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FRAMING ISSUES AND ACQUIRING CODES: AN OVERVIEW OF THE LEGISLATIVE SOJOURN OF THE CIVIL RIGHTS ACT OF 1991

Reginald C. Govan*

INTRODUCTION

Academics have written prolifically on the distinct issues of employment discrimination and affirmative action because federal legislators, executive branch enforcement agencies, and judges continue to struggle to craft an appropriate mix of public policies to implement the equality guarantee of the Fourteenth Amendment of the United States Constitution. Professor Epstein's article is intriguing and provocative, as are those of Professors Strauss and Abrams. However, many of the issues they raise—from total repeal of statutes prohibiting discrimination to the abandonment of a single unifying "reasonable person" or "reasonable woman" standard to evaluate the legality of behavior toward women in the workplace—bear little resemblance to the employment discrimination and affirmative action issues that preoccupied Congress and the public during the past two years.

Accordingly, my article is markedly different than those of my colleagues. I do not present a theoretical framework to rationalize the development—or as Professor Epstein has declared, misdevelopment—of equal employment and affirmative action law during the past quarter-century, although I certainly have notions of what we have done right and where we have gone wrong. Rather, as best I can, I summarize the two-year legislative sojourn of the Civil Rights Act of 1991 ("1991 Act").¹ Senator Thomas A. Daschle, a Demo-

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crat from South Dakota, recently summarized the current state of the legislative process as follows:

We debate in codes . . . The whole game is a rush to acquire the code. He who gets the code first, wins. It used to be a matter of who framed the issue. Now that is not even necessary. It is getting the code and making it stick. . . . It's a way to say we accomplished something without doing anything at all. It demigrates the national debate.2

Enactment of the 1991 Act is both a simple story of the legislative process in the place that has been described as the “puzzle palace on the Potomac,” and, ultimately, a complex story of a protracted political struggle between the Congress and the Executive Branch to get the code and make it stick concerning a series of judicial interpretations of federal civil rights statutes. I begin in Part I with a summary of the legislative and political history of civil rights issues during the 1980s. In Part II, I discuss the 1989 Supreme Court decisions that were the catalyst of the 1991 Act. In Part III, I discuss the three most contentious issues that Congress confronted: first, compensatory and punitive damages in cases of intentional employment discrimination; second, an employer’s “business necessity” defense in a disparate impact case; and, third, “within-group norming” of the results of written employee selection tests.

I. Political History of Federal Civil Rights Legislation

To fully understand the two-year congressional and public debate concerning the Civil Rights Act of 1991, one must have an appreciation of the political history of federal civil rights legislation. The majestic civil rights legislation of the 1960s—just some thirty years ago—enshrined for only the second time in our history a national policy against discrimination in most areas of public life. Title VII of the Civil Rights Act of 19643 codified a principle of nondiscrimination in employment. The Voting Rights Act of 19654 prohibited discrimination in the exercise of the franchise and required the eleven southern states that made up the old Confederacy to submit any future changes in their voting laws to the Department of Justice for approval. The Fair Housing Act of 19685 established the right to buy, sell, lease, and finance real property free from discrimination.

Title II of the Civil Rights Act of 1964\(^6\) prohibited discrimination in the provision of public accommodations. However, that legislation was flawed by compromises northern Democrats negotiated with moderate (but scarcely few) conservative Republicans in order to break the hammerlock southern segregationists held on the national legislature during the 1950s and 1960s. The issue compromised was not the principle of nondiscrimination, but rather how the newly codified rights were to be enforced.

During the 1970s and continuing through the decade of the 1980s, Congress amended each of the civil rights acts to strengthen the enforcement provisions of these laws. In 1972, Congress significantly expanded Title VII’s jurisdiction to include private employers with fifteen or more full-time employees and employees of state and local government, educational institutions, and the federal government.\(^7\) It also empowered the Equal Employment Opportunity Commission ("EEOC") to file lawsuits against employers when it was unable to conciliate charges of discrimination.\(^8\)

Congress also attempted to amend Title VII to give the EEOC the same enforcement authority that the National Labor Relations Board has had in labor relations cases—that of cease and desist authority, which enables the agency to order an employer to cease and desist from unlawful practices and, if the employer fails to do so, to petition a federal court of appeals for an order of enforcement.\(^9\) However, conservatives in Congress narrowly defeated that proposal because of very vigorous, organized opposition from the business community.\(^10\)

In 1978, Congress passed the Pregnancy Discrimination Act\(^11\)


\(^9\) H.R. 1746, 92d Cong., 1st Sess. § 4 (1971); see also Sape & Hart, supra note 7, at 836-45 (discussing the proposed cease and desist provisions).


thereby overruling a Supreme Court decision which held that the exclusion of maternity benefits from a disability plan did not constitute gender discrimination under Title VII.12 The Pregnancy Discrimination Act reaffirmed the principle that when one discriminates on the basis of pregnancy, one discriminates on the basis of gender. Once again, there was well-organized, vigorous opposition from the business community because its members apparently believed, or at least argued, that the cost of providing maternity benefits to pregnant women would bankrupt business.13

In 1982, Congress amended the Voting Rights Act to eliminate the requirement of proving discriminatory intent and to restore the legal standard of proving a discriminatory effect,14 which had been the standard prior to the decision of the Supreme Court in City of Mobile v. Bolden.15 In 1987, Congress enacted legislation overturning the Supreme Court decision in Grove City College v. Bell,16 which had interpreted Title IX of the Education Amendments of 197217 (and by implication Title VI of the Civil Rights Act of 196418 and Section 504 of the Rehabilitation Act of 1973,19 and the Age Discrimination Act of 197520), thereby reaffirming the simple principle that institutions receiving federal funds may not discriminate.21 Each of these initiatives succeeded because of the proponents' ability to get the code of "restoration," i.e. simply restoring the law to that which had been in effect prior to the decision of the Supreme Court—and making it stick.

After a decade-long struggle, Congress amended the Fair Housing Act in 1988 to establish an administrative enforcement mechanism in the Department of Housing and Urban Development, to

provide compensatory and punitive damages for victims of housing discrimination, and to permit victims to file lawsuits in federal court as an alternative to administrative agency enforcement.\textsuperscript{22} And, of course, there was the hard-fought and sometimes ugly battle in late 1987 over the nomination of then-Judge Robert Bork to be an Associate Justice of the Supreme Court—a battle that implicated many civil rights issues, including such issues as whether the Equal Protection Clause prohibits governmental discrimination against women, the contours of a constitutional right to privacy, and the legitimacy of a constitutional right to reproductive freedom.\textsuperscript{23}

During the 1980s, however, Congress did not seriously consider, debate, or vote on any proposal to strengthen enforcement of Title VII. The reasons are simple. First, as discussed above,\textsuperscript{24} Congress had enacted the Equal Employment Opportunity Amendments of 1972 to strengthen Title VII enforcement, and the Pregnancy Discrimination Act of 1978 to plug a gaping hole in Title VII enforcement created by the Supreme Court’s decision in \textit{General Electric Co. v. Gilbert}.\textsuperscript{25} Second, during the 1980s Congress was preoccupied with a series of legal policy disputes with the Reagan-Bush Administration concerning the appropriate parameters of lawful affirmative action and the strength and vitality of federal agency enforcement of civil rights laws.\textsuperscript{26}

Opponents of affirmative action brought their case to the public, to Congress, and to the courts. They probably won the battle for public opinion, but Congress rarely provided a legislative forum for their ideas. Moreover, the Reagan Administration unsuccessfully argued against the legality of affirmative action in a series of cases before the Supreme Court.\textsuperscript{27} In addition, when then Assistant Attorney General for Civil Rights William Bradford Reynolds proposed

\begin{itemize}
\item \textsuperscript{23} \textit{See Senate Comm. on the Judiciary, Nomination of Robert H. Bork to Be an Associate Justice of the United States Supreme Court, S. Rep. No. 7, 100th Cong., 1st Sess. 45-46, 30-36 (1987)}.
\item \textsuperscript{24} \textit{See supra} notes 7, 10-12 and accompanying text.
\item \textsuperscript{25} 429 U.S. 125 (1976).
\item \textsuperscript{26} \textit{See generally} \textit{One Nation}, supra note 22.
\end{itemize}
to modify approximately fifty consent decrees to significantly curtail or possibly eliminate the use of hiring and promotion goals and timetables, few state or local governments accepted his offer. Finally, the Reagan Administration proposed, but failed to act on, far-ranging revisions of Executive Order 11,246, which requires federal contractors to implement affirmative action programs.

Thus, Congress had spent a decade debating and resolving a wide variety of federal civil rights issues by the time the Supreme Court in June 1989 issued a series of decisions reinterpreting Title VII of the Civil Rights Act of 1964 and section 1981, a post-Civil War statute enacted as part of the Civil Rights Act of 1870.

II. JUNE 1989 DECISIONS

In June 1989, a series of Supreme Court decisions forced Congress to abandon its reluctance to be drawn into a legislative debate on equal employment and affirmative action issues. Collectively those decisions rewrote long-standing interpretations of Title VII's procedural requirements and substantive protections and severely restricted the coverage of section 1981.

Regardless of the merits of the result in any one case—a couple of those decisions arguably reached defensible, and perhaps correct, interpretations of then existing law—collectively those decisions, after twenty years of rather settled law, reconfigured virtually every stage of the Title VII process.

The initial flashpoint and harbinger of the series of decisions that were to come was the directive of the Supreme Court to the parties in *Patterson v. McLean Credit Union* to brief the issue of whether the Court should overturn its earlier decision in *Runyon v.*

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28. BNA Survey Determines Most Cities Are Resisting Justice Push on Consent Decrees, Daily Lab. Rep. (BNA), at A-10 (May 24, 1985) (stating that only the Arkansas State Police, Buffalo Police and Fire Departments, and Wichita Falls, Texas, Police Department would amend their decrees).


31. 42 U.S.C. § 1981 (1988). Section 1981 was derived from section 1 of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866), which was reenacted with minor changes as section 16 of the Civil Rights Act of 1870, ch. 64, § 16, 16 Stat. 140, 144 (1870).


Decided in 1976, Runyon applied section 1981's prohibition against racial discrimination in contractual relations to contracts between private parties, thereby permitting jury trials and awards of compensatory and punitive damages for racially discriminatory employment practices of private employers. That request by the Supreme Court unleashed a firestorm of opposition from Congress, religious groups, and the civil rights and labor communities, all of whom filed amicus briefs essentially saying to the Court, "Don't you dare." Ultimately, the Court, backing down from a frontal attack on the scope of section 1981, reaffirmed its earlier decision in Runyon. However, the decision of the Court confirmed the truth of the old saw that there is more than one way to skin a cat.

In Patterson, the Court rejected prior decisions of every federal court of appeals that had held section 1981 to prohibit not just discrimination at the formation of an employment contract but discrimination during the performance of that contract as well. The decision also stripped away equal employment coverage for the 3.7 million firms with fewer than fifteen employees, which are not covered by Title VII.

In Price Waterhouse v. Hopkins, the Court concluded that when a plaintiff proves that her gender played a motivating role in an employment decision, the employer may "avoid a finding of liability only by proving . . . that it would have made the same decision" even in the absence of discriminatory motives. One unmistakable message of Price Waterhouse was that a little overt discrimination in the employment process can be fine, provided it was not the primary basis for the employer's action.

37. Patterson, 491 U.S. at 171.
39. Id. pt. 1, at 91.
40. 490 U.S. 228 (1989).
41. Id. at 258.
The decision in *Lorance v. AT&T Technologies, Inc.* held that the six-month statute of limitations period for the filing of a Title VII charge begins to run as soon as an employment policy or practice is adopted rather than when it is implemented or for the first time applied to the particular employee. Thus, *Lorance* raised the specter of employees seeking to protect their interests by filing charges immediately after the adoption of any new employment policy that might conceivably be applied to affect them in the future.

Before the Supreme Court's decision in *Martin v. Wilks*, "the great majority of federal courts of appeals had adopted an overly restrictive rule precluding all challenges to a Title VII consent decree" after it had been approved by a court. In *Wilks*, the Supreme Court repudiated the rule followed by those courts and instead adopted an opposite and overly expansive rule permitting unlimited challenges by nonlitigant parties, regardless of the circumstances and regardless of how quickly after entry of the decree they are filed. *Wilks* threatened to reopen dozens of existing decrees to perpetual challenge.

In *Wards Cove Packing Co. v. Atonio*, the Court redefined the "business necessity" test to be used in statistically based disparate impact cases. Under *Wards Cove*, the "business necessity" of an employment practice causing a disparate impact was no longer a defense to be proven by the employer. Rather, the employer simply had to proffer a legitimate business goal significantly served by the practice, and the plaintiff was required to disprove it.

Those shifts in the legal rules governing federal equal employment litigation precipitated the introduction in Congress of the Civil
Rights Act of 1990 ("1990 bill").\textsuperscript{50} \textit{Patterson} was the least defensible of those decisions and became the engine driving the proposed legislation. \textit{Patterson} resulted in the dismissal of literally hundreds of cases in which plaintiffs had proved intentional discrimination and had been awarded monetary damages.\textsuperscript{51} But the decision in \textit{Wards Cove} was the most important decision symbolically because it overruled \textit{sub silentio} the unanimous 1971 decision of Chief Justice Burger in \textit{Griggs v. Duke Power Co.}\textsuperscript{52} \textit{Patterson} and \textit{Wards Cove} collectively energized Congress and its allies in the civil rights community to develop an affirmative legislative proposal to restore and, ultimately, strengthen Title VII and section 1981.

After eight months of drafting, the 1990 bill—House Bill 4000—was introduced in Congress on February 7, 1990.\textsuperscript{53} What began as an effort merely to overturn the June 1989 decisions had expanded during the drafting process to include overturning three objectionable attorney’s fees cases, which the Supreme Court had decided during the 1980s,\textsuperscript{54} and dramatically expanding Title VII remedies by authorizing jury trials and the award of compensatory and punitive damages in cases of intentional discrimination.\textsuperscript{55}

The bill also extended the statute of limitations period for filing charges from six months to two years.\textsuperscript{56} The bill further established a mechanism to reinstate any case that had been dismissed as a result of the June 1989 decisions\textsuperscript{57} and to permit the filing of any case that had not been filed as a result of any of those decisions.\textsuperscript{58}

Not surprisingly, the administration reacted to both the June 1989 decisions and the 1990 bill by denying that the decisions con-
stituted a significant break with established precedent or otherwise undermined effective enforcement of Title VII. With the exception of the Lorance and Patterson cases, it contended that the decisions were a necessary “correction” of a tilt in favor of victims of discrimination that had crept into the federal equal employment law during the past two decades. Indeed, the administration had advocated in briefs or arguments before the Supreme Court some of the very results the Court reached.

Notably, much was accomplished in the nine months between the introduction of the 1990 bill in February and the adjournment of the second session of the 101st Congress in November 1990. Proponents held hearings and mark-ups in committees of jurisdiction, voted in both the House of Representatives and the Senate, and sent the bill to the President. It is virtually unheard of for major legislation to be considered and passed by both the House of Representatives and the Senate the first time it is introduced. Generally, the first time major legislation is introduced in Congress, hearings may be held and a committee of jurisdiction may mark-up the proposed legislation, but rarely will votes be held in either the House of Representatives or the Senate, let alone in both.

Nevertheless, the bottom line is that the proponents of the 1990 bill lost the first round; plain and simple, the bill was not signed into law. It was vetoed. The Senate failed to override the veto. Had such a vote been taken in the House, the veto would have been sustained there as well.

However, proponents of the 1990 bill accomplished much in precious little time primarily because they established a consensus

59. See 1 Hearings on 1990 Act, supra note 51, at 370-78 (statements of Deputy Attorney General Donald B. Ayer); see also Joe Davidson, Civil Rights Groups Turn to Congress To Overcome Recent High Court Rulings, WALL ST. J. July 14, 1989, § 1, at 5 (noting that civil rights groups would have to rely on Congress, not the Bush Administration, in recouping losses from defeats in 1989 Supreme Court decisions); Bob Secter, Won’t Seek Rights Ruling Reversal, Thornburgh Says, L.A. TIMES, June 28, 1989, pt. 1, at 12 (stating that the Bush Administration would not support congressional efforts to reverse the June 1989 Supreme Court rulings).

60. See 1 Hearings on 1990 Act, supra note 51, at 366.


within the Congress and the country that the June 1989 decisions of the Supreme Court eviscerated Title VII and section 1981's prohibitions against employment discrimination and that the law which had been in effect prior to those decisions needed to be restored. Simply put, the code of "restoration" stuck.

III. Monetary Damages, Quotas, and Race Norming

During the two-year legislative and political battle over the 1990 bill and the 1991 Act, Congress had to confront and resolve three significant, substantive issues in order to enact the legislation. First, there was the issue of expanding Title VII remedies to include jury trials and compensatory and punitive damages in all cases of intentional discrimination. Second, there was the issue of defining the strength and scope of the employer's "business necessity" defense to an employment practice causing a disparate impact. Both of these issues were addressed in the 1990 bill. The third issue—the legality of "race norming" results of written employment tests—arose for the first time several months after the President's veto of the 1990 bill on October 22, 1990.

A. Damages

Expanding Title VII remedies to include compensatory and punitive damages and a right to a jury trial in all cases of intentional discrimination was the one major provision of the 1990 bill that neither responded to any Supreme Court decision nor restored the law that had been in effect prior to June 1989. Plain and simple, it was an attempt to strengthen Title VII remedies, privatize Title VII enforcement, and strip the federal judiciary of its role as fact finder in employment discrimination cases. Under the 1990 bill, all victims of intentional discrimination who proved they incurred pain, suffering, medical injury, or other economic injury were entitled to an award of compensatory damages. Punitive damages were to be

64. H.R. 4000 was introduced on February 7, 1990, with 123 cosponsors. H.R. 4000, supra note 50. The House passed the Civil Rights Act of 1990 273 to 154 on October 17, 1990, 136 CONG. REC. H9975 (daily ed.), and the Senate passed it 62 to 34 on October 16, 1990, 136 CONG. REC. S15,399 (daily ed.).

awarded in cases of particularly egregious or willful discrimination. 66

The rationale for a monetary remedy for intentional discrimination was neither complex nor inscrutable. First, as noted above, during the previous twenty years monetary damages had been available in intentional race discrimination cases. 67 Thus, it was a matter of simple equity to eliminate the preferential status of race discrimination cases and provide to victims of gender, religious, national origin, and disability discrimination remedies long available to victims of race discrimination. Second, victims of intentional discrimination often experience severe pain and suffering, humiliation, loss of self-esteem, and sometimes medical injury, particularly in harassment cases. 68 Those injuries, it was thought (and rightly so), ought to be compensated for. Then-current Title VII remedies of backpay and reinstatement did not compensate and make victims whole for the full range of those injuries. 69 Third, twenty-seven years had elapsed since the Civil Rights Act of 1964 first prohibited intentional discrimination in the workplace, and raising the cost of engaging in or tolerating such discrimination might serve as a powerful incentive to finally eliminate such practices.

Needless to say, monetary damages was the issue employers most cared about. Expanding an employer's monetary liability from the narrow group of race discrimination cases to all gender, national origin, religious, and disability cases no doubt constituted a dramatic expansion of the employer's risk and would precipitate a sea-change in the human relations function of Corporate America. It is fully understandable that employers fought the 1990 bill tooth-and-nail.

B. "Business Necessity" Defense

As mentioned above, the unanimous Supreme Court decision in Griggs v. Duke Power Co. held that Title VII prohibits not just intentional employment discrimination but also "procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups

66. H.R. 4000, supra note 50, § 8.
and are unrelated to measuring job capability.\textsuperscript{70} According to the \textit{Griggs} Court, "good intent or absence of discriminatory intent does not redeem" employment practices that have a discriminatory impact on protected groups. Contrary to Professor Epstein's view, Congress understood, if not in 1964 when it enacted Title VII then certainly in 1972 when it amended Title VII after the \textit{Griggs} case was decided, that the statute prohibited intentional discriminatory employment practices as well as practices that, while neutral on their face, disproportionately excluded significant numbers of women and minorities from the workplace.\textsuperscript{71} In 1972, Congress evinced a clear intent to ratify \textit{Griggs} by giving the EEOC specific authority to initiate litigation to challenge employment practices that had a disparate impact on women and minorities.\textsuperscript{72} As was aptly stated in the report of the House Education and Labor Committee in 1972:

\begin{quote}
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.\textsuperscript{73}
\end{quote}

Codifying \textit{Griggs} and its business necessity defense became the single most complex and well-nigh intractable problem Congress confronted. The business community and the administration contended that too strong and too narrow a definition of "business necessity" would render the employer's defense illusory because "business necessity" could never be proved. As a consequence, employers would be forced to hire and promote women and minorities by the numbers—quotas—rather than face litigation they had no realistic opportunity of winning.\textsuperscript{74} That contention had a patina of intellectual justification and did not originate with either the business com-

\textsuperscript{72} See supra note 7 and accompanying text.
\textsuperscript{74} 1 \textit{Hearings on 1990 Act, supra note 51, at 364, 373-74 (statement of Deputy Attorney General Donald B. Ayer); 1 id. at 669, 675 (statement of Lawrence Z. Lorber on behalf of the National Association of Manufacturers and the Society for Human Resource Management); 2 id. at 109, 119-21 (statement of Marshall B. Babson on behalf of the United States Chamber of Commerce); 2 id. at 106-08 (statement of Barrington Parker on behalf of the United States Chamber of Commerce).
munity or the administration; it had been embraced by three justices of the Supreme Court: Justice Blackmun in 1975 in *Albemarle*,

75 Justice O'Connor in 1988 in *Watson*,

76 and Justice White in 1989 in *Wards Cove*.77 Of course, proponents of the Act always maintained that the definition of business necessity was neither too strict nor too narrowly focused and would not force employers to adopt hiring and promotion quotas rather than risk defending themselves in a lawsuit. Nevertheless, “quotas” became the code of those opposed to the 1990 bill; making it stick became their central challenge.

As introduced, the bill required an employer to prove that a practice that had a disparate impact on women or minorities was “essential to effective job performance.”78 Generally, if the employment practice could be proven “essential to job performance,” then it could be maintained. The business community and the White House forcefully opposed that definition. First, as noted above, they contended that the so-called “essentiality” test was too stringent; it was unlikely that any employer could prove any practice essential to job performance. While it may have been a mistake to define business necessity in such strict and rigorous terms,79 it is also true that four months after the introduction of the 1990 bill Congressman Augustus F. Hawkins, then-Chairman of the House Education and Labor Committee and the principal House sponsor of the bill, attempted to respond on the merits to the legitimate concerns of business by amending the definition in a committee mark-up.

Chairman Hawkins’ amendment changed the definition of business necessity to require the employer to prove that an employment practice that caused a disparate impact bore a “substantial and demonstrable relationship to effective job performance.”80 Some representatives of the business community privately stated that with that

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78. H.R. 4000, supra note 50, § 3.
79. See Steven A. Holmes, *On Job Rights Bill, A Vow To Try Again in January*, N.Y. Times, Oct. 26, 1990, at A25 (quoting Morton Halperin of the ACLU as saying, “We thought that, given the current Supreme Court and its demonstrated hostility toward rights, the language had to be stronger to get the result we think *Griggs* managed.”).
80. H.R. 4000, supra note 50, § 3 (1990) (as reported by the House Committee on Education and Labor), reprinted in *House Comm. on Education and Labor*, H.R. Rep. No. 644, supra note 65, at 3, 4; see also id., pt. 1, at 52-54.
change business could go to court and win cases. One editorial writer, referring to proponents of the bill, stated that "rather than fight, they switched." Other representatives of business and the administration disagreed and continued to chant "quota bill," which, thereafter, became the singularly powerful rallying cry of those opposing the bill.

Second, opponents of the bill also objected to the definition's exclusive focus on an employee's "effective job performance" because it failed to take into account the legitimate range of employer interests beyond the employee's performance of actual work activities. Punctuality, attendance, safety, consideration of an employee's relative abilities or skills, ability to get along with coworkers and supervisors, and promotability were illustrative of the interests that opponents asserted were excluded by a definition of business necessity that had as its exclusive focus "effective job performance." Generally, proponents of the 1990 bill did not credit that contention.

The third basis of the quota argument related back to the expansion of Title VII remedies to include compensatory and punitive damages. Opponents contended that an employer faced with the prospect of money damages in intentional discrimination cases would likely hire by the numbers as protection against being sued. Of course, that argument is illogical. Any employer who is likely to engage in intentional discrimination probably will hire as few women and minorities as possible. The business community promoted and clung tenaciously to the quota argument for political reasons because the monetary damages and jury trials about which they were really concerned could not be opposed openly and frontally.

Opposition to an expansion of monetary damages ultimately was premised on a policy choice that victims of race discrimination should get money, the victims of gender discrimination should not.

82. See supra note 74.
83. E.g., 3 Hearings on 1990 Act, supra note 51, at 115, 126-28 (statement of Frank C. Morris, Jr.).
84. E.g., 3 id. at 82, 161-62 (testimony of Kerry Scanlon, NAACP Legal Defense and Educational Fund).
85. E.g., LABOR POLICY ASS'N, INC., SPECIAL MEMORANDUM: THE KENNEDY-DANFORTH CIVIL RIGHTS COMPROMISE IS STILL A QUOTA BILL 90-109 (May 17, 1990) (stating that the "threat of jury trials, compensatory damages, and punitive damages reinforces the need to have a quota-based workforce to avoid immense liability").
86. See, e.g., 2 Hearings on 1990 Act, supra note 51, at 2, 55-60, (testimony of Ralph H.
That translated politically into "what is good for racial minorities is not good for women," and that is how it played in Congress. Employers and the administration could not sustain that argument, and to make sure opponents could not sustain that argument, proponents of the bill spoke of monetary damages in terms of providing damages to white women. That translated politically into "white women ought to be treated at least as well as minorities."

C. Negotiations To Compromise

There were two distinct bases of opposition to the 1990 bill and the 1991 Act. Generally, business had come to accept Griggs and its formulation of the business necessity test. It had proven to be a workable, balanced test that allowed employers a fair opportunity to successfully defend themselves against charges of disparate impact discrimination. Business had no affirmative legislative agenda during the 1970s and 1980s to modify the business necessity test and probably was not prepared to expend significant resources defending Wards Cove, which was an unexpected gift from the Supreme Court. What greatly concerned the business community, however, was the expansion of Title VII remedies to include jury trials and compensatory and punitive damages. Its members' very legitimate concern was the bottom line—what it was going to cost.

Baxter, Jr., Chairman and Chief Executive Officer of Orrick, Herrington & Sutcliffe); The Civil Rights Bill, WASH. POST, June 25, 1990, at A10 (editorial) ("Nor is it a problem for us if racial and the other prohibited forms of discrimination are differently treated; they are different.").

87. Joan Biskupic, New Struggle over Civil Rights Brings Shift in Strategy, 49 CONG. Q. WKLY. REP. 366, 367 (1991); see also Dorothy Gilliam, Playing to Worst in Americans, WASH. POST, Oct. 25, 1990, at C3 (quoting Kerry Scanlon of the NAACP Legal Defense and Educational Fund as saying that "[o]ne of the unspoken but primary reasons for the veto was the desire to prevent millions of working women, including white women, from getting damage awards in cases of intentional discrimination and harassment").


89. E.g., 1 Hearings on 1990 Act, supra note 51, at 669, 683-85 (statement of Lawrence Z. Lorber on behalf of the National Association of Manufacturers and the Society for Human Resource Management).
The other basis of opposition to the bill was rooted in a philosophical antagonism to the unanimous 1971 Supreme Court decision in *Griggs* and to statistically based disparate impact cases. However, many of those who opposed *Griggs* were not troubled by expanding Title VII remedies to provide compensatory damages to victims of intentional discrimination. Consequently, those opponents to the bill did not always faithfully and accurately represent business's true concerns. Although it should have been easier to satisfy the concerns of business than to satisfy the concerns of those who opposed *Griggs*, unfortunately the divergent interests between the business community and the administration were never fully explored or exploited during the battle over the 1990.

There were several missed opportunities and failed attempts to negotiate a compromise bill acceptable to proponents, the business community, and the administration. One missed opportunity occurred shortly after then-Chairman Hawkins introduced House Bill 4000 on February 7, 1990. In a speech before the Equal Employment Advisory Council—an employer-sponsored organization of human resources professionals—Chairman Hawkins summarized the negotiations that had preceded enactment of amendments to the Voting Rights Act in 1982 and to the Fair Housing Act in 1988, and he invited the business community to work with Congress to fashion legislation to overturn the June 1989 decisions of the Supreme Court. During the succeeding months, the silence of the business community was deafening. Another missed opportunity occurred in June 1990 when Chairman Hawkins sponsored an amendment to House Bill 4000, which was then being marked up in the Education and Labor Committee, to remove the “essentiality” requirement from the definition of business necessity. As a result of that amendment Senator Jack Danforth (the sponsor of the amendment in the Senate), several other Republicans, and southern Democrats endorsed the bill. Once again, the business community failed


to respond to that overture and a subsequent invitation to work with
Congress to fine-tune the bill. Nevertheless, during the summer of
1990, Senator Kennedy met with John Sununu and C. Boyden Gray
of the White House over two or three months and reached some
tentative compromises that ultimately were spurned by both Repub-
licans and the civil rights community. That was unfortunate. As a
result, a great deal of ill-will and bitterness developed between the
proponents and opponents of the legislation.93

However, as a result of those negotiations, proponents of the 1990
bill again modified the definition of business necessity. The original
definition, which required an employer to prove the "essentiality" of
a practice, had been modified once to require a showing of "substan-
tiability," and was again modified to require an employer to prove
that the practice bore a "significant relationship to successful job
performance."94 Additionally, as a response to concerns that the fo-
cus of the employer's business necessity defense was too narrow,
proponents substituted the phrase "successful performance of the
job" for the phrase "effective job performance."95

Proponents of the bill also agreed to lower the strength and
broaden the focus of the business necessity test for employment
practices that did not involve selection. The new test required em-
ployers to prove such practices that bore a "significant relationship
to a manifest business objective of the employer,"96 a phrase strik-
ingly similar to the formulation set forth in the Wards Cove case.97

Finally, proponents agreed to limit awards of punitive damages to


95. See HOUSE COMM. ON THE JUDICIARY, H.R. REP. No. 644, supra note 94.

96. Id.

97. Wards Cove required employers to proffer evidence that a challenged employment practice "serves, in a significant way, the legitimate employment goals of the employer." Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989).
the greater of $150,000 or the amount of backpay and compensatory damages.98

Another attempt to reach a compromise involved negotiations between Senator Orrin Hatch, one of the leaders of the opposition, and William Coleman, a Washington, D.C., lawyer, former Secretary of Transportation in the Ford Administration, and, more relevant here, Chairman of the NAACP Legal Defense and Educational Fund. In the closing days of the 101st Congress, Senator Hatch, Senator Arlen Specter of Pennsylvania, Senator Jack Danforth of Missouri, William Coleman, and others reached tentative agreements on seven or eight amendments to the bill.99 As had been agreed to, Senator Hatch presented the proposed compromise to the Administration and told members that he would endorse the compromise only if they agreed with it.100 Knowing that their principal Senate ally would "hang tough" and not support the bill, the Administration nixed the compromise, understandably contending that it did not go far enough to satisfy their concerns.101 Nevertheless, proponents incorporated into the 1990 bill the compromises that had been negotiated by Senator Hatch.102 The President vetoed the bill.103 The Senate failed to override the veto.104 Congress increasingly turned its attention toward a proposed budget "deal," a tax increase, and adjournment.105 The 1990 bill died.


100. See Mr. Bush Against the Tide, N.Y. TIMES, Oct. 15, 1990, at A18 (editorial).


D. 102d Congress and the Civil Rights Act of 1991

In 1991, the new Civil Rights Act proceeded on two distinct tracks. First, Senator Kennedy did not reintroduce a bill, but House Democratic leadership support solidified behind House Bill 1, introduced on January 3, 1991 by Congressman Jack Brooks, Chairman of the House Judiciary Committee. Second, in a dramatic break with the year-long strategy of the business community, the Business Roundtable, an organization of chief executive officers of approximately fifty of the largest corporations in America, secretly initiated direct negotiations with the Leadership Conference on Civil Rights, an umbrella organization of civil rights and other organizations.

Full-blown negotiations between the Business Roundtable and civil rights organizations took place for several months but failed to produce an agreement. In theory, those negotiations made sense. The people who sue (the civil rights community) should talk with those who get sued (the business community) to try to hammer out a compromise. But the world of hardball politics supplanted theory. According to media reports, those negotiators had reached agreement on most issues when the Administration rallied elements of the business community not represented by the Business Roundtable to repudiate the negotiations. The Roundtable represented only the largest companies to the exclusion of small and medium businesses, whose legitimate interests differed from those of big business.

Many other reasons, however, also explain why the Roundtable negotiations collapsed. For example, it simply may have been too late for third parties, however well intentioned, to impose a solution on what had developed into a national political contest between the Congress and the President. The political process had not sanc-

106. H.R. 1, 102d Cong., 1st Sess. (1991); see also Biskupic, supra note 87.
108. Steven A. Holmes, How the Talks that Raised Hopes for a Civil Rights Measure Stalled, N.Y. TIMES, Apr. 21, 1991, § 1, at 18; Steven A. Holmes, Business and Rights Groups Fail in Effort To Draft Bill on Job Bias, N.Y. TIMES, Apr. 20, 1991, § 1, at 1.
109. See articles cited supra note 108; Letter from Representative Craig A. Washington to Ralph G. Neas, Executive Director, Leadership Conference on Civil Rights (on file with the DePaul Law Review). Representative Washington stated:

My immediate concern . . . deals with the negotiation process between the members of the Leadership Conference and the Business Roundtable. Unfortunately, Members
tioned the initiation of such negotiations. Moreover, the negotiations failed to reach a timely compromise on monetary remedies, an issue of critical concern to the Business Roundtable as well as business generally. At no time prior to or during those negotiations was there sufficient political support, in the context of everything else provided in the legislation, for virtually unlimited compensatory and punitive damages for women, religious minorities, and the disabled.

E. Within-Group Norming or Race Norming

The one new issue that Congress confronted in 1991 was a practice called within-group norming or race norming.\textsuperscript{110} It was a politically charged, divisive issue that could have killed the proposed bill. Within-group norming is a device that the EEOC and the Department of Labor promoted during the 1980s to adjust scores on written employment tests.\textsuperscript{111} It is premised on the notion that certain groups of otherwise qualified employees, be they Hispanics or blacks or women, do not perform as well as white males on written employment tests. The practice of within-group norming scores and ranks each group of test takers separately rather than against all other test takers. Thus when an employer considers the top fifteen or twenty test takers, the pool includes some of the top white male candidates, some of the top Hispanic candidates, and so on, group by group.

Many proponents of the 1990 bill and of House Bill 1 concluded that within-group norming was racial or ethnic or gender queuing
and one of the clearest examples imaginable of quotas in the workplace. It was interesting that the practice took so long to surface because during all of Congress' consideration of the 1990 bill, proponents had challenged opponents to produce some evidence that quotas either were inherent in or resulted from disparate impact cases as they had charged. Within-group norming was the answer to that challenge. Many proponents of the bill viewed within-group norming as the functional equivalent of point shaving in basketball, and in the political context it was dynamite.

An amendment to prohibit within-group norming was offered in the Judiciary Committee mark-up of House Bill 1. Because the issue had not been explored at hearings on the bill, that amendment was defeated on a party-line vote. Consequently, Republicans thought that the Democrats were prepared to go to the floor of the House and defend within-group norming. Opponents of the bill would have had a field day. Instead, immediately following that vote, Democrats decided just the opposite—that they were going to make within-group norming illegal, and that is exactly what they did. As a result, within-group norming did not become the politically destructive issue that it could have become.

Building on concepts discussed (and tentatively agreed to) during the Roundtable negotiations, House Bill 1, as passed by the House, embodied a new definition of business necessity that broadened the focus of the employer's business necessity defense to include consideration of an employee's punctuality, attendance, and insubordination in addition to actual work activities.

House Bill 1 also explicitly affirmed that an employer had the right to determine the requirements for a job. Any employer could now point to a section in Title VII that provided explicit statutory authority to set high requirements. Finally, House Bill 1 explicitly affirmed employers' right to rely upon the relative qualifications or skills of employees in making employment decisions.

meant an employer could pick a person who had a better test score over someone who had an acceptable score even though both persons were capable of performing the job.

The House also adopted new legislative language designed to insulate the bill from the quota attack. Proponents of the bill concluded that the quota argument was a political issue that they had not effectively dealt with. There were two reasons: First, the argument tapped into a very real, sometimes open but other times latent, frustration in the workplace that white males in the employment line have been asked to step aside for women and minorities.117 Second, because the quota slogan ultimately was not tied to any particular section of the bill, it was difficult to draft alternative statutory language to respond to a slogan. As a consequence, some observers concluded that the proponents had decided to meet a political argument with a political response.118

House Bill 1, as passed by the House, explicitly affirmed congressional intent that the use of quotas would be deemed an unlawful employment practice under Title VII.119 A quota was defined as a fixed number or percentage of persons of a particular race, color, sex, or national origin, without regard to individual qualifications.120 It is true that some observers who read that definition thought it was too clever by half.121 However, proponents were able to point to explicit language in their bill, and only their bill, that evinced a clear intent that the use of quotas would be illegal. Therefore, proponents succeeded in at least blunting the force of the quota rhetoric.


120. Id. § 111(b), reprinted in H.R. REP. NO. 83, supra note 113, at 21.

Through those devices, proponents of House Bill 1 resolidified their political base in support of the bill notwithstanding a vigorous antiquota campaign, replete with political commercials—radio and television advertisements—aired in select congressional districts with messages similar to that which Senator Jesse Helms used in his reelection campaign.122

Resolidifying the base of support in the House, however, was not sufficient to get a bill enacted into law. House Bill 1 passed the House with 273 yea votes,123 which was the same number of votes in support of the civil rights bill the year before.124 Proponents added approximately ten more Democratic votes but lost ten Republican votes. Thirty-two Republicans supported the bill in the 101st Congress and only twenty-two supported House Bill 1 in the 102d Congress.126 Two-hundred-seventy-three was well short of the magic two-thirds (290) necessary to override a Presidential veto.

The action then shifted to the Senate. As noted above, Senator Kennedy had not reintroduced a bill in 1991. Senator Danforth and most of the group of Republican senators who had sponsored the bill in 1990, however, occupied center stage by introducing their own legislative proposals in 1991.126 To seize the political middle ground, Senator Danforth crafted a series of real compromises on a variety of otherwise contentious issues. Senate Bills 1407, 1408, and 1409 completely eliminated sections of House Bill 1 and other prior legislative proposals concerning the extension of the statute of limitations for filing discrimination charges to a period longer than six months;127 three attorneys fee decisions that had been decided during the 1980s;128 and the application of the restorative provisions of the legislation to cases that had been dismissed as a result of the

127. H.R. 4000, supra note 50, § 7.
June 1989 decisions,\textsuperscript{129} cases that had not been filed as a result of any of those decisions,\textsuperscript{130} and cases then pending in the courts.\textsuperscript{131}

Most importantly, Senate Bill 1409 compromised the issue of monetary damages in intentional discrimination cases.\textsuperscript{132} For the first time during this protracted struggle, a proponent proposed and was prepared to accept fixed limits on both compensatory and punitive damage awards. Those limits varied depending on the size of the employer: $50,000 for employers of between 16 and 100 employees; $100,000 for employers of between 101 and 500 employees; and, $300,000 for employers of more than 500 employees.

Senator Danforth, however, had not developed a political consensus around a definition of the \textit{Griggs} business necessity test. His initial proposal—Senate Bill 1408—would have required an employer to prove that a selection practice bore a "manifest relationship" to "actual work activities" as well as any other "requirement related to behavior that is important to the job" such as punctuality, attendance, job turnover.\textsuperscript{133} That definition closely paralleled the definition of business necessity set forth in House Bill 1, which had failed to garner two-thirds support of the House of Representatives necessary to override a threatened Presidential veto and had been tarred with the quota label.

Nevertheless, when the time came to bring Senator Danforth’s legislative proposal, embodied in Senate Bill 1745, to a vote,\textsuperscript{134} political circumstances had changed and there was renewed pressure for additional compromise to break the deadlock.\textsuperscript{135} Eroding Republican support for another presidential veto forced the administration to accept the fact that Congress intended to overturn all the June 1989 Supreme Court cases, including \textit{Wards Cove} and \textit{Wilks}, the two decisions that the Administration aggressively defended and sought to maintain.

Because compensatory damages were already capped,\textsuperscript{136} Senator

\begin{footnotes}
\item 129. \textit{Id.} § 15; \textit{see supra} text accompanying notes 32-52 (discussing the June 1989 decisions).
\item 130. H.R. 4000, \textit{supra} note 50, § 15.
\item 131. \textit{Id.}
\item 132. S. 1409, \textit{supra} note 126, § 3.
\item 133. S. 1408, \textit{supra} note 126, § 5.
\item 136. S. 1745, as passed by both Houses of Congress and signed into law by President Bush, divided the single $100,000 limit into two categories—$100,000 for employers of between 101 and
\end{footnotes}
Danforth and the Administrations' remaining task was to develop yet another definition of business necessity. The deal struck on October 24, 1991, took a definition almost verbatim from the Americans With Disabilities Act, which Congress passed and the President signed in 1990, that required employers to prove that an employment practice causing a disparate impact is "job related for the position in question and consistent with business necessity." By using a definition of the business necessity defense that faithfully codified Griggs, Congress and the President concluded that they had responsibly responded to and accommodated legitimate concerns regarding quotas.

The fragility of that deal was readily apparent to all seasoned observers of the legislative process. The deal included an interpretive memorandum containing a one-sentence explanation of the definition of business necessity that was to serve as the exclusive legislative history of that issue.

Before the ink on the deal was dry, differences as to the meaning of the definition of business necessity erupted in congressional and public debate. In an extraordinary response, Senate Bill 1745 was amended to provide that the agreed upon interpretative memorandum shall be considered the exclusive legislative history of the meaning of business necessity.

Nevertheless, the public debate continued. One conservative commentator wrote of "Bush's surrender on quotas," in part because the Act required the employer to prove that an employment practice is "'essential' or 'critical' to employee productivity or business profits." C. Boyden Gray, Counsel to the President, entered the fray


countering that "the proposal used essentially meaningless language from the Americans with Disabilities Act that left the term in question undefined." 143 Civil Rights lawyers William T. Coleman, Jr., and Vernon E. Jordan, Jr., fired back: the Act requires employers to prove "that job selection practices must be shown to be significantly related to performance of the job in question. . . . There must be a substantial relationship . . . between selection criteria and job performance." 144

Despite that public debate, the political impasse had ended. The Administration accepted overturning *Wards Cove* and the proponents of the bill accepted fixed limits on compensatory as well as punitive damages, albeit reluctantly. On November 21, 1991, the President signed into law the Civil Rights Act of 1991. 145

**CONCLUSION**

To this participant, the two-year legislative struggle culminating in the enactment of the Civil Rights Act of 1991 embodies large lessons for the nation. The 1991 Act involved issues of political power, legislative process, the proper role and efficacy of advocacy groups representing business and victims of discrimination, money, and principle that are beyond the scope of this article. The salient message for employers is the privatization of enforcement of Title VII through jury trials and awards of compensatory and punitive damages in appropriate cases. Another message of the 1991 Act is the reaffirmation of a national commitment to laws and legal policies necessary to eradicate discrimination in the workplace. Most importantly, the two-year political struggle over the 1991 Act dramatically reaffirmed the historical truth that all civil rights progress results from compromise. Not compromise of the nondiscrimination principle; since 1964 that principle has been and must remain inviolate. However, the prognosis for continued progress toward fulfillment of our national goal of equal opportunity is excellent only when proponents of strengthened civil rights protections seize the tenable middle ground occupied by people of reason and good will.

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