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I. INTRODUCTION

Imagine that the following proposal has been offered by the CEO of a Fortune 500 corporation. Anxious to guarantee those who work at his firm the substantive rights embodied in the nation’s employment discrimination laws, but troubled by the endless mischiefmaking of the litigation system, the CEO decides to establish an internal grievance process that will provide a substitute for the enforcement processes now operated by the government. All those who feel that they have suffered from discrimination will have the opportunity to present their cases to an in-house tribunal, chosen by the corporation’s management and composed of corporate officers and employees. If this tribunal concludes that the claim is meritorious, it can provide such remedies as reinstatement, promotion, and monetary compensation from the firm’s funds. Those who are dissatisfied with the outcome of this process, however, can receive no help from government enforcement agencies and no redress through the courts.

After the bedlam dies down and smelling salts have been administered to the company’s general counsel, the board of directors naturally votes to commit our CEO to an asylum for the politically insane. The head of another large corporation thereafter decides to take a different approach. Having observed the political appeal of disinterested tribunals, she proposes that discrimination complaints by the company’s employees be resolved by panels of independent arbitrators, and that their decisions be reviewable in a federal court. Knowing how insensitive outsiders can be to a firm’s distinctive corporate culture, however, the CEO takes care to ensure that the arbitrators will be chosen by someone who answers directly to the corporation’s management. And, for an extra measure of safety, she provides that the arbitrators’ decisions can be

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overruled by a special committee of corporate officers. Judicial review, moreover, will not take the form of a trial on the merits. Instead, a federal appellate court will simply apply the kind of highly deferential standard of review normally used when the administrative decisions of federal bureaucracies are challenged in the courts. In order to create a rule-of-law aura around this system, the CEO proposes that the legislature incorporate the new rules affecting her firm into a federal civil rights statute, but with a proviso permitting the CEO's firm to alter or repeal the system at its own discretion.

This second CEO is not likely to get much further than the first in promoting her alternative to the normal processes of litigation. Indeed, her elaborate effort to create the appearance of impartiality would deprive her of the excuse that she had lost her mind. Her proposal looks like a calculated sham, and she would likely be cast into one of the lower circles of that special inferno reserved for those who are considered retrograde on civil rights.

All of this is obvious. So obvious, in fact, that it takes a major effort just to imagine an American business executive who would make such weird proposals. If our imaginary CEOs were given a chance to defend their bizarre behavior, however, they might point to one of the least noticed provisions of the Civil Rights Act of 1991.1 Section 118 of that statute gently counsels those who are regulated by the employment discrimination laws to steer away from litigation, suggesting that they instead use “alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, factfinding, minitrials, and arbitration.”2 Because this section of the statute is hortatory on its face, it has understandably been overshadowed by the many other provisions that actually bring the force of law to bear on people's conduct. Indeed, when President Bush sought to play up the importance of alternative dispute resolution (“ADR”) at the signing ceremony for the new law,3 cynics

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3. “This bill contains several important innovations. For example, it contains strong new remedies for the victims of discrimination and harassment, along with provisions capping damages that are an important model to be followed in tort reform. And it encourages mediation and arbitration between parties before the last resort of litigation.” Remarks by President Bush at a
may have speculated that he was merely groping for reasons to approve legislation that violated every principle he had defended in the long and rancorous debate that preceded the new statute’s enactment.4

Is all this toothless advocacy of ADR just window dressing designed to distract attention from the more important substantive provisions of the Civil Rights Act of 1991? One may certainly be tempted to conclude that Congress does not really care at all about avoiding unnecessary employment-related litigation or about fostering alternative forms of dispute resolution. This temptation should be resisted. Other provisions of the new statute demonstrate that Congress in fact cares deeply about this issue, though not in quite the high-minded way suggested by the provision in which it was directly addressed.

The depth and nature of congressional concern with fostering alternatives to litigation is revealed instead by the provisions in the new statute that apply to complaints of discrimination brought by congressional employees. The two hypotheticals presented above were not just made up: they are based on the civil rights enforcement mechanisms that the U.S. House of Representatives and Senate, respectively, actually adopted for themselves in the Civil Rights Act of 1991.5 This self-exemption from the law, moreover, is nothing new. Congress

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4. Such speculation would not have been altogether implausible, but neither does it necessarily provide an adequate explanation for what the President said. Section 118, and conceivably even President Bush’s emphasis on its importance, might help incline the courts to permit more widespread use of binding arbitration clauses in employment contracts than they otherwise would have. The extent to which such clauses are enforceable under the Federal Arbitration Act is not settled. See Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1651 n.2 (1991). Pending the Supreme Court’s resolution of that issue, lower courts have found the Civil Rights Act of 1991’s express endorsement of ADR mechanisms relevant in deciding whether such clauses violate the policies reflected in the employment discrimination statutes. See, e.g., Hirras v. National R.R. Passenger Corp., 10 F.3d 1142 (5th Cir. 1994); Williams v. Katten, Muchin & Zavis, 837 F. Supp. 1430 (N.D. Ill. 1993); and Scott v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 89 Civ. 3749, 1992 WL 245506 (S.D.N.Y. Sept. 14, 1992) (all relying in part on Section 118 of the Civil Rights Act of 1991 in enforcing an arbitration agreement). Compare Allford v. Dean Witter Reynolds, Inc., 975 F.2d 1161 (5th Cir. 1992); Magro v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992); and Hull v. NCR Corp. 826 F. Supp. 303 (E.D. Mo. 1993) (all enforcing arbitration agreements without relying on Section 118 of the Civil Rights Act of 1991).

Editor’s note: The subject of ADR under the civil rights laws is discussed at length in R. Gaull Silberman et al., Alternative Dispute Resolution of Employment Discrimination Claims, 54 La. L. Rev. 1533 (1994).

5. One other provision of the Civil Rights Act of 1991 fosters a peculiar form of alternative dispute resolution. Section 108 throws severe procedural obstacles in the path of legal challenges to consent decrees that institute quotas or similar personnel-selection devices that adversely affect individuals who are not parties to the litigation out of which the consent decrees arise. Unless this
has consistently refused to bring itself under the statutes by which it regulates other employers.

Despite considerable congressional rhetoric to the contrary, the Constitution does not require this self-indulgent practice. The Framers were acutely aware that such exemptions signal a degeneracy in the constitutional order, and a failure of important restraints on the abuse of legislative power. One of those restraints—the constitutional power of the President to veto proposed legislation of which he disapproves—proved conspicuously and surprisingly inadequate in the peculiar circumstances that produced the Civil Rights Act of 1991. Having lived on through those circumstances, the congressional exemption from the employment laws is likely to be with us for a long time to come, and with it a continuing congressional inclination to pass “civil rights” bills without anything like an intelligent regard for their probable effects on the public welfare.

II. THE NEW CONGRESSIONAL RULES

A. The House of Representatives

The provisions of the Civil Rights Act of 1991 governing the House of Representatives can be described in fairly simple terms. The statute contains a section purporting to apply the “purposes” as well as the “rights and protections” of Title VII of the Civil Rights Act of 1964 to the House. For several reasons, however, this section of the statute does not mean much of anything. First, it

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provision is held unconstitutional, it should strongly encourage the settlement of certain types of litigation by making it easier for the parties to the dispute to shift the costs of the settlement onto third parties.

This statutory restriction on the procedural rights of one disfavored class of litigants necessarily recalls Justice Scalia’s remarks about the Supreme Court’s substantive restrictions on the rights of that same class:

It is unlikely that today’s result [upholding an affirmative action plan that entailed sex discrimination] will be displeasing to politically elected officials, to whom it provides the means of quickly accommodating the demands of organized groups to achieve concrete, numerical improvement in the economic status of particular constituencies. Nor will it displease the world of corporate and governmental employers (many of whom have filed briefs as amici in the present case, all on the side of Santa Clara) for whom the cost of hiring less qualified workers is often substantially less—and infinitely more predictable—than the cost of litigating Title VII cases and of seeking to convince federal agencies by nonnumerical means that no discrimination exists. In fact, the only losers in the process are the Johnsons of the country, for whom Title VII has been not merely repealed but actually inverted. The irony is that these individuals—predominantly unknown, unaffluent, unorganized—suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent.


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expressly excludes the remedial provisions of Title VII from application to the House, thereby rendering the supposed application of the law to its Members a symbolic matter at best. Second, the provision reaffirms a preexisting remedial scheme that lodges the administration and enforcement of Title VII's antidiscrimination principles exclusively in an internal grievance process operated by the House leadership. Third, this internal grievance process does not even exist or operate pursuant to statute; on the contrary, it is established "by the House of Representatives as an exercise of the rulemaking power of the House of Representatives, with full recognition of the right of the House to change its rule, in the same manner, and to the same extent as in the case of any other rule of the House." Thus, although the text of a bill signed by the President includes some words dealing with employment discrimination in the House, those words do not create law in the constitutional sense, or indeed in any very meaningful sense at all.

The system used by the House of Representatives has been highly successful in discouraging discrimination complaints. In the four years from 1989 through 1992, only sixteen complaints were filed with the House office that handles these matters; about half the complaints were for age discrimination, and not a single one involved sexual harassment. During these same four years, however, the House office recorded over 1,200 contacts, including 398 calls requesting an appointment or expressing a concern.8

Maybe the House has been so successful in discouraging formal complaints because its employees do not have much to complain about. In early 1993, however, a Washington Post survey indicated that 34% of the women working for Congress claimed they had been the victims of harassment (about the same percentage as in a national survey of working women); a third of those said the victimizer was a Member of Congress.9 More than half of the respondents said discrimination was a problem for women who work on the Hill, while 80% said they feared being fired for reporting such abuse and 70% said they thought such

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When the House was considering the bill that became the Civil Rights Act of 1991, efforts to strengthen the provisions affecting the House were rejected first in the Rules Committee and then on the floor. See 137 Cong. Rec. H9505, H9508, H9510, H9513-16 (daily ed. Nov. 7, 1991).


complaints would be unavailing. One need indulge no gullible faith in Washington Post surveys or in simplistic statistical arguments to recognize that self-regulation by the Congress is no more presumptively reliable than it would be in the private sector. Indeed, if the market forces that discourage economically irrational discrimination by private firms are likely to operate with more effect than the political forces that are practically the only constraint on Congress, such a presumption of reliability is less plausible with respect to the legislature than with respect to private employers.

B. The Senate

The provisions of the Civil Rights Act of 1991 that apply to the Senate, which were adopted after a noisy and impassioned debate, are more complex and at first glance look more aggressive than those affecting the House. A careful examination of the Senate provisions, however, indicates that the differences are mainly cosmetic. Like the established House system, the new regulations for the Senate do not promise anything like real application of the employment discrimination laws to the legislators.

Title III of the Act purports to give Senate employees the basic substantive rights to be free of discrimination based on race, color, religion, sex, national origin, age, and disability. These rights, however,

10. Morin, supra note 9.

11. As this is written (mid-February 1994), there has been considerable press interest in the Senate’s handling of allegations that Senator Bob Packwood has engaged in various kinds of misconduct, including behavior that might violate Title VII’s proscription against sexual harassment in the workplace. It would be wrong to conclude from the Senate Ethics Committee’s well-publicized investigation of Packwood that Congress can or will control its own Members to the same degree that other employers are disciplined by the law.

First, the information on which the Packwood investigation has proceeded has to some unknown degree been kept confidential, and the final outcome is still very much in doubt. It is therefore not possible to know why this investigation has taken a different course than some others.

Second, much of the behavior that Packwood has been accused of appears either to fall outside the scope of the employment discrimination laws or to have occurred very long ago. The Packwood investigation, moreover, seems to have taken its most serious turn when investigators began to suspect him of criminal conduct completely unrelated to his own employment practices.

Third, even if the Senate’s handling of the allegations against Packwood turns out to be a model of scrupulous investigation and sound adjudication, one could not necessarily conclude either that complaints of discrimination by congressional employees generally lead to the same result or that they will in the future. Indeed, if the most serious allegations of recent sexual harassment by Packwood are true, and if certain incidents reportedly memorialized in his diaries actually occurred, one might more reasonably conclude that fear of sanctions has not been a powerful constraint on the behavior of our national legislators. And one might reasonably doubt that a climate in which such behavior has long been tolerated will be changed much as the result of one case like Packwood’s.

12. Civil Rights Act of 1991 § 302, 2 U.S.C. § 1202 (Supp. IV 1992). Tucked away toward the end of Title III are some interesting exceptions to the substantive coverage proclaimed in § 302. Most of those who are employed directly by Senators, or by the Senate’s leadership or committees, may be discriminated against on the basis of party affiliation, domicile, or “political compatibility.”
are granted only through an exercise of the Senate's rulemaking power, not by law.\textsuperscript{13} The Senate's new internal rule also creates a fair employment office, and establishes an elaborate administrative procedure for that office to follow in considering complaints by employees.\textsuperscript{14} After mandatory counseling and mediation, an aggrieved employee may file a formal complaint, which triggers the appointment of a hearing board selected by the director of the fair employment office.\textsuperscript{15} This director (who serves at the pleasure of the Senate leadership) is required to select members for the hearing boards from outside the Senate, and the formal rules purport to encourage the use of experienced personnel arbitrators.\textsuperscript{16} The hearing board may dismiss complaints or order such remedies as reinstatement, back pay, and compensatory damages.\textsuperscript{17} Any monetary payment, however, must be approved by the Committee on Rules and Administration, and all decisions are freely reviewable by the Senate's Select Committee on Ethics (or any other entity chosen by the Senate).\textsuperscript{18} These provisions for review by selected Senators, together with the control that the Senate leadership exercises through the director of the fair employment office over the selection of hearing boards, ensures that discrimination complaints by

\textsuperscript{13} Civil Rights Act of 1991 § 314, 2 U.S.C. § 1214 (Supp. IV 1992). Anyone familiar with the bitter debate that took place between 1989 and 1991 over disparate impact analysis will recognize that these exceptions seem more generous than the analogous private-sector "business necessity" provisions included in the Civil Rights Act of 1991, and certainly far more generous than the business-necessity provisions that a large majority of the Senate voted for in 1990. (Of course, since "political compatibility" is completely undefined, and since the 1991 Act's definition of "business necessity" is exceedingly unclear, one cannot yet say for sure which of them will be construed more broadly.) What is even more telling, though, is that the Senate did not see fit to extend anything like a party affiliation, domicile, or "political compatibility" exception to politicians outside the Senate who are actually governed by the law, such as those who are elected to office in state and local government.

\textsuperscript{14} Id. §§ 303-304, 2 U.S.C. §§ 1203-1204 (Supp. IV 1992).


\textsuperscript{16} Id. §§ 303(b), 307, 2 U.S.C. §§ 1203(b), 1207 (Supp. IV 1992). Although the Senate's fair employment office says that arbitrators are chosen from lists provided by the Federal Mediation and Conciliation Service and the Administrative Conference of the United States, it refuses to publish the names of those selected. Among sixteen arbitrators identified by an investigative journalist, five are reported to have been former colleagues of the fair employment office's deputy director. See Mary Jacoby, Backgrounds of 16 Senate OFEP Consultants Revealed Despite Grievance Office's Secrecy, Roll Call, Jan. 24, 1994, at 3.

\textsuperscript{17} Id. §§ 307(c), 308, 2 U.S.C. §§ 1207(c), 1208 (Supp. IV 1992). Review by the Ethics Committee may be requested by the complaining employee, by the head of the employing office involved in the dispute, or by the fair employment office. Id. § 308(a), 2 U.S.C. § 1208(a) (Supp. IV 1992).

\textsuperscript{18} The Senate rule specifies that Ethics Committee review is to be based on the record of the hearing board, which the Committee may require the board to supplement, but the Committee is not formally constrained by any legal standard, except perhaps implicitly by the judicial review provision discussed below.
Senate employees will be handled with the utmost sensitivity to the institutional concerns of the employer. And there can be little doubt that this sensitivity will far exceed that which private firms encounter in the government enforcement agencies with which they have to deal.  

In a final effort to give this system a taste of the rule of law, without relinquishing the critical self-protective elements of its new administrative process, the Senate adopted a very special "judicial review" provision. Under that provision, any party aggrieved by a decision in the Senate may seek review in the United States Court of Appeals for the Federal Circuit. Unlike those who are covered by the antidiscrimination laws in the private sector or in the executive agencies or in state or local government, complainants who are aggrieved by the Senate's self-administered grievance process are not entitled to have their cases considered afresh by a federal trial court. Nor are they entitled under any circumstance to a trial by jury, which every federal employment discrimination statute makes available to those who, unlike the Senate's employees, are actually protected by law.

In sharp contrast with the de novo judicial consideration available to those dissatisfied with the outcome of the administrative enforcement mechanisms that cover the private sector and the executive agencies, the Federal Circuit can engage only in extremely limited review of the Senate's dispute resolution process:

The [Federal Circuit] shall set aside a final decision [by the hearing board or Senate Ethics Committee] if it is determined 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.

The operative terms of this provision—which are drawn immediately from the enforcement scheme created for Congress' own General Accounting Office and ultimately from the Administrative Procedure Act—ensure that Senate proceed—

19. For a detailed analysis of some techniques that may be used to frustrate victims of discrimination who seek relief through the Senate's new procedures, see Thomas W. Reed & Bradley J. Cameron, Above the Law: Congressional Coverage Under Federal Employment Laws 32-38 (1994).


ings dealing with complaints of employment discrimination will be reviewed in a highly deferential manner. This kind of deferential review may be appropriate where the agency making the decision has been insulated from the interests of the parties, as is generally the case when such standards are used to review the administrative decisions of executive agencies, but the Senate's rules do not provide for anything comparable to such insulation. This judicial review provision is a hoax, designed to create an image of disinterested adjudication without disturbing the reality of the Senate's prerogative to act as the judge of its own case in every case that may arise.

Lest one think that the self-indulgent nature of the Senate coverage provisions simply reflected an understandably heightened awareness of the special needs of politicians or legislators generally, it should be noted that the Senate added a section to the Civil Rights Act of 1991 extending coverage of the antidiscrimination laws to previously uncovered personal and policymaking aides to elected officials in the States. These politician-employers do not receive the special dispensations that the Senate conferred on itself. On the contrary, they are exposed to administrative enforcement by federal bureaucrats at the Equal Employment Opportunity Commission, who are authorized to order "appropriate relief" without waiting around for a court of law to decide that anyone's rights have been violated. In this respect, state and local politicians are treated even more harshly than private employers, who are free of such direct bureaucratic enforcement by the EEOC. Nor are state and local politicians who suffer an adverse ruling at the hands of these federal bureaucrats given the right to have their cases heard de novo by a court. On the contrary, they are entitled only to have a federal court of appeals review their cases under the same highly deferential standard of review that the Senate created for appeals from its own hearing boards and Ethics Committee. The effect on state and local politicians of this highly deferential standard of review, obviously, is the exact opposite of its effect on U.S. Senators. What the Senate did, in sum, was to create a peculiar and highly effective set of protections for itself, while simultaneously imposing exceptionally harsh new burdens on other similarly situated legislators who do not have the same power to exempt themselves from the law.

The strange judicial review provision in the Civil Rights Act of 1991 is anomalous in yet another way. It was technically enacted as statutory law.


25. Id. § 321(c), (d), 2 U.S.C. § 1220(c), (d) (Supp. IV 1992).
apparently in an effort to avoid the obvious constitutional problems that would arise from trying to use the Senate's rulemaking power to confer jurisdiction on an Article III court. All of the rights and procedures that may be invoked prior to judicial review, however, are creatures solely of that rulemaking power. It is by no means evident that the Constitution will permit courts to enforce the new rights of Senate employees, which are not created either by the Constitution or by a statute, especially where judicial review would entail review of a decision made by a body of Senators such as the Select Committee on Ethics. It is quite striking that this very obvious constitutional problem received no attention at all during the public portion of the Senate's debate over congressional coverage, much of which was taken up with elaborate argumentation about a less serious constitutional issue.

Let us assume, in a spirit of charity, that the new Senate system was not deliberately designed to be vulnerable to constitutional challenge. Whatever the motivation, the effect is very convenient for those who oppose judicial review of congressional employment decisions. If the judicial review provisions are

26. To the extent that the Senate has attempted to use its rulemaking power to create rights that are enforceable in the courts, the effort may fall afoul of the principle that the "legal rights, duties, and relations" of persons outside the legislative branch can be altered only through legislation. Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 952, 103 S. Ct. 2764, 2784 (1983). Resolution of the questions that are raised in light of Chadha may be affected by a number of considerations, such as whether the Senate's attempt to exercise its rulemaking power through a provision included in a bill passed by both Houses and signed by the President renders Chadha's rule inapplicable, and whether the Senate employees who bring discrimination complaints are considered for that purpose to be "outside the legislative branch."

If the answers to these questions are not clear, neither is it obvious whether a Senate rule can be considered one of the "Laws of the United States" referred to in Article III of the Constitution. Perhaps that difficulty could be overcome by arguing that the Federal Circuit will not enforce Senate employees' substantive rights to be free from discriminatory treatment, but will enforce only statutory procedural rights such as those set out in § 309(c). If this argument were accepted, however, it would still be true that the Federal Circuit must in some cases actually review a decision made by a body of Senators (such as the Ethics Committee) that was itself acting pursuant to a Senate rule that was presumably adopted pursuant to the constitutional provision authorizing each House to govern its own proceedings. U.S. Const. art. I, § 5, cl. 2. The exercise of this authority, which is committed by the Constitution itself to each House (though perhaps not on an exclusive basis), may not be judicially reviewable. Cf. Nixon v. United States, 113 S. Ct. 732 (1993).

The courts may conclude that there is nothing constitutionally objectionable about the very odd relationship between the judicial review provision of the Civil Rights Act of 1991 and the rights and procedures under which the cases subject to such review will arise. That outcome, however, is by no means assured.

27. See infra part V.

28. The Senate was aware that the judicial review provision raised serious constitutional questions, and it even adopted provisions designed to facilitate legal challenges to that provision. Every Senator is expressly authorized to "intervene as a matter of right" in any proceeding that reaches the Federal Circuit in order to address the constitutionality of the judicial review provision; the Federal Circuit, in turn, is directed to treat the constitutionality of the provision as a threshold issue, and a special procedure is set up for expedited appeals to the Supreme Court. Civil Rights Act of 1991 § 325, 2 U.S.C. § 1224 (Supp. IV 1992).
held unconstitutional for reasons like those suggested above, that result will undoubtedly—and wrongly—be trumpeted as a prohibition against judicial review of congressional employment decisions. That claim will be false because the constitutional problems discussed here could have been eliminated simply by enacting a statute providing for de novo judicial consideration of claims arising from adverse employment decisions.\textsuperscript{29} The critical distinctions among the different sorts of constitutional issues, however, will be easy to obscure, leaving congressional opponents of judicial review with a very handy political argument: "The courts just won’t let us treat ourselves as we treat others." That the claim will be false is hardly a reason to think it will not be made.

C. Scandal or Business As Usual?

After sorting through the various self-protective exceptions and artful dodges that litter the sections of the Civil Rights Act of 1991 dealing with congressional coverage, one might expect this trumpery to have become the stuff of scandal. And yet, the architects of these mechanisms have not been vilified by the Washington civil rights establishment, a collection of interest groups that is not so trusting of the many other employers who would no doubt like the freedom to police themselves as Congress does.\textsuperscript{30} Nor has the organized bar, usually so

\textsuperscript{29} As discussed in part IV infra, such a statute would almost surely be sustained against a constitutional challenge.

\textsuperscript{30} This point was illustrated in recent testimony by two prominent representatives of the civil rights lobby. Both advocated that Congress change its approach to the regulation of its employment practices, but neither insisted on the most straightforward, and probably the only potentially effective, reform: applying the antidiscrimination laws to Congress and giving complainants a right of action in the courts. In a prepared statement to the Joint Committee on the Organization of Congress, Marcia Greenberger said:

Regarding the availability of judicial review, obviously difficult constitutional questions are raised . . . [T]he National Women’s Law Center believes, as a policy matter, that a [sic] full judicial review as possible would be the best alternative. If, however, the Committee concludes that constitutional requirements prevent this full review, it is imperative to structure a review process which is as independent and accessible to discrimination victims as possible.

\textit{Hearings, supra} note 8, at 288. Similarly, Barbara Arwine of the Lawyers’ Committee for Civil Rights Under Law said in her prepared statement:

Judicial review is clearly the best means of applying the law in a uniform, impartial manner. However, there is a question whether any provision for judicial review will withstand Speech or Debate Clause scrutiny as applied to any employees. This body will have to decide whether to take the risk that the courts will either not permit judicial review at all, or permit judicial review for only certain congressional employees or for only certain employer conduct . . . . As a matter of fundamental fairness, the Committee may want to remove any doubt that its bill will effectively cover all House employees and all employer conduct. This could be accomplished by crafting legislation providing for effective review which is internal to Congress, but is also as independent and neutral as possible.

\textit{Id.} at 285-86 (emphasis in original).
sedulous in guarding its canons of fairness and looking out for signs of the abuse of government power, discovered any iniquity in Congress' proclivity for just-trust-me self-regulation.31

It is tempting to dismiss this phenomenon with a chuckle or a sigh. Indeed, in comparison with some of Congress' other embarrassments in recent years, congressional self-exemption from the antidiscrimination laws may not seem particularly noteworthy. In contrast to the savings-and-loan debacle, which helped bring down the Speaker of the House and damaged the careers of the Senate's Keating Five, we have not seen billions of dollars gushing from the Treasury because of fecklessness and conflicts of interest that would send almost any federal official but a legislator to prison. Unlike those caught up in the House Bank scam, moreover, those responsible for the congressional exemption from the antidiscrimination laws have not shown a complete disregard for even the appearance of adhering to the same rules that others must follow. And unlike the endless shell game that Congress plays with campaign finance regulations, congressional resistance to altering the core elements of its exemption from the civil rights statutes does not look like a desperate effort to prevent the kind of institutional change that could lead to really massive alterations in the ability of incumbents to protect their own tenure and perquisites.

Though the congressional exemption from the antidiscrimination laws is not going to be on anybody's list of the great scandals of our time, the persistence of that exemption is a revealing symptom of a malady that is theoretically interesting and practically significant. Much of the remainder of this article will be devoted to exploring the nature of this malady and the constitutional devices that were meant to provide a partial cure for it. The way that Congress and the President dealt with demands for ending the legislature's exemption from the antidiscrimination laws during the debates about the Civil Rights Act of 1991 may also help explain why that statute contains so many other potentially destructive provisions.

III. CONSTITUTIONAL THEORY

Much of what people ordinarily mean when they praise the "rule of law" is tied up in the intuitive notion that no one should be the judge of his own case. Political liberty, however, is attractive largely because it lets each of us be his own judge in most decisions that we regard as important to our happiness. The

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31. Id. (statement of Harold H. Bruff) (neither the American Bar Association nor its Congressional Process Committee has taken a position as to when or how the laws should apply to Congress). Like the civil rights establishment, the organized bar has material interests that can be dramatically affected by congressional action.
American constitutional system, to the extent that it is characterized especially by an elaborate separation of governmental powers, can be understood as a device for reconciling these opposed principles. In *The Federalist No. 10*, James Madison framed the problem with the following striking analogy:

> No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine?32

Madison's analogy is a useful reminder that the allocation of power among different governmental institutions is ultimately simply a means for addressing the intractable problem of creating and maintaining the far more fundamental distinction between the pursuit of public and private interests. As Locke had emphasized a hundred years before our Constitution was framed, *this* separation is the goal served by what we call the separation of powers.33 The separation of powers is a direct response to the fundamental human selfishness that requires the creation of government itself.

Madison also recognized that our Constitution cannot fully, or perhaps even adequately, solve the problem posed by the fact that legislatures are inevitably judges and parties at the same time. In a subsequent number of *The Federalist*, Madison argued that members of the House of Representatives would tend to remain faithful to the interests and sentiments of their constituents. He gave four reasons, stressing particularly the fact that the frequency of elections would

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33. John Locke, *Second Treatise of Government*, chs. 9 and 12 (Peter Laslett ed., 1965). There is no one form of separating the government's powers that necessarily best serves the goal of the enterprise in all circumstances. Today we are accustomed, largely because of the Constitution's formal structure, to thinking that the government exercises three different kinds of power: legislative, executive, and judicial. But a thoughtful theorist might draw a different set of distinctions, as Locke, for example, did. Our own Constitution's structure and underlying theory, moreover, have not prevented the development, in practice, of a set of institutions that do not fit easily if at all into the familiar tripartite formula. The federal government has almost literally been transformed by the development of an administrative apparatus exercising various "quasi-legislative" and "quasi-judicial" powers, often through entities outside the three constitutional departments of government. Whatever doubts one may entertain about the wisdom or legitimacy of this transformation, it is not thought to have altered the fundamental republican characteristics of our government.
impose on them an habitual recollection of their dependence on the people. Madison then continued:

I will add, as a fifth circumstance in the situation of the House of Representatives, restraining them from oppressive measures, that they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interests and sympathy of sentiments of which few governments have furnished examples; but without which every government degenerates into tyranny. If it be asked, what is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society? I answer: the genius of the whole system; the nature of just and constitutional laws; and, above all, the vigilant and manly spirit which actuates the people of America—a spirit which nourishes freedom, and in return is nourished by it.

If this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate anything but liberty.

... It is possible that these may all be insufficient to control the caprice and wickedness of men. But are they not all that government will admit, and that human prudence can devise?34

It is easy to make either too much or too little of this well-known passage from The Federalist. When he published these remarks, Madison was presumably intent primarily on calming the fears of those who expected the national legislature to become a regular oligarchy, plundering the country and oppressing the people to satisfy the selfish interests of the legislators and a few others closely connected to them. It would therefore be incautious to infer that tyranny is at hand whenever one observes a deviation from the principle that all laws should oblige legislators equally with other citizens. Nevertheless, Madison did speak in general terms of the debasement that would allow people to tolerate any law not obligatory on the legislature, and he clearly believed that legislators should avoid such self-exemptions, even in relatively small matters. During the First Congress, for example, Madison opposed a provision in the Militia Bill that exempted Members of Congress from military service, arguing that “the greatest security for the preservation of liberty, is for the government to have a sympathy with those on whom the laws act, and a real participation and communication of all their burthens and grievances.”35

The congressional exemption from the employment antidiscrimination laws does not necessarily signal a descent into true oligarchic degeneracy, but it does illustrate on a smaller scale one of the serious problems to which The Federalist did not claim that the new Constitution could itself supply a remedy. In our own time, the principal evils created by congressional self-exemption from laws like those that regulate employment discrimination are (1) that the Members face greatly reduced incentives to understand the measures they adopt for others in society; (2) that these incentives help cause the enactment of laws that are self-contradictory or virtually incomprehensible to those who are governed by them; and (3) that legislators can too easily be tempted to accede to the demands of well-organized interest groups whose rent-seeking agendas are adverse to the permanent and aggregate interests of the community. Suffice it to say that the Civil Rights Act of 1991 and its history provide vivid illustrations of each of these three phenomena.

IV. CONSTITUTIONAL LAW

Is there any respectable reason for Congress to exempt itself from the employment discrimination laws? Ironically, in view of the hostility that James Madison expressed toward laws that do not apply to Members of Congress, the main excuse that Members have offered for their exemption from coverage under the employment discrimination statutes has been that such application would actually violate the Constitution. Although that objection is not well-founded, neither is it entirely fanciful.

Even granting, as Madison emphasized, that the legislature is the department of government most dangerous to liberty and to the constitutional order of a representative democracy,36 the executive and judiciary are not by nature so

36. See The Federalist No. 48, at 308-10 (James Madison) (Clinton Rossiter ed., 1961): It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others. What this security ought to be, is the great problem to be solved.

[. . .] In a representative republic . . . where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. . . . Nor is
benign or so utterly feeble as to be no threat at all. To the extent that officers of the United States are empowered to enforce the laws against individual legislators, the executive may be tempted to exercise a politically motivated discretion in its prosecutions. The judiciary, too, especially if it were dominated by appointees sympathetic to schemes of the executive, could become an engine of intimidation and harassment that might severely undermine the republican nature of our government.

To meet this danger, the Constitution provides that, "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place." The language of this constitutional provision is very generous in the protection it grants: it offers protection not merely from punishment, or from prosecution, or from legal liability, but even from being deposed or interrogated about any matter that it covers. The scope of coverage specified by the constitutional language, however, is correspondingly narrow: it applies only to words spoken within the Congress by its Members. As I will show in the remainder of this section, the Supreme Court has interpreted the Speech or Debate Clause in a manner that ensures the preservation of legislative independence from the other departments of government.

The speech or debate language, which was not controversial at the Constitutional Convention, can be traced to section 9 of the English Bill of Rights of 1689, which provided: "That the freedom of speech, and debates or proceeding in Parliament, ought not to be impeached or questioned in any court or place out of Parliament." Article V of our own Articles of Confederation provided: "Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace."

The freedom protected by the Speech or Debate Clause does not lead to anarchy because the Constitution also provides that "Each House may determine the Rules of its Proceedings, punish its members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member." U.S. Const. art. I, § 5, cl. 2. Such a provision would certainly have been appropriate, and would probably have been necessary, even if the Speech or Debate Clause had been omitted from the Constitution. See, e.g., 2 Joseph Story, Commentaries on the Constitution of the United States § 835 (1833).

37. U.S. Const. art. I, § 6, cl. 1. The provision reads in full as follows:

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

The freedom protected by the Speech or Debate Clause does not lead to anarchy because the Constitution also provides that "Each House may determine the Rules of its Proceedings, punish its members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member." U.S. Const. art. I, § 5, cl. 2. Such a provision would certainly have been appropriate, and would probably have been necessary, even if the Speech or Debate Clause had been omitted from the Constitution. See, e.g., Powell v. McCormack, 395 U.S. 486, 502-03, 89 S. Ct. 1944, 1954 (1969); Dombrowski v. Eastland, 387 U.S. 82, 84-85, 87 S. Ct. 1425, 1427 (1967); United States v. Johnson, 383 U.S. 169, 176-77, 86 S. Ct. 749, 753 (1966); MINPECO, S.A. v. Conticommodity Servs., Inc., 844 F.2d 856, 859 (D.C. Cir. 1988); Miller v. Transamerican Press, Inc., 709 F.2d 524, 528-29 (9th Cir. 1983).
without preventing the Congress from subjecting itself to the laws that regulate employment discrimination. Although a small shadow has been cast on this conclusion by one decision of the United States Court of Appeals for the District of Columbia Circuit, any doubt that might be created by this decision is insubstantial.

A. Congressional Immunity in the Supreme Court

The Supreme Court has held that the purpose of the Speech or Debate Clause requires that its coverage be expanded beyond the bounds set out in the constitutional text. That purpose, the Court has concluded, is primarily to "insulate the independence of the legislative process from interference by a potentially hostile executive or judiciary." In order to serve this purpose, the Supreme Court has extended congressional immunity to activities other than speeches or words spoken in debate, holding that it covers such activities as voting, conducting hearings, and producing committee reports. The Clause has also been extended to cover a narrow class of actions by congressional aides who are directly involved in the legislative process. The general rule is that the constitutional purpose requires the extension of immunity to all matters that are an "integral part of the deliberative and communicative processes" by which legislation is formulated and considered.

This common-sense rule has been joined with a second and equally important limiting principle. The Supreme Court has held that immunity is not available for extra-legislative activities, even if they are perfectly legitimate and


40. See, e.g., Gravel v. United States, 408 U.S. 606, 616-17, 92 S. Ct. 2614, 2622-23 (1972).

41. See, e.g., Kilbourn v. Thompson, 103 U.S. 168, 204 (1881) ("It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers.").

42. E.g., Gravel, 408 U.S. at 616-22, 92 S. Ct. at 2622-25; Eastland v. United States Servicemen's Fund, 421 U.S. 491, 507, 95 S. Ct. 1813, 1823 (1975).

43. Gravel, 408 U.S. at 625, 92 S. Ct. at 2627. It is not always easy to determine whether an act falls under this general definition. Courts have disagreed, for example, about the status of testimony provided by a Member of Congress to a congressional committee investigating allegations of misconduct by that Member. Compare Federal Election Comm'n v. Wright, 777 F. Supp. 525, 530 (N.D. Tex. 1991) (holding that "any testimony given by [then-Speaker] Wright to the Committee on Standards was given by him in his capacity as a witness and not in his legislative capacity with the consequence that no immunity attached by virtue of the [Speech or Debate] Clause") with United States v. Durenberger, Crim. No. 3-93-65, 1993 WL 556454 (D. Neb. Dec. 3, 1993) (rejecting Wright and concluding that "the official acts performed by senators sitting on the Senate Select Committee on Ethics, as well as acts by senators and their high-ranking aides appearing before the Committee, are protected by the [Speech or Debate] Clause.").
official aspects of congressional business. Communications with voters, for example, are not protected by the Clause. Nor are such routine activities as making appointments for constituents with federal agencies or assisting them in securing government contracts.

This limiting principle is rooted in both the language and history of the Constitution, and in the manifest need to avoid creating a privileged class of officials who are above the law. Its importance is suggested by the fact that the Court has refused to extend the constitutional immunity to activities that are very closely related to the legislative process but that take place prior to its inception. The Court has specifically said, for example, that neither Members nor their aides would be immune if they seized the property or invaded the privacy of a citizen “in order to secure information for a [congressional] hearing.”

The law can therefore be summarized in simple terms: the Speech or Debate Clause provides absolute immunity for purely legislative activities but not for other forms of official conduct by those in Congress. The principal issue with respect to the constitutionality of congressional coverage under the civil

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45. See, e.g., United States v. Brewster, 408 U.S. 501, 512, 92 S. Ct. 2531, 2537 (1972). Cf. Burton v. United States, 202 U.S. 344, 366-69, 26 S. Ct. 688, 693-94 (1906) (upholding a criminal statute forbidding U.S. Senators to receive compensation for representing private parties before an executive agency in connection with contracts or other matters in which the United States had an interest). Although the Burton Court did not advert expressly to the Speech or Debate Clause, its analysis is consistent with the modern cases under that constitutional provision:

A statute like the one before us has direct relation to those objects [for which the national government was established], and can be executed without in any degree impinging upon the rightful authority of the Senate over its members or interfering with the discharge of the legitimate duties of a Senator. The proper discharge of those duties does not require a Senator to appear before an executive Department in order to enforce his particular views, or the views of others, in respect of matters committed to that Department for determination. He may often do so without impropriety, and, so far as existing law is concerned, may do so whenever he chooses, provided he neither agrees to receive nor receives compensation for such services. Congress, when passing this statute, knew, as, indeed everybody may know, that executive officers are apt, and not unnaturally, to attach great, sometimes, perhaps, undue, weight to the wishes of Senators and Representatives. Evidently the statute has for its main object to secure the integrity of executive action against undue influence upon the part of members of that branch of the Government whose favor may have much to do with the appointment to, or retention in, public position of those whose official action it is sought to control or direct. The evils attending such a situation are apparent and are increased when those seeking to influence executive officers are spurred to action by hopes of pecuniary reward. There can be no reason why the government may not, by legislation, protect each Department against such evils, indeed, against everything, from whatever source it proceeds, that tends or may tend to corruption or inefficiency in the management of public affairs. A Senator cannot claim immunity from legislation directed to that end, simply because he is a member of a body which does not owe its existence to Congress, and with whose constitutional functions there can be no interference.

Id. at 367-68, 26 S. Ct. at 693.
rights laws then reduces to just one question: Are employment-related decisions—such as hiring and firing congressional aides, setting their pay scales, and regulating the sexual atmosphere of the workplace—a part of the legislative process, or are they official but nonlegislative administrative decisions?

The answer is just about as clear as it can be. Employment decisions can be quite important in facilitating the legislative process, but they simply are not part of it. Just like the gathering of documents for use in a congressional hearing, which the Court has said is outside the scope of the constitutional immunity, even the most important personnel decisions are simply a means of preparing for the legislative process.

The absence of a direct Supreme Court ruling on the applicability of the Speech or Debate Clause to employment decisions is no reason to entertain serious doubts about this issue. The main reason there has been no case before the Court is that Congress has been quite scrupulous in exempting itself from the law. There is, however, one instance where Congress did apply the law to itself, and this exception to the usual pattern reinforces the conclusion that the Clause is inapplicable to personnel decisions. Beginning in 1972, Title VII of the Civil Rights Act of 1964 and several other antidiscrimination statutes have been extended to cover certain congressional employees, most importantly those in the competitive service who work for agencies such as the General Accounting Office. Over the years, a variety of mechanisms have been used for administrative enforcement, but de novo consideration in the federal courts has been available just as it is for similarly situated employees in the executive agencies. It appears that the constitutionality of this application of the law has never even been challenged in the courts, let alone invalidated. Because some of the employees who remain unprotected by the employment laws are more intimately involved in the legislative process than those in the competitive service, the extension of the laws to them might not be quite so manifestly


48. Indeed, the former General Counsel to the House of Representatives has testified that his office never raised the issue of the constitutionality of the judicial review provisions that have applied to congressional employees in agencies like the General Accounting Office since 1972. See Hearings, supra note 8, at 59 (statement of Steven R. Ross). This fact looks extraordinarily odd in light of Mr. Ross's claims that all employment decisions affecting people who "are employed in assisting Members in their capacity as legislators" are covered by the Speech or Debate Clause, and that congressional employees can be given the protection of the law only if their jobs are to "attend to the human needs of Members" (as, for example, by cooking food in the restaurant). Id. at 55.
unchallengeable, but the Supreme Court's jurisprudence clearly indicates that such a challenge would fail.\footnote{49}

This claim is not seriously undermined by the fact that the lower courts have issued some conflicting opinions, to which I will return below. To understand those opinions properly, however, one must first consider a related body of doctrine dealing with the common-law immunities that protect public officials other than those in Congress. That body of law can be summarized as follows.

In some circumstances, the common law cloaks official conduct with an absolute immunity equivalent to that granted by the Speech or Debate Clause.\footnote{50} This immunity applies only in narrow circumstances, primarily where a public official must routinely inflict substantial legal harm on other people while doing his job. The main examples involve the work of judges, prosecutors, and state legislators.\footnote{51} The purpose of this immunity is similar to that of the Speech or Debate Clause—namely, to diminish the threat to essential functions of government that could arise if individual officials were exposed to harassment through litigation. In this context, as in that of the Speech or Debate Clause, the Supreme Court has emphasized that absolute immunity does not extend to all of the official functions performed by those who are covered.\footnote{52} On the contrary,

\footnote{49.- Throughout the following analysis, I will assume that application of the employment laws to Congress entails, most importantly, the availability of de novo consideration by a federal court for those who claim to have been the victims of discriminatory conduct. I will also assume that complaining parties can be required to exhaust a set of reasonable administrative remedies before proceeding in court. Constitutional objections that are not altogether specious might be raised if administrative enforcement authority were lodged in an executive agency, or if the courts were asked to review judgments rendered by a committee composed of Members of Congress (as they are under the Civil Rights Act of 1991). The Supreme Court’s jurisprudence of the separation of powers is not so well developed as to allow complete certainty about how seriously such objections would be taken. An administrative mechanism could easily be devised, however, that avoided objections like these and, in fact, such a mechanism has been used at the General Accounting Office. See 31 U.S.C. §§ 731-750 and 42 U.S.C. § 2000e-16 (1988 & Supp. IV 1992). See generally Ramey v. Bowsher, 9 F.3d 133 (D.C. Cir. 1993); Chennareddy v. Bowsher, 935 F.2d 315 (D.C. Cir. 1991); General Accounting Office v. General Accounting Office Personnel Appeals Bd., 698 F.2d 516 (D.C. Cir. 1983).

\footnote{50. The common-law absolute immunities may in some cases also be required by the Constitution. In Tenney v. Brandhove, 341 U.S. 367, 71 S. Ct. 783, 788 (1951), the Court said: “Let us assume, merely for the moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption.” Today, of course, this dictum seems less weighty than it once was. See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 105 S. Ct. 1005 (1985). But Garcia does not necessarily represent well-settled law, so it would be a mistake simply to assume that Congress has unfeathered discretion under the Constitution to limit the freedom of state officials. Cf. Garcia, 469 U.S. at 580, 105 S. Ct. at 1032 (Rehnquist, J., dissenting) (predicting that Garcia will be overruled); Gregory v. Ashcroft, 111 S. Ct. 2395 (1991) (construing Garcia narrowly); New York v. United States, 112 S. Ct. 2408 (1992) (same).


\footnote{52. See, e.g., Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2615-18 (1993); Burns v. Reed, 111}
the Court has consistently held it is the nature of the act performed, not the identity of the actor, that determines what kind of immunity, if any, is available. Judges, for example, do not enjoy "judicial immunity" when selecting trial jurors. Conversely, judges receive legislative rather than judicial immunity when promulgating codes of conduct for attorneys, and prosecutorial rather than judicial immunity when enforcing those codes.

Under the common law, it is well-settled that employment decisions are administrative in nature and therefore not entitled to absolute immunity, whether in the case of judges, prosecutors, or legislators. In coming to this conclusion, the Supreme Court recognized that any restriction on the discretion to hire and fire at will could impair the exercise of the governmental functions that are protected by absolute immunity. Nevertheless, and despite the fact that such administrative decisions "may be essential to the very functioning" of institutions such as the courts, employment decisions have been held to be outside the coverage of absolute immunity.

Given the very close analogy between the Speech or Debate Clause and the common-law doctrine of absolute immunity, it is difficult to imagine why the Supreme Court would treat employment decisions differently under one heading than under the other. This is another powerful reason, in addition to those based on the Speech or Debate cases themselves, for believing there is no constitutional obstacle to providing congressional employees with the same rights enjoyed by others who work in the government and the private sector.

It is worth emphasizing that the absence of an absolute immunity for legislators' personnel decisions does not imply that the law should or does treat these officials exactly as it treats private citizens. The common law also recognizes a much weaker form of protection—qualified or "good faith" immunity—that applies to most public officials in the federal and state governments. This qualified immunity does not insulate officials from lawsuits entirely, but requires the plaintiff or prosecutor to show that a discretionary decision by the official violated a clearly established legal rule. The doctrine does not create a true exemption from the law, but simply protects government officials from liability in damages for conduct they could not reasonably have been expected to know was unlawful.

Administrative decisions like those entailed in hiring and firing employees are protected by this qualified immunity. Thus, for example, if a state judge instituted a "no women" policy in hiring his staff, he would not be insulated

54. Ex parte Virginia, 100 U.S. 339 (1880).
57. E.g., Gallegos v. City and County of Denver, 984 F.2d 358 (10th Cir.), cert. denied, 113 S. Ct. 2962 (1993); Grady v. El Paso Community College, 979 F.2d 1111 (5th Cir. 1992).
from a damages award under Title VII. However, if that same judge were sued for sexual harassment under the ill-defined concept of the "hostile environment," the complaining party would have to show the challenged conduct clearly violated a well-established legal right. That burden would in many circumstances be impossible to meet, even if the official would most likely have been found liable after a trial on the merits.58

The common-law doctrine of qualified immunity reduces the risks of public service by foreclosing damages awards for conduct challenged in "cutting edge" litigation or in areas of the law that are for other reasons afflicted with confusion and uncertainty. At the same time, the doctrine preserves valuable incentives and symbolic effects that would be lost if public officials could violate the recognized rights of other citizens with impunity. The Supreme Court's common-law decisions, which are generally well-reasoned, plainly indicate that qualified immunity, rather than absolute immunity, provides the appropriate level of protection for those who make employment decisions in the public sector. It is unclear whether there is a qualified immunity for personnel decisions by those who serve in Congress,59 but such immunity could certainly be created by statute. The availability of this alternative to absolute immunity strengthens the case for concluding that the Supreme Court should not and will not expand the Speech or Debate Clause in a way that confers absolute immunity on congressional employment decisions.

B. Congressional Immunity in the Courts of Appeals

Were the Supreme Court's opinions the only source of guidance on congressional immunity, there would be almost no colorable basis even to suggest that congressional employment decisions are constitutionally immune from judicial scrutiny. Unfortunately, however, the U.S. Court of Appeals for the District of Columbia Circuit has confused the law in a way that demands some further analysis.

In 1984, that court permitted a woman who was fired from her position as manager of the House restaurant system to bring a constitutional tort action for

58. Under the current test, Title VII is violated when the workplace is "permeated with discriminatory intimidation, ridicule, and insult" that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63, 67, 106 S. Ct. 2399, 2405 (1986)) (citations omitted). The Court has acknowledged that this test does not answer all the potential questions it raises. Id. at 371. Justice Scalia has more pointedly observed that the Court's test "lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages." Id. at 372 (Scalia, J., concurring).

sex discrimination against the chairman of the subcommittee that supervised the restaurant.60 Two years later, however, the same court decided the Speech or Debate Clause foreclosed a race discrimination claim brought by a stenographer who worked for the Clerk of the House. This second case, *Browning v. Clerk, U.S. House of Representatives*, 61 is the principal source—indeed it is practically the only source—of any real doubt that might be raised about the legal validity of full application of the employment laws to Congress.

There are at least three good reasons not to regard *Browning* as an obstacle to bringing Congress under the employment discrimination laws. First, the decision was highly questionable at the time it was issued. Second, the reasoning employed in *Browning* has subsequently been rejected in the clearest terms by the Supreme Court in the context of common-law immunities. Third, *Browning* is easily distinguishable from the kind of cases that could arise under legislation applying the employment discrimination statutes to Congress.

Turning first to the merits of the *Browning* decision, one must note it conflicted with an earlier panel decision of the U.S. Court of Appeals for the Fifth Circuit, which held employment decisions are not immunized by the Speech or Debate Clause.62 The Fifth Circuit case was ultimately resolved on other grounds, and this holding did not become a binding precedent.63 The opinion’s analysis, however, was entirely defensible. The court’s reasoning hinged on the proposition that “[w]hen members of Congress dismiss employees they are neither legislating nor formulating legislation.”64 This principle, as we have seen, is well-grounded in Supreme Court precedent.

The D.C. Circuit took a different approach in *Browning*, arguing that “[p]ersonnel decisions are an integral part of the legislative process to the same extent that the affected employee’s duties are an integral part of the legislative process.”65 The court did not explain why it drew this highly dubious conclusion, which conflicted with the Supreme Court’s carefully articulated distinction between activities that are part of the legislative process and activities that constitute preparations for the legislative process.66 Nor did the *Browning* court cite any language from Supreme Court opinions that would dictate the

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61. 789 F.2d 923 (D.C. Cir. 1986).


63. Sitting en banc, the Fifth Circuit held, for reasons quite apart from the Speech or Debate Clause, that the complaining party did not have a private right of action under the Constitution. The Supreme Court reversed this holding, and remanded the case without reaching the Speech or Debate issue. Before the Speech or Debate issue could be addressed in the Fifth Circuit, the parties settled the case.

64. *Davis*, 544 F.2d at 880.

65. *Browning*, 789 F.2d at 928-29.

66. See supra text accompanying note 46.
contrary conclusion it drew. Instead, it relied upon a First Circuit opinion dealing with common-law legislative immunities.67

The dubiousness of the Browning court's analysis became even more apparent in 1988, when the Supreme Court emphatically rejected an analogous argument. In a case that arose after a state court judge dismissed a probation officer from his staff, the Seventh Circuit relied on Browning, and on the First Circuit decision cited in Browning, for the following proposition: if an employee's duties are "intimately related" to a protected process like adjudicating or legislating, then personnel decisions relating to that employee are also part of the process.68 In Forrester v. White, the Supreme Court unanimously reversed this decision, emphasizing in its opinion that personnel decisions are strictly administrative in nature.69 No matter how important such decisions may be "in providing the necessary conditions of a sound adjudicative system," said the Court, they are "not themselves judicial or adjudicative."70

The D.C. Circuit itself has subsequently acknowledged that there is "unquestionably tension" between Forrester and its own earlier decision in Browning.71 If Browning had come before the D.C. Circuit after Forrester was handed down, rather than in 1986, it would almost surely have been decided differently. There is little reason to suppose Browning would be reaffirmed by the D.C. Circuit itself today, and virtually no reason to think any other court of appeals would adopt its conclusion.

Even if Browning were reaffirmed, however, it would be easily distinguishable from the cases that could arise under legislation applying the employment

67. Browning v. Clerk, U.S. House of Representatives, 789 F.2d 923, 928-29 (D.C. Cir. 1986) (citing Agromayor v. Colberg, 738 F.2d 55 (1st Cir.), cert. denied, 469 U.S. 1037, 105 S. Ct. 515 (1984)). When rehearing en banc was suggested in the Browning case, Judge Ginsburg noted the conflict with the Fifth Circuit panel decision in Davis v. Passman and suggested that the Supreme Court should resolve it. Only Justices White and Blackmun voted to grant certiorari in Browning, however, so her recommendation was not accepted at that time. See Browning v. Clerk, U.S. House of Representatives, 479 U.S. 996, 107 S. Ct. 601 (1986).
68. Forrester v. White, 792 F.2d 647, 655 (7th Cir. 1986).
70. Forrester, 484 U.S. at 229, 108 S. Ct. at 545.
71. Gross v. Winter, 876 F.2d 165, 170 (D.C. Cir. 1989) (holding that a member of the city council of the District of Columbia is not entitled to absolute immunity for claims arising from the discharge of an employee). The court's opinion understandably discussed Forrester at some length. Browning, which would seem distinguishable on the ground that it was a Speech or Debate Clause case, was also discussed thoroughly, apparently because the breadth of its reasoning had been heavily relied on by the city council member who was claiming absolute immunity.
discrimination laws to Congress. *Browning* was a constitutional tort case in which the plaintiff's claim was based on the Fifth Amendment. This form of liability was not established by Congress, but by the courts. That fact is highly significant in light of the central purpose of the Speech or Debate Clause, which is to protect the legislature's independence from the threat of harassment or intimidation by a hostile executive or judiciary. If Congress itself authorizes the judiciary to adjudicate employment discrimination cases brought by its employees, the possibility of any conflict with the purpose of the immunity clause becomes even more attenuated than it would be in the context of court-created causes of action. It is hardly reasonable to expect the courts to force upon Congress an immunity that Congress itself does not believe is needed to protect its own independence, especially when doing so would require looking for the immunity in the murkiest penumbras of the Speech or Debate Clause.  

The D.C. Circuit's *Browning* decision therefore cannot reasonably be invoked as a reason for maintaining the status quo. Not only is *Browning* a very weak precedent, which is unlikely to be followed in the future, but it is not even directly on point with the issue it is often said to resolve.

V. THE DEBATE IN CONGRESS

Supreme Court pronouncements about the Constitution are not infallible, and those who serve in Congress have an independent right and responsibility to exercise their own interpretive judgment. During the Senate's debate on the Civil Rights Act of 1991, its Members had occasion to exercise that responsibility in response to demands that the employment discrimination laws be extended to cover the Senate. The content of that debate, however, suggests Congress can be trusted to discern the limits of its own constitutional rights to about the same degree it can be trusted to police its own compliance with the laws against employment discrimination.

In reviewing the Senate's debates, it is important to keep in mind the difference between reasoned interpretation of the Constitution, an undertaking that transcends persons and interests, and self-serving policy judgments masquerading as "separation of powers" arguments that are untethered to any specific constitutional provision. The difference between the two is not always

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72. This is not to say the courts would use a waiver analysis. Congress may not be able statutorily to waive a Member's immunity under the Speech or Debate Clause, for example, by exposing Members to defamation claims based on speeches given on the floor of the House or Senate. *Cf.* United States v. Helstoski, 442 U.S. 477, 492-93, 99 S. Ct. 2432, 2441-42 (1979) (reserving the waiver issue). Waiver analysis, however, would not be needed to distinguish a claim under a statute that applied the employment discrimination laws to Congress from the constitutional tort claim at issue in *Browning*. Rather, the courts would need only follow the path already established in the many cases in which they have looked to the purposes of the Speech or Debate Clause in deciding how far to extend the reach of the Clause beyond the core protections dictated by its language.
easy to discern, for there are legitimate cases in which a violation of the constitutional separation of powers may be found even though it requires more imagination than textual analysis to reach that conclusion.\textsuperscript{73} For obvious and understandable reasons, however, those who have a personal interest in preserving the institutional prerogatives of one or another department of the government cannot be relied on to confine their imaginations within legitimate bounds when contemplating the general principle of the separation of powers.\textsuperscript{74} The Senate debate over congressional coverage under the discrimination laws produced some novel constitutional arguments, and it put some real passion on display. But it did not generate any good reason to think the Supreme Court's approach to congressional immunity is the least bit unsound.

\textbf{A. Background}

The Civil Rights Act of 1991 resulted from a compromise between the Bush administration and Senate supporters of a bill that had been vetoed by the President the previous year. A bill embodying this compromise, which was reached late in the 1991 session, was taken directly to the floor of the Senate, without committee consideration. The compromise bill did not include provisions addressing the congressional coverage issue. Because the Senate bill was considered by the House of Representatives under a closed rule, and passed out of the House without amendment,\textsuperscript{75} the legislative history of the congressional coverage provisions is contained entirely in the Senate debates. The debate on congressional coverage was devoted primarily to considering two amendments.

The first amendment was offered by Senator Nickles. His proposal was to apply several of the most important employment-regulation statutes to the Congress in the same way they apply to the private sector.\textsuperscript{76} Nickles and

\begin{itemize}
\item \textsuperscript{73} For a recent example, see Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 111 S. Ct. 2298 (1991).
\item \textsuperscript{74} Justice Jackson made this point in an exceptionally memorable dictum, in which he seemed to relegate to the ash heap of political history certain statements he had made himself as Attorney General:

The vagueness and generality of the clauses that set forth presidential powers afford a plausible basis for pressures within and without an administration for presidential action beyond that supported by those whose responsibility it is to defend his actions in court. The claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy. While it is not surprising that counsel should grasp support from such unadjudicated claims of power, a judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 647, 72 S. Ct. 863, 876 (1952) (Jackson, J., concurring).
\item \textsuperscript{76} See 137 Cong. Rec. S15,350-51 (daily ed. Oct. 29, 1991). The Nickles amendment would have applied both the principal antidiscrimination laws and several other employment laws to
several other supporters of his amendment—who came from both parties and from across the ideological spectrum—argued primarily that they could not explain to their constituents or to themselves why Congress should be exempted from the laws that Congress imposes on others. Most of the opposition to the Nickles amendment came in two forms. First, there were constitutional objections, which I will discuss below. Second, several Senators argued the Nickles amendment would cause the civil rights compromise to unravel, primarily because the House would be unlikely to accept the bill if it included such a provision. This second objection was not frivolous, but neither does it have anything to do with the merits of congressional coverage. Nor is it completely clear the bill would actually have been torpedoed by passage of the Nickles amendment, which was supported by several strong advocates of new employment discrimination regulations. Finally, concern about the response of the House should not have prevented Senators from voting for meaningful coverage of the Senate alone, as some opponents of the Nickles amendment later did.

Congress. For a useful summary of the patchwork fashion in which these various laws affect the legislature, see Thomas W. Reed & Bradley J. Cameron, Above the Law: Congressional Coverage Under Federal Employment Laws 1-26 (1994).

77. See, e.g., 137 Cong. Rec. S15,351-52 (daily ed. Oct. 29, 1991) (statements of Sen. Nickles); id. at S15,330 (statements of Sen. Leahy); id. at S15,332 (statements of Sen. Fowler); id. at S15,361 (statements of Sen. Durenberger); id. (statements of Sen. Wofford). Senator Brown also made the important point that living under the laws would help those in Congress understand the effects of those laws. Id. at S15,353.

78. Id. at S15,352 (statements of Sen. Hatch); id. at S15,359 (statements of Sen. Danforth); id. (statements of Sen. Dole).

79. One opponent of the Nickles amendment suggested that if the amendment passed, so would the underlying bill, thus injuring the self-interest of those in Congress without preventing the enactment of the controversial changes in the laws affecting other employers. “And we are going to go home and say, ‘Isn’t it nice; we put those laws that are bad on us, too.’ And it will not do a bit of good for anyone, except perhaps at a few town meetings for the next 6 months, and then it will disappear.” Id. at S15,357 (statements of Sen. Domenici).

80. Supporters of the Nickles amendment, for example, included Senators Adams, Boren, Bumpers, Conrad, Dixon, Dodd, Durenberger, Fowler, Graham, Harkin, Kerry, Leahy, Lieberman, Mikulski, Packwood, and Specter, all of whom had voted to override President Bush’s veto of the Civil Rights Act of 1990. See 136 Cong. Rec. S16,589 (daily ed. Oct. 24, 1990) (Rollcall Vote No. 304). It is quite possible, of course, that some who supported the Nickles amendment did so because they were confident it would not pass.

81. Compare 137 Cong. Rec. S15,361 (daily ed. Oct. 29, 1991) (Rollcall Vote No. 234) with 137 Cong. Rec. S15,455 (daily ed. Oct. 30, 1991) (Rollcall Vote No. 237). Not long after the defeat of the Nickles amendment (by a vote of 61-38), several Senators who had voted against the Nickles proposal voted with Senator Nickles on a new proposal that would have provided meaningful coverage of the Senate alone. They were: Cohen, D’Amato, Domenici, Gorton, Gramm, Heflin, Hollings, Lugar, Murkowski, Pryor, Simon, Wellstone, and Wirth. Despite the support of these opponents of the Nickles amendment, the later proposal failed by a vote of 54-42. Id. This result occurred because some supporters of the Nickles amendment later voted against meaningful coverage of the Senate. They were: Boren, Conrad, Dixon, Dodd, Graham, Grassley, Harkin, Kerry, and Simpson. Thanks to this vote switching, all the Senators in these two lists were enabled to proclaim...
The Nickles proposal was soundly defeated, and the Senate then engaged in a lengthy debate over a much more limited compromise amendment offered by Senators Mitchell and Grassley. This amendment was included, with minor alterations, in the bill that was finally enacted. During the debate, which was convoluted at times, three major points of view emerged. First, Senator Nickles argued strongly that the Mitchell-Grassley amendment was woefully inadequate, mainly because it lacked any provision for meaningful judicial review of employees' discrimination complaints. Second, supporters of the Mitchell-Grassley amendment argued it was a reasonable compromise. Third, the strongest opponents of congressional coverage, primarily Senator Rudman, contended that the Mitchell-Grassley and Nickles proposals were both unconstitutional.

B. Constitutional Issues

Whatever might be said for Mitchell-Grassley as a political compromise, it could hardly be defended as a constitutionally preferable alternative to the Nickles proposal. Senator Mitchell, the Senate Majority Leader and a former federal judge, nevertheless attempted to put it in a favorable light.

Senator Mitchell's analysis began with the assertion the Nickles proposal was plainly unconstitutional. He also asserted that Mitchell-Grassley was significantly different: "Because of the 'speech and debate' clause prohibition which limits the reach of the Judiciary into the operations of a Senator's own office or committee, the independent hearing board is the trier of fact rather than a Federal district court." As Senator Nickles pointed out, however, Mitchell-Grassley also contained judicial review provisions, which makes it utterly inapparent how it could be constitutionally distinguishable from Nickles' proposal. On practical grounds, however, they could not be more different, that they had voted in favor of meaningful coverage of the Senate, while their votes against one or the other proposal ensured that they will not have to live with such coverage.

82. See discussion supra part II.
84. Senator Grassley, who is not a lawyer and who seems personally to have favored more meaningful coverage of the Senate, left the legal and constitutional issues largely to Senator Mitchell during the debate.
85. "[T]his is the most blatant, flagrantly, obviously unconstitutional proposal that I have seen since I have been in the Senate. . . . I do not think there is the slightest chance that this could be found constitutional. This makes no effort whatsoever to approach this in a serious, responsible way." 137 Cong. Rec. S15,359 (daily ed. Oct. 29, 1991). This kind of hyperbole, from a legally sophisticated politician who does not have a reputation for reckless posturing, suggests just how deeply the passion for congressional exemption from the law runs in the U.S. Senate.
86. Id. at S15,373.
87. See id. at S15,379. Mitchell acknowledged he was not sure his own proposal was
since Mitchell-Grassley exempted the Senate from de novo judicial review, jury trials, and punitive damages.

Senator Mitchell’s main defense of his amendment against the objection it lacked essential safeguards for the rights of Senate employees was that those employees could be given the same substantive rights enjoyed by those in the private sector without giving them the same remedies: “Who has ever said, or has ever accepted the premise that the only way you could achieve a desirable result is to adopt an identical process? As I said, it is contrary to common sense, contrary to reality, contrary to the whole history of Anglo-Saxon law, going way back before the United States was even a country.”

There are probably not many people whose sense of reality and of our legal history would suggest that the right to have one’s case decided by a court of law is a trivial procedural right that can be taken away without affecting the nature of the underlying substantive right. Senator Mitchell’s tortured attempt to make a legally principled defense of the political compromise he had negotiated was manifestly inadequate. The effort he made is therefore probably best explained as a product of his political duties as majority leader rather than as a result of legal analysis.

During the debates about the Nickles and Mitchell-Grassley amendments, Senator Warren Rudman emerged as the leading critic of covering Congress by the law and the most forceful exponent of the view that judicial review of Senate employment decisions is unconstitutional. Senator Rudman took the position that any judicial review of Senate personnel decisions is flatly unconstitutional. He had two main legal arguments for this bold conclusion. The first was based on judicial precedent under the Speech or Debate Clause, primarily *Browning*, and it suffered from all the weaknesses discussed in Part IV above. Rudman’s misplaced reliance on *Browning*, it should be noted, was not simply a mistake based on hasty legal research. The Speech or Debate issues had been reviewed on the floor of the Senate a year earlier.

Rudman’s response, which was more in the nature of an advocate’s constitutional, but he did not specify what the source of his doubts was. *Id.* at S15,373.

Later in the debate, Mitchell suggested the constitutional defect in the Nickles proposal was that it combined executive-branch enforcement with “the broadest possible scope of judicial branch oversight over legislative affairs.” 137 Cong. Rec. S15,454 (daily ed. Oct. 30, 1991). It is true that enforcement of the law by executive agencies, even an independent agency like the EEOC, raises a set of constitutional issues that are somewhat different from those raised by the judicial review provisions of the Nickles amendment. But this was a red herring because executive enforcement could have been eliminated from the Nickles proposal without compromising its essential remedial element, viz. de novo judicial review of employment discrimination complaints. Opponents of the Nickles amendment never proposed this minor adjustment, and Mitchell-Grassley went much farther in gutting the remedies and judicial procedures that Nickles would have provided.

argument than a reasoned effort honestly to evaluate the state of the law, relied on the technical distinction between Speech or Debate cases and the jurisprudence that has developed under the rubric of common-law official immunities. 91 For the reasons discussed earlier, that technical distinction does not provide any real foundation for the position Senator Rudman took during the debates. 92

Senator Rudman’s second argument, in which he seemed to place even greater confidence, was based on a more general theory of the separation of powers. He asserted without any reservation, or for that matter any hesitation, that the courts shared his view that separation-of-powers doctrine precluded judicial review of Senate employment decisions. The explanation he offered for this conclusion showed just how little basis he had for such a notion:

[T]o submit the employment decisions of this body as it relates to our committee staffs and our personal staffs to a review by a judge who is appointed for life tramples any semblance of separation of power that I have ever read or heard of.

I wonder what the Federal district court would say or the Federal circuit court of the United States if the Senate Judiciary Committee proposed and we passed, a law telling them what their Rules of Civil Procedure would be. It would take them about two lines to tell us what they thought. 93

Rudman’s preposterous assumption that Congress is constitutionally barred from enacting rules of procedure for the courts shows pretty vividly that legal analysis was not likely the driving force in his insistence on preserving Congress’ exemption from the employment discrimination laws.

It might be possible to save Rudman’s conclusion (if not his reasoning) by showing that the separation of powers requires a congressional immunity that goes beyond that provided by the Speech or Debate Clause. But that would not be easy. The Supreme Court has specifically held, and with good reason, that generalized separation-of-powers considerations cannot be used to augment the immunities provided through the Speech or Debate Clause. 94 It would also be

91. Id. at S15,354, S15,376 (statements of Sen. Rudman).
92. Senator Rudman was willing to overlook legal distinctions more significant than the distinction between Forrester and Browning when it served his purposes. He relied on Nixon v. Fitzgerald, 457 U.S. 731, 102 S. Ct. 2690 (1982), for example, to suggest that Senators enjoy the same constitutional immunity as the President:

What is good for the goose is good for the gander. What is good for the executive branch is good for the Congress. We are three equal branches. It means just that. Not one more equal than the other, but coequal, and the Nixon case is clear on that issue... [W]e should not knowingly vote for legislation unconstitutional on its face, not on my say-so; on the say-so of the U.S. Supreme Court.

94. Davis v. Passman, 442 U.S. 228, 235 n.1, 99 S. Ct. 2264, 2272 n.11 (1979). It does not require a naive attachment to the canons of construction to recognize how much force there is in this
difficult to maintain that the Supreme Court has been too stingy in its construc-
tion of the Speech or Debate Clause itself. The Court has already extended the
immunity well beyond the bounds of the constitutional language, and it is none
too easy to imagine how the constitutional purpose of protecting the legislature's
freedom would be advanced by taking away the legislature's freedom to decide
that its own employees may have access to the courts.

C. Nonconstitutional Issues

The absence of a plausible constitutional argument does not mean, however,
that Senator Rudman's opposition to judicial review of Senators' employment
decisions was petty or idiosyncratic. On the contrary, he articulated a rhetorically
powerful, if nonlegal, argument for his position:

[T]his Senate is a very special place with very special obligations, a
very rich history and, I hope, a rich future. None of us who serve here
will serve here longer than a brief blink of time. And there are some
institutional values which are worth protecting.

Do Members understand that by [creating judicial review of Senate
employment decisions], because of the unique position that we are in,
we are not owners of factories or food stores or restaurants or sport
teams or construction companies, we are in the political eye, we are
subject to attack by opponents and potential opponents, by each other
on occasion.

There has been more malice around here in the last 3 weeks than
I have seen in the previous 10 years. This is an invitation for trashing
each other in court on trumped-up charges.

Under this [Mitchell-Grassley] proposal . . . once [a complaint] gets
into that circuit court, not only have you given up all of your rights and

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case to the principle that *expressio unius est exclusio alterius*: by specifically protecting the
separation of powers through one form of legislative immunity, the Constitution implies that no other
form of such immunity should be inferred. *Cf.* United States v. Stanley, 483 U.S. 669, 685, 107 S.
Ct. 3054, 3064 (1987):

[The Constitution itself contain[s] an applicable immunity provision—the Speech or
Debate Clause, Art. I, § 6, cl. 1—which render[s] Members of Congress immune from suit
for their legislative activity. The Court held that the “special concerns counseling
hesitation“ in the inference of *Bivens* actions in that area “are coextensive with the
protections afforded by the Speech or Debate Clause.” That is to say, the Framers
addressed the special concerns in that field through an immunity provision—and had they
believed further protection was necessary they would have expanded that immunity
provision. It would therefore have distorted their plan to achieve the same effect as more
expansive immunity by the device of denying a cause of action for injuries caused by
Members of Congress where the constitutionally prescribed immunity does not apply.
(citations omitted).
your privacy, but you have given up something that is very precious. There is little chance to defend yourself against well-timed, ill-considered, malicious complaints destined to go to court. There are several Members of this body who have told me of incidents that have occurred to them in their home States with complaints that were brought not into the Senate, but in other fora and the problems that it caused those Senators.  

Senator Rudman’s exquisite sensitivity to the peculiar vulnerabilities of employers who are U.S. Senators led him to the strongest argument that can be made on behalf of his position. It is true those who hold elected office might actually lose their jobs if a groundless but inflammatory lawsuit were brought just before an election. Even allowing for the likelihood that voters heavily discount unproven accusations made late in a political campaign, the potential for manipulative accusations surely does exist. Rudman might with a little diligence have discovered that owners of factories and food stores can also suffer considerable damage from false charges brought under the employment discrimination laws, but it is not absurd on its face to suggest there is something different about the nature of the damage that can occur in the two cases.  

A disinterested and well-informed observer might conclude, though I doubt it, that the potential for the political misuse of discrimination charges against elected officials is far greater or more serious than the abuses that occur in the commercial setting. Such an observer might also decide that congressional employees should not have the same opportunities to receive compensation for their injuries that their private-sector counterparts enjoy. But even if one assumes these dubious conclusions, Senator Rudman’s argument fails.  

First, it is hard to see why charges filed in court should be more politically dangerous than charges made through the press. An adverse legal judgment presumably would be more damaging, but if baseless charges have much chance of leading to judgments in favor of plaintiffs, the law needs fixing for reasons much more important than protecting the job security of a few U.S. Senators. Second, the logic of Rudman’s argument would seem to demand that Senators be insulated from all lawsuits, whether or not they have anything to do with a Senator’s official duties. A paternity suit or a nonpayment-of-taxes charge would be just as easy to trump up as an employment discrimination claim, yet nobody argues that Senators should be immune from lawsuits involving their personal lives. Third, if Rudman’s argument were correct, it is hard to see why immunity  

96. Actually, the owners of businesses may face less risk of catastrophic consequences from false charges of discrimination than the individual employees who are ordinarily the ones accused of having actually engaged in the wrongful conduct. Although these individuals can rarely be held liable under the federal statutes, they may find their careers severely damaged or even destroyed without any of the evidence or opportunity to defend themselves that would be required in a judicial proceeding.
should not extend to political challengers as well as to incumbents. All candidates have the same vulnerability to politically motivated lawsuits, but the constitutional immunity does not attach to everyone who runs for office. Fourth, and perhaps most revealing, Senator Rudman did not propose extending immunity from the employment discrimination laws to state legislators, who have precisely the same exposure as U.S. Senators to what he called "well-timed, ill-considered, malicious complaints destined to go to court." State legislators have been covered by Title VII since 1972, and the Civil Rights Act of 1991 actually broadens the application of the laws to them, giving legal protection against discrimination for the first time to personal staff, to policymaking officials, and to constitutional and legal advisors.97

Flimsy as all of Senator Rudman's arguments were, they were the best anyone in the Senate offered in defense of preserving the Senate's exemption from the law.98 Rudman's legal arguments did not persuade his fellow Senators to forego judicial review altogether, but the Senate decisively rejected the Nickles amendment, which would have exposed them to meaningful judicial review.99 The provision they adopted, moreover, does raise serious constitutional questions, though only because it includes unnecessary features that could easily have been eliminated.100 The obvious explanation for all this is that Senators were moved

97. Civil Rights Act of 1991 § 321, 2 U.S.C. § 1220 (Supp. IV 1992). If judicial review of legislators' employment decisions were likely to lead to evils of the kind Senator Rudman seemed to fear, one would expect there to be evidence of it at the state level. Rudman did not allude to any such evidence, which is a reason both to doubt that the fears he expressed were well-founded and to doubt that they arose from anything like a dispassionate analysis of the issue.

98. The Senate Majority Leader, himself a former federal judge, offered essentially the same job-security analysis articulated by Senator Rudman:

The costs of unsubstantiated cases, to the private sector, are to erode the profits of a business or even, in extreme cases, to threaten the continued existence of the business.

[In the public electoral sector, there is an asset which is easily damaged and hard to repair, and that is an individual Member's reputation.]

[Individual corporate officers may be temporarily embarrassed; but in very few cases would an antidiscrimination suit, or the threat of one, cause a CEO or other corporate officer to lose his position directly.

The same is not true for elected officials such as Members of the Senate. If a credible and politically well-timed charge can be levied against a Member that he or she intentionally discriminated on the basis of race or sex or disability or some other cause, that Member is at direct risk of forfeiting his or her seat without the benefit of due process.

137 Cong. Rec. S15,373 (daily ed. Oct. 29, 1991) (statements of Sen. Mitchell). Whatever notion of due process Senator Mitchell was alluding to at the end of this remarkable passage, he presumably could not have meant to invoke either the Fifth or Fourteenth Amendments.

99. The vote to table the Nickles amendment was 61-38. Id. at S15,361.

100. See supra note 26.
primarily or exclusively by the kind of extralegal fears for their own personal and political interests that Senator Rudman so eloquently expressed.  

D. Postscript  

The analysis of the Senate debate could probably be considered complete at this point were it not for one striking exception to the pattern of self-protective behavior that otherwise seems to run so consistently through all that happened. After the Senate rejected the Nickles amendment, which would actually have applied the laws to the Senate, an amendment was offered to the Mitchell-Grassley proposal making Senators personally liable for violations of the Senate's antidiscrimination rules. This amendment, which treated Senators in one respect more harshly than the other government officials who have been covered by Title VII for many years, was offered by none other than Warren Rudman himself. Although Rudman was accused of offering his proposal as a "poison pill" that was designed to cause the defeat of Mitchell-Grassley and thus to head off the dread prospect of judicial review of Senate employment decisions, the Senate actually adopted his amendment after an ostentatious—and nationally televised—debate on the floor of the Senate.

That Rudman's amendment was adopted (and by a lopsided vote at that) seems to undermine the hypothesis that legislators will not agree, except perhaps under the most severe duress, to measures that significantly threaten their own personal well-being. Could it be that the Senate overwhelmingly agreed that it just would not be right for the taxpayers to foot the bill if a Senator was found

101. Compare the following comment, offered by Senator McCain:  
I believe what Mark Twain said "patriotism is the last refuge of a scoundrel." I am beginning to believe that interpretations of court decisions by very learned lawyers, of which I have many colleagues who are lawyers, may be the last refuge of Members who prefer the very nice and pleasant lifestyle that we have here in this body, exempting ourselves from a veritable laundry list of legislation which has been passed over the past 40 or 50 years and which place a well justified but sometimes onerous burden on men and women in the free enterprise system in America.

137 Cong. Rec. S15,361 (daily ed. Oct. 29, 1991). Some may disagree with Senator McCain's characterization of this "onerous burden" as "well justified." Consider, for example, the comments that one small businessman made after his hotel business went bankrupt:

I wish that during the years I was in public office I had had this firsthand experience about the difficulties business people face every day. That knowledge would have made me a better U.S. senator and a more understanding presidential contender. . . . While one cannot assess the merit of all these claims [made in litigation], I've also witnessed firsthand the explosion in blame-shifting and scapegoating for every negative experience in life.


103. Id. at S15,446-51.

104. The vote was 75-22. Id. at S15,451.
guilty of misconduct by the Senate’s new internal grievance procedure? Well, perhaps. Or maybe the acceptance of Rudman’s amendment merely reflected a fear that voters might not understand why Senators were voting to bill the taxpayer for the costs of Senators’ misconduct. This may seem more likely.

It turns out, however, that this incident does not require one even to question the hypothesis that self-interest drove every move the Senate made. During the very next session, the Senate unobtrusively slipped a rider repealing the Rudman amendment onto Congress’ own appropriations bill. That rider was adopted without debate, and without a single objection from Warren Rudman or anyone else.

VI. THE EXECUTIVE RESPONSE TO CONGRESSIONAL SELF-EXEMPTION

Hypocrisy and self-dealing are natural characteristics in legislative bodies, and there is nothing shocking in the way Congress protected its own interests in 1991. The behavior of the Executive, whom we might expect to have acted in a similarly rational and self-interested manner, is not quite so easy to explain. The executive response to the legislature’s self-serving impulses is more interesting, both because it is more surprising and because it seems to illustrate a failure of one of the Constitution’s most significant devices for controlling congressional misconduct.

A. What Did the Bush Administration Want?

For more than two years after the 1989 Supreme Court decisions that generated the political momentum that led to the Civil Rights Act of 1991, the Bush administration resisted that impetus. Insisting repeatedly that he would not sign a “quota bill,” the President also sought to moderate various other features of the proposals favored by majorities in both Houses of Congress. Whatever one may think of the comparative merits of the bills favored by Congress and the President during this period, the administration’s resistance to the dramatic legal


106. The rider also repealed the personal liability provisions that had been imposed on the President in the Civil Rights Act of 1991. When he signed the bill, President Bush complained vociferously about Congress’ continuing failure to subject itself to the same laws that it imposes on others, but he did not object to the repeal of the personal liability provisions. See Statement on Signing the Legislative Branch Appropriations Act, 1993, 28 Weekly Comp. Pres. Doc. 1873 (Oct. 6, 1992).

The manner in which the personal liability provisions of the Civil Rights Act of 1991 were subsequently repealed tends to confirm Senator Mitchell’s claim that Senator Rudman had offered his amendment as a poison pill. The repeal also illustrates the general point that the costs of monitoring politicians’ behavior increases sharply as an issue recedes from public prominence. It is unlikely any of those who spoke on national television in favor of the Rudman amendment will ever have to explain to their constituents why they did not object to its repeal.
changes proposed by Congress was in principle consistent with the constitutional
decision to include the President in the legislative process. Defenders of
President Bush’s resistance to congressional demands for legislation—a resistance
made in the face of considerable ungentle criticism of his administration—might
offer this as an example of Alexander Hamilton’s claim that the President’s veto
“establishes a salutary check upon the legislative body, calculated to guard the
community against the effects of faction, precipitancy, or of any impulse
unfriendly to the public good, which may happen to influence a majority of that
body.” Even if one thinks President Bush’s position was wrong on the
merits, it should be apparent he and his advisors could have believed they were
fulfilling Hamilton’s expectations.

Assuming the Bush administration was serious about preventing the
enactment of legislation it regarded as inimical to the public good, it is striking
to observe how little resistance was offered to Congress’ continuing refusal to
subject itself to the law. Even if, as Madison suggested, it is not possible fully
to control the “caprice and wickedness of men,” surely the President’s
constitutional role in the legislative process implies that he should be expected
to provide some counterweight to the legislators’ proclivity to make “legal
discriminations in favor of themselves and a particular class of society.” In
circumstances like those preceding enactment of the Civil Rights Act of 1991,
where the President strongly opposed legislation favored by near-veto-proof
margins in the Congress, one might think he would have an obvious occasion to
insist that Congress subject itself to the same burdens it was anxious to impose
on other employers.

It would have been perfectly feasible for President Bush to announce that he
would veto any employment discrimination bill (other than one containing only
those few provisions he affirmatively favored) that did not include a provision
applying the same laws to Congress. His opponents could not easily have made
a politically effective attack on the President for insisting on this simple, easily
communicable, and patently just principle. At the very least, such a position
would have been no more difficult to defend than his frequently reiterated threat,
on which he acted in 1990, to veto anything he considered a “quota bill.”

108. The obvious alternative hypothesis is that the President and his advisors were cynically
manipulating the issue of civil rights for political gain. A complete analysis of this hypothesis is
beyond the scope of this paper, but one can at least say that if such manipulation was attempted the
results were spectacularly unsuccessful.
110. This is not to suggest that President Bush’s anti-quota rhetoric was politically hazardous.
On the contrary, the 1990 elections (which were held barely two weeks after the President vetoed
what he called a “quota bill”) suggest just the opposite. The quota issue had played a significant role
in two or three important contests decided that year—the Senate race in North Carolina, the
gubernatorial race in California, and maybe the gubernatorial race in Alabama. In each instance, the
election was won by the candidate whose position was closer to the President’s. See Thomas B.
Whereas the administration was relentlessly accused of insincerity and demagogy for its use of the word “quota,” it would have been much more difficult to claim that President Bush’s position on congressional coverage, rather than that of Congress, was hypocritical or insincere.111

The effect of insisting on the principle of congressional compliance with the law, moreover, could only have been to advance the administration’s stated aim of moderating the extent of the costly, and in many cases impossibly obscure, new regulations that Congress sought to impose on American employers other than itself. Maybe the specter of living under the law would have been so terrifying that Congress would have been unwilling to pass any legislation at all. Because President Bush proved his willingness to veto an unacceptable bill in 1990, it would seem that this should not have been the worst imaginable outcome from his point of view. More important, whether or not any bill was enacted, the prospect of complying with the same rules as other employers should have stimulated something like a serious congressional analysis of the consequences for the public welfare of the various legislative proposals.

This simple and obvious tactic surely occurred to those responsible for formulating the administration’s policies. Beginning with his first major speech on the employment discrimination controversy, the President repeatedly said he favored ending the special treatment of Congress.112 When Senator Nickles offered his proposal to subject the Senate to the law, moreover, President Bush took the unusual step of personally endorsing the Nickles amendment.113 He also volunteered that he had no objection to abolishing the President’s own exemption from Title VII. On the contrary, the President affirmatively encouraged the Senate to restore a provision that would have authorized punitive damages against the Executive, and stated that “I have absolutely no objection to providing White House employees the identical protections, remedies, and procedural rights the bill would give to private sector employees.”114

111. Obviously, a veto threat on the congressional coverage issue would have served as a supplement rather than an alternative to the President’s opposition to legislation fostering quotas.
114. Id. Acting on its own, the Senate adopted provisions subjecting the President to a regulatory regime closely analogous to the one it set up for itself. Civil Rights Act of 1991 § 320, 2 U.S.C. § 1219 (Supp. IV 1992). This regime contains some technical flaws that may reflect hasty
The fundamental soundness of insisting on the principle of congressional coverage under the law is suggested by the fact that President Bush did in fact threaten to veto any new civil rights legislation that continued Congress’ special treatment of itself. In what many will see as a typical reflection of his administration’s approach to domestic policy, however, President Bush announced this resolve after the Civil Rights Act of 1991 was enacted, when it was too late for the tactic to have any meaningful effect.

In 1992, moreover, when the administration transmitted an actual legislative proposal subjecting Congress to the antidiscrimination laws, it contained some curious and significant exclusions. The Bush bill would not have extended legal protection against discrimination to personal staff above a certain pay grade who report directly to Members of Congress. It is hard to imagine how this exception could have any constitutional basis, and the administration does not seem to have issued any statements suggesting a constitutional rationale. However, it is easy to see why it might have been included when one observes that the Bush bill contained an exactly parallel exception for the immediate staff of the President and the Vice President. So much for the President’s statement a few months earlier that “I have absolutely no objection to providing White House employees the identical protections, remedies, and procedural rights the bill would give to private sector employees.”

draftsmanship. It defines the general class of those covered by the new law, for example, as those “not already entitled to bring an action under [Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990].” Unfortunately, it has never been clear exactly who is and is not covered by those laws, so the definition may raise difficult threshold questions about which regime applies to certain executive employees. The new law also contains an exemption for “the uniformed services” that on its face does not correspond with Title VII’s military exception.

117. 137 Cong. Rec. S15,455 (daily ed. Oct. 30, 1991) (letter from President Bush to Sen. Nickles). President Bush’s refusal to propose giving White House employees the same rights enjoyed by those in the private sector or in the executive agencies may also throw some light on the President’s otherwise baffling statement that “some of the measures [in the Civil Rights Act of 1991] affecting individuals in the executive branch, raise serious constitutional questions.” Statement on Signing the Civil Rights Act of 1991, 27 Weekly Comp. Pres. Doc. 1701 (Nov. 21, 1991). The President’s statement provided absolutely no explanation of what these constitutional questions were, and it is not easy to imagine what they might have been. Because the new statute specifically excludes from its coverage positions requiring Senate confirmation, and therewith principal officers of the United States, the usual source of constitutional questions about employment regulations in the executive department is not applicable. See U.S. Const. art. II, §2, cl. 2. Nor has the Supreme Court ever suggested that Congress is prohibited from placing restrictions on the President’s power to remove inferior officers like those covered under the Civil Rights Act of 1991. On the contrary, it is well-established that Congress may restrict the removal of inferior officers appointed by heads of departments. See Morrison v. Olson, 487 U.S. 654, 689-90 n.27, 108 S. Ct. 2597, 2618 n.27 (1988); United States v. Perkins, 116 U.S. 483, 485, 6 S. Ct. 449, 450 (1886). And even the Court’s
Whether because of this glaring and self-serving change in position, or for some other reason, Congress did not treat the President's bill as a serious proposal. The Minority Leader in the House introduced it "by request" (which means that the Leader did not necessarily endorse it), and it attracted no sponsors. In the other chamber, the administration was apparently not able to find a single Senator willing to sponsor its proposal, or even to get it introduced "by request." It is simply impossible to believe a President who was serious about extending the antidiscrimination laws to Congress could have submitted a proposal that absolutely no one in either party was willing to sponsor; indeed, it is virtually impossible to believe the President's proposal could have been treated with such complete disdain if his administration had made any effort at all to advance it.

Nor is it possible to take seriously the President's threat to veto any future employment discrimination bills that omitted congressional coverage. He was not going to be presented with any bills on this subject for a long time, and everyone knew it. Enactment of the Civil Rights Act of 1991, which included significant revisions of practically every important employment discrimination statute in the federal code, had put an end to one of the nastiest legislative fights in recent memory. To suppose that Congress would soon have revisited this divisive subject is inconsistent with the most obvious patterns of legislative behavior and the most obvious incentives for the avoidance of self-inflicted pain.

What is the explanation for President Bush's tardy and bootless adoption of an extremely obvious legislative strategy? One possibility is that the most aggressive exponent of a broad construction of the President's removal power has not argued that the Constitution prohibits restrictions on the President's authority to remove those of his appointees who are inferior officers. See Morrison, 487 U.S. at 724 n.4, 108 S. Ct. at 2636 n.4 (Scalia, J., dissenting)

[The Constitution] requires that [the President] have plenary power to remove principal officers such as the independent counsel, but it does not require that he have plenary power to remove inferior officers. Since the latter are, as I have described, subordinate to, i.e., subject to the supervision of, principal officers who (being removable at will) have the President's complete confidence, it is enough—at least if they have been appointed by the President or by a principal officer—that they be removable for cause, which would include, of course, the failure to accept supervision.

One cannot help suspecting that the supposedly "serious" constitutional questions to which President Bush alluded would evaporate under serious and disinterested scrutiny. Because the public was never told what those questions were, however, such scrutiny was conveniently avoided.

119. Senator Nickles's proposed amendment to the Civil Rights Act of 1991, which President Bush had publicly endorsed, received 38 votes. See supra notes 76-83 and accompanying text.
120. Some readers may assume I must know the answer to this question since I worked at the White House, on issues relating to the civil rights bill, during the relevant period of time. The assumption is both understandable and wrong. Everyone who works on the White House staff always has incomplete information about the motives and intentions of the President and other important decisionmakers. These same staffers, for a variety of bad and good reasons, ordinarily seek to cultivate the impression they know far more about the President's thinking than they really do. In fact, I do not know why the President or his administration behaved as they did with respect to this
President, sensing the depth of congressional aversion to living under the same employment laws prescribed for other Americans, feared the legislature would rather pass no law at all than subject itself to what a large majority of its members wished to impose on others. This would explain why the President did not insist on congressional coverage in 1991, and why he advocated greater coverage of the White House in 1991 than he was willing to propose in 1992.

This hypothesis is consistent, I believe, with the public record and especially with two of President Bush’s most striking statements during the long struggle that culminated with the enactment of the Civil Rights Act of 1991. In the first of many speeches in which he announced his desire to sign a new civil rights bill, the President mentioned that he favored bringing Congress under the law, but pointedly did not include this issue among what he called the “principles” with which any new legislation must conform.121 Second, after he was presented with a bill he deemed unacceptable, the President began his formal veto message as follows: “I am today returning without my approval S. 2104, the ‘Civil Rights Act of 1990.’ I deeply regret having to take this action with respect to a bill bearing such a title . . . .”122 There can be no substantive reason to regret opposing any piece of legislation because of its title, which makes it hard to resist the conclusion that a significant aspect of the President’s attitude toward the bill had nothing at all to do with its contents. Whether this attitude is properly characterized as political, or simply as sentimental, it suggests that President Bush’s role in preserving the congressional exemption from the law cannot be explained by the very simple model of rational self-interest that seems adequate to account for Congress’ behavior.

B. The “Retaliation” Counterhypothesis

An alternative explanation of President Bush’s behavior might be constructed on the hypothesis that he refrained from a serious attack on the congressional exemption because he feared congressional retaliation. This hypothesis has the great attraction of an easy consistency with rational-choice assumptions about political behavior. Nevertheless, it is not very plausible. Though it is conceivable that a fear of retaliation played some peripheral role in the President’s decision, it is not at all likely to have been a significant factor. To see why, one

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122. Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 Weekly Comp. Pres. Doc. 1632 (Oct. 22, 1990). The President explained his deep regret as follows: “The temptation to support a bill—any bill—simply because its title includes the words ‘civil rights’ is very strong. This impulse is not entirely bad. Presumptions have too often run the other way, and our Nation’s history on racial questions cautions against complacency.” Id. For the President of the United States, in a formal statement of the reasons for exercising his constitutional powers, to defend his impulses by saying they are “not entirely bad” must certainly be an unusual phenomenon.
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needs to consider three main possibilities: (1) that the President was deterred from threatening to veto any legislation that did not include congressional coverage by an explicit threat of congressional retaliation; (2) that he believed Congress would respond to such a veto threat first by passing a bill that included congressional coverage, but then by retaliating against him for having put the legislature to the choice; or (3) that he feared that Congress would initiate retaliatory action against him after he issued his veto threat, but before the issue was finally resolved.123

It is unlikely the President was presented with an explicit threat of retaliation before his (early) decision124 to refrain from insisting that any bill presented to him include a congressional coverage provision.125 Such threats are not easy to make credibly, and there are obvious costs to making threats that are not credible. The threatened form of retaliation would have had to consist of some congressional action that was obnoxious to the President and the President would have had to be assured that it would be visited upon him if and only if he seriously pressed Congress to apply the law to itself. Because President Bush was frequently confronted (for reasons independent of the battle over the civil rights bill) with the prospect of disagreeable impositions from a legislature controlled by the opposing party, and because he had resources of his own (such as the constitutional veto) for fending off measures to which he was strongly opposed, it would have been very costly for a Member or group of Members to

123. These three alternatives, which are not mutually exclusive, are based on an assumption of congressional rationality; viz., that any retaliation against the President would have been intended to have a deterrent effect. It is possible, of course, that Congress might have lashed out against the President simply for revenge, without taking the trouble to do so in a way calculated to affect his future conduct. Collective bodies may not be completely immune to such irrationality, but one rarely observes it on any kind of serious scale in situations where the target of the revenge has significant political resources of his own with which to respond to disagreeable impositions. It therefore seems quite unlikely that President Bush would have had any reason to consider a simply vengeful response from Congress as an important possibility.

It is no doubt true that some Members of Congress might have considered a veto threat against legislation that lacked congressional coverage provisions as a kind of personal affront. This might have had some minor deleterious spillover effects on their willingness to work cooperatively with the President on other issues in the future. But this could be said about almost any opposition by the President to anything that someone in Congress badly wanted. To assume that the President could have been influenced much by the fear of such spillover effects, especially during a period in which Congress was not exactly distinguishing itself by its willingness to pass significant portions of the President’s program, is to assume either that he was deluded about the value of gentleness in politics or that he put a very low value on preventing the enactment of civil rights legislation to which he purported to be strongly opposed.

124. The President’s decision appears to have been made no later than May 17, 1990. See Remarks at a Meeting With the Commission on Civil Rights, 26 Weekly Comp. Pres. Doc. 778 (May 17, 1990).

125. So far as I am aware, there is no record that the President was presented with an actual or explicit threat of retaliation in advance of his decision not to insist that any bill he signed include a congressional coverage provision. Because there would be little incentive to create a record of such a threat, however, this is not particularly significant.
assemble the political capital necessary to make a credible threat of meaningful retaliation. One cannot necessarily assume that these costs would have been prohibitive, but neither is there any obvious reason to think that anyone in Congress was, or would have been, able and willing to incur them in advance of the President's actually deciding to press seriously for congressional coverage.

The second possibility is that the President feared Congress would pass a bill containing congressional coverage provisions, but then retaliate against him afterwards in order to deter him from imposing similar unpleasant choices in the future. This kind of retaliation would have been very difficult to carry out. The most likely form of punishment would have consisted of a vexatious rider attached to some bill that the President was unwilling to veto. Passing such a rider might not have been hard (President Bush had to deal frequently with bills containing riders that he opposed), but the very ease of doing it would have made it difficult to fulfill the second condition of an effective punishment: signalling credibly that the rider would not have been attached except for the President's efforts to force Congress to extend the antidiscrimination laws to itself. The second condition would have been especially hard to fulfill given the strong general tendency in the legislature not to treat disagreements that arise in the context of one bill or issue as impediments to the working relationships that facilitate cooperation on other issues. Given the low probability of this sort of ex post retaliation, it seems quite unlikely that President Bush's legislative strategy on the civil rights bill could have been materially shaped by an ex ante fear that such an event would occur.

The third, and least implausible, alternative is that President Bush feared that a veto threat would cause Congress to take steps (such as adding a distasteful rider to another bill) calculated to force him to drop that threat. But even if one assumes President Bush calculated ex ante that there was a nontrivial probability of being confronted with such steps, he would also have known he could simply respond by offering to drop his insistence on Congress' covering

126. Theoretically, Congress could have punished the President by declining to pass some bill he favored. But because few of the bills the President favored were passed in any event, it would have been almost impossible to establish credibly that the bill failed of enactment because of what the President did with respect to congressional coverage in the context of the civil rights bill.

127. One might also speculate that President Bush feared Congress would pass a civil rights bill containing an effective congressional coverage provision along with a provision applying the antidiscrimination laws in an equally effective manner to the White House staff. The President's refusal to propose full coverage of the White House staff in 1992 is consistent with the assumption he feared such coverage. This refusal, however, is not particularly telling because the 1992 proposal was offered when there was almost no chance that legislation applying the antidiscrimination laws to Congress would be seriously considered. More important, the theory that President Bush was moved principally by a fear that the law would be fully applied to the White House staff is inconsistent with the fact that he publicly invited exactly such coverage at the very moment when the threat of its enactment was greatest (just after the bipartisan compromise that assured enactment of the Civil Rights Act of 1991 and just before the Senate was to vote on whether to include meaningful coverage of itself in the bill). See 137 Cong. Rec. S15,455 (daily ed. Oct. 30, 1991) (letter from President Bush to Sen. Nickles).
itself under the antidiscrimination laws if Congress would withdraw the threatened punishment.\footnote{Although the Bush administration was generally scrupulous about carrying through on veto threats, the civil rights bill itself was an important exception to this rule. Early in the legislative process, the President announced three “principles” that an acceptable bill must meet: (1) it would have to “operate to obliterate consideration of factors such as race, color, religion, sex, or national origin from employment decisions,” and avoid the unintended fostering of quotas; (2) it would have to reflect “fundamental principles of fairness that apply throughout our legal system,” giving individuals who believe their rights have been violated their day in court, and treating those accused of wrongdoing as innocent until proved guilty; and (3) it should provide an adequate deterrent against harassment in the workplace based on race, sex, religion, or disability, without turning the civil rights laws into “some lawyer’s bonanza, encouraging litigation at the expense of conciliation, mediation, or settlement.” Remarks at a Meeting With the Commission on Civil Rights, 26 Weekly Comp. Pres. Doc. 778 (May 17, 1990). In the end, however, he compromised these principles: the first and second are both violated by Section 108 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(n) (Supp. IV 1992), and the second may be violated by Section 107, 42 U.S.C. § 2000e-2(m) (Supp. IV 1992); the third principle is very hard to reconcile with Sections 102, 105, 107, and 113, 42 U.S.C. § 1981a (Supp. IV 1992); 42 U.S.C. § 2000e-2(k) (Supp. IV. 1992); 42 U.S.C. § 2000e-2(m) (Supp. IV 1992); 42 U.S.C. § 1988(c) (Supp. IV 1992); 42 U.S.C. § 2000e-5(k) (Supp. IV 1992).} It is therefore extremely unlikely that fear of this relatively small inconvenience would measurably have influenced the President’s decision not to make a timely and serious effort to insist that any acceptable bill would have to include congressional coverage under the antidiscrimination laws.\footnote{It is therefore also unlikely that President Bush feared Congress would give up on getting a new employment discrimination statute, but then punish him later for frustrating the congressional majority’s desire for such a statute. What the majority wanted was a new statute and a continuation of the congressional exemption from the laws. If faced with a President who resisted letting them have both, it would have made much more sense to try to induce the President to drop or compromise his demand for congressional coverage than simply to admit defeat on the principal issue. If that tactic was not successful, it would have confirmed that the President’s opposition to the underlying employment discrimination bill was strong enough to make him willing to accept whatever punishment Congress could credibly threaten him with for linking enactment of a bill with congressional coverage. In that event, it would have made no more sense to punish him later for opposing the bill because it lacked congressional coverage provisions than it would have made to punish him for characterizing the legislation as a “quota bill.”}

C. The Limits of Rational-Choice Analysis

The logic of the situation thus seems to suggest the conclusion that the probability of meaningful retaliation against the President was remote, both in absolute terms and in comparison with the probability that Congress would place a higher value on retaining the congressional exemption from the antidiscrimination laws than on seeing a new statute enacted. If that is true, then the President’s decision not to pursue the congressional coverage issue vigorously may best be explained by an overriding desire on his part to see a new civil rights statute enacted. Given the fact, however, that the Bush administration never articulated any reasons for supporting the vast majority of the significant
legal changes made by the Civil Rights Act of 1991, such a desire does not seem explicable through the application of rational-choice analysis. In this respect, the President's behavior contrasts sharply with that of Congress. It may not be an accident that rational-choice analysis better explains the actions of the truly collective decisionmaker than those of the formally unitary Executive, even apart from the fact that the President may have thought he had less at stake in this case than Congress did.

VII. CONCLUSION

The congressional exemption from the laws against employment discrimination has persisted since those laws were first enacted. Those who framed our Constitution considered such exemptions pernicious, and the Constitution neither encourages nor requires them. The Framers also recognized, however, that natural human selfishness would incline any legislature to create special privileges for itself, and the Constitution does not prevent this from happening.

One feature of the Constitution—arming the President with the legislative power that his veto provides—might be expected to help control the congressional appetite for special privileges. That device received a revealing test during the struggle that culminated in the Civil Rights Act of 1991. Faced with a President who said he favored applying the law to Congress and who had expressed strong opposition to many of the regulatory burdens that the new statute imposes on other employers, Congress nonetheless managed both to preserve its own exemption from the law and to impose significant new burdens on other employers. In the unusual circumstances that led to the enactment of the Civil Rights Act of 1991, it appears that greater presidential resolve might very well have forced the elimination of the longstanding congressional exemption.

130. The Bush administration's initial response to the 1989 Supreme Court decisions was tentatively favorable. See The President's News Conference, 25 Weekly Comp. Pres. Doc. 982 (June 27, 1989). A few months later, the administration proposed a bill that would have overruled two of those decisions, only one of which had broad significance. See 136 Cong. Rec. S1522-23 (daily ed. Feb. 22, 1990). As time went on, the administration made a variety of concessions to the proponents of sweeping legislative change, but without ever agreeing that such change was actually desirable. When he signed the new statute, for example, President Bush listed the overrides of the two Supreme Court decisions, along with the creation of a limited monetary remedy for workplace harassment, as measures that he "favored." He then characterized several other relatively minor features of the bill as changes in which the administration had "concurred." The signing statement contained not a word of approval for the most important provisions of the new statute, such as those that codified and revised the law of disparate impact, provided for compensatory and punitive damages under Title VII and the Americans with Disabilities Act, and provided for liability under Title VII against employers who can prove they had completely sufficient and legitimate reasons for taking an adverse action against a complaining party. See Statement on Signing the Civil Rights Act of 1991, 27 Weekly Comp. Pres. Doc. 1701 (Nov. 21, 1991).
Had Congress been brought under the law in 1991, the other revisions of the employment discrimination laws might also have been quite different. The new statute creates significant new legal impositions and uncertainties, and there is scant evidence they were ever measured carefully against the public benefits that may accrue from imposing them. Those who voted for this statute—and there was almost no opposition in either chamber to the final bill¹³¹—might not have been nearly so ready to impose these burdens and uncertainties on private employers if they themselves had expected to have to live with them.

It is not likely we will soon see another alignment of forces as favorable to ending the congressional exemption as the one that briefly existed during the Bush administration. Having survived that crisis through the helpful inaction of many people in and out of government, the exemption can now be expected to persist indefinitely, and with it the congressional proclivity for passing dubious statutes that contain the words “civil rights” in their titles.
