

2014

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Recommended Citation

25 Yale J.L. & Feminism 249 (2014)

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Twenty Years of Compromise: How the Caps on Damages in the Civil Rights Act of 1991 Codified Sex Discrimination

Lynn Ridgeway Zehrt*

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INTRODUCTION

Congress declared the enactment of the Civil Rights Act of 1991¹ a victory for women and civil rights advocates.² After all, before the Civil Rights Act amended Title VII of the Civil Rights Act of 1964, white women could not

*Assistant Professor of Law, Belmont University College of Law. This author would like to thank the Honorable Robert W. Wooldridge, Jr., at George Mason University School of Law, for his encouragement and editing assistance with this paper. This author also appreciates the editing assistance of her research assistants, Nathan S. King, Patrick D. Ober, and Anna M. Waller.

1. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (damages provisions codified at 42 U.S.C. § 1981a (2006)).

2. *See, e.g.*, 137 CONG. REC. 35,060 (1991) (statement of Sen. Hatch) (declaring that the Civil Rights Act was a “major step forward” in protecting women from sex discrimination in the workplace); 137 CONG. REC. 35,098 (1991) (statement of Sen. Kennedy) (calling the Civil Rights Act a “landmark civil rights bill” and praising its passage).

recover damages for intentional sex discrimination.³ Victims of sex discrimination were limited only to equitable relief such as back pay, reinstatement, and injunctive relief.⁴ So, Congress said, the Civil Rights Act was a victory because white women who sued under Title VII could finally recover damages.⁵

But the “victory” was only partial. The Civil Rights Act capped a victim’s recovery to a maximum of \$300,000 in combined compensatory and punitive damages, a stark contrast to the unlimited compensatory and punitive damages⁶ available to black women who sued under 42 U.S.C. § 1981.⁷ Congress said that capped damages was the best remedy they could provide under the circumstances.⁸ It was a compromise necessary to secure passage of the bill.⁹

The time for compromise has long since passed, if it ever existed, yet we continue to accept Title VII’s codified version of injustice.¹⁰ In the more than

3. See Civil Rights Act of 1964, Pub. L. No. 88-352 § 706(g), 78 Stat. 241, 261 (codified at 42 U.S.C. § 2000e-5(g) (1988)); see also 137 CONG. REC. 35,100 (1991) (statement of Sen. Packwood) (“When Congress pass[ed] Title VII of the Civil Rights Act of 1964, it provided that the remedies for intentional discrimination . . . would be primarily ‘equitable’ – that is, you could get injunctions to stop the illegal treatment, and you could get reinstated to your job, and maybe back pay if you were illegally fired. You could not get compensatory damages, which are designed to compensate you for losses you suffered like doctor bills You could not get punitive damages, which are designed, in egregious cases, to punish the wrongdoer who caused the discrimination.”).

4. Congress amended the remedies available to a prevailing plaintiff under Title VII in 1972. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 § 4(g), 86 Stat. 103, 107 (codified at 42 U.S.C. § 2000e-5(g) (2006)); see also 2 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1775-1858 (3d ed. 1996).

5. See, e.g., 137 CONG. REC. 35,060 (1991) (statement of Sen. Hatch) (acknowledging that the Civil Rights Act of 1991 “failed to achieve total parity between the damages available to them and the damages available to those covered under section 1981”).

6. See Civil Rights Act, *supra* note 1, at § 102(b)(3) (codified at 42 U.S.C. § 1981a(b)(3)).

7. See 42 U.S.C. § 1981 (2006); see also 42 U.S.C. § 1981a(a)(1) (specifically exempting claims under § 1981 from the caps applying to damages arising from claims under Title VII).

8. See, e.g., 137 CONG. REC. 35,100 (1991) (statement of Sen. Packwood) (stating that “[w]hen we passed the Civil Rights Act of 1991, I and some of my distinguished colleagues noted that they were uncomfortable with the still-unequal remedy scheme, and would continue to advocate for uncapped damages for all”); *id.* (statement of Sen. Wellstone) (declaring the caps “on damages in the Civil Rights Act represented a compromise necessitated by concern about passing a bill which would be signed by the President. Now that this step has been taken, we need to take the next step: the elimination of a damage scheme that itself discriminates against victims of employment discrimination.”).

9. See, e.g., 137 CONG. REC. 35,060 (1991) (statement of Sen. Hatch) (stating that the caps were part of a compromise package); 137 CONG. REC. 35,100 (1991) (statement of Sen. Metzenbaum) (acknowledging that the Civil Rights Act was not perfect but arguing that a compromise was necessary to move forward).

10. See, e.g., 137 CONG. REC. 35,098-99 (1991) (statement of Sen. Kennedy) (explaining that “the new remedy created a glaring inequity by placing a ceiling on the amount of damages that can be recovered There is no justification for this double standard Women . . . are not second-class citizens, and they do not deserve second-class remedies.”); 137 CONG. REC. 35,101 (1991) (statement of Sen. Wellstone) (declaring that he “know[s] of no legitimate reason . . . that justifies this difference in treatment. Illegal discrimination of any kind wounds its victims. Illegal discrimination of any kind diminishes us as a society and as a Nation. We cannot say that one kind of discrimination is better or less reprehensible than another. The existence of a two-tier system of remedies says to the victims of . . . discrimination that what they have suffered is of lesser importance; it says to the perpetrators of this discrimination that the law has greater tolerance for their conduct. Neither is true.”).

twenty years since Congress enacted the Civil Rights Act, the caps on compensatory and punitive damages remain.¹¹ Indeed, Congress has not once increased the caps for inflation. Thus, the maximum limit of liability for the largest employer remains \$300,000, exactly as it was when Congress first passed the Civil Rights Act more than twenty years ago.¹²

There have been numerous attempts to repeal the caps, but all have failed.¹³ The first attempt, the Equal Remedies Act of 1991, was proposed by the late Senator Edward Kennedy five days after President Bush signed the Civil Rights Act, but it died in the Senate.¹⁴ Senator Kennedy also proposed the last attempt at repeal in 2008, with the bill enjoying nineteen cosponsors, including then-Senators Barack Obama and Hillary Clinton.¹⁵ Despite the support of these key Democrats, the 2008 bill also failed to make it to a floor vote and no similar legislation has been proposed in Congress since.

The failure to repeal the caps should not be taken as a sign that they are acceptable. These caps are now, just as they were then, unequal and discriminatory. Although one of the goals of the Civil Rights Act was to equalize the remedies between victims of discrimination suing under § 1981 and Title VII, the Act only codified the disparity it allegedly sought to correct.¹⁶ Most importantly, the legislative history surrounding the enactment of the Civil Rights Act demonstrates that Congress knew it was creating a “double-standard”¹⁷ that treated women victims as “second-class citizens,”¹⁸ but it nonetheless approved the caps endorsed by the Bush administration.

11. See 42 U.S.C. § 1981a(b)(3) (2006) (capping a defendant’s exposure to compensatory and punitive damages at \$50,000 if the employer has 15 to 100 employees; at \$100,000 if the employer has 101 to 200 employees; at \$200,000 if the employer has 201 to 500 employees; and at \$300,000 if the employer has 501 or more employees).

12. *Id.*

13. See Equal Remedies Act of 1991, S. 1422, 102d Cong. (1991); Equal Remedies Act of 1991, H.R. 3975, 102d Cong. (1991); Equal Remedies Act of 1993, H.R. 224, 103d Cong. (1993); Equal Remedies Act of 1993, S. 17, 103d Cong. (1993); Equal Remedies Act of 1995, H.R. 96, 104th Cong. (1995); Equal Remedies Act of 1995, S. 296, 104th Cong. (1995); Equal Remedies Act of 1997, S. 516, 105th Cong. (1997); Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, H.R. 3809, 108th Cong. §§ 531-32 (as introduced, Feb. 11, 2004); Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, S. 2088, 108th Cong. §§ 531-32 (as introduced, Feb. 12, 2004); Equal Remedies Act of 2007, S. 1928, 110th Cong. (2007); Civil Rights Act of 2008, H.R. 5129, 110th Cong. §§ 441-42 (as introduced, Jan. 23, 2008); Civil Rights Act of 2008, S. 2554, 110th Cong. §§ 441-42 (as introduced, Jan. 24, 2008).

14. See Equal Remedies Act of 1991, S. 1422, 102d Cong. (1991); Equal Remedies Act of 1991, H.R. 3975, 102d Cong. (1991). Senator Hatch also introduced the Employee Equity and Job Preservation Act of 1991, and while it removed caps on damages for all employers with 50 or more employees, it preserved a cap of \$50,000 for claims against smaller employers. See Employee Equity and Job Preservation Act of 1991, S. 2053, 102d Cong. (1991).

15. See Civil Rights Act of 2008, S. 2554, 110th Cong. § 442 (as introduced, Jan. 24, 2008).

16. See, e.g., Michael W. Roskiewicz, *Title VII Remedies: Lifting the Statutory Caps From the Civil Rights Act of 1991 to Achieve Equal Remedies for Employment Discrimination*, 43 WASH. U. J. URB. & CONTEMP. L. 391, 408, 418 (1993).

17. See *supra* note 10 (statement of Sen. Kennedy).

18. *Id.*

Specifically, the legislative history shows concern by Republicans that should women be allowed to sue for monetary damages, it would create a flood of sexual harassment claims. Therefore, they capped the awards to limit the possible recovery of these suits.

These caps are not based on the extent of a victim's injuries. Nor are the caps variable based on the egregiousness of the employer's conduct. They also are not designed to deter and punish, given that the only loose connection to an employer's net worth is an assessment of the number of employees it retained during the relevant calendar year.¹⁹ Thus, various plaintiffs have challenged the reduction of their jury awards on the grounds that the caps violate the due process and equal protection guarantees of the Constitution because they "intentionally and arbitrarily discriminate[] against women."²⁰ Others have argued that the caps violate the Seventh Amendment right to a jury trial, because the caps require an inflexible reduction of jury awards and, therefore, violate the jury's historic obligation to determine damages.²¹

This article takes a novel approach and reexamines the legislative history surrounding the enactment of the Civil Rights Act of 1991 with a central focus on exploring the issue of capped damages. Part I begins by briefly contrasting and summarizing the diverging remedies available under 42 U.S.C. § 1981 and Title VII. The article then shifts in Part II to an examination of the political climate and legislative history that forged the enactment of the 1991 Act, paying particular attention to the debate surrounding damages. This history reveals that many members of Congress had a discriminatory motive in capping damages for victims of sex discrimination under Title VII, and therefore, that these capped damages represent a codified version of injustice. Although prior scholarship documents the legislative history of the 1991 Civil Rights Act, it fails to adequately address the issue of capped damages. Thus, this legislative history is a substantial contribution to contemporary Title VII scholarship, as it provides necessary context for the current debate about whether to abolish the existing Title VII damage regime.

19. See, e.g., Sandra Sperino, *Judicial Preemption of Punitive Damages*, 78 U. CIN. L. REV. 227, 242-43 (2009) (demonstrating why the damage caps under Title VII are "an inappropriate measure of constitutional excessiveness" because they "are not directly tied to punishment and deterrence," are not adjusted for inflation, and may be arbitrary).

20. Appellant's Opening Brief at 23, 44, *Lansdale v. Hi-Health Supermart Corp.*, 314 F.3d 355 (9th Cir. 2002) (Nos. 01-16017, 97-2555); see also *Madison v. IBP, Inc.*, 257 F.3d 780, 804-05 (8th Cir. 2001), cert. granted and vacated on other grounds, 536 U.S. 919 (2002); *Pollard v. E.I. DuPont de Nemours Co.*, 213 F.3d 933, 945-46 (6th Cir. 2000), rev'd, 532 U.S. 843 (2001); *Means v. Shyam Corp.*, 44 F.Supp.2d 129, 131-133 (D. N.H. 1999); see also *Martini v. Federal Nat. Mortg. Ass'n*, 977 F. Supp. 464, 470 (D. D.C. 1997), vacated on other grounds, 178 F.3d 1336 (D.C. Cir. 1999).

21. See, e.g., *Madison v. IBP, Inc.*, 257 F.3d 780, 804-05 (8th Cir. 2001); Appellant's Opening Brief at 53, *Lansdale v. Hi-Health Supermart Corp.*, 314 F.3d 355 (9th Cir. 2002) (Nos. 01-16017, 97-2555).

Based on the findings documented in this legislative history, this article asserts in Part III that the time is long overdue for repealing the caps on damages codified by the Civil Rights Act and ending the injustice created by the two-tiered damages regime.²² Part III explores the theoretical and practical consequences of the ceiling placed on damages to victims of intentional discrimination. It examines the practical consequences of applying statutory caps to claims of sex discrimination by reviewing reductions in damages and other complications caused by the caps. Part III also considers various constitutional challenges asserted in the federal courts by litigants who objected to some of the reductions. Finally, Part IV of this article concludes by evaluating various solutions to the current remedial scheme. In light of the discriminatory animus revealed by the legislative history, this article endorses a complete repeal of the caps.

I. THE ORIGINS OF COMPROMISE: A HISTORICAL REMINDER OF THE ENACTMENT AND DEVELOPMENT OF § 1981 AND TITLE VII

Before examining the legislative history of the Civil Rights Act of 1991, it is important to review the context of the laws impacted by the legislation. The 1991 Act amended the remedial scheme for both § 1981 and Title VII.²³ Therefore, part of this contextual discussion will include a brief overview of the substance of the rights afforded to claimants under Title VII and § 1981 as those rights existed in 1990. This analysis will briefly compare claimants' rights under § 1981 with those provided to individuals suing under Title VII, and analyze the limitations of these statutes prior to the enactment of the Civil Rights Act of 1991.

Although § 1981 and Title VII were created more than a century apart, both were the result of powerful activist movements seeking to improve the living conditions and rights afforded to African-Americans. Section 1981 is a broadly worded statute guaranteeing, in sweeping language to newly freed slaves, the “right . . . to make and enforce contracts . . . as is enjoyed by white citizens.”²⁴ Originally enacted under Section 1 of the Civil Rights Act of

22. Nothing in this article should be interpreted to suggest that the Civil Rights Act does not also cap damages for other qualifying victims of discrimination under Title VII. For instance, the restrictions on damages also apply equally to victims of religious and disability discrimination as well as others. *See* 42 U.S.C. § 1981a(a)(1) (applying the caps to victims of gender, religious discrimination); 42 U.S.C. § 1981a(a)(2) (applying the caps to victims of disability discrimination). Rather, this article seeks to document the evidence of gender bias in the Congressional debate, because sex discrimination—not religion or disability discrimination—is what motivated Congress in 1991 to amend the remedial provisions of Title VII.

23. *See* Civil Rights Act, *supra* note 1, at § 102.

24. Section 1981 currently states:

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

1866,²⁵ it was passed to enforce the newly ratified Thirteenth Amendment.²⁶ Indeed, one of the purposes of the Fourteenth Amendment was to confirm its constitutionality, and Congress later re-enacted the provisions of Section 1 of the 1866 Act to mirror the “all persons” language in the Fourteenth Amendment.²⁷ The enactment of § 1981 was undoubtedly a victory for Reconstructionists,²⁸ but the statute largely lay dormant for a century due to several initial Court decisions restrictively interpreting similar civil rights statutes.²⁹

Not only is the language in the statute broad, but it also is noticeably silent with respect to some of the more common provisions found in modern civil rights statutes. Prior to the Civil Rights Act of 1991, § 1981 did not specify the remedies available to prevailing claimants. Furthermore, the Reconstruction Congresses did not define the concept of race in § 1981, provide the pertinent statute of limitations, denote which entities were restrained by its provisions, or enumerate the scope of its right of contractual freedom.³⁰

Beginning in 1968, the Warren and early Burger Courts³¹ revived § 1981³² and issued a series of decisions that capitalized on § 1981’s broad language and vastly expanded its scope.³³ First, in *Jones v. Alfred H. Mayer Co.*,³⁴ the Court expanded the Civil Rights Act of 1866 to prohibit private as well as state-

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.

42 U.S.C. § 1981 (2006).

25. Civil Rights Act of 1866, 14 Stat. 27, 27 (1866), *re-enacted and amended by* Voting Rights Act of 1870 § 18, 16 Stat. 140, 144 (1870), *amended by* Civil Rights Act of 1991, *supra* note 1, at §101.

26. STEPHEN N. SHULMAN & CHARLES F. ABERNATHY, *THE LAW OF EQUAL EMPLOYMENT OPPORTUNITY* ¶ 12.01 (1990); *see also* DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* § 2.12 (5th ed. 2004).

27. Barbara A. Bayliss, Note, *Saint Francis College v. Al-Khazraji: Cosmetic Surgery or a Fresh Breadth For Section 1981*, 16 PEPP. L. REV. 77, 79-80 (1988).

28. *See* BELL, *supra* note 26, at § 2.12.

29. *See* SHULMAN & ABERNATHY, *supra* note 26, at ¶ 12.01; *see also* Elyse Hilton, *Private Clubs and Employment Discrimination: Does Federal Law Apply?*, 16 FORDHAM URB. L.J. 615, 622 (1987-88) (citing decisions restrictively interpreting the Civil Rights Act of 1866); Danielle Tarantolo, Note, *From Employment to Contract: Section 1981 and Antidiscrimination Law For the Independent Contractor Workforce*, 116 YALE L.J. 170, 184-89 (2006); Note, *The Thirteenth Amendment and Private Affirmative Action*, 89 YALE L. J. 399, 400 (1979).

30. *See* Bayliss, *supra* note 27, at 81-82.

31. *See* William N. Eskridge, Jr., Symposium: *Civil Rights Legislation in the 1990s, Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 622 (1991) (characterizing the Warren Court and early Burger Court as “progressive” and documenting “dynamic and liberal interpretation” of civil rights laws).

32. *See* *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

33. *See* *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987); *McDonald v. Santa Fe Trail Trans. Co.*, 427 U.S. 273 (1976); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454 (1975); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

34. 392 U.S. 409 (1968).

sponsored³⁵ racial discrimination in the sale of property.³⁶ The Court later broadened its interpretation of § 1981 by holding that the prohibition against racial discrimination in contracts also applies to private contracts of employment.³⁷

The Court both expanded the scope of the contractual claim afforded by § 1981 and the scope of those protected by the statute. Despite legislative history indicating that the 1866 Act was intended to protect newly freed slaves, and statutory language guaranteeing them the rights “enjoyed by white citizens,” the Court declared that § 1981 protected white citizens as well as African-Americans.³⁸ The Court subsequently permitted an Arab immigrant to bring a claim under § 1981, unanimously concluding that Congress intended the statute to encompass intentional discrimination “solely because of . . . ancestry or ethnic characteristics.”³⁹

Similarly, the text of § 1981 did not specify the remedies available to prevailing parties.⁴⁰ Yet again, the Court broadly interpreted the statute and held that individuals suing under § 1981 were eligible to recover both equitable relief and tort-like damages, including compensatory and punitive damages.⁴¹ Given the availability of damages, a claimant also was entitled to request a jury trial under the Seventh Amendment.⁴² Thus, by interpreting the statute’s broad language expansively, the Court fashioned § 1981 into one of the most powerful weapons in combating race discrimination.⁴³

Just as § 1981 sought to ensure the property and contractual rights of newly freed slaves, the driving force behind the enactment of Title VII also was “the plight of the Negro in our economy.”⁴⁴ Economic conditions continued to deteriorate for African-Americans during the 1940s and 1950s,⁴⁵ and during the century of § 1981’s dormancy, “blacks had no effective legal machinery for dealing with employment discrimination.”⁴⁶ President Kennedy originally

35. *But see* *Hurd v. Hodge*, 334 U.S. 24, 31 (1948) (holding that Section 1981 applies only to state-sponsored action), *rev’d in part* by *Johnson v. Ry. Express Agency, Inc.*, 392 U.S. 409, 436-37.

36. *See Jones*, 392 U.S. at 436-37.

37. *Johnson*, 421 U.S. at 459-60.

38. *McDonald*, 427 U.S. at 273 (quoting 42 U.S.C. § 1981).

39. *St. Francis Coll.*, 481 U.S. 604, 605.

40. 42 U.S.C. § 1981 (1982).

41. *Johnson*, 421 U.S. at 459-60.

42. *See* SHULMAN & ABERNATHY *supra* note 26, at ¶ 12.08.

43. *See* Theodore Eisenberg & Stewart Schwab, Comment, *The Importance of Section 1981*, 73 CORNELL L. REV. 596, 598-99 (1988) (examining Section 1981’s importance in the “fabric of our law” and declaring that it is the “third most important” federal civil rights law).

44. 110 CONG. REC. 6,548 (1964) (statement of Sen. Humphrey); *see also* *United Steelworkers v. Weber*, 443 U.S. 193, 202 (1979) (quoting Senator Humphrey’s remarks).

45. *See* Ronald Turner, *A Look at Title VII’s Regulatory Regime*, 16 W. NEW ENG. L. REV. 219, 229 (1994) (explaining that unemployment rates for African-Americans were “generally double the rate of white unemployment” by 1958).

46. BELL, *supra* note 26, at 640.

proposed Title VII as part of the Civil Rights Act of 1963,⁴⁷ declaring that “the time has come for the Congress of the United States to join with the Executive and Judicial Branches in making it clear to all that race has no place in American life or law.”⁴⁸ Given that the Court had not yet revived § 1981, the enactment of the Act was crucial toward the fight to eradicate race discrimination and stem the violence of racial riots in the South.⁴⁹ After what some have described as the “longest debate in congressional history,”⁵⁰ Congress enacted the Civil Rights Act in 1964.

The intended beneficiaries of the 1964 Act were African-Americans,⁵¹ so feminists largely were “absent during the proceedings regarding Title VII.”⁵² In fact, it is widely believed that the provision adding sex as a characteristic protected from discrimination was included as a last minute floor amendment to Title VII by opponents of the legislation who hoped the amendment would *defeat* the legislation.⁵³ Specifically, Representative Howard Smith, chairman of the House Rules Committee and a Southern congressman, proposed to include the term “sex” the day before the act was passed.⁵⁴ Although Representative Smith was hoping it would divide supporters of the bill,⁵⁵ it instead produced “an unholy alliance between feminists and segregationists”⁵⁶ because it triggered the contention that without the amendment, the bill would protect black women but not white women.⁵⁷ Despite the near accidental origins of sex as a protected characteristic under the Civil Rights Act of 1964, it

47. Civil Rights Act of 1963, H.R. 7152, 88th Cong. (1963).

48. John F. Kennedy, Special Message to the Congress on Civil Rights and Job Opportunities, (June 19, 1963), *available at* Gerhard Peters and John T. Woolley, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=9283>.

49. Adam W. Aston, Note, “Fair and Full Employment”: *Forty Years of Unfulfilled Promises*, 15 WASH. U. J.L. & POL’Y 285, 288 (2004).

50. Michael Z. Green, *Addressing Race Discrimination Under Title VII After Forty Years: The Promise of ADR as Interest-Convergence*, 48 HOW. L.J. 937, 944 (2005); *see also* CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985) [hereinafter WHALEN & WHALEN, THE LONGEST DEBATE].

51. *See* Aston, *supra* note 49, at 289-92.

52. Deborah N. McFarland, *Beyond Sex Discrimination: A Proposal for Federal Sexual Harassment Legislation*, 65 FORDHAM L. REV. 493, 501 (1996).

53. 110 CONG. REC. 2, 577 (1964) (amendment offered by Rep. Smith on February 8, 1964 proposing to add the word “sex” to Title VII); *see also* WHALEN & WHALEN, THE LONGEST DEBATE, *supra* note 50, at 115-118, 234 (“[C]overage [of women] in H.R. 7152 did not come about through strenuous lobbying by women’s groups; it was the result of a deliberate ploy by foes of the bill to scuttle it.”).

54. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 816-17 (1991).

55. McFarland, *supra* note 52, at 502.

56. Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755, 769 (2004).

57. *Id.* at 770-772.

was the “first piece of major civil rights legislation to protect the rights of women.”⁵⁸

Despite the success in enacting Title VII, the statute as originally enacted contained significant limitations. First, although Title VII prohibited both private and public employers from intentionally discriminating on the basis of race, color, religion, sex, and national origin, the statute defined the term “employer” narrowly and excluded businesses with fewer than twenty-five employees.⁵⁹ Eight years later, Congress passed the Equal Employment Opportunity Act,⁶⁰ lowering the statutory minimum number of employees from twenty-five to fifteen.⁶¹ Section 1981 does not require a minimum number of employees as a prerequisite to coverage,⁶² and many arguments have been made to encourage the repeal of this portion of Title VII.⁶³

More importantly, Title VII granted victims of discrimination a private right of action against their employers, but the right was not unlimited. First, a prevailing party under Title VII was not initially entitled to compensatory or punitive damages.⁶⁴ Instead, when Title VII originally was enacted, a prevailing party was only entitled to recover equitable remedies such as backpay, injunctive relief, and reinstatement.⁶⁵

Perhaps the greatest weakness of Title VII, however, was that it failed to define certain key terms including “discrimination”⁶⁶ and “sex.”⁶⁷ In 1965, the EEOC responded to “the unexpectedly high number of sexual discrimination charges filed in [Title VII’s] first year” by issuing guidelines to define the concept of sex discrimination.⁶⁸ Almost immediately, lawsuits were filed in federal court challenging the meaning of these terms.⁶⁹ The circumstances

58. See CHARLES F. ABERNATHY, *CIVIL RIGHTS AND CONSTITUTIONAL LITIGATION* 732 (4th ed. 2006); Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 *HOFSTRA LAB. & EMP. L.J.* 431, 432-33 (2005).

59. See Civil Rights Act of 1964, Pub. L. No. 88-352 § 701(b), 78 Stat. 241, 253-254 (codified at 42 U.S.C. § 2000e (b) (1964)).

60. The Equal Employment Opportunity Act, Pub. L. No. 92-261 § 2(4), 86 Stat. 103, 103 (1972) (codified at 42 U.S.C. §2000e (b) (1976)).

61. The Act also expanded the EEOC’s enforcement powers to include filing its own lawsuits. *Id.* at §§ 4-12.

62. 42 U.S.C. § 1981 (2006).

63. See Aston, *supra* note 49, at 307-312 (discussing the arguments advanced during the Congressional debate in 1972 in support of the repeal of the employee minimum).

64. Civil Rights Act of 1964, Pub. L. No. 88-352 § 706(g), 78 Stat. 241, 261 (codified at 42 U.S.C. § 2000e-5(g) (1988)).

65. *Id.*

66. Civil Rights Act of 1964, Pub. L. No. 88-352 § 701, 78 Stat. 241, 253 (codified at 42 U.S.C. § 2000e (1964)) (defining key terms in the statute but lacking a definition for “discrimination” or “sex”).

67. *Id.*

68. Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 *HOFSTRA LAB. & EMP. L.J.* 671, 675 (2005).

69. See Ronald Turner, *Thirty Years of Title VII’s Regulatory Regime: Rights, Theories, and Realities*, 46 *ALA. L. REV.* 375, 409-434 (1995) (exploring the various theoretical approaches to the term “discrimination”).

under which “sex” was added to the statute, however, did not provide much legislative history to assist courts with its meaning.⁷⁰

While the statute clearly prohibited certain tangible employment actions such as termination and refusal to hire and promote,⁷¹ litigants also challenged the more ambiguous language prohibiting discrimination in “other terms and conditions of employment.”⁷² Here again, African-Americans led the reform effort and filed suits challenging conduct amounting to racial harassment.⁷³ Courts generally were willing to recognize that racial harassment amounted to discrimination because of race,⁷⁴ but they initially refused to recognize that sexual harassment amounted to discrimination because of sex.⁷⁵ Federal courts advanced different theories to justify the dismissal of those sexual harassment suits, but the predominant theory was that sexual harassment involved “personal urge[s]” and “proclivit[ies]”⁷⁶ and that the victim’s sex was “merely incidental to the harassment.”⁷⁷

70. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986).

71. Civil Rights Act of 1964, § 703(a)(1) (codified at 42 U.S.C. § 2000e-2(a)(1) (1964)).

72. *Id.*

73. See Pat K. Chew, *Seeing Subtle Racism*, 6 STAN. J. C.R. & C.L. 183, 184-186 (2010) (discussing the early cases asserting claims of racial harassment and stating that the first federal court to recognize the claim did so in 1969); Colleen M. Davenport, *Sexual Harassment Under Title VII: Equality in the Workplace or Second-Class Status?: Meritor Savings Bank, FSB v. Vinson*, 10 HAMLIN L. REV. 193, 208-210 (1987) (tracing the recognition of racial, religious, and national origin harassment claims under Title VII); Susan M. Matthews, *Title VII and Sexual Harassment: Beyond Damages Control*, 3 YALE J.L. & FEMINISM 299, 305-307 (1991) (comparing the success of racial harassment with sexual harassment and finding that Section 1981 has traditionally afforded victims of racial discrimination the opportunity to seek compensatory and punitive damages); Kathleen A. Smith, *Employer Liability for Sexual Harassment: Inconsistency Under Title VII*, 37 CATH. U. L. REV. 245, 252 (1987) (discussing the inherent differences in a claim of race and religion harassment with a sexual harassment claim and how those differences contributed somewhat to the refusal to recognize the claim in some of the early cases).

74. See generally sources cited *supra* note 73.

75. See ALBA CONTE, *SEXUAL HARASSMENT IN THE WORKPLACE LAW AND PRACTICE* § 2.01 at 2-4, 2-10 2-20 (4th ed. 2010) (discussing federal cases refusing to recognize a cause of action for sexual harassment); McFarland, *supra* note 52, at 508 n.83 (citing cases dismissing a claim of sexual harassment); Julianne Scott, *Pragmatism, Feminist Theory, and the Reconceptualization of Sexual Harassment*, 10 UCLA WOMEN’S L.J. 203, 208-210 (1999) (discussing the holdings in the first cases that refused to recognize sexual harassment as a form of sex discrimination and examining how these holdings influenced several leading feminists and their arguments).

76. *Corne v. Bausch & Lomb, Inc.*, 390 F.Supp. 161, 163 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977); see also *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F.Supp. 553, 556 (D.N.J. 1976) (“[Title VII] is not intended to provide a federal tort remedy for what amounts to physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley”), *rev’d and remanded*, 568 F.2d 1044 (3d Cir. 1977); *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976) (“It is conceivable, under plaintiff’s theory, that flirtations of the smallest order would give rise to liability. The attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions”), *rev’d and remanded*, 600 F.2d 211 (9th Cir. 1979); accord Katherine M. Franke, *What’s Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691, 698-701 (1997) (exploring the early sexual harassment cases in which courts dismissed the claim as “an [e]xpression of [p]rivate, [p]ersonal [s]exual [d]esire”).

77. McFarland, *supra* note 52, at 508; see also Katherine H. Flynn, *Same-Sex Sexual Harassment: Sex, Gender and the Definition of Sexual Harassment Under Title VII*, 13 GA. ST. U. L. REV. 1099,

In 1976, a federal court held for the first time that sexual harassment constituted sex discrimination within the meaning of Title VII.⁷⁸ Shortly thereafter, several other federal circuit courts issued similar decisions recognizing claims of sexual harassment, but federal courts were by no means uniform in their justifications or conclusions.⁷⁹ Legal scholars credit several feminists, including Catharine MacKinnon, Lin Farley, and Carroll Brodsky,⁸⁰ as the impetus that created the “quiet revolution in sexual harassment law.”⁸¹ Even the Supreme Court later relied on MacKinnon’s theories⁸² in its landmark decision in *Meritor Savings Bank v. Vinson*, when it confirmed for the first time that sexual harassment is a type of sex discrimination under Title VII.⁸³

Despite the general recognition that sexual harassment was a valid claim under Title VII, it was clear by the 1980s that women who filed a lawsuit under Title VII achieved only a hollow victory.⁸⁴ If a woman endured sexual harassment and resigned as a result, then she was entitled to recover back pay for a limited period of no more than two years or until she obtained similar employment.⁸⁵ On the other hand, if a woman endured sexual harassment but

1103-04 (1997) (examining the various concerns advanced by the early courts when they refused to recognize sexual harassment claims).

78. See *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976).

79. See CONTE, *supra* note 75, at 2-4.

80. See CAROL M. BRODSKY, *THE HARASSED WORKER* (1976); LIN FARLEY, *SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB* (1978); CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 59 (1979).

81. Holly B. Fechner, *Toward an Expanded Conception of Law Reform: Sexual Harassment Law and the Reconstruction of Fact*, 23 U. MICH. J.L. REF. 475, 477 (1990); see also Scott, *supra* note 75, at 209.

82. See Camille Gear Rich, *What Dignity Demands: The Challenges of Creating Sexual Harassment Protections for Prisons and Other Nonworkplace Settings*, 83 S. CAL. L. REV. 1, 8 (2009) (“Modern workplace sexual harassment law would not exist as it does today were it not for Catharine MacKinnon’s attempt to articulate a coherent theory of workplace sexual harassment in the 1970s, as her work unquestionably shaped federal courts’ understanding of sexual harassment as a social problem.”); Joanna P. L. Mangum, *Wrightson v. Pizza Hut of America, Inc.: The Fourth Circuit’s “Simple Logic” of Same-Sex Sexual Harassment Under Title VII*, 76 N.C. L. REV. 306, 319 (1997) (“The judiciary followed [the] lead [of Professor MacKinnon], ultimately resulting in the Supreme Court’s creation of a Title VII sexual harassment claim.”).

83. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63 (1986) (using the same framework when discussing sexual harassment as a valid claim under Title VII that Catherine MacKinnon proposed in her book); see also *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 752 (1998) (citing MacKinnon’s work).

84. See, e.g., Eleanore K. Bratton, *The Eye of the Beholder: An Interdisciplinary Examination of Law and Social Research on Sexual Harassment*, 17 N.M. L. REV. 91, 106-07 (1987) (arguing that Title VII should be amended to provide compensatory and punitive damages); Krista J. Schoenheider, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1462, 1472-75 (1986) (discussing the remedial relief available to victims of sexual harassment under Title VII and stating that it is “grossly inadequate”). Even after the passage of the Civil Rights Act of 1991, some advocates continued to encourage claims under state law. See, e.g., Deborah S. Brenneman, Note, *Sexual Harassment Claims and Ohio’s Workers’ Compensation Statute: Kerans v. Porter Paint Co.*, 61 U. CIN. L. REV. 1515, 1540-41 (1993) (“State tort law holds greater potential for providing more complete recovery for sexual harassment victims.”).

85. See Christine O. Merriman & Cora G. Yang, *Employer Liability for Coworker Sexual Harassment under Title VII*, 13 N.Y.U. REV. L. & SOC. CHANGE 83, 103-113 (1984-85) (discussing the

remained on the job, then her recovery was limited to injunctive relief ordering the company to stop the harassment.⁸⁶ Indeed, several sexual harassment lawsuits gained national attention during this time period for the atrocities and extended harassment suffered by women at the hands of their supervisors and co-workers.⁸⁷ In one case, the district court described the sexual harassment endured by the plaintiff as “sustained, malicious, and brutal harassment,”⁸⁸ and stated that it had occurred over a period of five years. The plaintiff, however, only recovered \$2,763.20 in back pay to cover her salary while she took several short medical absences.⁸⁹ Thus, many women elected not to pursue their claims of sexual harassment because, on one hand, they needed their jobs and feared they would suffer retaliation at work, and on the other hand, a successful lawsuit would not make them whole.⁹⁰

Also in the 1980s, the Supreme Court’s composition shifted significantly to the right with a series of nominations by President Reagan.⁹¹ These personnel changes not only signaled the end of an era of judicial activism toward the advancement of civil rights, but also marked a period of judicial regression in which the Court “significantly narrowed prior interpretations” of both § 1981 and Title VII.⁹² In the 1988 to 1989 term, the Supreme Court issued six decisions that dramatically curtailed the scope of § 1981 and Title VII.⁹³ Of particular relevance here, the Court held in *Patterson v. McLean Credit Union* that racial harassment is not a valid claim under § 1981, because § 1981 only

inadequacies of remedial relief in sexual harassment cases and arguing for the availability of compensatory and punitive damages); Schoenheider, *supra* note 84, at 1472-75 (discussing remedies awarded to victims of sexual harassment).

86. See sources cited *supra* note 85.

87. See, e.g., *Brooms v. Regal Tube Co.*, No. 85C1401, 1987 WL 61557 (N.D. Ill. 1987), *rev’d* 881 F.2d 412 (7th Cir. 1989); *Zabkowitz v. West Bend Co.*, 589 F.Supp. 780 (E.D. Wis. 1984).

88. See *Zabkowitz*, 589 F. Supp. at 785.

89. See *Zabkowitz v. West Bend Co., Div. of Dart Industries, Inc.*, 789 F.2d 540, 543 (7th Cir. 1986).

90. See, e.g., BARBARA A. GUTK, *SEX AND THE WORKPLACE* 47-48 (1985) (discussing the prevalence of sexual harassment in the workplace and reporting fifty-three percent of women suffered sexual harassment); John W. Whitehead, *Eleventh Hour Amendment or Serious Business: Sexual Harassment and the United States Supreme Court’s 1997-1998 Term*, 71 TEMP. L. REV. 773, 775-778 (1998) (providing statistics documenting the pervasiveness of sexual harassment but documenting the psychological reasons that women fail to report it).

91. These personnel changes on the Court included Justice O’Connor’s accession to Justice Stewart’s seat in 1981, Chief Justice Rehnquist’s replacement of Chief Justice Burger in 1986, Justice Scalia’s appointment that same year, and Justice Kennedy’s appointment in 1987. See Charles B. Craver, *Radical Supreme Court Justices Endeavor to Rewrite the Civil Rights Statutes*, 10 LAB. LAW. 727, 727-28 (1994); Eskridge, *supra* note 31, at 624 n.62, 633 n.131.

92. Drew S. Days, III, *Civil Rights at the Crossroads*, 1 TEMP. POL. & CIV. RTS. L. REV. 29, 33 (1992).

93. See *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (overruling *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

applies to the formation and enforcement of contracts and not to “conditions of continuing employment.”⁹⁴

After the *Patterson* decision, the viability of future harassment claims was in complete disarray. African-Americans could no longer bring a claim of racial harassment under § 1981.⁹⁵ Although a claim for racial harassment was still viable under Title VII, that statute did not compensate successful litigants by awarding damages, and therefore many believed it was not as effective a deterrent to employers.⁹⁶ The impact of the *Patterson* decision was immediate and severe, causing the dismissal of hundreds of claims pending in federal court and a sharp decline in claims filed under § 1981 the subsequent year.⁹⁷

This time, African-American leaders and feminists were united in their efforts to obtain congressional reform.⁹⁸ African-American leaders primarily advocated the restoration of their rights to sue for harassment under § 1981, but they also supported the efforts of feminists to seek reform under Title VII.⁹⁹ Likewise, feminist leaders working through groups including the National Women’s Law Center,¹⁰⁰ the National Federation of Business and Professional

94. See *Patterson*, 491 U.S. at 171, 176-77.

95. See Harvey L. Cohen, *In the Wake of Patterson v. McLean Credit Union: The Treacherous and Shifting Shoals of Employment Discrimination Law*, 67 DENV. U. L. REV. 557 (1989) (discussing the Tenth Circuit’s application of *Patterson* to specific cases pending prior to the enactment of the Civil Rights Act of 1991).

96. See Woody W. Lay, Note, *Patterson v. McLean Credit Union: A Narrowing of Remedies for the Employment Discrimination Plaintiff*, 47 WASH. & LEE L. REV. 995, 999 (1990) (discussing the advantages, including the availability of damages, to filing suit under Section 1981 rather than Title VII).

97. See NAACP LEGAL DEFENSE & EDUC. FUND, INC., THE IMPACT OF PATTERSON V. MCLEAN CREDIT UNION 4 (1989) (estimating that in four and one-half months since the Supreme Court issued its *Patterson* decision, more than ninety-six cases were dismissed in the lower courts and predicting continued dismissals at a similar rate); Kelly J. Andrews, *Patterson v. McLean Credit Union: The Deconstruction of a Reconstruction Era Civil Rights Statute*, 35 HOW. L.J. 403, 431 n.163 (1992) (discussing the “devastating” effects of the *Patterson* decision and the dismissal of lawsuits filed under Section 1981); William B. Gould, IV, Symposium, *The United States Supreme Court’s 1988 Term Civil Rights Cases, The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TUL. L. REV. 1485, 1506 & n.99 (1990) (“[M]any courts have jumped with alacrity to dismiss claims without even consideration of oral argument”).

98. See Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1, 35-36 (1993) (documenting that the Women’s Legal Defense Fund and the National Women’s Law Center proposed the plan to equalize damages under Title VII and § 1981 and NAACP Legal Defense and Education Fund “immediately embraced the proposal because it stripped a federal judiciary . . . of its exclusive role as fact-finder in employment discrimination cases under Title VII”).

99. See, e.g., *Vol. I, infra* note 115, at 430, 465 (testimony of William T. Coleman, Jr., Chairman of the Board of the NAACP Legal Defense and Education Fund, Inc.) (advocating the reversal of *Patterson* and the availability of full compensatory and punitive damages under Title VII); *Vol. I, infra* note 115, at 268, 271 (testimony of Marcia D. Greenberger, Managing Attorney, National Women’s Law Center) (arguing for the same, but focusing on the availability of damages under Title VII because that is really “[w]hat is at issue in this legislation”); see *infra* notes 104, 120, 122-125, 127, 174-176 and accompanying text.

100. See *Vol. I, infra* note 115, at 268 (testimony of Marcia D. Greenberger).

Women's Clubs, Inc.,¹⁰¹ and People for the American Way¹⁰² lobbied Congress for a damages scheme under Title VII that was equal to the damages scheme under § 1981. These women emphasized the growing problem of sexual harassment in the workforce, the inadequacies of Title VII's current remedial scheme to make victims whole and deter employers' wrongful conduct, and the inequities of pursuing claims under Title VII rather than § 1981. In short, by uniting their efforts, both groups succeeded in raising national awareness of the harassment crisis and mounted an impressive campaign that urged Congress to reform both laws.

Ultimately, Congress acquiesced to the reform requested by the African-American community, and it amended the text of § 1981 to include a cause of action for harassment, thus restoring the rights removed by the Court's *Patterson* decision.¹⁰³ In fact, the legislative history of the Civil Rights Act of 1991 demonstrates very little Congressional debate surrounding the proposed amendment to the text of § 1981.¹⁰⁴ Both President Bush and the Democrat-controlled Congress disagreed with the Court's decision in *Patterson* and supported this portion of the amendment.¹⁰⁵ Thus, there was virtually no debate between the two parties over this issue.

On the other hand, the damages reform advocated by women to Title VII caused sharp dissension and controversy. As documented in the legislative history section of this article, numerous days of testimony before congressional committees and subcommittees were devoted to the problem of sexual harassment and the inadequacies of remedies available to women under Title VII. Yet despite this convincing testimony, congressional leaders in both

101. See *Vol. II, infra* note 115, at 708-722 (supporting the Civil Rights Act of 1991).

102. See *Vol. I, infra* note 135, at 131.

103. See Civil Rights Act of 1991, *supra* note 1, at § 101 (codified at 42 U.S.C. § 1981 (2006)). Section 101 of the Civil Rights Act of 1991 reads as follows:
Section 1977 of the Revised Statutes (42 U.S.C. § 1981) is amended –
by inserting “(a)” before “All persons within”; and
by adding at the end the following new subsections:
“(b) For purposes of this section, the term ‘make and enforce contracts’ includes 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 and impairment under color of State law.”

104. See *Vol. I, infra* note 115, at 268 (testimony of Marcia D. Greenberger, Managing Attorney, National Women's Law Center) (“It was very heartening to hear the expressions of support that seem quite unanimous, in fact, with respect to overruling the *Patterson* case. . .”).

105. See Caroline R. Fredrickson, *The Misreading of Patterson v. McLean Credit Union: The Diminishing Scope of Section 1981*, 91 COLUM. L. REV. 891, 902-903 (1991) (“The view that *Patterson* should be overruled, though, seems not to have been an issue of dispute, as the President's own alternate sought to overrule it as well.”) (citing President's Civil Rights Act, S. 3239, 101st Cong. § 11, 136 CONG. REC. 18,048 (1990); accord Sheilah A. Goodman, *Trying to Undo the Damage: The Civil Rights Act of 1990*, 14 HARV. WOMEN'S L.J. 185, 208 (1991) (agreeing that President Bush supported legislative action to overturn the *Patterson* decision but explaining that he initially favored a more limited interpretation of Section 1981 that would “extend[] coverage only to claims of harassment that would constitute a violation of state contract law” (internal citation omitted)).

houses of Congress exchanged sharp words of disagreement over the scope of damages that should be afforded to victims of sex discrimination. This included the testimony of several witnesses who offered discriminatory justifications for the availability of only limited damages to victims of sex discrimination, including the view that sex discrimination was an unavoidable “social problem.” Given the inevitability of flirtations between men and women in the workplace, some Republican congressional leaders expressed the concern that providing women with unlimited tort damages would “open the floodgates” and overburden the federal courts with sexual harassment claims. After more than two years of debate, the Civil Rights Act that was enacted and signed by President Bush in 1991 fell far short of the damages reform requested by feminists. Rather than equalizing the remedies between § 1981 and Title VII, it created a two-tier damage structure that discriminates against women. Now, let us reexamine the legislative history of the Civil Rights Act of 1991 by focusing on the political debate over the availability of remedies under Title VII and revealing the discriminatory justifications advanced for limiting recovery to victims of sex discrimination.

II. THE ART OF COMPROMISE: PROBING THE LEGISLATIVE HISTORY THAT FORGED THE DAMAGES PROVISION OF THE CIVIL RIGHTS ACT OF 1991

As documented in numerous sources, the enactment of the Civil Rights Act of 1991 was not an easy task. It required two legislative efforts and was achieved only after the first attempt, the Civil Rights Act of 1990, was vetoed by President Bush. Yet prior scholarship has provided only limited treatment of the internal battle raging within Congress over whether victims of sex discrimination should be granted equal remedies to those granted to victims of race discrimination. During both legislative attempts, Congress heard testimony and acknowledged the unequal rights of women imposed by the limited and inadequate equitable remedies then available under Title VII. Yet despite this inequality, Congress subrogated the rights of women by adopting a damages regime that placed caps on the damages available to victims of sex discrimination while affording unlimited damages to victims of race discrimination. As revealed by the legislative history, Congress knew that the caps on damages devalued claims of sex discrimination, but nonetheless sacrificed equality for the sake of political compromise. Despite the significance of Congress’ decision to knowingly abdicate its duty to advance equality, this is a neglected aspect of the legislative history of the Civil Rights Act and provides an additional basis for advocating the repeal of this discriminatory remedial scheme. Let us now separately examine the legislative

history of the 1990 and 1991 Civil Rights Acts as it pertains to the availability of damages.

A. *The Failed Attempt to Resist Compromise: The Civil Rights Act of 1990*

On February 7, 1990, Senator Kennedy and Representative Hawkins simultaneously introduced identical versions of the Civil Rights Act of 1990 in both the Senate¹⁰⁶ and the House of Representatives.¹⁰⁷ This initial version of the Kennedy-Hawkins bill was ambitious, and boldly declared in its findings that “existing protections and remedies under Federal law are not adequate to deter unlawful discrimination or to compensate victims of such discrimination.”¹⁰⁸ As originally proposed, Section 8 of the Kennedy-Hawkins bill permitted unlimited compensatory and punitive damages against nongovernmental employers for acts of intentional discrimination.¹⁰⁹ It also specifically provided for trial by jury in accordance with the dictates of the Seventh Amendment.¹¹⁰ Despite the broad reforms sought by the Kennedy-Hawkins bill, it garnered significant support from its inception in both Congressional houses as it was introduced with a large number of co-sponsors to convey strong commitment to the act.¹¹¹

Approximately two weeks later, Senator Hatch introduced President Bush’s initial civil rights bill, which proposed only limited reforms.¹¹² Although the President’s bill amended § 1981 to restore racial harassment claims and overturn the Supreme Court’s decision in *Patterson*, it did not amend Title VII’s remedial scheme.¹¹³ Thus, “[t]he administration immediately found itself in a vulnerable position with respect to the sexual harassment issue,” and the President’s bill largely was disregarded.¹¹⁴

106. 136 CONG. REC. 1,600, 1,653 (1990) (introducing the Civil Rights Act of 1990 in the Senate).

107. 136 CONG. REC. 1,550 (1990) (introducing the Civil Rights Act of 1990 in the House).

108. S. REP. NO. 101-315, at 2 (1990) (§ 2(a)(2) of S. 2104); H.R. REP. NO. 101-644, pt. 1, at 3 (1990) (§ 2(a)(2) of H.R. 4000).

109. S. REP. NO. 101-315, at 4 (1990) (§ 8 of S. 2104); H.R. REP. NO. 101-644, pt. 1, at 5, 6 (1990) (§ 8 of H.R. 4000).

110. S. REP. NO. 101-315, at 55 (1990).

111. See 136 CONG. REC. 1,600, 1,653 (1990) (when introduced by Senator Kennedy on Feb. 7, 1990, the bill listed 34 cosponsors); 136 CONG. REC. 1,550 (1990) (when introduced by Representative Hawkins on Feb. 7, 1990, the bill listed 122 cosponsors, and 56 additional sponsors were added on May 16, 1990); see also Govan, *supra* note 98, at 50, 51.

112. 136 CONG. REC. 2,402 (1990) (Senator Hatch introduced the administration’s bill, entitled the “Civil Rights Protections Act of 1990,” and this version of the bill was endorsed by other key Republican senators including Senator Coats, Senator Dole, Senator Kasten, and Senator Thurmond).

113. *Id.*

114. See Roger Clegg, Symposium, *Introduction: A Brief Legislative History of the Civil Rights Act of 1991*, 54 LA. L. REV. 1459, 1464 (1994).

Five congressional hearings were held to consider the Civil Rights Act of 1990 during the 101st Congress.¹¹⁵ The initial hearings held in the House of Representatives focused largely on the damages provision found in Section 8 of the Kennedy-Hawkins bill.¹¹⁶ The first hearing was held in February, just two weeks after the Kennedy-Hawkins bill was introduced.¹¹⁷ Much of the testimony during this hearing advocated the availability of compensatory and punitive damages to victims of sex discrimination under Title VII, enumerating several justifications.

First, numerous witnesses at the February hearing asserted that the lack of damages under Title VII constituted discrimination against women and advocated that Title VII be amended and modeled after the remedies afforded to victims under § 1981. For instance, David Rose, the former Chief of Employment Litigation at the U.S. Department of Justice, acknowledged that “[t]here is a strong element of unfairness in the present law and . . . that is that purposeful discrimination is actionable under 1981 if the discrimination is on grounds of race or national origin and it is not for grounds of sex discrimination.”¹¹⁸ Additionally, John E. Jacob, President and Chief Executive Officer of the National Urban League, testified that a refusal to afford equal remedies to women “would, in itself, be discriminatory, a way of saying that

115. Four hearings were held in the House of Representatives during the 101st Congress. *See Hearings on H.R. 4000, The Civil Rights Act of 1990—Volume 1: Joint Hearings Before the Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong. (1990) (hearings were held on Feb. 20 and 27, 1990) [hereinafter *Vol. I*]; *Hearings on H.R. 4000, The Civil Rights Act of 1990—Volume 2: Joint Hearings Before the Comm. on Education and Labor and the S. Comm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong. (1990) (hearing was held on March 13 and 20, 1990) [hereinafter *Vol. II*]; *Hearings on H.R. 4000, The Civil Rights Act of 1990—Volume 3: Hearings Before the H. Comm. on Education and Labor*, 101st Cong. (1990) (hearings were held on April 25 and May 21, 1990) [hereinafter *Vol. III*] and *Hearings on H.R. 4000, Civil Rights in the Work Force: Hearings Before the H. Comm. on Small Business*, 101st Cong. (1990) (hearings were held on July 30, 1990). One published hearing was held in the Senate during that time. *See Hearings on S. 2104, The Civil Rights Act of 1990: Hearing Before the S. Comm. on Labor and Human Resources*, 101st Cong. (1990) (held on Feb. 23 and 27, Mar. 1 and 7, 1990) [hereinafter *Senate Hearing*].

116. Section 8 of the Kennedy-Hawkins bill stated in its entirety:
SEC. 8. PROVIDING FOR DAMAGES IN CASE OF INTENTIONAL DISCRIMINATION.
 Section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g)) is amended by inserting before the last sentence the following new sentences: ‘With respect to an unlawful employment practice other than an unlawful employment practice established in accordance with section 703(k) —
 (A) Compensatory damages may be awarded; and
 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. If compensatory or punitive damages are sought with respect to a claim arising under this title, any party may demand a trial by jury.’

S. 2104, 101st Cong. § 8 (1990); H.R. 4000, 101st Cong. § 8 (1990).

117. *See Vol. I, supra* note 115.

118. *See Vol. I, supra* note 115, at 716 (testimony of David Rose).

discrimination is a minor misdemeanor, like a parking ticket.”¹¹⁹ Other advocates urged support for the bill on similar grounds.¹²⁰

Second, witnesses testified that the remedial scheme under Title VII was inadequate to compensate victims of sex discrimination. Chairman of the House Subcommittee on Civil and Constitutional Rights Don Edwards explained in his opening remarks at the hearings in February that the damages provision was “need[ed] to put teeth in Title VII, to serve as a deterrent to violators, and to give victims of discrimination a proper remedy.”¹²¹ Other witnesses testified that the remedial relief afforded by Title VII could prove “woefully inadequate” to many victims of discrimination¹²² because it “fail[ed] to provide employers with a meaningful incentive to comply with the law,”¹²³ impaired the attainment of Title VII’s dual purposes to “eliminate[e] effects of past discrimination and . . . prevent[] future discrimination,”¹²⁴ and deterred women from filing suit.¹²⁵ In the view of these witnesses, Title VII remedies imposed unequal redress for victims,¹²⁶ and the witnesses urged that women should be entitled to “comparable remedies.”¹²⁷

119. In that same portion of his testimony, Mr. Jacob predicted that opponents of the legislation might try to weaken the damages provision in the bill and encouraged Congress to resist those pressures, stating any limits would be unfair:

I’m also concerned that attempts will be made to dilute provisions of the bill that provide adequate relief to victims of discrimination. It seems to me that when the judicial system finds that someone is wrong, they should receive just compensation. In those cases where the courts find gross intentional violations of rights that warrant punitive damages, such punishment should be enforced.

Those means of redress are embedded in our justice system and commonly applied to other forms of victimization. To refuse to apply them to the bitter wrongs of discrimination would, in itself, be discriminatory, a way of saying that discrimination is a minor misdemeanor, like a parking ticket.

Id. at 591.

120. *See id.* at 271 (testimony of Marcia D. Greenberger, Managing Attorney for the National Women’s Law Center) (calling the lack of damages remedy in Title VII a “glaring omission” and urging Congress to enact the “long overdue” bill); *id.* at 565 (testimony of John J. Curtin, Jr., President of the American Bar Association) (testifying in support of providing unlimited damages to victims of discrimination under Title VII and explaining that the bill “does for women what for years has been done for racial discrimination”); *id.* at 580-81 (statement of Norman Dorsen, President of the American Civil Liberties Union) (explaining that he supported the damages provision in the bill because it “resolves an anomaly” in employment law which allows these remedies for cases of racial discrimination, but denies them to women and others).

121. *See Vol. I, supra* note 115, at 429 (statement of Rep. Don Edwards, Chairman, Subcomm. on Civil and Constitutional Rights).

122. *Id.* at 277 (testimony of Ms. Greenberger).

123. *Id.* at 280; *see also id.* at 533 (statement of Mr. John J. Curtin, Jr.).

124. *Id.* at 280.

125. *Id.* at 279.

126. *Id.* at 133 (statement of John H. Buchanan, Jr., Chairman, People for the American Way); *see also id.* at 613 (statement of Antonia Hernandez, President and Counsel of the Mexican-American Legal Defense Fund) (testifying that “what one can hope for is to provide to women the opportunity to file [for compensatory and punitive damages]. It makes no sense for a black woman to be able to file under 1981 and to have a white woman not be able to file”).

127. *See id.* at 282 (statement of Ms. Greenberger) (summarizing findings of a report prepared by the National Women’s Law Center titled *Title VII’s Failed Promise: The Impact of the Lack of a Damages Remedy*, which explored, among other things, the remedies recovered by women who turned to state tort law to pursue their sex discrimination claims. The report concluded that “[s]tate law does not

Finally, some of the testimony emphasized the pervasive problem of sexual harassment in the workplace and demonstrated how Title VII's equitable remedies were particularly inadequate for these victims. For example, the report submitted by the National Women's Law Center documented that "[s]exual harassment is a severe problem for a large percentage of women."¹²⁸ The report also "chronicle[d] case after case in which courts have found in reported decisions that individuals have been discriminated against by their employers, and yet the victims have gotten minimal or no relief under Title VII."¹²⁹ After listening to testimony related to this report, Representative Hawkins concluded that the lack of a damages remedy for victims of sex discrimination was inherently unfair because such victims could suffer "severe damages as a result of being harassed on the job," including "physical damage for the rest of [their] life," but would have "no remedy."¹³⁰

Joint hearings again were held on March 13 and 20, 1990, before the House Committee on Education and Labor and the Subcommittee on Civil and Constitutional Rights.¹³¹ Although much testimony was given during the February hearings that related to damages, the focus on damages at the March hearings was even greater and focused almost exclusively on the need for providing damages to victims of sex discrimination. These hearings began with powerful testimony from two victims of sexual harassment, Carol Zabkowitz¹³² and Helen Brooms,¹³³ who shared their personal experiences involving egregious and prolonged harassment from their employers. Both women urged Congress to amend Title VII to provide for damages and advanced two rationales, namely that Title VII's provisions did not make them whole¹³⁴ and

provide a sufficient alternative [because] state tort laws typically include requirements which are extremely difficult to satisfy, and many victims are barred by state worker's compensation laws from suing their employers in tort altogether.").

128. *Id.* at 273.

129. *Id.* at 277.

130. *Id.* at 418; *see also id.* at 716 (testimony of David Rose, former Chief, Employment Litigation of the U.S. Department of Justice) (explaining that the equitable remedies in Title VII were particularly problematic in cases of sexual harassment because "there is no relationship whatsoever between the injury that the employee or applicant suffers and the back pay").

131. *See Vol. II, supra* note 115.

132. *See Vol. II, supra* note 115, at 2–11 (statement of Carol Zabkowitz) (testifying that she endured more than five years of "sustained" harassment at the hands of co-workers and supervisors, that the harassment harmed her health, and that her recovery was limited to \$2,700 in backpay).

133. *See Vol. II, supra* note 115, at 12–18 (statement of Helen Brooms) (describing brutal and graphic acts of harassment at the hands of her supervisor, including threats if she did not sleep with him, and a fall down a flight of stairs when she tried to escape him during an encounter. Brooms suffered physical damage and "spent eight weeks in traction." Her recovery also was limited to backpay.).

134. *See id.* at 4 (testimony of Ms. Zabkowitz) (stating that "Title VII is supposed to make victims whole for the harm they have suffered because of discrimination. I was not made whole. Not only did I have to pay a lot of medical bills and suffer a great deal of medical harm because of the harassment, but I was robbed of my dignity. Today, in 1990, several years after leaving West Bend, I am finding the healing process is far from over."); *see also id.* at 14 (statement of Ms. Brooms) (explaining that she testified "for myself and for all the women who continue to be victimized on the job, to a large degree as a result of the fact that the law, by limiting our real damages, encourages management to permit

that damages would increase employer incentives to “take the law more seriously.”¹³⁵

Reinforcing a position that numerous witnesses made in the February hearings, witnesses in the March hearings also offered testimony declaring that remedial remedies for victims of sex discrimination under Title VII were inadequate. First, some witnesses explained that equitable remedies fail to deter employer misconduct¹³⁶ because they amount to nothing more than “a slap on the wrist.”¹³⁷ Others explained that equitable remedies simply encourage employer enforcement of Title VII, which was much like “having the wolf watch the chicken coop.”¹³⁸ In response to this testimony, several Congressmen argued that without the possibility of damages, “there is no hammer out there to put over their heads, [and] then we are whistling Dixie.”¹³⁹ Finally, other supporters expressed that the only deterrence afforded by equitable remedies was to deter victims from bringing suit because the remedies did not “come close to making whole the woman”¹⁴⁰ and they reinforced the “grin and bear it”¹⁴¹ tendency of many victims. In short, Representative Washington declared that if damages “prevent[ed] one [woman] from being subjected to [harassment],” then they should be made available under Title VII.¹⁴²

Several witnesses testifying at the March hearings also attempted to justify the expansion of remedies under Title VII by comparing the statute with existing causes of action at common law in which similar remedies already were available. For instance, several witnesses compared a claim of employment discrimination to various intentional torts including battery under state law.¹⁴³ Theodore Eisenberg, a professor at Cornell Law School, explained that employment discrimination claims qualified as intentional torts.¹⁴⁴ He also discussed the remedies for intentional torts at common law and stated that

violations of the law”); *see also id.* at 12 (testimony of Ms. Brooms) (explaining that she agreed to testify because she “fel[t] strongly that women who are victimized by sexual harassment and other forms of discrimination on the job must obtain fair damages and redress. . . . I agreed to testify so that other women in this country who are also brutalized on the job may, in the future, have a remedy which compensates them for their pain and exploitation.”).

135. *Id.* at 4 (testimony of Ms. Zabkowicz); *see also id.* at 14 (testimony of Ms. Brooms) (explaining that she was speaking out “to a large degree as a result of the fact that the law, by limiting our real damages, encourages management to permit violations of the law”).

136. *See id.* at 51, 54 (testimony of Ms. Nancy Kreiter, Research Director, Women Employed Institute); *id.* at 181 (testimony of William Burns, Pacific Gas & Electric); *id.* at 710 (prepared statement of National Federal of Business and Professional Women’s Clubs, Inc.); *id.* at 851 (prepared statement of Robert B. Fitzpatrick, Vice President, Plaintiff Employment Lawyers Association).

137. *Id.* at 21 (testimony of Ms. Nancy Kreiter).

138. *Id.* at 68 (statement of Rep. Payne, Member, H. Comm. on Education and Labor).

139. *Id.* at 185 (statement of Rep. Washington, Member, H. Comm. on Education and Labor).

140. *Id.* at 191 (testimony of Jane Lang, attorney, Sprenger and Lang).

141. *Id.* at 69 (statement of Rep. Payne, Member, H. Comm. on Education and Labor).

142. *Id.* at 75 (statement of Rep. Washington, Member, H. Comm. on Education and Labor).

143. *See id.* at 136 (testimony of Theodore Eisenberg, Professor, Cornell Law School); *id.* at 73 (statement of Rep. Washington, Member, H. Comm. on Education and Labor).

144. *See id.* at 136 (testimony of Mr. Eisenberg).

“[t]he thought of my not getting compensatory or punitive damages is simply unheard of.”¹⁴⁵ Other witnesses relied on the remedies available under other federal statutes and noted that these other statutes afforded more complete relief than the remedial structure of Title VII. For instance, some witnesses relied on 42 U.S.C. § 1983,¹⁴⁶ and noted that compensatory and punitive damages were available to plaintiffs under that statute, including to victims of employment discrimination against certain governmental employers.¹⁴⁷ Others emphasized that victims of age discrimination could recover liquidated damages under the Age Discrimination in Employment Act,¹⁴⁸ which consisted of doubling the amount of actual damages for willful violations,¹⁴⁹ and considered this remedial scheme a substantial improvement over the equitable remedies available under Title VII.¹⁵⁰

However, most witnesses compared the purposes of Title VII with those of § 1981.¹⁵¹ This is not surprising given that the Civil Rights Act of 1990 proposed to amend both statutes to “restor[e] the civil rights protections that were dramatically limited by [the Supreme Court’s recent decisions.]”¹⁵²

Some Republicans, however, opposed the comparison of remedies under § 1981 with Title VII and advanced three main theories to argue that the claims

145. *Id.* (comparing the unavailability of remedies under Title VII with the remedies available for other intentional torts and stating that employment discrimination “is a legal wrong . . . which in remedies is discriminated against by our legal system. That is, the victims of discrimination are themselves discriminated against by the set of laws we have on the books now”); *see also id.* at 143 (prepared statement of Theodore Eisenberg & Stewart Schwab) (arguing that “Title VII is one of the few areas of law in which the victim of an acknowledged *intentional* wrong cannot recover effective damages Whatever one thinks of compensatory and punitive damages in doctrinal areas involving behavior other than intentional wrongdoing, defendants who commit *intentional* torts under state law would be laughed out of state legislatures and Congress if they argued that they should not be liable for the full range of traditional compensatory and punitive damages.”).

146. Section 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (2006).

147. *See Vol. II, supra* note 145, at 149 (prepared statement of Theodore Eisenberg & Stewart Schwab).

148. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (2006).

149. *See* 29 U.S.C. § 626(b) (limiting the recovery of liquidated damages to “cases of willful violations of this chapter”).

150. *See Vol. II, supra* note 115, at 179 (testimony of Victor Schachter, attorney, Schachter, Kristoff, Ross, Sprague & Curiale) (discussing the liquidated damages provisions of the ADEA and how employers “take it extremely seriously”).

151. *See id.* at 77 (testimony of William Burns, consultant with Pacific Gas & Electric); *id.* at 137 (testimony of Theodore Eisenberg); *id.* at 149 (prepared statement of Theodore Eisenberg & Stewart Schwab); *id.* at 186-87 (statement of Rep. Washington); *id.* at 716-17, 730 (prepared testimony of National Federation of Business and Professional Women’s Clubs, Inc.).

152. S. 2104, 101st Cong. § 2(b)(1) (1990); H.R. 4000, 101st Cong. § 2(b)(1) (1990).

should remain distinct.¹⁵³ First, they argued that Title VII and § 1981 were inapposite given that § 1981 originally was not enacted as a labor law.¹⁵⁴ Second, while Republicans supported the amendment of § 1981 to restore racial harassment claims after the Supreme Court's decision in *Patterson*,¹⁵⁵ they distinguished the substance of a claim of racial harassment from a claim of sexual harassment. For instance, attorney Glen D. Nager testified that sexual harassment was a "social problem" and, therefore, "an administratively imposed fine . . . is the more rational way of dealing with this specific problem."¹⁵⁶ Similarly, attorney Ralph Baxter explained that sexual harassment was a more difficult problem to eradicate from the workplace than racial harassment because sexual harassment "derives not only from gender-based thinking . . . it also derives from forms of social behavior. . . . It is more complicated than just bias. It is sexual in nature, and it makes it a harder problem to deal with. . . ." ¹⁵⁷ Finally, opponents of the bill expressed concern

153. A third round of hearings was held on April 25, 1990 and May 21, 1990. The Republicans requested this third round of hearings and it largely explored their views and theories contending that a damages remedy was not necessary under Title VII. *See Vol. III, supra* note 115. Only a small part of this hearing consisted of testimony related to damages, and whenever possible, parallel citations to both Volume II and III will be provided for the Republican position.

154. *See Vol. II, supra* note 115, at 88 (testimony of Victor Schachter); *see also Vol. III, supra* note 154, at 3-4, 15 (testimony and prepared statement of Edward E. Potter, President, National Foundation for the Study of Employment Policies); *id.* at 438 (prepared statement of Linda Ottinger Headley, attorney, Hutcheson & Grundy).

155. *See supra* notes 131-33 and accompanying text.

156. *See Vol. II, supra* note 115, at 630 (testimony of Glen D. Nager, attorney, Jones, Day, Reavis & Pogue).

157. *Id.* at 55-58 (testimony of Ralph Baxter, attorney, Orrick, Herrington, Sutcliffe). Mr. Baxter also testified as follows:

Mr. Baxter. [S]exual harassment in the work place is much harder to control because it derives not just from the thinking, not just from the bigotry or the bias or the other things that drive other forms of discrimination, it derives from the sexual drives and other biological human drives of the people involved. It's a different kind of problem, and it's a harder one to deal with. . . .

Mr. Miller. Why?

Mr. Baxter. Because it is social as well as intellectual. It is a different kind of problem.

Mr. Miller. You're not answering the question. Why?

Mr. Baxter. I'm trying to. Why is it?

Mr. Miller. Explain to me why this thing that you now say is cultural, intellectual and social might be different than racism. What is it about racism that makes it distinguishable from this? It's not social? It's not intellectual? It's not cultural? People don't carry it into the workplace?

. . .

Mr. Baxter. . . . The reason is there's a spectrum of intersexual, interpersonal relations from flirtation to offense and lots of place in between and beyond. . . . Men and women employees in the work place are going to flirt. They are going to have interchanges. It's going to happen. We're never going to legislate that away. . . .

Mr. Miller. How is that different than when activity based upon race runs that same spectrum?

Mr. Baxter. I find it hard to accept that people, good naturedly, in a good-natured way - . . . you're going to involve racial activity.

. . .

Mr. Miller. You find it hard to believe what? . . . That you good naturedly could offend somebody based upon racial activity? . . . But in good humor you could fail to offend somebody sexually? So good humor is a defense? Who are you, Andy Rooney?

that extending compensatory and punitive damages to claims of discrimination would “open the floodgates” of litigation in federal courts.¹⁵⁸

In contrast to Republican witnesses, civil rights leaders and feminists defended the comparison of Title VII with § 1981. They emphasized that the comparison was entirely appropriate because the most common allegation at that time under § 1981’s provisions was an *employment* discrimination claim on the basis of race.¹⁵⁹ Other witnesses disputed the argument that punitive damages would open the “floodgates” of sexual discrimination claims by offering empirical evidence that very few verdicts under § 1981 resulted in million-dollar awards and that “the median award for both compensatory and punitive damages under § 1981 has been less than \$40,000 per case.”¹⁶⁰ Finally, some witnesses relied on the results achieved by the availability of punitive damages under § 1981 and noted that while it did “not necessarily . . . change people’s attitudes . . . there have been all kinds of advances in the South where there was racial discrimination.”¹⁶¹ So, while it “didn’t change peoples[’] attitudes necessarily . . . the possibility of punitive [damages] certainly changed the behavior.”¹⁶²

The most explosive testimony during the March hearings, however, was delivered by witnesses who believed that the inequity of damages under Title VII rendered women “second-class citizens.”¹⁶³ For instance, Chairman

...

Mr. Baxter. It is an easier problem to deal with because almost never is conduct of an ethnic, racial . . . kind appropriate in the work place. But people do have social relationships in the work place that are not inappropriate. That’s the difference.

Id. at 56-58 (conversation between Rep. Miller and Mr. Baxter).

158. *See, e.g., Vol. II, supra* note 115, at 89 (testimony of Victor Schachter) (describing the amount of punitive damages awarded under California’s employment discrimination statute and concluding “that neither the Commission nor the Judiciary are presently equipped to handle the onslaught of additional cases that plaintiffs certainly will pursue in hopes of winning a big jury award”); *id.* at 60 (statement of Rep. Fawell); *Vol. III, supra* note 115, at 4, 72 (testimony of Edward E. Potter, President, National Foundation for the Study of Employment Policies); *id.* at 441 (prepared statement of Linda Ottinger Headley).

159. *See, e.g., Vol. II, supra* note 144, at 137 (testimony of Theodore Eisenberg); *see also Vol. II, supra* note 151, at 77 (testimony of William Burns, consultant, Pacific Gas & Electric).

160. *Vol. II, supra* note 115, at 70 (statement of Rep. Poshard, Member, H. Comm. on Education and Labor); *see also id.* at 137-140 (testimony of Mr. Eisenberg); *id.* at 137-140, 145-48 (prepared statement of Theodore Eisenberg & Stewart Schwab) (analyzing reports regarding the frequency and size of compensatory and punitive damages awards in a variety of tort claims).

161. *Vol. II, supra* note 141, at 69 (statement of Rep. Payne).

162. *Id.*; *see also Vol. II, supra* note 115, at 188 (statement of Rep. Washington) (acknowledging that punitive damages “can’t change attitudes in the work place. . . . But [it] can change behavior.”).

163. *See, e.g., Vol. II, supra* note 115, at 77 (statement of William Burns) (testifying that “[I] think it’s also very, very important to emphasize that the damages that are called for are not new. Section 1981 . . . specifically covers intentional racial discrimination. . . . It does not cover discrimination based on gender. . . . Since it provides protections not offered by Title VII, we now have a form of disparate treatment by the law which seems to imply that some forms of discrimination are somehow more tolerable than other. [Our] position is that women are not second-class citizens and that discrimination

Hawkins admitted that he was “embarrassed that a simple little proposal has been so maligned . . . because it is pretty obvious that we are committing some serious harm to the women of America the way we are treating them.”¹⁶⁴ Likewise, others declared that “[t]here is no justification today for the inferior treatment of women under a Civil Rights Law,”¹⁶⁵ that “it is wrong in the way [Title VII] has been functioning now as it relates to women,”¹⁶⁶ and that “[t]he logic and necessity for [providing the same remedy to women and other minorities] are unassailable.”¹⁶⁷ Additionally, Representative Washington explained his belief that providing a full range of damages under Title VII was as pivotal to the fight against sex discrimination as it was in the fight against race discrimination:

The problem . . . is that our history teaches us in this country that far too often the only resource available to most people is the Federal court. You know the history of the civil rights movement in the South. . . . If the state courts had been doing their job and enforcing the law, we wouldn't have had to have overburdened the Federal courts with that. I think that [women] out there [are] a little suspicious if all of a sudden we find that the courts don't have room for the cases involving discrimination against women. If I were one I would be affronted by such a notion. That sounds like George Wallace standing in the school-house door to me. . . . But to tell people that there is a wrong for which there is no remedy, it seems to me is being disingenuous. . . .

We ought not to be proud of a society in which women who are discriminated against are put at a disadvantage as compared with blacks or Hispanics, or Jewish persons, or anybody else who is discriminated against. . . . But the bottom line to Ms. Murphy is that the guy walks by and pats her on the butt and she is offended, and I am offended because it happens to her, and if she doesn't have a remedy where she can go to court, where I have one if they call me a nigger, then there is a problem with that.

against women is not second-class discrimination. This is why we support Section 8.”); *id.* at 827 (statement of the National Alliance Against Racist and Political Repression).

164. *Id.* at 172 (statement by Rep. Hawkins, Chairman, H. Comm. on Education and Labor).

165. *Id.* at 619 (prepared statement of Alfred W. Blumrosen, Thomas A. Cowan Professor of Law, Rutgers Law School).

166. *Id.* at 178 (statement of Rep. Hayes, Member, H. Comm. on Education and Labor).

167. *Id.* at 850 (statement of Robert B. Fitzpatrick, Vice President, Plaintiff Employment Lawyers Association).

Until we arrive at the point where women receive the same kind of treatment in our society, in our judicial system, if I were a woman, as I said, I would be a little suspect. . . .¹⁶⁸

Despite the persuasiveness of the testimony at these congressional hearings, the Bush Administration, while continuing to support the restoration of full damages to claimants of race discrimination under § 1981, remained opposed to the provision of the Kennedy-Hawkins bill equalizing damages to victims of sex discrimination.¹⁶⁹ Indeed, the inequity of the Administration's position was a principal focus of the hearing held before the Senate Committee on Labor and Human Resources.¹⁷⁰ Deputy Attorney General Donald B. Ayer defended the Administration's position on remedies available to victims of gender and race discrimination by characterizing racial discrimination as "uniquely abhorrent."¹⁷¹ As Chairman of the Senate Committee on Labor and Human Resources, Senator Kennedy questioned him about the President's opposition to damages:

The CHAIRMAN. Now my question is why not treat the victims of intentional sex . . . discrimination in the same manner as victims of intentional race discrimination? If you support damages for race discrimination, why not support damages for the other equally offensive forms of bigotry?

Mr. AYER. Well, I think racial discrimination has a history in this country that does make it, though not the only serious form of discrimination, it makes it unique. There is a history that we are all aware of, going back before even the Civil War, the history of slavery and a history of statute, statutory remedies being enacted.

168. *Id.* at 186-87 (statement of Rep. Washington).

169. See Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 CAL. L. REV. 775, 801-02 (1991) (disagreeing with the Bush Administration's position and advocating that "[t]here is no compelling reason to favor [Section] 1981 plaintiffs over other victims of discrimination; indeed, it does a great disservice to all victims of discrimination to attempt to classify racial groups as historically more deserving of a damages remedy than other victims of intentional discrimination").

170. See *Senate Hearing*, *supra* note 115, at 2 (statement of Sen. Kennedy, Chairman, S. Comm. on Labor and Human Resources) (explaining that "victims of sexual harassment on the job currently have no effective Federal remedy. The act will close this serious loophole by granting victims of intentional discrimination the right to recover compensatory damages. In particularly flagrant cases, punitive damages will be available as well.").

171. See Winston, *supra* note 169, at 802 n.144. Likewise, the Washington Post affirmed the opinion that racial discrimination was more deserving of a damages remedy in a June 1990 opinion editorial, arguing that "[r]acial discrimination occupies a place in our history and the law that discrimination on such bases as sex . . . simply do[es] not. Its victims have a special status, exercise a special claim. . ." *id.* (quoting Op-Ed., *The Civil Rights Bill*, WASH. POST, Jun. 25, 1990, at A10).

The CHAIRMAN. You can't find that same history with regards to women?

Mr. AYER. I don't find the same history, no. I find a different history.

The CHAIRMAN. Well, don't you find it particularly egregious and obnoxious and deplorable?

Mr. AYER. I think we have a serious problem of sex discrimination in this country. . . . It is our view that the remedies of Title VII have, by and large, worked quite well. . . .

Mr. CHAIRMAN. Well, the only point, and then I will yield, women aren't second-class citizens. . . . But I just find it absolutely baffling on the whole question we are talking about – intentional discrimination – of why, with the opportunity that we have now and the record that has been quite amply demonstrated across the landscape in our society, why the administration is not prepared to deal with that in our society at this time, to be absolutely incomprehensible.¹⁷²

This colloquy sparked comments from subsequent witnesses testifying at the hearing, as well as from other Senators,¹⁷³ and many witnesses expressed outrage that anyone would indicate that sex discrimination was a less egregious form of discrimination than any other.¹⁷⁴ Additionally, Marcia Greenberger, managing attorney of the National Women's Law Center, testified about the challenges faced by African-American women when identifying whether their

172. See *Senate Hearing*, *supra* note 115, at 136-37.

173. See, e.g., *Senate Hearing*, *supra* note 115, at 104 (statement of Sen. Metzenbaum, Member, S. Comm. on Labor and Human Resources) (arguing that "[i]ntentional discrimination against women is just as hurtful as intentional racial discrimination. But under current law, the remedies are not the same for intentional sex discrimination as they are for intentional race discrimination. The Civil Rights Act of 1990 corrects that inconsistency. The bill applies the damages provisions of Section 1981 which allow for compensatory and punitive damages to intentional employment discrimination claims under Title VII. Thus, all victims of intentional discrimination in the workplace will be able to receive full and fair compensation").

174. Both the Hon. Eleanor Holmes Norton, Professor of Law, Georgetown University Law Center, and Marcia Greenberger, managing attorney of the National Women's Law Center, directly addressed the statements made by Mr. Ayer. Professor Norton testified that "[o]ne of the anomalies of current Federal antidiscrimination law is the availability of damages remedies for some, but not all, victims of unlawful discrimination in the workplace." See *id.* at 158 (testimony of Professor Norton).

Ms. Greenberger characterized the lack of remedies as a "glaring hole in Title VII" and argued that compensatory and punitive damages "are just as important for victims of discrimination not protected by Section 1981." See *id.* at 229-30 (testimony of Ms. Greenberger). She also directly responded to the Mr. Ayer's comments as follows:

I want to respond also to a point that was made earlier by the panelists here about deserving victims of discrimination. And what I would submit is that these victims of discrimination are, by their very definition, deserving of full remedies which include compensation for the direct injuries that they suffer as a result of the discrimination and, in those particularly egregious circumstances, punitive damages as well.

Id. at 230 (testimony of Ms. Greenberger).

race or their sex was the primary bias motivating their employer.¹⁷⁵ Ms. Greenberger concluded by asserting that “[d]amages are a reasonable and long-overdue remedy for victims of intentional [sex] discrimination. . . . Furthermore, the addition of damages to Title VII ensures that all victims of unlawful discrimination have comparable remedies available to them, sending a strong message to the nation that all forms of discrimination are intolerable in our society.”¹⁷⁶

By July, both Democratic and Republican senators had either proposed a number of other amendments to the legislation or were threatening to do so.¹⁷⁷ Senator Kennedy was concerned about the delay and division additional amendments would cause¹⁷⁸ and therefore petitioned to invoke cloture in the Senate on July 13, 1990.¹⁷⁹ The Senate debated the cloture motion on July 17, 1990, and ultimately invoked cloture by a vote of 62 to 38.¹⁸⁰ Then, the Senate commenced debate on the Kennedy-Hawkins bill, S. 2104, under the cloture rules.¹⁸¹

Despite the limited nature of the debate, a substantial portion of the discussion in the Senate again focused on the damages provision in Section 8 of the bill. Damages reform was at the center of the floor debate because Senator Kassebaum introduced a substitute on July 16 that, among other things, limited

175. Ms. Greenberger explained to the committee: “[w]e have seen the spectacle in some of the courts where black women are concerned of trying to figure out in a Section 1981 case whether the discrimination they suffer is because of their race or because of their gender. That is simply an unacceptable status of the law right now.” *Id.* at 229-230.

176. *Id.* at 233 (prepared statement of Ms. Greenberger).

177. *See* 136 CONG. REC. 17,659-60 (1990) (statement of Sen. Jeffords) (contending that “time is now short” because “[o]nly a few weeks remain in this legislative session” and arguing that “[c]loture will not be unfair to the opponents of the legislation. . . . Yes, opponents have been waiting to offer amendments but so, too, have proponents been waiting. Both sides waited in hopes of reaching a compromise with the administration that would not make it necessary to go through the sometimes cumbersome process of amendments”).

178. For instance, on July 16, Senator Kassebaum introduced a substitute that, among other things, capped monetary awards under Section 8 to \$100,000. *See* 136 CONG. REC. 17,624 (1990) (S. Amendment No. 2131); 136 CONG. REC. 17,687-88 (1990) (statement of Sen. Kassebaum).

Two days later, Senator Boren lobbied for a different cap that limited punitive damages for all employers, regardless of size, to “\$150,000 or the amount awarded in compensatory damages whichever is larger.” *See* 136 CONG. REC. 18,010-11 (1990) (statement of Sen. Boren). The Senate ultimately rejected the Boren proposal. *See* 136 CONG. REC. 18,032 (1990) (statement of Sen. Boren).

179. *See* 136 CONG. REC. 17,408 (1990). Cloture limits the time in which the Senate may debate the bill to a total of thirty hours, with each Senator limited to two speeches totaling one hour. *See* Govan, *supra* note 98, at 87 (explaining Senator Kennedy’s strategy in invoking cloture on the Civil Rights Bill by stating that he and proponents of the Bill were “confronted with a stark choice. One option was to have the Senate consider the bill without a time agreement amid great uncertainty over the number (and nature) of amendments to be offered and whether they had sufficient votes to defeat such amendments. The other was to take a vote to invoke cloture which, if successful, automatically imposes a time limit on the Senate’s consideration of the bill”).

180. 136 CONG. REC. 17,670 (1990) (Rollcall Vote No. 158).

181. *See* 136 CONG. REC. 17,977 (1990) (the President pro tempore of the Senate noted after the conclusion of morning business on Thursday, July 18, that only 12 hours remained to consider S. 2104).

prevailing plaintiffs to a capped equitable award of \$100,000.¹⁸² Democrats argued that the equitable award was unconstitutional because it violated a litigant's Seventh Amendment right to a jury trial,¹⁸³ but also reasserted that capping damages under Title VII would treat women as second-class citizens. For instance, Senator Bumpers explained:

[I]f I were to vote for the substitute of the Senator from Kansas, could I not be fairly accused of saying that if you are discriminated against as a racial minority you are entitled to proceed under [Section] 1981 and receive compensatory and punitive damages, but if you proceed under Title VII, which women under the substitute of the Senator would be forced to do because they have no rights under Section 1981, they would be forced to proceed under Title VII and no matter how egregious the matter might be, they would not be entitled to anything more than \$100,000? . . . [W]hat I am talking about is are women not discriminated against to some extent under the proposal of the Senator from Kansas, simply because they are not entitled to the same remedy, even under her substitute, that racial minorities are entitled to in proceeding under Section 1981?¹⁸⁴

Ultimately, the Kassebaum substitute was withdrawn and the original language of Section 8 providing for unlimited damages remained before the Senate for a final vote.¹⁸⁵ The Senate passed the Civil Rights Act of 1990, with no limits on compensatory and punitive damages, by a vote of 65-34 on July 18, 1990.¹⁸⁶ In addition to 55 Democrats, 10 Republicans voted in favor of the bill.¹⁸⁷

In the House, Democrats ultimately agreed to a compromise on damages before the final vote occurred on the bill. Chairman Hawkins expressly disagreed with a universally applicable cap applying to all businesses, but he reluctantly agreed to support a cap that applied to small businesses.¹⁸⁸ Thus, on

182. See 136 CONG. REC. 17,624 (1990) (S. Amendment No. 2131); 136 CONG. REC. 17,687-88 (1990) (statement of Sen. Kassebaum).

183. See 136 CONG. REC. 17,981 (1990) (statement of Sen. Kennedy).

184. 136 CONG. REC. 17,988 (1990) (statement of Sen. Bumpers).

185. See 136 CONG. REC. 18,026 (1990) (stating that "[p]ursuant to the unanimous-consent agreement, amendment Nos. 2175 and 2131 are withdrawn").

186. 136 CONG. REC. 18,051 (1990) (indicating passage of the Civil Rights Act of 1990 in the Senate); see also 136 CONG. REC. 18,052 (including in the record S. 2104 § 8 (as passed the Senate on July 18, 1990)).

187. The ten Republican Senators who voted in favor of the Senate bill, providing for unlimited damages to victims under Title VII, were: Senator Chafee (R – RI); Senator Cohen (R – ME); Senator Danforth (R – MO); Senator Domenici (R – NM); Senator Durenberger (R – MN); Senator Hatfield (R – OR); Senator Heinz (R – PA); Senator Jeffords (R – VT); Senator Packwood (R – OR); Senator Specter (R – PA). 136 CONG. REC. 18,051 (1990) (Vote No. 161).

188. 136 CONG. REC. 22,023-24 (1990) (statement of Rep. Hawkins).

August 2, 1990, Representative Jack Brooks sponsored an amendment that added a cap to punitive damages, not compensatory damages, for small businesses employing less than 100 employees.¹⁸⁹ For these businesses, the Brooks Amendment specified that an award of punitive damages would not exceed the greater of \$150,000 or an amount equal to the sum of combined compensatory damages and back pay.¹⁹⁰

The House approved the Brooks Amendment by a vote of 289-134,¹⁹¹ and this approach to capping punitive damages was incorporated into the final version of the bill approved by the House.¹⁹² The House passed H.R. 4000 by a vote of 272-154 on August 3, 1990.¹⁹³

The Senate and House bills were then referred to a joint conference of both houses which was held on September 25, 1990.¹⁹⁴ In part, this joint conference

189. *Id.* at 22,021 (statement and amendment offered by Rep. Brooks).

190. *Id.*

191. *Id.* at 22,024.

192. The final version of Section 8 in the House version of the Civil Rights Act of 1990 stated, in pertinent part, as follows:

SEC. 8. PROVIDING FOR DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION.

(a) DAMAGES – Section 706(g) of the Civil Rights Act of 1964 . . . is amended by inserting before the last sentence the following new sentences: ‘With respect to an unlawful employment practice (other than an unlawful employment practice established in accordance with section 703(k)) . . . compensatory damages may be awarded; and 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 shall 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.’

(b) LIMITATION ON PUNITIVE DAMAGES – Section 706(g) of the Civil Rights Act of 1964 . . . is amended . . . by adding at the end the following:

‘(2) If the respondent has fewer than 100 employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, then the amount of punitive damages that may be awarded under paragraph (1)(B) to an individual against the respondent shall not exceed -- \$150,000; or

An amount equal to the sum of compensatory damages awarded under paragraph (1)(A) and equitable monetary relief awarded under paragraph (1); whichever is greater.’

136 CONG. REC. 22,176 (inserting into the record the final text of H.R. 4000 § 8, as passed by the House on Aug. 3, 1990).

193. 136 CONG. REC. 22,173-74 (1990).

194. *See* 136 CONG. REC. 24,749 (1990) (indicating that “pursuant to House Resolution 449, [Representative Hawkins] move[s] to take from the Speaker’s table the Senate bill (S. 2104) . . . with a House amendment thereto, insist[s] on the House amendment and request[s] a conference with the Senate thereon”); *id.* at 24,848 (recognizing a message from the House that “the House . . . insists upon its amendment to the bill [S. 2104] . . . [and] asks a conference with the Senate on the disagreeing votes of the two Houses thereon”).

was necessary due to the contrary approaches to damages.¹⁹⁵ The final bill that passed the Senate, S. 2104, provided for unlimited damages,¹⁹⁶ whereas the final bill that passed the House contained the Brooks Amendment that capped punitive damages for small employers at the greater of \$150,000 or an amount equal to compensatory damages and backpay.¹⁹⁷ The joint conference committee ultimately adopted the Brooks Amendment's caps on punitive damages¹⁹⁸ by a vote of nine to seven, but rather than just apply the caps to small employers, the committee recommended the caps apply equally to all employers.¹⁹⁹

The joint conference committee transmitted its final report recommending caps on punitive damages to both the Senate and House for approval and consideration.²⁰⁰ During consideration of this final conference report, numerous Democrats in both houses expressed considerable disagreement with the committee's decision to incorporate caps into the final bill. For instance, Representative Washington stated:

Make no doubt about it, this is still a crumb from the table. We ought to be able to pass one bill one time that puts everybody on par. This bill still leaves the women behind, and that troubles me, because as a person, deep down inside, I know that we will never have equality in this country until we stop looking at each other as being different . . . But I plan on being in Congress a long time, and I

195. The Senate initially disagreed with the House's approach to damages prior to the joint conference. *Id.* at 24,893 (recording Senate disagreement to the House amendment but agreement to a conference).

196. *See supra* notes 185-187 and accompanying text.

197. 136 CONG. REC. 22,176 (1990).

198. *See* 136 CONG. REC. 28,611 (1990) (statement of Rep. Goodling).

199. *See* H.R. REP. NO. 101-755, at 16 (1990) (Conf. Rep.) (stating that "[t]he House Amendment, but not the Senate Bill, specifies that for respondents employing fewer than 100 employees, punitive damages under the Act are limited to \$150,000 or an amount equal to the sum of compensatory damages and equitable monetary relief, whichever is greater. The Senate recedes with an amendment. The Senate amendment makes the limitations on punitive damages applicable to all respondents covered by Title VII . . ."); *see also* 136 CONG. REC. 28,611-12 (1990) (statement of Rep. Fish) (commenting on the differences between the final bill passed by the House and the language in the Joint Committee bill and noting that "[m]embers will recall that punitive damages were capped for employers of fewer than 100. The conferees lifted this limitation – approving a punitive damages ceiling applicable to all employers. This should allay concerns in the business community and gain broader support for this legislation"). A second joint conference was held on October 11, 1990, but this report did not alter the joint committee's cap on punitive damages. *See* H.R. REP. NO. 101-856, at 21 (1990) (Conf. Rep.) (stating that "[t]he Senate recedes with an amendment. The Senate Amendment makes the limitations on punitive damages set forth in the House Amendment applicable to all respondents covered by Title VII . . .").

200. The Senate considered and debated the final conference report on October 16, 1990. *See* 136 CONG. REC. 29,522 (1990) (Sen. Kennedy submitting the conference committee report and asking for its immediate consideration). Likewise, the House considered and debated the final conference report on October 17, 1990. *See id.* at 30,116 (statement of Rep. Wheat).

promise that the rest of my career I will continue to remind my colleagues every session, “Do not forget the women. . . .”²⁰¹

Likewise, Representative Schroeder characterized the caps on punitive damages as “a very hard thing for me to do, to surrender and say, ‘[o]h well, women, the nineties aren’t your decade yet. Maybe someday we will include you fully and treat you as full-fledged citizens.’”²⁰² Similarly, Representative Kennelly pleaded that “[w]e must always remember, sex discrimination knows no boundaries. It crosses racial distinctions. White women are not immune[.]. Black women are not spared. Asian women know it well. Put simply, women deserve the same protection from sexism, as they do from racism.”²⁰³

Other Democrats expressed disagreement with the caps on punitive damages, but explained that it was inserted into the bill during the joint conference committee because President Bush threatened to veto the legislation without it.²⁰⁴ Democrats responded to President Bush’s demand for a cap by arguing that it was a “[a]n absolute outrage.”²⁰⁵ Indeed, Representative Gray contended that the demand was nothing more than sex discrimination:

The fact is that we know what the White House wants. We know from the memo that John Sununu sent us last week proposing the alternative that the administration wanted. He had the nerve to say that this bill would interfere with customer relationships. You remember what customer relationships are. Let me remind you. It is what Lester Mattox offered as his reason for standing in front of his restaurant with an axe handle to deny blacks access to his restaurant. It is what universities and country clubs use as their reason why they could not admit people whose names were Cohen, Levy, or Goldberg. It is what corporations said when they hired women only to do typing and why

201. *Id.* at 30,119-20 (statement of Rep. Washington).

202. *Id.* at 30,123 (statement of Rep. Schroeder).

203. *Id.* at 30,135 (statement of Rep. Kennelly).

204. *See Id.* at 30,118 (statement of Rep. Edwards) (indicating that “[t]he major difference between the two bills was a cap on punitive damages. The House bill placed a cap on punitive damages of \$150,000 for nearly all businesses, except large businesses of over 100 employees. The conference removed this small business limitation. While I do not support, and did not vote for, any cap or for removing the small business limitation, the Senate conferees were insistent on removing the limitation, and I support the bill as agreed to by the conference”); *see also id.* at 29,530 (statement of Sen. Metzenbaum) (stating “[let] me make this clear. I personally oppose any cap on damages. I believe that the jury or the court has the right to determine for itself or themselves what that amount should be. I personally resent a cap on damages assessed against a person who has intentionally discriminated against women and minorities. It think it is fair to say, Mr. President, the majority of Senate conferees oppose any imposition of any cap. At the conference it became clear that a majority of the House conferees vehemently opposed any cap, as well”).

205. *Id.* at 30,133 (statement of Rep. Gray) (quoting in part Arthur Fletcher, Chairman of the Civil Rights Commission under President Bush).

law firms told many women graduates of law schools that they should get married and forget a legal career.

Why? Customer relations. “Our clients couldn’t deal with a woman lawyer.” . . . It is bigotry. It is sexism. It is racism. It is discrimination.

Arthur Fletcher, the Chairman of the Civil Rights Commission, appointed by President Bush, said [this] about the White House position:

An absolute outrage. It would take us back to the 1940’s. I cannot believe anyone sincere about civil rights would have proposed such language.²⁰⁶

Despite the fervent debate over the imposition of caps on punitive damages, both houses ultimately approved the final conference report containing the caps,²⁰⁷ and it was included in the final bill that was presented to the President.²⁰⁸ President Bush vetoed the bill in October.²⁰⁹ The bill was returned to the Senate, and the Senate failed to override the Presidential veto by just one vote: a vote that crossed party lines and now included the support of eleven Republicans.²¹⁰

After the Senate failed to override the veto, the President submitted his alternative version of the bill in both houses.²¹¹ Section 8 of the President’s bill was entitled “Providing for Additional Equitable Relief in Certain Cases of Intentional Discrimination” and did not allow the recovery of compensatory or punitive damages.²¹² The President’s bill received very little attention and died after being referred to various committees in both houses.²¹³

206. *Id.*

207. *See id.* at 30,136 (House voted 273 to 154 to accept the conference report) (Roll No. 478); *id.* at 29,606 (Senate voted 62 to 34 to approve the conference report) (Rollcall Vote No. 276).

208. *See id.* at 28,789-97 (final conference committee version).

209. *See* PRESIDENT’S MESSAGE TO THE SENATE RETURNING WITHOUT APPROVAL S. 2104, THE CIVIL RIGHTS ACT OF 1990, S. DOC. NO. 101-35 at 1 (2d. Sess. 1990) (indicating that he transmitted his own version of a civil rights bill on October 20, 1990); *see also* 136 CONG. REC. 33,378 (1990).

210. The final vote in the Senate was 66-34 to override the Presidential veto. The eleven Republican Senators that voted to override the President’s veto were: Senator Boschwitz (R – MN); Senator Chafee (R – RI); Senator Cohen (R – ME); Senator Danforth (R – MO); Senator Domenici (R – NM); Senator Durenberger (R – MN); Senator Hatfield (R – OR); Senator Heinz (R – PA); Senator Jeffords (R – VT); Senator Packwood (R – OR); Senator Specter (R – PA). 136 Cong. Rec. 33,406 (1990) (Vote No. 304). The vote was identical to the original vote on July 18, 1990, in the Senate approving S. 2104 with the exception of newly elected Republican Senator Boschwitz, also voting to override the veto. *Compare supra* note 187 (Vote No.161), *with supra* note 210 (Vote No. 304). Tensions ran high during the voting, as the Reverend Jessie Jackson, a civil rights leader, and David Duke, a white supremacist candidate for governor of Louisiana, observed the debate and voting from opposite sides of the Senate gallery. *See Goodman, supra* note 105, at 217.

211. *See* 136 CONG. REC. 33,531 (1990) (introducing the President’s version of the bill, S. 3239, in the Senate); *id.* at 33,751-52 (introducing the President’s version of the bill, H.R. 5905, in the House).

212. Instead, the President’s bill afforded the trial judge with discretionary authority to issue an equitable award not exceeding \$150,000 when the trial court determined an additional amount was

Although Democrats and civil rights leaders failed to garner enough support to pass a civil rights bill in 1990, Senator Kennedy vowed to renew legislative efforts to enact one the next year.²¹⁴ While Democrats did, in fact, succeed in passing a civil rights act in 1991, they did so by compromising the rights of women to recover full compensatory and punitive damages under Title VII. Congressional leaders advanced convincing arguments, similar to those raised during the debate of the 1990 bill, to justify unlimited compensatory and punitive damages for victims of sex discrimination. Despite these arguments, however, Republican leaders demanded a greater compromise in 1991 in order to secure passage of the bill. Rather than advocating solely for limiting the availability of punitive damages as they did during the 1990 debate, the 1991 compromise also required the forfeiture of complete compensatory damages as well.

B. Surrendering to Compromise: Enacting the Civil Rights Act of 1991

On January 3, 1991, Representative Jack Brooks, Chairman of the House Judiciary Committee, introduced the Civil Rights Act of 1991 (“H.R. 1”) as the first bill of the House of Representatives in the 102nd Congress.²¹⁵ When introducing H.R. 1 on the floor of the House, Representative Brooks declared that one of the primary purposes of the bill was to achieve parity between discrimination claims brought by women under Title VII and those brought by racial minorities under § 1981.²¹⁶ The original version of H.R. 1 did not contain any caps on punitive or compensatory damages despite the fact that Democrats previously had agreed to cap punitive damages in the final version of the civil rights bill vetoed by President Bush in 1990.²¹⁷ Thus, opponents of the legislation regarded this second attempt as “nearly identical to, and with respect to damages, [] worse than the bill which was vetoed by the President . . .”²¹⁸

“needed to deter the respondent from engaging in such unlawful employment practices.” 136 CONG. REC. at 33,532 (S. 3239, § 8).

213. See Govan, *supra* note 98, at 154 n.656.

214. See Goodman, *supra* note 105, at 217 n.234 (citing Helen Dewar, *Senate Upholds Civil Rights Bill Veto, Dooming Measure for 1990*, WASH. POST, Oct. 25, 1990, at A15).

215. See H.R. 1, 102d Cong. (1st Sess. 1991); 137 CONG. REC. 88 (1991).

216. See 137 CONG. REC. 229 (1991) (statement of Rep. Brooks).

217. See H.R. 1, 102d Cong. § 8 (1st Sess. 1991).

218. H.R. REP. NO. 102-40, pt. 2, at 52 n.2 (1991) (Conf. Rep.) (dissenting views); see also *Civil Rights Act of 1991: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. (1991) (hearings were held on February 7 and 28 and March 7, 1991) [hereinafter “Judiciary Comm. Hearings”] at 24 (statement of Rep. Hyde, Member, Subcomm. on Civil and Constitutional Rights).

Moreover, Democrats strategically titled the House bill the “Civil Rights and Women’s Equity in Employment Act of 1991” to further emphasize that one of its primary purposes was to equalize the value of discrimination claims brought by women and racial minorities.²¹⁹ Even Republican leaders in the House acknowledged the significance of the new name allotted to H.R. 1, stating in the minority report:

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 [fees] 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.²²⁰

Others openly declared that women were the “primary beneficiaries of H.R. 1,”²²¹ and acknowledged that the damages provision was the primary stumbling block to the enactment of the legislation in 1990.²²² Thus, while the 1990 battle for amending Title VII ultimately had not been successful, both sides began the 1991 effort sharply focused on the inequities of damages for women under Title VII.

Two committees in the House held hearings in 1991 on H.R. 1, and some of these hearings emulated the strategy advanced during the 1990 debate by focusing exclusively on the need for providing damages to victims of sex

219. H.R. REP. NO. 102-40, pt. 1, at 14 (1991) (Conf. Rep.).

220. H.R. REP. NO. 102-40, pt. 2, at 70 (1991) (Conf. Rep.).

221. *Hearings on H.R.1, The Civil Rights Act of 1991: Hearings Before the H. Comm. on Education and Labor*, 102d Cong. (1991) (hearings were held on February 27 and March 5, 1991) [hereinafter “Educ. Comm. Hearings”] at 378 (prepared statement of Rep. Jefferson, Member, H. Comm. on Education and Labor) (explaining that “[t]he fundamental purpose of H.R. 1 is to rectify a colossal inequity in current Federal civil rights law, and make good on the Constitution’s promise of fair treatment to all its citizens—women and men. . . . The truth is, the primary beneficiaries of the fruits of this bill will be women, not racial minorities. H.R. 1 would bring women under the same protective umbrella that shelters other American citizens from discrimination in the workplace. The present law does not provide women the same remedies, punitive and compensatory damages, that are already available to racial minorities under Section 1981”).

222. *See id.* at 72 (statement of Rep. Gunderson, Member, H. Comm. on Education and Labor) (explaining to Dr. Hartmann that this bill “follow[s] up at a later time on trying to resolve the whole issue of damages . . . and whether or not we have to change the civil rights law from make whole to jury trials and punitive damages because I think this is the area that’s holding us up, frankly.” Dr. Hartmann thereafter responded by acknowledging that “[y]es, I can see it’s the area that’s holding you up. I guess I’d refer there to the comments that Representative Mink made that we do have now an unfortunate inequality in the remedies that are available to people who are discriminated against based on two different laws”).

discrimination.²²³ First, the House Committee on Education and Labor held hearings on February 27 and March 5, 1991.²²⁴ The February hearing was dedicated completely to challenges facing women in the workplace, including a discussion of the inequitable remedies available under Title VII for victims of intentional sex discrimination.²²⁵ The witnesses who testified at the February hearing were impressive and included several victims of sexual harassment,²²⁶ one of whom was one of the first female attorneys to sue their law firm for sex discrimination.²²⁷

Additionally, several expert witnesses explored issues related to sex discrimination that only were briefly explored during the 1990 hearings.²²⁸ For instance, Dr. Heidi Hartmann, a labor economist who was serving as the Director of the Institute for Women's Policy Research, testified about the results of her research on the economic disadvantages of sexual discrimination.²²⁹ Dr. Hartmann offered testimony on both the discriminatory wage gap between men and women workers and the sex segregation of women into lower paying jobs in the labor market.²³⁰ Similarly, Dr. Freada Klein

223. H.R. REP. NO. 102-40, pt. 1, at 17 (1991) (Conf. Rep.).

224. See Educ. Comm. Hearings, *supra* note 221; Judiciary Comm. Hearings, *supra* note 218; see also H.R. REP. NO. 102-40, *supra* note 223.

225. See Educ. Comm. Hearings, *supra* note 221, at 23-24 (statement of Rep. Ford, Chairman, H. Comm. on Education and Labor) (indicating that the "principle focus will be on the lack of monetary relief for intentional sex discrimination under current law" but that "[w]e will also discuss barriers to the high level advancement of women and minorities in business, as well as the issue of pay equity for women and minorities"). Although damages were mentioned again briefly at the second hearing on March 5, 1991, it focused primarily on the need to restore civil rights protections that were altered by the six Supreme Court decisions issued between 1988 and 1989. *Id.* at 377 (statement of Rep. Ford) (indicating that "[l]ast week, the committee's principal focus was on issues relating to the remedies available for correcting workplace wrongs. . . . This week we will look at issues relating to the burden of proving unfair employment practices. . . . H.R. 1 overturns a number of Supreme Court decisions which protect employers who discriminate").

226. See Educ. Comm. Hearings, *supra* note 221, at 76 (prepared statement of Lois Robinson) (describing her experiences as a victim of sex harassment); *id.* at 121 (testimony of Jackie Morris) (testifying as a victim of sexual harassment); see also *id.* at 132 (testimony of Nancy O'Mara Ezold) (testifying as a victim of intentional sexual discrimination).

227. See *id.* at 132 (testimony of Nancy O'Mara Ezold) (describing her Title VII lawsuit as "a precedent-setting case" because "I am the first attorney even to sue other attorneys for this kind of wrong").

228. See *id.* at 33 (testimony of Dr. Heidi Hartmann); *id.* at 188 (testimony of Dr. Freada Klein).

229. See *id.* at 41-64 (prepared statement of Dr. Hartmann including the results of some of her social science research).

230. *Id.* at 34-37 (testimony of Dr. Hartmann) (describing both the sex gap in wages and the sex segregation of women into lower paying jobs in the workforce). For instance, Representative Miller questioned Dr. Hartmann about the economic disadvantages of sexual harassment and discrimination in the workplace:

MR. MILLER. What do we know about women who leave their jobs as a result of discriminatory practices or serious harassment? Women who simply walk away with an unreported action, who can't take it any longer, or won't take it and leave?

...

testified regarding the results of a sexual harassment survey that she conducted and she explained that, “90 percent of sexual harassment goes unreported to the employer.”²³¹ Based on her research, it was Dr. Klein’s opinion that Title VII’s remedial scheme was inadequate because it “[fell] far short of, first, making victims whole for their losses; second, encouraging victims to come forward to enforce the statute; and third, and especially, deterring future discriminatory behavior by employers.”²³²

Others testifying at the February hearing directly opposed the idea previously raised by the Administration and other Republican leaders that sex discrimination is not as reprehensible as other forms of intentional discrimination such as race discrimination. For instance, Professor Susan Deller Ross, of Georgetown University Law Center, testified that Title VII “must provide for complete damages for intentional discrimination” in part because there is a “need to send an unequivocal message to the employers of this country that Congress considers discrimination against women workers to be just as reprehensible and just as illegal as other forms of discrimination.”²³³ She further explained the historical reasons this unequivocal message was necessary:

Women workers have long struggled against the idea that sex discrimination is somehow not as reprehensible or as illegal as other forms of discrimination. When Title VII was first enacted, there were jokes in the popular press about whether men could be Playboy bunnies. And the clear implication was that the law’s sex discrimination coverage was not to be taken seriously. Employers got the message.

MS. HARTMANN. . . . There hasn’t been much in terms of quantifying the cost of people, women who leave jobs because of sexual harassment. But there have been some surveys. The general feeling is that less than 10 percent of sexual harassment is ever reported.

So there is a great deal of this happening that doesn’t even come to anyone’s attention. The woman does exactly what you say, leaves quietly, and that employer faces a turnover cost. . . . So they are quite significant.

MR. MILLER. Again, under Section 1981, you would have to [prove intentional discrimination. What concerns me is that when I listen to some members of the business community and other people oppose this bill, the suggestion is that somehow the penalty is unfair; that people may end up suing you for a lot of money if we determine that people’s rights have been intentionally violated.

I assume . . . that much of the decision about intentional discrimination as it relates to women is an economic decision that you will be able to pay this person less because they are a woman or because they are a minority and your company or your economic endeavor will, in fact, profit from that activity. This is an intentional decision that was made to take people of equal talent or equal skills or equal education attainment and treat them differently. . . .

Ms. Hartmann. Right. Exactly. I think, for example, that’s one of the reasons why we see the wage gap increase between women and men in the law field, for example. . . .

Id. at 68-69.

231. *Id.* at 168-171 (testimony of Dr. Klein).

232. *Id.* at 170.

233. *Id.* at 330 (testimony of Professor Ross).

Instead of eliminating the host of explicit rules differentiating between men and women workers, they chose to defend them in court. . . . Thus, for years, women were forced to litigate what seemed like the most clear-cut cases, frequently all the way to the Supreme Court. . . .

If Congress considers and then rejects the addition of full damages to Title VII for intentional discrimination, it will be sending the wrong message to employers. Capping damages would also be sending the wrong message, for the reality would remain that damages would be capped only for women. Under [Section] 1981, blacks and other minority groups would continue to have the availability of punitive and compensatory damages.

Consequently, the message in either case would be that Congress believes discrimination against women workers to be less serious than other forms of discrimination. The history of employer resistance to equal treatment for women workers shows that they would be delighted to receive that message and to act on it.²³⁴

Several Representatives also addressed the idea that sex discrimination was less reprehensible than race discrimination and, thus, justified limited damages.²³⁵ For example, Representative Washington declared that “[i]t’s not fair for a black woman to have one remedy and for a white woman to have a different remedy. It seems to me, anybody who doesn’t agree with that doesn’t agree with civil rights at all.”²³⁶ After some Republican Congressmen continued to express support for capped damages to victims of sex discrimination, even Chairman Ford became heatedly involved in the debate and argued with one witness in favor of equal remedies for victims of sex and race discrimination:

Chairman Ford: Well, now, as a lawyer you give me a catch-22 sort of situation to deal with. I would like to support this legislation, but if in fact I follow the rationale of your reasoning, affording these

234. *Id.* at 331-332.

235. *Id.* at 26 (statement of Rep. Mink, Member, H. Comm. on Education and Labor) (explaining that the two-tiered system of remedies is “exactly the situation under our current laws. It creates two separate and discrete classes of victims of intentional discrimination. It’s important to be crystal clear on this point. . . . Members of racial groups covered by Section 1981 . . . [are] entitled to full compensatory and punitive damages. However, women . . . are not entitled to Section 1981 protections regardless of the mental, emotional and physical pain that people have suffered and endured because of discrimination. They are limited to wage related remedies. Today we will hear powerful testimony from real victims of this discrimination that is practiced in all areas of employment. Women who have gone to court, won their cases, suffered unspeakable humiliation and degradation and yet because of the limitation of remedies under Title VII have been unable to recover compensation for their losses. After nearly 20 years of experience under Title VII, it is fully appropriate, indeed long overdue, Mr. Chairman, that we reevaluate and reinstate common sense, common law concepts of equity in applying all of the laws with regard to discrimination in the workplace”).

236. *Id.* at 29 (statement of Rep. Washington).

potential damage awards as a remedy to women would act against their best interest – what we really should be considering is repealing that remedy for race discrimination cases; should we not? Has it had that effect on race discrimination? . . .

Now, if that's the case, does anyone at that table advocate that we repeal the damages remedy for race discrimination case in order to enhance their protection?

Ms. Hemminger. No, I don't believe anyone at this –

Chairman Ford. Why not?

Ms. Hemminger. [Section] 1981 does not –

. . .

Chairman Ford. Because you're afraid to take on race, but you're not afraid to take on women? Why not? If you really believe that we would be hurting women by giving them the same remedy as we give people who assert race as a cause of their damage then why aren't you concerned about what we are doing adversely to the people who are victims of race discrimination?

Ms. Hemminger. Section 1981 does not have the comprehensive remedial scheme that's found in Title VII with the intent to eliminate and resolve discrimination claims as quickly as possible.

. . .

Chairman Ford. . . . Then, what you're telling me now, is, the objection is not to the availability of compensatory damages, but where it appears in the law.

Suppose we make it a free-standing provision like [Section] 1981, and don't attach it to Title VII, does the awarding of damages, then made legal by that provision of law, meet your test?

Ms. Hemminger. I think that would be most unfortunate, because I certainly believe –

Chairman Ford. Then, really what you are objecting to is the awarding of damages, not where it is in the statute?

Ms. Hemminger. I think I am addressing both. . . .

Chairman Ford. . . . Because I can remember . . . having a jury with tears in its eyes, come to me when they awarded me \$6,000 for the death of a woman, because she was only a woman. And I asked him, what about the instructions you had from the judge about what her value—even though she was only a waitress, and daddy was a carpenter—that she had to her family if she had been allowed to live beyond her twenties.

And this fine, religious fundamentalist, who ended up as the foreman of the jury, with a tear in his eyes, handed me a religious tract

and said, “After all, women have no value.” Now, that was Detroit, Michigan . . .

Things have been changing, changing very rapidly. And what I think I have heard here is an explanation of justification for the way things were. Not for the way things are. And I have to tell you that I’m not persuaded by what you say, that real concern for deleterious impact on women, who are victims of sex discrimination, is at the base of your testimony against money damages.²³⁷

Additionally, the House Subcommittee on Civil and Constitutional Rights also held three hearings on H.R. 1²³⁸ and Democrats commenced the first hearing by continuing to emphasize the inequities of remedies between sex and race discrimination.²³⁹ Republicans responded, however, with a novel argument. Although Republicans resisted the comparison of § 1981 with Title VII remedies during the 1990 debate, now they asserted that the “easy” solution to providing damages for victims of sexual harassment was to amend § 1981 to include protection for sexual harassment.²⁴⁰ At the hearing held on February 7, 1991, Representative Washington challenged John R. Dunne, the Assistant Attorney General for Civil Rights, about the Administration’s inconsistent position on amending § 1981:

Mr. Washington: I am troubled, Mr. Dunne, by two things. One, the administration took the position that because of the long history of Title 42 of the U.S. Code, Section 1981 and its origins out of slavery, that it ought not be tampered with with respect to an attempt to equalize the rights of women on the one hand, and then the suggestion you made a moment ago that the Congress could have amended that statute. But that is neither here nor there. I am troubled by the practical effect of a lawyer in private practice being presented with two women who came into his or her office having been employed by the same company. One who came in with an egregious case of sexual harassment, the other who came in with an egregious case of sexual and racial harassment—tried together before a jury. . . . But the point I want to make is that as I understand the present state of the law, one would happen to be black, the other would happen to be white. The

237. *Id.* at 367-69 (statement of Rep. Ford).

238. *See* Judiciary Comm. Hearings, *supra* note 218.

239. *See id.* at 23 (statement of Rep. Edwards, Member, H. Comm. on the Judiciary) (contending that H.R. 1 was necessary to “fill a serious gap in the law to provid[e] the same damages remedy for women . . . that are already available to racial minorities”).

240. *Id.* at 55-56 (dialogue between Rep. Edwards and Mr. John R. Dunne).

one who was black would have no limit on the amount of damages that she could receive. The one who was white, given the proposal that has been put forward and the objection made by the administration, would have an absolute limit on how much the jury could award her, even if they felt that the sexual harassment that had been visited upon her was much more egregious.

How can we call ourselves being fair and even with people when within the class of people who are discriminated against we discriminate?²⁴¹

Subsequent to this hearing, Representative Towns, a Democrat from New York, offered an amendment to H.R. 1 that seized on the suggestion offered by Mr. Dunne.²⁴² Specifically, the Towns Substitute Amendment proposed to amend § 1981 to ensure equal contract rights for women, thereby effectively affording women with a cause of action for sex discrimination under § 1981 and simultaneously extending to women § 1981's unlimited damages.²⁴³ The Towns Amendment was defeated in the House by a vote of 152 to 277.²⁴⁴

In March, Republicans introduced President Bush's version of the Civil Rights Act of 1991.²⁴⁵ Not only did this proposal differ substantially from H.R. 1, but it also was substantially weaker than the President's 1990 proposal. With regard to remedies, the Administration's proposal likewise was more limited than his proposal the previous year. Although the President's 1990 proposal authorized courts with power to make equitable awards not exceeding \$150,000 to any victim of intentional discrimination,²⁴⁶ his 1991 proposal only provided an equitable monetary award for victims of sexual harassment. Under this new damages provision, "the court may" award victims of sexual harassment an amount "not exceeding a total of \$150,000" if the court determines, after applying a number of factors, that such an award was "justified under the equities."²⁴⁷

The President's proposed bill provoked a considerable amount of criticism from Democrats in the House at the hearing held by the Subcommittee on Civil and Constitutional Rights on March 7, 1991.²⁴⁸ In fact, Representative

241. *Id.* at 58 (statement of Rep. Washington).

242. 137 CONG. REC. 13,237-41 (1991) (H. Amdt. 91 & statement of Rep. Towns).

243. *Id.* at § 17.

244. *Id.* at 13,253 (Roll No. 127).

245. *Id.* at 5,656 (statement of Sen. Dole) (introducing the President's version of the bill in the Senate); *id.* at 5,863 (statement of Rep. Michel) (introducing the President's version of the bill in the House).

246. S. 3239, 101st Cong. § 8(3) (1990).

247. S. 611, 102d Cong. § 8(m)(1) (1991).

248. *See, e.g.*, Judiciary Comm. Hearings *supra* note 218, at 217, 327 (statement of Rep. Edwards); *id.* at 328 (statement of Rep. Washington).

Edwards' opening remarks at the hearing were addressed to the President and expressed his outrage at the inadequacies of the President's proposal:

The President's bill that we received earlier this week would also allow courts to award up to \$150,000 in equitable monetary relief for harassment cases if certain conditions are met. Now let's be very clear about that. Harassment is already illegal under Title VII. There is no need for an explicit recognition of this fact.

The debate now is over what should be the remedy for intentional, egregious discrimination. A victim of harassment does not have to meet additional conditions in order to make a case of harassment under existing law. Yet the President's bill imposes new restrictions on the right of a harassment victim to get relief, including a shorter time period and complaining through the employers' grievance system. We ask why does the President want to put additional burdens on victims of harassment. . . .²⁴⁹

Several Republican witnesses also referenced the President's bill and finally acknowledged that victims of sexual harassment "may need a further remedy."²⁵⁰

In April, the House Committee on Education and Labor reported favorably on H.R. 1 and recommended that the House pass the bill with unlimited damages.²⁵¹ The report documented the need for providing damages for victims of sex discrimination by explaining that "[a]n unfair prejudice exists in federal civil rights law" because § 1981 "permit[s] the recovery of unlimited compensatory and punitive damages to victims of intentional *race* discrimination" but "[no] similar remedy exists in cases of intentional *gender* . . . discrimination."²⁵² The report thereafter asserted that "[w]here the manifestations of prohibited conduct are the same, and the harms caused are the

249. *Id.* at 217-18 (statement of Rep. Edwards).

250. *Id.* at 38 (prepared statement of John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. Dept of Justice) (contending that "the Administration has repeatedly called for effective remedies against sexual harassment on the job. . . . I urge you to pass quickly those civil rights initiatives on which we agree"); *id.* at 193 (statement of Zachary D. Fasman, on behalf of the National Association of Manufacturers and the Society for Human Resource Management) (admitting that there is "one area which Title VII prohibits where there is no economic injury, and that is in the area of harassment. . . . That is a problem with harassment. That's what I was talking about before. It seems to me that certainly in Congress, both in the last session and this session, that harassment, particularly sexual harassment law, may need a further remedy. There may have to be an economic incentive built in it to compensate these people"); *id.* at 196 (statement of Zachary D. Fasman) (addressing questions from Chairman Edwards and acknowledging "that it seems to me that the normal type of remedy, as I've said before, may not cover cases involving sexual harassment. There may be a need for an additional remedy there. I've already conceded that").

251. See H.R. REP. NO. 102-40, pt. 1, at 17, 18 (1991) (Conf. Rep.).

252. *Id.* at 65.

same, the remedies should be the same as well.”²⁵³ The report also directly criticized the Administration’s position on providing only limited damages for victims of sex discrimination, stating that “[b]ecause the Administration is in favor of restoring the damages remedy in case of intentional racial discrimination, it should have no objection to providing the same rights to women. . . .”²⁵⁴ Given the favorable committee reports, Representative Brooks and Representative Ford placed H.R. 1 on the House calendar on June 4, 1991 for a full vote.²⁵⁵

Before the scheduled vote in the House, two additional substitute amendments were offered to H.R. 1: the first by Republican Congressman Robert Michel and the second by Democratic Congressman Brooks.²⁵⁶ Representative Michel’s substitute amendment was submitted on behalf of the Administration and did not provide any compensatory or punitive damages,²⁵⁷ but only an equitable award in cases of harassment.²⁵⁸ This amendment failed by a vote of 162 to 266 on June 4, 1991.²⁵⁹

On the other hand, the Brooks-Fish Substitute passed by a vote of 264 to 166 on June 5, 1991.²⁶⁰ The Brooks-Fish Substitute only capped punitive damages and did not cap compensatory damages at all.²⁶¹ Specifically, punitive damages were capped in the amount of \$150,000, or an amount equal to compensatory damages, whichever was greater.²⁶² Displeased with the proposed cap on punitive damages, Republicans argued that it was an insufficient limitation because it was variable based on the size of the compensatory damages award. For example, Representative Hyde described it as “a phony cap”²⁶³ and Representative Goodling declared that it was “not a cap at all” because the “‘cap’ constantly floats.”²⁶⁴ In addition, Representative Stenholm argued that the term cap was “misleading” because it “will act as [a] floor[]” when the compensatory damage award exceeds \$150,000, and then is “removed” completely.²⁶⁵

253. *Id.*

254. *Id.* at 15.

255. 137 CONG. REC. 13,195 (1991) (statement of Speaker McNulty) (indicating that “[p]ursuant to House Resolution 162 . . . the Chair declares the . . . Whole House on the State of the Union for consideration of the bill, H.R. 1”); *id.* (statement of Rep. Brooks) (declaring that he is “proud to bring to the floor the bill H.R. 1”).

256. 137 CONG. REC. 13,253-58 (1991) (H. Amdt. 92 & statement of Rep. Michel); *id.* at 13,515 (H. Amdt. 93 & statement of Rep. Brooks).

257. *Id.* at 13,254 at § 8.

258. *Id.* at § 8.

259. *Id.* at 13,265 (Roll No. 128).

260. *Id.* at 13,552-53 (Roll No. 130).

261. *Id.* at 13,515 (H. Amdt. 93 & statement of Rep. Brooks).

262. *Id.* at 13,516 (statement of Rep. Brooks).

263. *Id.* at 13,522 (statement of Rep. Hyde).

264. *Id.* at 13,525 (statement of Rep. Goodling).

265. *Id.* at 13,537 (statement of Rep. Stenholm).

Although Democrats agreed to support the Brooks-Fish Substitute if necessary to achieve the enactment of a Civil Rights Bill, many were disgruntled with the idea of capping punitive damage awards.²⁶⁶ Many representatives also expressed frustration with President Bush, who once again was threatening to veto the civil rights bill passed by the House despite the Democratic compromise on capping damages.²⁶⁷ Some of these representatives, such as Representative Berman, accused President Bush of being insensitive to women's issues and indicated that this was the reason the President again was threatening to veto H.R. 1.²⁶⁸

266. 137 CONG. REC. 13,531 (1991) (statement of Rep. Morella) (acknowledging that “the substitute is the best we can achieve here today” but stating that “I feel strongly that every victim of intentional discrimination should be treated fairly and equitably. . . . Mr. Chairman, the battle for equal rights is not yet won, especially for women”); *id.* at 13,540 (statement of Rep. Zimmer) (conceding that “I will vote for the Brooks-Fish substitute because it is a significant improvement over the current law”); *id.* at 13,541 (statement of Rep. Brooks) (clarifying that “I don’t want anyone to think that the Brooks-Fish substitute is a perfect bill”); *id.* at 13,542 (1991) (statement of Rep. Collins) (declaring that “there are provisions of the Brooks-Fish substitute that I find unacceptable. . . . [They] have been placed in the substitute in an effort to work with President Bush, and while I strenuously disagree with them, I shall vote for Brooks-Fish”); *id.* at 13,547-48 (statement of Rep. McMillen) (declaring that “[d]iscrimination for whatever reason should be treated equally under the law; subject to the same judicial remedies and awards. Creating a two-tiered approach to discrimination by placing a cap on punitive damages for women and the handicapped is undesirable. . . . Reluctantly, after weighing the pros and cons . . . I have concluded . . . [t]his, it appears, is the only way to pass a civil rights bill in today’s Congress”); *id.* at 13,548 (statement of Rep. Markey) (acknowledging that he preferred “the Towns-Schroeder substitute” because it “would not have included a ceiling on damages for women. . . . Despite my opposition to such a ceiling, I, nonetheless, must now support the Brooks-Fish substitute as the strongest version remaining that can correct the weakening effects of recent court decisions”); *id.* (statement of Rep. Weiss) (declaring that he “support[s] the Brooks-Fish substitute” but he believes “the committee’s original bill (H.R. 1), would better protect victims of discrimination”); *id.* at 13,550 (statement of Rep. Skaggs) (acknowledging that “[t]he issue of caps on damages available to victims of discrimination persists” and admitting that the inclusion of a cap in Brooks-Fish is one more instance of the effort made by supporters of this bill to enact a law”).

267. *See* 137 CONG. REC. 13,549 (1991) (statement of Rep. Weiss) (declaring that “the Bush Administration continues to . . . sacrifice civil rights legislation and the victims of discrimination for the sake of partisan advantages. The Administration’s attempts to derail real civil rights legislation are inflaming racial tension and polarizing our society along lines of gender and skin color.”); *id.* at 13,546 (statement of Rep. Cox) (arguing that the “substitute addresses everything the President has stated as being wrong with the original bill, H.R. 1. However, the President continues to promise to veto this bill as amended in the Brooks-Fish substitute”); *id.* at 13,550 (statement of Rep. Skaggs) (asking “[w]hat more does the President want? Or is it that he really does not want a civil rights bill, that he’s more interested in an issue to divide Americans and benefit his party’s political agenda?”); *id.* at 13,546 (statement of Rep. Hoyer) (expressing that he is “greatly disturbed that we are back again to do what we know is fair and just and we once again are being threatened with a Presidential veto. This same President who claims he wants to sign a civil rights bill has quashed all efforts to come to a reasonable compromise on the bill and has sabotaged the efforts of the business and civil rights communities to work together to resolve their differences”).

268. *Id.* at 13,541 (statement of Rep. Berman) (stating that he “want[s] to also say a word about the particular burdens women face in the workplace. The administration, by barring women from recovering compensatory or punitive damages in title VII cases, is in essence saying that they must continue to suffer intentional discrimination in silence, because we will not take it seriously. Misconduct that offends us we make punishable by monetary damages under our system of civil justice. . . . I, for one, believe that it is long past time that we take discrimination against women seriously, and act to prohibit and redress it”).

Despite the objections of legislators from both parties, on June 5, 1991, the House approved both the Brooks-Fish Substitute,²⁶⁹ and immediately thereafter, the House approved H.R. 1 as amended, by a vote of 273 to 158.²⁷⁰ The House thereafter referred H.R. 1 to the Senate.²⁷¹

However, the Senate never voted on the House bill.²⁷² Instead, Republican Senator John Danforth from Missouri proposed bill S. 1209 on June 4, 1991, the day before the House passed H.R. 1.²⁷³ Prior to Senator Danforth's bill, Senator Kennedy had negotiated with the Administration, business groups, and Senate Republicans throughout February and March to draft a compromise bill, but did not officially propose that bill for lack of support.²⁷⁴ Thus, Senator Danforth's bill was the initial focus of the civil rights debate in the Senate.

Senate Bill 1209 received considerable attention not only because it was the first serious civil rights proposal in the Senate in 1991, but also because the damages provisions contained in S. 1209 were radically different than previous proposals in either house in 1990 or 1991. Specifically, S. 1209 allowed the recovery of compensatory damages for victims of intentional discrimination, but it capped the recovery of those damages based on the size of the employer.²⁷⁵ For employers with more than 100 employees, the bill established the cap for compensatory damages at \$150,000 excluding back pay and interest.²⁷⁶ For employers with 15 to 100 employees, the bill established the cap for compensatory damages at \$50,000.²⁷⁷ Moreover, S. 1209 did not permit the recovery of punitive damages, but instead provided for an additional equitable award under certain circumstances.²⁷⁸ This amount of the equitable award likewise was capped based on the size of the employer: employers with more than 100 employees were subject to an additional award of up to \$150,000; and employers with 100 employees or less were subject to an additional award of up to \$50,000.²⁷⁹ However, the equitable award was not payable directly to the victim of discrimination.²⁸⁰ Rather, the equitable award had to be used "to correct discriminatory practices at the place of employment, or in the community," or be deposited in an Equal Employment Enforcement Trust Fund.²⁸¹

269. See *supra* note 260 and accompanying text.

270. 137 CONG. REC. 13,553 (1991) (Roll No. 131).

271. *Id.* at 14,122-23 (statement of Sen. Moynihan) (indicating the Senate had received H.R. 1 from the House and requesting that the bill be read for the first time).

272. *Id.* at 33,942 (indefinitely postponing H.R. 1, S. Calendar No. 148, by unanimous consent).

273. *Id.* at 13,138-40 (statement of Sen. Durenberger) (introducing S. 1209 in the Senate).

274. See Govan, *supra* note 98, at 176.

275. See 137 CONG. REC. 13,139 (1991) (§ 3(b)(3) of S. 1209).

276. See *id.* at § 3(b)(3)(A).

277. See *id.* at § 3(b)(3)(B).

278. See *id.* at § 3(c).

279. See *id.* at § 3(c)(3).

280. See *id.* at § 3(c)(5)(A), (B).

281. *Id.*

Curiously, the bill also directed, for the first time, that the new remedies in S. 1209 be codified in a novel and unlikely location. Specifically, S. 1209 did not add the damages provisions to the existing text of Title VII, nor did S. 1209 add the new remedies to the text of § 1981.²⁸² Instead, S. 1209 proposed creating a new section immediately after § 1981, naming it § 1981(a).²⁸³ Senator Danforth retained this codification preference in all remaining bills he proposed in 1991, including the final bill passed by Congress.²⁸⁴ One prominent civil rights scholar commented that this was a “circuitous route” and suggested that the location of these new provisions raised questions about whether Congress was “trying to artfully . . . conceal the fact that its new provision effectively capped damages for women, while leaving them uncapped for blacks.”²⁸⁵ The bill ultimately failed in committee, however, presumably because Democrats and civil rights leaders were dissatisfied that the equitable penalty would not be used to compensate the victim and that caps would be placed on compensatory damages, thereby limiting compensation for non-pecuniary injuries such as pain and suffering.²⁸⁶

Thereafter, Senator Danforth proposed another civil rights bill on June 27, 1991, in an attempt to forge a compromise on the damages debate for Title VII claims.²⁸⁷ Senator Danforth’s second proposal actually consisted of three separate bills that attempted to separate the contested issues by subject matter.²⁸⁸ Of this trilogy, only S. 1409 contained revised provisions related to damages available for intentional discrimination under Title VII.²⁸⁹ The bill included a number of features. First, it allowed victims to request a trial by jury in the event the victim sought to recover compensatory damages.²⁹⁰ Additionally, the revised damages provisions in S. 1409 provided that the victim of intentional discrimination could directly receive both compensatory

282. See 137 CONG. REC. 13,138 (1991) (Section 3 of S. 1209) (declaring that “[t]he Revised Statutes are amended by inserting after section 1977 [i.e. 42 U.S.C. 1981] the following new section: ‘SEC. 1977A. DAMAGES IN CASE OF INTENTIONAL DISCRIMINATION IN EMPLOYMENT’”).

283. See *id.* at § 3.

284. Section 102 of the final version of the Civil Rights Act states, in pertinent part: “The Revised Statutes are amended by inserting after section 1977 (42 U.S.C. 1981) the following new section: ‘Sec. 1977A. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION IN EMPLOYMENT.’” Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. at 1073 (1991) (codified at 42 U.S.C. § 1981a(b)(3)).

285. ABERNATHY, *supra* note 58, at 841.

286. See Govan, *supra* note 98, at 206-07.

287. 137 CONG. REC. 16,962-63, 16,968-69 (1991).

288. See *id.* (statement of Sen. Danforth) (discussing S. 1407 and addressing attorneys’ fees and the *Martin v. Wilks* decision); *id.* at 16,962-63, 16,966-68 (statement of Sen. Danforth) (addressing S. 1408 and disparate impact claims); *id.* at 16,968-69 (text of S. 1409 addressing compensatory and punitive damages).

289. See 137 CONG. REC. 16,968-69 (text of S. 1409).

290. See *id.* at § 3(d).

and punitive damages,²⁹¹ thus removing the trust fund and community provisions objected to by Democrats in S. 1209.²⁹² Moreover, for the first time in any civil rights proposal, S. 1409 also created a combined cap for both compensatory and punitive damages, and expanded the categories of caps from the two categories found in S. 1209 to three.²⁹³ Specifically, combined compensatory and punitive damages for employers with 100 or less employees were capped at \$50,000; damage awards for employers with 101 to 500 employees were capped at \$100,000; and damage awards for employers with more than 500 employees were capped at \$300,000.²⁹⁴ The bill also required, for the first time, that the cap on damages not be disclosed to the jury.²⁹⁵ Democrats and civil rights leaders criticized the revised caps and emphasized that S. 1409 lowered the amount of the cap for employers with 101 to 500 employees from \$150,000 to \$100,000.²⁹⁶

Despite considerable support for the bills among Senate Republicans, President Bush continued to express his opposition to both of Senator Danforth's proposals, just as he opposed H.R. 1 after it passed the House.²⁹⁷ Soon, the exigencies of judicial politics intervened. On June 27, 1991, Justice Thurgood Marshall announced his resignation from the Supreme Court,²⁹⁸ and President Bush nominated then-Judge Clarence Thomas on July 1, 1991, to fill Justice Marshall's vacancy.²⁹⁹ Senator Danforth agreed to assist the Administration with Justice Thomas' confirmation,³⁰⁰ and the Senate's focus shifted temporarily from the civil rights agenda to Justice Thomas' confirmation. Justice Thomas testified before the Senate Judiciary Committee

291. See *id.* at §§ 3(a), 3(b).

292. See Govan, *supra* note 98, at 211-12.

293. See 137 CONG. REC. 16,968 (§ 3(b)(3) of S. 1409).

294. See *id.* at § 3(c).

295. See *id.* at § 3(c)(1)(B).

296. Compare *id.* at § 3(b)(3)(A)-(C), with 137 CONG. REC. 13,139 (1991) (§ 3(b)(3)(A)-(B) of S. 1209; see also Govan, *supra* note 98, at 212.

297. See Neal Devins, Symposium, *Reagan Redux: Civil Rights Under Bush*, 68 NOTRE DAME L. REV. 955, 994-95 nn.188-190 (1993).

298. See 137 CONG. REC. 16,883 (1991) (statement of Sen. Wirth); *id.* at 16,887 (statement of Sen. Metzenbaum); *id.* at 16,888 (statement of Sen. Harkin).

299. See Remarks Announcing the Nomination of Clarence Thomas to be an Associate Justice of the Supreme Court of the United States and a News Conference in Kennebunkport, Maine, 27 WEEKLY COMP. PRES. DOC. 868, 869 (July 8, 1991).

300. See 137 CONG. REC. 9234 (1991) (statement of Sen. Danforth) (announcing his support of Justice Thomas' nomination); Govan, *supra* note 98, at 217 (indicating that "Senator Danforth became preoccupied, however, with the nomination of then-Judge Clarence Thomas. . . . Danforth committed to the Administration to shepherd the nomination of Thomas through the Senate").

on September 10-13, 1991.³⁰¹ The summer had passed and a compromise seemed unlikely.³⁰²

On September 24, 1991, Senator Danforth proposed yet a third civil rights bill in the Senate, S. 1745.³⁰³ The damages provisions in this third proposal did not differ substantively from the provisions of S. 1409, but S. 1745 did make cosmetic changes by combining the damages provisions with the substantive provisions from S. 1407 and 1408 to create a single, cohesive proposal.³⁰⁴ Despite this third attempt at compromise, President Bush initially threatened to veto Senator Danforth's latest proposal.³⁰⁵

Finally, by the end of October and after two years of unwavering opposition to comprehensive civil rights legislation, President Bush suddenly agreed to support S. 1745.³⁰⁶ Most scholars credit two political events that occurred earlier in October as a catalyst for the President's change in position.³⁰⁷ First, David Duke, a White nationalist then serving in the Louisiana

301. *Nomination of Judge Clarence Thomas To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 102d Cong. (1991) (the initial hearings on the nomination were held by the Senate Judiciary Committee in September with Thomas testifying on September 10-13, 1991).

302. See Devins, *supra* note 297, at 994 (explaining that by "summer's end, the prospects for compromise seemed bleak. Bush, buoyed by the House vote, held to his position").

303. 137 CONG. REC. 23,904 (1991) (statement of Sen. Chafee) (introducing S. 1745 in the Senate).

304. See Govan, *supra* note 98, at 219-22 (discussing Sen. Danforth's attempt to incorporate revised versions of the prior three proposals into S. 1745); J.R. Franke, *The Civil Rights Act of 1991: Remedial Civil Rights Policies Prevail*, 17 S. ILL. U. L.J. 267, 284 (1993) (observing that S. 1745 "combined the three bills previously introduced by Senator Danforth").

305. See Devins, *supra* note 297, at 983 (describing the timeline of the President's opposition to the civil rights act and explaining that "[f]rom April 3, 1990, less than two months after the legislation was first introduced, to October 23, 1991, two days before the announcement of a compromise agreement, the Bush administration steadfastly claimed that it would veto this behemoth package of civil rights reforms" and the President "on at least two dozen occasions publicly discussed this matter").

306. See, e.g., Devins, *supra* note 297, at 995 (documenting that "the prospects of another presidential veto loomed as late as October 23," but on "[t]he very next day . . . 'marathon negotiations' resulted in a compromise that the President proclaimed he would 'enthusiastically sign'"); Clegg, *supra* note 114, at 1469 (stating that "[a]lmost immediately after the hearings, the civil rights groups and the administration reached agreement on a civil rights bill").

307. See, e.g., Clegg, *supra* note 114, at 1469 (explaining the impact of Anita Hill's testimony during the Clarence Thomas confirmation hearings and noting that "[a]lmost immediately after the hearings, the civil rights groups and the administration reached agreement on a civil rights bill." Also discussing the "ascendancy of David Duke's candidacy for governor of Louisiana at the same time" and describing how "president Bush simply could not abide another race-charged national battle"); Devins, *supra* note 297, at 996 (declaring that "[t]he emergence of the Hill-Thomas and Duke controversies clearly raised the symbolic stakes of a Bush veto. Given Bush's erratic track record on civil rights and his apparent desire to place political popularity ahead of a principled vision, it is not inappropriate to conclude that the October 24 compromise was a political capitulation"); Days, III, *supra* note 92, at 36 (discussing the "[s]peculation [that] continues to swirl over how the President, who had condemned Congress' earlier attempts as 'quota' bills, could have found the largely identical Civil Rights Act of 1991 worthy of support" and stating "it [is] plausible that the damage David Duke's campaign for governor of Louisiana was doing to the Republican Party's image . . . and the bruising confirmation fight over Clarence Thomas' appointment to the Supreme Court persuaded the President that he needed the Civil Rights Act of 1991 to salvage his reputation as a moderate on race issues"); James Forman, Jr., *Victory by Surrender: The Voting Rights Amendments of 1982 and the Civil Rights Act of 1991*, 10 YALE L. & POL'Y REV. 133, 171-72 (1992) (attributing the enactment of a compromise bill to two

House of Representatives, announced his plan to participate in a run-off election in November for Governor of Louisiana as a Republican candidate. President Bush wanted to distance himself and his stance on civil rights issues from any association with Duke's candidacy.³⁰⁸ Second, on October 6th, two media sources reported that Professor Anita Hill, a former employee who worked under the supervision of Clarence Thomas both at the Department of Education and during his tenure as Commissioner of the EEOC, alleged that Thomas had sexually harassed her during the course of her employment.³⁰⁹ After receiving considerable political pressure,³¹⁰ the Senate agreed to hold hearings on Hill's allegations.³¹¹ At the end of the hearings, the Senate confirmed Justice Thomas's nomination to the Supreme Court by a vote of 52 to 48,³¹² but the hearings undoubtedly raised national awareness of the problem of sexual harassment.³¹³ "With the uproar over the confirmation of Clarence Thomas to the United States Supreme Court, and the likely impact of the confirmation vote in an election year, President Bush's veto-proof margin began to fade."³¹⁴ Consequently, the President supported a compromise, bipartisan version of the Civil Rights Act (S. 1745) developed through last minute negotiations.

"extrinsic factors" including David Duke's candidacy for Governor of Louisiana and the Anita Hill-Clarence Thomas hearings).

308. See Clegg, *supra* note 114, at 1469.

309. Christine A. Littleton, *Dispelling Myths About Sexual Harassment: How the Senate Failed Twice*, 65 S. CAL. L. REV. 1419, 1419 (1992) (explaining that Professor Anita Hill's allegations first "ran in *Newsday* and on National Public Radio on Sunday, October 6. . . . On Monday, October 7, Hill held a televised press conference"); see also Charles B. Hencicz, *The Civil Rights Act of 1991: From Conciliation to Litigation—How Congress Delegates Lawmaking to the Courts*, 141 MIL. L. REV. 1, 5 (1993) (describing the enormous impact the Anita Hill/Clarence Thomas hearings by referring to them as "what many call the 'Anita Hill Civil Rights Act of 1991'").

310. See, e.g., Judith Resnik, *Hearing Women*, 65 S. CAL. L. REV. 1333-34 (1992) (describing her involvement in the letter signed by more than 120 women law professors "directed to each member of the Senate Judiciary Committee . . . urg[ing] the Senate to postpone the vote, to 'take this matter seriously' and to begin full investigation" and further describing "the image the newspapers gave us was of seven Congresswomen marching up the steps to the ninety-eight men and two women of the Senate and demanding a delay"); see also Littleton, *supra* note 308, at 1419.

311. *Nomination of Judge Clarence Thomas To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 102d Cong. (1991) (hearings were held October 11-13, 1991).

312. 137 CONG. REC. 14,704-05 (1991).

313. See, e.g., Govan, *supra* note 98, at 224 (stating that "three days of televised hearings on the issue of sexual harassment in the workplace did more than two years of activity by civil rights advocates to communicate the notion that the issue of civil rights concerns women as well as racial and ethnic minorities"); Linda S. Greene, *Feminism, Law, and Social Change: Some Reflections on Unrealized Possibilities*, 87 NW. U. L. REV. 1260, 1263-64 (1993) (discussing "Professor Anita Hill's charge that Justice Thomas sexually harassed her, as well as the initial decision of the Senate Judiciary Committee not to hold hearings on the issue" and how that decision "produced a catalytic effect on women and raised the problem of sexual harassment to a new level of visibility"); Clegg, *supra* note 114, at 1469 (describing the increased visibility of sexual harassment in the workplace as "the nation sat riveted before its television sets, watching the Clarence Thomas-Anita Hill hearings").

314. Timothy D. Loudon, *The Civil Rights Act of 1991: What Does it Mean and What is Its Likely Impact?*, 71 NEB. L. REV. 304, 307 (1992).

The last minute compromise to S. 1745 that President Bush endorsed included additional revisions to the damages provisions in the proposal. Specifically, on October 25, 1991, Senator Danforth and Senator Kennedy co-sponsored Amendment 1274.³¹⁵ The Amendment retained the availability of compensatory and punitive damages for victims of intentional discrimination, but expanded the categories of caps on damages from a three-tiered system to a four-tiered system.³¹⁶ The Amendment also divided the caps for middle-size employers into two categories. Under the original provisions of S. 1745, damages for employers with 101 to 500 employees were capped at \$100,000.³¹⁷ In contrast, under Amendment 1274's provisions, damages for an employer with 101 to 200 employees were capped at \$100,000, whereas damages for employers with 201 to 500 employees were capped at \$200,000.³¹⁸ The division of S. 1745's middle category to create the fourth tier was a modification specifically requested by Senator Kennedy, and not by President Bush.³¹⁹

Rather than expressing success in obtaining President Bush's approval after the two-year struggle to pass a civil rights bill, many Democratic Senators declared dissatisfaction with Senator Danforth's latest proposal. These Senators acknowledged that the caps for damages not only were insufficient, but also openly discriminated against women, treating them as second-class citizens³²⁰ and creating an unjustifiable "hierarchy of remedies."³²¹ Others argued that

315. 137 CONG. REC. 28,676- 28,680 (1991) (Section 5 of S. Amdt. 1274).

316. *Id.* at § 5(b)(3).

317. *Id.* at § 5(b)(3)(A)-(C).

318. *Id.* at § 5(b)(3)(A)-(C).

319. *See* Govan, *supra* note 98, at 230.

320. *See, e.g.*, 137 CONG. REC. 29,027 (1991) (statement of Sen. Harkin) (declaring that "although the remedies for women . . . are an improvement over current law, I would have preferred that there be no cap on the amount of damages available to women . . . since we currently do not have caps for racial minorities under section 1981. Congress should not allow women . . . to be second-class citizens when it comes to remedying the effects of intentional discrimination. When the harm is the same, the available remedies should be parallel"); *see id.* at 29,031 (statement of Sen. Adams) (expressing that he is "extremely disappointed that the bill falls short in redressing discrimination against women. The bill says that discrimination on the basis of sex is less important than other forms of discrimination. Under this bill, women of color would be forced to abandon their sex discrimination claims and use claims based on race or national origin to bypass the caps on damages. Under this bill, compensation for damages as a result of sexual harassment or discrimination are capped. By capping damages, we relegate women's discrimination cases to second class status in the American legal system. Just imagine the howl of anguish from the business community if we sought to cap damages a corporation could recover in civil litigation. There will come a day when this institution recognizes that sexual harassment cases should be taken as seriously as corporate litigation. . .").

321. *Id.* at 29,008 (statement of Sen. Robb) (stating that he would vote for S. 1745, but that it was "a springboard to greater achievements. It is not an end; but a beginning upon the long road to a society in which people are defined not by gender or race, but solely on their capabilities." Senator Robb also explained that "[t]he underlying substantive debate, all along, was not about disparate impact or quotas but about damages in cases of intentional discrimination. Should women be allowed to sue employers in cases of intentional discrimination, the way minorities currently can? That prospect is what had employers up in arms. Not quotas, but damages. I happen to support giving women . . . the same scope of remedies available to those who suffer racial discrimination, and will support such subsequent

capped damages communicated that sex discrimination was not as reprehensible as race discrimination,³²² sentiment expressed by many Democratic congressional members and some government officials the previous year during the hearings on the failed 1990 Civil Rights Act.³²³ For instance, Senator Wirth expressed particular dissatisfaction with the damages provisions of S. 1745 and its impact on the struggle to achieve gender equality:

Mr. Wirth: . . . Mr. President, I rise today to discuss what I consider to be a gaping hole in the Civil Rights Restoration Act before us today – a hole so large that I question if we can in fact term this piece of legislation a civil rights bill. By passing this bill, we will . . . also codify a premise that goes against the very grain of our Nation – it will say that we believe people should be treated separate and unequal.

I think some people will be perplexed that now, while we are trying to establish some equity in our laws, we turn around and create a new injustice. Now that remedies are finally available for women . . . we are going to impose limits on their extent. Of course, no one else is limited, except for one slice of the population, which is singled out to be treated as second-class citizens and deserving only second-class remedies. In all honesty, I find it unfathomable that this is the course we have chosen to head into the 21st century. . . .

Are there caps in the law for racial discrimination? No. . . . [B]ut there are caps in this bill for cases of gender-based discrimination and sexual harassment.

Clearly we are being unfair and unjust to impose caps on these kinds of discrimination cases. This action contradicts the very cornerstone of civil rights, the guiding principle of our country – and that is equality. It took us 125 years to provide women with the

legislation when it is offered. The current hierarchy of remedies simply makes no sense. Under existing law, a black woman can sue for damages for racial discrimination, but if she suffers gender discrimination, she's out of luck. Discrimination is wrong, and is not more or less so depending upon the demographics of its victim").

322. *See id.* at 29,027 (statement of Sen. Dodd) (criticizing the President and arguing that his "minor changes in [the area of damages] suggests that his problems have been more political than substantive. . . . I believe there is no real difference between the sting of race discrimination and the sting of sex discrimination. It makes good common sense to permit women to sue for damages when employers intentionally discriminate . . ."); *accord id.* at 29,016 (statement of Sen. Nickles) (considering an amendment to make the provisions of Senator Danforth's bill applicable to Members of Congress and stating "instead of having caps on punitive damages as we do on the underlying bill, let us take the cap off because it will not cost us anything. If we are also subject to punitive damages maybe there will be some cognizance of the cost of the law we place on the rest of America. Mr. President, George Orwell said it well in 'Animal Farm' (1945). He said, 'All animals are equal, but some animals are more equal than others'").

323. *See supra* notes 168, 173-76 and accompanying text.

remedies afforded to others – I can only hope that it does not take 125 more years to remove the limits we have imposed.

It is a matter of simple fairness to provide women . . . with the same remedies that the law provides to victims of other forms of discrimination. But now, in the name of civil rights, women . . . who are discriminated against in the workplace can take their cases to the courts, where they will be discriminated against again. That does seem ironic, does it not?

I think women in this country are sick of this kind of treatment.³²⁴

Despite these objections and the candid acknowledgement from several Senators that the caps on damages constituted sex discrimination, the Senate passed S. 1745 on October 30, 1991, by a vote of 93 to 5.³²⁵

Thereafter, the Senate bill was referred to the House for consideration. Recall that the House had enacted H.R. 1 just four months earlier, and that this final bill did not contain a cap on compensatory damages and instead only capped punitive damages.³²⁶ Yet again, Democratic Representatives criticized the more restrictive caps included in the Senate bill and expressed outrage that the tiered structure in the Senate bill would prohibit some women, employed by smaller employers and thus entitled to a smaller cap on damages, from being fully compensated for their damages.³²⁷ Others criticized the tiered structure of the caps in the Senate bill, arguing that the lack of uniformity of the caps on damages violated the Equal Protection Clause.³²⁸ Others contended that the

324. 137 CONG. REC. 29,021-22 (1991) (statement of Sen. Wirth).

325. *Id.* at 29,066 (Rollcall Vote No. 238).

326. *See supra* notes 260-66 and accompanying text; *see also* 137 CONG. REC. 30,660 (1991) (statement of Rep. Brooks) (discussing the differences between H.R. 1 and S. 1745).

327. 137 CONG. REC. 30,676 (1991) (statement of Rep. Pelosi) (expressing “concern about the limits placed on damages that women can receive for sexual harassment and discrimination cases. I am discouraged that we can allow sexual harassment cases to be judged on the basis of the size of the business a woman works for and not for the seriousness of the crime. Women must be allowed to receive what they deserve in damages and not have an arbitrary limit placed on the damages. This provision was obviously the sacrificial lamb for this compromise and women were sacrificed. . . . [T]he effect of the caps on damages is that women are discouraged from speaking out because their problems are not worth the same amount as others are worth under the law simply because of business size”); *id.* at 30,676-77 (statement of Rep. Hughes) (declaring that “I do not understand why the President sought to limit the compensation available to women . . . for the actual cost to them of discrimination. These limits are especially hard to understand when one realizes that there are no limits on damages for victims of racial discrimination”).

328. 137 CONG. REC. 30,671 (1991) (statement of Rep. Sensenbrenner) (expressing “concern[] about the unconstitutionality of the sliding scale of damages that are contained in this bill. This is a violation clearly of the equal protection clause of the 14th amendment to the U.S. Constitution. Why should someone who is in a medium-sized business who has been a victim of the same type of discrimination, who has suffered the same damages, be limited in the amount that they can recover vis-a-vis someone who has been victimized in a larger business? . . . The scale should be uniform, unlimited damages, zero damages, or some figure in between, but it should not have different strokes for different folks”); *id.* at 30,685 (statement of Rep. Orton) (declaring that he has “serious concerns about the constitutionality—under the equal protection clause—of the provisions of this act which would place a

caps constituted a new injustice towards women,³²⁹ treated them as second-class citizens³³⁰ by prioritizing race discrimination,³³¹ and codified sex discrimination in the recovery of damages.³³² Despite the multiple objections to the caps on punitive damages, the House eventually approved the Senate version on November 7, 1991, by a vote of 381 to 38.³³³ President Bush signed the Civil Rights Act of 1991 into law on November 21, 1991.³³⁴

The examination of this previously neglected legislative history of the Civil Rights Act provides a basis for drawing several novel conclusions that might otherwise have been overlooked in the ongoing debate over fashioning adequate remedies under Title VII. First, it is clear that Congress considered but rejected a number of proposals that would have provided equal remedies for victims of race and sex discrimination.³³⁵ Not only did Congress consider and reject numerous proposals providing for unlimited damages for victims of intentional discrimination under Title VII,³³⁶ but it also considered and rejected

limitation on the amount of damages available for sex discrimination while no such limitation exists on damages resulting from racial discrimination”).

329. See 137 CONG. REC. 30,661 (1991) (statement of Rep. Edwards) (explaining that “it is simply untenable to continue any longer the disparity in the civil rights laws which permits the recovery of compensatory and punitive damages in cases of intentional race discrimination but to deny these same remedies to victims of other forms of discrimination”); *id.* at 30,673-74 (statement of Rep. Clay) (arguing that “[t]he most troubling aspect of S. 1745 is its failure to provide full equity for women . . . who are victimized by intentional discrimination. In my view, the cap that has been placed by S. 1745 on the ability of women and others to obtain damages under title VII is unnecessary, unfair, and unjust. If we believe in justice for all, it remains for the Congress to perfect the remedies we would afford these individuals.”); *id.* at 30,684 (statement of Rep. Cardin) (declaring that the legislation “is designed to eliminate inequality in our society, yet it treats various types of discrimination differently”); *id.* at 30,686 (statement of Rep. Kleczka) (contending that “all persons harmed by intentional discrimination in the workplace, not just racial minorities, should have access to unlimited punitive damages”).

330. *Id.* at 30,645 (statement of Rep. Schroeder) (declaring that she has “an awful lot of trouble with the civil rights bill, because it really has treated women as second-class citizens. It is like we are all supposed to be so delighted that after 200 years we finally got on the bus, but the problem is we are supposed to go to the back of the bus because it is capping damages for women”).

331. *Id.* at 30,671 (statement of Rep. AuCoin) (declaring that this bill “tells women, like my young daughter, that discrimination based on sex is not as wrong as discrimination based on race. It continues to give women a message that they are second-class citizens. That is not equality. That is not freedom. . . .”); *id.* at 30,675 (statement of Rep. Hayes) (expressing reluctance and apprehension “about this bill because it forces me to prioritize discrimination, and I should not be presented with such a choice”); *id.* at 30,692-93 (statement of Rep. Atkins) (voicing his “objection to the fact that the compromise Civil Rights Act places a cap on damages available for victims of discrimination on the basis of sex. . . . This provision not only treats women as second-class citizens, it may very well prove to be unconstitutional. . . . I have heard from many of my constituents who argue that these caps are a slap in the face to the women . . . of this country. . . . By capping damages . . . we are limiting access to equal justice for all, and we are condemning women . . . to second-class status. . . .”).

332. *Id.* at 30,686 (statement of Rep. Richardson) (disagreeing with “the caps on damages for sex based discrimination suits. I find it ironic that a civil rights bill itself contains discrimination towards a particular group, in this case, women. . . . Although this compromise retains this glaring inequity, I am hopeful that the caps on damages will be eliminated in the upcoming year”).

333. *Id.* at 30,695 (Roll No. 386).

334. George Bush, Statement on Signing the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOC. 1702 (Nov. 21, 1991).

335. Sperino, *supra* note 19, at 244.

336. See *supra* notes 185-208 and accompanying text.

a proposal that would limit damages available to victims of race discrimination under § 1981.³³⁷ Either of these proposals, if accepted, would have provided victims of race and sex discrimination with a unified approach, and likewise would have disseminated a unified message to employers, namely that discrimination on the basis of any immutable characteristic is equally deplorable and reprehensible. Instead, Congress restored the availability of full damages only to victims of racial discrimination under § 1981.

Second, Congress extensively debated the inadequacies of remedies available to victims of sex discrimination, but despite overwhelming evidence of such dearth, it knowingly adopted an approach that limited a woman's ability to recover under Title VII. Under the arbitrary damages scheme adopted by the 1991 Act, a victim's ability to recover compensatory and punitive damages is based on her employer's number of employees, regardless of the extent of her injuries.³³⁸ Indeed, that discriminatory regime is embodied in the structure of the text of the Civil Rights Act of 1991. A victim pursuing a claim of intentional sex discrimination must rely on Section 102 of the Civil Rights Act, and must comply with the arbitrary damage scheme that limits her combined compensatory and punitive damages to a maximum of \$300,000.³³⁹ In contrast, a victim alleging racial discrimination under § 1981 is directed to pursue damages under Section 101 of the Civil Rights Act and may receive unlimited compensatory and punitive damages.³⁴⁰ Additionally, the text of Section 102 itself very clearly acknowledges the double standard by clarifying that "[n]othing in this section shall be construed to limit the scope of, or the relief available under, section 1977 of the Revised Statutes (42 U.S.C. 1981)."³⁴¹ Therefore, Congress restored full benefits to victims of race discrimination in the same statute in which it placed an arbitrary limit on the remedies available to victims of sex discrimination.

Third, the philosophical disagreement over the proper damages available to victims of intentional sex discrimination was the primary impediment to the passage of the Civil Rights Act in 1990, and the Congressional debate in 1991 again deadlocked on this issue. Representatives from both parties debated the appropriate remedies to afford women. Although Democrats repeatedly asserted that there was no valid justification for a separate system of damages for women, in the end, even they compromised the rights of women and voted in favor of limiting a woman's right to recover damages for intentional sex discrimination.

337. *See supra* notes 242-44 and accompanying text.

338. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102(b)(3).

339. *Id.*

340. *Id.* at § 101.

341. *Id.* at § 102(b)(4).

After two years of political negotiations, Congress enacted a civil rights bill that sent the unfortunate message that sex discrimination was not as intolerable in our society as race discrimination. In the years following passage of the 1991 Act, Senator Kennedy proposed numerous bills to lift the caps from Title VII awards, all of which were unsuccessful.³⁴² Since his death, no other Senator or Representative has stepped forward to challenge this inequity. For more than twenty years, courts have imposed these caps to reduce the recovery of women in sex discrimination cases. We now will examine the consequences of this regime.

III. THE CONSEQUENCES OF COMPROMISE: CONSIDERING THE CHALLENGES CREATED FROM TWENTY YEARS OF LITIGATING GENDER DISCRIMINATION CLAIMS UNDER A TWO-TIERED DAMAGE REGIME

Since their enactment in 1991, the caps on compensatory and punitive damages under Title VII have sparked tremendous controversy. Over the past twenty years, critics have objected to the damage caps on a wide variety of grounds including their ineffectiveness at curbing discrimination,³⁴³ their inconsistent standards,³⁴⁴ and various more serious constitutional arguments including the arbitrary nature of the caps³⁴⁵ and their restriction of the power of

342. See *supra* notes 13-15 and accompanying text.

343. See, e.g., Michael C. Harper, *Eliminating the Need for Caps on Title VII Damage Awards: The Shield of Kolstad v. American Dental Association*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 477, 480 (2011) (advocating the abolishment of caps on damage awards under Title VII because they are inconsistent with the "compensatory and deterrent goals" of Title VII); Michael W. Roskiewicz, *supra* note 16, at 414-15 ("The problem of inadequate compensation does not occur under section 1981 when a victim of racial discrimination suffers an identical injury."); Vanessa Ruggles, Notes & Comments, *The Ineffectiveness of Capped Damages in Cases of Employment Discrimination: Solutions Toward Deterrence*, 6 CONN. PUB. INT. L.J. 143, 155-158 (2006) ("[The caps] diminish the deterrent effect and the societal compensation for egregious conduct by large employers."); Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 WM. & MARY L. REV. 735, 742 (2008) ("[R]eform in the application of punitive damages to Title VII cases . . . which would bring the statute more in line with other areas of employment law.")

344. See Andrea Bough, *Punitive Damages in Title VII Employment Discrimination Cases: Redefining the "Standard"*, 69 UMKC L. REV. 381, 386 (2000) (arguing that the Supreme Court's decision in *Kolstad* came about because courts could not decide on a standard for determining punitive damages under Title VII); Judith J. Johnson, *A Standard for Punitive Damages Under Title VII*, 46 FLA. L. REV. 521, 546-552 (1994) (discussing courts' inconsistent approaches in defining the standards for awarding punitive damages under Title VII); Judith J. Johnson, *A Uniform Standard for Exemplary Damages in Employment Discrimination Cases*, 33 U. RICH. L. REV. 41, 42 (1999) ("[T]he courts have had considerable difficulty in articulating a uniform standard for exemplary damages . . . problems have included the courts' conflicting interpretations of the standard for punitive damages, inability to articulate any standard at all, and arbitrary treatment of punitive damages claims.")

345. See, e.g., Harper, *supra* note 343, at 494 (proposing an alternative to the damage caps under Title VII because the caps are arbitrary); Nelson Lund, *Retroactivity, Institutional Incentives, and the*

juries under the Seventh Amendment.³⁴⁶ Despite these credible objections, the caps remain firmly ensconced in Title VII jurisprudence.

Many litigants have attempted to circumvent the limitations of the caps by pleading parallel claims under both Title VII and state employment discrimination statutes.³⁴⁷ At least twenty-two states have enacted statutes prohibiting discrimination in the workplace,³⁴⁸ but the scope of these statutes differs widely from Title VII, includes broader protections from discrimination³⁴⁹ and applies diverse standards of proof.³⁵⁰ The damages

Politics of Civil Rights, 1995 PUB. INT. L. REV. 87 (1995) (“[C]aps inevitably have arbitrary effects, denying some plaintiffs full compensation for proven injuries [They] compound this arbitrary quality by varying the level of the caps according to the size of the employer.”); Sperino, *supra* note 19, at 243-45.

346. See, e.g., Stacy A. Hickox, *Reduction of Punitive Damages for Employment Discrimination: Are Courts Ignoring our Juries?* 54 MERCER L. REV. 1081, 1097 (2003) (reviewing the reduction of numerous jury awards to plaintiffs in employment discrimination cases); Colleen P. Murphy, *Judicial Assessment of Legal Remedies*, 94 NW. U. L. REV. 153, 157 (1999) (“The use of a statutory cap as a guide for remittitur below capped amounts improperly transforms the cap into an implied schedule of damages.”); Suja A. Thomas, *Re-examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 742-747 (2003) (examining the use of remittitur in federal employment cases over a ten-year period and determining that the doctrine “effectively eliminates” the plaintiff’s right to a jury trial under the Seventh Amendment).

347. See, e.g., *Bradshaw v. School Bd. of Broward Cnty., Fla.*, 486 F.3d 1205, 1207-10 (11th Cir. 2007) (“[I]f Title VII cannot remedy the full extent of her injury because of its damage cap, then the remaining portion of her injury should be remedied as much as possible under the Florida CRA, and vice versa.”); *Hall v. Consolidated Freightways Corp. of Del.*, 337 F.3d 669, 679-80 (6th Cir. 2003) (reversing the district court’s reduction of the jury’s award to comply with Title VII’s cap and concluding that the amount awarded in excess of the cap should have been allocated to the plaintiff’s claim under the Ohio statute); *Gagliardo v. Connaught Labs., Inc.*, 311 F.3d 565, 570-71 (3d Cir. 2002) (affirming the district court’s allocation of damages to maximize a plaintiff’s recovery between dual claims under the Pennsylvania Human Relations Act and the Americans with Disabilities Act, which also is subject to Title VII’s caps); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 510 (9th Cir. 2000) (affirming the district court’s allocation of damages in a sexual harassment suit brought under Title VII and Washington Law Against Discrimination to maximize the plaintiff’s recovery); *Martini v. Federal Nat. Mortg. Ass’n*, 178 F.3d 1336, 1349-50 (D.C. Cir. 1999) (reversing the district court’s reduction of damages awarded by the jury to a victim of sexual harassment and holding that although the Title VII damages were capped at \$300,000 there was no reason to limit recovery under D.C.’s civil rights statute); *Pavon v. Swift Transportation Co.*, 192 F.3d 902, 910-11 (9th Cir. 1999) (affirming the district court’s allocation of damages to a victim of race discrimination who sued under Title VII, the Oregon state law, and § 1981, and rejecting the argument that the entire award should be subject to the caps under Title VII); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 576 (8th Cir. 1997) (apportioning the jury verdict’s award to a sexual harassment plaintiff so that she received the maximum under Title VII and additional damages under the Missouri Human Rights Act).

348. See Hickox, *supra* note 346, at 1083 & app. (containing a table outlining the availability of punitive damages in state employment discrimination statutes).

349. See, e.g., CAL. GOV’T CODE § 12,920 (West 2012) (prohibiting employment discrimination on the basis of sexual orientation); CONN. GEN. STAT. § 46a-60(a)(9) (West 2012) (making it unlawful for an employer to discriminate on the basis of reproductive status or birth control devices); MONT. CODE ANN. §§ 39-2-215, 39-2-216 (West 2012) (forbidding discrimination on the basis of breastfeeding); MICH. COMP. LAWS § 37.2202 (West 2012) (broadly prohibiting many forms of discrimination including weight and marital status); see also *Carr v. United Parcel Serv.*, 955 S.W.2d 832, 836 (Tenn. 1997) (construing the Tennessee Human Rights Act to impose individual liability on any “individual who aids, abets, incites, compels or commands an employer to engage in employment-related discrimination”) *overruled in part by Parker v. Warren Cnty. Util. Dist.*, 2 S.W.3d 170 (Tenn. 1999) (altering standard as to vicarious liability for hostile work environment under the THRA to conform to

available under state statutory regimes also vary widely, with some remedial provisions providing unlimited punitive damages,³⁵¹ others allowing only limited punitive damages,³⁵² others providing for no punitive damages,³⁵³ and still others modeled largely after Title VII with caps applying to both compensatory and punitive damages at virtually identical levels.³⁵⁴ Theoretically, this parallel remedy gives successful plaintiffs an opportunity to allocate portions of the damage award to both the state and federal claims, thereby maximizing the recovery awarded to an individual plaintiff.³⁵⁵ In other words, plaintiffs in certain states can rely on the overlapping federal and state remedies to achieve more complete enforcement of the statutory regime and to recover more complete compensation.

Similarly, plaintiffs who bring dual race and gender claims § Section 1981 and Title VII may also avoid the harshness of the caps by allocating the amount

decisions in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), without reference to individual liability).

350. See, e.g., *Morgan v. New York Life Ins. Co.*, 559 F.3d 425, 440 (6th Cir. 2009) (observing that under the Ohio Civil Rights Act, punitive damages may be awarded only based on a showing of actual malice); *Caudle v. Bristow Optical Company, Inc.*, 224 F.3d 1014, 1027 n.9 (9th Cir. 2000) (discussing the standards for awarding punitive damages under Arizona's employment discrimination statute and noting that these standards are stricter than those under Title VII); *Kimsey*, 107 F.3d at 575 (noting that the standard for awarding punitive damages under the Missouri Human Rights Act is whether the conduct at issue is "outrageous, because of the defendant's evil motive or reckless indifference to the rights of others").

351. See, e.g., *Dixon v. Int'l Bhd. of Police Officers*, 504 F.3d 73, 83 (1st Cir. 2007) (indicating that the Massachusetts employment discrimination statute does not cap or otherwise limit punitive damages); *Brady v. Curators of Univ. of Mo.*, 213 S.W.3d 101, 111 (Mo. Ct. App. 2006) (observing that the Missouri Human Rights Act does not cap punitive damages); *Murillo v. Rite Stuff Foods, Inc.*, 65 Cal. App. 4th 833, 842 (1988) (observing that California's Fair Employment and Housing Act provides unlimited compensatory and punitive damages).

352. See, e.g., the District of Columbia Human Rights Law, D.C. CODE ANN. § 2-1403.13 (West 2012) (allowing the award of civil penalties but capping them in varying amounts based on the employer's number of prior discriminatory practices); the Florida Civil Rights Act of 1992, FLA. STAT. ANN. § 760.11 (West 2012) (capping punitive damages at \$100,000 for civil rights claims); the Tennessee Human Rights Act, T.C.A. §§ 4-21-306(a)(8), 4-21-311(c) (allowing the recovery of punitive damages only in certain cases involving discriminatory housing practices and malicious harassment).

353. See *Gagliardo v. Connaught Labs., Inc.*, 311 F.3d 565, 570-71 (3d Cir. 2002) (explaining that the Pennsylvania Human Relations Act provides unlimited compensatory damages but no punitive damages); see also *Timmons v. City of Tucson*, 830 P.2d 871, 875 (Ariz. Ct. App. 1991) (noting that the Arizona Civil Rights Act does not permit an award of compensatory or punitive damages).

354. See, e.g., *Black v. Pan Am. Lab.*, 646 F.3d 254, 258 n.3 (5th Cir. 2011) (stating that the damages available for employment discrimination claims under the Texas Commission on Human Rights Act are identical but coextensive with the caps available under Title VII); *Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368, 372 (1st Cir. 2004) (affirming the reduction of an award of compensatory and punitive damages to \$300,000, the same cap applicable under both Title VII and the Maine Human Rights Act, ME. REV. STAT. ANN. tit.5, § 4613(2)(B)(8)(e)(iv)); see also *Odom Antennas Inc. v. Stevens*, 966 S.W.2d 279, 282 (Ark.App. 1998) (upholding an award of compensatory and punitive damages under the Arkansas Civil Rights Act, Ark. Code. Ann. § 16-123-107, because the award fell within the limits of the statutory caps and were based on the employer's number of employees).

355. See *supra* note 347 and accompanying text; see also *Magee v. United States*, 976 F.2d 821, 822 (2d Cir. 1992) (concluding that when a federal jury renders a single verdict under a federal and state cause of action, the plaintiff should be paid in a way that permits the fullest recovery possible).

of damages exceeding the Title VII cap to the § 1981 claim.³⁵⁶ By attaining overlapping remedies, these plaintiffs further advance the stated goals of employment discrimination statutes, obtain more complete relief, and deter future misconduct.

This strategy is not without limits, however. First, it imposes upon courts the added complication of allocating the damages, and some courts have not allocated them proportionately to maximize a plaintiff's recovery.³⁵⁷ Title VII also forbids the court from "inform[ing] the jury of the limitations [on damages,]"³⁵⁸ thereby shifting to the courts the responsibility of remitting awards exceeding the caps or allocating them between the state and federal statutes. This allocation can raise legitimate federalism, separation of powers, and due process concerns, given that both states and the federal government have "legitimate interests" in legislating within this area.³⁵⁹ In particular, similar claims of gender discrimination are worth more in some states than others.³⁶⁰

Courts also have misapplied the caps to create unnecessary reductions in verdicts.³⁶¹ While courts admittedly are required to reduce verdicts to fit within

356. See, e.g., *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 798 (8th Cir. 2004) (discussing the differences between Title VII damages and damages under § 1981 and noting the Title VII caps do not apply to § 1981 actions); *Swinton v. Potomac Corp.*, 270 F.3d 794, 820 (9th Cir. 2001) (affirming a jury's award of \$1 million in punitive damages because Congress did not apply the caps to § 1981); *Pavon*, 192 F.3d 902 at 910 (affirming the district court's entry of judgment in favor of plaintiff on verdict under Title VII, § 1981, and a state law claim and explaining that plaintiffs need not choose between those remedies).

357. See, e.g., Rebecca Hollander-Blumoff & Matthew T. Bodie, *The Effects of Jury Ignorance About Damage Caps: The Case of the 1991 Civil Rights Act*, 90 IOWA L. REV. 1361, 1372-75 (2005) (discussing cases in which judges have "grapple[d]" with how to allocate damages between federal and state statutes).

358. 42 U.S.C. § 1981a(c)(2) (2006).

359. See Sperino *supra* note 19, at 235; see generally Catherine M. Sharkey, *Punitive Damages as Social Damages*, 113 YALE L.J. 347, 428-34 (2003) (identifying several due process concerns that might arise in punitive damages awards occurring in multiple states); Michael B. Kelly, *Do Punitive Damages Compensate Society?*, 41 SAN DIEGO L. REV. 1429, 1434-37 (2004) (discussing due process issues that arise when conduct is unlawful in some but not all states and how to determine the beneficiary of a punitive damages award).

360. Compare *Paterson v. State*, 915 P.2d 724, 729-30 (Idaho 1996) (affirming an award of \$1,000 in punitive damages under the Idaho Human Rights Act in a sexual harassment case in which the plaintiff established over 275 instances of harassing conduct), and *Fall v. Indiana Univ. Bd. of Tr.*, 33 F. Supp. 2d 729 (N.D. Ind. 1998) (remitting a jury's award of punitive damages from \$800,000 to \$50,000 in a case involving a sexual assault with claims under Title VII and Indiana state law), with *Weeks v. Baker & McKenzie*, 63 Cal.App.4th 1128, 1166-68 (Cal. Ct. App. 1998) (affirming \$3.5 million punitive damages award against a law firm in a sexual harassment action), and *Greenbaum v. Handelsbanken*, 67 F. Supp. 2d 228 (S.D.N.Y. 1999) (affirming a \$1.25 million punitive damage award against a bank that had subjected plaintiff to a pattern of sex discrimination and retaliation over a six-year period), and *Borg-Warner Protective Services Corp. v. Flores*, 955 S.W.2d 861, 868-70 (Tex. App. Corpus Christi 1997) (affirming jury's punitive damages award of \$2,225,000 in a sexual harassment suit including claims of sexual assault brought under Title VII and state law).

361. See, e.g., *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1067-68 (8th Cir. 1997) (determining that a jury's award of \$7 million in punitive damages in a Title VII and § 1981 claim should be reduced to \$300,000 despite the fact that claims under § 1981 are not capped); *Laymon v. Lobby House, Inc.*, 613

the Title VII caps, some courts have reduced the awards further³⁶² by applying the Supreme Court's standards in *BMW of North America, Inc. v. Gore*.³⁶³ This dual review is unnecessary, given that Congress satisfied any due process concerns by establishing the limits of punitive relief through the imposition of the statutory caps in Title VII.³⁶⁴

Many legislators, judges and scholars have suggested reforms to the caps found in Title VII. Some commentators have argued that the basis of the caps should be altered so that the capped amount corresponds to the egregiousness of the employer's conduct and not the number of employees.³⁶⁵ Under this proposal, punitive damage awards could increase incrementally based on repeated jury findings that the employer intentionally discriminated under Title VII, and any subsequent awards would have a greater capacity to deter.³⁶⁶ This reform does not fully compensate the victim, but instead "define[s] the amount of the plaintiff's harm for which the defendant will be held responsible."³⁶⁷

Other commentators have suggested that the caps be based on an employer's net worth, rather than its number of employees, because such a

F.Supp.2d 504, 513-14 (D. Del. 2009) (justifying the reduction of a jury's award in a sexual harassment and retaliation case of \$100,000 in punitive damages to \$25,000 because there was no evidence "of any physical contact or abuse" and because "most of the appalling conduct happened during [a single] party"); *Iannone v. Frederic R. Harris, Inc.*, 941 F.Supp. 403, 414-16 (S.D.N.Y. 1996) (reducing jury's punitive damage award from \$250,000, which was within the statutory cap under Title VII, to \$50,000 because the defendant's conduct was not "as reprehensible" as in other cases).

362. See, e.g., *Hickox*, *supra* note 346, at 1090, 1093 ("The test established in *BMW* for evaluating the amount of punitive damage awarded in common law litigation does not transfer well to the employment discrimination arena . . . [because it] ignores the fundamental difference between claims of discrimination and claims aimed toward economic recovery, as in *BMW*"); see also Sandra Sperino, *The New Calculus of Punitive Damages for Employment Discrimination Cases*, 62 OKLA. L. REV. 701, 704, 714 (2010) (noting that the *BMW* case and other Supreme Court "seminal" punitive damages cases involve claims of "fraud, deceit, and intentional infliction of emotional distress" rather than merely presenting employment discrimination claims).

363. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996) (directing reviewing courts to consider the following three factors in determining whether an award of punitive damages satisfies due process or is an excessive or arbitrary punishment: "the degree of reprehensibility of the [defendant's misconduct]; the disparity between the harm or potential harm suffered by [the plaintiff] and [the] punitive damages award; and the difference between [the punitive damages awarded by the jury] and the civil penalties authorized or imposed in comparable cases.").

364. See Joseph A. Seiner, *Punitive Damages, Due Process, and Employment Discrimination*, 97 IOWA L. REV. 473, 491-93 & n.158 (2012) ("There can be little doubt . . . then, that the courts need not reach the due process issues raised in *Gore* and *State Farm* when addressing employment discrimination claims brought under Title VII.") (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 501-02 (2008) (examining a punitive damages award under federal maritime law); *Abner v. Kansas City S. R. Co.*, 513 F.3d 154, 164 (2008) ("[Because] Congress has effectively set the tolerable proportion [for Title VII claims], the three-factor *Gore* analysis is relevant only if the statutory cap itself offends due process. It does not and, as we have found in punitive damages cases with accompanying nominal damages, a ratio-based inquiry becomes irrelevant."); see generally *Romano v. U-Haul Int'l*, 233 F.3d 655, 660 (1st Cir. 2000) ("[A] punitive damages award that comports with a statutory cap provides strong evidence that the award does not violate the defendant's due process rights.").

365. See, e.g., Sperino, *supra* note 362, at 726-27; Ruggles, *supra* note 343, at 161-62.

366. See, e.g., Ruggles, *supra* note 343, at 161-62.

367. See Sperino, *supra* note 362, at 726-27.

formulation would have a greater capacity to punish employers who engage in discriminatory conduct.³⁶⁸ In part, this proposal attempts to answer criticism that the current caps do not adequately deter large employers because the fourth tier does not differentiate between employers with 501 employees and those with one million employees.³⁶⁹ At the very least, some commentators have suggested that the tiered system should be modified to address this disparity by creating more tiers for extremely large employers.³⁷⁰

Still other scholars have proposed a liquidated damages model,³⁷¹ similar to the current remedial provisions of the Age Discrimination in Employment Act³⁷² and the Fair Labor Standards Act.³⁷³ This proposal would entitle victims of discrimination to an amount equal to the compensatory damages awarded by the jury.³⁷⁴ Under this proposal, the caps would apply only to the compensatory damage portion of the award, and thus, the victim's potential for recovery would be expanded from the current system but not unlimited.³⁷⁵

The most frequently proposed reform, however, is the complete elimination of the caps.³⁷⁶ Subsequent to the enactment of the Civil Rights Act, Senator Kennedy repeatedly proposed legislation, beginning with the Equal Remedies Act of 1991, to eliminate the caps.³⁷⁷ The proposal to eliminate the caps is based on similar principles articulated in the 1990 and 1991 legislative debates, namely, that they "create an unjustifiable hierarchy" between victims of intentional discrimination under Title VII and those pursuing claims under § 1981.³⁷⁸ Specifically, this hierarchy is "unconscionable and must be corrected" because the caps "value[] injuries suffered by women . . . less than the same

368. See, e.g., Ruggles, *supra* note 343, at 160-61.

369. See, e.g., Ruggles, *supra* note 343, at 155-57; Stuart J. Ishimaru, *Fulfilling the Promise of Title VII of the Civil Rights Act of 1964*, 36 U. MEM. L. REV. 25, 31 (2005) (observing that the caps under Title VII enable large employers to "buy their way out of discrimination" without changing their employment practices).

370. See, e.g., Ruggles, *supra* note 343, at 158-59.

371. See Seiner, *supra* note 364, at 775-83.

372. 29 U.S.C. §§ 621-634 (2006).

373. 29 U.S.C. §§ 201-219 (2006).

374. See Seiner, *supra* note 364, at 775-78.

375. *Id.*

376. See, e.g., Harper, *supra* note 343, at 507 (advocating that Congress remove the caps under Title VII because they are unnecessary in light of *Kolstad*); Judith Lichtman, *Almost There: For Women, the Civil Rights Act of 1991 is a Move in the Right Direction*, 19 SUM. HUM. RTS. 16, 17 (1992) (asserting that the caps should be removed because they prevent full recovery and apply regardless of the severity of the plaintiff's injury); Roskiewicz, *supra* note 16, at 414-15, 418 (arguing that the caps on compensatory damages should be removed to "enable courts to fully compensate victims of intentional discrimination," and to "strengthen the message that intentional, malicious discrimination has no place in society" and emphasizing that "[o]nly by eliminating the caps on compensatory and punitive damages available to Title VII discrimination victims can Congress accomplish its initial goal of absolute equality"); AVON L. SERGEANT, *Are the Legal Remedies Available to Sexually Harassed women Adequate?*, 20 WOMEN'S RTS. L. REP. 185, 190 (1999) ("The damage caps that are imposed under Title VII should be removed.").

377. See *supra* notes 13-15 and accompanying text.

378. See S. REP. NO. 102-286f, at 4 (1992).

injuries suffered by racial or ethnic minorities.”³⁷⁹ Moreover, the proposal asserts that the caps create “arbitrary, fixed ceilings on the amount of damages” that women can recover because the caps “apply without regard to the egregiousness of the defendant’s actions, the injuries suffered by the victim, or the need to deter others from engaging in similar actions.”³⁸⁰ Additionally, the caps “protect the worst violators” because they shield employers who engage in the most “outrageous” conduct “from full liability.”³⁸¹ In other words, the caps do not make the costs disappear.³⁸² Rather, for the worst violators, the caps “simply shift[] those costs, forcing the victim herself to pay for a portion of the harm caused by [that] defendant.”³⁸³ Title VII’s current two-tiered approach to damages simply “defies logic,” as “[t]here is no justification for denying . . . equal remedies” to women.³⁸⁴

Thus, the ultimate question is whether there is any legitimate justification for retaining the caps on damages. This question can be answered by examining the original justifications for the caps and determining whether they remain valid today. In other words, even if the original justifications for capping damages had some legitimacy in 1991, they may not remain viable more than twenty years later. The Bush Administration and its allies advanced three general justifications for capping punitive damages during the 1990 and 1991 debates surrounding the Civil Rights Acts. Therefore, we will review the merits of each of these justifications to determine their contemporary viability.

First, the Bush Administration argued that unlimited damages would encourage frivolous lawsuits³⁸⁵ and that attorneys would be the principal beneficiaries of allowing damages under Title VII. The Administration went so

379. *See id.* at 5.

380. *See id.* at 3.

381. *See id.* at 5.

382. *See id.* at 13.

383. *Id.*

384. *See id.* at 13, 15.

385. *See* PRESIDENT’S MESSAGE TO THE SENATE RETURNING WITHOUT APPROVAL S. 2104, THE CIVIL RIGHTS ACT OF 1990, S. DOC. NO. 101-35 at 2 (2d. Sess. 1990) (justifying the veto of the Civil Rights Act of 1990 because “[t]he bill contains a number of provisions that will create unnecessary and inappropriate incentives for litigation”); MEMORANDUM OF THE ATTORNEY GENERAL ACCOMPANYING THE PRESIDENT’S VETO MESSAGE, S. DOC. NO. 101-35, at 10 (supporting the President’s veto by explaining that the damages provision in the Civil Rights Act of 1990 “will create unnecessary and counterproductive litigation, serving the interests of lawyers far more than the interests of aggrieved employees”); *see also* 137 CONG. REC. 29,034 (1991) (statement of Sen. Dole) (indicating the caps were necessary to “significantly” reduce the incentive for filing frivolous lawsuits); 137 CONG. REC. 29,041 (1991) (statement of Sen. Bumpers) (discussing the “inordinate fear” of unlimited compensatory and punitive damages and acknowledging that some lawyers file meritless lawsuits because of pure settlement value alone); *but see* 137 CONG. REC. 13,547 (1991) (Statement of Rep. Slaughter) (“[That’s] what some opponents said on the House floor about the 1988 bill. One member, for example proclaimed: If this bill becomes law, without doubt there will be an open floodgate of lawsuits, making it extremely difficult for small businesses to stay in business. In fact, the Justice Department tells me that only 12 rulings have been made in 3 years. The floodgates did not open then, and they won’t now. . . . And can anyone name a business that failed as a result of the [Civil Rights Restoration Act]?”).

far as to characterize the bill as nothing more than “a lawyer’s relief act.”³⁸⁶ This argument is easily refuted by the attorneys’ fee provision in Title VII. Under this provision, attorneys’ fees may only be awarded to a prevailing party.³⁸⁷ Thus, when a plaintiff’s frivolous Title VII claim is dismissed, her attorney’s hope of recovering his fee likewise is lost.³⁸⁸

Additionally, the Bush Administration contended that compensatory and punitive damages were not necessary at all and defended the remedial scheme existing under Title VII on the grounds that the limited remedies of injunctive and declaratory relief provided “adequate deterrence.” The administration further argued that the availability of damages “transformed Title VII into a statute under which conflict in the workplace will be exacerbated and protracted, with costly litigation as the weapon of first, rather than last, resort.”³⁸⁹

This argument likewise has long been discredited. Indeed, supporters of the Civil Rights Act refuted the adequate remedial scheme argument during the four initial congressional hearings held in 1990.³⁹⁰ During these hearings, numerous witnesses recounted details of sexual harassment and the inadequacies of equitable remedies to redress the harm suffered as a result of such discrimination.³⁹¹ Additionally, members of Congress and numerous expert witnesses corroborated the witnesses’ testimony by offering statistics documenting the rising prevalence of sexual harassment in the workplace and employers’ lack of incentive to achieve systematic change under Title VII’s equitable structure.³⁹² Quite simply, by the conclusion of these hearings, “proponents of the 1990 bill [had] accomplished their twin objectives of establishing the need for restorative legislation . . . and flushing out the principal conceptual weaknesses” of Title VII.³⁹³ After these hearings, the only remaining issue was not whether a monetary remedy should be made available to victims of sexual harassment, but rather the amount and label that should be assigned to such a remedy.

This argument remains true today as current EEOC statistics document that the number of sexual discrimination claims (including those with allegations of

386. See 136 CONG. REC. 17,660 (1990) (statement of Sen. Hatch); see also S. REP. NO. 101-315 (1990) (minority views) (referring to the bill as a “Litigation Bonanza For Lawyers”).

387. See 42 U.S.C. § 2000e-5(k) (2006) (“In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee (including expert fees) as part of the costs . . .”).

388. See e.g., Mary L. Toppliff, *Right of Prevailing Plaintiffs to Recover Attorneys’ Fees Under § 706(k) of Civil Rights Act of 1964* (42 U.S.C.A. § 2000e-5(k)), 132 A.L.R. FED. 345 §15[a] (1996).

389. See 136 CONG. REC. 17,660 (1990) (statement of Sen. Hatch); see also S. REP. NO. 101-315 (1990) (minority views) (referring to the bill as a “Litigation Bonanza For Lawyers”).

390. See *supra* notes 115-42 and accompanying text.

391. See *supra* notes 115-42 and accompanying text.

392. See *supra* notes 121-42 and accompanying text.

393. See Govan, *supra* note 98, at 58.

sexual harassment) continues to increase, with approximately thirty percent of all EEOC charges filed in the last sixteen years containing allegations of sex discrimination.³⁹⁴ This establishes that sex discrimination remains a significant problem in the workforce. During the last five years, EEOC charges containing allegations of sex discrimination significantly outnumber charges containing claims of national origin,³⁹⁵ disability,³⁹⁶ age,³⁹⁷ and religious³⁹⁸ discrimination. Thus, employers not only lacked sufficient incentive to eradicate sex discrimination in 1991, but these statistics document that Title VII's capped damages scheme fails to deter sex discrimination in today's workplace.

Further, the Bush Administration and its allies argued that innocent employers could be liable for punitive damages.³⁹⁹ Supporters of the legislation responded by referring to language in Section 8 of the act that "makes it clear that damages are available only in intentional discrimination cases, not in disparate impact cases."⁴⁰⁰ Additionally, Congress and the Supreme Court have addressed these concerns independently of the damages provision in the Civil Rights Act. First, Congress created numerous employer defenses to claims of employment discrimination that serve as additional hurdles to any recovery of punitive damages.⁴⁰¹ Likewise, the Supreme Court

394. See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *Charge Statistics: FY 1997 Trough FY 2012*, (providing statistics for EEOC charges from 1997 to 2012) (last visited Oct. 7, 2013), <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

395. According to the EEOC, charges containing claims of national origin discrimination consisted of 10.9% of the total EEOC charges received in 2012, and 11.8% of the total charges received in 2011. *Id.*

396. Charges containing claims of disability discrimination consisted of 26.5% in 2012 and 25.8% of charges in 2011. *Id.*

397. Current EEOC statistics establish that the total number of charges of discrimination containing allegations of age discrimination comprised 23% in 2012 and 23.5% in 2011. *Id.*

398. Likewise, current EEOC statistics establish that only 3.8% of all charges of discrimination filed in 2012 and 4.2% of all charges filed in 2011 contained allegations of religious discrimination. *Id.*

399. See, e.g., *Vol I, supra* note 115, at 505 (testimony of Mr. Mark Dichter, attorney with Morgan, Lewis & Bockius) (expressing concern that under the act "[employers] could be found liable for engaging in disparate impact discrimination . . . without any proof that they even knew about the practice at all"); *id.* at 471 (statement of Professor Pamela L. Perry with Rutgers School of Law) ("[The Act] requires employees to demonstrate that the proved impact is attributable to the employer, not some other innocent cause"); *Vol II., supra* note 115, at 519 (prepared statement of Glen D. Nager, attorney, Jones, Day, Reavis and Pogue) (declaring that the act "is fundamentally unsound" because it "ignores the possibility" that "there are a myriad of innocent causes" that could lead to a "statistical imbalance" in an employer's workforce); *Vol. III, supra* note 115, at 628 (prepared statement of Commissioner Carl A. Anderson) (asserting that it would be unjust if the Civil Rights Act caused innocent parties to be found guilty of discrimination).

400. See 136 CONG. REC. 17,657 (1990) (statement of Sen. Kennedy); see also 136 CONG. REC. 22,176 (1990) (including the final language of the Civil Rights Act as passed by the House which provided for damages only in intentional discrimination cases).

401. See, e.g., 42 U.S.C. § 2000e-2(e)(1) (2006) (establishing the statutory defense of a "bona fide occupational qualification," which allows employers to intentionally discriminate on the basis of gender and other characteristics under certain circumstances); 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006) (allowing an employer to show a legitimate business reason for the allegedly discriminatory action); 42 U.S.C. § 5(g)(2)(B) (2006) (permitting an employer to establish that it "would have taken the same actions" as a defense to mixed motive case); 42 U.S.C. § 1981a(b)(1) (2006) (requiring an employee to

has limited an employer's liability, under the *respondeat superior* doctrine, in sexual harassment suits for acts of its agents.⁴⁰² These legislative and judicial defenses are unique to employment litigation and provide sufficient safeguards to prevent innocent employers from being inappropriately punished for discriminatory conduct with or without caps.

Finally, the Bush Administration challenged the impact that damages might have on small businesses, arguing that the imposition of unlimited awards would effectively bankrupt numerous small employers, thereby harming the national economy.⁴⁰³ This argument was unpersuasive from its inception because the provisions of Title VII do not apply to businesses employing fewer than fifteen employees.⁴⁰⁴ This minimum employee threshold excludes a significant number of employers from Title VII's antidiscrimination provisions, and many scholars estimate that around 15 percent of the workforce, or approximately 19 million employees, are not covered as a result of Title VII's small business exclusion.⁴⁰⁵ In other words, the definition of the term employer in Title VII is a distinct and separate provision⁴⁰⁶ from the provision capping

establish, as a prerequisite to the recovery of punitive damages, that the employer engaged in intentional discrimination and acted "with malice or with reckless indifference to the federally protected rights" of the employee).

402. See, e.g., *Vance v. Ball State Univ.*, 133 S.Ct. 2434, 2443 (2013) (holding that "an employer may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, i.e., to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits'" (citing *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761 (1998)); *Kolstad v. Am. Dental Assoc.*, 527 U.S. 526, 545 (1999) (establishing that an employer is not liable for punitive damages under Title VII for acts of its agent that "are contrary to the employers' good faith efforts to comply with Title VII"); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (creating an affirmative defense for employers to claims of sexual harassment by supervisors in cases without a tangible employment action).

403. See, e.g., 136 CONG. REC. 17,990 (1990) (statement of Sen. Bumpers) ("[T]he thing that causes me more pause about his bill than anything else is punitive damage[s]. . . . [T]hat is of no consolation to a small businessman. My State is virtually nothing but small business. . . . [L]et us say a guy has worked all his life. He has 100 employees and maybe he is even worth \$1 million. . . . It is that Damocles sword is hanging over your head when a jury sitting there is deliberating and debating your very existence and knowing full well that the plaintiff has asked for \$3 or \$4 million in punitive damages and may get \$1 million, which not only puts you out of business but puts another 100 people out of a job"); 137 CONG. REC. 29,042 (1991) (statement of Sen. Kasten) (declaring that the purpose of the caps on damages was to protect small businesses).

404. 42 U.S.C. §2000e-(b) (2006).

405. See, e.g., Richard Carlson, *The Small Firm Exception and the Single Employer Doctrine in Employment Discrimination Law*, 80 ST. JOHN'S L. REV. 1197, 1999 (2006) ("Legislative favoritism for small firms has important implications for the effectiveness of federal labor policy. Firms small enough to be exempt from Title VII employ more than 19 million employees . . . or more than 16% of the national workforce."); Elsa Miller, *Patterson v. McLean Credit Union: Preventing Backdoor Discrimination Acts or Closing the Door?*, 10 N. ILL. U. L. REV. 303, 322 (1990) (relying on a study conducted in 1988 regarding plaintiffs' reliance on Section 1981 to combat race discrimination rather than Title VII, and concluding that "approximately 86.3 percent of all work establishments . . . and 10.7 million workers" are not covered by Title VII).

406. Compare 42 U.S.C. § 2000e(b) (2006) (defining the term employer as "a person engaged in an industry affecting commerce who has fifteen or more employees..."), with 42 U.S.C. § 1981a(b)(3)

damages for victims of intentional discrimination and can continue to protect small businesses even if the caps are removed. Moreover, § 1981 has never catered to the small business concern as it applies to all employers, regardless of size, and places a greater priority on reducing racial discrimination than on catering to small businesses. Indeed, § 1981's lack of a minimum employee threshold is another example of § 1981's more resounding commitment to eradicating race discrimination.⁴⁰⁷ By contrast, Title VII's tolerance of sex discrimination committed by this substantial composition of the workforce further reinforces the misguided view that sex discrimination is less normatively harmful in our society than race discrimination.⁴⁰⁸

Since the initial arguments for caps are not persuasive, we next need to ask if any legitimate justification remains for compromising the value of sex discrimination claims under Title VII. Surely we haven't bought into the notion, advanced by Glen Nager and Ralph Baxter during the 1990 congressional hearings, that sex discrimination is more of a social problem and, therefore, an inherent and unavoidable aspect of the modern workplace.⁴⁰⁹ Even if that argument were plausible when it was asserted in 1990, it has since been refuted and has no place in today's society.

The harder question to answer is whether society views sex discrimination as a lesser evil to race discrimination and, thus, has accepted the premise that claims of sex discrimination should be valued lower than those of race discrimination.⁴¹⁰ To some extent, the Supreme Court has increased this

(2006) (establishing the first tier of caps on an employer's damages for those employers with 15 to 100 employees at \$50,000 in combined compensatory and punitive damages).

407. See Robert M. Weems, *Selected Issues and Trends in Civil Litigation in Mississippi Federal Courts*, 77 MISS. L.J. 977, 1022 (2008) ("[P]laintiffs alleging race discrimination (but not sex discrimination) will usually find greater recovery under 42 U.S.C. § 1981 . . . [T]he failure to recognize the benefits available under § 1981, as compared to Title VII, constitutes one of the greatest 'litigation traps' for plaintiffs in employment discrimination cases").

408. See Jeffrey A. Mandell, *The Procedural Posture of Minimum Employee Thresholds in Federal Antidiscrimination Statutes*, 72 U. CHI. L. REV. 1047, 1076 (2005) ("Congress explicitly limited its scope to employers with a least fifteen employees, knowing that such a requirement exempted the vast majority of employers.").

409. See *Vol. II*, *supra* note 115, at 630 (testimony of Glen D. Nager); *id.* at 55 (testimony of Ralph Baxter).

410. See, e.g., Deborah Brake, et al., *Centennial Panel, Two Decades of Intermediate Scrutiny: Evaluating Equal Protection for Women*, 6 AM. U. J. GENDER & L. 1 (1997) ("[T]wenty-five years ago, it was a basic tenet of feminist legal doctrine that what we wanted was strict scrutiny for sex discrimination. And here we are twenty-five years later, and we have not gotten strict scrutiny for sex discrimination. We have got an awful lot of things that are not quite strict scrutiny") (reprinting the statement of Donna Lenhoff, General Counsel and Director of the Work and Family Programs at the Women's Legal Defense Fund); Deborah L. Brake, *Re-Examining Gender Scrutiny: A Symposium Discussion, Sex as a Suspect Class: An Argument for Applying Strict Scrutiny to Gender Discrimination*, 6 SETON HALL CONST. L.J. 958, 963 (1996) (documenting that the application of intermediate scrutiny to gender discrimination claims in the lower courts has resulted in inconsistent results); Kim Shayo Buchanan, *Sexuality & Gender Law: Assessing the Field, Envisioning the Future*, 57 UCLA L. REV. 1149, 1149-50 (2010) (arguing that there is a "double standard" in the Supreme Court's Equal Protection jurisprudence); Martha F. Davis, *The Equal Rights Amendment: Then and*

perception by assigning an intermediate standard of review to gender claims brought under the Constitution while reserving strict scrutiny review only for race claims.⁴¹¹ While the Court certainly has not been unanimous on the issue of the appropriate level of scrutiny to apply to sex discrimination claims,⁴¹² the Court's contradictory jurisprudence has heightened the societal perception that sex discrimination is a lesser evil than race discrimination in American society.

Initial opinions from the Court on the issue indicated that gender classifications should be afforded the same strict scrutiny as classifications based on race.⁴¹³ Justice Brennan, in writing for a plurality of four Justices in *Frontiero*, clearly explained that sex discrimination is as severe and unjust as race discrimination and emphasized the similarities between the historical deprivation of legal rights of women and racial minorities:

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage. . . . [I]ndeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. . . . And

Now, 17 COLUM. J. GENDER & L. 419 (2008) (considering the modern impact of an Equal Rights Amendment to the Constitution and asserting, among other things, that it "would result in strict scrutiny for governmental policies that discriminate based on sex"); Lindsey Sacher, *From Stereotypes to Solid Ground: Reframing the Equal Protection Intermediate Scrutiny Standard and its Application to Gender-Based College Admissions Policies*, 61 CASE W. RES. L. REV. 1411, 1412 (2011) (arguing that the Court's immediate scrutiny is less muddled in the First Amendment context than with Equal Protection cases because "the judicial discourse has not been dominated by the unmanageable concept of gender group 'stereotypes'"); Ann Shalleck, *Revisiting Equality: Feminist Thought about Intermediate Scrutiny*, 6 AM. U. J. GENDER & L. 31 (1997) (reaffirming the symbolic and political importance of strict scrutiny to Equal Protection claims for women while discussing the practical importance of the judicial degree of scrutiny).

411. See, e.g., *Reed v. Reed*, 404 U.S. 71, 76 (1971) (applying for the first time a higher level of scrutiny, rather than rational basis review, when evaluating a claim of sex discrimination brought under the Equal Protection Clause); *Craig v. Boren*, 429 U.S. 190, 210 (1976) (Powell, J., concurring) ("*Reed* and subsequent cases involving gender-based classifications make clear that the Court subjects such classifications to a more critical examination than is normally applied when 'fundamental' constitutional rights and 'suspect classes' are not present."); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("[W]e apply different levels of scrutiny to different types of classifications. . . . Classifications based on race or national origin . . . are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.")

412. Compare *Goesaert v. Cleary*, 335 U.S. 464, 465-67 (1948) (applying only rational basis review to a gender classification), with *Reed*, 404 U.S. at 76 (applying an intermediate review to a sex classification challenged under the Equal Protection Clause), and *Frontiero v. Richardson*, 411 U.S. 677, 682-83 (1973) (plurality opinion) (advocating the application of strict scrutiny rather than intermediate scrutiny to gender classifications).

413. See *Frontiero*, 411 U.S. 677, 682-83 (1973).

although blacks were guaranteed the right to vote in 1870, women were denied even that right – which is itself “preservative of other basic civil and political rights” – until adoption of the Nineteenth Amendment half a century later.⁴¹⁴

Despite the plurality’s arguments for the application of strict scrutiny to gender classifications, the Court ultimately rejected this approach, choosing instead to apply only intermediate scrutiny to gender classifications.⁴¹⁵ When Justice Rehnquist explained the justifications for applying an intermediate level of scrutiny to sex challenges, he attempted to draw distinctions between race and gender discrimination claims:

[T]here are sufficient differences between race and gender discrimination. . . . Racial groups comprise numerical minorities in our society, warranting in some situations a greater need for protection, whereas the population is divided almost equally between men and women. Furthermore, while substantial discrimination against both groups still lingers in our society, racial equality has proved a more challenging goal to achieve on many fronts than gender equality.⁴¹⁶

Several Justices have lobbied strongly for the application of strict scrutiny to gender claims, including Justice Brennan’s plurality in *Frontiero*,⁴¹⁷ and Justice Stevens, who supports entirely the abrogation of tiered scrutiny contending that “[t]here is only one Equal Protection Clause.”⁴¹⁸ Similarly, Justice O’Connor and Justice Ginsburg believe that the possibility of applying strict scrutiny to gender claims is not foreclosed completely.⁴¹⁹ The majority of the Court still supports the application of intermediate scrutiny, however.⁴²⁰

414. *Frontiero*, 411 U.S. at 684-685 (citations omitted).

415. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1982) (emphasizing that the government had to establish “an exceedingly persuasive justification” to support its gender classification); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (requiring that gender based classifications serve “important governmental objectives”).

416. *J.E.B. v. Alabama*, 511 U.S. 127, 154-55 (1994) (Rehnquist, J., dissenting) (citations omitted).

417. *Frontiero*, 411 U.S. at 682-85 (1973) (Brennan, J., Douglas J., White, J., Marshall, J.).

418. *Craig*, 429 U.S. at 211 (Stevens, J., concurring).

419. Justice O’Connor applied intermediate scrutiny in *Hogan*, 458 U.S. at 724, but because the statute in question failed to meet that standard, it was unnecessary to determine whether strict scrutiny might apply instead. See *id.* at 724 n.9 (“We need not decide whether classifications based on gender are inherently suspect.”). See also *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 26 n.* (1993) (Ginsburg, J., concurring) (“[I]t remains an open question whether ‘classifications based upon gender are inherently suspect.’”) (citing *Hogan*, 458 U.S. at 724 n.9 (1982)). The Court uses the term “inherently suspect” to describe classifications warranting strict scrutiny. See *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (“[T]he Court’s decisions have established that classifications based on alienage, like those based on nationality or race, are *inherently suspect* and [thus] subject to close judicial scrutiny.”) (emphasis added).

420. See *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721, 754 (2003) (Kennedy, J., dissenting) (arguing that “heightened scrutiny” is the appropriate level of review to be applied in gender discrimination cases).

While it is true that the standard of review applied to race and gender challenges under the Equal Protection Clause is a different analysis than is applied in the employment context, it also is true that in both contexts, the predominant message has been the same: race discrimination is deserving of stronger protections than sex discrimination.

The Court's stance on gender discrimination and Congress's adoption of the discriminatory damages regime matter because of the basic principle that laws serve as important symbols of what society values.⁴²¹ Justice Brennan warned in *Frontiero* that discriminatory laws encourage discriminatory behavior when he stated that, "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."⁴²² So, too, Title VII's cap on damages for claims of gender discrimination serves to reinforce the view that women are regarded as second-class citizens. This legislative ideology codifies and even encourages discriminatory behavior against the classes who are most vulnerable.⁴²³

Whatever the reason, the Title VII caps may no longer be justified by claims of novelty. Title VII is no longer a new statute and claims of sex harassment and discrimination are no longer a novel challenge for employers. Employers throughout this country acquired their awareness of Title VII's prohibition of sex discrimination with its enactment in 1964, and these same employers have been subject to limited damage exposure for intentional instances of sex discrimination since the enactment of the Civil Rights Act of 1991. Thus, employers can neither claim that subjecting them to damage awards for acts of sex discrimination will catch them unfairly by surprise, nor can they claim that damage awards punish innocent employers given the statutory requirement that damages only are allowed in instances of intentional discrimination.

421. See, e.g., Larry D. Barnett, *Social Productivity, Law, and the Regulation of Conflicts of Interest in the Investment Industry*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 793, 823 (2006) ("Laws act as a symbol of important social values not only through new legal doctrines that emerge from constitutional (and statutory) interpretation but also through existing law. . . . that is applied to high-profile personalities."); Michael H. Shapiro, *Regulation as Language: Communicating Values by Altering the Contingencies of Choice*, 55 U. PITT. L. REV. 681, 687 (1994) ("If society wishes to maintain certain preferences, attitudes, beliefs and dispositions, and if the creation and operation of particular regulatory or non-regulatory systems reinforces or attenuates them, then the ultimate justification or condemnation of regulation requires a perspective that sees regulation as the 'communication' of basic societal ideas.").

422. *Frontiero*, 411 U.S. at 686-87 (1973).

423. See Robert Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 55 (2003).

IV. CONCLUSIONS OF A COMPROMISED DAMAGE STRUCTURE

Congress has never unequivocally committed to eradicating sex discrimination in employment. Congress added the prohibition of sex discrimination to Title VII on the eve of its enactment in 1964, and many scholars believe that the purpose of that amendment was to defeat the legislation, not to demonstrate its intolerance of sex discrimination in the workplace. Even after sex was added as a protected characteristic under Title VII, Congress failed to give the statute teeth to enforce its provisions and only provided that its victims recover equitable relief and not damages. Several decades later, Congress essentially was forced by inconsistent Supreme Court decisions to make damages available to victims of sex discrimination. In doing so, Congress made a conscious and deliberate decision not only to limit the punitive damages afforded to victims of sex discrimination, but also to cap their ability to recover full compensatory damages. By limiting both a jury's ability to deter and punish discrimination and a victim's quest to be made whole, Congress sent the unfortunate message that sex discrimination in employment is somehow more tolerable than race discrimination. It is not.

For more than twenty years, Congress has retained the same caps for victims of intentional sex discrimination. During this time, women and civil rights advocates have focused their efforts towards obtaining some monetary remedy and largely have ignored their failure to obtain complete and equal remedies. Given the vow of Democratic leaders to continue to seek equality and lift the caps, and their subsequent failure to achieve this promise, this complacency is misplaced. While the legislative history indicates that a compromise may have been necessary to ensure the passage of the Civil Rights Act in 1991, the original justifications for this compromise are no longer valid. Stated bluntly, it is unconscionable that Congress has failed to revisit these caps, not even to adjust them once for inflation, since that time.

Many compelling proposals have been advanced for modifying or eliminating Title VII's current damage regime, but Congress has rejected all of them. While many of these proposals would increase the remedies available to women and minorities under Title VII, nothing short of eliminating the caps would deter and compensate claims of sex and race discrimination equally. Additionally, some of the alternate solutions would complicate further the calculation of damages for victims of sex discrimination by adjusting the punitive damage caps based on either manipulative variables, such as an employer's net worth, or subjective measurements, such as the egregiousness of an employer's conduct. With both of these proposals, however, damages for victims of discrimination under Title VII still would fall short of the unrestrained damages available to victims of race discrimination under § 1981.

The policy question that lies at the heart of this debate is whether we as a society believe that victims of sex discrimination in the workplace should be afforded less protection and legal recourse than victims of race discrimination. If we do, Congress can continue to devalue and diminish claims of sex discrimination by refusing to award full and complete remedies to its victims. But if we do not, then the clearest and strongest method for removing such conduct from the workplace is to eliminate the caps from discrimination awards under Title VII, and to punish and deter such employer misconduct with the same commitment and ferocity as we apply to acts of race discrimination under § 1981.

When Congress developed the limited remedies in the Civil Rights Act of 1991, the voice of women was muted, in large part, by their lack of representation. The 102nd Congress had only three female Senators and thirty female Representatives.⁴²⁴ In comparison, the 113th Congress has twenty female Senators and eighty-two female Representatives, including the Honorable Nancy Pelosi, Minority Leader of the House of Representatives. With their increased influence, women are in an unprecedented position to persuade their colleagues in Congress to reexamine and eliminate the current damage regime under Title VII.

Title VII's caps are discriminatory against women. They undermine Title VII's effectiveness by limiting the statute's capacity to compensate victims and to deter and punish employers who intentionally discriminate on the basis of sex. By abolishing these caps and eliminating the two-tiered approach to damages, Congress finally will demonstrate its clear commitment to eradicating sex discrimination from the workplace.

424. See OFFICE OF ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, *Women Representatives and Senators by Congress, 1917–Present*, (last accessed Nov. 21, 2013), <http://history.house.gov/Exhibitions-and-Publications/WIC/Historical-Data/Women-Representatives-and-Senators-by-Congress/>.