The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog That Didn’t Bark

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THE AGE DISCRIMINATION IN
EMPLOYMENT ACT, TITLE VII, AND THE
CIVIL RIGHTS ACT OF 1991: THREE ACTS
AND A DOG THAT DIDN’T BARK†

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† The redoubtable Sherlock Holmes, in solving one of his many celebrated
cases, was called upon to determine who had stolen the prize race horse Silver
Blaze and subsequently murdered the horse’s trainer. Holmes, having learned
that there was a watchdog that guarded the stable where the horse was kept and
in which the stable hands slept, reasoned as follows: “[T]hough someone had
been in and fetched out a horse, he had not barked enough to arouse the two
lads in the loft. Obviously the midnight visitor was someone whom the dog knew
well.” ARTHUR CONAN DOYLE, Silver Blaze, in THE COMPLETE SHERLOCK HOLMES
335, 349 (1927). This observation, together with other bits and pieces of facts
stitched together through Holmes’ powers of deduction, led Holmes to conclude
that the trainer, who the dog obviously knew well, was in fact the culprit and
that his death following the theft had been accidental. This Article concerns the
(CRA), on the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34
by the CRA to the ADEA. Primarily, however, the Article focuses on the
amendments not made, i.e., Congress’ failure to amend the ADEA so as to
override several Supreme Court rulings that, while they interpreted Title VII of
1991), have potent analogical significance for ADEA plaintiffs. The question is
whether “Congress’ silence in this regard can be likened to the dog that did not
bark.” Chisom v. Roemer, 111 S. Ct. 2354, 2364 n.23 (1991). (In Chisom the
Court interpreted the significance of a 1982 amendment to § 2 of the Voting
Rights Act of 1965, 42 U.S.C. § 1973. This amendment, it was argued, changed
the meaning of the Act, which hitherto had been deemed to apply to judicial
elections, so as to exclude such elections from the Act’s coverage. In rejecting

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this argument the Court stated: "[W]e are convinced that if Congress had such an intent [to change a prior construction of the statute], Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history of the 1982 amendment." 111 S. Ct. at 2364. Here the Court appended to the just-quoted sentence as a footnote the foregoing reference to Silver Blaze and the dog that did not bark. In the same footnote the Court went on to quote from a dissent by Justice Rehnquist, in which he wrote: "In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night." Id. at 2364 n.23 (quoting Harrison v. PPG Indus., Inc., 446 U.S. 578, 602 (1980)).

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I. Introduction

For more than two decades, the Age Discrimination in Employment Act of 1967 (ADEA)\(^1\) and Title VII of the Civil Rights Act of 1964\(^2\) have been linked in a common enterprise: combatting bias in the workplace. This shared goal flows in the first instance from the Acts' virtually identical core proscriptive language.\(^3\) Over

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3. Section 703 of Title VII, 42 U.S.C. § 2000e-2(a) (1988), provides as follows:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 4(a) of the ADEA, 29 U.S.C. § 623(a) (1988), provides as follows:

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities
time their statutory kinship, born of like purpose and parallel phrasing, has been strengthened by the on-going development of common doctrine, with Title VII courts typically (albeit not always) taking the lead in devising interpretations later adopted in the ADEA context. This judicially-fashioned nexus has been premised on the perception of ADEA courts that decisions construing Title VII, the older and thus senior partner in this relationship, constitute particularly persuasive analogical guides, by virtue of the statutes' shared aims and like terms.

Jurisprudential examples of the joint evolution of Title VII and the ADEA are readily identifiable. For one, the Title VII framework for the establishment of a prima facie claim by a plaintiff who contends that he or she is the victim of intentional, individualized discriminatory treatment—a framework enunciated in McDonnell Douglas Corp. v. Green and refined in Texas Department of Community Affairs v. Burdine—has been embraced by virtually all courts called upon to address comparable ADEA claims. Thus, the Court of Appeals for the Eighth Circuit recently wrote as follows in Hase v. Missouri Division of Employ-

or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

There are similarly comparable Title VII and ADEA provisions banning discrimination by employment agencies, i.e., § 703(b) of Title VII, 42 U.S.C. § 2000e-2(b) (1988), and § 4(b) of the ADEA, 29 U.S.C. § 623(b) (1988); and by labor organizations, i.e., § 703(c) of Title VII, 42 U.S.C. § 2000e-2(c) (1988), and § 4(c) of the ADEA, 29 U.S.C. § 623(c) (1988).

4. In Lorillard v. Pons, 434 U.S. 575 (1978), an ADEA case concerning the availability of jury trials in actions for back pay, the Supreme Court observed that "[t]here are important similarities between the two statutes... both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions." Id. at 584. The Court continued: "In fact, the prohibitions of the ADEA were derived in hæc verba from Title VII." Id. The affinity of Title VII and the ADEA was confirmed by the Court in Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755-58 (1979), another ADEA ruling.


ment Security: 9 “Although McDonnell Douglas and Burdine dealt specifically with actions under Title VII, the guidelines they established are generally applicable to age discrimination actions as well.” 10

(In deciding St. Mary’s Honor Center v. Hicks 11 in late June, 1993, the Court modified Burdine’s prescription as to a Title VII plaintiff’s task in cases involving claims of individual-directed (as contrasted to systemic) discriminatory treatment. In applying Burdine most (but not all) lower courts had followed the literal language of that decision and had reasoned that if a plaintiff established as pretextual the defendant’s proffered explanation for the complained-of action or decision, the plaintiff would prevail. 12 To do this, the plaintiff needed only to establish, in Burdine’s words, that the “legitimate reasons offered by the defendant were not its true reasons . . .” 13 In other words, the debunking of the defendant’s excuse would automatically lead to the conclusion, once the defendant’s claim of innocence was established as being meritless, that the defendant indeed had been motivated by unlawful discriminatory animus. The five-Justice majority in Hicks, while claiming to be acting consistently with precedent, embraced a “pretext-plus” rule 14 that a few lower courts had been utilizing in recent years. 15 In order to prevail, a plaintiff now must not only prove the pretextuality of the defendant’s excuse, i.e., that it is not to be believed. He or she must further prove that unlawful discriminatory animus had prompted the defendant’s action or decision. The Court asserted as follows: “[N]othing in law would permit us to substitute for the required finding that the employer’s action was the product of unlawful discrimination, the much

9. 972 F.2d 893 (8th Cir. 1992).
10. Id. at 895-96; see also Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981); Loeb v. Textron, Inc., 600 F.2d 1003, 1016 (1st Cir. 1979).
13. 450 U.S. at 253.
different (and much lesser) finding that the employer’s explanation of its action was not believable.”16 Presumably, just as McDonnell Douglas and Burdine have been infused into the ADEA lexicon, so too will Hicks be absorbed into ADEA jurisprudence.)

A like scenario of ADEA courts playing follow the leader has transpired in the importation into the ADEA of the discriminatory impact analysis initially articulated by the Supreme Court in Griggs v. Duke Power Co.,17 a Title VII ruling. With virtually no hesitation, almost all ADEA courts called upon to address the matter have been willing to hold defendants liable, even without their having entertained discriminatory intent, for utilizing facially neutral policies or practices having disparate impacts on persons in the protected class, just as Title VII defendants have been so held liable.18

16. 113 S. Ct. at 2751.
17. 401 U.S. 424 (1971). For an explanation of this analysis, see infra part III.B.1.

There are numerous other instances of joint doctrinal development, keyed to similar statutory language. In *Delaware State College v. Ricks*, a Title VII ruling, the Court enunciated an analysis for determining what events will trigger the running of the 180-day and 300-day statutes of limitations applicable to the filing of administrative charges with the Equal Employment Opportunity Commission (EEOC), which enforces both Title VII and the ADEA. Lower courts addressing the comparable filing requirements contained in the age statute have routinely used the *Ricks* analysis as their guide. Addressing a different ADEA issue in *Western Air Lines, Inc. v. Criswell*, the Court itself looked to Title VII case law construing the 1964 Act's bona fide occupational qualification defense for guidance in interpreting the identical defense set forth in the age discrimination statute.

In addition, both Title VII and the ADEA contain provisions requiring grievants initially to seek relief from qualified state antidiscrimination agencies, and the Court's rulings concerning the preclusion of federal court Title VII suits filed subsequent to state administrative dispositions of discrimination claims have set the parameters for dealing with the same issue under the ADEA. Title VII decisions likewise have been the guides for ADEA courts construing the age statute's anti-retaliation provision, which parallels a provision in Title VII.

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21. Originally, the Department of Labor was designated by the ADEA to administer and enforce the Act. These responsibilities were transferred to the EEOC as of July 1, 1979, by President Carter's Reorganization Plan No. 1 of 1978, 92 Stat. 3781, 43 Fed. Reg. 19,807 (1979), reprinted at 5 U.S.C. app.
27. Section 14(b), 29 U.S.C. § 633(b) (1988). In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), the Court held that resort to such an agency is mandatory. See generally 3 Eglit, supra note 5, at §§ 17.16-.18.
The foregoing examples all reveal ADEA courts looking to Title VII rulings for guidance. Sometimes, although less frequently, ADEA courts have led the way, with Title VII courts following. For example, Title VII courts have looked to Gilmer v. Interstate/Johnson Lane Corp., where the Court addressed the issue of whether an arbitration clause in a contract between an individual and a third party could preclude suit under the ADEA by that individual against his employer.

For the most part, the tandem development of Title VII and ADEA doctrine has followed a harmonious course. But in late

33. See Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991); see also infra note 116.
35. See infra note 116.
36. Of course, the fact that Title VII and the ADEA are statutory relatives, so to speak, does not make them twins. There indeed are important distinctions between the two statutes which have precluded the development of completely parallel bodies of case law. Numerous exceptions set forth in § 4, 29 U.S.C. § 623 (1988 & Supp. III 1991), of the ADEA do not appear in Title VII. For example, what would otherwise constitute a prohibited use of age will not lead to liability “where the differentiation is based on reasonable factors other than age...” § 4(a)(1), id., § 623(f)(1) (1988). Title VII does not contain a similar provision. An employer that observes the “terms of a bona fide seniority system that is not intended to evade the purposes of [the Act]” likewise will be insulated from liability under the ADEA, except where such a plan imposes involuntary retirement. § 4(a)(2)(A), id., § 623(f)(2)(A) (Supp. III 1991). In contrast, there is a much more limited exception applicable to seniority plans set forth in Title VII. § 703(h), 42 U.S.C. § 2000e-2(h) (1988). The observance of a bona fide employee benefit plan’s provisions will also provide a defense to what might otherwise be a winning claim of age discrimination, provided the additional conditions of this particular defense, set forth in § 4(a)(2)(B), 29 U.S.C. § 623(f)(2)(B) (Supp. III 1991), are met. See generally 2 Egert, supra note 5, chap. 16. Title VII contains nothing that resembles the age statute’s extensive bona fide benefit plan exception.

The enforcement mechanisms for the two statutes also differ. While juries have been available to hear and decide the claims of ADEA litigants since the ADEA was amended in 1978, § 7(c)(2), 29 U.S.C. § 626(c)(2) (1988), Title VII only permitted bench trials until § 102 of the CRA, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-74 (1991), added to the United States Code a new 42 U.S.C. § 1981a (Supp. III 1991), subsection (c) of which authorizes jury trials in cases in which the plaintiff seeks compensatory and/or punitive damages. And whereas Congress devised a set of provisions particular to Title VII that were modeled on the National Labor Relations Act, 29 U.S.C. §§ 151-69 (1988), the drafters of the ADEA for the most part incorporated the enforcement provisions of the Fair Labor Standards Act, id. §§ 200-219 (1988 & Supp. III 1991) (FLSA). Thus, an FLSA-generated contrast between enforcement under Title VII and under the
1991 this statutory alliance was seriously disrupted by the enactment of the Civil Rights Act of 1991 (CRA).37 The CRA, which became law on November 21, 1991, amended Title VII in a number of significant ways. It rejected, in whole or in significant measure, *Wards Cove Packing Co. v. Atonio*,38 *Price Waterhouse v. Hopkins*,39 *Lorance v. AT&T Technologies, Inc.*,40 and *Martin v. Wilks*41—four 1989 decisions that for the most part adversely affected the interests of Title VII claimants.42 In addition to these amendments, there were other modifications made to Title VII that were prompted by concerns independent of these Supreme Court rulings.43 For example, the CRA added new provisions to the United States Code authorizing the award of punitive and compensatory damages, which consistently had been deemed to be beyond the scope of the pre-CRA statutory language.44 Moreover, other statutes—including the ADEA—were also amended by the CRA.45

ADEA concerns the extent of relief that a prevailing plaintiff may obtain. Liquidated damages, i.e., damages generally equivalent to the amount of back pay recovered, are available in ADEA cases because the FLSA provision authorizing the award of such damages was imported into the ADEA. § 7(b), id. § 626(b) (1988), (Incorporating 29 U.S.C. § 216(b) (1988)). As to such damages generally, see 3 EEOC, supra note 5, at §§ 18.14-.18. In contrast, no such damages are available under Title VII.

39. 490 U.S. 228 (1989). See infra part III.C.1.. Inasmuch as *Price Waterhouse* established for the first time at the Supreme Court level that in a mixed motives case the burden of proof will shift to the defendant once a prima facie case has been proven by the plaintiff, the decision cannot be characterized as entirely adverse to plaintiffs.
42. In another 1989 decision, *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), it was the interests of plaintiffs seeking redress under 42 U.S.C. § 1981 that were undermined by the Court. As to the CRA’s response to *Patterson*, see infra note 45.
43. See infra parts II., IV.
44. See infra part IV.A.
45. The amendments made to the ADEA, either directly or by implication, are discussed infra in part II. 42 U.S.C. § 1981 (Supp. III 1991) was amended by § 101 of the CRA, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071-72 (1991), to override *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), a ruling in which the Court limited the reach of the statute by holding that its prohibition of racial discrimination in contracting only applied at the contract formation stage and so would not afford protection to an employee who com-
While most of the changes made by the CRA do not generate particular implications for the ADEA, in some instances the CRA's additions do have clear ramifications for the ADEA. This is most clear in the case of an explicit amendment to the ADEA made by § 11546 of the CRA. Other changes also affect the age statute.47 But of potentially greatest significance are the modifications to Title VII in response to Wards Cove, Price Waterhouse, and Lorance—decisions that would ordinarily be expected to have powerful analogical force for the ADEA, since they interpret Title VII language that, at least until the CRA amended Title VII, was paralleled by language in the ADEA.

What makes these latter changes particularly perplexing is the fact that the ADEA—Title VII's long-time statutory cousin—was left untouched insofar as Wards Cove, Price Waterhouse, and Lorance are concerned.48 Because only Title VII was changed by

plained of discrimination that occurred following his or her having been hired.


In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the ... [ADA] or regulations implementing section 791 of Title 29 [section 501 of the Rehabilitation Act of 1973] [, 29 U.S.C. § 791 (1988 & Supp. III 1991)], damages may not be awarded ... where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

The ADA also was amended by § 109 of the CRA, Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1077-78 (1991), so as to apply extraterritorially.


47. See infra part II.B.

48. Martin v. Wilks, 490 U.S. 755 (1989), the fourth important Title VII Supreme Court decision handed down in 1989 that is of concern here, dealt with the question of third-party challenges to consent decrees and judicial orders; it
the CRA, an analytical quandary is posed. The Supreme Court rulings addressed language that, while now modified in the Title VII context, still is to be found in the age statute. Do these rulings, then, still have analogical bite for ADEA-based disputes? On the one hand, one could reason that even though the Title VII language generating Wards Cove and the other decisions has been modified, so that these decisions no longer bear on Title VII, these decisions still stand as expressions of analysis by the Supreme Court. As such, they constitute constructions of statutory language whose analogues still exists in the unmodified age discrimination statute, and so these rulings would seem to have continuing relevance for construing the ADEA. On the other hand, one must query whether it is justifiable to defend the analogical viability of decisions that have been spurned by Congress, even if Congress did not directly reject their analyses in the age context?

Beyond the matter the continuing relevance of Wards Cove and its fellow decisions, there is the further task of determining—if the Supreme Court decisions are to receive no judicial deference from ADEA courts—how ADEA doctrine is to be devised, now that the terms of Title VII and the ADEA diverge. Certainly, judicial rulings involving the new language of Title VII will not have the same analogical relevance for the ADEA that pre-CRA rulings possessed. They cannot, inasmuch as one of the key premises supporting ADEA courts looking to Title VII, i.e., common language, is no longer tenable.

This article is directed to assessing the consequences of the CRA for the ADEA. Section II of the article entails first ad-

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49. Some courts of appeals have adverted to the issue of the CRA's impact upon the ADEA, but have managed to avoid directly addressing the matter. See Fisher v. Transco Serv.-Milwaukee, Inc., 979 F.2d 1239, 1245 n.4 (7th Cir. 1992); Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161, 1163 (7th Cir. 1992); Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1181-82 (2d Cir. 1992). Likewise, the district court in Thompson v. Prudential Insurance Co., 795 F. Supp. 1337 (D.N.J. 1992), addressed—but ultimately did not rule on—the effect of the CRA for ADEA purposes. In Berger v. Edgewater Corp., 784 F. Supp. 263 (W.D. Pa. 1991), the court expressed no opinion as to the effect of the CRA. Id. at
dressing those provisions of the CRA that have an inarguable impact on the ADEA, either because the ADEA is expressly amended or because the terms of the CRA modifications to Title VII reach broadly enough to affect the age discrimination statute. These changes wrought by the CRA merit note in their own right, particularly because the one instance of direct amending of the ADEA produced a mixed legal bag of both clarifying language and ambiguous silence. Moreover, a review of the CRA’s unequivocal impact on the age statute is relevant, by way of contrast, to determining the import of Congress’ not having made other changes.

The next aspect of the analysis of the CRA’s impact on the ADEA concerns the CRA amendments to Title VII that constituted responses to Wards Cove, Price Waterhouse, and Lorance. Here, in section III, attention first is directed to what these amendments accomplished in terms of revised Title VII doctrine. The focus then turns to interpreting the significance of these changes for the ADEA, and here the effort is made to extract meaning from what Congress did not say or do. Is “Congress’ silence . . . just that—

266 n.3. In Bennett v. Cargill, Inc., 780 F. Supp. 560, 562 n.8 (N.D. Ill. 1991), the court, noting that the CRA had changed mixed motives analysis, “assumed for present purposes that the legislation does not affect the text analysis.” See also Collins v. Outboard Marine Corp., 59 F.E.P. Cas. (BNA) 1403, 1407 n.1 (N.D. Ill. 1992). The court deciding Smilan v. United Airlines, Inc., 796 F. Supp. 723 (E.D.N.Y. 1992), responded to the plaintiff’s argument that the CRA had overridden Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989), by not actually committing itself to a position, but rather by stating that “[t]o the extent that the Civil Rights Act of 1991 is applicable to the facts of this case, the Court holds that its provisions are to be given only prospective effect.” Id. at 727 n.6.

In Guillory-Wuerz v. Brady, 785 F. Supp. 889 (D. Colo. 1992), the court dealt with the question of whether a jury trial was available in an ADEA suit brought by a federal employee, who pointed to the right to a jury trial created by the CRA vis-a-vis Title VII claimants. The court was “‘unpersuaded’ that it should look to the new amendments affecting Title VII for guidance in ADEA litigation.” Id at 891. In so stating, the court relied upon Morgan v. Servicemaster Co. Limited Partnership, 57 F.E.P. Cas. (BNA) 1423 (N.D. Ill. 1992), which, in a four-paragraph ruling, addressed the availability of punitive and compensatory damages in an ADEA suit. The Morgan court rejected the plaintiff’s argument that such damages should be available, reasoning as follows: “‘Age’ is not mentioned as a form of discrimination that section 107 [of the CRA] is intended to clarify though race, color, religion, sex and national origin are. Moreover, the cases that . . . [the CRA damages provisions] are designed to negate . . . did not involve age discrimination claims.” Id. at 1424 (footnote omitted). Accord Lee v. Sullivan, 787 F. Supp. 921, 930 (N.D. Cal. 1992) (addressing compensatory damages). As to the CRA damages provisions, see infra part IV.A.
or does it send messages, albeit subliminal ones, of legal significance? Ultimately, it seems analytically appropriate to conclude—even if one sympathetic to plaintiffs’ concerns would question from a policy perspective the validity of all or parts of the analyses put forth in Lorance, Price Waterhouse, and Wards Cove—that those decisions have not been divested of their heavy analogical weight for ADEA courts, given Congress’ failure to amend the ADEA to reject or curtail these rulings.

Section IV of this Article is addressed to those provisions of the CRA that do not implicate, directly or inferentially, the ADEA. Here, as in section II, no grand conclusions emerge, but the end is served, at least, of providing completeness of discussion as to the interaction between the CRA and the ADEA. Finally, section V notes the particular problem of the CRA amendments’ retroactivity—an issue that has generated a considerable body of lower court rulings, most of which have rejected the retroactive application of the amendments.

II. CRA Provisions that Expressly or Impliedly Modify the ADEA

While it primarily addresses Title VII, the Civil Rights Act of 1991 in one instance does directly amend the ADEA. And in several other instances the CRA touches on, albeit not by name, the age statute. These points of impact are relevant, with varying degrees of importance, for individuals and entities attempting to invoke or comply with the ADEA, as well as for courts called upon to interpret and apply the statute. More generally, Congress’ indisputable attentiveness in some degree to the ADEA is relevant to assessing how one is to interpret Congress’ formal silence in other respects—i.e., its failure to amend the ADEA to respond to Wards Cove, Price Waterhouse, and Lorance.

A. Express Changes Made to the ADEA

1. The Statute of Limitations for Private Litigation

Section 115 of the Civil Rights Act of 1991 modified the statutes of limitations that had previously applied to the filing of

50. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987). (This quotation is admittedly taken out of context; the Brock decision is not apposite here.)
ADEA lawsuits. Prior to being amended by the CRA, § 7(e) of the ADEA,\(^{51}\) incorporated § 6(a) of the Portal-to-Portal Act,\(^{52}\) which establishes for purposes of the Fair Labor Standards Act\(^{53}\) a two-year statute of limitations, except for suits involving willful violations, in which instance a three-year limitations period applies.\(^{54}\) Section 7(e) further provided, prior to being amended by the CRA, that the statute of limitations for filing suit under the ADEA would be tolled for up to one year while the EEOC attempted to conciliate the grievance in question.\(^{55}\)

Section 115 of the CRA struck § 7(e)'s incorporation of the Portal-to-Portal Act's statutes of limitations, as well as the tolling provision. As amended, § 7(e) now directs the EEOC to provide notice to a complainant when it has concluded its internal agency efforts. In practice these efforts may be as limited as a perfunctory effort\(^{56}\) to conciliate the grievance without a full investigation,\(^{57}\) or may entail more, e.g., a fuller investigation of the charge of unlawful discrimination,\(^{58}\) strenuous efforts to conciliate the griev-

52. Id. § 255(a) (1988).
54. The issue of what standard applies for determining whether an employer acted willfully has been primarily litigated in the context of claims for liquidated damages, which are due a plaintiff who can prove that the defendant acted willfully. See infra note 366. See generally 3 EGLIT, supra note 5, at §§ 18.14-.18. The case law that has been developed in that setting has been carried over into the statute of limitations setting as well. See, e.g., McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988). See generally 3 EGLIT, supra note 5, at § 17.26.
55. Pursuant to § 7(d) of the ADEA, 29 U.S.C. § 626(d) (1988), the EEOC must seek to conciliate grievances.
56. At the least, the EEOC is required to promptly notify the charged party that a charge of unlawful discrimination has been filed. 29 C.F.R. § 1626.11 (1992).
57. As to the failure of EEOC offices to engage in conciliation without full investigations, and to dismiss claims without any further investigation where conciliation fails, see UNITED STATES GENERAL ACCOUNTING OFFICE, AGE EMPLOYMENT DISCRIMINATION—EEOC'S INVESTIGATION OF CHARGES UNDER 1967 LAW 2 (GAO/HRD 92-82 Sept 4, 1992). There is little case law regarding the significance of the EEOC's failure to seek to conciliate a charge filed by a grievant. There is, however, a requirement imposed upon the EEOC by § 7(b), 29 U.S.C. § 626(b) (1988), to seek to conciliate before the agency itself files suit against an alleged violator, and this conciliation requirement has generated somewhat more case law. See, e.g., Marshall v. Sun Oil Co. of Pa., 592 F.2d 563, 566 (10th Cir.), cert. denied, 444 U.S. 826 (1979) (characterizing EEOC's burden as being one of undertaking exhaustive conciliation efforts); Marshall v. Hartford Fire Ins. Co., 78 F.R.D. 97, 104 (D. Conn. 1978) (characterizing EEOC's conciliation burden as only being one of undertaking reasonable efforts). See generally 3 EGLIT, supra note 5, at § 17.42.
58. The EEOC has broad investigatory authority. See, e.g., Equal Employ-
ance, or even a determination to file suit on behalf of the charging party. Receipt of the notice issued by the EEOC triggers the running of a 90-day period within which a complainant must file suit. (Inasmuch as no time limit is set as to when the agency itself must act, a notice issued long after the alleged discrimination occurred and after the filing of a charge of unlawful discrimination—years even—will only then start the 90-day "meter" running. And so long as the suit is filed within that 90 days, the plaintiff will be deemed to have timely commenced his or her litigation.

59. Section 7(b), 29 U.S.C. § 626(b) (1988), of the ADEA incorporates § 16(c), 29 U.S.C. § 216(c) (1988), of the Fair Labor Standards Act, id. §§ 200-219 (1988 & Supp. III 1991) (FLSA), pursuant to which the EEOC may sue to recover back pay and other benefits due a grievant. The EEOC may also sue pursuant to § 17, id. § 217 (1988), of the FLSA—which is also incorporated into the ADEA by § 7(b)—for injunctive relief independent of that which may be obtained for an individual grievant on whose behalf it sues under § 16. A suit brought by the EEOC under § 16(c) will, if filed prior to an individual plaintiff's suit, bar the individual from suing. § 7(c)(1), id. § 626(c)(1) (1988). See Equal Employment Opportunity Comm’n v. Pan Am. World Airways, Inc., 897 F.2d 1499, 1505 (9th Cir. 1990); Burns v. Equitable Life Assur. Soc., 696 F.2d 21 (2d Cir. 1982), cert. denied, 464 U.S. 933 (1983). It is less clear whether a § 17 suit will bar a later private suit. One court has suggested that it will not. Equal Employment Opportunity Comm’n v. Chrysler Corp., 546 F. Supp. 54, 65 (E.D. Mich. 1982), aff’d on other grounds, 733 F.2d 1183 (6th Cir. 1984).

60. This change results in the ADEA to some degree paralleling Title VII, pursuant to which a grievant may not file suit until he or she receives a "right to sue" letter from the EEOC. § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (1988). The suit must be filed within 90 days of receipt of the letter. Id.

61. These changes made by the CRA regarding the filing of suit have nothing to do with the different timing requirements that apply to the filing of charges of unlawful discrimination with the EEOC. See generally 3 ECLRT, supra note 5, at §§ 17.07-.14A.

62. The ADEA continues to allow a grievant to file suit 61 days after filing a charge of unlawful discrimination with the EEOC. § 7(d), 29 U.S.C. § 626(d) (1988). In other words, under the ADEA a grievant can seize the initiative, unlike a Title VII complainant, who may not file suit before he receives a right to sue letter from the EEOC. See supra note 60.

The initial version of the CRA was altered in several respects before being passed by the House. A different version subsequently was devised and passed in the Senate, and was then sent to the House, where it was also adopted. See infra part III.E.2. But even in its initial form the proposed legislation contained a provision that amended the ADEA's statute of limitations for filing suit. While this provision eventually was, as noted, modified, it is still relevant to observe that the reports of both House committees that had jurisdiction over the legislation
The consequence of these changes is resolution of the continuing problem of private plaintiffs failing to file within two years or three years of the alleged wrong. This problem, when caused by the EEOC's lapses rather than by individual grievants, generated two earlier amendments to the ADEA aimed at alleviating the plight of late-filing plaintiffs, and further accounted for a number of judicial responses. Of course, a grievant still will have to file within the 90-day period following receipt of the EEOC notice, so there still remains the possibility for an individual to lose on procedural grounds, i.e., failure to timely file, a case that might have been won on the merits.


63. The pre-CRA differential in filing periods—with non-willful violations being subject to a two-year statute of limitations and willful violations triggering a three-year filing period—obviously now has been obliterated.

64. The Age Discrimination Claims Assistance Act (ADCAA), Pub. L. No. 100-283, 102 Stat. 78 (1988), was enacted in response to the EEOC's admission that it had failed to act on approximately 900 ADEA charges, the result being that the two-year statute of limitations had run while the unknowing charging parties awaited agency action. (As a legal matter they were not required to wait; they could have filed suit 61 days after filing their charges with the EEOC. See supra note 62.)

The ADCAA provided that for a period of 540 days following the date of its being signed into law, i.e., April 7, 1988, individuals who had timely filed charges with the EEOC on January 1, 1984, or thereafter, could bring suit. It subsequently was determined that the EEOC had continued to err, and so from "April 8, 1988, to June 30, 1990, 2,801 age discrimination charges under ADEA involved persons who lost their opportunity to file suit in federal court because EEOC district or state FEPA officers filed [sic] to resolve the charges before the 2-year statute of limitations expired and the affected individuals did not initiate court action." 136 Cong. Rec. H9,475 (daily ed. Oct. 11, 1990) (quoting from a study done by the United States General Accounting Office). Consequently, the Age Discrimination Claims Assistance Amendments of 1990, Pub. L. No. 101-504, 104 Stat. 1298, were enacted, so that grievants whose suits otherwise would be untimely would have an additional 15 months within which to file suit, provided certain conditions were met.


66. Prior to the amending of the ADEA by the CRA, a considerable body of case law had developed concerning whether a plaintiff could obtain equitable
2. *The Statute of Limitations for EEOC Suits*

While § 115 of the CRA in good measure tidied up, so to speak, statute of limitations issues for private grievants by abolishing the distinction between two- and three-year filing periods and by providing a clear-cut trigger, i.e., the EEOC notice for commencement of the filing period, in another respect it injected—through silence, rather than affirmative effort—considerable uncertainty into the suit-filing setting. This is because those same two- and three-year filing periods had applied to actions filed by the EEOC, which is authorized to sue pursuant to § 7(b) of the ADEA. Yet the new language of § 7(e), in spurning any further incorporation into the age statute of the Portal-to-Portal Act’s timing provisions, does not take into account agency suits and thereby leaves the EEOC without any statute of limitations applicable to its litigation efforts.

This gap—presumably an unintended one—arises in the first instance from the language of the amended § 7(e), which provides that a “person aggrieved” is to receive the notice from the EEOC as to the agency’s conclusion of its consideration of his or her charge of unlawful discrimination. A civil action then may be brought by a person as defined in § 11(a), within 90 days of receipt of the notice. “[P]erson” is defined in § 11(a) to include a variety of entities, but the EEOC is not included in this list.

In deciding *McConnell v. Thomson Newspapers, Inc.* the district court concluded that “the EEOC is a ‘legal representative’ for the purposes of . . . [§ 11(a)] when it files a civil action on behalf of an individual to enforce the ADEA.” The court then further reasoned as follows:

relief from the consequences of his or her having filed too late to satisfy the statute of limitations. This case law should continue to be applicable. Thus, equitable estoppel may apply so as to bar a defendant who induced a delay in the plaintiff’s filing suit by engaging in fraud, see *Vance v. Whirlpool Corp.*, 707 F.2d 483 (4th Cir.), *aff’d*, 716 F.2d 1010 (4th Cir. 1983), *cert. denied*, 465 U.S. 1102 (1984), or who engaged even in a clearly non-fraudulent misrepresentation, see, e.g., *Ott v. Midland-Ross Corp.*, 600 F.2d 24 (6th Cir. 1979), from using the statute of limitations as a defense. Equitable tolling may operate to excuse a late-filing plaintiff, provided he or she can establish an adequate justification for the delay. See, e.g., *Felty v. Graves-Humphreys Co.*, 785 F.2d 516, 518-19 (4th Cir. 1986). *See generally 3 B. Corr., supra note 5, at § 17.25.

68. *Id.* § 626(e) (Supp. III 1991) (emphasis added).
69. *Id.* Section 11(a) is 29 U.S.C. § 630(a) (1988).
71. *Id.* at 1499.
New section 626(e) starts the limitations period when "the person aggrieved" receives notice of the dismissal of a charge or the termination of EEOC proceedings. Section 626(b) provides that the EEOC must attempt to eliminate the discriminatory practices alleged and to effect voluntary compliance with the requirements of the ADEA through informal methods of conciliation, conference, and persuasion, before filing a civil action. Reading 626(b) and 626(e) together, it is concluded that the EEOC must notify the person aggrieved by the purportedly discriminatory conduct when its informal methods of resolution fail, and that it has ninety days from the date of receipt of that notice by the person aggrieved to file a civil action.\textsuperscript{72}

This analysis, prescribing for the EEOC a procedural formula that actually is only imposed by the literal language of the statute on private litigants, is of dubious persuasiveness. Why, after all, should the agency be required, just because this is the statutory scenario for private litigation, to engage in the formalistic exercise of sending a notice to individuals in order to thereby trigger the running of a 90-day period for its—and not the notice-recipient's—filing suit?\textsuperscript{73}

There is good reason, of course, to resist defendants being put to the task of defending against stale claims, and so prompt filings are to be encouraged. But the \textit{McConnell} court's interpretive ploy, already flawed by virtue of its contorting the statutory language, is unavailing, in any event. If the EEOC is intent on delay, it can simply forego sending out the notice until such time as it is ready to sue; nothing in the amended statute bars such an exercise in bureaucratic logrolling. Thus, the notice-sending requirement is not going to solve the problem of a dilatory agency effort, with the

\textsuperscript{72} \textit{Id.}

\textsuperscript{73} The \textit{McConnell} court reasoned as follows:

The superseded law tolled the statute for the EEOC, but not private parties, during the time the EEOC was attempting to effect voluntary compliance [pursuant to § 7(b), 29 USC § 626(b) (1988)], for a period up to one year. . . . If the EEOC does not dismiss a complainant's charge, new § 626(e) ties the limitations on civil suits by private parties to the receipt of notice of the end of EEOC administrative proceedings. The limitations statute likewise should be read to link the timeliness of EEOC civil suits to notice of the end of voluntary compliance measures, since such measures differ only in that they are pursued in accordance with 29 U.S.C. § 626(b), rather than § 626(d) [,which prescribes EEOC conciliation and other informal methods of dispute resolution when a private charge of unlawful discrimination is filed with the agency].

\textit{Id.} at 1499-1500 (footnote omitted).
consequent result of a suit involving dated events being litigated. More than that, in other contexts the courts have not required the EEOC to satisfy procedural requirements imposed upon private litigants and so the McConnell court’s analysis is devoid of analogical support.

But even if one were to credit, for argument’s sake, the court’s approach, the fact is that § 7(b) of the ADEA authorizes suits by the EEOC pursuant to two sections of the Fair Labor Standards Act—§§ 1676 and 17.77 And while in a § 16 suit the EEOC indeed does sue on behalf of specific individuals, and so carries out the representation role envisioned by the McConnell court, in § 17 suits the agency seeks injunctive relief in pursuit of a broader mission: its public interest function of assuring compliance with the law.78 Accordingly, in a § 17 suit the EEOC need not even

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76. Id. § 216.

77. Id. § 217 (1988).

name an aggrieved individual on whose behalf it is suing. The \textit{McConnell} court failed to note, let alone discuss, the differing nature of the two types of EEOC suits. Thus, even if the court’s analysis had some merit regarding § 16 suits, it would fail for § 17 suits inasmuch as in this latter context the agency is not acting in a representative capacity and so no apparent sensible end is served by requiring the EEOC to wait 90 days after sending notice to aggrieved individuals, since there are, or at least may not be, such people.

How, then, is one to interpret the CRA-amended ADEA? The proposition is well-established that the federal government is not bound by any limitations period unless Congress directs otherwise. Given that by adoption of § 115 of the 1991 Act Congress expressly dropped any reference to the Portal-to-Portal Act, which until its removal from the ADEA had set the times for filing ADEA suits, the argument that that now-excluded statute should nonetheless be infused by judicial interpretation back into the ADEA is strained at best.\footnote{Even if Congress acted inadvertently (and there is nothing}

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\textit{Id.} at 326 (footnote omitted).
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\textit{See, e.g.}, Guaranty Trust Co. v. United States, 304 U.S. 126 (1938).

\footnote{Even if Congress acted inadvertently (and there is nothing

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\textit{McConnell} analysis, the court accepted for the moment the proposition that the EEOC could be treated as a grievant’s legal representative—the posture in which the \textit{McConnell} court had cast the agency. The court then pointed out that the individual on whose behalf the EEOC was suing had himself failed to file the requisite timely charge of unlawful discrimination with the agency. Therefore, insofar as the EEOC sought to be treated as his representative, the agency was here seeking to act on behalf of someone who could not have himself maintained suit due to his failure to timely file the administrative charge. And the court reasoned that \textit{as representative, the EEOC can claim no greater rights than those possessed by the
in the legislative history to indicate that it did not do so), it did act. The excision of the Portal-to-Portal Act from the ADEA is a fact. Moreover, applying the solution devised by the McConnell court seems generally unwise, and certainly unworkable, for § 17 suits. What is left, then, is the conclusion that no time limitation applies to EEOC suits.

True, there is nothing to suggest that when the ADEA was amended by the CRA, Congress consciously determined that it wanted to extend the time for the filing of EEOC suits beyond the then-applicable two-and three-year time periods. Still, the fact is that Congress did not offer an express alternative when it severed the ADEA’s connection with the Portal-to-Portal Act. While defendants may wind up opposing suits the facts of which extend relatively far back in time, at least it can be reasoned that this extension of the time for filing EEOC suits comports with the general public interest role of the agency, since providing additional time for it to sue affords greater opportunity for it to vindicate that public interest.

B. Changes Expressly Linked to, but not Expressly Modifying, the ADEA


Title III of the Civil Rights Act of 1991\(^{82}\) sets forth the “Government Employee Rights Act of 1991.” Section 302\(^{83}\) guarantees to Senate employees, former employees, and applicants for

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individual grievant.” Slip op. at 31. Accordingly, the agency could not “commence suit as . . . [the grievant’s] legal representative where . . . [the grievant] himself would have been unable to do so.” Id.

The Avionics court then went on to assert, much more broadly, that McConnell was wrongly decided and that the Portal-to-Portal Act’s limitations periods indeed still did apply to EEOC actions, reasoning that the procedures imposed by the FLSA had to be applied to actions that, although concerning vindication of ADEA rights, actually involved the implementation of FLSA statutory provisions. Thus, the court concluded as follows: “Based upon the statutory scheme as it now exists, the court concludes that the 1991 amendments to the ADEA left EEOC actions under 29 U.S.C. §§ 216(c) and 217 subject to the limitations period set forth in 29 U.S.C. § 255(a) of the Fair Labor Standards Act.” Id. at 32.

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employment freedom from discrimination on the basis of age "within the meaning of Section 15" of the ADEA, which provision protects executive branch employees (other than those covered by the new Government Employee Rights Act of 1991). Title III affords the same protection to presidential appointees who are not otherwise already protected by the ADEA. In addition, Title III covers employees and job applicants who are, or seek to be, chosen or selected (a) to serve as members of state and local elected public officials' personal staffs; (b) to serve these elected officials on the policymaking level; and/or (c) to serve as "immediate advisor[s] with respect to the exercise of the constitutional or legal powers of the office." While Title III extends the ADEA's

84. Included in this group are employees of the Architect of the Capitol who are assigned to the Senate restaurants or to the Superintendent of the Senate Office Buildings. Id. § 301(c)(B), 105 Stat. 1071, 1088 (codified at 2 U.S.C. § 1201(c)(B) (Supp. IV 1992)).


86. These employees are defined in Pub. L. No. 102-166, § 320(b), 105 Stat. 1071, 1097 (1991) (codified at 2 U.S.C. § 1219(b) (Supp. IV 1992)), as follows:

[A]ny officer or employee, or an applicant seeking to become an officer or employee, in any unit of the Executive Branch, including the Executive Office of the President, whether appointed by the President or any other appointing authority in the Executive Branch, who is not already entitled to bring an action under . . . [the ADEA] but does not include any individual—

(1) whose appointment is made by and with the advice and consent of the Senate;

(2) who is appointed to an advisory committee, as defined in section 3(2) of the Federal Advisory Committee Act (5 U.S.C. App.); or

(3) who is a member of the uniformed services.


Much of the case law has concerned the status of state court judges, both elected and appointed. The argument has been that since judicial appointees do not engage in policymaking, they can invoke the protection of the ADEA. Generally, the plaintiffs in these cases have been unsuccessful. See, e.g., Equal Employment Opportunity Comm'n v. Massachusetts, 858 F.2d 52 (1st Cir. 1988)
prohibition of age discrimination to the foregoing individuals, the new Act sets up enforcement systems that differ from those that apply under the age statute. 88

(appointed judges); United States Equal Employment Opportunity Comm’n v. Illinois, 721 F. Supp. 156 (N.D. Ill. 1989) (appointed judges); Diamond v. Cuomo, 514 N.E.2d 1356 (N.Y. 1987), appeal dismissed, 486 U.S. 1028 (1988) (elected judges). In Gregory v. Ashcroft, 111 S. Ct. 2395 (1991), the Court was called upon to address the contention that appointed state court judges did not constitute policy makers and so were not excluded from the protection of the ADEA by virtue of § 11(f). The Gregory plaintiffs initially had been appointed to their offices by the governor and subsequently won retention elections. The Court did not resolve the issue of whether the plaintiffs were policy makers. Rather, it applied a plain statement rule in holding for the State, which was defending its state constitutional provision requiring the retirement of judges at age 70:

"[A]ppointee at the policy making level," ... is an odd way for Congress to exclude judges; a plain statement that judges are not "employees" would seem the most efficient phrasing. But in this case we are not looking for a plain statement that judges are excluded. We will not read the ADEA to cover state judges unless Congress has made it clear that judges are included. ... This does not mean that the Act must mention judges explicitly, though it does not. ... Rather, it must be plain to anyone reading the Act that it covers judges. In the context of a statute that plainly excludes most important state public officials [from protection], "appointee on the policy-making level" is sufficiently broad that we cannot conclude that the statute plainly covers appointed state judges. Therefore, it does not.

Id. at 2404.

Section 321(a) of the Government Employee Rights Act of 1991, Pub. L. No. 102-166, § 321, 105 Stat. 1071, 1097-98, by its terms seems to bring appointed judges within its coverage. If, however, the plain statement requirement enunciated in Gregory, an ADEA case, were to be carried over to the new 1991 Act, it would follow that such judges will not be able to claim statutory protection under this new legislation, as well. Given the federalism concern underlying the Gregory Court’s very considerable reluctance to allow the ADEA to control the make-up of state judiciaries, which concern led to the Court enunciating the plain statement requirement, it would seem appropriate to infuse that requirement into this context also.

88. Title III establishes an Office of Senate Fair Employment Practices. Pub. L. No. 102-166, § 303, 105 Stat. 1071, 1088-90 (1991) (codified at 2 U.S.C. § 1203 (Supp. IV 1992)), to deal with the claims of Senate employees and job applicants. Alleged violations traverse a four-step process: (1) counseling, 2 U.S.C. § 1205 (Supp. IV 1992); (2) mediation, id. § 1206; (3) the filing of a formal complaint followed by a hearing before a hearing board, id. § 1207; and (4) review of that board’s ruling, id. § 1208 (addressing review by the Senate Select Committee on Ethics) and id. § 1209 (addressing judicial review).

Judicial decisions construing the ADEA are to serve as the guides for the hearing board. Id. § 1207(i). If the hearing board determines that a violation
Since the Government Employee Rights Act extends protection to individuals hitherto unprotected under the ADEA, the new Act does not, in and of itself, pose any particular issues for the ADEA. What is significant for the latter statute is the fact that here, as in § 115 of the CRA, Congress clearly evidenced its awareness of the ADEA and expressed its willingness, in adopting the new legislation, to make explicit reference to the age discrimination statute.

Based on age has occurred, the board is directed to order "such remedies as would be appropriate if awarded under section 15(c) [29 U.S.C. § 633a(c) (1988),] of the" ADEA. Id. § 1207(h). (As to § 15(c) remedies, i.e., remedies available in federal employee suits, see 4 EARR, supra note 5, at chap. 18.) "Any order requiring the payment of money must be approved by a Senate resolution reported by the Committee on Rules and Administration." 2 U.S.C. § 1207(h) (Supp. IV 1992). The hearing board is not empowered to award punitive damages. Id. While the Government Employee Rights Act as enacted provided for individual senators being held personally liable, this exposure to liability was subsequently negated. Pub. L. No. 103-03, § 501(g), 107 Stat. 6 (1993).

If judicial review is sought, the decision will be set aside pursuant to 2 U.S.C. § 1209(c) (Supp. IV 1992) if the reviewing court determines that the decision was:

1. arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;
2. not made consistent with required procedures; or
3. unsupported by substantial evidence.

Pursuant to 2 U.S.C. § 1209(d), a prevailing complainant may be awarded attorney's fees in accordance with the standards prescribed by § 706(k) of Title VII, 42 U.S.C. § 2000e-5(k) (Supp. III 1991).

A presidential appointee must file a complaint with the EEOC (or such other entity that the President designates by executive order) within 180 days of the alleged violation. 2 U.S.C. § 1219(a) (Supp. IV 1992). The agency must then determine whether a violation occurred and record a final order reporting its conclusion. This order is to specify the relief to be awarded in instances where a violation has been found to have occurred. Id. An order may be reviewed by the United States Court of Appeals for the Federal Circuit, id. § 1219(a)(3)(A), which is to apply the same standards as are set forth in § 1209(c), quoted above. Id. § 1219(a)(3)(C). Again, a prevailing grievant may be awarded attorney's fees, in accordance with Title VII standards. Id. § 1219(a)(3)(D).

The triggering event for the consideration of claims made by state and local governmental employees who are covered under Title III is the filing of a complaint with the EEOC within 180 days of the alleged violation. Id. § 1220(b). If it is determined that a violation occurred, the agency's final order is to provide for appropriate relief. Id. Final orders are judicially reviewable, id. § 1220(c), pursuant to the same standards as are set forth in § 1209(c), quoted above. Id. § 1220(d). Attorney's fees may be awarded to the prevailing plaintiff, in accordance with Title VII standards. Id. § 1220(e).
2. The Response to Martin v. Wilks

Martin v. Wilks was decided by the Supreme Court in 1989. Before that ruling, post-entry challenges to consent decrees generally had been disallowed by the lower courts in Title VII cases. The House Committee on Education and Labor, in its report on the House version of what eventually was enacted, in a different form, as the CRA, described the Martin Court as having recognized "that the 'great majority of the federal courts of appeals' barred persons who were aware that a lawsuit might affect their interests, but who failed to intervene in a timely fashion to challenge the entry of a court decree, from filing a separate lawsuit challenging the decree." Notwithstanding that recognition on the Court's part, it rejected the majority position and opted for authorizing such suits regardless of how much time had elapsed since the entry of a decree.

Congress curtailed Martin with § 108 of the CRA, which amended Title VII by adding § 703(n). By the terms of this new subsection a post-judgment or post-order challenge generally may not be made if the challenger had adequate notice of the proposed judgment or order and had an opportunity to present objections to it prior to its entry, or if the challenger's interests were adequately represented by someone else who had challenged the judgment or order on the same legal grounds that would have been offered by the challenger. What makes this subsection, which obviously is lodged in Title VII, applicable to the ADEA is the language of both § 703(n)(1)(A) and § 703(n)(1)(B). The former provides as follows:

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment prac-

93. 42 U.S.C. § 2000e-2(n) (Supp. III 1991). Professors Catania and Sullivan have reasoned that this section "is very limited in its application..." and that "[e]ven for those claims within its ambit, the new law is likely to have considerably less effect than its sponsors may have anticipated." Andrea Catania & Charles A. Sullivan, Judging Judgments: The 1991 Civil Rights Act and the Lingering Ghost of Martin v. Wilks, 57 Brook. L. Rev. 995, 1046 (1992).
95. Id. § 2000e-2(n)(1)(B).
tice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

Similarly, § 703(n)(1)(B), which sets forth the specific instances in which post-order and post-judgment challenges are precluded, begins: “A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws. . . .”\(^{96}\) Obviously, the ADEA, being a federal civil rights

\(^{96}\) Id. Specifically, § 703(n)(1)(B) provides as follows:

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws—

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

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

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

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

Two key factors in determining whether a later claim will be precluded are prior receipt of notice by the person seeking to make that claim, and an opportunity for that person to have presented his or her objections to the proposed judgment or decree.

The primary decision concerning the general issue of notice is Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). In Mullane the Court “specifically recognized that due process may be satisfied so long as reasonable efforts are made to give notice to interested persons, even if a particular interested person does not actually receive notice.” H.R. REP. No. 102-40, PART 1, supra note 62, at 58. The Mullane Court found that publication of advertisements in local newspapers was constitutionally sufficient notification for individuals whose names and addresses could not be reasonably determined. The notice “need not come from a party or from the court. Instead, it may come from any source. . . .” Id. at 56. The Judiciary Committee report noted that “[t]he Supreme Court has held that actual knowledge satisfies due process regardless of whether individual notice was attempted or received, National Equipment Rental Ltd. v. Szechten, 375 U.S. 311, 315 (1964).” H.R. REP. No. 102-40, PART 2, supra note 62, at 22.

With regard to § 703(n)(1)(B)(ii), the House Committee on Education and
law, fits within the language of the two subsections.\textsuperscript{97} It further

Labor remarked as follows:

[This] section . . . closely resembles Federal Rules of Civil Procedure 23(b)(1) and (2), which most lower federal courts have said are constitutional. Under those provisions, members of a class who receive no notice are deemed to be represented by the class representative, and are accordingly barred in most circumstances from bringing a subsequent suit to re-litigate claims that were finally determined in the initial proceeding. . . .

[The subsection] . . . sets a standard analogous to that of Rule 23, and permits preclusion of subsequent challenges to court decrees by persons whose interests "were adequately represented by another person who [had] challenged . . . [the] judgment or order prior to or after" its entry. The term "adequately represented" is intended to have the meaning usually associated with the term under Rule 23.

H.R Rep. 102-40, Part 1, supra note 62, at 57. A section-by-section analysis of the legislation that was ultimately enacted as the CRA was placed in the Congressional Record by Senator Dole; this document was described as representing the views of 14 senators, as well as those of the Bush Administration. In this analysis the following elucidation was offered regarding § 108:

"Adequate representation" requires that the person enjoy a privity of interest with the later party. This is because . . . both "(n)(1)(B)(i)" and "(n)(1)(B)(ii)" must be construed with "(n)(2)(D)" so that peoples' due process rights are not jeopardized. And the Supreme Court has stated clearly: "It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore never had an opportunity to be heard." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979).


97. One need not pass judgment on the merits of this statutory attempt to curtail the reach of Martin v. Wilks to remark upon its awkwardness insofar as the ADEA is concerned. It seems less than ideal—given the potential for misleading the user of the age discrimination statute—to modify the ADEA by amending another statute, i.e., Title VII, particularly when there is not even a technical change made to the ADEA cross-referencing the new Title VII provision so as to at least alert litigants, lawyers, and judges focusing on the age statute regarding the existence of the Title VII language.

Challenges to judgments and consent orders of course may arise in a variety of contexts, both close to and far from employment discrimination. Even if all scenarios could be anticipated, it would be incredibly inefficient to seek to amend every statute that might give rise to a judgment or order that in turn might be challenged by a disgruntled third party. But the fact is that § 108 is limited in its reach; it only speaks to challenges made as a result of judgments or orders resolving employment discrimination claims arising under federal civil rights statutes or the Constitution. It would not have been so difficult, after all, to have separately amended the relatively few federal statutes giving rise to employment discrimination causes of action. (As for constitutional claims, Title 28—which generally includes procedural requirements regarding such claims—or Federal Rule of Civil Procedure 24 might have been amended to take care of these suits.)
follows that the caveats to preclusion that are set forth in § 703(n)(2) also apply to ADEA claimants.

Beyond the specific terms added to Title VII by the CRA, what is especially notable about § 108 of the 1991 Act is that it is the tangible result of Congress' perceiving Martin v. Wilks as having implications for other statutes, and acting affirmatively in response to that perception. This approach contrasts sharply with the CRA's inattention to the consequences for the ADEA of Wards Cove, Price Waterhouse, and Lorance, as discussed below.

3. Education, Outreach, and Technical Assistance

Section 705(h)(2) of Title VII was added by § 111 of the CRA. The new subsection directs the EEOC to undertake “ed-

99. Id. This subsection provides as follows:
2) Nothing in this subsection shall be construed to—
(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;
(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;
(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or
(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

As to the situation addressed in § 703(n)(2)(B), id. § 2000e-2(n)(2)(B) (Supp. III 1991), the House Judiciary Committee asserted that it intended “that existing law shall continue to determine the circumstances under which persons in... [this situation] may be permitted to bring, or [are] preclude[d] from bringing, collateral attacks on court decrees.” H.R. Rep. No. 102-40, Part 2, supra note 62, at 21. (The Judiciary Committee Report erroneously referred to § 703(n) as § 703(m) on this page.) ADEA claimants who have objected to consent decrees negotiated by the EEOC whereby their claims were resolved have had little success in being heard. See, e.g., Equal Employment Opportunity Comm’n v. Pan Am. World Airways, Inc., 897 F.2d 1499 (9th Cir.), cert. denied, 485 U.S. 815 (1990); Equal Employment Opportunity Comm’n v. Consolidated Edison Co., 557 F. Supp. 468 (S.D.N.Y. 1983). But see Equal Employment Opportunity Comm’n v. Boeing Co., 109 F.R.D. 6 (W.D. Wash. 1985). See generally 3 BOUL, supra note 5, at §§ 17.45A-.45D.
ucational and outreach activities (including dissemination of information in languages other than English) . . . concerning rights and obligations" under Title VII, as well as under other laws for whose enforcement the Commission has responsibility, i.e., the ADEA, the Equal Pay Act,\(^\text{102}\) and the Americans with Disabilities Act.\(^\text{103}\) These activities are to be "targeted to . . . individuals who historically have been victims of employment discrimination and have not been equitably served by the Commission; and . . . individuals on whose behalf the Commission has authority to enforce any other law prohibiting employment discrimination. . . ."\(^\text{104}\) Title VII's new § 705(j)(1),\(^\text{105}\) added by § 110 of the CRA,\(^\text{106}\) provides for the establishment by the EEOC of a Technical Assistance Training Institute "through which the Commission shall provide technical assistance and training regarding the laws and regulations enforced by the Commission."

Inasmuch as the ADEA and its regulations are enforced by the EEOC, it follows that the ADEA is affected by both the educational and outreach efforts envisioned by § 705(h)(2) and the activities of the institute to be established pursuant to § 705(j)(1), even though—as in the case of the provisions overriding Martin v. Wilks—the actual operative language is not lodged in the age discrimination statute.\(^\text{107}\)

4. Remedies, Affirmative Action, and Conciliation Agreements

Section 116 of the Civil Rights Act of 1991\(^\text{108}\) expresses a statutory assurance that the amendments made by the CRA are not to be "construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law."\(^\text{109}\) Senator Kennedy, the CRA's primary Democratic sponsor, and 14 Republican senators who placed in the Congressional Record a section-by-section analysis of the legislation that expressed

\(^{104}\) Id. § 2000e-4(h)(2).
\(^{105}\) Id. § 2000e-4(j)(1).
\(^{107}\) Inasmuch as neither § 705(h)(2) nor 705(j)(1) directly or even indirectly modifies specific terms or provisions of the ADEA, or the ADEA's application or interpretation, the criticism earlier leveled at § 108, i.e., that it affects the ADEA yet is neither included therein nor is even noted in that statute by a technical amendment, see supra note 97, is justifiably much more muted here.
\(^{109}\) Id.
their views and those of the Bush Administration,\textsuperscript{110} agreed that § 116 did not alter Title VII case law addressing affirmative action.\textsuperscript{111}

Inasmuch as the ADEA also is expressly amended by the CRA, it follows that the amended § 7(e)\textsuperscript{112}—and, for that matter, the other provisions implicating the ADEA discussed above—are not to be read as affecting remedies, conciliation agreements, and affirmative action plans fashioned in response to ADEA claims. Of course, given the relatively technical nature of the changes made by the CRA, there is in any event little likelihood of such an effect actually occurring, even absent the insulating language of § 116.\textsuperscript{113}


\textsuperscript{111} In response to the argument that, given its phrasing, § 116 only saves from modification by the CRA those remedies, affirmative action plans, and conciliation agreements that are "court-ordered," the EEOC has asserted that the phrase "court-ordered" only modifies the word "remedies." Thus, voluntary affirmative action plans and conciliation agreements indeed are protected under § 116, rather than being subject to the CRA amendments because they are not court-ordered. EEOC NOTICE, REVISED ENFORCEMENT GUIDANCE ON RECENT DEVELOPMENTS IN DISPARATE TREATMENT THEORY 24 (July 7, 1992). The Commission pointed to the CRA's legislative history to support its position. \textit{Id.} at 24-25.


\textsuperscript{113} Even given such an eventuality, the fact is that insofar as affirmative action is concerned, there is only one decision that expressly addresses its legality. In that case, Hamilton v. Caterpillar, Inc., 966 F.2d 1226 (7th Cir. 1992), the court held that the ADEA does not prohibit affirmative action on behalf of older workers. \textit{Hamilton} involved an early retirement program that provided benefits to older workers, but not to younger ones. The court termed this program an affirmative action effort. There are other decisions also approving early retirement incentive plans, which typically are written so as to only make employees over a certain age eligible. For a discussion of such plans, see 2 Eglit, \textit{supra} note 5, at §§ 16.62-.65; Judith A. McMorrow, \textit{Retirement and Worker Choice: Incentives to Retire and the Age Discrimination in Employment Act}, 29 B.C. L. REV. 347 (1988); \textsc{Elizabeth Meier}, \textit{Early Retirement Incentive Programs: Trends and Implications} (1986). Arguably, all such plans could be characterized as affirmative efforts on behalf of older workers, although as a practical matter such plans typically are devised by employers to serve their own financial and structural needs, i.e., to reduce their work forces, particularly by decreasing the numbers of employees who are, by virtue of seniority or otherwise, more highly paid. The \textit{Hamilton} court is not the only one to have approved such a preference for older workers (although it is the only one to have literally characterized such programs as affirmative action efforts). \textit{See}, e.g., Brown v. M & M/Mars, 883 F.2d 505, 511 n.3 (7th Cir. 1989) ("[I]t is not age discrimination to offer a voluntary separation plan that is more attractive to older workers than younger workers, even if done to induce older workers to leave, unless the plan
5. **Alternative Dispute Resolution**

The purpose of § 118 of the CRA\(^{114}\) is to encourage the use of alternative dispute resolution mechanisms, i.e., “settlement negotiations, conciliation, facilitation, mediation, factfinding, mini-trials, and arbitration,” for resolving disputes arising “under the Acts or provisions of federal law amended by this title.” Since the CRA amends the ADEA, it follows that § 118 applies to age discrimination claims.\(^{115}\) It is clear from § 118’s terms, however, is not truly voluntary.\(^{116}\)”); Schuler v. Polaroid Corp., 848 F.2d 276, 278 (1st Cir. 1988) (the ADEA “does not forbid treating older persons *more* generously than others.”); Karlen v. City Colleges of Chicago, 837 F.2d 314, 318 (7th Cir. 1988), *cert. denied*, 486 U.S. 1044 (1988); Mason v. Lister, 562 F.2d 343 (5th Cir. 1977); Cronin v. ITT Corp., 737 F. Supp. 224, 229 n.6 (S.D.N.Y. 1990), *aff’d mem.*, 916 F.2d 709 (2d Cir. 1990); Wehrly v. American Motor Sales Corp., 678 F. Supp. 1366 (N.D. Ind. 1988). See generally 2 Eglit, *supra* note 5, at § 16.18B. As to affirmative action on behalf of older workers generally, see Barry Bennett Kaufman, *Note, Preferential Hiring Policies for Older Workers Under the Age Discrimination in Employment Act*, 56 S. CAL. L. REV. 825 (1983).

The ADEA clearly does not require older workers to be treated more favorably than younger ones. See, *e.g.*, Rivas v. Federacion de Asociaciones Pecuaria de Puerto Rico, 929 F.2d 814, 822 (1st Cir. 1991); Equal Employment Opportunity Comm’n v. Sperry Corp., 852 F.2d 503, 509 (10th Cir. 1989); Tice v. Lampert Yards, Inc., 761 F.2d 1210, 1217 (7th Cir. 1985). Indeed, save for retirement incentive plans, preferences for older workers over younger workers would generally be violative of the ADEA, so long as the younger workers were themselves within the age protected class, i.e., persons at least 40 years of age. *See, e.g.*, Haskell v. Kaman Corp., 743 F.2d 113, 122 (2d Cir. 1984); Douglas v. Anderson, 656 F.2d 528, 533 (9th Cir. 1981). See Howard Eglit, *Health Care Allocation for the Elderly: Age Discrimination by Another Name?*, 26 Hous. L. REV. 813, 864 (1989), for a rationale for the legitimacy of preferences couched in terms of retirement incentive plans, as contrasted with their illegality in other contexts.

Insofar as court-ordered remedies are concerned, there are no reported cases in which courts have ordered employers to increase their complements of any particular age group. Of course, both injunctive relief directed at halting discriminatory practices and policies and injunctive relief only concerning the individual plaintiff, as well as monetary relief, may result—either quickly or in the long term—in greater numbers of older workers being hired or retaining their jobs.

There is extensive case law as to relief under the ADEA. *See 3 Eglit, supra* note 5, at chap. 18. Thus, § 116 has some potential relevance to this facet of ADEA case law, although, as observed earlier, the CRA amendments which § 116 serves to fence off from affecting ADEA court-ordered remedies are so innocuous that it is unlikely that they would have any particular impact, even without § 116.


\(^{115}\) In H.R. REP. No. 102-40, PART 1, *supra* note 62, the Committee on Education and Labor asserted as follows with regard to Title VII (and inferentially
that this provision does not require the use of alternative dispute resolution mechanisms. Thus, the CRA provision works no change in the current state of ADEA case law, which does not yet support the preclusion of access to the courts by employees who enter into arbitration agreements with their employers.\footnote{116}

with regard to the other statutes to which § 118 speaks, albeit not by expressly amending them):

The Committee emphasizes ... that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. ... The Committee does not intend this section to be used to preclude rights and remedies that would otherwise be available.

\textit{Id.} at 97.

116. Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991), left unresolved the issue of whether a grievant can be compelled to arbitrate an ADEA claim by virtue of an agreement he or she entered into with his or her employer. The \textit{Gilmer} Court addressed an arbitration agreement that had been executed by the plaintiff with the New York Stock Exchange, registration with which was a pre-condition to being employed by Interstate. By the terms of this agreement with a third party, i.e., the Stock Exchange, Gilmer agreed “to arbitrate any dispute, claim or controversy” that might arise between him and his employer that would be “required to be arbitrated under the rules, constitution, or by-laws of” the Exchange. \textit{Id.} at 1650. One of the Exchange’s rules provided for arbitration of “[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative.” \textit{Id.} at 1651. Thus, when Gilmer filed suit under the ADEA as a result of his discharge, the question of the effect of the arbitration agreement was at issue. The Court held that Gilmer was required to comply with this agreement.

However, Gilmer did not argue, nor did the Court on its own initiative address on the merits, the question of whether the Federal Arbitration Act, 9 U.S.C. §§ 1-15 (1988 & Supp. IV 1992), which made the arbitration agreement enforceable in the federal courts, was inapplicable to employment contracts. That argument, if made, would have been based on § 1 of the FAA, \textit{id.} § 1 (1988), which provides: “[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” The Court observed that “it would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment. ... Rather, the arbitration clause at issue is in Gilmer’s securities registration application, which is a contract with the securities exchanges, not with Interstate.” 111 S. Ct. at 1651-52 n.2.

The Court went on to hold that the arbitration agreement executed by Gilmer with the third party, i.e., the Exchange, was enforceable. But as a result of the
III. CHANGES MADE TO TITLE VII THAT ARE SILENT REGARDING THE ADEA BUT HAVE POTENTIAL ANALYTICAL RELEVANCE

A. Introduction

The Civil Rights Act of 1991 amended Title VII in a number of respects. Those modifications directly addressing, or at least clearly implicating, the ADEA already have been discussed. There were other changes made to Title VII that did not purport to apply, either explicitly or even implicitly, to the ADEA. In fact, however, these amendments to Title VII are relevant to the task of construing the age discrimination statute. This is because the modifications made by the CRA constituted responses to Supreme Court rulings enunciating interpretations of Title VII that ordi-
narily would be applied by analogy to the age statute. Thus, these Title VII amendments reveal Congress' assessment of the merits and flaws of the Court's analyses.

The first task of this section of this Article is ascertaining what, if any, changes in Title VII were effected by the CRA. The conclusion is that Wards Cove, Price Waterhouse, and Lorance were indeed very significantly overridden in the Title VII setting.

The next task is to determine whether those decisions nonetheless remain viable as to the ADEA. This enterprise involves looking to the legislative history to ascertain whether it affords any insight. This effort yields little of substance, but it does establish that Congress at some junctures was aware of possible implications for the ADEA of the changes made in Title VII. Because the legislative history offers little, one is next forced to deal with Congress' silence regarding the relation of the ADEA to Wards Cove, Price Waterhouse, and Lorance. This silence, as it turns out, is meaningful: it establishes that these decisions continue to be viable analogical precedents for ADEA litigants and courts.

Finally, some sketchy suggestions for the future course of ADEA doctrinal development are offered.

B. Disparate Impact Doctrine

There are two theories of liability that a grievant seeking redress under Title VII can pursue. One—the discriminatory treatment approach—entails the plaintiff seeking to prove that the defendant subjected him or her to differential treatment on the basis of a proscribed factor, e.g., race, sex, etc. Discriminatory intent is critical here: the plaintiff must ultimately establish that his race or her gender was the reason the adverse decision was made or

117. The relevance of the amendments made by the CRA of course does not follow from any suggestion that Title VII's new language is itself literally applicable to the ADEA. Obviously, a statute—in this instance the ADEA—can only be amended where the proposed change successfully traverses the bicameral legislative process, and is then presented to, and signed by, the President or is passed by a super majority in the Congress following a presidential veto. (In Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983), the Court struck down a single-house legislative veto provision contained in § 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2), because the veto provision did not satisfy the bicameralism and presentment requirements of Article I, §§ 1, 7 of the U.S. Constitution. Because an amendment to a statute is as much an expression of the lawmaking process as is the initial adoption of the statute, the bicameralism and presentment requirements must be satisfied for an amendment to become legally effective.)
the challenged action was taken.118 Under the other approach—the disparate impact tack—the plaintiff is required to prove that the defendant violated the Act by utilizing an ostensibly neutral policy or practice that had a disproportionately adverse impact on the protected group of which the plaintiff is a member.119 Here, intent is irrelevant. What counts, legally, is proof (by a preponderance of the evidence) that there was a disparity of some meaningful dimension between (a) the percentage of persons belonging to the statutorily protected group who were selected, promoted, rejected, etc. by the employer on the basis of the policy or practice at issue, and (b) the percentage of members of this group who were in the relevant selection pool.120

120. Not surprisingly, there has been considerable ambiguity as to what degree of disparity must be established, but no definitive resolution has been reached. See, e.g., Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 658 (1989) (Blackmun, J., concurring) (“sufficient disparate impact”); Connecticut v. Teal, 457 U.S. 440, 443 n.4 (1982) (“significantly discriminatory impact” established by a differential in the passing rate on a test where African-Americans passed the test at a rate equal to 68% of the rate of whites taking the test); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (“significantly different”); Griggs v. Duke Power Co., 401 U.S. 424, 426, 430 & n.6 (1971) (34% passing rate for whites, as contrasted to 12% for African-Americans on one criterion, and 58% for whites compared to 6% for African-Americans on another criterion, constituted a “substantially higher rate”).

Justice O'Connor, writing for the 4-justice plurality in Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988), a Title VII ruling, set forth the most authoritative statement thus far of the state of the law from the Supreme Court's perspective (although, of course, this was not enunciated in a majority statement):

[T]he lower courts have sometimes looked for more . . . direction in the EEOC's Uniform Guidelines on Employee Selection Procedures, 29 CFR pt. 1607 (1987) . . . . These Guidelines have adopted an enforcement rule under which adverse impact will not ordinarily be inferred unless the members of a particular race, sex, or ethnic group are selected at a rate that is less than four-fifths of the rate at which the group with the highest rate is selected. 29 CFR § 1607.4(D) (1987). This enforcement standard has been criticized on technical grounds, . . . and it has not provided more than a rule of thumb for the courts . . . .

Courts have also referred to the "standard deviation" analysis sometimes used in jury-selection cases . . . . We have emphasized the useful role that statistical methods can have in Title VII cases, but we have not suggested that any particular number of "standard deviations" can determine whether a plaintiff has made out a prima facie case in the
Wards Cove Packing Co. v. Atonio,\textsuperscript{121} decided in 1989, worked major changes in disparate impact analysis. Not surprisingly, given the long history of reliance on Title VII Supreme Court interpretations, ADEA courts have since looked to this decision as setting the new parameters for assessing disparate impact claims.\textsuperscript{122} The inquiry as to whether in the Title VII context the CRA undid, or modified, the changes made by Wards Cove for the most part yields affirmative answers.

1. Changes Wrought by Wards Cove Packing Co. v. Atonio

Before Wards Cove it was clear that once a plaintiff succeeded in proving a prima facie case by a preponderance of the evidence, it became the defendant’s task to respond.\textsuperscript{123} That much was not changed by the 1989 ruling. However, the five-Justice Wards Cove majority did engineer a major shift in doctrine (even while obstinately resisting characterizing it as such):\textsuperscript{124} the justices ruled that the defendant need only satisfy a burden of production, rather

\begin{quote}
Nor has a consensus developed around any alternative mathematical standard. Instead, courts appear generally to have judged the “significance” or “substantiality” of numerical disparities on a case-by-case basis. . . . At least at this stage of the law’s development, we believe that such a case-by-case approach properly reflects our recognition that statistics “come in infinite variety and . . . their usefulness depends on all of the surrounding facts and circumstances.” Teamsters v. United States, 431 U.S. 324, 340 (1977).
487 U.S. at 994-95 n.3 (O’Connor, J., joined by Rehnquist, C.J., White, and Scalia, JJ.)
122. See, e.g., MacPherson v. University of Montevallo, 922 F.2d 766, 773 (11th Cir. 1991); Equal Employment Opportunity Comm’n v. Francis W. Parker School, 61 F.E.P. Cas. (BNA) 967, 975 (N.D. Ill. 1993); see also Davidson v. Board of Governors, 920 F.2d 441, 444 (7th Cir. 1990). In Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161, 1163 (7th Cir. 1992), the court adverted to the question of the significance for the ADEA of the changes made in Title VII, but did not otherwise address the matter.
124. 490 U.S. at 660 ("We acknowledge that some of our earlier decisions can be read as suggesting [that the defendant bore a burden of proof], but to the extent that those cases speak of an employer's "burden of proof" with respect to a legitimate business justification defense, . . . they should have been understood to mean an employer's production—but not persuasion—burden.").
\end{quote}
than the burden of proof that generally had been understood up until then as being applicable.\footnote{125}

A second facet of disparate impact doctrine concerns the substance of the defendant’s response. Prior to \textit{Wards Cove} there had been some ambiguity as to what was required of the defendant once the plaintiff’s prima facie case was established. In \textit{Griggs v. Duke Power Co.},\footnote{126} the seminal Title VII disparate impact decision, the Court used several slightly different formulations. It identified the “touchstone . . . [as being] business necessity,” such that the employer had to show that the challenged job requirement had a “manifest relationship to the employment in question.”\footnote{127} The \textit{Griggs} Court also used the term “job related.”\footnote{128} Ultimately, it concluded that the challenged job requirement at issue in that case did not bear “a \textit{demonstrable relationship} to successful performance of the jobs for which . . . [it was used].”\footnote{129}

Subsequent decisions by the Court added further confusion to the task of definition. In \textit{Dothard v. Rawlinson}\footnote{130} the Court espoused a burden more rigorous than the \textit{Griggs} formulations for employers seeking to defend practices having disparate impacts on protected groups. The Court stated that “a discriminatory employment practice [challenged on disparate impact grounds] must be shown [by the defendant] to be \textit{necessary} to safe and efficient job performance to survive a Title VII challenge.”\footnote{131} But two years later the Court articulated a particularly mild burden of business


\footnote{126} 401 U.S. 424 (1971).
\footnote{127} \textit{Id.} at 431-32.
\footnote{128} \textit{Id.} at 436.
\footnote{129} \textit{Id.} at 432 (emphasis added).
\footnote{130} 433 U.S. 321 (1977).
\footnote{131} \textit{Id.} at 332 n.14 (emphasis added).
justification in *New York Transit Authority v. Beazer*, which involved a municipal transit authority policy precluding the employment of methadone users. The Court observed that the district court had noted that the authority’s goals of safety and efficiency were “significantly served by—even if they do not require—... [the] rule as it applies to all methadone users including those who are seeking employment in non-safety-sensitive positions.” Accordingly, “[t]he record ... demonstrates that ... [the] rule bears a ‘manifest relationship to the employment in question.’” With this analysis the manifest relationship requirement was seemingly equated by the *Beazer* Court with a standard which only required that a policy having a disparate impact ‘significantly serve’ the employer’s goals, rather than be necessary to them.

Given the unclear guidance emanating from *Griggs* and later Supreme Court rulings, the lower courts that addressed disparate impact arguments in the years preceding *Wards Cove* understandably set forth an array of formulations. But despite the fact that *Beazer* was a Supreme Court ruling and was thus presumably due considerable lower court deference, its apparent support for a relaxed business necessity standard was largely ignored. Instead, the thrust of most of the rulings was to impose on defendants a rigorous burden of justification. Many lower courts, taking their cue from *Dothard*, required the defendant to establish the existence of “an overriding legitimate business purpose such that the practice ... [was] necessary to the safe and efficient operation of the business.” Also common was phraseology requiring the defendant to establish a business necessity or “compelling” need or

133. *Id.* at 587 n.31.
135. *See* Perry, *supra* note 119, at 26, 26 n.140.
137. *See*, e.g., Davis *v.* Richmond Fredericksburg & Potomac R.R. Co., 803 F.2d 1322, 1325 n.2 (8th Cir. 1986).
138. *See*, e.g., Hawkins *v.* Anheuser-Busch, Inc., 697 F.2d 810, 815 (8th Cir. 1983).
purpose. A number of courts used the word "essential." And even though this more defendant-solicitous posture commanded only a minor level of judicial support prior to Wards Cove, the Court in that decision also chose to enunciate a relatively mild standard—one that closely resembled the Beazer language—for defendants to satisfy: "[T]he dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. . . . The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice." The Wards Cove Court was willing to caution that a "mere insubstantial justification . . . will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral practices." However, the Court, apparently intent on dispelling any notion that defendants continued to confront—as they had under Griggs—a rigorous burden of justification, went on to admonish that "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster. . . ." The final notable facet of Wards Cove was the special emphasis the Court placed on identifying with particularity the specific cause of the alleged unlawful disparate impact. The Court wrote: "As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack. Such a showing is an integral part of the plaintiff's prima facie case. . . ." In one respect this treatment of the causation requirement was supportive of plaintiffs' interests, for it confirmed the applicability of dis-

141. One court spoke of "policies which . . . are unrelated to legitimate business necessities." Louisville Black Police Officers Org., Inc. v. City of Louisville, 511 F. Supp. 825, 834 (W.D. Ky. 1979). Another court asserted that the "employer may rebut a prima facie case . . . [simply] by showing that the maintenance of safety and efficiency requires the practice." Muller v. United States Steel Corp., 509 F.2d 923, 928 (10th Cir. 1975).
142. 490 U.S. at 659 (emphasis added).
143. Id.
144. Id.
145. Id. at 657.
parate impact analysis to multi-component decisional processes—an application that some lower courts had rejected. But what was given with one hand, so to speak, was taken back to some extent with the other: the Court’s requirement of specificity imposed a more onerous burden on plaintiffs than previously had been demanded by those courts that had been willing to apply impact analysis to multi-part decisionmaking practices and systems. Thus, even if a plaintiff were able to show a statistically significant underrepresentation of members of the protected group, “this alone,” according to the Wards Cove Court, would “not suffice to make out a prima facie case of disparate impact.”

Rather, in order to succeed, the plaintiff would “have to demonstrate that the disparity . . . complain[ed] of is the result of one or more of the employment practices . . . [he or she is] attacking . . . , specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for” the members of the protected group, as contrasted with persons not in that group.

In sum, Wards Cove significantly rewrote disparate impact doctrine to make it considerably more protective of defendants. This was done by removing from the defendant’s shoulders the burden of proving its defense and by diluting the rigor of the substantive justification that the defendant had to put forth to explain its challenged practice or policy. The Court’s treatment of the causation issue was, as discussed, more of a legal mixed bag.

2. Changes Wrought by the CRA

a. The Statutory Language

In Section 2 of the CRA Congress set forth its findings, among which were the following:


148. 490 U.S. at 657.

149. Id.

(2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio . . . has weakened the scope and effectiveness of Federal civil rights protections; and

(3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

Section 3\(^{151}\) identifies the statute's purposes. These include restoring disparate impact doctrine to its pre-\textit{Wards Cove} state (although what exactly that was understood to be was a matter of considerable disagreement), as well as the provision of guidelines for the application of disparate impact analysis to Title VII claims. Section 3 reads in part as follows:

The purposes of this Act are—

\ldots

(2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v. Duke Power Co. . . . and in the other Supreme Court decisions prior to Wards Cove . . . ;

(3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964. . . .

Section 105(a) of the CRA\(^{152}\) effectuated these ends. It amended section 703 of Title VII by adding subsection (k),\(^{153}\) which provides that once the plaintiff establishes a prima facie disparate impact violation the defendant must satisfy a burden of proof in order to rebut this claim. This burden entails proving "that the challenged business practice is job related for the position in question and consistent with business necessity."\(^{154}\) In addition, subsection

\begin{itemize}
  \item[(151)] \textit{Id.} § 3, 105 Stat. 1071, 1071.
  \item[(152)] \textit{Id.} § 105(a), 105 Stat. 1071, 1074-75.
  \item[(154)] \textit{Id.} § 2000e-2(k)(1)(A)(i). One of the Republican senators involved in the drafting of the legislation was Senator Jeffords. He explained the quoted language:

\[\text{[I]n the compromise proposal . . . the parties have specifically included the requirement of job relatedness by providing that practices with disparate impact can be defended only if they are "job related for the position in question and consistent with business necessity." The use of the conjunctive "and" is very significant for it clarifies that the job related prong must be present in all cases even where other aspects of business necessity are asserted. The choice of providing either one or the other prong is not preserved in this compromise.}\]

(k) addresses the causation issue. It requires that the particular cause of a challenged decision or action be identified by the plaintiff, but it also provides a release valve, so to speak, for the plaintiff if this task is too difficult to master.\textsuperscript{155} (The provision also addresses the matter of alternative practices that have a less discriminatory impact—a facet of the disparate impact equation that the \textit{Wards Cove} Court had not altered.\textsuperscript{156})

\textsuperscript{155} See infra part III.B.2.e.
\textsuperscript{156} The full text of subsection (k) provides as follows:

(k) Burden of Proof in Disparate Impact Cases

(i) An unlawful employment practice based on disparate impact is established under this title only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice."

42 U.S.C. § 2000e-2(k) (Supp. III 1991). The reference in (k)(1)(C) is to the day preceding the day on which the \textit{Wards Cove} ruling was handed down.

Section 104 of the CRA, Pub. L. No. 102-166, § 104, 105 Stat. 1071, 1074 (1991), added subsection (m) to § 701 of Title VII, 42 U.S.C. § 2000e-m: "The term 'demonstrates' means meets the burdens of production and persuasion." A burden of persuasion subsumes a burden of production. Thus, an entity that satisfies the burden of persuasion thereby also will satisfy the burden of production. The converse is not true, however; an entity that satisfies no more than a burden of production will not thereby satisfy the more rigorous burden of persuasion standard. It would seem, then, that subsection (m) creates confusion, rather than clarification. Even so, the CRA's legislative history unequivocally supports the conclusion that in a disparate impact case the defendant bears a burden of persuasion, or proof, rather than merely a burden of production.

Two other aspects of the new § 703(k) address disparate impact. The business
b. The Statutory Directive

A unique facet of the CRA is a provision defining the relevant legislative history regarding core aspects of disparate impact analysis. Section 105(b) of the CRA asserts that an interpretive memorandum inserted in the Congressional Record by Senator Danforth during the Senate debates on the bill that eventually was enacted as the CRA constitutes the exclusive history regarding "business necessity / cumulation / alternative business practice." This memorandum provided as follows:

The final compromise on S.1745 agreed to by several Senate sponsors, including Senators Danforth, Kennedy, and Dole, and the Administration states that with respect to Wards Cove—Business necessity/cumulation/alternative business practice—the exclusive legislative history is as follows:

The terms "business necessity" and "job related" are intended to reflect the concepts enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, such as the height and weight requirements designed to measure strength in Dothard v. Rawlinson, 433 U.S. 321 (1977), the particular, functionally-integrated practices may be analyzed as one employment practice.

necessity defense may not be invoked as to claims based on a discriminatory intent theory. § 703(k)(2), id. § 2000e-2(k)(2). And disparate impact analysis may not be applied to rules barring the employment of users and possessors of drugs, except in cases where the use or possession of the drug is pursuant to the supervision of a licensed health care professional or is an authorized use under the Controlled Substances Act, 21 U.S.C. § 802 (1988 & Supp. III 1991), or some other federal statute. § 703(k)(3), 42 U.S.C. § 2000e-2(k)(3) (Supp. III 1991).

158. Id. Section 105(b) of the CRA provides that "[n]o statements other than . . . [this] interpretive memorandum . . . shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/alternative business practice."
As discussed below, this statutorily sanctified memorandum, which was intended to clarify § 703(k), hardly laid to rest dispute as to what had been wrought by the CRA.

c. The Burden of Proof

Prior to Wards Cove, most courts deemed the burden of proof in disparate impact cases to rest with the defendant once the plaintiff proved his or her prima facie case.\textsuperscript{160} The CRA resurrected this burden allocation scheme, and nothing in the congressional debates suggests any basis for questioning this reading of the statutory language.

d. Business Necessity and Job Relatedness

Neither Griggs nor later cases\textsuperscript{161} offered unambiguous definitions of the concepts of business necessity and job relatedness. As amended by the CRA, Title VII—which requires the defendant to prove "that the challenged business practice is job related for the position in question and consistent with business necessity"\textsuperscript{162}—does not provide clarification. Moreover, given the uncertainty inherent in the several variations of job relatedness used in Griggs, and inasmuch as subsequent rulings, i.e., Dothard v. Rawlinson\textsuperscript{163} and New York City Transit Authority v. Beazer,\textsuperscript{164} suggested further variations,\textsuperscript{165} the revival of the confusing pre-Wards Cove case law—a restoration to legal viability accomplished by the language of the CRA's § 3\textsuperscript{166} and confirmed by the § 105(b) memorandum—leaves considerable room for continuing ambiguity as to what the CRA accomplished.\textsuperscript{167} Indeed, varying interpretations as to the CRA's consequences did not have to await enactment of the 1991 Act; they were offered during the debates on the CRA. Of course, these interpretations were arguably of no significance whatsoever, given the mandate of § 105(b) that only

\textsuperscript{160} See supra part III.B.1.
\textsuperscript{161} Id.; see also Perry, supra note 119, at 11-28.
\textsuperscript{163} 433 U.S. 321 (1977).
\textsuperscript{164} 440 U.S. 568 (1979).
\textsuperscript{165} See supra part III.B.1.
\textsuperscript{166} See supra text accompanying note 151 for a quotation of section 3.
\textsuperscript{167} Most of the pre-Wards Cove lower courts were in agreement in imposing upon defendants a considerable task of justification. There was, however, variation in the terminology these courts used. See supra notes 136-140 and accompanying text.
the memorandum referenced therein is to have any historical significance. Nonetheless, these statements warrant attention because the Danforth et al. memorandum, while cloaked with exclusive authoritativeness by the language of § 105(b), is itself internally ambiguous: on the one hand it invokes Griggs and on the other hand it embraces Beazer—a post-Griggs, pre-Wards Cove decision that departed from Griggs. Thus, § 105(b), the purported definitive statement on business necessity, itself needs interpretation, and the views of those who voted for the bill containing § 105(b) are relevant in parsing this provision.169

1) The Republican Position

Senate Minority Leader Dole, one of the sponsors of the § 105(b) memorandum, inserted in the Congressional Record an analysis of the legislation which was identified as representing the views of the Bush Administration and 14 Republican senators. This analysis advanced the view that the CRA, rather than overturning Wards Cove, actually confirmed the decision’s formulation of business necessity.170 (The practical significance of this position was heightened by the fact that when then-President Bush signed the CRA, he asserted that the Republican Senators’ analysis would "be treated as authoritative interpretive guidance by all officials in the executive branch. . . ."171) The Dole group’s position was based on Beazer:

168. Senator Danforth, the primary drafter of the compromise language regarding disparate impact analysis, made the following observations during the Senate debates:

... [W]hatever is said on the floor of the Senate about a bill is the view of the Senator who is saying it. And if it is not written into legislative language, it does not necessarily bind and probably does not bind anybody else, including the 30-some odd cosponsors of the legislation. . . .

I believe . . . we should go ahead and pass the bill. . . . But I simply want to state that a court would be well advised to take with a large grain of salt floor debate and statements placed into the CONGRESSIONAL RECORD which purport to create an interpretation for the legislation that is before us.


169. Indeed, the varying positions expressed by various members of Congress were in some instances asserted by signatories to the key § 105(b) memorandum itself, and so their statements seem particularly relevant in assessing the meaning of the § 105(b) memorandum, as well as the § 3 language that it reiterates.


The Supreme Court’s formulation in \textit{Wards Cove} of the appropriate evidentiary standard defendants must meet is not only based upon that in \textit{Beazer}, but is nearly identical with it. . . . [T]he present bill has codified the “business necessity” test employed in \textit{Beazer} and reiterated in \textit{Wards Cove}.

The language in the bill [ultimately enacted into law as the 1991 Act] is thus plainly not intended to make that test more onerous for employers to satisfy than it had been under current law, [i.e., disparate impact doctrine as articulated in \textit{Wards Cove}].\textsuperscript{172}

Senator Hatch, ranking minority member of the Senate Committee on Labor and Human Resources, was an active participant in negotiating the compromise version of S. 1745,\textsuperscript{173} the bill ultimately enacted as the CRA. Like his Republican compatriots, he, too, regarded \textit{Wards Cove} as retaining considerable vitality: “[t]he burden of proof issue is the only part of \textit{Wards Cove} overruled by” the legislation.\textsuperscript{174} And like his Senate colleagues, Senator Hatch also looked to \textit{Beazer}:

The Supreme Court’s formulation in \textit{Wards Cove} is not only based upon it, it is nearly identical. . . . \textit{Beazer} is unquestionably reaffirmed by the compromise bill’s purposes clause and the \textit{Wards Cove} formulation of business necessity is not overruled by this substitute.\textsuperscript{175}

\textbf{2) The Democratic Position}

Senator Kennedy, chair of the Senate Committee on Labor and Human Resources, and an author of the §105(b) memorandum, was the manager of the bill in the Senate debates. Rather than directly responding to the Republican efforts to vindicate \textit{Wards Cove}, Senator Kennedy seemed to set forth on the one hand the position that only \textit{Griggs} was resurrected by the CRA, and on the other that both \textit{Griggs} and other pre-\textit{Wards Cove} decisional law were restored. Thus, at one point he asserted that

\textsuperscript{175} \textit{Id.} at S15,317.
"[t]he Danforth-Kennedy substitute makes clear that the Civil Rights Act of 1991 restores Griggs... It does not alter pre-Wards Cove law to favor either plaintiffs or defendants, but restores the status quo in Griggs that was disrupted by Ward [sic] Cove itself."176 He almost immediately went on to say, however, that S. 1745 "makes clear that the... terms 'job related' and 'business necessity' have the meaning enunciated by the Supreme Court in Griggs and in other Supreme Court decisions prior to Wards Cove."177 Thereby, Senator Kennedy, if not expressing unrefined acceptance of the Republicans' interpretation, also did not unambiguously rebut the Republicans' reading of the CRA-amended Title VII as essentially leaving Wards Cove's earlier incarnation, i.e., Beazer, intact with respect to the business necessity standard.

In contrast to the Democratic passivity in the Senate, the Republicans' reading of the CRA was emphatically contested when the compromise bill earlier passed by the Senate was taken up by the House in November, 1991. Congressman William Ford, chair of the House Committee on Education and Labor, which shared jurisdiction with the House Judiciary Committee regarding the legislation, pointed to three factors in disputing the Republicans' position:

[T]hose who make that argument [regarding the continuing vitality of Wards Cove's business necessity standard] have inexplicably chosen to ignore the plain meaning and command of the statute, the demise of numerous legislative proposals to codify Wards Cove,[178] and the unambiguous

177. Id. at S15,233-234.
178. Representative Ford recounted a history of failed efforts to inject the Wards Cove standard into the legislation, which first had been proposed in the 101st Congress, i.e., the Congress preceding the one during which the CRA was signed into law:

Language to codify the Wards Cove definition of business necessity was introduced during the 101st Congress in House amendment 702, the Michel substitute. Its definition of business necessity—that "the respondent's legitimate employment goals are significantly served by, even if they do not require, the challenged practice"—virtually mimicked the Wards Cove formulation that a challenged practice "serve in a significant way the legitimate employment goals of the employer." That proposal was resoundingly defeated by a roll call vote of 188 to 238.

An alternative legislative proposal to codify Wards Cove was submitted
interpretation of an identical formulation of the employers' business necessity defense embodied in the Americans With Disabilities Act.¹⁷⁹

Congressman Don Edwards, who chaired the House Judiciary Committee subcommittee that had jurisdiction over the legislation, offered a section-by-section analysis of the Senate-passed bill. He,

to the 101st Congress on October 21, 1990. In a written message accompanying the veto of the Civil Rights Act of 1990, the administration proposed “to codify the meaning of business necessity as used in Griggs v. Duke [Power Co.], 401 U.S. 424 (1971), and other opinions of the Supreme Court (1990 message, p. 20).” It is true that the phrase “to codify the meaning of business necessity used in Griggs . . . and other opinions of the Supreme Court” would have codified Wards Cove. However, that phrase also is markedly different from the phrase “. . . prior to Wards Cove . . .” which I [sic] embodied in the Danforth substitute [, i.e., S. 1745]. The proposed legislation accompanying the veto of the 1990 act was never considered in either the House of Representatives or the other body.

The administration introduced H.R. 1375 during the 102d Congress in yet another attempt to codify Wards Cove. The bill once again defined business necessity to mean “the respondent’s legitimate employment goals are significantly served by, even if they do not require, the challenged practice.” Section 4 of the Administration’s section-by-section analysis accompanying H.R. 1375 expressly acknowledged an intent to codify Wards Cove: “the burden-of-proof issue that Wards Cove resolved in favor of defendants is resolved by this Act in favor of plaintiffs . . . on all other issues, this Act leaves existing law undisturbed.” H.R. 1375 also was resoundingly defeated in the House by a roll call vote of 162 to 266.


Id. at H9,534. The Americans with Disabilities Act, 42 U.S.C. § 12101-213 (Supp. III 1991) (ADA), uses the same phrase as is used in the CRA, i.e., “related to the employment in question and consistent with business necessity.” Under the ADA an employer’s policy or practice will not be deemed to be consistent with business necessity if the practice does not “concern essential functions of the job”. Id. § 12111(8).

Representative Ford argued that the “related to the employment in question and consistent with business necessity” language, as used in the ADA, constituted “a formulation . . . more exacting than the administration supported but congressional[ly] rejected Wards Cove formulation.” 137 Cong. Rec. H9,535 (daily ed. Nov. 7, 1991). However, the data he cited and quoted from in support of this argument—i.e, passages from H.R. Rep. No. 101-485, Part 2, Committee on Education and Labor, U.S. House of Representatives, Americans With Disabilities Act of 1990, 101st Cong., 2d Sess. at 70-71, 172 (1990), as well as the ADA regulations issued by the EEOC, 29 C.F.R. §§ 1630.15(b), (c) (1992), and the EEOC’s interpretive appendix accompanying them—do not seem to particularly buttress his argument.
too, sought to debunk the Republicans’ interpretation: Edwards characterized Beazer, the linchpin for the Republicans’ insistence that Wards Cove was alive and well, as being limited to the special context of public safety.

3) Conclusion

Persuasive support for a negative conclusion as to whether the CRA in fact changed the Wards Cove business necessity formulation follows from the explicit resurrection of pre-Wards Cove case law, i.e., Beazer, by § 3 of the CRA and by the § 105(b) memorandum. This conclusion is reinforced by at least 14 Republican senators (including Senator Dole, one of the authors of the § 105(b) memorandum) who joined in an analysis making the argument for the Wards Cove standard’s continuing vitality, and by President Bush when he signed the CRA into law.

The trenchancy of the counter-arguments is problematic. As Congressman Ford urged, the earlier rejections of similar proposals that had set forth the Wards Cove standard argue against reading § 3 and the § 105(b) memorandum as legislative Trojan Horses,

180. Insofar as the Republicans’ effort entailed the argument that the business necessity standard enunciated in Wards Cove already had been articulated in Watson v. Fort Worth Bank and Trust, 487 U.S. 977 (1988), Representative Edwards pointed out that only a plurality of the Watson Court had so spoken. The reference, then, in § 3 of the CRA to returning the state of the law to that existing prior to Wards Cove could not indirectly confirm the vitality of Wards Cove by confirming the vitality of Watson, since the Watson plurality’s language did not constitute a holding. 137 Cong. Rec. H9,527 (daily ed. Nov. 7, 1991).

181. What was at issue in Beazer was the ability of workers to operate public transit without endangering the lives of the millions of people who ride the buses and subways in New York City every day. Indeed, the Supreme Court emphasized that the District Court had recognized “the special responsibility for public safety born [sic] by certain TA employees and the correlation between longevity in a methadone maintenance program and [job] performance capability.” 440 U.S. at 578. . . . Thus nothing in the Beazer decision suggests that the Supreme Court was departing in 1979 [the year Beazer was decided] from the job relatedness and job performance standard of business necessity that began with Griggs.

137 Cong. Rec. at H9,528.

182. It is true that the views of opponents of legislation are generally given little credence when legislative history is looked to for guidance. See, e.g., Shell Oil Co. v. Iowa Dept. of Revenue, 488 U.S. 19, 29 (1988). Here, however, the Republican senators—or at least some of them—purported to be supporters of the legislative language.
enlisted to resurrect a standard already explicitly spurned. The\footnote{See infra part III.E.1.} While this is a cogent point in theory, its actual persuasiveness is undercut by the fact that the bill that was ultimately enacted constituted a compromise between Bush Administration representatives who wanted to retain the Wards Cove formulation but lacked sufficient votes for their position, and a majority in the Congress, who wanted to revise Title VII to negate, or at least significantly curtail, Wards Cove, but lacked the votes needed to override the veto of a bill containing everything they wanted. Thus, the earlier rejections of Wards Cove's business necessity standard are not all that revelatory of Congressional intent, inasmuch as the terms of the CRA of 1991 constituted language painstakingly devised to deal with the political stand-off that had emerged subsequent to those rejections.

As for Congressman Edwards' effort to characterize Beazer as a decision concerning public safety, even were the pro-defendant Beazer formulation so limited, it would still at least have continuing vitality in that context. At most, then, his interpretive ploy—which effectively concedes the relevance of Beazer for post-CRA resolution of Title VII impact litigation—only restricts the ruling's reach, rather than completely negating it.\footnote{See, e.g., Norbert A. Schlei and Paul Grossman, Employment Discrimination Law 353-54 (2d ed. 1983) ("Even in . . . law-enforcement-related cases, where an element of public safety is at issue, the courts have not been willing to extend Dothard v. Rawlinson, 433 U.S. 321 (1977), to prisons other than Alabama's."). Accord Gunther v. Iowa State Men's Reformatory, 462 F. Supp. 952, 955-58 (N.D. Iowa 1979), aff'd, 612 F.2d 1079 (8th Cir. 1980), cert. denied, 446 U.S. 966 (1980). Some ADEA courts, however, have afforded employers considerable leeway when a public safety justification is invoked, typically using the excuse that they lack sufficient expertise to evaluate the employer's judgments, which often will be based on predictions as to the health problems that may confront older workers allowed to stay on the job. See, e.g., Murnane v. American Airlines, Inc., 667 F.2d 98, 101 (D.C. Cir. 1981), cert. denied, 456 U.S. 915 (1982); Touhy v. Ford Motor Co., 490 F. Supp. 258, 263 (E.D. Mich. 1980), rev'd, 675 F.2d 842 (6th Cir. 1982). In Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985), which involved a policy requiring}

\begin{thebibliography}{99}
\item\footnote{See infra part III.E.1.} Some of those proposals were made in the course of working out the terms of the ultimately-vetoed Civil Rights Act of 1990. Nonetheless, the legislative history of that aborted Act was part-and-parcel of the history of the CRA of 1991. See infra part III.E.1.
\item\footnote{See, e.g., Norbert A. Schlei and Paul Grossman, Employment Discrimination Law 353-54 (2d ed. 1983) ("Even in . . . law-enforcement-related cases, where an element of public safety is at issue, the courts have not been willing to extend Dothard v. Rawlinson, 433 U.S. 321 (1977), to prisons other than Alabama's."). Accord Gunther v. Iowa State Men's Reformatory, 462 F. Supp. 952, 955-58 (N.D. Iowa 1979), aff'd, 612 F.2d 1079 (8th Cir. 1980), cert. denied, 446 U.S. 966 (1980). Some ADEA courts, however, have afforded employers considerable leeway when a public safety justification is invoked, typically using the excuse that they lack sufficient expertise to evaluate the employer's judgments, which often will be based on predictions as to the health problems that may confront older workers allowed to stay on the job. See, e.g., Murnane v. American Airlines, Inc., 667 F.2d 98, 101 (D.C. Cir. 1981), cert. denied, 456 U.S. 915 (1982); Touhy v. Ford Motor Co., 490 F. Supp. 258, 263 (E.D. Mich. 1980), rev'd, 675 F.2d 842 (6th Cir. 1982). In Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985), which involved a policy requiring}
On balance, enough confusion exists to preclude a firm conclusion as to exactly what has been accomplished by the CRA in terms of negating or limiting *Wards Cove* with respect to the definition of business necessity. Nonetheless, it would appear that there is at least (and perhaps at most), a reasonable likelihood that the CRA, by adding language to Title VII, did indeed change the business necessity formulation enunciated in that decision.

*e. The Particular Cause Requirement*

Section 703(k) of the CRA-amended Title VII imposes on the plaintiff in a disparate impact case the requirement of proving "that a particular challenged employment practice causes a disparate impact." There is room for relieving the plaintiff of this burden, however: "[I]f the complaining party can demonstrate [i.e., prove] that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decision-
making process may be analyzed as one employment practice."\textsuperscript{186} The language of § 703(k) represents a compromise bridging in some measure the split that had existed in the lower courts prior to \textit{Wards Cove}, whereby some courts had deemed impact analysis inapplicable to multi-component decisional processes, while others had taken a contrary position.\textsuperscript{187} Impact analysis in this context is legitimized by § 703(k), but only at the price of imposing on the plaintiff the onerous task of proving which specific component of the process caused the impact.\textsuperscript{188}

As already noted, § 105(b) of the CRA sets forth the proposition that the exclusive legislative history regarding the issue of "cumulation" is articulated in an interpretive memorandum placed in the \textit{Congressional Record} during the debates on the Senate compromise bill that eventually became law. That memorandum offered some explication as to the requirement of particularity:

\begin{quote}
When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, such as the height and weight requirements designed to measure strength in \textit{Dothard v. Rawlinson}, 433 U.S. 321 (1977), the particular, functionally-integrated practices may be analyzed as one employment practice.\textsuperscript{189}
\end{quote}

The foregoing ostensibly exclusive legislative history notwithstanding, there in fact was disagreement regarding cumulation among even the authors of this memorandum, and so the document, while claiming exclusive authoritativeness, is less than completely enlightening.\textsuperscript{190}

\textsuperscript{186} \textit{Id.}

\textsuperscript{187} See supra notes 146-47 and accompanying text.

\textsuperscript{188} However, this burden is in turn eased by the caveat contained in the CRA-added § 703(k) which can be invoked by a plaintiff who proves that the specific culpable facet of the process cannot be isolated.


\textsuperscript{190} Senators Danforth, Kennedy, Hatch, and Dole placed a statement in the Congressional Record whereby they "recognize[d] that they do not agree on the meaning of the word 'cumulation.'" \textit{Id.} at S15,362 (daily ed. Oct. 29, 1991). Senator Danforth explained the disagreement:

All agree that cumulation covers the so-called Dothard case relating to combined requirements, such as height and weight. The administration believes that this agreed-to interpretive memorandum precludes further discussion on the floor or further weight being given to people's ex-
Ironically, Senator Danforth, the author of the § 105(b) memorandum, inserted in the Congressional Record another memorandum—jointly subscribed to, like the previously quoted one—that proves to be the most informative statement, albeit one apparently not seen by its authors as really touching on the particularity issue (since, had it been so viewed, it would have been rendered meaningless by virtue of the § 105(b) memorandum). In this document, entitled "Sponsors' Interpretative Memorandum on Issues Other Than Wards Cove Business—Necessity / Cumulation / Alternative Business Practice" and supported by the 30 or so original cosponsors of the legislation, the authors stated as follows:

The bill requires a complaining party to demonstrate that a particular employment practice causes a disparate impact. By use of the [word] "cause," the bill should not be read to require a plaintiff "to eliminate all alternative explanatory hypotheses for a disparate impact." See Allen v. Seidman, 881 F.2d 375, 380 (7th Cir. 1989). For example, if an employment test creates a disparate impact on the

pressed position[s] on the so-called black box issue; that is, what do you do when you do not really know what is on an employer's mind, or the lost and destroyed records issue [, i.e., what do you do when the relevant records that would help identify the particular practice or policy having the alleged disparate impact have been lost or destroyed].

So the administration thinks that this interpretive memorandum covers those issues.

I do not happen to agree with that analysis of what it means. I think that it does not cover those issues. . . .

Id. at S15,325.

191. The six original Republican co-sponsors of the Senate bill that was enacted into law, i.e., S. 1745, 102nd Cong., 1st Sess. (1990), also inserted another interpretive memorandum in the Congressional Record regarding the provisions of the compromise version of the bill, i.e., the version that was passed first by the Senate and then the House, and was ultimately signed into law. While this memorandum—unlike the one specifically referred to in § 105(b)—is not accorded special significance by the CRA, it nonetheless is particularly noteworthy because it set forth the jointly held views of legislators intimately involved (particularly Senator Danforth) in drafting the legislation, which was not otherwise explained by a committee report that, if it existed, presumably would have delineated and analyzed the Act's provisions and the intent underlying them. Although Senator Kennedy, chair of the Senate Committee on Labor and Human Resources and the key original Democratic co-sponsor, did not sign the memorandum, he did state that he agreed with it, save for its discussion of the issue of retroactive application of the CRA. Id. at S15,485 (daily ed. Oct. 30, 1991). For the full text of this memorandum, see id. at S15,483-85.
basis of race, a plaintiff would not be required to prove that a disadvantaged background was not an alternative, possible hypothesis for the disparate impact. . . .

With respect to the need for specificity, . . . if employment decision-makers cannot reconstruct the basis for their employment decisions, because uncontrolled discretion is given to a respondent’s employment decision-makers, then the decision-making process may be treated as one employment practice and need not be identified by the complaining party as discrete practices. See Sledge v. J.P. Stevens & Co., 52 EPD para. 39,537 (E.D.N.C. Nov. 30, 1989). Similarly, if a complaining party proves to a judge that it is impossible for whatever reason to reconstruct how practices were used in a decisionmaking process, then the decisionmaking process is incapable of separation for analysis and may be treated as one employment practice and challenged and defended as such.192

f. Responding to a Business Necessity Defense

In Albemarle Paper Co. v. Moody193 the Court held that even if a defendant successfully asserted a business necessity defense the plaintiff still could prevail by proving the existence of an alternative practice or policy that would allow the defendant to achieve its business need just as well, while at the same time

192. Id. at S15,484. Senator Danforth and his fellow co-sponsors of S. 1745 were not the only ones to address the causation issue. Despite the fact that the interpretive memorandum was supposed to constitute the exclusive legislative history, several senators (including some of the authors of the interpretive memorandum) expounded on the question of a plaintiff’s identifying with specificity the cause of the alleged discriminatory impact. See, e.g., id. at S15,234 (daily ed. Oct. 25, 1991) (statement of Senator Kennedy); id. at S15,318-19 (daily ed. Oct. 29, 1991) (statement of Sen. Hatch); id. at S15,380 (daily ed. Oct. 29, 1991) (statement of Senator Metzenbaum); id. at S14,473-474 (daily ed. Oct. 30, 1991) (statement of Senator Dole on behalf of himself, 13 other Republican senators, and the Bush Administration); id. at H9,528 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards, chair of the House Judiciary Committee subcommittee that had jurisdiction over the legislation); id. at H9,533-34 (daily ed. Nov. 7, 1991) (statement of Rep. Ford, chair of the House Committee on Education and Labor, which had concurrent jurisdiction, along with the House Judiciary Committee, over the legislation); id. at H9,544-45 (daily ed. Nov. 7, 1991) (statement of Rep. Hyde, ranking minority member of the House Judiciary Committee subcommittee that had jurisdiction over the legislation).

193. 422 U.S. 405 (1975).
imposing a less discriminatory impact on the group to which the victimized plaintiff belonged.\textsuperscript{194} This formulation was commonly applied in the succeeding years. And in 1989 the \textit{Wards Cove} Court, without stressing any shift in emphasis or analysis, opined that the refusal of an employer to use a less discriminatory alternative "belie[s] a claim by petitioners that their incumbent practices are being employed for nondiscriminatory reasons."\textsuperscript{195} The Court did not state that it would be necessary for the plaintiff to show that the defendant in fact had refused to utilize the alternative practice in question. Rather, if this refusal existed, it would simply constitute one—but not the only—means for undermining the business necessity defense.\textsuperscript{196}

The amended Title VII affords an enhanced degree of protection to defendants. Under the post-CRA Title VII a plaintiff apparently can no longer prevail just by proving the existence of a less discriminatory alternative; he or she must further prove that "the . . . [defendant] refuses to adopt such alternative employment practice."\textsuperscript{197} Thus, what under \textit{Wards Cove} would have been evidence of discriminatory intent, i.e., the employer's refusal to adopt an alternative policy or practice, is converted by the CRA's language into a requirement that must be satisfied by the plaintiff as to whose claim a business necessity defense has been proven.

\textbf{g. Summary}

It is safe to say that from the perspective of plaintiffs \textit{Wards Cove} was a grim development, given that the Court (1) reallocated the burden of proof from the defendant to the plaintiff, (2) diluted the business necessity standard, and (3) insisted that a plaintiff identify with specificity the particular aspect of a multi-component decisional process causing the complained-of impact. Conversely, the ruling had to have been welcome to those critics who argue that disparate impact analysis unduly penalizes employers who are innocent of harboring any discriminatory intent, and who have

\textsuperscript{194} \textit{Id.} at 425.

\textsuperscript{195} 490 U.S. at 660-61.

\textsuperscript{196} In theory, and often in application, disparate impact analysis is not concerned with the defendant's intent. Obviously, however, the question of intent can be relevant, after all, as evidenced by the \textit{Wards Cove} Court's according legal significance to an employer's refusal to adopt a less discriminatory practice.

condemned *Griggs* for supposedly forcing employers into the defensive posture of adopting quotas in order to avert impact-based lawsuits.\(^{198}\) In any event, whatever the characterization of disparate impact case law might have been prior to *Wards Cove*, and however *Wards Cove* itself might be viewed, it is undeniable that in some—maybe full—measure, the CRA consigned the ruling to the legal dust heap.

Granted, one possible consequence of the CRA—i.e., its formulation of the substantive nature of the business necessity defense—remains ambiguous. But other changes made by the CRA are clear. Plaintiffs are favored by virtue of the amended Title VII placing the burden of proof as to business necessity back where it was prior to *Wards Cove*: on the defendant’s shoulders. In addition, the amended Title VII affords to plaintiffs a means of relief from the task of establishing specific causation that did not exist under *Wards Cove*. On the other hand, defendants benefit from the amended Title VII making it more difficult for plaintiffs who seek to overcome a business necessity defense by pointing to a less discriminatory alternative, than was the state of legal affairs under *Wards Cove*.\(^{199}\)

There can be no doubt, then, that Title VII is today a different statute than it was the day after *Wards Cove* was decided. But what of the ADEA, which was not changed by the CRA? If *Wards Cove* was indeed such a flawed reading of Title VII’s prohibitions, as the congressional majority who voted for the CRA obviously deemed it and as the President who signed the legislation presumably thought it to be, why was the ADEA—which contains the same prohibitory language (except that “age” is substituted for “race,” etc.)—not amended to negate the import of *Wards Cove*, which remains a live, valid judicial opinion until overruled by the Court itself?


\(^{199}\) Of course, if the CRA indeed is read as supplanting *Wards Cove*’s defendant-protective business necessity formulation with a more rigorous justification standard, this benefit for defendants will be of diminished legal solace, because it will be more difficult in the first instance to erect the successful defense that will trigger the plaintiff’s task of proving that the defendant rejected a less discriminatory alternative.
No clear—or even obscure—answer emerges. What is clear is that the ADEA was not modified. More than that, Congress' failure to act notwithstanding the longstanding, firm linkage of Title VII and the ADEA, supports, even if it does not compel, reading Wards Cove—whatever the decision's analytical flaws—as still constituting an analogically persuasive precedent for the age discrimination statute.\textsuperscript{200} Before this silence is examined, however, two related matters demand attention: (1) the state of ADEA mixed motives case law, which also has fallen victim to uncertainty by virtue of the 1991 Act's silence, and (2) the timely filing issue brought into high relief by Lorance v. AT&T Technologies, Inc.\textsuperscript{201} and by the CRA's response to this decision.

C. MixMotives Analysis

During the 1980s, a small but steadily increasing number of courts addressed both Title VII and ADEA claims that involved situations where there were perceived to be mixed motives for the defendants' conduct or decision. The employer charged with violating the statute in question was seen as having been motivated


\textsuperscript{201} 490 U.S. 900 (1989).
in part by a consideration forbidden by Title VII or the ADEA, i.e., the plaintiff’s race or age, and in part by a legitimate concern, such as the plaintiff’s lack of qualification for the job in question. Several courts ruled that in such a circumstance the defendant as to which a prima facie case had been established would have to shoulder a burden of proof, rather than merely one of production. 202 This burden required the defendant to prove that it would have made the same decision even had the forbidden factor not been considered. 203 The courts generally agreed that if the defendant succeeded in proving this defense, reinstatement of the discharged employee or the hiring of the rejected applicant could not be ordered, nor could back pay be awarded. However, they also generally took the position that by reason of the plaintiff having proven some level of unlawful discriminatory intent, he or she could obtain injunctive relief barring the defendant from continuing to act in a wrongful manner, and/or declaratory relief, as well as attorney’s fees and costs. 204

1. Price Waterhouse v. Hopkins

Price Waterhouse v. Hopkins, 205 a Title VII decision, involved a mixed motives situation. While there was no majority opinion, a majority of the justices agreed that once a prima facie case was established, the burden shifted to the defendant to prove a same decision defense. 206 While a majority of the justices also opted for a preponderance of the evidence standard for this defense, and not the clear and convincing evidence requirement imposed by the Court of Appeals in the Price Waterhouse litigation, 207 there was dispute as to what was involved in application of the former standard. The Price Waterhouse plurality, in an opinion authored by Justice Brennan and joined by Justices Marshall, Blackmun, and Stevens, only required the plaintiff to establish that the

202. See, e.g., Fields v. Clark Univ., 817 F.2d 931 (1st Cir. 1987); Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985).
203. See cases cited supra note 202.
204. See, e.g., Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985); King v. Trans World Airlines, Inc., 738 F.2d 255 (8th Cir. 1984); Nany v. Barrows Co., 660 F.2d 1327 (D.C. Cir. 1981); Roberts v. Fri, 29 F.E.P. Cas. (BNA) 1445 (D.D.C. 1980).
205. 490 U.S. 228 (1989).
206. Id. at 244-45 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.); id. at 261 (O'Connor, J., concurring in the judgment).
207. Id. at 253 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.); id. at 261 (O'Connor, J., concurring in the judgment).
forbidden characteristic—gender in the *Price Waterhouse* case—"played a motivating part in an employment decision..." Justice White, who concurred in the judgment, asserted that the plaintiff had to show that "the unlawful motive was a substantial factor in the adverse employment action." And Justice O'Connor, who also concurred in the judgment, agreed with Justice White on this "substantial factor" formulation.

The three dissenters rejected the plurality's analysis. In seeking to narrowly characterize the plurality, White, and O'Connor opinions, Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, contended that these opinions established that "[t]he shift in the burden of persuasion occurs only where a plaintiff proves by direct evidence that an unlawful motive was a substantial factor actually relied upon in making the decision." Justice Kennedy's characterization would seem to be correct insofar as the "substantial factor" standard is concerned, in light of the

208. Id. at 250.
209. Id. at 259.
210. Id. at 276.
211. Id. at 280.
212. *Accord* Berlett v. Cargill, Inc., 780 F. Supp. 560, 563 (N.D. Ill. 1991); Greanias v. Sears, Roebuck & Co, 774 F. Supp. 462, 472 (N.D. Ill. 1991). But see Glover v. McDonnell Douglas Corp, 981 F.2d 388, 394 (8th Cir. 1992). Despite Justice Kennedy's effort at characterizing what had transpired in the case, it is unclear whether direct evidence is indeed the necessary trigger for shifting the burden of proof. The four justices who joined in the plurality opinion were apparently willing to shift the burden once a prima facie case based on circumstantial evidence was established. The three dissenters were unwilling to have the burden shift at all, no matter the nature of the evidence adduced in support of the plaintiff's prima facie claim. Justice O'Connor, who concurred in the judgment, required direct evidence for the burden to be shifted. 490 U.S. at 261. Justice White, who also concurred in the judgment, did not address the issue. Reading these diverse opinions in light of Marks v. United States, 430 U.S. 188, 193 (1977), *see infra* text accompanying note 213, it appears that by combining the plurality's position with that of Justice White—who, by not speaking to the issue did not impose a direct evidence requirement—the conclusion follows that the decision indeed does not require proof by direct evidence as the predicate for burden shifting. Thus, the dissenters' characterization is an inaccurate one. *Accord* Charles A. Sullivan, *Accounting for Price Waterhouse: Proving Disparate Treatment Under Title VII*, 56 *Brook. L. Rev.* 1107, 1132 n.100 (1991). Nonetheless, since *Price Waterhouse* a number of courts have reasoned, or assumed, that the burden of proof shifts only where the plaintiff has proved his or her case with direct evidence. *See, e.g.*, Beshears v. Asbill, 930 F.2d 1348, 1353 (8th Cir. 1991); Lynch v. Belden & Co., 882 F.2d 262, 269 n.6 (7th Cir. 1989), *cert. denied*, 493 U.S. 1080 (1990); Rossy v. Roche Prods. Inc., 880 F.2d 621 (1st Cir. 1989). Other courts, however, have not required direct
explanation offered by the Court in *Marks v. United States*\(^{213}\) that where there is a plurality decision with no identifiable rationale followed by at least a majority of the justices, ""the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .""

A majority of the *Price Waterhouse* justices rejected the proposition that a defendant that successfully established the same decision defense still could be held legally accountable to some extent. Instead, their position was that a defendant could completely avoid both liability for any legal or equitable relief and financial responsibility for costs and fees by proving that it would have made the same decision had it not taken that factor into account, notwithstanding that the plaintiff was able to prove that a proscribed factor played a motivating part in the challenged employment decision.\(^{214}\)

Following *Price Waterhouse*, courts began to apply the decision to the claims of age discrimination plaintiffs\(^{215}\)—hardly a surprising development, given ADEA courts' regular reliance on Title VII case law for analogical guidance.\(^{216}\)

2. *The Civil Rights Act's Response to Price Waterhouse*

The CRA amended Title VII in response to *Price Waterhouse*. Section 703(m)\(^{217}\) was added to Title VII by § 107(a) of the CRA\(^{218}\) to provide that ""an unlawful employment practice is established when the complaining party demonstrates [, i.e., proves,] that race . . . [, etc.] was a motivating factor for any employment practice, even though other factors also motivated the practice."" And section 107(b) of the CRA\(^{219}\) added a new subsection (2)(B) to § 706(g) of

evidence as a predicate to shifting the burden. *See, e.g.*, Fragante v. City of Honolulu, 888 F.2d 591, 598 (9th Cir. 1989), cert. denied, 494 U.S. 1081 (1990); Waltman v. International Paper Co., 875 F.2d 468, 481 (5th Cir. 1989).


214. 490 U.S. at 237 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.); *id.* at 261 * (White, J., concurring in the judgment); *id.* at 261 (O'Connor, J., concurring in the judgment).


216. *See supra* text accompanying note 5.


219. *Id.* § 107(b), 105 Stat. 1071, 1075-76.
Title VII authorizing the award of limited relief for a plaintiff as to whom the same decision defense has been invoked successfully, while also precluding the relief available in a standard, single motive Title VII suit:

(i) [the court may grant] . . . declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A) [, which deals with the standard forms of relief available to a prevailing Title VII plaintiff].

Thus, while the 1991 Act left untouched the shifting to the defendant of the burden of proof by a preponderance of the evidence, the amended Title VII does ease the task confronting the plaintiff. Pursuant to § 703(m) of Title VII, a plaintiff need only prove that the forbidden criterion was a "motivating factor" for the employer—a less rigorous standard than the "substantial factor" formulation that emanates from harmonizing the multiple opinions of Price Waterhouse. The CRA also overturned Price

221. "It is . . . the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination." Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). Back pay, awarded to make the prevailing plaintiff whole in financial terms, and injunctive relief, fashioned to provide the plaintiff the job or promotion wrongfully denied or to restore the plaintiff to the position from which he or she was wrongfully removed, are the two basic forms of make-whole relief.
223. There is considerable confusion emanating from Price Waterhouse as to whether the burden will shift only when the prima facie case is based on direct evidence. See supra note 212; see also 3 EBLR, supra note 5, at §§ 17.72C-.72D. The CRA does not address this issue.
224. Two commentators have written that "[s]ection 107 of the CRA dramatically changes [the] equation by amending Title VII to provide that the standard for establishing liability is merely that the prohibited characteristic was 'a motivating factor,' apparently no matter how slight, in the employment decision." James H. Code III & Amy Weinstein, Past Sins or Future Transgressions: The Debate Over Retroactive Application of the 1991 Civil Rights Act, 18 Employee Rel. L.J. 5, 10 (1992). The authors probably overstate the degree to which the CRA has eased the plaintiff's task.
Waterhouse insofar as that ruling enabled a defendant to avoid responsibility for the plaintiff’s fees and costs through successful invocation of the same decision defense.

Obviously, the CRA modified mixed motives analysis in the direction of aiding plaintiffs. But the ADEA, into which the Supreme Court decision has been infused, was not comparably amended. Again, then, one is left with substantial interpretive uncertainty.225

D. Timely Filing of an Administrative Charge

1. The Lorance Decision

The plaintiffs in Lorance v. AT&T Technologies, Inc.226 challenged a seniority rule governing layoffs that they claimed had been adopted for the purpose of discriminating against women employees. Although the defendant adopted this rule in 1979, its rule was not in fact applied to the plaintiffs until 1982; it was at this juncture that the plaintiffs filed charges of unlawful discrimination with the EEOC. At that point in time Title VII required (as it still does) that a charge of unlawful discrimination be filed with the EEOC within either 180 or 300 days of the alleged discrimination having occurred.227 (This timing framework is paralleled by the filing deadlines in the ADEA.228) The Lorance Court held that the charges had not been timely filed because the limitations period for the filing of a charge began to run when the seniority rule was adopted, rather than when the complainants first directly experienced the rule’s impact. The consequence of the Lorance decision was to require a grievant complaining of a seniority system allegedly violative of Title VII to file his or her charge of discrimination at a point when the system had not yet

225. The question of the significance for the ADEA of the changes made by the CRA to Title VII was noted, but not resolved, in Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1181-82 (2d Cir. 1992). See also Collins v. Outboard Marine Corp, 59 F.E.P. Cas. (BNA) 1403, 1407 n.1 (N.D. Ill. 1992). In Berlett v. Cargill, Inc., 780 F. Supp. 560, 562 n.8 (N.D. Ill. 1991), the court, noting that the “ADEA has not been expressly amended,” stated that it would “be assumed for present purposes that the legislation does not affect . . . [pre-CRA] text [i.e., ADEA] analysis.”
been applied, and indeed, when it was not even certain that the system ever would be applied.\textsuperscript{229}

While Lorance dealt with an allegedly discriminatory seniority rule, nothing in its logic suggests that it is not applicable to other Title VII issues. Moreover, Lorance's reasoning seems to be, and in fact has been deemed to be, relevant to ADEA claims involving seniority systems,\textsuperscript{230} as well as to other facets of the employment relationship. Indeed, in \textit{Equal Employment Opportunity Commission v. City Colleges of Chicago},\textsuperscript{231} a case involving the age discrimination statute, the Court of Appeals for the Seventh Circuit asserted that it saw "no reason for confining Lorance to Title VII suits challenging seniority systems."\textsuperscript{232} Congruent with this observation, ADEA courts have applied Lorance to both a maximum hiring age policy allegedly violative of the ADEA\textsuperscript{233} and an allegedly discriminatory benefit plan.\textsuperscript{234}

2. \textit{The Civil Rights Act's Response to Lorance}

Section 112 of the CRA\textsuperscript{235} amended Title VII by adding § 706(e)(2);\textsuperscript{236} this provision overrides Lorance insofar as seniority systems subjected to Title VII challenges are concerned:

\textsuperscript{229} Thus, Lorance encouraged charges and suits based on mere speculation. Furthermore, even if it seemed safe to predict that although the rule in question would be applied at some point, but not for months or even years into the future, the charge still would have to be filed. Thus, the decision required grievants to pursue legal actions, and to thereby engender workplace animosities, where such might well be unnecessary since the complained-of rule or system—if left unchallenged until it actually had a direct impact on an individual some time in the future—might have been changed before ever having been applied to the grievant, or the grievant might have stopped working for the employer before the rule would have ever come into play. The only caveat set forth by the Lorance Court to its requirement of premature litigation was the proviso that a rule or plan that was discriminatory on its face did not have to be challenged until it was actually applied to the complainant. 490 U.S. at 912.

\textsuperscript{230} Barrow v. New Orleans S.S. Ass'n, 932 F.2d 473, 477 (5th Cir. 1991).

\textsuperscript{231} 944 F.2d 339 (7th Cir. 1991).


(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or a provision of the system.237

In light of § 706(e)(2)'s narrow scope, Lorance continues to be viable in non-seniority system situations, and thus the pro-plaintiff change made to Title VII by § 112 of the CRA is of relatively limited reach. This conclusion follows as to the narrow reach of the CRA-added § 706(e)(2), despite the legislative history, which reveals a broader condemnation of Lorance than is captured in the actual language of the addition to Title VII. A memorandum represented as expressing the views of the approximately 30 original sponsors of the legislation was inserted in the Congressional Record during the Senate debate on S. 1745.238 Lorance, it was observed, had been applied in contexts other than those involving seniority systems, as well as in a non-Title VII context, i.e., the ADEA. “Unfortunately,” the memorandum’s authors asserted, “[t]his legislation should be interpreted as disapproving the extension of . . . [Lorance] to contexts outside of seniority systems.”239 The committee reports addressing the House bill that, in altered form, was eventually enacted as the CRA also criticized Lorance’s application to contexts other than seniority systems.240

The significance of the Congressional Record memorandum, as well as the committee reports, is difficult to assess. They certainly evidenced a desire to limit Lorance. Yet, condemnatory comments notwithstanding, the ADEA in fact was not modified

237. Id.
240. See H.R. Rep. No. 102-40, Part 2, supra note 62, at 23; H.R. Rep. No. 102-40, Part 1, supra note 62, at 61-62 ("Although the Lorance decision involved a seniority system, its reasoning is applicable to many other employment practices, causing equally harsh and inequitable results.").
to reflect these concerns. And although, in contrast, Title VII was amended, even there the actual statutory change did not match the expansive damning rhetoric, but rather was limited just to allegedly discriminatory seniority systems.

Whatever the defects, then, of Lorance (and there was general agreement on both sides of the Congressional aisles, as well as by members of in the Bush Administration,241 that the decision was so flawed that it deserved to be overturned), the ruling’s rejection for ADEA purposes was not expressed in the way such rejection could—and expectably would—be manifested, i.e., a statutory change. (Of course, even if there were proscriptive language applicable to the age statute, if that language did no more than track Title VII’s § 706(e)(2) the hypothetical ADEA provision would likewise be of limited reach. Indeed, some of the previously noted ADEA decisions in which Lorance was followed would not even be affected by such a provision, since they did not address seniority systems.) Thus, again, the perplexing problem of matching rhetoric with actuality in a jurisprudentially responsible manner emerges. Does one jettison Lorance for challenges to seniority systems and, perhaps—if one were to heed the condemnatary rhetoric of the legislators and the committees—for other applications, as well, or does one focus on the fact that the ADEA was not changed to reject the decision and accordingly conclude that Lorance’s analogical weight persists?

E. Gleaning Guidance From the Legislative History

The accepted practice in reading a statute when its meaning is not clearly discernible from its terms is to seek to divine the legislature’s intent.242 Of course, for courts (or other interpreters of a statute) bent on ascertaining legislative intent, the process of interpretation and discovery is rarely simply a mechanical endeavor.

241. In his October 22, 1990 message to the Senate explaining his veto of the Civil Rights Act of 1990—the CRA of 1991’s predecessor, see infra part III.E.1., President Bush pointed out that the bill that he did support was in agreement, in some respects, with the legislation he was vetoing. In this regard, he observed that both his administration’s recommended bill and the vetoed bill “expand[ed] the right to challenge discriminatory seniority systems by providing that suit may be brought when they cause harm to plaintiffs.” 26 WEEKLY COMP. PRES. DOC. 1632, 1633 (Oct. 29, 1990).

242. See, e.g., 2A NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 45.05 (5th ed. 1992) (“For the interpretation of statutes, ‘intent of the legislature’ is the criterion that is most often cited.”).
“To a substantial extent, the metaphor of judge as cipher has been replaced,” it has been observed by a leading scholar of statutory interpretation, “with the vision of a creative lawmaker whose judgment in ‘hard’ statutory cases, where the statutory text does not answer the question determinately, rests in large part on the judge’s subjective views of the statute and the justice of the particular case.” This need not mean, however, that the interpretation of a statute consistent with the legislature’s aims is a completely discretionary endeavor. “This ‘intentionalist’ approach asks how the legislature originally intended the interpretive question to be answered, or would have intended the question to be answered had it thought about the issue when it passed the statute.”

244. Id. at 1479-80. Another very influential expression of this theme was articulated by Professors Hart and Sacks:

In interpreting a statute a court should: 1. Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then 2. Interpret the words of the statute immediately in question so as to carry out the purpose as best as it can.

H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1411 (tent. ed. 1958) (unpublished manuscript), quoted in Eskridge, supra note 243, at 1545. Hart and Sacks’ prescription has been undermined by changing times and understandings, as explained by Judge Posner:

Since Hart and Sacks wrote, a large number of factors have combined to inflict a mortal blow on the comfortable view of statutory interpretation they espoused. Chief among these factors have been the breakdown of political consensus; the growth of social choice theory on the foundation of [Kenneth] Arrow’s impossibility theorem; the rediscovery of interest groups by economists and political scientists on both the left and the right; the criticisms of the “public-interestedness” of legislation by the conservative and deregulation movements; the debunking of the “canons of statutory construction”; and the attacks made by Continental philosophers and their American followers on the objectivity of interpretation.


On the present Supreme Court, Justice Scalia has taken an aggressive stance in rejecting reliance upon traditional legislative materials, i.e., legislative debates and committee reports. See, e.g., Green v. Bock Laundry Mach. Co., 490 U.S.
As it turns out, there are no intellectual gold nuggets buried in the legislative history of the Civil Rights Act of 1991 that afford guidance for meshing the CRA, the CRA-amended Title VII and the Supreme Court decisions generating these amendments, on the one hand, with the ADEA, on the other. Indeed, what is so striking—given the extensive body of case law establishing virtually without cavil the regular and overt reliance of ADEA courts on Title VII decisions—is the very considerable inattention (at least so far as the public record discloses) to the impact on the ADEA of the changes made to Title VII. There was only the most occasional reference to the age discrimination statute in the testimony offered and the documents submitted during the course of the hearings on the legislation that culminated, after a number of versions, in the CRA.\textsuperscript{245} And none of these very rare mentions of the ADEA touched on, or evinced any recognition of, the fact that the decisions to which the proposed amendments of Title VII were directed also had significance for age discrimination claims. The debates in the House and the Senate were equally silent regarding the ADEA generally, as well as the specific impact of

the CRA. (There was, of course, one notable exception to this approach, i.e., the CRA’s response to Martin v. Wilks,246 which response entailed looking both to the ruling’s impact on Title VII and its consequences for other civil rights statutes, including the ADEA.247)

Still, the effort to locate some modicum of attention accorded the ADEA and its post-CRA fate is not entirely fruitless: there was some language in the CRA’s vetoed predecessor, as well as a House Judiciary Committee reference early on in the development of the CRA, that touched on the 1991 Act’s intersection with the ADEA. While the messages these isolated instances conveyed are confusing, there are nonetheless some useful inferences to be drawn.

1. The Proposed, but Rejected, Rules of Construction

The relevant history of the Civil Rights Act of 1991, a product of the 102nd Congress, actually begins in 1990 with the 101st Congress’ passage of the Civil Rights Act of 1990. This proposed legislation was vetoed by President Bush on October 22, 1990. It was the efforts to draft language satisfactory to both the supporters of the 1990 aborted bill and to the Bush Administration that culminated in the compromise bill that was passed and signed into law as the 1991 Act. In contrast to the 1991 CRA, which is devoid of any language relevant to interpreting the ADEA in light of the amended Title VII’s rejection or limiting of several relevant Supreme Court decisions, the vetoed 1990 bill did address, in some measure, the impact of an amended Title VII on the ADEA. This attention to the age statute took the form of two proposed rules of construction that were to be placed in Title XI of the Civil Rights Act of 1964248 as subsections (b) and (c) of a new 42 U.S.C. § 1107. Section 11 of the proposed 1990 Act, setting forth these provisions, read as follows:

**SEC. 11. CONSTRUCTION**
Title XI of the Civil Rights Act of 1964 (42 U.S.C. 2000h et seq.) is amended by adding at the end thereof the following new section:
**SEC. 1107. RULES OF CONSTRUCTION FOR CIVIL RIGHTS LAWS.**

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247. See supra part II.B.2.

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

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

(c) INTERPRETATION.—In interpreting Federal civil rights laws, including laws protecting against discrimination on the basis of race, color, religion, sex, national origin, age, and disability, courts and administrative agencies shall not rely upon the amendments made by the Civil Rights Act of 1990 as a basis for limiting the theories of liability, rights, and remedies available under civil rights laws not expressly amended by such Act.249

While both the Senate bill that was passed in 1990, S. 2104,250 and the proposal passed in the House, H.R. 4000,251 contained from the outset the foregoing proposed 42 U.S.C. § 1107(b), subsection (c) originated in the House and did not appear on the Senate scene until a substitute bill was introduced by Senators Kennedy and Jeffords252 after the Senate Committee on Education and Labor reported out the committee version of S. 2104.253 It was this substitute version of S. 2104 that eventually was passed by the Senate.

The Conference Committee report on the substitute bill was silent as to the import of the proposed § 1107(b) and (c), but the earlier committee reports offered some useful instruction. Subsec-

252. This substitute bill, also denominated S. 2104, was introduced by Senators Kennedy and Jeffords on July 10, 1990. 136 Cong. Rec. S9,325-27 (daily ed. July 10, 1990). It was supported by a majority of the Senate Committee on Education and Labor.
tion (b) was explained in the report of the Senate Committee on Labor and Human Resources:

Subsection (b) codifies in the civil rights areas the well-established rule that in construing federal laws protecting civil rights, the courts are not to infer that other federal laws protecting civil rights have implicitly repealed or amended such laws. For example, in construing federal civil rights laws protecting against discrimination on the basis of race, color, national origin, sex, religion, age or disability, courts should not rely on the amendments made by the Act as a basis for limiting the theories of liability, rights and remedies available under civil rights laws not expressly amended by the Act.254

Subsection (c) was added by the House Judiciary Committee during the course of its consideration of the House bill; the committee report accompanying the bill offered some elucidation as to this subsection’s purpose:

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

254. Id. at 58. The House version of the legislation contained a comparable provision, which was explained as follows by one of the two committees having concurrent jurisdiction over the legislation:

Subsection (b) codifies in the civil rights areas the well-established rule that in construing federal laws protecting civil rights, the courts are not to infer that other federal laws protecting civil rights have implicitly repealed or amended such laws.

accorded to civil rights claimants under Title VII and Section 1981 to be construed as somehow narrowing the rights and remedies available under any other federal civil rights statutes. 255

Given these committee explanations, it is safe to conclude that the proposed subsections (b) and (c) spoke in some way to the impact on the unamended ADEA of the proposed amendments to Title VII. Exactly what was said, however, is unclear.

Subsection (c) purported to preclude courts and agencies from relying upon the amendments to Title VII made by the proposed Civil Rights Act of 1990 as bases for "limiting theories of liability, rights, and remedies available under other civil rights laws [i.e., the ADEA] not expressly amended by such Act."256 One problem, however, with reading this provision as speaking to the ADEA follows from the fact that the bill sent to the President (which he did not sign) contained a provision—actually the precursor of § 115 of the Civil Rights Act of 1991257—that directly amended the age statute with regard to the time for filing charges of unlawful discrimination with the EEOC and the time within which suit could be filed.258 Indeed, this provision had first appeared in the bill reported out of the House Judiciary Committee, and that bill—the Judiciary Committee's proposed version of the 1990 Act—also contained the proposed 42 U.S.C. § 1107(c).259 Thus, from the very inception of the latter provision to its final incarnation, it was brigaded with a companion provision addressing the age discrimination statute. And since the ADEA was expressly amended by the proposed 1990 Act, it followed from the language of the

255. H.R. REP. NO. 101-644, PART 2, supra note 254, at 42 (footnotes omitted). When Senator Kennedy introduced a substitute version of S. 2104, 101st Cong., 2d Sess. (1990), to supplant the bill that had been reported out of the Senate Committee on Education and Labor that he chaired, he similarly explained that the purpose of the proposed § 1107(c), which had not been included in the to-be-supplanted committee bill, was "to ensure that the changes made by the Civil Rights Act should not be used as a basis for narrowing civil rights laws not addressed in the Act." 136 CONG. REC. S9,324 (daily ed. July 10, 1990).

256. Proposed 42 U.S.C. § 1107(c) (emphasis added).

257. See supra part II.A.


proposed 42 U.S.C. § 1107(c) that the age discrimination statute fell outside the protection that the provision sought to erect.

However, the logic of the foregoing reading is undermined by the report of the Judiciary Committee addressing the committee's proposed version of the Civil Rights Act of 1990. The committee, as noted above, explained that subsection (c) was intended to ensure that the changes made by the CRA of 1990 to Title VII and to 42 U.S.C. § 1981 "should not undermine accepted rules of law and precedents construing other federal civil right [sic] laws."²⁶⁰ Appended to this sentence was a footnote in which the Committee stated: "Including, but not limited to, 42 U.S.C. § 1983, the Age Discrimination in Employment Act, and the Equal Pay Act."²⁶¹ Thus, notwithstanding that on its face the proposed § 1107(c) seemed to preclude the subsection’s application to the ADEA, the Judiciary Committee somehow saw its way clear to asserting a contrary position in explaining that very provision.²⁶²

Even if one were able to surmount the ostensibly preclusive language of the proposed 42 U.S.C. § 1107(c) by pointing to the just-quoted committee report’s language, it still would be difficult to know what to make of this subsection, as well as of the proposed § 1107(b), for that matter. Both subsections were aimed at foreclosing the changes made to Title VII and 42 U.S.C. § 1981 "limiting" (to employ the term used by the committees in explaining the proposed rules of construction) the interpretation and application of other statutes. The sticking point is that the ADEA was arguably already being read more narrowly than the proposed amended Title VII—i.e., Title VII as amended by the proposed CRA of 1990—would have been interpreted, inasmuch as ADEA courts were taking their cues from Wards Cove, Price Waterhouse,

²⁶¹ Id. at 42 n.63.
²⁶² The proposed 42 U.S.C. § 1107(c) provided that courts were not to rely upon the CRA of 1990’s amendments "as a basis for limiting the theories of liability, rights, and remedies available under civil rights statutes not expressly amended by such Act." Arguably, the phrase "not expressly amended by such Act" could be read as modifying "theories of liability, rights, and remedies" rather than "civil rights statutes." In other words, rather than this proposed rule of construction only barring reliance upon the amendments made by the CRA of 1990 vis-a-vis statutes that were amended by the CRA of 1990, the rule—it could be suggested—spoke to barring reliance upon the amendments with regard to "theories of liability, rights, and remedies" that had not been amended by the CRA of 1990. This construction of the language of the provision would be a strained one. The syntax more naturally leads to reading the phrase "not expressly amended by such Act" as applying to "civil rights statutes."
and Lorance, each of which was cabinned with respect to Title VII by the proposed 1990 legislation. Thus, the proposed CRA of 1990 in fact did not embody changes that, if applied to the ADEA, would have limited the age discrimination statute. Rather, the changes to Title VII that the 1990 legislation proposed would have, if applied to the ADEA as well, freed the age discrimination statute from the debilitating constructions applied to it pursuant to the very Supreme Court rulings that the CRA of 1990 aimed to curtail or negate in the Title VII context. It is difficult, then, to discern how the proposed rules of construction set forth in § 1107 of the vetoed Civil Rights Act of 1990 would have affected the ADEA.

Granted, there is another tenable reading here, although the process of analysis becomes steadily more Byzantine as one pursues this tack. One could hypothesize that the members of the Senate Committee on Labor and Education and of the House Judiciary Committee, as well as other supporters of the proposed Civil Rights Act of 1990, were unaware of the decisions—which in fact were then few in number—in which ADEA courts were following the guidance of Wards Cove and the other restrictive Supreme Court Title VII decisions. One could further conjecture that the senators and representatives, while viewing the changes embodied in their proposed legislation as curtailing those Supreme Court rulings, thought that the amended Title VII would only be partially recouping the losses imposed by Wards Cove et al., and so the CRA-modified Title VII would not be as plaintiff-protective as the pre-CRA Title VII had been prior to those rulings. Thus, to synthesize this speculative analysis, the proponents of the Civil Rights Act of 1990—perhaps thinking that the ADEA case law actually continued to be more protective of plaintiffs’ rights than were Wards Cove, Price Waterhouse, Lorance and their lower court Title VII progeny—further thought that what they were accomplishing by the language of the proposed 42 U.S.C. § 1107(b) and (c) was the perpetuation of this plaintiff-protective ADEA case law, which otherwise might be adulterated by the compromises reflected in the new language of Title VII. In fact, of course, there is nothing in the committee reports to provide empirical support for this line of analysis. Nor do the House or Senate debates, or the committee hearings, offer anything more. Moreover, those who concocted this hypothetical scenario would have been wrong on their facts and off base as to their surmises!

The bottom line, of course, is that the proposed § 1107(b) and (c) never were enacted. Nor were such rules set forth as proposals
in the legislation introduced in the House and Senate in the 102nd Congress. Indeed, nothing in the legislative history directly focusing on the 1991 Act—i.e., committee reports, debates, etc.—speaks to the failure of the proposed § 1107(b) and (c) to reappear on the legislative scene. There is an apt explanation, however: President Bush's expression of opposition in the message that accompanied his vetoing of the proposed 1990 Act. After setting forth in some detail his primary objections to the legislation, he noted several other "unacceptable provisions."263 In amplifying his concerns, he stated as follows: "The bill also contains a number of provisions that will create unnecessary and inappropriate incentives for litigation. These include . . . a 'rule of construction' that will make it extremely difficult to know how courts can be expected to apply the law."264 (Inasmuch as the proposed 42 U.S.C. § 1107 in fact contained not just "a" proposed rule, but in fact three rules of construction, it is difficult to know to which particular rule the President was referring. Beyond that, it is impossible to understand the basis for his perception that the objectionable rule would make it "extremely difficult" for courts to apply the law, since he offered no elucidation.265)

In sum, the most that one can conclude with certainty is that in 1990, when the Senate and House addressed the precursor to the 1991 Civil Rights Act, the members at least perceived that what they were proposing to do vis-a-vis Title VII had potential implications for other statutes, as well. One can further conclude that this perception was the impetus for the effort, albeit an ambiguous one, to stave off the "limiting" (presumably to be read

264. Id.
265. The President did state that "[i]n order to assist the Congress regarding legislation in this area," he was enclosing with his veto message "a memorandum from the Attorney General explaining in full detail the defects that make S. 2104 unacceptable." Id. However, that memorandum from Attorney General Thornburgh, dated October 22, 1990, in fact offered no such explanation. All the Attorney General had to say was the following:

Several . . . provisions of this bill have little to do with promoting civil rights. Rather, they seem principally designed to give plaintiffs special and unwarranted litigation advantages. . . . Section 11 creates a special legislative rule of construction for civil rights cases that seems intended to encourage courts to resolve cases in favor of plaintiffs whenever possible. . . .

as meaning ‘plaintiff-restrictive’) of theories, rights, and interpretations that had been devised in those non-Title VII contexts prior to the anticipated enactment of the proposed CRA of 1990. What one cannot conclude, however, is that these abortive rules of construction sent a signal that Wards Cove, Price Waterhouse, and Lorance were to be read out of the ADEA lexicon. Nor can one conclude that the other statutory changes made by the failed Civil Rights Act of 1990 were intended to be read into the ADEA, through some sort of legislative legerdemain or otherwise.

2. The 1991 Judiciary Committee Report

Legislation to accomplish what the 101st Congress had sought to achieve by the vetoed Civil Rights Act of 1990 was immediately introduced when the 102nd Congress convened at the beginning of 1991. This bill, H.R. 1,\textsuperscript{266} was reported out of the House Judiciary Committee without amendment, and with an accompanying committee report in May, 1991.\textsuperscript{267} H.R. 1 never was considered by the full House, however; rather, it was a substitute bill—the “Brooks-Fish” version of H.R. 1—that the House debated on June 4 and 5, 1991, and passed on the latter day.\textsuperscript{268} The original H.R. 1’s companion bill in the Senate, S. 1745,\textsuperscript{269} did not generate any committee reports. In any event, it, too, was supplanted prior to debate by a substitute bill containing language reflecting extensive negotiations between members of the Bush Administration and Senators Danforth and Kennedy.\textsuperscript{270} After several days of debate and the adoption of several technical amendments, this substitute was passed by the Senate on October 30, 1991. The Senate-passed bill was then debated and passed in the House on November 7, 1991. It was ultimately signed into law as the Civil Rights Act of 1991.

Obviously, the House Judiciary Committee’s report on the original House bill is not a notably authoritative beacon of legis-

lative intent, given its positioning at the beginning stages of a tortuous legislative effort that took numerous turns before reaching its fruition as the CRA. Nonetheless, the bill discussed in the House report was similar in some respects to the version enacted into law. Moreover, the original House bill was motivated by the same basic goal underlying the bill that was passed and signed into law, i.e., to respond to a series of Supreme Court employment discrimination decisions seen as antagonistic to the interests of victims of bias in the workplace. Thus, although some of the language of the House bill—particularly that concerning disparate impact doctrine—differed in good measure from that of the bill eventually enacted, the observations made in the report can be accorded at least some note, if not much weight.

The Judiciary Committee observed that “[a] number of other laws banning discrimination, including the [ADEA], are modeled after, and have been interpreted in a manner consistent with, Title VII.” 271 And the report continued: “The Committee intends that these other laws modeled after Title VII be interpreted consistently in a manner consistent with Title VII as amended by this Act.” 272 Here, then, was an explicit expression of intent that the ADEA be interpreted so as to reflect the modifications made to the 1964 Act. 273 How that expression might be read is problematic, however. For one, the Committee did not offer even a clue as to how it would be feasible to interpret the language of the ADEA—language that once paralleled that in Title VII—so as to have the age discrimination statute continue marching in tandem with the new verbiage of Title VII, when no comparable new language had been lodged in the ADEA. The Committee’s report, then, seemed to constitute an expression of hope that courts and litigants would read into the ADEA words and phrases that simply are not there—a venture incompatible with the constitutional prescription for lawmaker. 274

A second basis for querying the relevance of the Judiciary Committee’s desire that statutes be interpreted consistently with the amended Title VII concerns the question of whether the

272. Id.
273. Virtually the same iterations were set forth by the House Judiciary Committee in its report in the previous Congress accompanying the bill that ultimately, after being passed in the House and Senate, was vetoed by the President. H.R. Rep. No. 101-644, Part 2, supra note 254, at 11.
274. See supra note 117.
Committee gave any thought to the actual implementation of its interpretive prescription for the ADEA’s purposes. The fact is that the Committee, after expressing its desire that its precursor version of the CRA have global impact on civil rights legislation, immediately turned, not to the ADEA, but to the Americans with Disabilities Act (ADA)\textsuperscript{275} to illustrate its aim. The Committee wrote as follows:

For example, disparate impact claims under the ADA should be treated in the same manner as under Title VII. Thus, under the ADA, once a plaintiff makes a prima facie case of disparate impact, the burden then shifts to the defendant to demonstrate business necessity, using the same standards as under Title VII. \textit{This was the clear intent of the Committee during its consideration of the ADA.}

Similarly, mixed motive cases involving disability under the ADA should be interpreted consistent with the prohibition against all intentional discrimination in Section 5 of this Act [i.e., H.R. 1].

Certain sections of Title VII are explicitly cross-referenced in Subsection 107(a) of the ADA, to ensure that persons with disabilities have the same powers, remedies and procedures as under Title VII. This would include having the same remedies and statute of limitations as Title VII, as amended by this Act, and by any future amendment. \textit{This issue was specifically addressed by the Committee during its consideration of the ADA.}\textsuperscript{276}

Inasmuch as the business necessity formulation injected into Title VII by the CRA tracks language of the ADA,\textsuperscript{277} it is understandable that the Committee advocated a common reading of disparate impact claims under Title VII and the ADA. Since the ADEA does not contain that language, however, the Committee’s admonition rings hollow for the age statute. The emphasized


\textsuperscript{276} H.R. Rep. No. 102-40, Part 2, supra note 62, at 4 (emphasis added; footnote omitted). Virtually the same assertions were set forth—except for the paragraph concerning mixed motives analysis—in the 1990 report of the Judiciary Committee that addressed the legislation that was ultimately passed by the House and Senate as the Civil Rights Act of 1990, but was vetoed by the President. H.R. Rep. No. 101-644, Part 2, supra note 254, at 11.

\textsuperscript{277} See supra note 179.
language further demonstrates the differences between the ADA and the ADEA. Thus, because of these distinctions the Judiciary Committee's illustrations supporting its position that other statutes should be interpreted consistent with the amended Title VII are unpersuasive vis-a-vis the ADEA.

A third problem with according much significance to the expressed desire of the Judiciary Committee regarding the interpretation of the ADEA stems from the fact that this desire, once uttered, was never reiterated. The drafters of the bill actually enacted made no reference to the impact on the ADEA of the CRA's amendments to Title VII. Nor did anyone do so during the debates in the House and the Senate. Thus, Congress' failure to actually amend the ADEA to conform to the changed Title VII was matched, in very large measure, by a lack of expressed intent that the age discrimination statute be read in tandem with the modified Title VII.

There is a fourth problem, although it is not a product of the statement of the Judiciary Committee report, but rather emerges from a reading of the legislative history as a whole. The earlier discussion focused on the rules of construction that had been proposed for insertion into Title XI of the Civil Rights Act of 1964 by the vetoed Civil Rights Act of 1990. These proposed rules arguably sought to preclude the changes being proposed for Title VII from having a limiting impact upon the ADEA. The 1991 Judiciary Committee report expressed the desire that the new version of proposed amendments—i.e., the post-veto proposed Civil Rights Act of 1991—be read into the ADEA. Thus, a review of the legislative history reveals Congress at one point expressing a desire to hold the ADEA at a distance from the amended Title VII, and at another point expressing the contrary. This contradiction makes a confusing scenario even murkier.

3. Conclusion as to the Legislative History

Its ambiguities notwithstanding, the legislative history of the Civil Rights Act of 1991 is in one respect instructive. It reveals that at some points in the lawmaking process some formal structures of the Congress—i.e., committees having jurisdiction as to the legislation, as well as majorities in the full House and Senate in the case of the proposed rules of construction included in the bills passed in 1990—openly expressed recognition of the fact that the changes being proposed for Title VII might have consequences for other statutes, including the ADEA.
True, a closer examination of the means used to reflect this recognition—the proposed rules of construction and the committee statements regarding them that were published in 1990, and the Judiciary Committee's 1991 report—discloses internal ambiguities. Moreover, taken as a whole these efforts were inconsistent. Thus, the substantive thrust of Congress' limited acknowledgments of the potential intersection of the CRA, the amended Title VII, and the unamended ADEA afforded mixed signals, at best. In fact, however, the lack of substantive clarity of those efforts is of little consequence. What are significant are the facts that, first, some sort of a relationship between Title VII and the ADEA was perceived at some points in the process, and, second, in the vetoed predecessor to the Civil Rights Act of 1991 this perception was explicitly reflected in the text of the proposed legislation. These aspects of legislative history make particularly pointed, by way of contrast, the lack of attention—both during the course of the extensive debates in the Senate on the CRA of 1991 and during the lesser level of discussion on the 1991 legislation in the House—accorded the waning relationship between the amended Title VII and the unamended ADEA. Equally notable, by way of contrast, is the complete silence during consideration of the CRA of 1991 as to the question of how Wards Cove, Price Waterhouse, and Lorance—rulings to which the CRA responded for the purposes of Title VII—were to be dealt with in the ADEA context. (Of course, this inattention is equally apparent in the language of the CRA itself, which simply ignores the intersection of these decisions with the age statute.)

In sum, while the legislative history offers nothing concrete by way of guidance as to how the ADEA is to be read, it further undermines (as does the treatment of Martin v. Wilks in § 108 of the CRA) any contention that Congress simply never thought, or recognized the possibility, that what it was doing to Title VII—and thereby to the Supreme Court rulings to which the amended Title VII was responding—might have some relevance for the ADEA. The remaining task is to determine whether Congress' silence regarding the ADEA offers anything by way of substantive instruction.

F. The Significance of Silence

1. The Pros and Cons of According Significance to Legislative Silence

For all the media and academic attention focused on constitutional decisions rendered by the courts, and particularly by the
United States Supreme Court, the fact is that most of what federal courts do entails efforts of a less elevated, albeit no less important, nature. Much of the judicial enterprise is devoted to construing statutes: filling in gaps in their language; clarifying ambiguous phraseology; applying ostensibly clear provisions to unanticipated circumstances; and so on. Occasionally, a particular judicial construction of a statute will attract Congress’ attention, and the statute will be rewritten to eliminate the omissions made apparent by the court’s decision; or to correct the drafting errors which that ruling revealed; or to overturn a construction condemned by the legislature as a misguided interpretation of the statute construed.

The Civil Rights Act of 1991 of course is an example *par excellence* of responsive lawmakership. But such an example notwithstanding, the fact is that judicial constructions of statutes typically do not elicit legislative responses. Indeed, a quick scan of the annotated federal statutes will readily reveal instances in which numerous decisions construing a given statute—42 U.S.C. § 1983, for example, or, closer to home, Title VII and the ADEA—are rendered annually with no ensuing modifications being made by Congress to the statutory language.

Given the doctrinal significance such decisions often possess, particularly those rendered by the Supreme Court, it might be reasoned that the lack of legislative response to a judicial construction of a statute should, or at least could, be read as signifying legislative approval of that interpretation. In other words, one might presume that if a court in fact has erred in its reading of a statute, Congress, assumedly concerned that its work product not be distorted or undermined, will act to rectify that misconception. It follows that the legislature’s silence arguably can be understood as expressing agreement with that judicial construction, at least if Congress was aware of the interpretation and enough time had elapsed within which the legislature could have acted had it wanted to do so.278 On the other hand, it might also be reasoned that

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278. As one scholar has put it, “When a court says to a legislature: ‘You (or your predecessor) meant X,’ it almost invites the legislature to answer: ‘We did not.’” G. Calabresi, *A Common Law for the Age of Statutes* 31-32 (1982). Any belief in the notion of a dialogue between the judiciary and the legislature must acknowledge that on occasion an invitation declined is as significant as one accepted. *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 630 n.7 (1987).
legislative failure to respond to a court’s construction of a statute is to be understood as signifying no more than legislative inattention, for any of a number of reasons, rather than as conveying some substantive message regarding the rectitude of an unmodified judicial interpretation. Silence, in sum, can be read as meaning nothing.

While both interpretive postures have support in the case law, here there are compelling bases for crediting the proposition that silence can have (although it does not follow that silence must have) meaning. The CRA was prompted by several Supreme Court interpretations of Title VII provisions that, in the ordinary course of judicial events, would be expected to have important implications for the ADEA, given that courts construing parallel provisions of the age discrimination statute have regularly looked to such interpretations for guidance. Inasmuch as Congress indeed did not—insofar as Title VII was concerned—remain silent in the face of Wards Cove, Price Waterhouse, Lorance, and Martin v. Wilks, but rather acted to overturn or modify these rulings, it is fair to conclude that it perceived problems with the Supreme Court’s analyses in these cases. Here, then, there was no acquiescence through silence. In sharp contrast, however, Congress only responded, for the purposes of the ADEA, to Martin. Otherwise, the age statute was not at all modified to assure that the other ostensibly flawed Title VII decisions would not influence—even control—judicial readings of the age statute. In light of Congress’ obvious intense concern about Wards Cove and the other rulings, and given further the long kinship between the ADEA and Title VII, it just does not sit well, either intellectually or intuitively, to unreflectively credit Congress’ silence as amounting to nothing more than inattention or ignorance, with no meaning or significance to be drawn from that silence.

Granted, there are arguments that may be made to the contrary. For one, the task of extracting meaning from legislative silence is an essay in speculative inference, at best, and the uncertain aspects of such an effort here are exacerbated considerably by the fact that the rulings whose approbation through legislative silence is at issue did not address the ADEA itself, but rather the age discrimination act’s statutory relative, Title VII. Thus, one tenable explanation for Congress’ inattention is as follows: since the critical Supreme Court decisions involved Title VII, there was really no

279. See infra part III.F.2.
reason to expect that they would evoke some legislative response in terms of the construction or interpretation of the ADEA. Accordingly, the argument would continue, Congress’ silence in the wake of these rulings insofar as the ADEA was concerned should not be read as having any substantive significance: Congress simply did not do what there was no reason to expect would be done.

The foregoing rationalization for Congress’ silence, while perhaps possessing a superficial ring of accuracy, is too simplistic to be satisfactory. Given that Title VII and the ADEA have been joined for years by the common aim of eradicating bias in the workplace, by parallel language, and by shared doctrine, one cannot dismiss Congress’ silence with the analytically shallow observation that while Title VII was amended to respond to Supreme Court decisions directly construing it, the ADEA was not amended because those rulings did not specifically address the age statute.\textsuperscript{280} Moreover, Congress’ response to \textit{Martin v. Wilks} deci-

\textsuperscript{280} In Hillsboro National Bank v. Commissioner of Internal Revenue, 460 U.S. 370 (1983), the Court addressed the question of the applicability of the “tax benefit” rule to two separate corporate taxpayer situations. The Court’s primary focus was on § 336 of the Internal Revenue Code, 26 U.S.C. § 336. But the Court deemed it useful, in arriving at a conclusion as to the operation of this provision vis-à-vis the taxpayer, to look at a companion provision, 26 U.S.C. § 337, which the Court described as using “essentially the same broad language to shield the corporation from the recognition of gain on the sale of . . . assets” as was used in § 336. 460 U.S. at 399-400. In further justifying its attention to § 337, the Court observed that “[t]he similarity in language alone would make the construction of § 337 relevant in interpreting § 336.” \textit{Id.} at 400. Moreover, “the function of the two provisions reveals that they should be construed in tandem,” \textit{Id.}, since “[t]he very purpose of § 337 was to create the same consequences as § 336,” \textit{Id.} at 401, i.e., to enable corporations to adopt plans of liquidation and then sell their assets without recognizing gain or loss at the corporate level. The Court went on to point out that the question of whether § 337 protected corporations from recognizing income because of unwarranted deductions had arisen frequently, and the case law, as well as revenue rulings, had resulted in the “well established . . . [rule] that the tax benefit rule overrides the nonrecognition provision.” \textit{Id.} The Court then further pointed out that Congress had recently undertaken a major revision of the Internal Revenue Code, and had made changes in the liquidation provisions, “but it did not act to change this longstanding, universally accepted rule.” \textit{Id.} at 402. The Court then concluded as follows: “If the construction of the language in § 337 as permitting recognition in these circumstances has the acquiescence of Congress, . . . we must conclude that Congress intended the same construction of the same language in the parallel provision in § 336.” \textit{Id.}

Title VII and the ADEA are not as closely linked as were § 336 and § 337 of the Internal Revenue Code. Nonetheless, \textit{Hillsboro National Bank} is useful in
mates this simplistic analysis, since Martin, too, was a Title VII ruling and yet Congress, in responding to that decision, indeed did look to the ADEA as well.

Other objections to interpreting Congressional silence are possible. Justice Scalia, who has generally taken a vigorously negative view toward looking beyond the words of a statute for interpretive guidance,\textsuperscript{281} has strenuously resisted the notion that legislative silence is of any legitimate use. He has written that “vindication by Congressional inaction is a canard. . . .”\textsuperscript{282} He is not the first Supreme Court justice to have disparaged inference based on inaction.\textsuperscript{283} The majority of academic commentators addressing the issue also have expressed negative views, ranging from complete castigation of the notion that Congressional silence can be meaningful to more cautious, but still generally condemnatory, positions.\textsuperscript{284} In one of the most cogent of these academic analysis it was pointed out that “Congress’ silent acquiescence surely cannot be equated with a new affirmative enactment,” since “Congress can create law only by enacting a statute, and statutes may be enacted only if the specific constitutional prerequisites contained in article I, section 7 of the U.S. Constitution have been met.”\textsuperscript{285} Yet, “the Court, while never openly saying so, at times appears to be treating this acquiescence as something akin to an independent enactment. . . .”\textsuperscript{286}

The same author further noted that the Court has often iterated the position that the post hoc views both of members of Congress


\textsuperscript{283} See, e.g., Helvering v. Hallock, 309 U.S. 106 (1940); Cleveland v. United States, 329 U.S. 14, 22 n.4 (1946) (Rutledge, J., concurring).


\textsuperscript{285} Grabow, supra note 284, at 746 (footnotes omitted).

\textsuperscript{286} Id. at 747.
and of congressional committees regarding the meaning of earlier enacted legislation are to be accorded minimal credit. The logic for this position is that short of a formal enactment by a later Congress explaining an earlier statute's meaning, it is only the intent of the enacting Congress that can properly illuminate the meaning of the statute in question. 287 Having set this analytical stage, the author went on to argue as follows:

By focusing on congressional acquiescence, . . . this distinction [between post-enactment statements and subsequent legislation declaring the intent of an earlier statute] tends to be lost, with legislative acquiescence being treated as something closer to an affirmative enactment rather than merely another manifestation of the views of a subsequent Congress. If the Court were truly interested only in the intent of the enacting Congress, the post-enactment views of critical members of Congress—an act's sponsors, committee chairmen, and the like—or reports of the relevant committees, would be of equal or greater probative value than the perceived acquiescence of a later and different Congress. 288

The argument also has been made, both by commentators and by the Court itself, that Congressional inaction cannot support any inferences because there are so many possible reasons for a legislature's failure to act. 289

287. Id. at 747-48.
288. Id. at 748.
The failure to enact corrective legislation, rather than indicating approval of the disputed interpretation, may demonstrate Congress' belief that the interpretation is erroneous but that the matter would better be left to the courts or agencies for correction. Alternatively, Congress may think that the existing legislation already incorporates the proposed change and that new legislation would be redundant. Finally, the pressure of matters Congress considers more pressing may dominate its scarce time and resources; Congress may not consider the issue of sufficient importance to warrant corrective legislation or it simply may be uninterested.

Grabow, supra note 284, at 749-50 (footnotes omitted). The weight of legislative inertia was also noted by another commentator:

Political theory and experience suggest that because of the many pro-
Notwithstanding the foregoing, the reliance upon legislative silence that the courts engage in is perhaps not entirely without an intellectually respectable rationale. Arguably, the practice of holding a legislature accountable, in effect, for its failure or refusal to act can encourage greater attentiveness by that legislature to judicial rulings—particularly, in Congress’ instance, the rulings of life-tenured federal judges (as opposed to elected state court judges)—in order to assure that interpretive errors are rooted out of the corpus of judge-made doctrine.\(^{290}\)

In any event, the most compelling counter-argument to the contention that legislative inaction is to be accorded no meaning is a pragmatic one. The fact of the matter is that the courts, including the Supreme Court, continue to discern meaning in legislative inaction.\(^{291}\) While this may not be an analytically deep response, it is a powerfully realistic one: one can theorize and argue as to what courts \textit{should} do, but one also must deal with what the courts in fact \textit{are} doing. This is particularly so when there looms a legal problem of current and pressing significance, i.e., the task of interpreting the ADEA, that will not lie conveniently quiescent until some indeterminate future day when academic expressions of preference as to what judges ought to do finally infiltrate the judicial consciousness.

\[\text{cedural obstacles to legislation in our bicameral committee-dominated Congress, the tendency of interest groups to block rather than advance legislation, and the deference that legislators and their staffs will typically give to virtually any decision of the Supreme Court, \ldots legislative correction will rarely occur. \ldots}\

In short, legislative inertia means that only occasionally and adventitiously will Congress respond to judicial statutory interpretations at odds with original intent or purpose. Eskridge, \textit{supra} note 243, at 1524-25.

\(^{290}\) Cf. Commissioner of Internal Revenue v. Fink, 483 U.S. 89, 101 (1987) (Stevens, J., dissenting). Justice Stevens argued that the IRS should not have challenged a well-established tax law interpretation. Rather, the IRS—according to Justice Stevens—should have sought a change in that interpretation from Congress. In support of his position, he suggested that there was a salutary aspect for the legislative process of courts leaving settled doctrines untouched, and the lower courts’ affirmative response here to the IRS’s litigation had undermined it. In so reasoning, Justice Stevens wrote: “[I]f Congress understands that as long as a statute is interpreted in a consistent manner, it will not be reexamined by the courts except in the most extraordinary circumstances, Congress will be encouraged to give close scrutiny to judicial interpretations of its work product.” \textit{Id.} at 104.

\(^{291}\) \textit{See infra} parts III.F.2.-3.
2. The Case Law

There are numerous Supreme Court decisions regarding the matter of Congressional silence following an authoritative construction—which, as the cases reveal, may be articulated not only in a judicial ruling, \(^{292}\) but also by way of an executive or administrative agency pronouncement. \(^{293}\) While these decisions are contradictory, some descriptive coherence is at least achievable: Professor Eskridge has identified three types of situations giving rise to judicial assessments of legislative silence. \(^{294}\) First, there are cases in which the question is whether Congressional approval of a judicial or agency interpretation of a statute is to be inferred from Congress’ failure to respond to that interpretation. Second, there are rulings that address the question whether an inference of Congressional approbation of an earlier interpretation is to be drawn from Congress’ reenacting, without change, a statute that had been previously interpreted by a court or agency. The third group of decisions involves failed legislative efforts to adopt statutory amendments responding to agency or judicial constructions, with the inference following that the defeat of the proposed change signifies Congress’ approval of a given interpretation.

It is the first group of cases—the acquiescence-through-inaction rulings—that prove to be very much on the mark here.

a. The Acquiescence-Through-Inaction Cases

On numerous occasions the Court has addressed the significance of Congress’ failure to respond to judicial or administrative agency interpretations of statutory provisions, including interpre-


\(^{294}\) Eskridge, supra note 284.
tations of statutes not directly before the Court. In some in-

295. See Hillsboro Nat'l Bank v. Commissioner of Internal Revenue, 460 U.S. 370 (1983), discussed in note 280 supra. In Monroe v. Pape, 365 U.S. 167 (1961), the seminal ruling that invigorated one of the post-Civil War statutes, 42 U.S.C. § 1983, which then became—and continues to be—the primary federal statutory basis for pursuing constitutionally-grounded civil liberties claims arising out of non-federal government action, the Court focused on the phrase "under color of law," which is critical to § 1983's reach. The defendant police officers, who had allegedly broken into the plaintiffs' home, "routed them from bed, made them stand naked in the living room, and ransacked every room," id. at 169, argued that the "under color of law" language contained in § 1983 excluded acts of officials, including policemen, who could show no authority under state law, custom, or usage for their actions.

In United States v. Classic, 313 U.S. 299 (1941), decided 20 years prior to Monroe, the Court had construed § 1983's criminal offense analogue, 18 U.S.C. § 242, which contains the same "under color of" language. The Classic Court ruled that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." Id. at 326. This view of the meaning of the phrase was reaffirmed in Screws v. United States, 325 U.S. 91 (1945), and Williams v. United States, 341 U.S. 97 (1951).

The Monroe Court, after discussing these decisions, pointed to the legislative history of § 1983 as establishing that 18 U.S.C. § 242 was the model for the former statute. The Court then turned to the legislative activity in the years since Screws and Williams and read this history, which did not directly address § 1983 but rather other statutes, as verifying its interpretation of the "under color of" law language. The Court reasoned as follows:

Since the Screws and Williams decisions, Congress has had several pieces of civil rights legislation before it. In 1956 one bill reached the floor of the House. This measure had at least one provision in it penalizing actions take "under color of law or otherwise." A vigorous minority report was filed attacking, inter alia, the words "or otherwise." But not a word of criticism of the phrase "under color of" state law as previously construed by the Court is to be found in the report.

Section 131(c) of the Act of September 9, 1957, . . . amended 42 U.S.C. § 1971 by adding a new subsection which provides that no person "whether acting under color of law or otherwise" shall intimidate any other person in voting as he chooses for federal officials. A vigorous minority report was filed attacking the wide scope of the new subsection by reason of the words "or otherwise." It was said in that minority report that those words went far beyond what this Court had construed "under color of law" to mean. But there was not a word of criticism directed to the prior construction given by this Court to the words "under color of" law.

The Act of May 6, 1970, . . . uses "under color of" law in two contexts, once when § 306 defines "officer of election" and next when § 601(a) gives a judicial remedy on behalf of a qualified voter denied the opportunity to register. Once again there was a Committee report containing minority views. Once again no one challenged the scope given
stances the Court has concluded that Congress' silence is to be read as amounting to acquiescence to an earlier judicial or administrative interpretation. On other occasions the Court has arrived at a contrary conclusion. This split, which emerges from a review of opinions that typically read as expressions of ad hoc rationalizations rather than of principled analysis, is illustrated by two decisions handed down in the same year—*Apex Hosiery Co. v. Leader* and *Helvering v. Hallock*. The Court wrote as follows in the former:

The long time failure of Congress to alter the Act [in question] after it had been judicially construed ... is persuasive of legislative recognition that the judicial construction is the correct one. This is the more so where ... the application of the statute ... has brought forth sharply conflicting views both on the Court and in Congress, and where after the matter has been fully brought to the attention of the public and the Congress, the latter has not seen fit to change the statute.

by our prior decisions to the phrase "under color of" law.

If the results of our construction of "under color of" law were as horrendous as now claimed, if they were as disruptive of our federal scheme as now urged, if they were such an unwarranted invasion of States' rights as pretended, surely the voice of the opposition would have been heard in those Committee reports. Their silence and the new uses to which "under color of" law have recently been given reinforce our conclusion that our prior decisions were correct on this matter of construction.

365 U.S. at 186-87.

296. The Court will reject the inference of acquiescence when it is convinced that Congressional inaction notwithstanding, the language of the statute in question does not justify the earlier interpretation to which it is argued Congress had, by its inaction, acquiesced. See, e.g., Arkansas Best Corp. v. Commissioner of Internal Revenue, 485 U.S. 212, 222 & n.7 (1988); Rodriguez v. Compass Shipping Co., 451 U.S. 596, 614-16 (1981); James v. United States, 366 U.S. 213, 220-21 (1961) (plurality opinion).

297. 310 U.S. 469 (1940).

298. 309 U.S. 106 (1940).

299. 310 U.S. at 488-89. A classic—and close-to-home, so to speak—application of the acquiescence-through-inaction approach is provided by Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987), a Title VII case addressing the legality of a voluntary affirmative action program adopted by a county. The Court pointed out that it had previously addressed the issue of voluntary affirmative action plans in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), in which it had ruled that the language of Title VII and its legislative
The *Hallock* Court articulated a contrasting position:

It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines. To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities.\(^{300}\)

The *Hallock* Court further observed: "Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of . . . Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."\(^{301}\)

Notwithstanding the *Hallock* Court's railing against ascribing any significance to Congressional silence, there is considerable case law to the contrary—*Apex Hosiery* being just one example. And here, in the context of considering the CRA and the ADEA, the arguments for finding acquiescence through inaction prevail.

1) *Acquiescence to Wards Cove*

Prior to *Wards Cove* Congress had remained silent in the face of numerous lower court ADEA decisions embracing Griggs-defined disparate impact doctrine, as initially fashioned in *Griggs v. Duke Power Co.*\(^{302}\) Likewise, the long-time EEOC semi-endorsement of the application of Griggs-based disparate impact analysis

history both supported the conclusion that such plans were not precluded under the statute. The *Johnson* Court asserted: "Congress has not amended the statute to reject our construction, nor have any such amendments even been proposed, and we may therefore assume that our interpretation was correct." 480 U.S. at 629 n.7.

300. 309 U.S. at 119-20.

301. *Id.* at 121.

302. 401 U.S. 424 (1971). There have been two instances of disagreement, or at least some questioning, at the Supreme Court level. The first was expressed in a dissent from a denial of certiorari written by then-Justice Rehnquist. Markham v. Geller, 451 U.S. 945, 948 (1981) (Rehnquist, J., dissenting). More recently, Justice Kennedy wrote, in a concurring opinion in which the Chief Justice and Justice Thomas joined, that "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA." Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1710 (Kennedy, J. concurring, joined by Rehnquist, C.J., and Thomas, J.).
to the ADEA\textsuperscript{303} elicited no negative Congressional response, even as the ADEA was being amended over the years in other respects.\textsuperscript{304}

\begin{quote}
303. 29 C.F.R. § 1625.7(d) (1992). The EEOC interpretation reads as follows: When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Obviously, this interpretation is vague as to the burden imposed upon a defendant; moreover, it does not develop the meaning of the term "business necessity." Thus, it cannot be said to constitute an uncompromising embrace of Title VII pre-CRA Griggs disparate impact analysis. On the other hand, its language is clearly compatible with Griggs and its progeny insofar as defining "business necessity" is concerned. Moreover, the EEOC language is compatible with the proposition that the defendant bears a burden of proof. (The interpretation makes reference to a "factor other than age." This is a reference to the "reasonable factors other than age" exception set forth in § 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1) (1988). For an analysis of this exception, and its relation to disparate impact analysis, see Howard Eglit, \textit{The Age Discrimination in Employment Act's Forgotten Affirmative Defense: The Reasonable Factors Other Than Age Exception}, 66 B.U. L. REV. 155 (1986).

The EEOC guideline, which has been in the Code of Federal Regulations since at least 1982, is an interpretation of the Act; it is not a regulation. Accordingly, it does not have the force of law. The EEOC also enforces Title VII and issues guidelines and interpretations concerning the 1964 Act. With regard to such guidelines the Court in \textit{Equal Employment Opportunity Commission v. Arabian American Oil Co.}, 111 S Ct. 1227 (1991), wrote: "[T]he level of deference afforded 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'" \textit{Id.} at 1235 (quoting \textit{General Elec. Co. v. Gilbert}, 429 U.S. 125, 142 (1976), which had quoted \textit{Skidmore v. Swift & Co.}, 323 U.S. 134, 140 (1944)). The foregoing assertion reasonably can be presumed to apply, by way of analogy, to EEOC guidelines addressing the ADEA. Also decided in the Title VII context, but analogically relevant to the ADEA, is \textit{Equal Employment Opportunity Commission v. Commercial Office Products Co.}, 486 U.S. 107 (1988), in which the Court asserted that "the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference." \textit{Id.} at 115.

304. In \textit{United States v. Rutherford}, 442 U.S. 544 (1979), the Court wrote: [O]nce an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned. \textit{Id.} at 554 n.10 (quoting \textit{Apex Hosiery}, 310 U.S. at 489).

The ADEA of course was amended by the CRA. But more than that, the ADEA has been amended on several occasions during the years that the EEOC interpretation has been in existence. A major revision of the ADEA's bona fide benefit plan and seniority plan exceptions was effectuated by the Older Workers
Thus, a very respectable argument can be made that Congress, by not at some point during these years repudiating these judicial and administrative endorsements of Griggs-based disparate impact analysis, approved them as correct interpretations of the ADEA. Even conceding this to be so, however, this manifestation of Congressional acquiescence through inaction does not preclude the conclusion that Wards Cove, a Title VII decision that drastically undercut Griggs and that was in turn undone by the CRA, is the operative analogical guide today for ADEA courts. Several lines of reasoning, of varying degrees of diffuseness, come into play here.

The first is based on the fact that the pre-CRA ADEA disparate impact cases did more than just address the particulars of impact analysis, as applied to the claims of ADEA plaintiffs. They also constituted confirmation of a more global proposition, to wit, the regular reliance on Title VII rulings by courts entertaining ADEA claims. Typical of this scenario is Geller v. Markham,305 a ruling by the Court of Appeals for the Second Circuit in which the court looked to the leading Supreme Court Title VII disparate impact decisions in addressing the ADEA plaintiff’s argument:

A prima facie case of discriminatory impact may be established by showing that an employer’s facially neutral practice has a disparate impact upon members of plaintiff’s class. . . . Griggs v. Duke Power Co. . . . Such a discriminatory impact is frequently evidenced by statistics from which it may be inferred that an employer’s selection methods or employment criteria result in employment of a larger share of one group . . . than of another. . . . The employer may defend by showing the employment practice is justified by business necessity or need and is related to

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This kind of invocation of Title VII precedents is representative of that seen in numerous ADEA decisions, spanning a wide range of issues that range far afield from disparate impact analysis. By this mode of analysis the ADEA case law in fact demonstrates more than just mere reliance on Title VII interpretations: the decisions confirm that reliance upon decisions construing the 1964 Act—most particularly Supreme Court decisions—is at the heart of ADEA analysis. In other words, this reliance has been neither episodic nor merely routine. Rather, it has been basic to the way in which ADEA courts handle their interpretive tasks. It follows, looking to the array of ADEA decisions that track Title VII analogues, and looking further to the fact that this mode of operation has elicited no legislative responses, that one can readily and properly infer that Congress has acquiesced to the infusion of Title VII doctrinal analysis into the ADEA where the language of the two statutes runs along parallel lines, as is the case regarding the core prohibitions of the ADEA and the pre-CRA Title VII. And from this inference flows the further conclusion that Congress, by virtue of its acquiescence over the years to this general proposition, implicitly acquiesced to particular applications of that proposition, such as the infusion of *Wards Cove* into the ADEA.

There are other factors on which to base the conclusion that even if one were to infer that in the past Congress acquiesced

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307. *See supra* notes 6-10, 17-32 and accompanying text.

308. There is some post-*Wards Cove* ADEA case law following the Supreme Court decision. *See*, e.g., MacPherson v. University of Montevallo, 922 F.2d 766, 771 (11th Cir. 1991); Davidson v. Board of Governors, 920 F.2d 441, 444 (7th Cir. 1990). However, there is not really a substantial enough body of case law to justify the conclusion that at the time the CRA was being considered Congress had acquiesced to these post-*Wards Cove* decisions and had thereby approved the application of *Wards Cove* to the ADEA. (The still-limited ADEA case law today counsels against reading acquiescence into Congress' continuing post-CRA silence.)
through silence to Griggs-based disparate impact analysis, that acquiescence does not stave off the application of Wards Cove to ADEA claims. At the outset, one can concede that Congress' silence as to the impact of Wards Cove, Price Waterhouse, and Lorance may have simply reflected a political decision on the part of the CRA's drafters in Congress and in the Bush Administration to avoid injecting another element, i.e., the ADEA, into their reportedly intense and complicated negotiations.309 Alternatively, one might concede that perhaps the drafters simply wanted to defer dealing with the ADEA to a later point in time, or that they did not think the ADEA warranted their attention. It might also be hypothesized, and accepted, that the drafters genuinely regarded Wards Cove as rightly articulating disparate impact doctrine so far as the age discrimination statute was concerned. It is also possible that they just did not think much about the ADEA one way or another. The record affords no answer as to these speculations, and for that reason the Hallock Court's counsel has some bite to it: there indeed is an element of "speculative unrealities" here.310 Still, there is an objective, observable fact that surmounts all speculation: by its inaction, whatever its cause, Congress left Wards Cove intact for the age statute. More than that, there are other factors driving the conclusion that here, at least, Congress' silence does have meaning—and the meaning that is to be inferred is acquiescence to the continuing vitality of Wards Cove for the ADEA. For one, Congress was obviously aware of the negative consequences of Wards Cove for employment discrimination plaintiffs seeking redress under Title VII. Its passage of the CRA is testament to that perception.

Second, Congress obviously was aware of some amount of interaction between Title VII judicial rulings and courts' interpretations of other civil rights statutes. The CRA's response to Martin v. Wilks makes this clear. The legislative history likewise confirms that element of Congressional knowledge. It is true that that history does not disclose any explicit attention addressed to the parallel doctrinal development of Title VII and the ADEA, and so one might suggest that Congress simply was ignorant of the almost 20 years' worth of shared interpretations. To do so, however, one would have to credit Congress with a very considerable measure of ignorance. That would not only contradict reality (the fashion-

able, but unfounded, denigration of Congress notwithstanding), but in addition such a posture would run afoul of the proposition, asserted by the Court in Cannon v. University of Chicago, that "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law." In Cannon the Court addressed the issue of whether an implied private cause of action for damages could be read into Title IX of the Education Amendments of 1972. The Court posited the assumption that the legislators were familiar with rulings interpreting comparable language in Title VI of the Civil Rights Act of 1964, which language had been construed to allow for such a remedy, and the Court reasoned that "our evaluation of congressional action in 1972 must take into account its contemporary legal context."

Third, and finally, Congress was actively aware of the ADEA as it crafted the CRA's terms: this conclusion inescapably follows from § 115 of the CRA, which explicitly amended the age statute. It is buttressed by other provisions of the 1991 Act, discussed earlier, whose terms, while amending Title VII, revealed Congressional cognizance of, and concern about, civil rights statutes in addition to Title VII.

a) Duration of Acquiescence and Congressional Awareness

It is correct to note that Apex Hosiery called for a "long time failure of Congress to alter the Act [in question] after it had been judicially construed." A number of other Supreme Court rulings in which legislative inaction has been read as acquiescence reflect


However, the Court has refused to infer acquiescence to a judicial interpretation where the interpretation was unclear. Thus, in United States v. Mendoza-Lopez, 481 U.S. 828, 836 (1987), the Court reasoned that the principle at issue "was not so unequivocally established as to persuade us that Congress must have intended to incorporate that prior law into" the statute at issue. See also Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 237-38 (1987). If Congress was indeed unaware of the matter now at issue, acquiescence will not be inferred. See Toussie v. United States, 397 U.S. 112, 120 (1970).
315. 441 U.S. at 698-99.
316. See supra part II.
317. 310 U.S. at 488 (emphasis added).
this durational factor as well,318 even though it is not necessarily correct to conclude that this factor constitutes an unalterable prerequisite to inferences based on silence. Here, one might suggest, the durational element is lacking: Wards Cove was decided in 1989 and the CRA was enacted only two years later. Thus, an inference of acquiescence insofar as the ADEA is concerned necessarily would be based on just a brief elapse of time between the decision in question and Congressional action vis-a-vis Title VII, which action in turn involved the critical inaction as to the ADEA on which that inference would be grounded. In fact, however, the practice of ADEA courts looking to Title VII rulings for guidance is one of long standing. And if one understands that it is to this general mode of analysis that Congress had acquiesced, it follows that the legislative silence attending Wards Cove satisfies the Apex Hosiery Court’s concern.

Satisfaction of the second concern evinced by the Apex Hosiery decision, i.e., the “matter [of the ADEA courts’ reliance upon Title VII case law having been] fully brought to the attention of the public and the Congress,”319 is more problematic. The legislative history, after all, discloses no discussion of the interpretive nexus that has been forged between Title VII case law and the ADEA. Even so, there was some recognition in the House Judiciary Committee’s reports, both in 1990 and 1991, of the intertwinenment of Title VII with the ADEA.320 Also, the proposed rules of construction contained in the vetoed Civil Rights Act of 1990 seemed to be premised on a similar, albeit more general, percep-


319. 310 U.S. at 488-89 (emphasis added).

320. See supra part III.E.2.
tion, i.e., the recognition of a linkage between interpretations of Title VII and judicial readings of other civil rights statutes. Moreover, the general proposition that ADEA courts have regularly relied upon Title VII precedents is not the product of just a small number of aberrational decisions buried in a mass of case law: it is a mode of analysis and interpretation obvious to anyone who might choose to read a representative sampling of ADEA decisions. Admittedly, the Title VII-ADEA connection was not trumpeted in the tabloids, or, more relevantly, in the hearings leading up to the CRA. Still, as the Cannon Court instructed, it is appropriate to entertain the assumption that Congress knows the law—and the law as it stood in 1991 was that Title VII precedents provided the guidance for ADEA judicial dispositions. Thus, Apex Hosiery’s second criterion for inferring acquiescence from Congressional silence is satisfied.

b) Conclusion

The conclusion follows from Congress’ silence that Wards Cove, while not necessarily well-reasoned (from the plaintiff’s perspective, at least), is alive and well for the ADEA.321 The

321. One might reason that Congress both acquiesced to pre-Wards Cove disparate impact analysis by not responding to the numerous ADEA lower court decisions that looked to the seminal Title VII decision, Griggs v. Duke Power Co., 401 U.S. 424 (1971), and also to Wards Cove, which repudiated Griggs. Thereby, one would confront the perplexing problem of reading Congressional acquiescence as supporting inconsistent inferences: approbation of pre-Wards Cove ADEA disparate impact case law and, at the same time, approbation of the contrarily decided Wards Cove. In Bob Jones University v. United States, 461 U.S. 574 (1983), the Court concluded that for a nine-year period, 1971 to 1980, Congress had acquiesced in an IRS interpretation whereby the IRS had denied tax-exempt status to two Christian fundamentalist schools that maintained racially discriminatory admissions policies. Prior to 1970, however, the IRS had taken the contrary position, allowing tax-exempt status for such schools. Thus, there were two conflicting agency interpretations of the same statutory provision, 26 U.S.C. § 501(e)(3), and Congress knew about or could be deemed to have known about both of them. The Bob Jones University Court did not explain how acquiescence could be inferred as to the later interpretation, but not as to the earlier one. Here, however, the seeming conflict between inferring Congressional acquiescence to the pre-CRA ADEA case law embracing Griggs and also inferring acquiescence to Wards Cove’s being applicable to the ADEA can be resolved by reading the acquiescence to the ADEA cases as simultaneously constituting acquiescence to the broader proposition that Title VII precedents—particularly Supreme Court rulings—that address language parallel to that in the ADEA are deemed to carry heavy analogical weight for ADEA courts. Thus, Wards Cove, being such a precedent, overrides the earlier case law (to the extent that Wards Cove is in disagreement with it).
legislative “dog” did not bark when Wards Cove came on the scene,\(^{322}\) and that silence yields a message of acquiescence. This is a conclusion that in some respects is a troubling one for the author to espouse, for Wards Cove is a decision that deserves serious criticism. The majority’s disingenuous revisionist treatment of the burden of proof\(^{323}\) bordered on the intellectually dishonest. Its requirement that the plaintiff identify with specificity the particular part of a multi-component decisional process causing the alleged disparate impact imposes an especially demanding task on grievants. Its relaxation of the business necessity standard is problematic, given that the defendant will typically best know its own business needs and so a rigorous requirement of explanation arguably comports with the employer’s ability—and the plaintiff’s correlative inability—to explain how business needs can justify adverse consequences for individuals belonging to statutorily protected groups.

On the other hand, one must acknowledge that there is room for reasonable people to differ and that Wards Cove can be read as a legitimate response to perceived doctrinal excesses of earlier years. After all, disparate impact analysis certainly had attracted criticism even before the Court’s 1989 ruling. Moreover, one must conclude that the Wards Cove majority was made up of reasonable people making presumably reasonable judgments—that is, judgments within the realm of legitimate interpretation of Title VII.\(^{324}\)

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322. For an explanation of the significance of the dog not barking, see supra note 1.  
323. See supra note 124.  
324. I confess to having no hard supporting data, but I will nonetheless venture the observation that the sympathies of the majority of academics who write in the field of employment discrimination run in the direction of a preference, if you will, for plaintiffs. Congruent with this preference (I hesitate to say that there is a cause-effect relationship, however) is the probable fact (I confess that I have not engaged in a formal survey to gather hard data for this assertion, either) that the majority of the academic literature is critical of decisions insofar as they disfave plaintiffs’ ends. This is not to say that the reasoning in the usual law journal article is distorted so as to intentionally give vent to a proplaintiff bias. It is to say, however, that when one entertains a predisposition as to a certain issue or area of the law, e.g., an inclination to sympathize with the claims of victims of alleged employment discrimination, it is likely that one’s interpretation of cases, and one’s assessment of the validity of the reasoning contained in those cases, is going to lead one in the direction of finding fault with analysis that does not jibe with one’s predisposition. Thus (and I do not mean to defend the decision), the fact that Wards Cove has attracted some unfavorable reviews in the academic literature is certainly noteworthy and instruc-
And so, unless one is to apply the acquiescence-through-silence case law with complete cynicism—inferring acquiescence when it produces the desired substantive result, and refusing to do so when it results in an undesirable conclusion—one is forced to accept the interpretive consequences so long as they are intellectually reasonable, even if they do not comport with one’s sympathies.

2) Acquiescence to Price Waterhouse

Unlike Title VII, the ADEA was not amended to reject the “substantial factor” requirement set by a majority of the Price Waterhouse justices. The age statute likewise was not amended—in contrast to the treatment by the CRA of Title VII—to negate the complete insulation from liability that a majority of the Price Waterhouse justices extended to defendants successfully invoking the same decision defense. Thus, the by-now familiar issue arises as to whether these aspects of Price Waterhouse remain viable for ADEA purposes. An affirmative answer emerges.

In reaching that answer, one might suggest, using one of the modes of analysis employed to address Congress’ acquiescence through silence to Wards Cove, that Congress had acquiesced by inaction to pre-Price Waterhouse lower court ADEA decisions that departed from the positions embraced by the majority of justices in the 1989 Supreme Court ruling. Then one could further reason that this earlier acquiescence implied approval of the more general, longstanding proposition of which the pre-CRA ADEA mixed motives cases were just examples, to wit, that Title VII precedents guide ADEA interpretation. From this line of reasoning would follow the conclusion that Congress, by acquiescing to the regular practice of ADEA courts relying over the years upon Title VII precedents, had thereby implicitly acquiesced to the application to the ADEA of another example of that practice, i.e., Price Waterhouse. However, while apposite in dealing with the disparate impact analysis/acquiescence equation, this particular piecing to-

tive and indeed may be right on the mark. Those academic condemnations do not, however, support the correlative conclusion that the justices who made up that majority in that case were being irrational. Indeed, if academic criticism were the benchmark of rationality, one would probably find that virtually every controversial judicial ruling could be deemed to be the product of irrational adjudicators: a conclusion that certainly has its tempting aspects (at least insofar as some decisions are concerned), but one that ultimately simply goes too far.

325. See supra part III.C.
326. Id.
gether of a chain of inferences is more problematic in the mixed motives context.

For one, unlike the situation involving pre-\textit{Wards Cove} disparate impact rulings, there were very few pre-\textit{Price Waterhouse} mixed motives decisions. Second, these dispositions in any event were ill-formed in their treatment of mixed motives analysis. Sometimes the courts’ treatments only amounted to recognition that such an analysis might be appropriate, with no illumination offered as to how it would actually be applied or what the ramifications of that analysis for purposes of liability might be.\textsuperscript{327} Sometimes the courts did not even invoke, in specific terms, “mixed motives” analysis, and it is only by means of a retrospective and creative reading of a case that one would venture to include it within the corpus of mixed motives decisions.\textsuperscript{328}

That an inference of Congressional approbation, of whatever sort, cannot confidently be drawn from Congress’ silence vis-a-vis the ADEA pre-\textit{Price Waterhouse} mixed motives case law does not, however, end the interpretive process regarding Congressional silence. Indeed, one may draw an inference of acquiescence to \textit{Price Waterhouse}, after all. It is grounded on the same factors that, apart from the existence of a large body of ADEA cases relying upon Title VII precedents, supported a like inference as to \textit{Wards Cove}. First, Congress clearly was knowledgeable as to the consequences of \textit{Price Waterhouse}, as confirmed by its amending of Title VII. Second, the legislature’s awareness that interpretations of Title VII could have consequences for other civil rights statutes is established by the CRA’s legislative history. Third, the Congress that passed the CRA was actively aware of the ADEA’s existence, as evidenced by the direct and implicit amendments affecting the age discrimination statute. As already discussed, what is missing from this equation, and what was present in the earlier consideration of the status of \textit{Wards Cove} for ADEA purposes, is the ability to read acquiescence to pre-CRA mixed motives case law as implicitly constituting acquiescence, as well, to the general proposition that Title VII precedents press heavily in interpreting the ADEA. Nonetheless, the general proposition having been es-

\textsuperscript{327} See, e.g., Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1101-02 & n.2 (8th Cir. 1988); Mullins v. Uniroyal, Inc., 805 F.2d 307 (8th Cir. 1986).

tablished in one context, i.e., consideration of disparate impact analysis, it follows that acquiescence to that general proposition can be read into other facets of the contemporaneous legislative activity, i.e., consideration of mixed motives analysis, that culminated in the CRA.

In sum, Price Waterhouse remains viable, by way of analogy, for interpreting the ADEA. Again, one may express some chagrin at vindicating the viability of a decision that, depending on one’s perspective, is flawed in one respect or another. Unless, however, one is to manipulate the relevant factors supporting an inference of acquiescence so as to avoid a substantive result with which one disagrees, one is forced to follow those factors to the conclusion to which they lead.

3) Acquiescence to Lorance

In Lorance v. AT&T Technologies, Inc. the Court addressed the issue of when an injury allegedly caused by a long-running policy or practice would be deemed to trigger the running of the statute of limitations for the filing of a charge of discrimination with the EEOC, the agency responsible for enforcing Title VII (as well as the ADEA). There was very little by way of pre-CRA ADEA case law directly focusing on this question, although there were a few pre-Lorance decisions addressing the timing for filing lawsuits, in contrast to the timing for filing administrative charges, which was at issue in Lorance. While these decisions

329. See Collins v. Outboard Marine Corp., 59 F.E.P. Cas. (BNA) 1403, 1407 n.1 (N.D. Ill. 1992). But see ARTHUR LARSON & LEX K. LARSON, 3A EMPLOYMENT DISCRIMINATION 21-340 (June, 1992 Supp.) (without any explanation, the authors asserted: “Although... the CRA provision responding to Price Waterhouse is an amendment to Title VII, prior practice suggests that the new proof rules will be used in cases brought under the ADEA as well.”).


331. See Cohn v. A.E. Staley Mfg. Co., 734 F. Supp. 832 (N.D. Ill. 1990). Cohn involved an agreement setting forth a scheme of benefits due the employee if he or she were to lose his or her job as a result of a change in ownership of the company.

332. Several ADEA courts have held that continuing violations existed with regard to discriminatory pension plans, so that the wrong existed for the life of the plan and thus the statute of limitations did not begin to run until the employee was actually hurt by the plan. See Crosland v. Charlotte Eye, Ear & Throat Hosp., 686 F.2d 208 (4th Cir. 1982); Morelock v. NCR Corp., 586 F.2d 1096 (6th Cir. 1978), cert. denied, 441 U.S. 906 (1979); Equal-Employment Opportunity Comm’n v. Home Ins. Co., 553 F. Supp. 704 (S.D.N.Y. 1982). Like analysis
(which actually took a stance contrary to that embraced by the Lorance Court) did not elicit any Congressional response, the paucity of numbers—particularly regarding the issue of charge-filing (in contrast to suit-filing)—militates against inferring legislative acquiescence through inaction regarding the pre-CRA case law treatment of charge-filing *per se*. Even so, an inference of acquiescence through inaction is again in order. Indeed, the rationale supporting such an inference is a particularly strong one.

Here, unlike the treatment involving Wards Cove and Price Waterhouse, there is express reference in the legislative history regarding the impact of the Supreme Court decision on the ADEA. The comments of senators who were intimately involved in the drafting of the CRA, as well as the comments made in the committee reports regarding the decision, establish more clearly than in any other setting that the analysis pursued in Lorance was considered to be erroneous for the ADEA, as well as for Title VII. Thus, it is easy to conclude that there was awareness of the decision and its implications for the age discrimination statute. Yet, notwithstanding this clear cognizance and condemnation of Lorance's adverse consequences for the age discrimination statute, the ADEA was not amended to reflect that condemnation. True, there had been no longstanding acquiescence to Lorance, inasmuch as it was decided less than three years prior to the enactment of the CRA. Even so, the opportunity for Congress to act was so clearly presented that the durational factor—which in any event has not been imposed as an absolute requisite to inferences of acquiescence being drawn—pales to insignificance.

There is another basis for inferring acquiescence through silence here. As already discussed in addressing Wards Cove, Congress can be deemed to have acquiesced to the general practice of ADEA courts looking to Title VII rulings—particularly decisions of the Supreme Court—for guidance. That inference carries over to consideration of Lorance, and so by virtue of Congress not having rejected the decision by amending the ADEA, it follows that the

common interpretive practice of ADEA courts—which would be to follow the decision—was approved through inaction.

Granted, this result is a troubling one, given that both a majority in Congress, as well as the Bush Administration, agreed that Lorance was not well-reasoned. It seems somewhat perverse that this decision still carries analogical weight for ADEA courts. On the other hand, whatever the misgivings regarding Lorance, the fact is that Congress did not even amend Title VII to reject the decision in full. Indeed, the only application of Lorance that the CRA foreclosed for Title VII purposes is that regarding seniority systems. Thus, whatever its perceived flaws, the ruling apparently was not—in terms of what Congress actually did, as opposed to what some legislators said—so analytically bankrupt for Title VII purposes, after all. Thus, the fact that Lorance remains viable for Title VII’s statutory cousin, the ADEA, does not seem so daunting a legal conclusion.\textsuperscript{333}

\textit{b. The Reenactment Argument}

There are a number of decisions that involve the following scenario: a judicial or administrative agency interpretation of a statute is rendered and at some later point in time that statute is re-enacted without the earlier-interpreted provision being changed by the Congress. Under the “so-called ‘reenactment rule’,”\textsuperscript{334} “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. . . .”\textsuperscript{335} As the case law

\textsuperscript{333} In Thompson v. Prudential Insurance Co., 795 F. Supp. 1337 (D.N.J. 1992), the court addressed—but did not ultimately resolve—the question of Lorance’s continuing viability in the ADEA context in light of the CRA’s rejecting Lorance for Title VII purposes. In Smilan v. United Airlines, Inc., 796 F. Supp. 723 (E.D.N.Y. 1992), the court avoided a firm position on the issue. In response to the plaintiff’s argument that the CRA had overridden Lorance for ADEA purposes, the court stated: “[T]o the extent that the . . . [CRA] is applicable . . ., the court holds that its provisions are to be given only prospective effect.” Id. at 727 n.6. The court proceeded to apply Lorance to the facts before it.

\textsuperscript{334} Grabow, supra note 284, at 755.

\textsuperscript{335} Lorillard v. Pons, 434 U.S. 575, 580 (citations omitted) (1978). Monessen v. Southwestern Railway Co. v. Morgan, 486 U.S. 330 (1988), illustrates this proposition in application. At issue was whether state courts could award prejudgment interest pursuant to local practice in actions brought under the Federal Employers’ Liability Act, 45 U.S.C. § 51 (FELA). In holding in the negative, the Court relied both on the acquiescence analysis discussed above and the fact that Congress had reenacted the FELA on more than one occasion.
reveals, however, this presumption is readily susceptible to manipulation: the reenactment rule is indeed not always followed,336 with various justifications offered for its avoidance. For example, lack of awareness on Congress’ part of the prior interpretation can support the conclusion that the reenactment of the statute did not constitute approval of that interpretation.337 Where, whether because of lack of awareness or otherwise, “there is no indication that a subsequent Congress ... addressed itself to the particular problem, ... [a court may simply be] unpersuaded that silence is tantamount to acquiescence, let alone ... approval. ...”338 If the

without having modified judicial interpretations of the statute in which the interest issue had been decided:

[We have recognized that Congress’ failure to disturb a consistent judicial interpretation of a statute may provide some indication that “Congress at least acquiesces in, and apparently affirms, that [interpretation] ... The federal and state courts have held with virtual unanimity over more than seven decades that prejudgment interest is not available under the FELA ... Congress has amended the FELA on several occasions since [it was enacted in] 1908 ... Yet, Congress has never attempted to amend the FELA to provide for prejudgment interest. We are unwilling in the face of such congressional inaction to alter the longstanding ... [rule].

486 U.S. at 338-39 (footnote omitted).

The reenactment cases may involve Congressional action following a Supreme Court ruling, see, e.g., Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373-74 & n.16 (1978), or a lower court decision, see, e.g., Lindahl v. Office of Personnel Management, 470 U.S. 768, 782-85 & n.15 (1985), or an executive or agency interpretation. See, e.g., Clarke v. Securities Indus. Ass’n, 479 U.S. 388 (1987).

336. “[T]he fact that Congress has remained silent or has re-enacted a statute which we have construed ... does not necessarily debar us from re-examining and correcting the Court’s own errors.” James v. United States, 366 U.S. 213, 220 (1961) (plurality opinion) (emphasis added). Accord Helvering v. Hallock, 309 U.S. 106, 120-21 (1940). In United States v. Powell, 379 U.S. 48, 55 n.13 (1964), the Court, acknowledging that there were several lower court decisions that had been rendered prior to the reenactment of the statutory provision at issue, simply asserted—without explanation—that “[t]hese cases represent neither a settled judicial construction, ... nor one which we would be justified in presuming Congress, by its silence, impliedly approved.”


prior interpretation now claimed to have been approved by a
subsequent reenactment of the statute was an isolated one, a court
may conclude that the reenactment did not adopt the interpr-eta- tion.339 In addition, other factors involved in the statute’s reenact-
ment may counsel against reading that legislative exercise as
expressing approval of a prior interpretation.340

339. See McLaughlin v. Richland Shoe Corp., 486 U.S. 128, 132 n.8 (1988);
Rodriguez v. Compass Shipping Co., 451 U.S. 596, 614-16 (1981); see also Barrett

340. See, e.g., Girouard v. United States, 328 U.S. 61, 70 (1946). Girouard
rejected the earlier rulings construing the statute requiring aliens seeking to
take an oath of allegiance to the United States to become naturalized citizens to take an oath of allegiance to the United States.
These decisions had established that an alien who refused to bear arms would
not be admitted to United States citizenship. See, e.g., United States v. Bland,
283 U.S. 636 (1931); United States v. Macintosh, 283 U.S. 605 (1931); United
States v. Schwimmer, 279 U.S. 644 (1929). It was argued that Congress had
adopted the rule enunciated in the three earlier decisions, thereby precluding the
Girouard Court from construing the statute differently. The Court explained this
argument and then rejected it:
The argument runs as follows: Many efforts were made to amend the
law so as to change the rule announced by those cases; but in every
instance the bill died in committee. Moreover, when the Nationality Act
of 1940 was passed, Congress reenacted the oath in its pre-existing form,
though at the same time it made extensive changes in the requirements
and procedure for naturalization. From this it is argued that Congress
adopted and reenacted the rule of the Schwimmer, Macintosh and Bland
cases.

... It is at best treacherous to find in congressional silence alone the
adoption of a controlling rule of law. We do not think under the
circumstances of this legislative history that we can properly place on
the shoulders of Congress the burden of the Court’s own error. The
history of the 1940 Act is at most equivocal. It contains no affirmative
recognition of the rule of the Schwimmer, Macintosh and Bland
cases. The silence of Congress and its inaction are as consistent with a desire
to leave the problem fluid as they are with an adoption by silence of the
rule of those cases. But, for us, it is enough to say that since the
date of those cases Congress never acted affirmatively on this question
but once and that was in 1942. At that time... Congress specifically
granted naturalization privileges to non-combatants who like petitioner
were prevented from bearing arms by their religious scruples. That was
affirmative recognition that one could be attached to the principles of
our government and could support and defend it even though his
religious convictions prevented him from bearing arms. ... Thus the
affirmative action taken by Congress in 1942 negatives any inference
that otherwise might be drawn from its silence when it reenacted the
oath in 1940.

328 U.S. at 69-70.
The CRA addresses the ADEA specifically in § 115, which amended § 7(e) of the ADEA with respect to a narrow, albeit important, issue: when a suit must be filed. The argument presumably might be ventured, then, that this amending of one provision of the age discrimination statute, while the other aspects of the ADEA were left untouched, should be read as expressing implicit approval of the interpretations of the entire Act rendered prior to its reenactment by virtue of the changes made by § 115. Inasmuch as there already were, by the time the CRA was enacted, lower court ADEA rulings expressly following Wards Cove, Price Waterhouse, and Lorance, it follows—so this reasoning would go—that the ADEA’s reenactment constituted approval of those ADEA decisions. From this could follow the further inference that the amending of § 7(e) served, albeit somewhat indirectly, either as a signal of Congressional approbation of the application to the ADEA setting of the specific Title VII Supreme Court decisions on which the ADEA courts relied, or of the general proposition that it is proper for ADEA courts to look to Title VII rulings for analogical guidance.

The argument here for legislative approbation based on reenactment is not particularly persuasive. The reenactment decisions typically have dealt with situations where the reenacted provision was the same provision that had earlier been interpreted by the courts or administrative agencies. Here, it was only the statute of limitations aspects of § 7(e) of the ADEA that were addressed by § 115 of the CRA, and so to read the CRA as constituting approval of lower court ADEA decisions applying Wards Cove,

343. See supra part II.A.
344. There could be confusion arising from acquiescence being inferred not only as to the post-1989 ADEA rulings, but as well to the pre-1989 rulings—which looked to precedents not in accord with Wards Cove, and which further utilized analyses not in accord with the positions taken in Price Waterhouse and Lorance. For a possible resolution of this confusion, see supra note 321.
Price Waterhouse, and Lorance (which deal with other issues) to the ADEA would be to swallow the bathtub while washing the baby (to completely mangle a familiar expression).

Admittedly, there are some rulings entailing the issue of legislative approbation where, even though the prior interpretation addressed a portion of the statute other than that which was later reenacted, an affirmative answer as to Congressional ratification was reached. But these cases dealt with situations—unlike that here—where the prior interpretation at least was related in terms of substance to the provisions of the statute that were later reenacted. For example, in Merrill Lynch, Pierce, Fenner & Smith v. Curran the Court addressed the issue of remedies—specifically, the question of whether a private cause of action could be implied as being included in the Commodity Exchange Act (CEA).

Prior to 1974 the lower federal courts routinely and consistently had recognized such a cause of action, and so the issue was whether the substantial modifications made by Congress to the CEA in 1974 and again in 1978 constituted ratifications of those prior judicial interpretations. While these alterations addressed a number of matters, including the general issue of remedies, they did not directly deal with an implied private cause of action. Even so, the Merrill Lynch Court ruled that Congress had acquiesced in the lower courts decisions. The Court reasoned that the "fact that a comprehensive reexamination and significant amendment of the CEA left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy."

Here, there is nothing to support the conclusion that Congress' attention to the narrow concerns addressed in § 115 of the CRA could justifiably be read as signaling ratification by silence of any

349. 456 U.S. at 381-82. The Court then buttressed its conclusion that the CEA should be read as including a private cause of action by reviewing the legislative history, which it read as persuasively indicating that preservation of this cause of action indeed was intended. Here, of course, there is no legislative history of note as to whether the ADEA should or should not be read as following or rejecting Wards Cove, Price Waterhouse, Lorance, and/or the lower court ADEA decisions following these Title VII rulings.
interpretations—actual or potential—applicable to other provisions of the ADEA.350 This is not to say that Congress ought not to have imputed to it knowledge of the general practice of reliance by ADEA courts on Title VII decisions, but rather that Congress' attention to a narrow facet of the ADEA was just that: a focus on only that narrow aspect of the age discrimination statute.

c. Failed Legislative Efforts to Respond to Judicial and/or Agency Interpretations

There is a third group of decisions involving the issue of reading Congressional silence as signifying something substantive. These have been termed by Professor Eskridge the "[r]ejected [p]roposal" cases.351 He has explained these as follows: "In many of its acquiescence and reenactment cases, the Court fortifies its argument that legislative inaction has ratified the existing interpretation by pointing to the rejection of the opposite interpretation by either the enacting Congress or a subsequent one."352 Here,

350. See Aaron v. SEC, 446 U.S. 680 (1980). The Aaron Court addressed the question of whether the SEC was required to establish scienter as an element of a civil enforcement action to enjoin violations of § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77a, § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78a, and SEC Commission Rule 10b-5. The SEC argued that § 10(b) did not require proof of scienter by pointing to the fact that Congress had been expressly informed of the SEC's administrative interpretation to that effect on two occasions when significant amendments to the securities laws had been enacted and each time the Congress had taken no action in response to this information. The Court rejected the SEC's argument:

[S]ince the legislative consideration of those statutes was addressed principally to matters other than that at issue here [i.e., the issue of scienter], it is our view that the failure of Congress to overturn the Commission's interpretation falls far short of providing a basis to support a construction of § 10(b) so clearly at odds with its plain meaning and legislative history.

446 U.S. at 694 n.11.

Here, the infusing of Wards Cove, Price Waterhouse, and Lorance into the ADEA admittedly would not be at odds with the ADEA's "plain meaning and legislative history." Moreover, there is no record of Congress explicitly being put on notice as to the ADEA case law in which courts, as a matter of course, have followed the lead of Title VII Supreme Court rulings. Thus, Aaron addresses a situation somewhat different from that here, but not so much so that the decision is not useful to note.

351. Eskridge, supra note 284, at 84. Included among such cases are Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), and Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962), both of which are discussed by Eskridge, supra, at 85-86.

352. Eskridge, supra note 284, at 84-85.
again, there is conflicting case law: the inference of approbation that some courts draw can be contrasted with the rejection of the same inference in other decisions, "[i]n most of . . . [which] the Court has . . . stressed that the proposal differed from the interpretative issue then under consideration, and Congress therefore was not faced with a clear referendum on that issue."353

The rejected proposal cases arise out of situations involving a bill being passed by one House but rejected by the other;354 a bill being spurned in the only chamber in which it was considered;355 or a proposal not even surviving committee consideration.356 None of these paradigms applies here. The closest Congress came to addressing the viability of Wards Cove and other decisions for the ADEA was in the proposed rules of construction contained in the vetoed Civil Rights Act of 1990, which attempted to preclude the changes made by that proposed legislation from deleteriously affecting other statutes. Those proposed rules did not, however, set forth Congress’ view that Wards Cove and the other decisions were not themselves to be deemed applicable—or inapplicable—to the ADEA. In any event, those provisions disappeared not because they were voted down in committee or in one of the two houses of Congress, but because they were vetoed—along with the rest of the Civil Rights Act of 1990—by the President. True, Congressional silence then ensued, in the sense that the successor to the vetoed legislation did not contain the proposed rules of construction. But there is no inference of Congressional distaste to be drawn from this scenario: the proposed rules presumably disappeared because they ran afoul of a veto-proof President.

3. Conclusion as to the Significance of Silence

Silence is not necessarily devoid of meaning. Numerous judicial rulings, including many at the Supreme Court level, so instruct. Here, Congress’ silence indeed delivers a message: Wards Cove, Price Waterhouse, and Lorance survive, unmodified, as analogical guides for interpreting the ADEA. This is because they address

353. Id. at 87-88.
language that was contained in Title VII and that continues to be paralleled by language in the age discrimination statute. Obviously, Title VII has been amended by caveats and emendations cabining the reach of the three Supreme Court rulings for Title VII’s purposes. But the ADEA remains untouched by Congress, and so its language still resonates to the Supreme Court’s interpretations.

G. Implications for the Future

One can concede that there are problems with the analyses in Wards Cove, in Price Waterhouse, and in Lorance, as well.\textsuperscript{357} It still does not follow, however, that their analogical relevance for ADEA courts can be rejected with a bootstrap argument that invokes the CRA’s treatment of them for Title VII purposes as justification for their being rejected in the ADEA context. The inferences of Congressional acquiescence foreclose that interpretive tack in the lower courts. Two options, then, are left for overriding these rulings. Either the Court itself is going to have to consign them to obscurity for purposes of the age statute, or the Congress is going to have to do what it did vis-a-vis Title VII, i.e., it is going to have to amend the ADEA.

Absent the exercise of one or the other of these options, it seems unavoidable to conclude, insofar as the future course of development of ADEA doctrine is concerned, that not only will ADEA courts have to look to Wards Cove, Price Waterhouse, and Lorance. They further will not be able to look to the developing Title VII case law as Title VII courts begin to address disparate impact claims, mixed motives analysis, and charge-filing timing issues concerning seniority systems. For in each of these instances, Title VII now contains particularized statutory language that is not paralleled by like provisions in the ADEA, and so one of the two fundamental bases for looking to ADEA rulings as analogical guides—i.e., like terms—is absent.\textsuperscript{358}

\textsuperscript{357} I readily acknowledge that I am leaving to another day, and perhaps to other commentators, full discussion of the question of the suitability of disparate impact analysis—whether based on Wards Cove, Griggs v. Duke Power Co., 401 U.S. 424 (1971), or some other source of inspiration—for the ADEA. Likewise, I do not undertake to address the substantive merits (or demerits) of Price Waterhouse and Lorance in the ADEA context, even though I am willing to concede that such an enterprise could be useful.

\textsuperscript{358} The other key basis for the Title VII-ADEA kinship is the two statutes’ shared goal of eradicating discrimination in the workplace.
IV. Changes Made by the CRA to Title VII That are Clearly Inapplicable to the ADEA

Section II of this article is addressed to provisions of the Civil Rights Act of 1991 that in some way directly touch on the ADEA, either by expressly amending the age discrimination statute or by infusing into Title VII provisions whose terms, while not explicitly singling out the ADEA, nonetheless bring the latter statute within their reach. Section III addresses the intersection of the ADEA with the CRA in instances where there is a basis for considering the 1991 Act to have had some impact upon the age statute, even though no express amendments were made to the latter. There is a final group of provisions contained in the CRA. These either modify Title VII or add new provisions to the United States Code, but in so doing they neither address the ADEA expressly nor impliedly. Even so, it is useful to address these provisions for at least two reasons. The first is an admittedly formalistic one: the other aspects of the CRA have been addressed, so it seems appropriate to note the remaining features of the CRA simply for the sake of completeness. A second basis for addressing at least some of these remaining facets of the 1991 Act follows from the fact that in some instances—such as the matter of the statute of limitations applicable to federal employees’ suits, as well as Congressional consideration of the consequence of authorizing punitive damages under Title VII—there has been some interchange even where similarities in language are absent. Thus, this final group of CRA provisions merit attention because they are not, after all, entirely conceptually divorced from the ADEA.

A. Damages

The uniform view of the lower courts prior to the enactment of the CRA was that both compensatory and punitive damages were not recoverable under Title VII. The situation was (and continues to be) different for prevailing plaintiffs invoking 42 U.S.C. § 1981, which addresses intentional racial discrimination in contracts, including the contractual employment relationship. Under the latter statute such damages were (and continue to be) recoverable. Given this disjunction between the two statutes, prevailing plaintiffs who successfully pursued Title VII claims of

359. The Supreme Court had not addressed these issues.
employment discrimination based on gender, national origin,\textsuperscript{360} and religion—which forms of bias of course are proscribed by Title VII—could secure less relief than could victims of racial and ethnic origin discrimination—which also are barred by Title VII, since the latter individuals could secure under § 1981 what they could not obtain under the 1964 Act.

This disparity between victims of discrimination was somewhat ameliorated by the CRA, which created 42 U.S.C. § 1981a. By virtue of this provision, victims of gender, national origin, and religious discrimination can now recover compensatory and punitive damages,\textsuperscript{361} to a limited extent,\textsuperscript{362} for intentional violations of

\textsuperscript{360} In Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987), the Court ruled that § 1981 protects “identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.” \textit{Id.} at 613. In a concurring opinion Justice Brennan pointed out that § 1981 does not prohibit discrimination based on the place or nation of origin. \textit{Id.} at 614 (Brennan, J., concurring). It has since been held that § 1981 does not apply to victims of discrimination based on national origin. \textit{Zar v. South Dakota Bd. of Examiners of Psychologists}, 976 F.2d 459, 467 (8th Cir. 1992); \textit{Duane v. Government Employees Ins. Co.}, 784 F. Supp. 1209, 1216 (D. Md. 1992).

(During the debates on the CRA, an obviously pre-arranged colloquy was engaged in by Senator DeConcini and Senator Kennedy on the question of § 1981’s application to discrimination based on national origin. Senator Kennedy, manager of the legislation being considered, responded affirmatively to the proposition put forth by Senator DeConcini that § 1981 applies to discrimination based solely on national origin. 137 Cosw. Rec. S15,488-489 (daily ed. Oct. 30, 1991). However, it is well-established that the views expressed by a single member of Congress as to the meaning of an earlier-enacted statute count for very little. \textit{See}, e.g., \textit{Bread Political Comm. v. Federal Election Comm’n}, 455 U.S. 577, 582 n.3 (1982) (“\textit{Post hoc} observations by a single member of Congress carry little if any weight.”) (quoting \textit{Quern v. Mandley}, 436 U.S. 725, 736 n.10 (1978); \textit{see also} United States v. Clark, 445 U.S. 23, 33 n.9 (1980); \textit{Southeastern Community College v. Davis}, 442 U.S. 397, 411 n.11 (1979)).

\textsuperscript{361} 42 U.S.C. § 1981a(b)(1) (Supp. III 1991) sets the standard for recovery of punitive damages:

A complaining party may recover punitive damages . . . against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

This language more or less parallels the judicial standard established by § 1981 courts for the recovery of punitive damages. \textit{See}, e.g., \textit{Rowlett v. Anheuser-Busch, Inc.}, 832 F.2d 194, 205 (1st Cir. 1987); \textit{Beauford v. Sisters of Mercy—Province of Detroit, Inc.}, 816 F.2d 1104, 1108-09 (6th Cir.), \textit{cert. denied}, 484 U.S. 913 (1987).

Back pay, interest on back pay, or any other type of relief already authorized
Title VII. A victim of age discrimination, like the pre-CRA Title VII plaintiff, is barred from recovering punitive and compensatory damages under the ADEA, and the new 42 U.S.C. § 1981a under § 706(g) of Title VII may not be included as elements of the newly authorized compensatory damages. 42 U.S.C. § 1981a(b)(2) (Supp. III 1991). But recoveries for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses" are included. Id. § 1981a(b)(3).

A number of courts have awarded damages in lieu of reinstatement, also known as front pay, although such relief is not expressly authorized under § 706(g). In light of the fact that 42 U.S.C. § 1981a(b)(3) authorizes the award of "future pecuniary losses" as a component of compensatory damages, it arguably imposes on front pay awards the limits set forth below regarding compensatory damages. The legislative history militates against such a conclusion, however. Sponsors' Interpretative Memorandum on Issues Other Than Wards Cove—Business Necessity/Cumulation/Alternative Business Practice, 137 Cong. Rec. S15,484 (daily ed. Oct. 30, 1991); id. at H9,527 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards, chair of the House Judiciary Committee subcommittee having jurisdiction over the legislation in question).

Only individuals who cannot recover under 42 U.S.C. § 1981 are eligible for damages awards under § 1981a(a). Thus, victims of racial and ethnic origin discrimination cannot look to the new statutory provision.

362. A statutory scheme of limits is set forth in § 1981a(b)(3) that establishes caps on the total amount of compensatory and punitive damages, combined, that a prevailing plaintiff may recover. These caps are based on the size of the employer. 42 U.S.C. § 1981a(b)(3) (Supp. III 1991) provides as follows:

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

363. Thus, by the terms of § 1981a(a), a plaintiff who prevails on a disparate impact theory cannot secure such relief.

364. There are numerous rulings in which courts have held that the recovery of compensatory damages is barred. See, e.g., Pfeiffer v. Essex Wire Corp., 682 F.2d 684 (7th Cir. 1982); Fiedler v. Indianhead Truck Line, Inc., 670 F.2d 806 (8th Cir. 1982); Naton v. Bank of Cal., 649 F.2d 691 (9th Cir. 1981). See generally 3 ELLERT, supra note 5, at §§ 18.19-.22. Likewise, there are numerous rulings denying the recovery of punitive damages. See, e.g., Johnson v. Al Tech Specialties Steel Corp., 731 F.2d 143 (2d Cir. 1984); Walker v. Pettit Constr.
certainly does not, on its face, change that situation. But the


As discussed earlier, see supra part III.F., the legislative history of the CRA is markedly silent regarding the ADEA. One of the very rare exceptions to this silence was the argument made by the dissenting members of the House Committee on Education and Labor, who objected to the allowance for punitive and compensatory damages proposed under the CRA's predecessor, the ultimately-vetoed Civil Rights Act of 1990. In the committee report accompanying the House bill these dissenters invoked ADEA case law to support their argument that the authorization of the award of punitive damages would harm the Title VII enforcement scheme. This was because it would create a disincentive for grievants to conciliate their charges of discrimination, given the prospect of more lucrative financial gains through litigation:

Numerous courts touched on these potential problems [of increased litigation and decreased willingness to conciliate discrimination claims] in considering and ultimately concluding that the Age Discrimination in Employment Act (ADEA) should not include compensatory damages. For example, the Third Circuit reasoned that compensatory damages “would . . . introduce an element of uncertainty which would impair the conciliation process. Hagglng over an appropriate sum could become a three-sided conflict among the employer, the [EEOC], and the claimant. . . . [T]he possibility of recovering a large verdict for pain and suffering will make a claimant less than enthusiastic about accepting a settlement for only out-of-pocket loss in the administrative phase of the case. . . .” [Rogers v. Exxon Research & Engineering Co., 550 F.2d 834, 841 (3d Cir. 1977)].


365. Accord Lee v. Sullivan, 787 F. Supp. 921, 930 (N.D. Cal 1992); Morgan v. Servicemaster Co. Ltd. Partnership, 57 F.E.P. Cas. (BNA) 1423 (N.D. Ill. 1992). One commentator has deplored the failure of Congress to amend the ADEA while modifying Title VII. Catherine Ventrell-Monsees, A Geism: The Segregation of a Civil Right, EXCHANGE ON AGING, LAW & ETHICS, BULLETIN No. 8, Spring 1992, at 1 (paper presented at the annual meeting of the Gerontological Society of America, Nov. 24, 1991). The author offered two pointed reasons—one based on grounds of equity, the other on practicality—why this disparity in treatment is particularly unfortunate. As to the equitable argument she wrote: “The emotional trauma and injury inflicted by discrimination can be as significant in a case of age harassment as it is in a sexual harassment case. Yet Congress' failure to provide for such damages in an age case implies that the older victim does not deserve a remedy.” Id. at 4.

The second basis for Ventrell-Monsees' concern was grounded on practical considerations:

The denial of such damages in age cases . . . [will have a] negative
inability of ADEA grievants to recover such damages is not the

__effect . . . on the enforcement and litigation of age discrimination claims. Attorneys have been willing to take age discrimination cases because the ADEA provided for a jury trial and double damages, which Title VII did not permit. Title VII has now become more attractive than the ADEA because the Civil Rights Act of 1991 provided for potentially greater damages (more than double) and a jury trial. Thus, attorneys may be more willing to handle more Title VII cases than ADEA cases. There is already a dearth of attorneys willing and able to litigate ADEA cases and the lack of such valuable remedies under the ADEA could mean even fewer attorneys available in the future.

__Id. at 4-5.

366. While the ADEA enforcement scheme has been read by the courts as foreclosing such damages, see cases supra note 364, § 7(b), 29 U.S.C. § 626(b) (1988), of the ADEA does incorporate the remedies embodied in § 16 of the Fair Labor Standards Act, 29 U.S.C. § 216 (1988 & Supp. III 1991), which in turn authorizes, in § 216(b), the recovery of liquidated damages. Such damages only may be awarded, however, in the instance of willful violations of the ADEA. __Id. § 626(b) (1988). In Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985), the Court likened liquidated damages to punitive damages. Liquidated damages typically are understood as being made of up an amount equivalent to the back pay and lost benefits recovered by the prevailing plaintiff. See, e.g., Stamey v. Southern Bell Tel. & Tel. Co., 658 F. Supp. 1152, 1156 (N.D. Ga. 1987), aff'd in part & rev'd in part on other grounds, 859 F.2d 855 (11th Cir.), cert. denied, 490 U.S. 1116 (1989). See generally 3 Employment, supra note 5, at § 18.18.

A plaintiff can establish willfulness by proving that the defendant “either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.” Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc., 713 F.2d 940, 956 (2d Cir. 1983), aff'd in part & rev'd in part, 469 U.S. 111 (1985), quoted in Thurston, 469 U.S. at 126; accord Coston v. Plitt Theaters, Inc., 860 F.2d 834 (7th Cir. 1988).

A very considerable problem for the courts has flowed from the fact that discriminatory intent is an essential component of a discriminatory treatment case. It would thus seem that a plaintiff who prevails, meaning that he or she was able to establish that the defendant acted intentionally, necessarily establishes that the defendant willfully. This would mean, however, that every prevailing plaintiff in a discriminatory treatment case would be entitled to liquidated damages—a possibility abjured by the Court in Thurston, and one that would also conflict with the apparent intent underlying the ADEA's allowance of such damages only in instances of egregious wrongdoing. Consequently, some courts engaged in legal contortions to devise formulae imposing upon plaintiffs who sought to establish willfulness some added burdens of proof. See Dreyer v. Arco Chem. Co., 801 F.2d 651, 658 (3d Cir. 1986), cert. denied, 480 U.S. 906 (1987) (in instance of a discriminatory policy, willfulness will exist where employer knowingly violated the ADEA or acted in reckless disregard of whether its conduct violated the Act, but in instance of an individual discriminatory practice, plaintiff must establish that defendant was guilty of “outrageous conduct”); Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1551 (10th Cir. 1988)
result of ADEA courts looking to statutory language tracking that of the pre-CRA Title VII and then applying pre-CRA Title VII case law analogically. Rather, even though parallel conclusions were reached by ADEA and pre-CRA Title VII courts as to the unavailability of compensatory and statutory damages, these conclusions were reached independently, based on each Act’s distinct enforcement scheme. Thus, although the amended Title VII now allows for such damages while the ADEA still does not, this does not prompt the inquiry that the changes made in response to Wards Cove, Price Waterhouse, and Lorance occasioned—i.e., an inquiry as to whether changes made to Title VII language that hitherto had paralleled that in the ADEA might have ramifications for construing the unchanged ADEA.

B. Expert Witness Fees

In Crawford Fitting Co. v. J.T. Gibbons, Inc.367 the Supreme Court held that “absent explicit statutory or contractual authorization,” federal courts may not award to prevailing parties more than $30 per day for expert witnesses who testify in civil actions. Title VII, as amended by the CRA, now contains such explicit authorization.368 Section 7(b) of the ADEA369 incorporates § 16(b)

(“factfinder must find that age was the predominant factor in the employer’s decision”); Schrand v. Federal Pac. Elec. Co., 851 F.2d 152, 158 (6th Cir. 1988) (following Cooper’s “predominant factor” standard). Other courts of appeals failed to articulate any discernible formulations, even while ostensibly searching for a standard of culpability greater than mere discriminatory intent. See, e.g., Brown v. M & M/Mars, 883 F.2d 505 (7th Cir. 1989); Benjamin v. United Merchants & Mfrs., Inc., 873 F.2d 41 (2d Cir. 1989); Bethea v. Levi Strauss & Co., 827 F.2d 355 (8th Cir. 1987); Gilliam v. Armtex, Inc., 820 F.2d 1387 (4th Cir. 1987). Ultimately, this issue was ostensibly resolved in Hazen Paper Co. v. Biggins, 113 S. Ct. 1701 (1993). The Court confirmed the continued viability of Thurston and stated: “Once a ‘willful’ violation has been shown, the employee need not additionally demonstrate that the employer’s conduct was outrageous, or provide direct evidence of the employer’s motivation, or prove that age was the predominant rather than the determinate factor in the employment decision.” Id. at 1710. By so stating, the Court—while insisting that “[i]t is not true that an employer who knowingly relies on age in reaching its decision invariably commits a knowing or reckless violation of the ADEA,” id. at 1709—in fact came close to establishing an automatic equation of discriminatory intent and willfulness.

of the Fair Labor Standards Act, which provides that "[t]he court shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." No express authorization for the recovery of expert witness fees exists, then, in the ADEA setting, and so Crawford Fitting continues to apply so as to preclude ADEA prevailing plaintiffs from recovering such fees.

C. Post-Judgment Interest on Awards Against the Federal Government

Post-judgment interest may be recovered by prevailing plaintiffs in suits brought against non-governmental entities. Insofar as suits in which the federal government is a party are concerned, however, the general rule is that interest may not be assessed against the United States absent express statutory or contractual authorization. Section 717 of Title VII was amended by § 114 of the CRA to authorize the payment of post-judgment interest by the federal government in Title VII cases. No comparable amendment was made as to recoveries by prevailing ADEA plaintiffs, and so the general rule still applies in the ADEA context. In brief, ADEA courts may not award post-judgment interest.


370. Id. § 216(b).
371. Gray v. Phillips Petroleum Co., 971 F.2d 591 (10th Cir. 1992). In some instances, courts have awarded expert witness fees as a part of the attorney's fee award in ADEA cases. See, e.g., Heiar v. Crawford County, 746 F.2d 1190 (7th Cir. 1984), cert. denied, 472 U.S. 1027 (1985); Coleman v. Omaha, 714 F.2d 804 (8th Cir. 1983). Such awards would seem to be precluded, however, in light of West Virginia University Hospitals, Inc. v. Casey, 490 U.S. 83 (1991).
D. Statute of Limitations for Federal Employees' Suits

In pre-CRA days, § 717 of Title VII\(^{377}\) provided that lawsuits involving the federal government had to be filed within 30 days of completion of the administrative complaint process. The filing period was extended to 90 days by § 114 of the CRA.\(^{378}\) The ADEA is silent as to time limits for filing suits against the United States. Consequently, over the years the courts, lacking statutory guidance, have split as to determining the appropriate filing period. The six-year statute of limitations set by 28 U.S.C. § 2401(a) has been invoked by some ADEA courts.\(^{379}\) Others took their cue from Title VII's pre-CRA 30-day filing requirement.\(^{380}\) In theory, the fact that Title VII's language now has been changed should not raise an issue for the ADEA, because the ADEA simply does not have any analogous language to be read in one way or another. In fact, however, those courts that had previously followed the lead of Title VII decisions now may adjust their positions, albeit not their methodology, so as to allow a 90-day filing period for age discrimination claimants. (Insofar as the ADEA enforcement agency, the Equal Employment Opportunity Commission, is concerned, it has responded to the statutory silence by issuing a regulation authorizing a 90-day filing period.\(^{381}\))

E. Test Scoring

Section 106 of the CRA\(^{382}\) added a new subsection (l) to § 703 of Title VII\(^{383}\) to prohibit the adjusting of test scores, the use of different cut-off scores, and any other alteration of test results on the basis of the race, color, etc. of the test-taker.\(^{384}\) The ADEA was not similarly amended, and there is nothing in the CRA's legislative history to suggest that a like proscription ought to be

\(^{379}\) See, e.g., Lubniewski v. Lehman, 891 F.2d 216 (9th Cir. 1989).
applied under the ADEA by either judicial or agency interpretation.

F. Extraterritorial Application of Title VII

The question whether Title VII applied outside the United States was answered in the negative by the Court in *Equal Employment Opportunity Commission v. Arabian American Oil Co.* The ruling thus established that United States citizens working abroad for American-owned companies could not invoke the statute's protection. Section 109 of the CRA amended § 701(f) of Title VII to make the statute applicable extraterritorially under certain circumstances: § 701(f) now defines the term "employee" to include "[w]ith respect to employment in a foreign country... an individual who is a citizen of the United States." There are, however, caveats and limits as to the reach of the amended Title VII.

As a result of these changes, Title VII now parallels the ADEA, which in 1984 also was amended to apply extraterritorially. The existence of the ADEA provision, then, may give rise to Title VII courts looking for guidance to ADEA decisions (rather than the more typical scenario of ADEA courts seeking guidance from Title

386. The Court thereby resolved a split in the lower courts (although there was little case law on this issue). The resolution was to the obvious disadvantage of plaintiffs.
389. Section 109 of the CRA also added language to the ADA regarding the extraterritorial application of the ADA. This language parallels that added by the CRA to Title VII. ADA §§ 101(4), 102(c) 42 U.S.C. §§ 12111(4), 12112(c) (Supp. III 1991).
390. The ADEA was extended to extraterritorial employment decisions and actions by § 802 of the Older Americans Act Amendments of 1984, Pub. L. No. 98-549, 98 Stat. 1792. The word "employee" was redefined in § 11(f) of the ADEA, 29 U.S.C. § 630 (1988 & Supp. III 1991), to include an employee "who is a citizen of the United States employed by an employer in a workplace in a foreign country." Section 4(f)(1), *id.* § 623(f)(1) (1988), was added to create an affirmative defense whereby an employer abroad can justify acts that would otherwise violate the ADEA "where such practices involve an employee in a workplace in a foreign country, and compliance with... [the ADEA's prohibitions] would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located." Section 4(h), *id.* § 623(h) (1988), provides that foreign companies not controlled by American firms do not fall within the ADEA's reach, and it further sets forth a series of factors to use in determining whether an employer controls a corporation.
VII rulings), at least until a body of Title VII case law develops.391

V. Effective Date

The changes made by the CRA were to become effective on November 21, 1991, the date of enactment,392 unless some other date was specifically prescribed in the act.393 Notwithstanding the deceptive and superficial clarity in the CRA’s prescription regarding its effective date, a very large body of decisions has developed as courts have grappled with litigants’ claims that the various provisions of the CRA should be applied retroactively.394 Of the several courts of appeals that had ruled on the issue395 within the year or so following the CRA’s enactment, all but one396 held that the amendments made by the CRA did not apply retroactively. Most of the large number of federal district courts that addressed the issue held similarly.

This case law is explained in part by the ambiguous language and legislative history of the CRA. The CRA provision—§ 402—arguably leaves unresolved the Act’s applicability to discrimination that occurred prior to November 21, 1991, but that was not challenged until thereafter; to charges filed prior to that date but not resolved as of the date of enactment; to suits filed but not yet decided prior to that date; and to cases in which judgments had been entered prior to that date, but which had not yet been resolved at the appellate stage.397 Moreover, the statutory provision

391. The ADEA case law is very limited and offers little substantive guidance.
395. See, e.g., Curtis v. Metro Ambulance Serv., Inc., 982 F.2d 472 (11th Cir. 1993) (CRA not retroactive vis-a-vis jury trial provision and claims for compensatory and punitive damages where case arose before effective date, but final judgment had not yet been entered before CRA’s effective date); Baynes v. AT&T Technologies, Inc., 976 F.2d 1370 (11th Cir. 1992) (CRA not retroactive re jury trial provision, and as to claims for compensatory and punitive damages, where judgment entered before CRA’s effective date); Gersman v. Group Health Ass’n, 975 F.2d 886 (D.C. Cir. 1992); Johnson v. Uncle Ben’s, Inc., 965 F.2d 1363 (5th Cir. 1992); Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929 (7th Cir. 1992); Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992); Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992).
396. Davis v. San Francisco, 976 F.2d 1536, 1556 (9th Cir. 1992).
does not foreclose an arguable distinction between the retroactive application of substantive changes made by the CRA and procedural changes—a distinction generally endorsed by a number of courts ruling that the latter should apply retroactively.\textsuperscript{398}

The Court of Appeals for the Seventh Circuit explained in part the ambiguity of the legislative language and history in \textit{Luddington v. Indiana Telephone Co.},\textsuperscript{399} a decision holding that the CRA does not apply retroactively:

The new act provides . . . that the amendments made by it "shall take effect upon enactment." This could mean no more than that employers were given no grace period in which to bring their practices into compliance with the requirements of the act; they must begin to comply, on pain of sanctions if they fail, on the day the act was passed. So interpreted the statute would be prospective. Or the language . . . could mean that the requirements of the act apply to every undecided case—or perhaps to decided cases as well, which losing litigants could reopen to take advantage of the new act. The floor debates on the 1991 act reveal, as one would expect, divergent views on these questions. It seems futile to search for legislative intent, bearing in mind that the President is by virtue of the veto power a key participant in the legislative process. President Bush would probably have vetoed a statute that contained an express provision for retroactivity—he had done so the previous session and his veto had not been overridden—but the Democratic majority in both houses would equally have "vetoed" an express provision for prospective application. As so often happens, the contenders could not agree, so they dumped the question into the judiciary's lap without guidance.\textsuperscript{400}

Another basis for uncertainty as to the CRA's retroactive application is the inconsistency that exists between two key Supreme Court rulings. In \textit{Bradley v. Richmond School Board}\textsuperscript{401} the


\textsuperscript{399} 966 F.2d 225 (7th Cir. 1992).

\textsuperscript{400} \textit{id.} at 227.

\textsuperscript{401} 416 U.S. 696 (1974).
Court stated that the general rule is that courts addressing new statutory provisions should apply the law in existence as of the time of the decision. Accordingly, if a statute were to be enacted into law during the course of litigation—but prior to decision—Bradley would call for applying the new statute. In 1988, however, the Court espoused a contrary view, even while leaving Bradley ostensibly intact. In Bowen v Georgetown University Hospital\(^{402}\) the Court asserted that courts generally should presume that statutes only apply prospectively; thus, a new statute should not be deemed to apply in a pending case, i.e., a case that arose out of events preceding enactment of the new statute, absent specific language in the statute directing such an application. In brief, and as lamented in Mozee v American Commercial Marine Service Co.,\(^{403}\) "the Supreme Court has left us with two seemingly contradictory lines of cases.\(^{404}\)

In McConnell v Thomson Newspapers, Inc.\(^{405}\), the district court concluded that the new ADEA statute of limitations created by § 115 of the CRA should apply retroactively, since "the statute of limitations for ADEA claims is [merely] procedural. . . .\(^{406}\)

In contrast, the court deciding Smilan v. United Airlines, Inc.,\(^{407}\) in responding to the plaintiff's argument that the CRA had overridden Lorance v. AT&T Technologies, Inc.\(^{408}\) for ADEA purposes, stated that "[t]o the extent that the . . . [CRA] is applicable. . . , the Court holds that its provisions are to be given only prospective effect.\(^{409}\)

Resolution of the ambiguities regarding retroactivity may be in the offing, as the Court granted certiorari in two rulings rejecting retroactive application of changes made by the CRA. One case addressed a claim arising under 42 U.S.C. § 1981 that was pending at the time of enactment;\(^{410}\) the other concerned the issues of the availability of jury trials and compensatory damages in Title VII cases, again in a case pending at the time of the CRA's enactment.\(^{411}\)

\(^{402}\) 488 U.S. 204 (1988).
\(^{403}\) 963 F.2d 929 (7th Cir. 1992).
\(^{404}\) Id. at 935.
\(^{406}\) Id. at 1496.
\(^{408}\) 490 U.S. 900 (1989).
\(^{409}\) 796 F. Supp. at 727 n.6.
\(^{411}\) Landgraf v. USI Film Prods., 968 F.2d 427 (5th Cir. 1992), cert. granted, 113 S. Ct. 1250 (1993).
VI. Conclusion

Congressional responses to Supreme Court rulings are not so rare that the Civil Rights Act of 1991—a statute sweeping aside a whole group of Title VII decisions—is to be deemed a remarkable legislative endeavor on that score. Nor is it particularly notable that the CRA does not do everything that it conceivably might have done by way of clarifying employment discrimination doctrine. Indeed, it is safe to say that only rarely does a statute completely resolve the problem that inspired it in the first instance—given the compromises that characterize the process of moving from idea to law. Still, even if one is willing to make all the appropriate excuses for the legislative process—a process that typically will take into account the conflicting needs and demands of competing interests, wielding varying amounts of influence—one still arrives at the perplexing problem of the ADEA, a statute that, if not scorned, was at least left very largely unadorned by amendments comparable to those made to its statutory cousin, Title VII.

The CRA amended the ADEA in some respects. What it did not do was change the age discrimination statute to respond to Supreme Court decisions construing Title VII that would ordinarily be—and are—of potent analogical force for the ADEA. That silence on Congress’ part cannot be ignored. It has meaning: it grounds inferences of acquiescence on Congress’ part to the applicability of those decisions to the age statute. Thus, Wards Cove, Price Waterhouse, and Lorance continue to apply in the ADEA context. What is more, they now not only have the strength of common language to justify their analogical relevance. They also have the inferred seal of approval by Congress flowing from legislative acquiescence.

These conclusions do not mean that Wards Cove, Price Waterhouse, and Lorance were each well-reasoned, or that they do not lend themselves to reasoned criticism. They do mean, however, that these rulings cannot be rejected in the ADEA context by reliance upon their rejection in the Title VII context. Rather, if they are to be accorded the same fate for the age statute that has been befallen them in the Title VII context, either the Court itself is going to have to so hold, or Congress is going to have to do what it did for Title VII: amend the ADEA.

Until one or the other of these events occurs, ADEA courts must heed Wards Cove and its 1989 cohorts. Moreover, as ADEA courts address the litigation confronting them now and in the future, they will not be able—as they have in the past—to look to developing Title VII disparate impact, mixed motives, and
charge-filing doctrine (insofar as timing concerns arise vis-a-vis seniority systems) for analogical guidance. For Title VII now contains language that the ADEA does not, and so the longstanding analogical linkage of the two statutes has been severed by the CRA, at least with respect to these particular issues.