undercut this prohibition, threatening to undermine Title VII's twin objectives of deterring employers from discriminatory conduct and redressing the injuries suffered by victims of discrimination.

In *Price Waterhouse,* plaintiff Ann Hopkins alleged that her employer, an accounting firm, unlawfully denied her a promotion to partnership because of her sex. Hopkins was denied the promotion even though she had brought the firm more business than any of the 87 men considered for partnership that year. One partner involved in the decision-making process told her 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." She was also told that she needed a "course in charm school" to qualify for partnership. 109 S. Ct. at 1792.

The district court found that Title VII had been violated because sex discrimination had been a factor in the firm's refusal to promote Hopkins, but ruled that the employer could avoid equitable relief—promotion to partnership—if it could prove that Hopkins would have been denied partnership in the absence of discrimination. The court of appeals took a different approach, holding that an employer who permitted discrimination to play a role in an employment decision may escape all liability under Title VII if it could prove by clear and convincing evidence that it would have made the same decision absent discrimination.

Thus, one of the issues before the Supreme Court centered on the effect of the employer's evidence that it also had nondiscriminatory reasons for denying partnership to Hopkins, despite the presence of proven discrimination. The Department of Justice in the Reagan Administration argued that where an employer who is shown to have acted for a discriminatory reason also proves that it would have taken the same action for a second, lawful reason, that fact should operate only to limit the appropriate remedy, not to permit the employer to escape liability altogether.[30]

A number of appellate courts had also adopted this view that a finding of invidious motivation is dispositive of the question of li-

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[29] *See* Remarks by Senator Humphrey, 110 Cong. Rec. 13088 (1964); remarks by Senator Case, 110 Cong. Rec. 13837-38 (1964).

[30] *See* Brief for the United States as Amicus Curiae at 23-24, *Price Waterhouse* v. *Hopkins,* 109 S. Ct. 1775 (1989) (No. 87-1167):

> [I]t 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 the plaintiff.

ability—leaving open only the question of appropriate remedy.[31] But the Supreme Court rejected this position. The plurality opinion held that "when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, *the defendant may avoid a finding of liability* only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." 109 S. Ct. at 1795. (italic added.)

The Court's holding in *Price Waterhouse* severely undermines protections against intentional employment discrimination by allowing such discrimination to escape sanction completely under Title VII. Under this holding, even if a court finds that a Title VII defendant has clearly engaged in intentional discrimination, that court is powerless to end that abuse if the particular plaintiff who brought the case would have suffered the disputed employment action for some alternative, legitimate reason.

The impact of this decision is particularly profound because the factual situation at issue in *Price Waterhouse* is a common one. As the Justice Department observed, "virtually every Title VII disparate treatment case will to some degree entail multiple motives." Brief for the United States as Amicus Curiae, at 6.

If Title VII's ban on discrimination in employment is to be meaningful, proven victims of intentional discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions.

This provision would not make mere discriminatory thoughts actionable. Rather, to establish liability under the proposed Subsection 703(1), the complaining party must demonstrate that discrimination was a contributing factor in the employment decision—*i.e.,* that discrimination actually contributed to the employer's decision with respect to the complaining party.

Requiring that a Title VII violation is only established when discrimination is shown to be a contributing factor to an employment decision further clarifies that intent of this legislation to prohibit only an employer's actual discriminatory actions, rather than mere discriminatory thoughts.

In providing liability for discrimination that is a "contributing factor," the Committee intends to restore the rule applied by the majority of the circuits prior to the *Price Waterhouse* decision that any discrimination that is actually shown to play a role in a contested employment decision may be the subject of liability. Conduct or statements are relevant under this test only if the plaintiff shows a nexus between the conduct or statements and the employment decision at issue. For example, isolated or stray remarks not shown, under the standards generally applied for weighing the sufficiency of evidence, to have contributed to the employment decision at issue are not alone sufficient.

Section 5 of the bill also amends Subsection 706(g) of Title VII to make clear that where a violation is established under Subsection 703(l) and where the employer establishes that it would have taken

[31] *See, e.g Bibbs* v. *Block,* 778 F.2d 1318 (8th Cir. 1985); *King* v. *Trans World Airlines, Inc.,* 738 F.2d 255 (8th Cir. 1984); *Ostroff* v. *Employment Exchange Inc.,* 683 F.2d 302 (9th Cir. 1982); *Nanty* v. *Barrows Co.,* 660 F.2d 302 (9th Cir. 1981); *Roberts* v. *Fri,* 29 F.E.P. Cases 1445 (D.C. Cir. 1980).

the same action in the absence of any discrimination, a court may not order the employer to hire, reinstate, promote or provide back pay to the complainant.

The subsection explicitly provides that "damages for a violation of Subsection 703(l) may be awarded only for injury attributable to the unlawful employment practice. Thus, a complaining party may receive relief only for the harm that actually results from the illegal discriminatory conduct.

For example, where two independent contributing factors, one discriminatory and the other nondiscriminatory, were present, the remedies available to the complaining party will be limited where the employer establishes that it would have made the same adverse employment decision even absent the discriminatory contributing factor. Where the employer makes such a showing, the employee would be precluded from receiving court-ordered hiring, reinstatement, promotion, or back pay. However, the presence of a contributing discriminatory factor would still establish a Title VII violation, and a court could order other appropriate relief, including injunctive or declaratory relief, compensatory and punitive damages where appropriate, and attorney's fees.

Section 6.—Facilitating Prompt and Orderly Resolution of Challenges to Employment Practices Implementing Court Judgments

In *Martin* v. *Wilks,* 109 S.Ct. 2180 (1989), the Supreme Court held that nothing in Title VII or the Federal Rules of Civil Procedure barred persons who had failed to intervene in an employment discrimination suit in which a court decree was entered from bringing a later lawsuit to challenge hiring and promotion decisions made pursuant to that decree. But the Court noted that Congress has the power to create, and has created.

> special remedial schemes . . . expressly foreclosing successive litigation by nonlitigants . . . [which] may terminate pre-existing rights if the scheme is consistent with due process. *Id.* at 2184, n.2.

Congress has created, and the Court has upheld, similar schemes in bankruptcy and probate. See, e.g., *NLRB* v. *Bildisco & Bildisco,* 465 U.S. 513 (1984) and *Tulsa Professional Collection Services, Inc.* v. *Pope,* 485 U.S. 478 (1988).

The Committee intends to overturn *Martin* v. *Wilks* by creating a similar remedial scheme. This section is intended to promote the prompt and final resolution of employment discrimination cases while also ensuring that non-parties who may be adversely affected by a court decree resolving such a case have an adequate opportunity to challenge the decree.

This scheme, as described below, is fully consistent with the due process clause of the Constitution. The fundamental requirements of due process are notice and an opportunity to be heard. The Supreme Court addressed this issue in *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950).

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circum-

stances, 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. *Id.* at 314–15. (Citations omitted.)

Section 6 amends Section 703 of Title VII and creates a new subsection (m).

Subsection 703(m)(1).—This subsection creates a general rule that precludes, in three situations, challenges on constitutional or federal civil rights law grounds to employment practices that implement and are within the scope of a litigated or consent judgment or order resolving a claim of employment discrimination under the Constitution or federal civil rights laws. Where the requirements of this subsection have been met, the provision bars subsequent challenges to the decree, except under certain circumstances discussed in Subsection 703(m)(2).

Subsection 703(m)(1)(A).—This subsection precludes a challenge to an employment practice implementing such a decree by a person who, prior to the entry of the decree, had actual notice of the decree and a reasonable opportunity to present objections to the decree. This notice may be from any source, sufficient to apprise the person that the decree might affect his or her interests and that an opportunity was available to present objections to the decree.

Subsection 703(m)(1)(A) requires both actual notice and an opportunity to be heard. The actual notice required under this subsection must be sufficient to apprise the recipient that the decree might affect his or her interests. That requirement satisfies the constitutional requirement that notice must be such that it will "apprise [the person] of, and permit adequate preparation for, an impending 'hearing.'" *Memphis Light, Gas & Water Div.* v. *Craft,* 436 U.S. 1, 14 (1978).

Under Subsection 703(m)(1)(A), a person must be afforded a reasonable opportunity to present objections to the decree. This satisfies the due process requirement for "an *opportunity* . . . granted at a meaningful time and in a meaningful manner for [a] hearing appropriate to the nature of the case." *Boddie* v. *Connecticut,* 401 U.S. 371, 378 (1971) (Citation omitted.)

Subsection 703(m)(1)(B).—If the requirements of Subsection 703(m)(1)(A) are not satisfied, this subsection precludes a challenge by a person whose interests were adequately represented by another person who challenged the decree prior to or after the entry of such judgment or order. The court determines whether a person's interests were "adequately represented."

Martin v. *Wilks,* recognized the existence of a limited exception to the general rule against precluding claims by non-litigants, where a person although not a party "has his interests adequately represented by someone with the same interests." 109 S. Ct. at 2184 (citing *Hansberry* v. *Lee,* 311 U.S. 32 (1940) and Fed. R. Civ. P. 23).

Subsection 703(m)(1)(B) is closely analogous to Rule 23 of the Federal Rules of Civil Procedure, under which a person who is a member of a class represented by the individual representatives in a class action is barred from bringing a subsequent suit relitigating claims that were finally determined in the class action. Rule 23(a) permits class action suits only where the representatives "will fairly and adequately protect the interests of the class."

Subsection 703(m)(1)(C).—If the court that entered the decree determines that reasonable efforts were made to provide notice to interested parties, then subsequent challenges also may be precluded under this subsection. This determination should be made prior to the entry of the decree, but if the decree was entered prior to the enactment of this subsection, then the determination may be made at any reasonable time.

Whether particular efforts to notify interested persons of a proposed decree satisfy this subsection should be determined by the court that entered the decree through the princples set forth in *Mullane* and its progency. *Mullane* recognized that due process is satisfied so long as reasonable efforts are made to give notice to interested persons, even if particular interested persons do not actually receive notice. In *Mullane* the Court held that attempts at notice through publication of advertisements in local newspapers were constitutionally sufficient means to seek to notify persons whose identities and addresses could not reasonably be ascertained. 339 U.S. at 317-18.

Subsection 703(m)(2).—This subsection sets forth exceptions to the preclusion rules in Subsection 703(m)(1).

Subsection 703(m)(2)(A).—This subsection provides that nothing in Subsection 703(m)(1) alters the standards for determining whether a person may intervene in an action under Rule 24 of the Federal Rules of Civil Procedure. A person wishing to challenge an employment practice that implements a court decree maintains the right under Rule 24 to seek to intervene in the proceeding in which the decree was entered and the court should determine whether intervention is appropriate through reference to Rule 24. Subsection 703(m)(2)(A) also provides that Subsection 703(m)(1) does not affect the substantive rights of parties who have successfully intervened pursuant to Rule 24 in the action in which they have intervened.

Subsection 703(m)(2)(B).—This subsection provides that nothing in Subsection 703(m)(1) applies to the rights of parties to the action in which the decree was entered. Nor does it apply to the rights of members of a class represented or sought to be represented, or of members of a group on whose behalf relief was sought by the federal government. The Committee intends that existing law shall continue to determine the circumstances under which persons in these 3 categories may be permitted to bring, or preclude from bringing, collateral attacks on court decrees.

Subsection 703(m)(2)(C).—This subsection provides that Subsection 703(m)(1) does not prevent challenges to a court decree on the ground that the decree was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction. This provision incorporates the common law exception to the general rule precluding collateral attack on judg-

ments. See *Martin* v. *Wilks,* 109 S.Ct. at 2189 (Stevens, J., dissenting).

Subsection 703(m)(2)(D).—This subsection provides that nothing in Subsection 703(m)(1) authorizes or permits the denial to any person of the due process of law required by the United States Constitution. A court cannot deny procedural due process rights in connection with the entry of a consent decree or court order that will later bar subsequent attacks.

The purpose of this subsection is to insure that any pre-decree "notice," "representation" or "reasonable efforts" conducted pursuant to Subsections 703(m)(1) (A), (B) or (C) comport with constitutional due process; otherwise a post-decree challenge could not be foreclosed. The Committee intends for the courts to have the flexibility to determine the type of notice appropriate to the particular facts of the situation. Appellate courts will reverse a trial court if the trial court precludes the filing of post-decree lawsuits without insuring that due process rights were accorded prior to the entry of the decree.

Individual notice may not necessarily be required by due process, depending upon the circumstances of the case. The Supreme Court has held that actual knowledge satisfies due process regardless of whether individual notice was attempted or received, *National Equipment Rental Ltd.* v. *Szukhent,* 375 U.S. 311, 315 (1964). The court have made clear that constitutional due process does not require "the meaningless formality of written notice" when the person otherwise is informed: "We refuse to elevate form over substance." *Lehner* v. *U.S.*, 685 F.2d 1187, 1191 (9th Cir. 1982), *cert. denied,* 460 U.S. 1039 (1983).

Subsection 703(m)(3).—This subsection provides for the proper venue for actions challenging employment practices that implement and are within the scope of a decree not precluded under Subsection 703(m)(1). These actions shall be brought in the court, and if possible before the judge, that entered the decree. This subsection is not intended to preclude a change of venue pursuant to 28 U.S.C. § 1404 (permits transfer where the interests of justice require).

Section 7.—Statute of Limitations

This section overturns the Supreme Court's decision in *Lorance* and lengthens the statute of limitations.

Subsection 7(a)—Statute of Limitations.—Subsections 7(a)(1), (3) and (4) of the Act expand the time for filing discrimination charges with the EEOC from 180 days to two years. This modification brings Title VII's statute of limitations provision into harmony with the longer statute of limitations found in 42 U.S.C. § 1981,[32] and the two year periods in the Fair Housing Amendments Act of

[32] Section 1981 is the other major rights statute used to challenge racially discriminatory contracts, including employment contracts. It has no statutory time period for filing complaints, therefore, courts look to state statues of limitation which typically allow two to three years—in some states up to six years—to file. *See, e.g., Goodman* v. *Lukens Steel Co.,* 482 U.S. 656, 662 (1987) (two years), *Runyon* v. *McCrary,* 427 U.S. 160, 179–82 (1976) (two years); *Gordon* v. *National Youth Work Alliance,* 675 F.2d 356, 358 n.1 (D.C. Cir. 1982) (three years), *Larkin* v. *Pullman-Standard Div., Pullman, Inc.,* 854 F2d 1549, 1567 (11th Cir. 1988) (six years).

1988,[33] Fair Labor Standards Act,[34] and Equal Pay Act.[35] It also eliminates the dual standard presently in the law which allows victims of race discrimination to file employment discrimination complains under Section 1981 after the 180 days authorized under Title VII while victims of gender, religious and national origin discrimination are time-barred for charges filed after 180 days (300 days for charges filed with state or local agencies). Adoption of this change means meritorious Title VII claims will no longer be denied review because of this anomaly in the law.

Subsection 7(a)(2)—Overturning Lorance.—Subsection 7(a)(2) of the Act provides that the statute of limitations begins to run from the date the unlawful employment practice is adopted or has an adverse effect, whichever is later.[36] This subsection overturns the Supreme Court's holding in *Lorance* v. *AT&T Technologies, Inc.*, 109 S.Ct. 2261 (1989).[37] Although the decision dealt with a seniority system, the reasoning is applicable to other employment practices.[38] Taken to its logical conclusion, the *Lorance* rule would bar all challenges to present-day applications of discriminatory practices in existence when Title VII became law—since, under the *Lorance* rule, the deadline for a timely charge would have expired before Title VII became effective.

What Subsection 7(a)(2) does not do is affect existing law with respect to the "continuing violation" theory. Instead, this subsection of the legislation addresses discriminatory employment rules and decisions in their first application after adoption by the employer.

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[33] 42 US.C. § 3601 *et seq.*

[34] 29 U.S.C. § 201 *et seq.*

[35] Public Law 88-38.

[36] Of course, the initial adoption of a discriminatory employment practice may sufficiently alter or affect an employee's employment terms or conditions as to justify the pursuit of legal remedies at that state.

[37] The *Lorance* holding must be overruled. Courts may well find that plaintiffs lack standing to bring suit, or that the suits should be dismissed for lack of ripeness. See *Allen* v. *Wright*, 468 U.S. 737 (1984); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). As the Justice Department observed regarding the rule adopted by the *Lorance* majority:

> [E]mployees would be required to take the drastic action of using their employer before they could know if they would ever suffer any concrete injury from operation of the seniority system. . . . The employee . . . faced with a Hobson's choice either to bring what may be an unnecessary and premature lawsuit against his employer, to the detriment of the employment relationship, or to forgo any possibility of recovery in the event that the plan ever should operate to injury him. Brief for the United States as Amicus Curiae at 8, 24, *Lorance* v. *AT&T Technologies*, 109 S.Ct. 2261 (1989) (No. 87-1428).

[38] See generally, *EEOC* v. *City Colleges of Chicago*, 52 F.E.P. Cases 1424, 1429 (N.D. Ill. 1989) ("*Lorance*'s rationale applies with equal force to the challenge of all employment plans or systems"). The courts have extended the *Lorance* holding to claims that do not involve seniority systems: *Davis* v. *Boeing Helicopter Co.*, No. 88-0281 (E.D. Pa. Oct. 24, 1989), [promotion policy], *Beavers* v. *American Cast Iron Pipe Co.*, 1990 U.S. Dist. LEXIS 16143 (N.D. Ala. Nov. 21, 1990), [requirements for health insurance coverage and medical services for children have discriminatory effect on non-custodial fathers]. In addition, the courts have applied the *Lorance* reasoning to claims brought under other statutes: Age Discrimination in Employment Act—*Colgan* v. *Fisher Scientific Co.*, 747 F. Supp. 299 (W.D. Pa. 1990) [plaintiff's age discrimination claim was time-barred since limitations period began to run at time of unfavorable evaluation, rather than at time of his discharge], *Cote* v. *University of Illinois*, 1990 U.S. Dist. LEXIS 3739 (N.D. Ill. April 3, 1990) [pay discrimination as a result of layoff and subsequent rehiring at lower salary grade], *Hamilton* v. *First Source Bank*, 1990 U.S. App. LEXIS 22298 (4th Cir. Dec. 27, 1990) [pay claim], *Davidson* v. *Board of Governors of State Colleges and Universities of Western Illinois University*, 1990 U.S. App. LEXIS (7th Cir. Dec. 13, 1990) [salary discrimination claim arising from collective bargaining agreement]; Fair Labor Standards Act—*Hendrix* v. *Yazoo City*, 911 F.2d 1102 F.2d 1102 1102 (5th Cir. 1990); 42 U.S.C. 1983—*Kuemmerlein* v. *Madison* 894 F2s 257 (7th Cir. 1990); Railway Labor Act *Addison* v. *Piedmont Aviation, Inc.*, 745 F. Supp. 343 (M.D.N.C. 1990).

The "continuing violation" theory generally arises where the employer's continuing conduct or pattern of ongoing discrimination causes multiple or repeated injuries to members of the groups protected under the statute.[39]

Subsection 7(b)—Application of callenges to seniority systems.—Subsection 7(b) clarifies Title VII treatment of seniority systems that are part of a collective bargaining agreement. The subsection addresses an aspect of Title VII closely related to the decision in *Lorance.*[40] Most employer practices, such as salary structures and work rules, remain in effect indefinitely once adopted. But seniority systems embodied in a collective bargaining agreement are by definition in force for the life of the agreement. The seniority system is renewed in the same or modified form with each successive collective bargaining agreement.

Subsection 703(h) of Title VII is modified to clarify that where a seniority system or practice is included in a collective bargaining agreement with the intent to discriminate, the unlawful employment practice is the adoption or application of the system or practice during the term of the agreement. So, where an employee injured by the application of the seniority system or practice included in a collective bargaining agreement alleges that the system or practice was invidiously motivated, the resolution of that claim turns on whether the system or practice was included in that specific agreement for a discriminatory reason.

In determining the intended purpose of a seniority provision contained in a collective bargaining agreement, the purpose for including the same or a similar seniority provision in earlier agreements between the parties may be relevant evidence.

Section 8.—Providing for Damages in Cases of Intentional Discrimination

Section 8 amends Subsection 706(g) of Title VII to permit courts to award damages in cases of intentional discrimination under Title VII. It is the Committee's intention that damages should be awarded under Title VII in the same circumstances in which such awards are now permitted under U.S.C. § 1981 in intentional race discrimination cases.

A serious gap exists in Title VII, one that leaves victims of intentional discrimination on the basis of sex or religion without an effective remedy for many forms of bias on the job, while victims of intentional race discrimination in employment have such a remedy. Title VII, which prohibits discrimination on the basis of race, color, religion, sex or national origin, permits a court to award equitable relief, including injunctive relief, reinstatement or

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[39] Compare *Bazemore* v. *Friday,* 478 U.S. 385, 395-96 (1986) *(per curiam)* (each new pay check under discriminatory wage policy triggered a Title VII violation even though policy was first adopted prior to enactment of Title VII), with *United Air Lines, Inc.* v. *Evans,* 431 U.S. 553 (1977) (operation of neutral seniority system did not constitute Title VII violation even though plaintiff's seniority was reduced, pursuant to that system, due to time lost following earlier, time-based discriminatory dismissal).

[40] The *Lorance* case, and section 7(b), deal with disparate treatment challenges to seniority systems. Challenges to the bona fides of a seniority system continue to be governed by the principles set forth in the Supreme Court's decision in *Teamsters* v. *United States,* 431 U.S. 324 (1977).

hiring, with up to two years backpay;[41] but the statute does not authorize the award of compensatory or punitive damages.

By contrast, 42 U.S.C. § 1981 authorizes courts to award to victims of intentional discrimination in contracts not only equitable relief, but also compensatory damages, and in appropriate cases, punitive damages as well. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975).

Victims of intentional sexual or religious discrimination in employment terms and conditions often endure terrible humiliation, pain and suffering. This distress often manifests itself in emotional disorders and medical problems. Victims of discrimination often suffer substantial out-of-pocket expenses as a result of the discrimination, none of which is compensable with equitable remedies. The limitation of relief under Title VII to equitable remedies often means that victims of intentional discrimination may not recover for the very real effects of the discrimination. Thus, victims of intentional discrimination are discouraged from seeking to vindicate their civil rights.

As one court observed:

> 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 she has suffered in private . . . when she is precluded from recovering damages for her perpetrators' behavior. *Mitchell* v. *OsAir, Inc.*, 629 F. Supp. 636, 643 (N.D. Ohio 1986)

Disturbing testimony presented to the Subcommittee last year regarding the severe consequences of the lack of a damages remedy in Title VII for claimants who suffered severe sexual harassment on the job,[42] was augmented this year in a national report.[43]

> A case in point is the experience of Nancy Phillips who was fired when she told her employer that she was pregnant. *EEOC* v. *Service News Co.*, 898 F.2d 958 (4th Cir. 1990). Ms. Phillips not only lost her job but also her family's health insurance at a time when that insurance was of paramount importance due to her pregnancy. She and her family were unable to pay the medical bills for her pregnancy and delivery and were successfully sued by the hosptial which threatened to send a marshal to their home to collect the judgment. According to Ms. Phillips, her family was barely able to make ends meet during the pendency of the litigation and went deeply into debt, well beyond the medical bills. While Ms. Phillips was ultimately found to have been a victim of illegal sex discrimination and was awarded back pay and the medical costs incurred

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[41] Section 706(g), 42 U.S.C. 2000e-5(g).

[42] *See* 1990 Joint Hearing on H.R. 4000, vol. 2, at 6-8, 12-13.

[43] National Women's Law Center, Title VII's Failed Promise: The Impact of the Lack of a Damages Remedy, 1991.

in connection with her pregnancy, she recovered nothing for the years of stress and humiliation caused by her family's financial difficulties.[44]

Virginia Delgado was illegally harassed, discriminatorily denied an increase in salary and eventually discharged by her supervisor, the head of a Navy EEO office, *Delgado* v. *Lehman,* 665 S. Supp. 460 (E.D.Va. 1987). During the years between the discrimination and her ultimate vindication by the courts, she lived in poverty. Although she actively sought alternate employment, she was unsuccessful. Ms. Delgado describes scraping by on borrowed money, often with insufficient funds to eat properly. She lacked medical coverage and therefore neglected her health . . . Although she eventually received back pay, she declined a court award of reinstatement. Her supervisor was still on the job, and she simply could not return to her previous job under such circumstances. She took early retirement instead which represented a financial loss from what she would have received in salary. She was never compensated for that loss, her medical injuries, or the stress and humiliation she suffered as a direct result of the discrimination.[45]

Frances Danna was the victim of intentional sex discrimination and harassment in her traditionally male service technician position. *Danna* v. *New York Telephone Co.,* 752 F. Supp. 594 (S.D.N.Y. 1990). Her supervisors denied her guidance and adequate training; her supervising manager states that "one way or another" he would "get this bitch" and that if she would act more "feminine and cutesy" other service technicians would do her work for her. "Extremely vulgar and sexually explicit graffiti" was directed at her. Ms. Danna finally requested a downgrade to escape the harassment; her employer took advantage of her request, demoting her to an "unprecedented" degree despite her qualifications and substantially reducing her pay. The court awarded Ms. Danna reinstatement, back pay and injunctive relief. She received nothing, however, for the humiliation and stress she suffered from the harassment and the demotion or from the financial problems caused by the cut in pay.[46]

Carolyn Gaddy's supervisor discriminatorily refused to allow her to work overtime because she was a mother and it was his view that the children needed her at home. *Gaddy* v. *Abex Corp.,* 884 F.2d 31 (7th Cir. 1989). This same supervisor sexually harassed her. Eventually she was discriminatorily discharged from her job. While Ms. Gaddy ultimately recovered back pay and reinstatement with lost seniority, she was never compensated for the harassment or any stress caused by the discrimination . . .[47]

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[44] *Id. at 11.*
[45] *Id.*
[46] *Id.* at 12.
[47] *Id.*

James Williams suffered through racial slurb, "jokes" and "pranks", such as the posting of a Ku Klux Klan application on the company bulletin board, in a oppressively racist work environment. The trial court found that Williams' employer had violated Title VII, but "regretted" that it could not award Williams damages under Title VII for his emotional distress and psychological problems which resulted, at least in part, from the harassment. *Williams* v. *Atchison, Topeka & Santa Fe Ry.*, 627 F. Supp. 752, 757 (W.D.Mo. 1986).[48]

Ramona Arnold, a female police office, suffered extreme sexual harassment and retaliation for her complaints about the harassment. *Arnold* v. *City of Seminole, Okl.*, 614 F. Supp. 853 (D.Okl. 1985). Sexual pictures with her name written on them were posted around the stationhouse, and signs saying "Do women make good police officers? NO!" were posted in the workplace and on her supervisor's car. The court found that the harassment extended into Ms. Arnold's personal life as well: her minor son was arrested and taken into the stationhouse for completely unjustified reasons, and she and her firefighter husband were told that if they filed complaints, their city jobs would be in jeopardy. Under Title VII, Ms. Arnold recovered only back pay for the harassment period, and an injunction against future harassment. Since Title VII does not provide for compensatory damages, she could not recover for the "massive anxiety and depression" and "stroke-level" high blood pressure that the court found she suffered as a result of the harassment.[49]

Another example is that of Rodney Compston, a millwright, who got along well with his supervisor until the supervisor learned that he was of Jewish descent. *Compston* v. *Borden Inc.*, 424 F.Supp. 157 (S.D. Ohio 1976). After that, the supervisor called Mr. Compston "Goddam Jew", "kike" and "Christkiller" in front of his co-workers. The court stated, "[W]were compensatory damages available to a Title VII plaintiff, this Court would not hesitate to enter such an award in this case, because it is apparent from the evidence that Compston suffered mental anguish and humiliation at defendant's hands." Because of Title VII's limitation, however, Mr. Compston only received nominal damages of $50.[50]

All too frequently, Title VII leaves victims of employment discrimination without remedies of any kind of their injuries and allows employers who intentionally discriminate to avoid any meaningful liability.[51]

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[48] *Id.* at 13.
[49] *Id.*
[50] *Id.*, at 14.
[51] *See, e.g.*, National Women's Law Center, Title VII's Failed Promise: The Impact of the Lack of a Damages Remedy (1990) (collecting cases), executive summary printed in Subcommittee joint hearings on H.R. 4000, 101st Cong., 2d Sess. 70, vol. 1 at 284; testimony of Nancy Kreiter, *Id.*, vol. 2 at 19.

The forms of discrimination for which a damages remedy is needed are wide-ranging, and not limited to harassment. For example, a lease analyst for a major corporation was unlawfully demoted and discharged by her supervisor and was berated by the supervisor for having career ambitions when she had two children; he also told her that it was "dangerous" for women to get too much education. *Derr* v. *Gulf Oil Corp.,* 798 F.2d 340 (10th Cir. 1986). Because her only remedy was under Title VII, the plaintiff was not able to seek compensation for the mental depression and setbacks to her career that she experienced.

This situation contrasts with that of a plaintiff who was discharged for racially discriminatory reasons. Under Title VII, he was reinstated with full seniority. However, it was only through his Section 1981 action that he received compensation for the consequences of his discriminatory discharge: losing his car and house, and suffering marital and family troubles. *Muldrew* v. *Anheuser-Busch, Inc.,* 728 F.2d 989 (8th Cir. 1984).

Another discrimination victim who was inadequately served by Title VII was a physical education teacher who was subject to discriminatory working conditions because of her sex. While male physical education teachers were given an office, private toilet, lockers and shower facilities, the plaintiff was given only a partitioned space within the girls' locker room for an office, and she was forced to use the students' toilet and shower facilities. The Court of Appeals for the Sixth Circuit ruled that although she had been discriminated against, she could obtain no relief for the discrimination, since she had suffered no wage injury, and an injunction would not benefit her because she had retired by the time she won her case. *Harrington* v. *Vandalia-Butler Board of Education,* 585 F.2d 192 (5th Cir. 1978), cert. *denied* 441 U.S. 932 (1979).

In contrast to this plaintiff is a black television news personality who suffered disparate treatment on the job because of his race, and was awarded compensatory and punitive damages under Section 1981 for the discriminatory treatment he suffered. *Lowery* v. *WMC-TV,* 658 F. Supp. 1240 (W.D. Tenn. 1987), *vacated,* 661 F. Supp. 65 (W.D. Tenn. 1987) (pursuant to subsequent settlement).

Permitting the award of damages in intentional discrimination cases under Title VII will not interfere with the conciliation and adjudication of claims by the EEOC under that statute. Under current law, persons who bring race discrimination claims before the EEOC may have claims under both Section 1981 and Title VII. There is no evidence that the availability of damages under Section 1981 has interfered with conciliation of race discrimination claims by the EEOC. Most Title VII litigation is brought under both provisions, which means that almost necessarily the party has to take advantage of Title VII in one way or another, including conciliation provisions.

This Committee finds that there is a compelling need to amend Title VII to permit damages to be awarded in cases of intentional discrimination.

Compensatory damages.—Under this section, compensatory damages may be awarded to victims of intentional discrimination. The Committee intends that compensatory damages be awarded under

Title VII using the same standards that have been applied under Section 1981.

Punitive damages.—In addition to compensatory damages, punitive damages are available in cases of intential discrimination if the employer acted with "malice, or with reckless or callous indifference to the federally protected rights of others." This standard for punitive damages is taken directly from civil rights case law. As was noted in *Stallworth* v. *Shuler,* 777 F.2d 1431, 1435 (11th Cir. 1985) (a Section 1981 case):

> Punitive damages are of course available under 42 U.S.C. §§ 1981 and 1983 "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."

quoting *Smith* v. *Wade,* 461, U.S. 30, 56 (1983) (a Section 1983 case). Punitive damages may not be awarded under the Act against a government, governmental agency, or political subdivision. The Committee believes that evidence of the defendant's financial conditions should not be introduced at trial until a prima facia case of liability for punitive damages has been established.

Damages only for intentional discrimination.—H.R. 1 makes compensatory and punitive damages available only for intentional discrimination claims. Such damages would not be available for disparate impact claims under Subsection 703(k).

In addition, compensatory and punitive damages may be awarded for intentional discrimination under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.* Section 107 of the ADA incorporates by reference the powers, remedies and procedures of Title VII. Similarly, damages would not be available for disparate impact claims brought under the ADA.

Equitable remedies not affected.—The damages remedies added by Section 8 of the Act are in addition to the equitable remedies, including backpay and interest, now available under Title VII. The section makes clear that a court may not award as compensatory damages backpay or any interest on backpay, thus avoiding the possibility of duplicative recoveries.

Right to a jury trial.—To protect the rights of all persons under the Seventh Amendment, Section 8 also makes clear that in cases where compensatory or punitive damages are sought under Title VII, any party may demand a trial by jury. Because compensatory and punitive damages may not be sought in disparate impact cases, a jury trial would not be available in such cases.

Claims which involve a claim for damages (and a consequent right to a jury trial) may be brought in the same action as claims brought using the disparate impact theory. The Committee intends that the courts continue to exercise their discretion in the handling of such hybrid actions, as they have done in handling the many hybrid Title VII/Section 1981 actions in the past.

Section 9.—Clarifying Attorney's Fees

Section 9 overrules or clarifies the application of four Supreme Court decisions limiting the recovery of attorney's fees, other fees, and other costs of litigation under Title VII.[52]

The cumulative effect of these decisions is to frustrate the intent of Congress to protect the public interest by eliminating employment discrimination and to ensure that victims of such discrimination be made whole for the losses they have suffered. *See Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 418–21 (1975).

Recovery of expert witness fees by prevailing plaintiffs

Subsection 9(2) of the Act amends the attorney's fees provision in Title VII, Subsection 706(k), 42 U.S.C. § 2000e–5(k), to confirm explicitly that courts are authorized to award prevailing parties reasonable expert witness fees and other litigation expenses as part of attorney's fees. This subsection expresses the intent of the Committee that the rule announced by the Supreme Court in *Crawford Fittings Co.* v. *J.T. Gibbons, Inc.,* 482 U.S. 437 (1987), denying recovery of expert fees, not be applied in the civil rights context.

The Committee recognizes that evidence from one or more expert witnesses is critical to trying an employment discrimination case.

Subsection 9 (1), (2) and (3) of the Act ensure that prevailing plaintiffs in Title VII cases, like prevailing plaintiffs under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), and twenty-seven other federal statutes, may recover reasonable expert witness fees.[53]

For purposes of this provision, the Committee adopts the reasoning of the United States Court of Appeals for the Seventh Circuit in *Friedrich* v. *City of Chicago,* 888 F.2d 511, 518 (1989) ("expert fees for advice and consultation [as well as trial preparation and testimony] can be shifted along with paralegal and other incidental appeals normally incurred in litigation").

Recovery of attorney's fees incurred ost-settlement offer

Subsection 9(3) of the Act overrules the Supreme Court's holding in *Marek* v. *Chesny,* 473 U.S. 1 (1985), that plaintiffs "who reject an offer [of judgment under Fed. R.Civ. P. 68] more favorable than what is thereafter recovered at trial will not recover attorney's fees for services performed after the offer is rejected." *Id.* at 10.[54] This provision of the Act would permit a prevailing party to recover attorney's fees independent of such party's recovery of costs, rather than "as part of the costs," as that subsection currently provides. Under amended Subsection 706(k) of Title VII, an offer of judgment under Rule 68 would not bar a successful plaintiff from recovering

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[52] *Crawford Fittings Co.* v. *J.T. Gibbons, Inc.,* 482 U.S. 437 (1987) (recovery of reasonable expert witness fees); Marek v. *Chesny,* 473 U.S. 1 (1985) (recovery of postsettlement offer attorney's fees); *Independent Federation of Flight Attendants* v. *Zipes,* 109 S.Ct. 2732 (1989) (recovery of attorney's fees for defending Title VII judgments); and *Evans* v. *Jeff D.,* 475 U.S. 717 (1986) (conditioning settlement on waiver of attorney's fees).

[53] See *International Woodworkers of America* v. *Champion International Corp.,* 790 F.2d 1174, 1179 n.7 (5th Cit. 1986) (*en banc*) (listing statutes), *aff'd sub nom. Crawford Fitting Co.* v. *J.T. Gibbons, Inc.,* 482 U.S. 437 (1987).

[54] Although *Marek* involved an interpretation of Section 1988 of the U.S. Code, Section 706(k) of Title VII is currently subject to the same interpretation. *See* 42 U.S.C. §§ 1988, 200e–5(k).

attorney's fes incurred following rejection of the offer and recovery of a less favorable judgment at trial.

Subsection 9(3) of the Act is intended to relieve Title VII plaintiffs from being forced to accept pretrial offers of judgment even before they have had the opportunity to engage in sufficient discovery to evaluate the extent of the defendant's liability. This provision will ensure that Title VII claimants are treated, for purposes of offers of judgment, in the same way as plaintiffs under numerous other federal civil rights statutes.[55]

Coerced waivers of attorney's fees

Subsection 9(4) of the Act amends Subsection 706(k) of Title VII to create Subsection 706(k)(2), which states that no consent order or judgment settling a Title VII claim may be entered, and no stipulation of dismissal of such a claim may become effective,[56] unless the parties or their counsel attest to the court that a waiver of all or substantially all attorney's fees was not compelled as a condition of the settlement. This provision counteracts the ruling in *Evans* v. *Jeff D.*, 475 U.S. 717 (1986), which allows defendants in civil rights cases to condition proposed settlements on a waiver of attorney's fees by the plaintiff.

This provision addresses the unfairness of the *Jeff D.* ruling to civil rights plaintiffs and their attorneys. For example, following the *Jeff D.* ruling, the Third Circuit reversed a lower court's fee award. *Phillips* v. *Allegheny County, Pennsylvania,* 869 F.2d 234 (3rd Cir. 1989). The appellate court acknowledged that *Jeff D.* "may create tensions for civil rights plaintiffs in negotiating settlements," but concluded that the court was "bound by the holding." Id. at 239. Subsection 9(4) would bar defendants from forcing a wedge between Title VII plaintiffs and their counsel, by precluding settlements premised on a coerced waiver of fees incurred by the plaintiff's attorney. The Committee is aware of the inequities that result when the plaintiff's attorney must forgo recovery of earned fees.

Subsection 706(k)(2) of Title VII would not prevent plaintiff(s) and counsel from reaching settlements concerning the amount of fees. Nor would it preclude them from knowingly and voluntarily agreeing, without compulsion, to waive all or substantially all the attorney's fees to which they would be entitled under Title VII.[57] This provision does, however, seeks to eliminate the coerced waiver of all or substantially all such fees through the attestation procedure outlined above. It plaintiff's counsel declines to execute such an attestation upon a reasonable belief that a waiver of all or substantially all attorney's fees was compelled as a condition of settlement, he or she should not be deemed to have engaged in unethical conduct as prescribed by the standards of the profession.

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[55] *See, e.g.,* Fair, Housing Amendments Act of 1988, § 812(p), 42 U.S.C. § 3612(p) (providing for recovery of "a reasonable attorney's fee *and* costs") (emphasis added); Age Discrimination in Employment Act of 1967, § 7(b), 29 U.S.C. § 626(b) (incorporating by reference Fair Labor Standards Act provision allowing recovery of "a reasonable attorney's fee . . . *and* costs") (emphasis added).

[56] Stipulations of dismissal along with consent orders and judgments are the principal circumstance in which this practice arises.

[57] See generally *White* v. *New Hampshire Dept. of Employment Security,* 455 U.S. 445, 454 n.15 (1982) ("[i]n considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from both damages and fees").

Recovery of attorney's fees when defending title VII relief

Subsection 9(4) also creates a new Subsection 706(k)(3) of Title VII, which clarifies that prevailing Title VII plaintiffs are entitled to recover reasonable attorney's fees and costs with respect to all proceedings in which they participate in order to obtain, defend or enforce Title VII relief. The Supreme Court suggested otherwise in *Independent Federation of Flight Attendants* v. *Zipes,* 109 S.Ct. 2732 (1989).

For example, where a court decree is entered in a Title VII case and a third party intervenes (either before or after the decree is entered) in an unsuccessful attempt to challenge it, this provision makes clear that the original prevailing plaintiffs will be entitled to receive, from either the original defendants or the unsuccessful party challenging such relief, or both under an equitable allocation determined by the court, reasonable attorney's fees and costs for their efforts in defending the judgment or decree in response to the intervention.

In addition, if a third party brings a separate suit in an unsuccessful attempt to challenge a judgment or consent decree entered in a previous Title VII case, the original prevailing Title VII plaintiffs would be entitled to receive reasonable attorney's fees and costs from either the original defendants or the unsuccessful party challenging such relief, or from both under an equitable allocation determined by the court, if such plaintiffs intervene in the second suit to defend the previous judment or decree successfully. This provision of the bill does not disturb the holding in *Zipes* that an unsuccessful intervenor in a Title VII suit should not be required to pay attorney's fees unless the intervenor's action was "frivolous, unreasonable, or without foundation. "*Zipes,* 109 S.Ct, at 2736; *Christiansburg Garment Co.* v. *EEOC,* 434 U.S. 412, 421 (1978).

Similarly, if a third party brings a successful "reverse discrimination" Title VII suit against an employer challenging a previous Title VII decree, the third party could obtain attorney's fees and cost from the employer. If the original Title VII plaintiffs intervened in the second suit, they would not be responsible for such fees and costs unless their actions during the course of the second suit were frivolous, unreasonable, or without foundation. It would not be frivolous, unreasonable, or without foundation for prevailing plaintiffs in an original Title VII suit to move to intervene in a subsequent action in order to defend the relief obtained in the original action.

In determining whether to allow recovery of fees from the party challenging the initial judgment or order, the court should consider not only whether such challenge was unsuccessful, but whether the award of fees against the challenging party promotes fairness. The court should consider such factors as the reasonableness of the challenging party's legal and factual position and whether other special circumstances make an award unjust.

The Committee intends this provision be construed in a manner that will promote fairness in the assignment of the responsibility to pay fees incurred in protecting the relief obtained in judgments or orders and provide a deterrent to baseless, frivolous, unjustified or repetitious challenges to the relief provided in a judgment or

order. The Committee believes this provision protects the ability of challenging parties to make reasonable factual and legal challenges to such relief, and the ability of prevailing parties in the original action to afford counsel to protect their rights with respect to that challenge.

A successful challenging party will, under section 706(k), have the right to an award of his or her reasonable attorney's fees, expenses and costs from the party against whom relief was granted in the original action, and will not be subject to payment of any fee award to the original prevailing plaintiff for services performed in defending against the challenge.

In making an allocation of a fee award between an unsuccessful challenging party and the party against whom relief was granted in the original action, the court should consider their comparative resources and ability to pay, and the comparative reasonableness of their positions. For purposes of this statute, an unsuccessful party is one who challenges the relief originally awarded but fails to obtain the modification requested.

Section 10.—Providing for Interest and Extending the Statute of Limitations in Actions Against the Federal Government

This section expands the statute of limitations period from 30 to 90 days for filing with EEOC Title VII charges against the federal government. Title VII offers a 90 day statute of limitations to all other complaining parties. Because of this section, the limitations period for federal and non-federal government employment will now be the same.

The section also overrules the Supreme Court's holding in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986) in which the Court applied the "no interest rule" to bar recovery of prejudgment interest on delayed payment of attorney's fees.[58] The Court reasoned that interest may not be awarded against the federal government in the absence of express statutory or contractual consent.

The Supreme Court has recognized that:

> [C]ompensation received several years after the services were rendered—as it frequently is in complex civil rights litigation—is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would normally be the case with private billings. We agree, therefore, that an appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rate or otherwise—is within the contemplation of the statute. *Missouri* v. *Jenkins*, 109 S. Ct. 2463, 2469 (1989); see also *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 716 (1987) ("courts have regularly recognized the delay factor" and adjusted awards accordingly).

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[58] *Shaw* has been relied on in denying interest for back pay awards to the prevailing party. See, e.g., *Mitchell* v. *Secretary of Commerce*, 715 F. Supp. 409, 410 (D.D.C. 1989). Some contend Congress already has empowered courts and EEOC to award interest on back pay claims against the federal government. See 5 U.S.C. § 5596(b)(2)(A) (back pay awards issued by an appropriate authority against the federal government "shall be payable with interest"); *Parker* v. *Burnley*, 703 F. Supp. 925 (N.D. Ga. 1988); *Hall* v. *Lyng*, EEOC No. 05880912 (Dec. 29, 1988).

Title VII authorizes awards of interest or other compensation for delayed payments on back pay and attorney's fees in actions against private employers and state and local governments.[59] Legislative history of the 1972 amendments to Title VII demonstrates that Congress intended that federal employees enjoy the same rights and remedies in the courts as private litigants. *Shaw,* at 325 (Brennan, J., dissenting). Failure to overrule the Court's holding in *Shaw* frustrates that congressional intent; it also has a chilling effect on the "private attorneys general" policy of federal civil rights laws.

The change made by this section expressly waives the Government's immunity from interest. This express waiver clarifies that courts may award interest or other compensation to prevailing parties and their counsel for delayed payment of monetary relief by the federal government. Pre-judgment interest on compensatory damages may not be awarded in claims against the federal government.

Section 11.—Rule of Construction for Civil Rights Laws

Section 11 amends Title XI of the 1964 Civil Rights Act, to create a new Section 1107, and codifies a well established canon of statutory construction that remedial statutes, such as civil rights laws, be broadly construed.[60] At times, the Supreme Court has followed this principle.[61] When it has not, Congress has been compelled to enact legislation overruling the Court's narrow holdings.[62] In reversing the Court, the Congress has often stressed its intent that these remedial statutes be broadly construed.[63] The several cases overruled by this legislation suggest the Court is no longer guided by this principle.

In codifying this rule of construction, the Congress intends that when the statutory terms in civil rights law are susceptible to alternative interpretations, the courts are to select the construction which most effectively advances the underlying congressional purpose of that law.

Subsection 1107(a)—Effectuation of purpose.—Subsection (a) declares the purpose of civil rights laws is to provide equal opportunity and effective remedies to persons who have been discriminated against.

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[59] See, e.g., *Johnson* v. *University College of University of Alabama,* 706 F.2d 1205, 1210 (11th Cir. 1983) (awarding interest on attorney's fee award because "delay obviously dilutes the eventual award"), *cert. denied,* 464 U.S. 994 (1983), *Sowers* v. *Kemira, Inc.,* 702 F.Supp. 809, 827 (S.D. Ga. 1988) (awarding interest on back pay).

[60] Southerland, Statutes and Statutory Construction, Section 60.01 (4th ed., 1986 revision).

[61] See, e.g., *United States* v. *Price,* 383 U.S. 787, 801 (1966) ("if we are to give Section 241 [of the Enforcement Act of 1870] the scope that its origins dictate, we must accord it a sweep as broad as its language"); *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 437 (1968) (same); *Griffin* v. *Breckenridge,* 403 U.S. 88, 97 (1971) ("[t]he approach of this Court to . . . civil rights statutes . . . has been to 'accord them a sweep as broad as their language' ").

[62] See, e.g., Equal Employment Amendments Act of 1972, Pub. L. 92-261 [overruling *Dewey* v. *Reynolds Metals Co.,* 402 U.S. 689 (1971)]; Pregnancy Discrimination Act of 1978, Pub. L. 95-555 [overruling *General Electric* v. *Gilbert,* 429 U.S. 125 (1976)]; Age Discrimination in Employment Act Amendments of 1978, Pub. L. 95-256 [overruling *United Airlines, Inc.* v. *McMann,* 434 U.S. 192 (1977)]; Voting Rights Act Amendments of 1982, Pub. L. 97-205 [overruling *City of Mobile* v. *Bolden,* 446 U.S. 55 (1980)]; Handicapped Children's Protection Act of 1985, Pub. L. 99-372 [overruling *Smith* v. *Robinson,* 468 U.S. 2 (1984)]; Civil Rights Restoration Act of 1988, Pub. L. 100-259 [overruling *Grove City College* v. *Bell,* 465 U.S. 555 (1984)].

[63] See, e.g., S. Rep. 100-64, at 5 [overturning *Grove City College* v. *Bell,* 465 U.S. 555 (1984)].

Subsection 1107(b)—Nonlimitation.—Subsection (b) codifies the well-established principle that the amendments made to one law not be interpreted as directly or by implication repealing or amending any other federal laws protecting the same or similar rights.[64]

Subsection 1107(c)—Interpretation.—Subsection (c) is intended to ensure that the changes made by this legislation to Title VII and to 42 U.S.C. § 1981 not be used as a basis for limiting theories of liability, rights and remedies of other civil rights laws not amended here. The changes made to these laws should not undermine accepted rules of law and precedents construing other federal civil rights laws.[65] The Committee does not want its efforts to restore protections that have historically been accorded to civil rights claimants under Title VII and Section 1981 to be construed as somehow narrowing the rights and remedies available under any other federal civil rights statutes.

Section 12.—Restoring Prohibition Against All Racial Discrimination in the Making and Enforcement of Contracts

This section amends 42 U.S.C. § 1981 (commonly referred to as "Section 1981") to overturn *Patterson* v. *McLean Credit Union* and to codify *Runyon* v. *McCrary*, 427 U.S. 160 (1976).

Section 1981 was originally enacted as part of the Civil Rights Act of 1866. It provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, 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, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Many Supreme Court decisions have held that Section 1981 prohibits intentional race discrimination in the making and enforcement of private contracts, as well as in state action affecting individuals' ability to make and enforce contracts. The statute is of particular importance for three principal reasons:

> Section 1981 is the only federal law banning race discrimination in all contracts. It has been a critically important tool used to strike down racially discriminatory practices in a broad variety of contexts.[66]

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[64] For example, 42 U.S.C. § 1981 prohibits racial discrimination in contractual relations, including employment contracts. Courts should not rely on other federal civil rights statutes prohibiting employment discrimination, such as Title VII, as a basis for limiting the theories of liability, rights and remedies available under Section 1981.

[65] Including, but not limited to, 42 U.S.C. § 1983, the Age Discrimination in Employment Act, and the Equal Pay Act.

[66] *e.g.*, Private schools, *Runyon* v. *McCrary*, 427 U.S. 160 (1976); community recreation facilities, *Tillman* v. *Wheaton-Haven Recreation Ass'n. Inc.*, 410 U.S. 431 (1973); hotel lounges, *Wyatt* v. *Security Inn Food & Beverage, Inc.*, 819 F.2d 69 (4th Cir. 1987); and private recreation facilities, *Scott* v. *Young*, 307 F.Supp. 1005 (E.D. Va. 1969), *aff'd*, 421 F.2d 143 (4th Cir. 1970), *cert. denied*, 398 U.S. 929 (1970); discrimination post-award of contract, *Brandt Construction Company* v. *Lumen Construction, Inc.*, 515 N.E.2d 868 (Ind. App. 3 Dist. 1987).

Section 1981 covers employers of all sizes. Title VII, on the other hand, applies only to employers with 15 or more employees.

Section 1981 authorizes courts to award compensatory and punitive damages,[67] in addition to equitable relief.

In *Patterson,* the Supreme Court gave Section 1981 a narrow interpretation, holding that the prohibition against discrimination only goes to "the formation of a contract . . . not to problems that may arise later from the conditions of continuing employment." *Patterson,* 109 S.Ct. at 2372.

The Court held that Section 1981 does not prohibit an employer from racially harassing its employees or generally prohibit racial discrimination that arises after an employee is hired.

The Court rejected the plaintiff's claim of racial harassment. "[T]he right to make contracts" on an equal basis with white citizens "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." *Id.* at 2373.

The Court held that the plaintiff could prevail on her promotion claim only if she could establish that the promotion "involved the opportunity to enter into a new contract with the employer." *Id.* at 2377.

The impact of *Patterson* has been disastrous. Last year, the Committee took notice that more than 200 Section 1981 race discrimination claims had been dismissed because of *Patterson.*[68] That number continues to grow.[69] Employees protected by Title VII lack adequate protection against racial harassment and other forms of discrimination on the job. For employees covered by Title VII, who do not quit or otherwise accrue claims for lost wages, Title VII provides no adequate remedy, because Title VII remedies are limited to equitable relief, including up to two years back pay.

The damage caused by *Patterson* has not been limited to the employment context. Complaints that alleged intentional racial discrimination in insurance, auto repair, and advertising contracts, have been dismissed because of *Patterson.*[70]

During Committee debate on H.R. 1, concerns were raised about minority contractors who have been unable to secure surety bonds for construction projects because of racial discrimination. An amendment was offered to ensure that surety contracts were among the contracts subject to Section 1981's prohibition against racial discrimination. The amendment was withdrawn because the term "contract" as used in Section 1981 prohibits discrimination in all contracts including all types of business and commercial contracts.

In order to resolve any confusion among the courts regarding application of Section 1981 to national origin groups, the Committee offers this clarification.

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[67] *Johnson* v. *Railway Express Agency, Inc.,* 421 U.S. 454 (1975).

[68] Report, 101-644, Part 2, at page 43.

[69] Women's Legal Defense Fund, The Unjust Workplace—the Impact of the *Patterson* Decision on Women, reprinted in the Hearings on H.R. 1 Before the Subcomm. on Civil and Constitutional Rights to the House Committee on the Judiciary, 102nd Cong., 1st Sess., vol. 1, at 160.

[70] *Id.* at 178-79.

The Committee affirms the holding in *Saint Francis College* v. *Al-Khazraji*, 481 U.S. 604 (1987), "that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of *their ancestry or ethnic characteristics.* Such discrimination is racial discrimination that Congress intended (Section) 1981 to forbid . . .," [71] [italic added].

The Supreme Court has long recognized and the Committee agrees that "national origin" is synonymous with "ancestry." [72] Thus, for the purpose of pleading under Section 1981, it is sufficient to allege discrimination based upon national origin; such an assertion will state a valid cause of action under this statue.

Subsection (b)—Scope.—This subsection overrules *Patterson* by adding a new subsection to Section 1981. This subsection would make it clear 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." The Committee intends this provision to bar all racial discrimination in contracts. This list is intended to be illustrative and not exhaustive. In the context of employment discrimination, for example, this would include, but is not limited to, claims of harassment, discharge, demotion, promotion, transfer, retaliation, and hiring.

Subsection (c)—Prohibiting discrimination in private contracting.—This subsection is intended to codify *Runyon* v. *McCrary.* In *Runyon,* the Court held that Section 1981 prohibited intentional racial discrimination in private, as well as public, contracting. The Committee intends to prohibit racial discrimination in all contracts, both public and private.

Section 13.—Lawful Court-Ordered Remedies, Affirmative Action and Conciliation Agreements Not Affected

Section 13 has two purposes. First, it is intended to reiterate that nothing in the amendments made by this Act shall be construed to require or encourage an employer to adopt hiring or promotion quotas on the basis of race, color, religion, sex or national origin. Second, it makes clear that nothing in the amendments made by this Act shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law.

The lawfulness of court-ordered remedies, affirmative action, or conciliation agreements is to be determined under the law [73] without reference to the amendments made by the Act.

Section 14.—Severability

This section provides that if any provision of the Civil Rights Act of 1991 is found to be invalid, then that provision will be severed

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[71] *Id.*, at 613.

[72] *Espinzoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 89 (1973).

[73] See, e.g., *Steelworkers* v. *Weber*, 443 U.S. 193 (1979); *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986); *Sheet Metal Workers* v. *EEOC*, 478 U.S. 421 (1986); *Firefighters* v. *Cleveland*, 478 U.S. 501 (1986); *Johnson* v. *Transportation Agency*, 480 U.S. 616 (1987); *U.S.* v. *Paradise*, 480 U.S. 149 (1987).

from the Act and will not affect the enforceability of the remaining provisions of the Act.

Section 15.—Retroactivity

Section 15 provides effective dates for each section of this legislation, sets forth transition rules which permit courts to vacate certain orders inconsistent with the legislation, and allows revival of certain claims which would otherwise be untimely. As used in this section, the word "proceedings" includes both judicial actions as well as administrative proceedings.

Subsection 15(a)—Application of Amendments.—H.R. 1 applies retroactively certain provisions overturning specific Supreme Court cases. These sections would apply to all proceedings pending on or commenced after the date of the relevant decision.

The retroactive sections are: 4 (overturning *Wards Cove*); 5 (overturning *Price Waterhouse*); 6 (overturning *Martin* v. *Wilks*); 7(a)(2) (overturning *Lorance*); and 12 (overturning *Patterson*).

All other sections are applied prospectively to all proceedings pending on or commenced after the date of enactment. The definitions added by Section 3, which are used in several sections, will apply to any actions or proceedings to which these sections apply.

Congress can apply laws retroactively. The Supreme Court recently addressed this issue in *U.S.* v. *Sperry Corp.*, 110 S.Ct. 387, 396 (1989):

> Our standard of review is settled: "[R]etroactive legislation does have to meet a burden not faced by legislation that has only future effects. 'It does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter must not suffice for the former.' *But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose."* (emphasis added, quoting *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984), which quotes *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16–17 (1976) (citation omitted)).

If a legitimate and rational legislative purpose is shown, "judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches. . . ." *Pension Benefit* at 729.

Federal courts have consistently upheld the retroactive application of civil rights and employment laws.[74]

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[74] See, e.g. *Usery* (upholding retroactive imposition of liability on employers for employees' work-related disabilities); *Leake* v. *Long Island Jewish Medical Center*, 869 F.2d 130, 131 (2d Cir. 1989) (applying Civil Rights Restoration Act retroactively given its restorative purpose); *Aledo-Garcia* v. *Puerto Rico National Guard Fund, Inc.*, 887 F.2d 354, 358 (1st Cir. 1989) (applying Age Discrimination in Employment Act amendment retroactively); *Austin* v. *City of Bisbee*, 855 F.2d 1429, 1434–36 (9th Cir. 1988) (applying Fair Labor Standards Act amendment retroactively, upholding Congress' power to "step into previously-filed litigation and terminate a party's substantive rights"); *Mrs. W.* v. *Tirozzi*, 832 F.2d 748, 754–55 (2d Cir. 1987) (applying Handicapped Children's Protection Act of 1986 retroactively given its restorative purpose).

As a general rule, the law at the time of the decision should apply to a case. *Bradly* v. *Richmond School Board,* 416 U.S. 696, 711 (1974). But the court should not apply a legal rule retroactively if "doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Id.* at 711. There is no manifest injustice in applying the restored law to actions or proceedings pending on the dates the decisions were announced. Because these cases were likely filed in reliance on the prior law, it would be manifestly unjust to apply the rules announced by the Supreme Court to cases decided after those decisions but before the date of enactment of this Act.

Although "statutes affecting substantive rights and liabilities are presumed to have only prospective effect," *Bennett* v. *New Jersey,* 470 U.S. 632, 639 (1985), statutes that make only procedural or remedial changes are presumptively retroactive, following *Bradley.* The retroactive sections of H.R. 1 make procedural changes, and do not affect substantive rights and liabilities. Section 4 shifts the burden of proof, Sections 5 and 12 change the scope of coverage, Section 6 affects notice requirements, and Subsection 7(a)(2) changes application of the statute of limitations.

Subsection 15(b)—Transition Rules.—For Sections 4, 5, 7(a)(2) and 12, any order entered by a court between the applicable effective date and the enactment date that is inconsistent with the amendments will be vacated if requested within 1 year after enactment.

For Section 6, overturning *Martin* v. *Wilks,* any order entered between the effective date and enactment date that permits a challenge to an employment practice that implements a litigated or consent judgment or order and that is inconsistent with the amendment made by Section 6, will be vacated if requested within 6 months after enactment. An individual whose challenge is denied under the amendment made by Section 6, or whose order or relief obtained by a challenge is vacated, has the same right of intervention in the case in which the challenged litigated or consent judgment or order was entered as that individual had on June 12, 1989, for 1 year following the date of enactment.

Retroactive application does not violate the doctrine of separation of powers, as long as it does not dictate the outcome of a particular case. "For legislation to be struck down because it encroaches on the powers of the judiciary, it must dictate an outcome which reverses the court's decision in the particular case." *Capello* v. *D.C. Bd. of Ed.,* 669 F. Supp. 14 (D.D.C. 1987), citing *U.S.* v. *Klein,* 80 U.S. (13 Wall.) 128 (1871).

Congress may create a new legal right and invite the courts to re-examine fully litigated disputes in light of this right, so long as it does not "prescribe the outcome of the . . . new review of the merits." *U.S.* v. *Sioux Nation of Indians,* 448 U.S. 371, 407 (1980).

Subsection 15(c)—Period of Limitations.—The period of limitations for the filing of a claim or charge will be tolled from the applicable effective date until the enactment date, on a showing that the claim or charge was not filed because of a rule or decision altered by the amendments made by Sections 4, 5, 7(a)(2) or 12.

Congress can retroactively toll the statute of limitations. "[L]ifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is [not] per se an offense"

against due process, *Chase Securities Corp.* v. *Donaldson,* 325 U.S. 304, 316 (1945). See also, *Electrical Union* v. *Robbins & Meyers, Inc.* 429 U.S. 229, 243–44 (1976). Congress can toll statutes of limitation retroactively because "the history of pleas of limitations shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control." *Chase Securities* at 314.

Section 16.—Congressional Coverage

Section 16 amends Title VII to make it applicable to Congress. Each House of Congress shall determine the means for enforcement.

In 1988, the House applied Title VII to itself and created an enforcement mechanism with the passage of the Fair Employment Practices Resolution, H. Res. 558, in the 100th Congress. This was extended through H. Res. 15 in the 101st Congress.

Section 17.—Statute of Limitation; Notice of Right To Sue

Section 17 adds a conforming amendment to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* to make similar changes in the statute of limitations in that Act.

Although the statute of limitations provision under Title VII and the ADEA are not identical, their overall scheme, especially with regard to their charge filing requirements, is very similar. Because of the similarities between the statutes, the courts have routinely looked to Title VII precedent in interpreting corresponding provisions of the ADEA. Thus, there is a danger that *Lorance* will be applied under the ADEA, if the statute of limitations is changed in Title VII but not in the ADEA.

Further, some of the differences between the Title VII and ADEA charge filing and litigation statute of limitations provisions have led to substantial confusion among persons alleging discrimination on the basis of age, or under the ADEA and Title VII together. Two differences in particular have caused serious problems.

First, unlike Title VII, which sets a limitations period only for filing charges, the ADEA imposes time limits both for filing charges and for initiating lawsuits. The limitation period for filing an administrative charge alleging discrimination is the same as in Title VII but, unlike Title VII, ADEA claimants must file their court case within two years of the discriminatory act, regardless of whether the administrative agency has acted.

Second, Title VII specifically directs the EEOC to provide complainants with affirmative notice of their "right to sue" upon the occurrence of certain events. The ADEA does not impose this notice requirement.

As a result of these differences, many age discrimination victims lost their right to go to court, because they were unaware of the ADEA's time limitations for filing a lawsuit and they received no notice from the EEOC that they could—in fact, must—file suit by certain dates. These slight differences between Title VII and the ADEA have resulted in confusion, which may be exacerbated by the changes made in Section 7 of this Act.

To avoid confusion, this section eliminates the dual limitations scheme for filing charges and initiating litigation, replacing it with the single 2 year charge-filing requirement that Section 7 proposes

for Title VII. ADEA claimants will retain their historical right to go directly into court after filing a charge. As in Section 7, the time period for filing an age discrimination charge will begin to run from when the violation actually "occurred," overturning *Lorance*.

This section also adds a new provision to the ADEA, which imposes an explicit obligation on the EEOC to notify ADEA complainants of their right to sue, after the EEOC has dismissed their charges. The notice of a right to sue is already required under Title VII. This section deletes a tolling provision which becomes obsolete with the establishment of a single statute of limitations.

Section 18.—Alternative Means of Dispute Resolution

This section encourages the use of alternative means of dispute resolution, where appropriate and to the extent authorized by law. These methods include settlement negotiations, conciliation, facilitation, mediation, factfinding, mini-trials and arbitration.

This amendment was adopted to encourage alternative means of dispute resolution that are already authorized by law. A virtually identical amendment was enacted as part of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.

The Committee emphasizes, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander* v. *Gardner-Denver Co.* 415 U.S. 36 (1974). The Committee does not intend for the inclusion of this section be used to preclude rights and remedies that would otherwise be available.

Committee Oversight Findings

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

Committee on Government Operations Oversight Findings

No findings or recommendations of the Committee on Government Operations were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

New Budget Authority and Tax Expenditures

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(C)(3) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill H.R. 1, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 19, 1991.

Hon. JACK BROOKS,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 1, the Civil Rights Act of 1991, as ordered reported by the Committee on the Judiciary on March 19, 1991. This bill could affect the federal budget by adding administrative costs due to the potential increase in the number of complaints handled by the Equal Employment Opportunities Commission and by increasing compensation payments in the case of settlements against federal or congressional employers. Each of these potential costs is discussed below. Because the bill does not affect direct spending or receipts, there are no pay-as-you-go implications under the procedures of section 252 of the Budget Enforcement Act of 1990.

This bill would restore the civil rights protections that were limited by recent Supreme Court decisions and would strengthen existing protections and remedies available under federal civil rights laws. This bill would extend the definition of illegal employment practices and would allow for the award of compensatory damages in cases of intentional discrimination.

As a result, there could be additional administrative costs because the number of complaints the Equal Employment Opportunities Commission (EEOC) would be required to investigate could increase. This bill could increase the number of complaints because the time for filing a complaint is increased from 180 or 300 days to 2 years and because compensatory damages could be awarded in some cases. It is difficult to estimate precisely the increase in administrative costs; however, the costs are not expected to add significantly to the EEOC's current $198 million budget. The workload of the Department of Justice (DOJ) also could increase as a result of H.R. 1, but according to staff at the DOJ, the additional administrative cost would be minimal.

In addition, there could be additional compensation costs. Currently, if a discrimination complaint is filed against the federal government, the complaint can be resolved between the federal agency and the complainant before a formal Title VII charge is filed or before the complaint can be resolved through an EEOC hearing. If the federal agency is found to be at fault through either process, the complainant is reinstated and is awarded only back pay—compensatory damages are not allowed under current law. According to staff at the EEOC, there were 5,858 administrative settlements involving the federal government that cost $4.2 million in fiscal year 1990. These settlement costs could increase under the bill because compensatory damages could be awarded in some cases

involving the federal government. While it is difficult to estimate what the payment of compensatory damages might add to settlement costs, CBO does not expect the amount to be significant. According to a survey done by the law firm of Shea and Gardner, compensatory damages were awarded in approximately 10 percent of the cases not involving the federal government that were decided between 1980 and 1990. The initial awards ranged from $1 to $300,000 with the majority concentrated at the lower end of the range.

Finally, there could be an increase in the number of future complaints against the federal government because of the prospect of payment of compensatory damages in addition to payments for back pay. CBO, however, has no basis for projecting potential increases in the number of discrimination complaints against the federal government.

The budgets of state and local governments also could be affected. As in the case of the federal government, there could be an increase in the number of case brought against state and local governments. However, CBO is unable to estimate this number.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Cory Oltman (226-2820).

Sincerely,

ROBERT F. HALE
(For Robert D. Reischauer, Director).

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 1 will have no significant inflationary impact on prices and costs in the national economy.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, H.R. 1 as reported are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

CIVIL RIGHTS ACT OF 1964

* * * * * * *

TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY

DEFINITIONS

SEC. 701. For the purposes of this title—

(a) * * *

* * * * * * *

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "group of employment practices" means a combination of employment practices that produces one or more decisions with respect to employment, employment referral, or admission to a labor organization, apprenticeship or other training or retraining program.

(o)(1) The term "required by business necessity" means—

(A) in the case of employment practices involving selection (such as hiring, assignment, transfer, promotion, training, apprenticeship, referral, retention, or membership in a labor organization), the practice or group of practices must bear a significant relationship to successful performance of the job; or

(B) in the case of employment practices that do not involve selection, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

(2) In deciding whether the standards in paragraph (1) for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The defendant may offer as evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence, and the court shall give such weight, if any, to such evidence as is appropriate.

(3) This subsection is meant to codify the meaning of "business necessity" as used in Griggs v. Duke Power Co. (401 U.S. 424 (1971)) and to overrule the treatment of business necessity as a defense in Wards Cove Packing Co., Inc. v. Atonio (109 S. Ct. 2115 (1989)).

(p) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining programs, including on-the-job training programs, or those Federal entities subject to the provisions of section 717 (or the heads thereof).

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

SEC. 703. (a) * * *

* * * * * * *

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex or national origin. *Where a seniority system or seniority practice is part of a collective bargaining agreement and such system or practice was included in such agree-*

ment with the intent to discriminate on the basis of race, color, religion, sex, or national origin, the application of such system or practice during the period that such collective bargaining agreement is in effect shall be an unlawful employment practice. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

* * * * * * *

(k) PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE IMPACT CASES.—(1) An unlawful employment practice based on disparate impact is established under this section when—

(A) a complaining party demonstrates than an employment practice results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice is required by business necessity; or

(B) a complaining party demonstrates that a group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such group of employment practices is required by business necessity, except that—

(i) except as provided in clause (iii), if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact;

(ii) if the respondent demonstrates that a specific employment practice within such group of employment practices does not contribute to the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity; and

(iii) if the court finds that the complaining party can identify, from records or other information of the respondent reasonably available (through discovery or otherwise), which specific practice or practices contributed to the disparate impact—

(I) the complaining party shall be required to demonstrate which specific practice or practices contributed to the disparate impact; and

(II) the respondent shall be required to demonstrated business necessity only as to the specific practice or practices demonstrated by the complaining party to have contributed to the disparate impact;

except that an employment practice or group of employment practices demonstrated to be required by business necessity shall be unlawful where a complaining party demonstrates that a different employment practice or group of employment practices with less disparate impact would serve the respondent as well.

(2) A demonstration that an employment practice is required by business necessity may be used as a defense only against a claim under this subsection.

(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses an illegal drug as defined in Schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of the race, color, religion, sex, or national origin.

(4) The 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.

(l) DISCRIMINATORY PRACTICE NEED NOT BE SOLE CONTRIBUTING FACTOR.—Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a contributing factor for any employment practice, even though other factors also contributed to such practice.

(m) FINALITY OF LITIGATED OR CONSENT JUDGMENTS OR ORDERS.—(1) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order resolving a claim of employment discrimination under the United States Constitution or Federal civil rights laws may not be challenged in a claim under the United States Constitution or Federal civil rights laws—

(A) by a person, who, prior to the entry of such judgment or order, had—

(i) actual notice from any source of the proposed judgment or order sufficient to apprise such person that such judgment or order might affect the interests of such person and that an opportunity was available to present objections to such judgment or order; and

(ii) a reasonable opportunity to present objections to such judgment or order;

(B) by a person with respect to whom the requirements of subparagraph (A) are not satisfied, if the court determines that the interests of such person were adequately represented by another person who challenged such judgment or order prior to or after the entry of such judgment or order; or

(C) if the court that entered the judgment or order determines that reasonable efforts were made to provide notice to interested persons.

A determination under subparagraph (C) shall be made prior to the entry of the judgment or order, except that if the judgment or order was entered prior to the date of the enactment of this subsection, the determination may be made at any reasonable time.

(2) Nothing in this subsection shall be construed to—

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which they intervened;

(B) apply to the rights of parties to the action in which the litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the United States Constitution.

(3) Any action, not precluded under this subsection, that challenges an employment practice that implements and is within the scope of a litigated or consent judgment or order of the type referred to in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code.

* * * * * * *

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

SEC. 706. (a)* * *

* * * * * * *

(e) A charge under this section shall be filed within [one hundred and eighty days] *2 years* after the alleged unlawful employment practice occurred *or has been applied to affect, adversely the person aggrieved, whichever is later,* and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter[, except that in]. *In* a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, [such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under State or local law, whichever is earlier, and] a copy of such charge shall be filed by the Commission with the State or local agency.

* * * * * * *

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, 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 em-

ployees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable dilgence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. *With respect to an unlawful employment practice (other than an unlawful employment practice established in accordance with section 703(k)) or in the case of an unlawful employment practice under the Americans with Disabilities Act of 1990 (other than an unlawful employment practice established in accordance with paragraph (3)(A) or paragraph (6) of section 102 of that Act) as it relates to standards and criteria that tend to screen out individuals with disabilities)—*

(A) compensatory damages may be awarded; and

(B) if the respondent (other than a government, government agency, or a political subdivision) engaged in the unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others, punitive damages may be awarded against such respondent;

in addition to the relief authorized by the preceding sentences of this subsection, except that compensatory damages shall not include backpay or any interest thereon. Compensatory and punitive damages and jury trials be available only for claims of intentional discrimination. If compensatory or punitive damages are sought with respect to a claim of intentional discrimination arising under this title, any party may demand a trial by jury. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) *or, in a case where a violation is established under section 703(l), if the respondent establishes that it would have taken the same action in the absence of any discrimination. In any case in which a violation is established under section 703(l), damages may be awarded only for injury that is attributable to the unlawful employment practice.*

* * * * * * *

(k)*(1)* In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fees [as part of the] *(including expert fees and other litigation expenses) and* costs, and the Commission and the United States shall be liable for costs the same as a private person.

(2) No consent order or judgment settling a claim under this title shall be entered, and no stipulation of dismissal of a claim under this title shall be effective, unless the parties or their counsel attest

to the court that a waiver of all or substantially all attorney's fees was not compelled as a condition of the settlement.

(3) In any action or proceeding in which any judgment or order granting relief under this title is challenged, the court, in its discretion and in order to promote fairness, may allow the prevailing party in the original action (other than the Commission or the United States) to recover from either an unsuccessful party challenging such relief or a party against whom relief was granted in the original action or from more than one such party under an equitable allocation determined by the court, a reasonable attorney's fee (including expert fees and other litigation expenses) and costs reasonably incurred in defending (as a party, intervenor or otherwise) such judgment or order. In determining whether to allow recovery of fees from the party challenging the initial judgment or order, the court should consider not only whether such challenge was unsuccessful, but also whether the award of fees against the challenging party promotes fairness, taking into consideration such factors as the reasonableness of the challenging party's legal and factual position and whether other special circumstances make an award unjust.

* * * * * * *

NONDISCRIMINATION IN FEDERAL GOVERNMENT EMPLOYMENT

SEC. 717. (a) * * *

* * * * * * *

(c) Within [thirty days] *ninety days* of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission[9] on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 706 (f) through (k), as applicable, shall govern civil actions brought hereunder, *and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties, except that prejudgment interest may not be awarded on compensatory damages.*

* * * * * * *

SEC. 719. CONGRESSIONAL COVERAGE.

Notwithstanding any other provisions of this title, the provisions of this title shall apply to the Congress of the United States, and

the means for enforcing this title as such applies to each House of Congress shall be as determined by such House of Congress.

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TITLE XI—MISCELLANEOUS

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SEC. 1107. RULES OF CONSTRUCTION FOR CIVIL RIGHTS LAWS.

(a) EFFECTUATION OF PURPOSES.—All Federal laws protecting the civil rights of persons shall be interpreted consistent with the intent of such laws, and shall be broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies.

(b) NONLIMITATION.—Except as expressly provided, no Federal law protecting the civil rights of persons shall be construed to repeal or amend by implication any other Federal law protecting such civil rights.

(c) INTERPRETATION.—In interpreting Federal civil rights laws, including laws protecting against discrimination on the basis of race, color, national origin, sex, religion, age, and disability, courts and administrative agencies shall not rely on the amendments made by the Civil Rights Act of 1990 as a basis for limiting the theories of liability, rights, and remedies available under civil rights laws not expressly amended by such Act.

SECTION 1977 OF THE REVISED STATUTES OF THE UNITED STATES

SEC. 1977. *(a)* All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, 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, and shall be subject to like punshment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) For purposes of this section, the right to "make and enforce contracts" shall include the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination as well as against impairment under color of State law.

SECTION 7 OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

RECORDKEEPING, INVESTIGATION, AND ENFORCEMENT

SEC. 7. (a) * * *

* * * * * * *

(d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unawful discriminaton has been filed with the Secretary. Such a charge shall be filed—

(1) within [180 days] *2 years* after the alleged unlawful practice occurred *or has been applied to affect adversely the person aggrieved, whichever is later*; or

(2) in a case to which section 14(b) applies, [within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier] *a copy of such charge shall be filed by the Commission with the State agency.* Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e)[(1) Section 6 and] *Section* 10 of the Portal-to-Portal Act of 1947 shall apply to actions under this Act. *If a charge filed with the Commission is dismissed by the Commission, to Commission shall so notify the person aggrieved and within 90 days after the giving of such notice a civil action may be brought against the respondent named in the charge by a person defined in section 11 (29 U.S.C. 630).*

[(2) For the period during which the Secretary is attempting to effect voluntary compliance with requirements of this Act through informal methods of conciliation, conference, and persuasion pursuant to subsection (b), the statute of limitations as provided in section 6 of the Portal-to-Portal Act of 1947 shall be tolled, but in no event for a period in excess of one year.]

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DISSENTING VIEWS OF HON. HENRY J. HYDE, HON. HOWARD COBLE, HON. BILL McCOLLUM, HON. CARLOS J. MOORHEAD, HON. JAMES F. SENSENBRENNER, JR., HON. GEORGE W. GEKAS, HON. D. FRENCH SLAUGHTER, JR., HON. LAMAR SMITH, AND HON. JIM RAMSTAD

INTRODUCTION

On March 19, 1991, the Judiciary Committee favorably reported the bill, H.R. 1, by a vote of 24–10. Republican Members offered six amendments to H.R. 1 which were debated by the Committee. Unfortunately, none of the amendments, which were designed to cure some of the more serious flaws of H.R. 1, were adopted.

H.R. 1, introduced by Judiciary Committee Chairman Jack Brooks (D–TX), proposes a comprehensive and, for the most part, unnecessary revision of employment discrimination law. It would either reverse or modify at least 26 Supreme Court cases and would, for all practical purposes, transform Title VIII of the Civil Rights Act of 1964 42 U.S.C. 2000(e) et. seq. from an employment law statute encouraging policies of mediation, conciliation and settlement into a tort law statute encouraging unrestricted damages awards against employers and protracted litigation and would create an atorneys' bonanza. We affirm the President's requirements for a true civil rights bill: that it provide equal opportunity without resorting to quotas, it must reflect fundamental principles of fairness, it must not encourage litigation or create a lawyer's bonanza and it must place Congress under the same requirements as they prescribe for others [1] and therefore support the Bush Administration's Civil Rights Bill, H.R. 1375. Because H.R. 1 as introduced and reported by the Judiciary Committee fails to embody these principles, we cannot support its passage.[2]

HISTORY OF H.R. 1

This is the second consecutive session in which legislation to amend title VIII and make other changes to the law of employment discrimination has come before the Congress and this Committee.[3]

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[1] These principles were first announced by President Bush in a Rose Garden Speech delivered on May 17, 1990.

[2] On January 3, 1991, Chairman Jack Brooks of the House Judiciary Committee introduced H.R. 1, the "Civil Rights Act of 1991." H.R. 1 is nearly identical to, and with respect to damages, is worse than the bill which was vetoed by the President at the end of the 101st Congress. During floor consideration of H.R. 4000, an amendment was offered by Chairman Brooks and Congressman Robin Tallon, (D–SC) to cap punitive damages for intentional discrimination at either $150,000 or an amount not to exceed compensatory damages, whichever is greater. Although the cap, in reality, was ineffectual, it created the impression that small employers would not be exposed to unlimited damage awards.

[3] The Subcommittee on Civil and Constitutional Rights held hearings on H.R. 1 on February 7, 1991, February 28, 1991 and March 7, 1991.

In 1989, the United States Supreme Court handed down a series of decisions dealing with employment discrimination: *Wards Cove Packing Co.* v. *Atonio,* 109 S.Ct. 2115 (1989); *Price Waterhouse* v. *Hopkins,* 109 S.Ct. 1775 (1989); *Patterson* v. *McLean Credit Union,* 109 S.Ct. 2363 (1989); *Martin* v. *Wilks,* 109 S.Ct. 2180 (1989); *Lorance* v. *AT&T Technologies,* 109 S.Ct. 2261 (1989); *Independent Federation of Flight Attendants* v. *Zipes,* 109 S.Ct. 2732 (1989).

In February of 1990, Senator Edward Kennedy (D-MA) and Congressman Gus Hawkins (D-CA), introduced the "Civil Rights Act of 1990" (S. 2140/H.R. 4000). The ostensible purpose of the bill was to overturn these decisions which were then characterized as "shocking," "a swift retreat" from established principles and the product of a "backward moving" Supreme Court.[4] The legislation would have prevented the "devastating effect on those seeking relief from employment discrimination" which was said would be the result of the Supreme Court decisions and swift enactment was assured.

Shortly thereafter, hearings on the legislation were begun in the House of Representatives before the Judiciary Subcommittee on Civil and Constitutional Rights and the Committee on Education and Labor. In the course of the hearings, as the bill was examined more closely, however, it became clear that there was much more to the "Civil Rights Act of 1991" than simply overturning the six Supreme Court cases.[5]

Briefly, the bill was hotly debated before both Committees and both Houses of Congress. It was passed by both the House and the Senate and sent to the President for signature. The President reluctantly vetoed the legislation. The Senate failed to override the veto, and thus the bill was not enacted into law.

IMPACT OF 1989 SUPREME COURT DECISIONS

For the most part, it appears that the "devastating" impact of the 1989 Supreme Court decisions has failed to materialize.

Shortly after the decisions were handed down, at the direction of President Bush, the Department of Justice began monitoring the effect of the Supreme Court decisions to determine the appropriate legislative response. Initially, the Department of Justice recommended corrective legislation to overturn two of the decisions: *Patterson* v. *McLean Credit Union* and *Lorance* v. *AT&T.* Education and Labor Committee introduced the Administration proposal,

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[4] It is somewhat illusory to characterize all of the Supreme Court decisions in this fashion. For example, in *Price Waterhouse* v. *Hopkins,* not only did the plaintiff win her case, but at the time the decision was handed down by the court, it was "hailed by women's rights groups as an important victory." "Court Backs Women on Sex Bias," The Washington Post, May 2, 1989, p. A1.

[5] In fact, there are an additional twenty cases, not usually named by the proponents of the legislation which are either overturned or modified by the bill. These are: *Griggs* v. *Duke Power,* 401 U.S. 424 (1971); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975); *United Air Lines* v. *Evans,* 431 U.S. 553 (1977); *Dothard* v. *Rawlinson,* 433 U.S. 2720 (1977); *Hazelwood School District* v. *United States,* 433 U.S. 299 (1977); *Teamsters* v. *United States,* 431 U.S. 324 (1977); *New York Transit Authority* v. *Beazer,* 440 U.S. 568 (1978); *United Steelworkers and Kaiser Aluminum* v. *Brian Weber,* 443 U.S. 195 (1979); *Delaware State College* v. *Ricks,* 449 U.S. 250 (1980); *Chardon* v. *Fernandez,* 454 U.S. 6 (1981); *County of Washington* v. *Gunther,* 452 U.S. 161 (1981); *Pullman Standard* v. *Swint,* 456 U.S. 273 (1982); *Connecticut* v. *Teal,* 457 U.S. 440 (1982); *American Tobacco* v. *Patterson,* 456 U.S. 63 (1982); *Marek* v. *Chesney,* 473 U.S. 1 (1985); *Evans* v. *Jeff D.,* 106 S.Ct. 1531 (1986); *Library of Congress* v. *Shaw,* 478 U.S. 310 (1986); *Johnson* v. *Transportation Agency,* 107 S.Ct. 1442 (1987); *Crawford Fittings* v. *J.T. Gibbons, Inc.,* 107 S.Ct. 2494 (1987); *Watson* v. *Fort Worth Bank & Trust,* 108 S.Ct. 2777 (1988).

H.R. 4081, in February of 1990 to overturn these two cases. Since that time, the Civil Rights Division of the Department of Justice has been monitoring the impact of the other key Supreme Court decisions: *Wards Cove* v. *Atonio, Price Waterhouse* v. *Hopkins* and *Martin* v. *Wilks.*

Most importantly, with respect to the *Wards Cove* decision, the report found that:

> Plaintiffs have been able to present prima facie cases of disparate impact and, where final decisions have been rendered, they have been able to win cases with fact situations like those they won prior to *Wards Cove.* In all, there have been 11 rulings favorable to plaintiffs, including nine decisions on the merits after a full application of the *Wards Cove* principles. These decisions demonstrate that *legitimate disparate impact claims can still be brought and won.*[6] [Italic added]

The study found that in the last 18 months, of the 19 reported lower court cases dealing with the mixed-motive *Price Waterhouse* decision, 15 have been victories for the plaintiffs. This is not surprising considering that *Price Waterhouse* is a pro-plaintiff decision authored by Justice Brennan.

In monitoring the impact of the *Martin* v. *Wilks* decision, the Department of Justice study found three title VII decisions in which *Wilks* played a major role. None of the cases have overturned a decree, although challenges have been filed. Even so, it is difficult to see why these plaintiffs, like other civil rights plaintiffs, are not entitled to their day in court.

We cite the study to illustrate the point; the sky has not fallen in on civil rights. Despite dire predictions to the contrary, especially with respect to *Wards Cove,* plaintiffs can still bring cases and win them.

The following is a discussion of the major points at issue.

(1) Definitions and Disparate Impact—(Sections Three and Four)

Griggs v. Duke Power

In *Griggs* v. *Duke Power,* 401 U.S. 424 (1971), Chief Justice Burger first enunciated the theory of adverse or disparate impact under title VII of the Civil Rights Act of 1964. The court construed title VII to require that employment practices neutral on their face, and even neutral in terms of intent, cannot be maintained if they are discriminatory in operation.

The plaintiffs in *Griggs* were a group of black workers challenging the employer's policy of requiring a high school diploma or the passing of an intelligence test as a condition of employment in or transfer to jobs at the plant. Although the court found no overt discriminatory intent on the part of the employer, it ruled that because the requirements operated to exclude blacks and were not intended to measure ability to learn or to perform a particular job,

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[6] Memorandum for the Attorney General Re: Impact of 1989 Supreme Court Decisions, February 7, 1991, by Assistant Attorney General John Dunne p.2.

they were prohibited under the Act, "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." 401 U.S. 424 at 431. In explaining what justification the employer must show where use of certain employment practices created a discriminatory impact, the court used phrases such as "business necessity," "related to job performance," and "manifest relationship to the employment in question."

Wards Cove v. Atonio

The Supreme Court's decision in *Wards Cove* further clarified and focused the Court's prior rulings in *Griggs* and its progeny. First, the Court required that the plaintiff identify the particular employment practice that causes the disparate impact. Second, once the plaintiff has proven the disparate impact of the practice, the employer must show that the practice serves a legitimate employment purpose and third, the burden on the employer is one of production of evidence, not proof and thus the overall burden of proving discrimination remains on the plaintiff throughout the case. In addition, the Court held that the proper statistical comparison for establishing a disparate impact case is between the racial composition of the jobs at issue and the racial composition of the qualified workers in the relevant (i.e. nearby) labor market.

"Restoration" of the Griggs Standard

According to its proponents, one of the key purposes of the Civil Rights Act of 1991 (H.R. 1) and its predecessor (H.R. 4000) was to restore the *Griggs* standard which they claim had been undermined by the Court's decision in *Wards Cove* v. *Atonio.*

As the discussion that follows will illustrate, however, not only does H.R. 1 fail to "restore" the *Griggs* standard it rewrites the past 20 years of caselaw on disparate impact in a way that can only lead to one result—that employers will be forced to adopt quotas rather than face litigation under H.R. 1.

To fully understand the disparate impact analysis, it is helpful to analyze the four subsidiary issues: burden of proof, the need for the plaintiff to show which specific employment practice caused the disparate impact, evidentiary requirements and the legal standard for business necessity.

Burden of Proof

Prior to the *Wards Cove* decision, there was a divergence in the law as to which party was required to prove "business necessity." Some said that an employer merely had to "put forth evidence" of business necessity while the ultimate burden of persuasion remained on the plaintiff at all times. Others stated that once the plaintiff put forth his prima facie case, the burden shifted to the employer to prove that his employment practices were justified by "business necessity." *Wards Cove* resolved the issue in favor of the former.

Both H.R. 1 and the alternative proposed by the Bush Administration (H.R. 1375) would reverse this aspect of the *Wards Cove.* That is, once the plaintiff establishes a prima facie case of disparate impact, the burden of proof shifts to the employer to show that the practice is justified by business necessity.

Specific Employment Practice

H.R. 1 would not require a plaintiff to identify the specific practice which caused the statistical imbalance in the employer's workforce. Instead, it would allow the plaintiff to "demonstrate that a group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin" (k)(1)(B). The employer would then be required to "demonstrate" that "such practices are required by business necessity" (k)(1)(B).

Allowing plaintiffs to group employment practices divests them of the basic requirement of most lawsuits—that the plaintiff prove that the action complained of caused the disparate impact. The effect of grouping of employment practices, alleging for example that the employer's entire hiring system led to a disparate impact is that employer's will have to dig themselves—practice by practice—out of the litigation hole by proving their innocence; that each of their practices was required by business necessity.

Evidentiary Requirements

H.R. 1 severely limits the kinds of evidence an employer may use to prove business necessity, further restricting the ability to defend against these types of lawsuits. H.R. 1 states:

> In deciding whether the standards . . . for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The defendant may offer as evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Fedeal Rules of Evidence, and the court shall give such weight, if any, to such evidence as is appropriate.[7]

Although little attention has been given to this provision of the bill, according to the Society for Industrial and Organizational Psychology, it will cause great confusion as to what types of evidence may be used to prove business necessity. There is concern that this language and the requirement of a "significant relationship to successful job performance" will force employers to produce a validation study "for each and every job in each and every situation"[8]—quite an expensive proposition.

This language would likely exclude evidence otherwise probative on the relationship between an employee's performance and the selection criteria utilized by the employer. This provision was criticized by Attorney Zachary Fasman, who testified before the Subcommittee on Civil and Constitutional Rights on February 28, 1991:

> Must an employer produce charts and statistical summaries in every case? Are the opinions of employer representatives who are most familiar with the job duties and workplace so completely unreliable that they must be outlawed by Congress, even though they otherwise might have some probative weight in court?

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[7] Sec. 3. (o)(2), H.R. 1. "The Civil Rights Act of 1991."

[8] Letter to Representative Augustus F. Hawkins, House Education and Labor Committee, from Fred J. Landy, President, Society for Industrial and Organizational Psychology. September 7, 1990.

> 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, and illustrates the problems that undoubtedly will arise when Congress begins telling the federal courts what types of evidence they may receive and consider in any given case. Federal courts rely upon the Federal Rules of Evidence in all cases that come before them, and there is no reason for devising special rules of evidence for employment cases.[9]

We agree with Mr. Fasman's assessment of these provisions and find them unnecessary. They do, however, seem to fall in line with the real thrust of H.R. 1—rigging the rules to make it easier for plaintiff's attorneys to win cases—and more difficult for employers to defend themselves in such suits.

Standard for Business Necessity

H.R. 1 bifurcates the definition of "business necessity" into two sections. The language in H.R. 1 as reported by the Judiciary Committee states that the term "required by business necessity" means—

> (A) in the case of employment practices involving selection (such as hiring, assignment, transfer, promotion, training, apprenticeship, referral, retention, or membership in a labor organization), the practice or group of practices must bear a significant relationship to successful performance of the job; or
>
> (B) in the case of employment practices that do not involve selection, the practice or group of practices must bear a significant relationship to a significant business objective of the employer. Sec. 3. (o)(1) (A) and (B).

Traditionally, disparate impact analysis has been used analyze selection criteria to determine the most qualified applicants for hire, promotion, transfer, etc. Disparate impact analysis has not routinely been applied to non-selection practices, i.e. awarding of compensation or benefits, bankruptcy, plant closings or layoffs. This definition, Section (B) would for the first time, clearly apply the *Griggs* disparate impact analysis to non-selection procedures.

In *Griggs,* by way of contrast, the Court required employers to show that a challenged practice was justified by "business necessity," meant "job relatedness" or "having a manifest relationship to the employment in question." The more difficult and previously unlitigated standard imposed by H.R. 1 will further burden employers trying to defend their legitimate business practices in cases alleging unintentional discrimination.

H.R. 1 Discourages a Quality Workforce

Under H.R. 1, an employment practice, regarding selection or promotion, is only justifiable if it is confined to whether or not the candidate can do the job "successfully". An employer must prove that a particular employment practice (i.e. such as an objective

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[9] Prepared testimony of Zachary Fasman, Paul, Hastings, Janofsky & Walker on behalf of the National Association of Manufacturers and the Society for Human Resource Management before the House Judiciary Committee, Subcommittee on Civil and Constitutional Rights, February 28, 1991, p. 19–20.

test, a diploma requirement, prior relevant experience, etc.) "bears a significant relationship to successful performance of the job." Employers are rightly concerned that this language means that they must hire any applicant who meets the minimal qualifications for the particular job, or be prepared to explain why in court. Seeking the best possible candidate for the job would become a risky business, since that would no longer be a valid defense in a discrimination lawsuit. The search for excellence would be both illegitimate and illegal!

If employers can only hire for the job at hand, seeking people qualified for eventual promotion would not be a defense in litigation. Further, if the long range promotional potential of an applicant cannot be considered, the validity of management trainee programs is called into question. Another concern is whether or not employers could consider an employee's smoking habits or an employee's record of complying with workplace safety rules. These factors are not directly related to "successful performance of the job" but are valid concerns for an employer and nereby employees.

Why H.R. 1 is a Quota Bill

H.R. 1 would not only reverse the decision of the Supreme Court in *Wards Cove*, it would significantly depart from prior caselaw to establish new and previously untried standards for disparate impact analysis. H.R. 1 would overrule the most important aspects of the Court's holding by providing that a plaintiff need not identify the specific practice that caused the disparate impact, but may "demonstrate that a group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin" (k)(1)(B). The employer would then be required to "demonstrate" that "such group of employment practices required by business necessity" (k)(1)(B). Liability could be avoided by the employer by proving that each practice at issue does not create a disparate impact.

Proponents of the Hawkins bill argue that the Supreme Court's ruling in *Wards Cove* is a "radical" and "unprecedented" departure from its prior decisions especially in *Griggs* v. *Duke Power Company*. It would appear, however, that the new way in which one would go about proving a disparate impact case under H.R. 1 represents the more significant departure from prior caselaw.

First, the burden of proof is shifted to the employer to prove business necessity for each of the practices. Second, the plaintiff is allowed to lump all the employment practices together without showing how they specifically lead to a disparate impact.[10] Third, the employer is unduly restricted in the types of evidence which may be offered to prove "business necessity". Fourth, the requirement that the practice "bear a significant relationship to successful performance of the job" is different from the holding of *Griggs* in which "business necessity" meant "having a manifest relationship to the employment in question."

[10] Section 4(k)(B)(i) provides: ". . . if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact.

The net effect of H.R. 1 will be that once a plaintiff shows a numerical disparity and names the group of employment practices the employer will then be required to justify all the employment practices as bearing a "significant relationship to successful performance of the job." This creates a situation whereby any employer whose numbers are off will be open to a title VII disparate impact suit and thus the motivation to tacitly accept hiring by the numbers (quotas) in order to avoid litigation.

It has been repeatedly stated that since *Griggs* has been the law for twenty years and has not forced employers to hire by quota, reinstatement of the *Griggs* standard in H.R. 1 could not possibly force employers to resort to quotas. This argument was recently raised on the House Floor by Congresswoman Rosa Delauro (D–CT).

> [H.R. 1] simply restores the law as it existed for 20 years in employment discrimination cases prior to an ill conceived 1989 Supreme Court decision. No one opposing this measure has offered any evidence that the law prior to 1989 disserved the business community or resulted in the arbitrary imposition of quotas in the workplace.[11]

To the contrary, several witnesses testifying during the 101st and 102nd Congresses on the proposed Civil Rights Legislation warned of the use of quotas in the employment community. Among these were Assistant General John R. Dunne, Professor Charles Fried, and Attorney Glen D. Nager. A Fortune magazine poll (March 13, 1989) of 202 CEO's of Fortune 500 and Service 500 companies had 18% of the CEOs admitting that their companies have "specific quotas for hiring and promotion.[12]

The tendency of the disparate impact analysis, if not carefully calibrated, to push employers to adopt quotas was recognized prior to the Supreme Court's ruling in *Wards Cove Packing* v. *Atonio.* Justice O'Connor recognized this difficulty in *Watson* v. *Fort Worth Bank and Trust Co.,* 108 S.Ct. 2777 (1988):

> [T]he inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. * * * [E]xtending disparate impact analysis to subjective employment practices has the potential to create a Hobson's choice for employers and thus to lead in practice to perverse results. If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met.

The record shows that there is evidence that certain employers already use quotas to avoid liability. Unfortunately, H.R. 1, will likely exacerbate the problem into a widespread practice. In other

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[11] Congressional Record, April 24, 1991, p. H2476.

[12] Title VII at Sec. 703(j) already contains language prohibiting the use of quotas. Thus, employers are understandably reluctant to come forward with evidence that they are engaging in such practices.

words, the regrettably inescapable bottom line of H.R. 1 is that employers will be forced to hire by the numbers—resulting in quotas.

Unfortunately, H.R. 1 will create the precise problem warned off by Justice O'Connor. In other words, the regrettably inescapable bottom line of H.R. 1 is that employers will be forced to hire by the numbers—resulting in quotas.[13]

Failed Attempts to Solve the Quota Problem

According to the proponents of H.R. 1, however, the conclusion that H.R. 1 is a quota bill is unfounded. They point to specific language in the bill which is designed to solve the quota problem.

Section 4(k)(4) states "the 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." It has never been the case under this bill that a plaintiff would only have to allege a "mere statistical imbalance" in order to prove his or her case. The plaintiff would also need to state that some or all of the employer's practices caused the imbalance. The problem is that under the language of the bill, the plaintiff does not have to show that a practice *caused* the imbalance, merely that both exist. The burden then shifts to the employer to prove his or her innocence.

An additional problem, with this language is that it incorrectly focuses on the statistical imbalance "in an employer's workforce." All parties have affirmed the ruling of *Wards Cove,* proponents and opponents of H.R. 1 alike, that the proper statistical comparison is between the jobs in question in the employer's workforce and the qualified applicants in the population at large. It is the showing of a statistical imbalance among these two groups that will lead to quotas not within an employers own workforce. Thus, this provision provides no assurances with respect to quotas.

The other language directed at "solving" the quota problem is found in section 13 of the bill which states that "Nothing in the amendments made by this Act shall be construed to require or encourage an employer to adopt hiring or promotion quotas on the basis of race, color, religion, sex or national origin". No one has ever argued that H.R. 1 requires quotas. Even the language that the bill is not to "encourage" quotas is insufficient without amending sections 3 and 4. The problem with H.R. 1 is that it rewrites the rules for bringing disparate impact cases, so that employers will be forced to quietly resort to quotas in order to avoid costly lawsuits which they have virtually no chance of winning.

Codification of the Griggs—Disparate Impact Standard

An amendment was offered during the Judiciary Committee Markup by Congressman Henry J. Hyde (R–IL), Ranking Member of the Subcommittee on Civil and Constitutional Rights to substitute the provisions of H.R. 1 with respect to disparate impact anal-

[13] For further discussion on how H.R. 1 will lead to quotas, see discussion on "Expansion of Remedies for Intentional Discrimination" ante.

ysis with the language of H.R. 1375, the President's Civil Rights bill.[14] The amendment, in significant part, provided as follows:

> An unlawful employment practice is established under this section when a complaining party demonstrates that an employment practice causes a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice is justified by business necessity. * * *
>
> The term "justified by business necessity" means that the practice has a manifest relationship to the employment in question.

The purpose of the amendment, as explained by Congressman Hyde, was to shift the burden of proof to the employer to show business necessity and codify the actual holding of *Griggs*.

The conclusion that the language of the Hyde Amendment accurate tracked the language of *Griggs* was confirmed by Congressman Bill Hughes (D–NJ) during the debate on the amendment before the House Judiciary Committee. Congressman Hughes stated:

> I have read Wards Cove and I've read Griggs a number of times. I'm persuaded that the language in this amendment defining "business necessity," that is, the challenged practice having "a manifest relationship to the employment in question * * * is, indeed, a codification of the Griggs standard. * * * I am persuaded that the holding in Griggs tracks this language. We have a history of almost 20 years, it seems to me, of interpretation of that language. Some of the fear that is raised [about this bill] is that in some way we're embarking upon a whole new era of legislative history. I think there's some merit to that.

In response to Congressman Hughes' support of the Hyde amendment, Judiciary Committee Chairman Jack Brooks stated, "the language in H.R. 1, stronger language, also from the *Griggs* decision, relies on 20 years of case law that followed that decision in 1971." Unfortunately, the case law does not support this position. No Supreme Court cases have cited *Griggs* for the standard contained in H.R. 1. Instead, the Supreme Court and lower federal courts have consistently referred to the business necessity standard found in the Hyde amendment.

In *Griggs* v. *Duke Power Company*, the Supreme Court held job requirements "must have a manifest relationship to the employment in question." 401 U.S. at 432 (1971).

In *Albemarle Paper Company* v. *Moody*, 422 U.S. at 425 (1975), the Supreme Court cited *Griggs* for the proposition that [employment requirements must have] a manifest relationship to the employment in question. [*Griggs*] at 432."

In *Dothard* v. *Rawlinson*, 433 U.S. at 329 (1977), the Supreme Court again cited *Griggs* for the requirement that the practice

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[14] In the course of the markup, the business necessity definition of the Hyde amendment was amended pursuant to a unanimous consent request of Congresman Hughes (D-NJ). The deleted portion, "or that legitimate employment goals are significantly served by the practice" would have codified the pre-*Wards Cove* standard for business necessity found in *New York City Transit Authority* v. *Beazer* 440 U.S. at 587 (1979).

must have "a manifest relationship to the employment in question. *Griggs* v. *Duke Power Company, supra,* at 432."

In *New York City Transit Authority* v. *Beazer*, 440 U.S. at 587 N. 31 (1979), the Supreme Court again cited *Griggs* standard that the employment requirement "bears a manifest relationship to the employment in question. *Griggs* * * * at 432."

In *Connecticut* v. *Teal*, 457 U.S. at 446–447 (1982), the Supreme Court said employers must demonstrate that a "requirement [has] a manifest relationship to the employment in question, * * * *Griggs, supra,* at 432."

In *Watson* v. *Fort Worth Bank & Trust*, 108 S.Ct. at 2790 (1988), the Supreme Court stated: "[W]e have said that an employer has the 'burden of showing that any given requirement must have a manifest relationship to the employment in question,' *Griggs*, 401 U.S., at 432. * * *" [15]

In addition to the business necessity standard, the Hyde amendment would achieve several important objectives. First, it would overrule *Wards Cove* in that once the plaintiff has made out a prima facie case, the burden of production and persuasion would shift to the employer to show that the employment practice at issue was required by business necessity. We believe that while the effect of shifting the burden of proof is, in fact, negligible, it is sound public policy to require, in this instance, that the burden of proof be borne the party in the best position to evaluate and explain the evidence in its possession.[16] Second, the amendment would require the plaintiff to allege a specific employment practice (in addition to the appropriate statistical evidence) to establish a prima facie case.[17] Third, the amendment would not unfairly restrict the types of evidence the respondent would be able to use to prove business necessity. Fourth, the amendment tracks the standard for business necessity taken from *Griggs* and its progeny.

Under the current language of the bill, a plaintiff would be able to show that a statistical disparity existed in the employer's work-

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[15] Prior standards, also purported to restore *Griggs* failed to utilize the language of *Griggs*. As introduced, in the 101st Congress (H.R. 4000) the Kennedy-Hawkins bill would have "restored" *Griggs* by requiring employers to prove that their practices were "essential to effective job performance." The Hawkins amendment, passed during the House Education and Labor mark up of H.R. 4000 would have "restored" *Griggs* by requiring employers to prove "by demonstrable relationship to effective job performance." The Kennedy-Danforth proposal would have "restored" *Griggs* by stating that employers must prove that job requirements "bear a substantial and demonstrable relationship to effective job performance."

[16] Some have argued, erroneously, that since H.R. 1 and the President's bill (H.R. 1375) shift the burden of proof to the employer to show business necessity, both bills will lead to quotas. This analysis, however, is shallow and flawed. It fails to distinguish between who has the burden and what one needs to prove—the "weight" of the burden. As the discussion above has shown, H.R. 1, by allowing the grouping of employment practices, restricting the types of evidence which can be used and rewriting the standard for "business necessity" so greatly increases the burden on the employer that he will have no choice but to hire by the numbers. In contract, H.R. 1375, reinstates the *Griggs* standard which has been the law for over 20 years, requires that the plaintiff identify the specific practice that led to the disparate impact and applies the standard rules of evidence as to what type of proof may be used.

[17] This requirement will not require a plaintiff to break down each of the employer's practices to the greatest possible degree. For example, in *Sledge* v. *J.P. Stevens,* 52 EPD Para. 39,537 (E.D.N.C. Nov. 30, 1989) the court applied the Wards cove principals to a so-called "black box" case. In *Sledge,* the plaintiffs were unable to discern the particular practice that caused the disparate impact because the defendant's personnel officers were unable to identify the basis on which they made their personnel decisions. The court held that "the identification by the plaintiffs of the uncontrolled, subjective discretion of defendant's employing officials as the source of the discrimination shown by plaintiff's statistics sufficed to satisfy requirements of *Wards' Cove.*"

force and then simply allege that the disparity was a "result" of the employer's practices. There is no requirement of specificity or causation. The employer is then forced to defend his or her entire system of employment practices by showing that each one is required by business necessity or that the individual practice did not lead to the disparity.[18]

In conclusion, despite the various permutations of verbiage offered by the proponents of H.R. 1 to rectify the "quotas" problem, sections 3 and 4 will still have the effect of forcing employers to hire by the numbers in order to avoid costly and protected litigation.

Racial and Ethnic Test Scoring

The previous discussion emphasizes the importance of disparate impact analysis and describes the appropriate test for "business necessity" as a means of justifying the use of a particular employment practice. One such employment practice would be the use of aptitude tests as one means of measuring an individual's employment potential. The use of such tests by employers, as long as they are validated and objective, is justified by business necessity. For example, employers are permitted to use employment aptitude tests as one means of measuring an individual's employment potential.

Unfortunately, some would have us believe that altering the results of such validated, objective tests may somehow be necessary to meet the equal employment opportunity requirements of title VII (and, implicitly, the amendments made by H.R. 1 to title VII). This is distorted and legally inaccurate logic. It is totally inconsistent with the original legislative history on title VII and the subsequent caselaw interpreting that statute. An employer is not required or permitted to adjust test scores or use different cut-off scores for members of different groups, or otherwise use test scores in a discriminatory manner. As the Court noted in *Griggs*: "Discriminatory preference for any group, minority or majority is precisely and only what Congress has proscribed." 401 U.S. 431.

During Judiciary Committee consideration of H.R. 1, Congrssman Hyde offered an amendment to clarify the law on this point and prohibit changing test scores on employment aptitude tests based upon an individual's race or ethnicity. Specifically, the Hyde amendment would make it a clear violation of title VII of the Civil Rights Act for any employer, employment agency or state employment service to alter or adjust the scores on tests used in evaluating current or prospective employees, where those scoring changes are based solely on an individual's race, color, religion, sex or national origin. Unfortunately, the Hyde amendment was defeated on a straight party line vote, 21-13.

Congressman Hyde's amendment is aimed at preventing a practice known as "within group norming" (or, as it is often called "race norming"). Since 1981, the U.S. Department of Labor has been encouraging the various state employment agencies and their

[18] In the latter circumstance, where the employer is forced to prove that the employment practice did not lead to the disparate impact, the employer is placed in the untenable position of proving a negative.

local offices to utilize a method of scoring (described in bureaucratic langauge as a "score-adjustment strategy") which, in fact, distorts the results of what is otherwise an objective employment aptitude test. The basic test used in known as the General Aptitude Test Battery or "GATB."[19]

Under the race norming practice, all candidates take the same test. But, for scoring purposes, these candidates are divided into three separate categories, based upon the person's racial or ethnic heritage. Their actual scores are then computed as a percentile score within his or her own racial or ethnic group (black, Hispanic, and other). So, the resulting final score, which goes to a prospective employer, is the adjusted or converted score. A person's score under this system really reflects how that person's score compares with others of his/her own racial or ethnic group. Because a person is confined to his/her percentile within a particular racial or ethnic group, the percentage-based scores distort an individual's performance. Frequently, the adjusted scores of black or Hispanic candidates are higher than whites who actually scored better on the underlying GATB test.

The following exemple demonstrates the impact of this scoring method. Let's say three candidates take the test—one white, one hispanic and one black. Assume that all three persons achieve identical scores of 301 on the GABT test. However, once their actual scores are "normed" through the use of differing "conversion tables", the three candidates scores would be recorded and reported quite differently. The white candidate would be listed as scoring 39, the Hispanic candidate would receive a score of 63, and the black candidate gets a score of 80. These final, converted scores are the results eventually reported to an unknowing prospective employer. As a practical matter, these scores determine whether a prospective applicant gets referred for any job opening at all.

As astounding as it sounds, this is the scoring method currently being used by 34 states and at one time was used in over forty states. The various state employment agencies are estimated to screen approximately 20 million job applicants a year. The race norming scoring method has also been adopted by a number of private employers apparently concerned about the racial and ethnic makeup of their workforces. That is, a number of companies administer their own tests and then "adjust" scores in a similar manner.

Title VII of the Civil Rights Act of 1964 was a legal mandate for equal employment *opportunity*. It was, and is, about preventing employment practices that discriminate solely on the basis of race, color, religion, sex, or national origin. This legislation (H.R. 1)—the "Civil Rights Act of 1991"—is supposed to be about reinforcing the legal protections and laudable goals of title VII. The practice of "within group norming" as a method of scoring employment tests is totally antithetical to the goal of equal employment opportunity. Instead it is social engineering carried to a dangerous extreme.

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[19] The GATB is a widely used and highly respected test that measures cognitive, perceptual and manual dexterity skills. In fact, in 1989 a study done by the National Research Council of the National Academy of Sciences concluded that the GATB was a fair predictor of job performance and that it did not discriminate against minority groups. The problem is not with the test itself; rather, the problem is the manner in which it is being scored.

Race norming is a before-the-fact quota system—in fact, one commentator referred to it as "quotas cubed"! It is a scoring system that does more than encourage quotas, it actually creates the quotas. For example, it discriminates against Asian Americans and Jewish Americans, while at the same time it patronizes and insults African Americans and persons of Hispanic descent.

H.R. 1 is directed, in part, at employment practices that cause a discriminatory result. Changing test scores on employment aptitude tests is the blatant use of an employment practice in a clearly discriminatory manner. We do not disapprove of the use of objective tests as one means of evaluating an employee's or prospective employee's potential job skills. Standardized tests, as long as they are objective and fair, can be useful as part of an overall effort to measure a job candidate's qualifications. Employers, of course, also have the right to consider the candidate's education, specialized training and prior employment experience.[20]

The time has come to codify the principle that altering test scores on employment tests to achieve a particular racial or ethnic result will not be tolerated under our nation's civil rights laws. To take otherwise objective scores and transform them into misleading percentages violates the "spirit" of equal employment opportunity. The letter of the law should prohibit this practice as well.

(2) Mixed Motive Cases—(Section Five)

Price Waterhouse v. *Hopkins,* 109 S.Ct 1775 (1989), involved a so-called "mixed motive" case where the trial court found that both legitimate and illegitimate consideration played a part in the decision to place Ms. Hopkins' candidacy for partnership on hold. Procedurally, the issue was whether Ann Hopkins or Price Waterhouse had the burden of proving that the employment decision was made "because of" a factor outlawed by title VII.

In a 6-3 plurality decision, Justice Brennan, joined by Justices Marshall, Blackmun and Stevens concluded that once a title VII plaintiff has proven that an unlawful criterion was considered by the employer in making an employment decision, the burden shifts to the employer who can avoid liability "only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken gender into account."

In separate opinions, Justice O'Connor and Justice White concurred in the decision, concluding that the burden of proof should shift to the employer to show that gender made no difference in the decision, but only when a plaintiff shows "by direct evidence that an illegitimate criterion was a substantial factor in the decision.

Section Five of H.R. 1 would amend title VII to provide that a violation would be found whenever a discriminating factor was shown to have been "*a* contributing factor" regardless of the pres-

[20] It is also important to stress that the Hyde amendment would not affect the veteran's preference given in connection with the federal civil service exam. The veteran's preference is a statutorily based policy and is a recognition of a person's past contribution and service to his or her country. Furthermore, the veterans preference is non-discriminatory because it is provided without reference to one's race, color, religion, sex or national origin.

ence or importance of other factors supporting the personnel action.

This expansive method of dealing with the *Price Waterhouse* decision would 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 legitimate factors. Under the proposed Section Five of H.R. 1, liability would be found where a discriminatory consideration was *a* contributing factor even if it was not *the* contributing factor or even a substantial contributing factor. The Brooks bill provides that if the employer could prove that the same decision would have been made in the absence of the improper factor, the court would be foreclosed from ordering a backpay award or the hiring or promotion of the individual, but the employer could still be subject to "cease and desist" order and be required to pay attorneys fees and court costs.

Of particular concern is the fact that if a jury found that the violation had caused the "victim"; of the discrimination mental anguish or distress, it could award compensatory and punitive damages, even through in fact the employee was being treated no differently than they would have been treated in the absence of any discrimination. This is once again, a manifestation of the intent to transform title VII from an employment discrimination statute into a tort statute.

The principles of causation expressed in *Price Waterhouse* are in keeping with the general rule in civil cases that the plaintiff must show that the defendant's unlawful act caused the injury. If the employer would have taken the same action regardless of the improper motive, then it makes little sense to award damages where the harm complained of is not the cause of the improper bias. Nevertheless, H.R. 1 would "overturn" *Price Waterhouse* and provide for liability, if any illegal factor exists, even if it is so insubstantial as to have no bearing on the outcome.

It is important to remember that Ann Hopkins, the plaintiff in *Price Waterhouse* won her case. The Supreme Court remanded the case to the lower court, which, applying the Supreme Court's test, found for Hopkins and awarded her the following:

Partnership in the firm;

Compensation set at the average among those admitted to partnership in 1983;

Benefits (including retirement plan accrual) set as if Hopkins had been admitted to partnership in 1983;

Back pay totalling $371,175 including interest and no reduction for taxes; and

Attorneys' fees totalling $433,460.

In addition to the above, under the formulation of H.R. 1 as reported by the Judiciary Committee, Ann Hopkins would have been able to collect punitive and compensatory damages for her "injuries" even if Price Waterhouse could show that it would have denied her a partnership without regard to gender.

(3) CHALLENGING THE VALIDITY OF CONSENT DECREES—(SECTION SIX)

At issue in *Martin* v. *Wilks,* 109 S.Ct. 2180 (1989) was whether a group of white fire-fighters could reopen and litigate the validity of

a consent decree entered into by black fire-fighters and the City of Birmingham, Alabama, which provided for race-conscious preferential treatment where the plaintiffs had not been parties to the original litigation. The Supreme Court, relying on the settled doctrine that "a person cannot be deprived of his legal rights in a proceeding to which he is not a party", held that the white fire-fighters were not precluded from challenging actions taken under a consent decree.

The Brooks bill (sec. 6) provides that consent decrees are not open to challenge by any person who had notice of the original litigation and had an opportunity to present objections or any person who did not have such notice and opportunity if his or her interests were "adequately represented" by *another* person or if the court determines that reasonable effort was made to provide notice to the interested persons. Proponents argue that the provision will provide finality and certainty to court-approved plans and will reaffirm the intent of Congress to encourage the quick and effective resolution of discrimination claims.

(4) Statute of Limitations and Challenges to Seniority Agreements—(Sections Seven and Seventeen)

Section Seven would change the statute of limitations for bringing an action from 180 days to two years. The purpose for providing for a relatively short period of time in which to file a charge of employment discrimination is to provide for the quick and inexpensive resolution of disputes. Section Seventeen would extend the statute of limitations for filing a claim under the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(d)) from 180 days to two years, as well. No justification was given for the need for expanding the Statute of Limitations for either statute.

This unwarranted expansion of the statute of limitations will allow charges of discrimination to fester and back pay to accrue even if the employee was aware of the problem when it first occurred.

In addition, under H.R. 1, the time period for the statute would begin to run when the unlawful practice occurred or when the practice was applied to adversely affect the individual filing the charge (not, as in *Lorance* when the system was adopted).

Section 7 would also reverse the holding of the Supreme Court in *Lorance* v. *AT&T Technologies, Inc.,* 109 S.Ct. 2261 (1989). In *Lorance,* female employees challenged a seniority system under title VII. Their claim was that the system was adopted with an intent to discriminate against women. Although the seniority system was facially nondiscriminatory, it produced demotions for the plaintiffs. The Supreme Court ruled that the claim of the female employees was barred because title VII required that a charge be filed within 180 days of the adoption of the discriminatory seniority system.

Section 7(b) of the Brooks bill would provide that the statute of limitations would begin to run from the date the employee was adversely affected by the seniority system, not from the date the system was established. We agree with this overruling of the Supreme Court's decision in *Lorance* although we would prefer the

broader language found in the Administration's proposal, H.R. 1375, which states:

> For purposes of this section, an unlawful employment practice occurs 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 seniority system, or provision thereof, that was adopted for an intentionally discriminatory purpose, in violation of this title, whether or not that discriminatory purpose is apparent on the face of the seniority provision.

Although we recognize that the effect of this provision would be to leave the validity of seniority systems unsettled for many years, we believe that it is in keeping with notions of fundamental fairness.

(5) EXPANSION OF REMEDIES FOR INTENTIONAL DISCRIMINATION—(SECTION EIGHT)

Under present law, title VII damages are limited to back pay, reinstatement and other injunctive relief. Jury trials are not available for violations of title VII. H.R. 1 would change this by allowing jury trials and the recovery of punitive and compensatory damages in cases involving "intentional" discrimination.

How Expanded Damages will lead to Quotas

Not only would H.R. 1 allow the recovery of punitive and compensatory damages in individual disparate treatment cases, it would allow recovery of such damages and jury trials for class action disparate treatment suits. Like disparate impact suits, a prima facie case in a "pattern and practice," intentional discrimination lawsuit is established through the use of statistical evidence.[21]

The pressure that Section 8 will put on employers to adopt quotas or face big money lawsuits was analyzed by attorney Zachary Fasman, who testified before the Civil and Constitutional Rights Subcommittee. In a letter to Congressman Bill Goodling, (R-PA), he stated:

> The proponents of this legislation [H.R. 1] consistently have argued that the expanded remedies in question will apply only to cases of "intentional discrimination." In fact, . . . the bill would allow compensatory and punitive damages in . . . class actions premised upon the disparate treatment theory of discrimination.
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> [T]he premise under which statistical evidence is used in disparate treatment class actions is very similar to that used in disparate impact cases. [P]laintiffs will tend to abandon the disparate impact theory entirely in class cases, in order to take advantage of the significantly expanded remedies made available in such cases by H.R. 1.

[21] "It is well established that discriminatory intent may be proved in a class-based disparate treatment case either by the use of statistics alone or by statistics supplemented with other evidence." See Shulman and Abernathy, "The Law of Equal Employment Opportunity," Warren, Gorhan & Lamont, Boston, 1990, p. 3-65.

> This possibility would impose enormous pressure upon employers to hire and promote in a race and sex conscious manner. Unlike disparate impact cases, where an employer can prove that a challenged practice is justified as a business necessity, there is no "justification" defense in a disparate treatment class action. The availability of compensatory and punitive damages, and jury trials, in such cases would lead a risk averse employer to ensure that its employment practices cannot be challenged on a disparate treatment theory. In other words, the risk averse employer would have strong reasons to avoid any statistical claims that its workforce was in some way "unbalanced".[22]

Once again, under H.R. 1 the overwhelming incentive to avoid expensive and time-consuming litigation—unlimited punitive and compensatory damages and jury trials—will force employers to ensure that their hiring and promotion decisions reflect the proper racial, gender and ethnic mix.

Although H.R. 1 is portrayed as simply "reversing" or "restoring" precedents overtuned by the U.S. Supreme Court last term, it is important to note that none of the Supreme Court's June 1989 decisions dealt with the issue of punitive and compensatory damages under title VII for cases involving intentional discrimination. In essence, H.R. 1 seeks to fundamentally transform the purpose of title VII by shifting the focus from encouraging conciliation and settlement to promoting protracted litigation. It would take the remedies found under 42 U.S.C. 1981 and, for the first time, apply them to title VII discrimination claims.

History of 42 U.S.C. 1981

42 U.S.C. 1981 was part of the Civil Rights Act of 1866 pursuant to the congressional power to eradicate slavery as provided by the Thirteenth Amendment. It was enacted to prohibit racial discrimination in the making and enforcement of contracts.

It was not until the 1975 case of *Johnson* v. *Railway Express Agency, Inc.*, that the Supreme Court affirmatively ruled that "Section 1981 affords a federal remedy against discrimination in private employment on the basis of race" 421 U.S. 454 at 459, 460 (1975) and more importantly, that compensatory and punitive damages (and in certain cricumstances jury trials) were available to Section 1981 litigants.

The argument for the wholesale expansion of title VII is based on the fact that 42 U.S.C. 1981 includes punitive and compensatory damages as remedies. It is important to note, however, that Sec. 1981 is not an employment law statute. It is a general civil rights statute which covers a broad range of areas, (among these are housing, zoning, police misconduct and education), only one of which is employment. To allow Section 1981 to drive the debate on damages is to allow the exception to become the rule.

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[22] Letter to Congressman William Goodling, from Attorney Zachary Fasman, Paul, Hastings, Janofsky & Walker, March 11, 1991.

The "Parity" Argument

This year, proponents of H.R. 1 have "changed the nameplate" of H.R. 1. No longer is this a bill to combat racial discrimination, we are told, it is now a "woman's equity" bill. The thrust of the argument is that a black woman who is subject to intentional discrimination can receive punitive and compensatory damages under 42 U.S.C. 1981 while a white woman can only sue under title VII and is limited to injunctive relief, attorneys and an award of backpay. Thus, according to the proponents, title VII must be amended to achieve "parity"—a white woman is entitled to the same damages as a black woman.

This argument is not entirely accurate. A black woman cannot sue for sexual harassment under 42 U.S.C. 1981. That statute is solely directed at racial discrimination. If she is sexually harassed she has the same cause of action as the white woman—a claim under title VII.[23]

The Flaws of the Shea And Gardner Study

The chief study on which the proponents rely in support of expanding title VII to allow for the recovery of punitive and compensatory damages was performed by the law firm of Shea and Gardner.

The Shea and Gardner study is flawed, however, in that it only reviews the "case law"—that is, it takes into consideration only those cases which have generated written opinions; it does not address settled cases which have not been reported or are required by the terms of settlement to be kept confidential; and it under-emphasizes verdict amounts.

Although an estimated 2500, Section 1981 cases are filed each year, the Shea & Gardner study located only 576 since 1980. No information is provided as to the rest. Of the 576 cases found, 314 were either dismissed before trial or the plaintiff lost. In 144 of the remaining cases, the study reports that no information is available about final disposition. In addition, the study misses the many jury verdicts that have not been reported in the official reporters. For example, the study does not discuss *Young* v. *Von's Market,* (C.D. Calif. July 1, 1988) reported at 31 ATLA L. Rep. 405 (November, 1988), in which the jury awarded a racial harassment claimant, suing under Section 1981 and title VII, $12.1 million including $10.7 million in punitive damages.[24]

The study does not address settlements, but only reported cases. According to a recent Rand study, 87% of all "civil rights" cases, which would include Section 1981 cases, are concluded by settlement or other disposition without a trial. The absence of information on this vast majority of cases creates a massive void in any attempt to estimate possible outcomes.

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[23] In addition, proponents have not achieved "parity" beause title VII applies only to employers with less than 15 employees while 42 U.S.C. 1981 applies to all employers. One has to wonder why the proponents, if they were truly concerned about "parity", did not simply add women to the list of protected persons within Section 1981. We can only surmise that the reason, as discussed above, is the unique historical context of Section 1981.

[24] The trial judge reduced the punitive damages verdict to $600,000. The case was appealed to the Ninth Circuit, but settled prior to the Court rendering a decision.

The final flaw in the Shea & Gardner study is that it under-emphasizes verdict amounts. In 42 of the 68 cases the study located in which compensatory and/or punitive damages were awarded, the combined award was less than $50,000.00. The study does not review in detail, however, the 25 cases that resulted in awards of $50,000 or more.

By under-emphasizing the number and amount of large awards reported, the study misses a major point in the debate. While the frequency of excessive damages is of significant concern, it is the mere occurrence and the size of such awards which is even more problematic.

The argument that the Shea & Gardner study of Sec. 1981 cases show that damage awards have been "infrequent and moderate," missess the point. The study fails to take into account the psychological effect of a massive punitive damages claim. As Senator Bumpers said during the debate in the other body in the 101st Congress.

> You can show people all the studies that reveal that punitive damage awards in the past have not been for astronomical amounts . . . But I can tell you that it is small comfort if you are on the receiving end of a lawsuit where the allegation is for say $3 or $4 million in punitive damages. That is your exposure. When somebody files a lawsuit against you and they say, "I am entitled to $10,000 in compensatory damages and $5 million in punitive damages," it will ruin your whole night's sleep.

The mere availability of punitive damages will undoubtedly escalate settlement demands. It will be economically prudent for employers to settle individual cases rather than face the uncertainty of an unlimited punitive damages award from a jury.

The California Experience with Expanded Damages

A better determinant of the effect of additional damages than the flawed Shea & Gardner study is the California experience with respect to the availability of punitive and compensatory damages in wrongful discharge cases. Based on her experience litigating wrongful discharge cases in California, Patricia Gillette, a San Francisco attorney, testified before the Subcommittee on Civil and Constitutional Rights on the effect remedies similar to those proposed under H.R. 1, would have on Federal civil rights litigants. She testified that when the California courts allowed for the recovery of punitive and compensatory damages for wrongful discharge there was a dramatic increase in the number of employee lawsuits and that the subsequent limitation on the availability of such damages saw a drastic decrease in the number of lawsuits. She further stated:

> It is probably safe to assume that in the ten year period between this increase and decrease in wrongful discharge cases, employers did not miraculously change from "bad" to "good." Rather, this trend reflects what I believe to be a direct correlation between the amount of money an employee and his or her lawyer can recover and the number

> of lawsuits brought. Simply put, the higher the dollars available, the more incentive there is to "take a shot" at litigation, especially if a contingency fee arrangement is available to the employee. Thus the increase in the number of claims does not correlate to more legitimate claims. It simply reflects the greater economic incentive involved for lawyers to bring these types of claims. There is no reason to believe that this same phenomena would not occur if Title VII were amended to allow punitive and compensatory damages.[25]

Ms. Gillette concluded that the damages section of H.R. 1 would lead to: the filing of more frivolous claims, undermining of the EEOC administrative process and no increase in the deterrent effect of large verdicts due to the length of time require to handle the additional cases.

The Lawyers' Bonanza

Several of the witnesses who appeared before the Subcommittee complained about the dearth of attorneys available to handle employment discrimination complaints.[26] These attorneys testified in support of H.R. 1. This is not surprising considering that they will certainly benefit from the expanded damages provisions (and the increased opportunities for the recovery of attorneys fees found in section nine).

> At a time when a previously burgeoning sector of the legal industry seemed to be faltering, this bill would come to the rescue by opening wider market opportunities for litigation. Lawyers will no longer have to settle for mere lawyers fees. Title VII lawyers can now compete with ordinary tort lawyers, operating on speculation for a percentage of the damages. And if the pattern in other areas holds up here (as we have every reason to expect), lawyers will retain the lion's share of the money that changes hands.[27]

Title VII should not be turned into a Tort Law Statute

All of the labor and employment laws that Congress has enacted have one thing in common—they provide for "make-whole" relief designed to restore the injured person to the status he or she would have enjoyed if the unlawful act had not taken place. The approach makes particular sense in the employment context. Unlike the typical automobile accident, the parties to an employment discrimination case typically are not strangers who never met until they collided. Labor and employment disputes involve individuals and com-

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[25] Prepared Statement of Patricia Gillette, March 7, 1991, p. 4-5.

[26] Attorney Larry Daves, testified during the February 28, 1991 Subcommitte hearing that "In the 1970's there were dozens of solo-practitioners and small firms litigation title VII cases in Texas. I do not know of more than 4 or 5 attorneys in the State who still represent victims of employment discrimination as a primary aspect of their practice of law." At the March 7, 1991 Subcommittee hearing, Attorney Joyce Davis, senior partner with the law firm of Crisp, Davis, Schwentker, Page and Currin testified that "the market for attorneys to represent plaintiffs in discrimination cases in North Carolina has dried up."

[27] Testimony of Professor Jeremy Rabkin, Hearings on H.R. 4000, Serial No. 101-70, Volume I, pp. 409-410.

panies with an ongoing relationship that began before dissention and should continue after the differences are resolved. By offering make-whole remedies, Congress has provided for full relief while preserving working relationships which otherwise might be destroyed by a punitive award.

As Glen Nager, a Washington, DC attorney, stated at the February 20, 1990 joint hearing held before the House Subcommittee on Civil and Constitutional Rights and the Committee on Education and Labor:

> In title VII, Congress has determined that voluntary compliance and prompt and inexpensive dispute resolution best serves those whom title VII seeks to protect. Job applicants and employees do not want lawsuits; they want employment. Moreover, applicants and employees have families to support and lives to lead; they cannot wait years for resolution of their claims, and it is unhealthy to allow their claims to linger. Inexpensive and speedy dispute resolution is more likely to serve these people's needs than is protracted litigation.[28]

H.R. 1 will transform title VII from a statute encouraging prompt resolution of employment disputes providing remedies for legal injuries of an economic character to a tort law statute which will award victims, if they can afford to wait two to three years for a jury trial, and their attorneys, potentially unlimited damages awards.

It is bad public policy to turn title VII into a tort law statute and we are opposed to this effort to do so.[29]

> This proposal to create a federal tort law system for employment discrimination cases is likely to benefit no one but lawyers. Authorizing the recovery of compensatory and punitive damages will lead to a dramatic increase in title VII litigation, with accompanying judicial delays.
>
> Our tort system, long renowned for its unfairness and glacial pace, has little to recommend it in employment discrimination cases. It is ironic that a majority of the Senate and at least 180 representatives apparently support creating a new federal tort system for employment discrimination cases at the same time that legislators on both federal and state levels actively are seeking alternatives to the tort system itself in areas such as product liability and medical malpractice.[30]

Remedies for Victims of Harassment

We do recognize, however, that there is a weakness in title VII, in that victims of on-the-job harassment, who are not fired or otherwise lose their jobs receive no monetary remedy.

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[28] Serial No. 101-70. Volume 2, p. 510.

[29] An amendment was offered at the Full Committee markup to strike section 8 from the bill, thus maintaining the status quo with respect to title VII damages. The amendment was defeated on a voice vote.

[30] "Practical Problems of the Civil Rights Act" Zachary D. Fasman, the Washington Post, July 23, 1990.

During the full Judiciary Committee Markup, Congressman McCollum offered an amendment to strike the unlimited damages found in Section 8 of H.R. 1 and insert the damages provisions found in H.R. 1375, the Administration's civil rights bill. The purpose of the amendment was to provide an effective deterrent to on-the-job harassment.

Victims who endure the indignities of workplace harassment, under current law, are only able to obtain injunctive relief and attorneys fees. Victims of harassment who quit their jobs, in contrast, are entitled to back pay, injunctive relief, and attorneys fees (which can be substantial). The amendment would expand title VII to provide a new remedy for on-the-job harassment to correct this anomaly which exists under title VII law, whereby employers who allow on-the-job harassment to occur have no clear economic incentive to prevent them from engaging in such conduct in the future.

The amendment would provide a monetary remedy of up to $150,000.00 to be awarded by a judge, in cases of unlawful harassment based on race, sex, religion and national origin. The amendment defines harassment as "the subjection of an individual to conduct that creates a working environment that would be found intimidating, hostile or offensive by a reasonable person." The amendment also defines sexual harassment codifying the decision of the United States Supreme Court in *Meritor Savings Bank* v. *Vinson,* 477 U.S. 57 (1986).

The amendment would encourage employers to quickly and fairly resolve harassment claims by establishing an in-house procedure to effectively settle complaints of harassment within 90 days. In addition, an employee could petition a court for emergency injunctive relief, even if the complaint procedures have not been exhausted.

Unfortunately, the amendment was defeated. Thus, as it now stands, Section 8 of H.R. 1 will turn title VII into a tort law—and a lawyer's bonanza. It will destroy all hope of conciliation in most cases by holding out the hope of striking it rich in court. This is bad public policy—and despite arguments to the contrary, we cannot support it. The better option is to adopt the McCollum amendment which is carefully tailored to meet a pressing need without upsetting the careful balance of title VII.

(6) Attorneys' Fees and Court Costs—(Section Nine)

Under present law, expert witness fees are set at a statutory limit of $35.00 per day. Section 9 of H.R. 1 would allow recovery of unrestricted expert witness fees and other litigation expenses. Thus, a defendant employer would be put in the position of not only having to pay pain and suffering damages, but would also be liable for the fees of medical and other experts called by the plaintiff to support such claims. Expert witness fees can be as high as $600 per hour or $5,000 per day to testify at trial.

Section 9 also requires that "No consent order or judgment settling a claim under this title shall be entered and no stipulation of dismissal of a claim under this title shall be effective, unless the parties and their counsel attest that a waiver of all or substantially all attorneys' fees was not compelled as a condition of the settle-

ment." This provision seeks to overturn *Evans* v. *Jeff D.,* 106 S.Ct. 1531 (1986), which held that settlement of class actions could be conditioned upon a waiver of attorney fees. This section would preclude an employer from offering a "lump sum" settlement to resolve himself of liability and leave the issue of payment of attorneys' fees to be determined between the plaintiff and his attorney (as is commonly the case in other civil lawsuits).

Section 9(3) of the bill would reverse *Independent Federation of Flight Attendants* v. *Zipes,* 109 S.Ct. 2732 (1989). In *Zipes,* a union unsuccessfully intervened in a sex discrimination suit challenging a settlement. The original plaintiffs to the action sought attorney fees from the intervenor union. The Court said that the losing intervenor (the union) had to pay fees only when its actions were frivolous, unreasonable or without foundation. Thus, the plaintiff was not able to collect fees from the union.

Under H.R. 1, the court is directed to determine whether the unsuccessful intervenor or the employer, or both, will pay the plaintiff's fee. In determining who will pay, the court will consider the reasonableness of each parties' position and "whether other special circumstances make an award just."

(7) Section 1981—(Section Twelve)

Patterson v. *McLean Credit Union,* 109 S.Ct. 2362 (1989) narrowly construed 42 U.S.C. 1981 (a general post Civil War civil rights statute) so that it did not apply to racial harassment related to the conditions of employment or any other conduct which did not interfere with the "formation" or "right to enforce" a contract.

The bill, in section 12 reverses *Patterson* by amending section 1981 to cover all aspects of the employment relationship by defining the phrase "make and enforce contracts" to include "the making, performance, modification and termination of contracts and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."

While we agree that Section 1981 should be amended to give redress to victims of on-the-job racial harassment, we reject the notion that punitive and compensatory damages should be the norm for employment discrimination litigation.[31]

(8) Resurrection of Prior Actions—(Section Fifteen)

Section 15 of the bill has several provisions dealing with retroactivity. These provisions pose questions of constitutionality with respect to the finality of judgments in that they would apply the substantive changes of H.R. 1 to cases in which final judgment was entered prior to the date of enactment.

Provisions of the bill that reverse specific Supreme Court decisions will apply to proceedings pending or begun after the date of the Supreme Court's decision. Expansion of title VII remedies, payment of expert witness fees and other litigation expenses will apply to proceedings that are pending or commenced after the date of en-

[31] H.R. 1375, the Administration's Civil Rights bill introduced by House Minority Leader Bob Michel would also amend 42 U.S.C. 1981 to cover on-the-job harassment such as found in the *Patterson* case.

actment of the legislation. Court orders entered after the date of one of the Supreme Court's decisions that are inconsistent with the provisions of H.R. 1 will be voidable if a request for relief is made within one year of enactment. If an individual could show that a claim or charge was not filed because of a decision that is overruled by H.R. 1, the time period for filing a charge between the date of any Supreme Court decision being reversed and the date of enactment would be tolled. In addition, the individual would now have two years from the date of enactment to file a charge.

Objections to Retroactivity

According to the Department of Justice, Section 15, by "upsetting final judgments . . . may unconstitutionally interfere with vested legal rights." [32]

More strenuous objections were raised on behalf of the Administrative Office of the United States Courts. L. Ralph Mecham, Director of the Administrative Office, in a letter to Judiciary Committee Chairman Jack Brooks, dated May 29, 1990 commenting on the identical provision in H.R. 4000 expressed these concerns:

> The application of section 15(b) to final judgments raises serious constitutional and prudential concerns and should be avoided. . . . Moreover, the effective functioning of the Judiciary depends on there being an effective and determinable end to disputes, a principle reflected in procedural rules and judicially created doctrines that prohibit repeated litigation of the same issues. The integrity of the judicial function is threatened by section 15(b), in that the provision permits the reincarnation of finally ended disputes and the reversal of legally correct decisions.

Section Fifteen is Fundamentally Unfair

A legislative attempt to override judgments raises constitutional issues in that a prevailing party may sometimes claim a "vested property right" in a final judgment. H.R. 1 creates problems to the extent that it creates new legal rights and applies those rights to legal actions that have already been decided. The separation of powers doctrine may also be violated in the Congress is attempting to dictate a result in a specific case that is contrary to the result previously reached by the court thereby trespassing on the autonomy of the judicial branch. In addition, Section 15 raises serious concerns with respect to the issue of fundamental fairness. Employers should not have past employment practices judged by standards which were arguably first created in 1991. While it may or may not be sound policy to overturn some of the Supreme Court's 1989 decisions, it is unfair for Congress to change the rules in the middle of the game—now almost two years after the date of the rulings. Attorneys and individuals—both plaintiffs and defendants—rely on Supreme Court decisions as the law of the land, both in the preparation and resolution of litigation.

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[32] Letter of the Attorney General of the United States, Richard Thornburgh to Representative Augustus Hawkins, April 4, 1990, p. 15.

Perhaps one of the most egregious examples of the unfairness of Section 15 is the effect it will have on the Wards Cove Packing Company. Wards Cove was accused of intentional and unintentional discrimination because of its 1971 hiring practices. After 20 years and 8 court decisions, Wards Cove has yet to be found guilty—but H.R. 1 will make this family-run company relitigate the entire case.

The first District Court decision in the Wards Cove litigation applied the *Griggs* standard to the disparate impact charges and found: "Defendants have not discriminated on the basis of race. . . ." The Ninth Circuit agreed. Both courts even said Wards Cove had the ultimate burden of proof, as provided for in H.R. 1, and still found Wards Cove innocent. After the Supreme Court remanded the case, the District Court found: "[T]he defendants hired individuals . . . based upon their qualifications, and not upon their race. . . ." Nevertheless, H.R. 1 will force Wards Cove into more litigation because of the retroactive application of the new record-keeping requirements, the new statute of limitations and the new definition of business necessity which, according to the 248 courts which have cited *Griggs* since 1971, is not the actual *Griggs* holding.

Why should Wards Cove's 1971 employment practices be judged by standards first created in 1991, particularly when the company has been found innocent by every court which has heard the case? Why should any company be placed in this position?

In addition, it is inconsistent for the proponents of H.R. 1 to argue that the need for "finality" of judgments is so overwhelming that it justifies denying individuals the right to raise due process and equal protection claims to challenge discriminatory consent decrees (Section Six), but here they reject the need for finality and leave, in a state of flux, cases that had finally been settled after a decade or more of litigation.

Recognizing the inequity of this provision, Congressman Carlos Moorhead (R–CA) offered an amendment at the Judiciary Committee markup to strike section 15 of H.R. 1 and replace it with the language on "effective date" from the President's civil rights bill which reads, "This act and the amendments made by this act shall take effect on the date of enactment. This act shall not apply to any claim arising before the date of enactment."

In support of his amendment, Congressman Moorhead argued for the application of constitutional principles of fundamental fairness:

> To be able to depend upon the law as it exists at the time that your action takes place is one of the basic civil rights of Americans. When you violate that civil right, regardless of what race, color, or creed that you are, you are violating your own civil rights and all of the civil rights of all Americans.

Unfortunately, the amendment was defeated in a roll call vote.

(9) Congressional Coverage—(Section Sixteen)

One of the President's requirements for a "true" civil rights is that it apply the same requirements to the Congress that are ap-

plied to the private sector and the executive branch. H.R. 1 contains the following provision with respect to coverage of Congressional employees:

> Notwithstanding any other provision of this title, the provisions of this title shall apply to the Congress of the United States, and the means for enforcing this title as such applies to each House of Congress shall be as determined by such House of Congress.[33]

Unlike the above provision, H.R. 1375, the Administration's Civil Rights proposal allows a Congressional employee, once a final determination has been issued by the appropriate internal body, to file a title VII lawsuit in federal district court. The Congressional coverage provision of H.R. 1375 will given teeth to the anti-discrimination requirements of internal House rules prohibiting discrimination by providing an effective enforcement remedy.

(10) ALTERNATIVE MEANS OF DISPUTE RESOLUTION—(SECTION EIGHTEEN)

This section "encourages" the voluntary use of conciliation, mediation, arbitration and other methods for resolving disputes under Civil Rights laws governing employment discrimination.

We agree that voluntary mediation and arbitration are far preferable to prolonged litigation for resolving employment discrimination claims. As Congresswoman Nancy Johnson (R-CT) testified before the Subcommittee on Civil and Constitutional rights:

> Instead of moving these cases into an already overcrowded and costly court system, we should work to improve the mediation process that has proven itself capable of providing timely and affordable justice. [Experience with] medical malpractice and the liability problems arising from such cases has show quite clearly that a system bent on forcing claimants into court increases costs, but more notabily, denies access to the poor and unsophisticated, and does nothing to improve health care.[34]

Unfortunately, this section is nothing but an empty promise to those claimants (and employers) who wish to resolve their disputes without expensive litigation.

We recognize that mediation and arbitration, knowingly and voluntarily undertaken, are the preferred methods of settlement of employment discrimination disputes. This provision, however, is an empty promise which is no way will assist claimants or employers in the resolution of such claims.

CONCLUSION

Certainly employment discrimination still exists and we need to have strong laws to combat such discrimination. We should not

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[33] Under Rule 51 of the Rules of the House of Representatives for the One Hundred Second Congress, the provisions of the Fair Employment Practices Resolution (H. Res. 558 100th Congress) are applied to the employees of the House of Representatives.

[34] Prepared statement of Congresswoman Nancy Johnson (R-CT), Hearing on H.R. 1, Subcommittee on Civil and Constitutional Rights, March 7, 1991.

ignore the fact, however, that the Civil Rights Act of 1964 has worked well over the past 26 years to provide equal opportunities for all Americans. We agree with NAACP Legal Defense and Educational Fund which has stated:

> Over the last two decades, the implementation of title VII of the Civil Rights Act of 1964 has broken down barriers to the participation and advancement of minorities and women in the work force. There have been significant increases, for example, in the numbers of black and female police officers, minority workers in skilled trades, and minorities and women in white collar occupations. "Nearly a quarter of the minority labor force of 1980 were in significantly better occupations than they would have been under the occupational distribution of 1965." [35]

While we acknowledge that title VII has worked well, we must also point out that the solutions proposed by H.R. 1—quotas and increased litigation—will address none of the real problems faced by the disadvantaged in this nation. To rectify this situation, in addition to proposing legislation to strengthen employment discrimination laws, President Bush has proposed a comprehensive agenda to expand opportunity and choice for all Americans. Six major initiatives are in the process of being presented to the Congress: restoring quality education; ensuring crime-free neighborhoods; strengthening civil and legal rights for all; creating jobs and new businesses; expanding access to home-ownership; and allowing localities a greater share of responsibility. We agree that there needs to be a much broader approach than that taken by H.R. 1.

The inadequacy of H.R. 1 to address the true problems of the disadvantaged has been pointed out by columnist William Raspberry:

> The problems most critically affecting black America are the joblessness and despair of our young people, the academic indifference of our children, the dissolution of our families, the destruction, (by crime and drug trafficking) of our neighborhoods, the economic marginality of our people. And the Civil Rights Act of '91 won't do a blessed thing about these problems.[36]

But there is a more pressing deficiency surrounding H.R. 1 than its apparent ineffectiveness in addressing the urgent problems of the disadvantaged. According to a recent study commissioned by the Leadership Conference on Civil Rights and reported in the Washington Post, while Americans strongly support basic principles such as equal opportunity, promotion for merit and hard work, and fairness in the workplace, they do *not* favor legislation which seeks special preferential benefits for a chosen few. As the previous discussions have clearly shown, H.R. 1 suffers from this precise flaw.

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[35] Barry L. Goldstein and Patrick O. Patterson, NAACP Legal Defense and Educational Fund, Inc., "Commentary, Turning Back the Title VII Clock: The Resegregation of the American Work Force through Validity Generalization." Journal of Vocational Behavior 33, 425 (1988).

[36] William Raspberry, "Why Civil Rights Isn't Selling: Too many people don't believe in this bill." Washington Post, March 13, 1991.

According to Celinda Lake, one of the authors of the study, "the civil rights organizations and proponents of civil rights were no longer seen as . . . addressing generalized discrimination, valuing work and being for opportunity. The proponents weren't seen as speaking from those values." [37]

Again, this sentiment was echoed by columnist William Raspberry in his March 13, 1991 editorial in the Washington Post.

> The American civil rights leadership reminds me of the American automobile industry: hoping for a return to the days when its products had worldwide appeal, playing to nameplates and psychological gambits, willing to almost anything to restore consumer interest. Anything, that is, except the one thing that might work: a better line of products.

There is a better product—it is the President's Civil Rights proposal. H.R. 1375 will strengthen the nation's civil rights laws without encouraging quotas or endless litigation. It is fair and it should be enacted into law.

In conclusion, H.R. 1 rests on the misguided notion that protracted litigation is the answer to employment discrimination. Section 9 makes it easier to collect attorneys' fees; Section 8 make it possible to obtain punitive and compensatory damage, which means contingency fees (routinely 33% to 40% of the final settlement); Section 4 and 5 make it easier to win cases generally and Section 11 gives the plaintiff's attorney a statutorily imposed "leg-up" on the other side.

> H.R. 1 rests on the mistaken premise that the effectiveness of civil rights laws should be measured solely by reference to how many plaintiffs win cases, or by reference to how uniform the representation of each racial, ethinic, and gender group is in each job classifiction of each employer [and] on the mistaken premise that employee rights are adequately protected only by protracted federal court litigation.[38]

In conclusion, H.R. 1 would do much more than "restore" the workings of title VII, it would fundamentally and radically alter title VII—for the worse, and thus, should be rejected.

HENRY J. HYDE.
HOWARD COBLE.
BILL MCCOLLUM.
CARLOS J. MOORHEAD.
F. JAMES SENSENBRENNER, Jr.
GEORGE W. GEKAS.
D. FRENCH SLAUGHTER.
LAMAR SMITH.
JIM RAMSTAD.

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[37] Thomas G. Edsall, "Rights Drive Said to Lose Underpinnings: Focus Groups Indicate Middle Class Sees Movement as Too Narrow." the Washington Post, March 9, 1991, A-6.

[38] Testimony of Glen Nager, Hearings on H.R. 4000, Serial No. 101-70, Volume II, p. 513.

ADDITIONAL VIEWS OF HON. STEVE SCHIFF

I believe a civil rights bill should be signed into law this year. I am a co-sponsor of H.R. 1375, the administration's civil rights bill, and supported many of the provisions of that legislaton in Committee. For example, I believe H.R. 1375 best addresses the issue of retroactivity and most accurately sets out the best standard for "business necessity."

But, I do not believe that all of the provisions contained in H.,R. 1375 are superior to H.R. 1. Although I understand the problems with the jury trial system—it can be expensive and time consuming for plaintiff and defendant alike—I do not agree that some citizens should be denied a jury trial when it is available to others in employment discrimination cases, even if that is through the use of another statute. Therefore I prefer the remedy section of H.R. 1 over that of H.R. 1375. However, the damages section of H.R. 1 could still be improved by encouraging and offering a non-litigation remedy in addition to a jury trial.

I believe the best civil rights bill which can be passed by the House should contain a combination of certain provisions from both H.R. 1375 and H.R. 1. For example, I believe we should let the claimant choose whether or not to pursue the complaint through administrative channels, or through court equity, or to take the complaint to jury trail, by combining the remedy sections from both H.R. 1375 and H.R. 1 into one bill.

STEVE SCHIFF.

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