Court vs. Congress: Judicial Interpretation of The Civil Rights Acts and Congressional Response

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"Neither our words nor our decisions should be interpreted as signaling one inch of retreat from Congress's policy to forbid discrimination in the private, as well as the public, sphere."

Patterson v. McLean Credit Union,, 109 S. Ct. 2363, 2379 (1989).

"Congress finds that . . . in a series of recent decisions addressing employment discrimination claims under Federal law, the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protections;"

The Civil Rights Act of 1990, § 2 (a)(1), H.R. 4000, S. 2104, 101st Cong., 2d Sess. (1990).

In the space of eight weeks during the spring and summer of 1989, the United States Supreme Court handed down seven decisions that restrictively interpreted provisions of the 1866 and 1964 Civil Rights Acts that prohibit employment discrimination.[1] On February 7, 1990, identical bills were introduced in the House and Senate that would, if passed into law as the Civil Rights Act of 1990, overrule in whole or in part these decisions as well as three other rulings handed down in 1986 and 1987.[2] The bills also admonish the Court that:

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1. Price Waterhouse v. Hopkins, 490 U.S. ——, 109 S. Ct. 1775 (1989); Wards Cove Packing Co. v. Atonio, 490 U.S. ——, 109 S. Ct. 2115 (1989); Martin v. Wilks, 490 U.S. ——, 109 S. Ct. 2180 (1989); Lorance v. AT&T Technologies, Inc., 490 U.S. ——, 109 S. Ct. 2261 (1989); Patterson v. McLean Credit Union, 491 U.S. ——, 109 S. Ct. 2363 (1989); Jett v. Dallas Indep. School Dist., 491 U.S. ——, 109 S. Ct. 2702 (1989); Independent Fed'n of Flight Attendants v. Zipes, 491 U.S. ——, 109 S. Ct. 2732 (1989).

2. The bills are H.R. 4000 and S. 2104, 101st Cong., 2d Sess. (1990). *See* 136 CONG. REC. S1018 (daily ed. Feb. 7, 1990). Sections of the Act that would overrule Supreme Court decisions and the decisions affected are as follows: Sec. 4, Wards Cove Packing

> All Federal laws protecting the civil rights of persons shall be broadly construed to effectuate the purpose of such laws to eliminate discrimination and provide effective remedies.[3]

This is not the first time Congress has found it necessary to respond to restrictive readings of the civil rights laws. Indeed, in other areas of the law Congress has also had to correct what it considered misreadings of its statutes.[4] What is striking about the bills just introduced, however, is both the number of Supreme Court decisions they would overturn and the fact that they represent the seventh time since 1975 that Congress has felt a need to respond to such decisions. Whether the precatory language quoted above will end this process is unclear. If not, it is likely that an increasingly conservative Court will continue to confront a Congress determined to preserve the advances brought about by the civil rights statutes. Such confrontations will inevitably and unnecessarily consume the time and resources of both institutions. More important, this recurring pattern—the Supreme Court restrictively interpreting civil rights statutes, followed by Congress's amending or enacting new laws to correct those interpretations—can only create a perception amongst the public that the government is not unified and committed to extirpating the discrimination which, throughout our history, has been so divisive and destructive.[5]

I. Civil Rights From Reconstruction Until 1971

The first civil rights acts were passed in the years immediately following the Civil War, both before and after the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution.[6] The acts were broad in scope and sought to remedy

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Co. v. Atonio, 109 S. Ct. 2115; Sec. 5, Price Waterhouse v. Hopkins, 109 S. Ct. 1775; Sec. 6, Martin v. Wilks, 109 S. Ct. 2180; Sec. 7, Lorance v. AT&T Technologies, 109 S. Ct. 2261; Sec. 9, Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987), Evans v. Jeff D., 475 U.S. 717 (1986), and Independent Fed'n of Flight Attendants v. Zipes, 109 S. Ct. 2732; Sec. 10, Library of Congress v. Shaw, 478 U.S. 310 (1986); Sec. 11, Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702; Sec. 12, Patterson v. McLean Credit Union, 109 S. Ct. 2363.

3. H.R. 4000, S. 2104, 101st Cong., 2d Sess. § 11 (1990).

4. *See, e.g.*, The Norris-LaGuardia Act, 29 U.S.C. §§ 101-105 (1982), which was enacted to end the use of the anti-trust laws to enjoin the activities of labor unions. *Compare* Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921), *with* United States v. Hutcheson, 312 U.S. 219 (1940).

5. *See* the dissent of Justice Blackmun in Wards Cove Packing Co. v. Atonio, 109 S. Ct. at 2136: "One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was."

6. Civil Rights Act of 1866, 14 Stat. 27; Civil Rights Act of 1871, 16 Stat. 433, 17 Stat. 13; Civil Rights Act of 1875, 18 Stat. 336.

discrimination by both private and public entities.[7] At the same time, Congress passed a variety of measures designed to assist the newly freed slaves in achieving economic, as well as political, equality.[8] However, when Reconstruction ended after the election of 1876, the Supreme Court rendered the civil rights acts largely ineffective by strictly construing the fourteenth amendment to reach only state action, and by issuing a series of other restrictive holdings.[9] Congress did nothing to revitalize any of these acts and, indeed, silently acquiesced when the Court ratified segregation in *Plessy v. Ferguson*.[10]

From 1871 until 1957, Congress passed no civil rights statutes, despite continuing pressure to act, at the very least, against the atrocity of lynching. Instead, the Supreme Court took the lead, beginning with voting and housing decisions in the early part of this century and culminating in *Brown v. Board of Education*,[11] which outlawed segregation in public schools. During the 1950s and early 1960s the Court handed down a series of decisions that changed American society forever by declaring unconstitutional every type of publicly mandated or supported segregation or discrimination.[12] Finally, in 1957 Congress passed the Civil Rights Act of 1957,[13] which, in addition to creating the Commission on Civil Rights and the Civil Rights Division of the Department of Justice, enacted voting rights provisions which were to prove largely ineffective.

The emerging civil rights movement, however, dramatically changed the political climate. In 1964, 1965, and 1968 Congress enacted the Civil Rights Act,[14] the Voting Rights Act,[15] and the Fair

7. *See* Runyon v. McCrary, 427 U.S. 160 (1976).

8. Freedmen's Bureau Bill, 13 Stat. 507 (1865); Freedmen's Bureau Bill, 14 Stat. 173 (1866); Freedmen's Bureau Bill, 15 Stat. 83 (1868).

9. Thus, in The Civil Rights Cases, 109 U.S. 3 (1883), the Court struck down Sections 1 and 2 of the Civil Rights Act of 1875. *Compare* The Slaughter House Cases, 83 U.S. 36 (1873) *and* Railroad Co. v. Brown, 84 U.S. 445 (1873), decided before the Compromise of 1877.

10. 163 U.S. 537 (1896).

11. 347 U.S. 483 (1954). For the most comprehensive history of the litigation campaign that culminated in *Brown v. Board of Education*, see R. KLUGER, SIMPLE JUSTICE (1977).

12. *See, e.g.*, Browder v. Gayle, 352 U.S. 903 (1956)(public transportation); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955)(public parks); Holmes v. City of Atlanta, 350 U.S. 879 (1955)(public golf course); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)(privately operated restaurant in a publicly owned and operated parking facility).

13. Pub. L. No. 85-315, 71 Stat. 634.

14. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

15. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

Housing Act,[16] which all reached, for the first time since Reconstruction, private as well as public discrimination and segregation. The Supreme Court responded in kind. Not only did it uphold the new statutes against challenges similar to those that were successful in the nineteenth century,[17] but it also resurrected the Civil Rights Acts of 1866 and 1871 by declaring that their provisions against discrimination in contracts and property rights reached private conduct under the thirteenth amendment.[18] Thus, in effect, the Court overruled its earlier decisions that had severely limited Congressional power.

Between 1964 and 1971 the Court consistently interpreted the new civil rights acts broadly. It held that the public accommodations section of the 1964 Act ended virtually all state prosecutions of participants in sit-ins in the South.[19] It upheld the Voting Rights Act's prohibition of all literacy tests, even in states with no history of discrimination, by invoking a broad national interest in overcoming the political effects of the deliberately inadequate education provided to many African American citizens.[20] It held that the attorneys' fees provisions of the civil rights acts guaranteed fees to all successful plaintiffs who acted as "private attorneys-general" to vindicate national policies of the greatest importance.[21] And it interpreted Title VII of the Civil Rights Act of 1964 as prohibiting not only intentional discrimination in employment, but any employment practice that had the effect of excluding minorities[22] or women[23] from being hired or promoted. When it amended Title VII in 1972,[24] Congress expressly approved the judicial interpretations of the statute.[25] Thus, by the early 1970s, it appeared that the Court and Congress were united in using the law to attack all vestiges of our long history of discrimination and segregation.

16. Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 801-809, 82 Stat. 73.

17. Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

18. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Runyon v. McCrary, 427 U.S. 160 (1976).

19. Hamm v. City of Rock Hill, 379 U.S. 306 (1964).

20. Oregon v. Mitchell, 400 U.S. 112 (1970).

21. Newman v. Piggie Park Enters., 390 U.S. 400 (1968).

22. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

23. Dothard v. Rawlinson, 433 U.S. 321 (1977).

24. The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

25. 118 CONG. REC. 7167, 7564 (1972). *See also* S. REP. No. 415, 92d Cong., 1st Sess., 14-15 (1972) (citing with approval Griggs v. Duke Power Co., 401 U.S. 424 (1971) and mandating its application to the personnel practices of the federal government).

II. The New Court and Civil Rights

Beginning in 1969, the national mood, and the makeup of the Supreme Court, grew more conservative. As the Court's membership changed, so, gradually, did its rulings interpreting the various civil rights statutes; this shift culminated in the dramatic series of decisions last term.

The Court's first restrictive ruling was *Alyeska Pipeline Service Co. v. Wilderness Society,*[26] issued in 1975. In *Alyeska* the Court rejected lower court decisions holding that attorneys' fees could be awarded under the "private attorneys general" standard enunciated in *Newman v. Piggie Park Enters.*[27] and overruled a series of lower court decisions holding that fees could be awarded under the Reconstruction Civil Rights Acts, 42 U.S.C. §§ 1981, 1982, and 1983.[28] Congress reacted speedily and passed the Civil Rights Attorneys' Fee Act of 1976,[29] which overruled *Alyeska* insofar as it applied to civil rights cases. The 1976 Attorney's Fee Act amended 42 U.S.C. § 1988 to provide the same fees in actions brought under the old civil rights acts that were obtainable under the Civil Rights Act of 1964.[30]

In 1976, in *General Electric Co. v. Gilbert,*[31] the Supreme Court narrowly interpreted Title VII of the 1964 Act to permit a medical insurance plan to exclude pregnancy-related disabilities although it covered other medical disabilities. Responding to the argument that such differential treatment necessarily discriminated against women, the Court held that since men and women received the same coverage, the fact that a disability affecting only women was not covered did not constitute gender discrimination. Congress again reacted quickly and passed the Pregnancy Discrimination Act,[32] which specifically overruled *Gilbert.*

In 1980, the Court turned its attention to the Voting Rights Act of 1965,[33] as reenacted in 1975. In *City of Mobile v. Bolden*[34] the Court held that plaintiffs must prove that a political unit intended to discriminate against African Americans when it adopted at-large rather than district elections (which might return minority candidates).

26. 421 U.S. 240 (1975).
27. 390 U.S. 400 (1968).
28. *Alyeska,* 421 U.S. at 270 n.46.
29. Pub. L. No. 94-559, 90 Stat. 2641.
30. Pub. L. No. 88-352, 78 Stat. 241.
31. 429 U.S. 125 (1976).
32. Act of Oct. 31, 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (1982)).
33. Pub. L. No. 89-110, 79 Stat. 437.
34. 446 U.S. 55 (1980).

Again, Congress responded swiftly and, in the face of opposition from President Reagan's new administration, passed the Voting Rights Amendments of 1982.[35] The amendments restored the law to what it had been before *Bolden*, providing that an "effects" standard applied in voting cases as it did in employment cases brought under Title VII.[36]

The next major restrictive decision of the Supreme Court was *Grove City College v. Bell*,[37] involving Title IX of the Education Amendments of 1972.[38] Long-standing administrative regulations had conditioned receipt of federal funds on the absence of discrimination in any part of a school's programs or facilities.[39] The new Administration and the Court, along with Grove City College, disagreed with this reading of the statute. Finding for the challenging recipient, the Court held that the Federal Government could cut off funds only to the program in which the discrimination actually took place. Again Congress acted, albeit more slowly. Three years later the aptly named Civil Rights Restoration Act of 1987,[40] which was passed over President Reagan's veto, overruled *Grove City College*.

During this same period, the Court restrictively interpreted two other civil rights statutes. It held that the Education of the Handicapped Act[41] did not provide attorneys' fees[42] and that the Rehabilitation Act of 1973[43] did not waive the states' eleventh amendment immunity from suit in federal court for monetary relief.[44] Congress overruled these decisions with the Handicapped Children's Protection Act of 1986[45] and the Rehabilitation Act Amendments of 1986.[46] Thus between 1976 and 1988, Congress overruled restrictive readings of civil rights statutes six separate times, an average of one statute per Congress.

35. Pub. L. No. 97-205, 96 Stat. 131 (codified at 42 U.S.C. § 1973 (1982)).
36. *See* Thornburg v. Gingles, 478 U.S. 30 (1986).
37. 465 U.S. 555 (1984).
38. Pub. L. No. 92-318, 86 Stat. 235.
39. *See* 34 C.F.R. § 106.4 (1988) (implementing Title IX, derived from the regulations implementing Title VI of the Civil Rights Act of 1964). *See also* 45 C.F.R. § 80.4(d) (1988).
40. Pub. L. No. 100-259, 102 Stat. 28 (1988).
41. Pub. L. No. 94-142, 89 Stat. 773 (1975).
42. Smith v. Robinson, 468 U.S. 992 (1984).
43. Pub. L. No. 93-112, 87 Stat. 355.
44. Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).
45. Pub. L. No. 99-372, 100 Stat. 796 (codified at 20 U.S.C. 1415 (1988)).
46. Pub. L. No. 99-506, 100 Stat. 1807.

III. The Decisions of May and June, 1989

Prior to the 1988 Term of the Court, the prospect of a more dramatic shift in the reading of the civil rights statutes had become increasingly likely. The Department of Justice, led by its Civil Rights Division argued, in case after case, for the most narrow reading of the very statutes it was charged with enforcing,[47] and an increasing number of Justices consistently voted for such narrow readings.[48] Justice Powell, who had become the center of the Court, resigned and was replaced by Judge Anthony Kennedy of the Ninth Circuit. The Court granted certiorari to a number of cases involving the interpretation of the statutes relating to employment discrimination, Title VII of the Civil Rights Act of 1964,[49] and 42 U.S.C. § 1981. Finally, in what appeared to be a new five person majority, the Chief Justice and Justices White, O'Connor, Scalia, and Kennedy sent a most disquieting signal by *sua sponte* announcing, over bitter dissents, that it would reconsider its 1976 decision in *Runyon v. McCrary*[50] that the Civil Rights Act of 1866 applied to private discrimination.[51] The resulting decisions, however, exceeded even the most pessimistic expectations. The Court, in a series of narrow majority opinions, went beyond even the positions of the Department of Justice and rewrote much of employment discrimination law.

A. Price Waterhouse v. Hopkins *(May 1, 1989)*[52]

Interestingly, many advocates initially considered this decision a victory for the civil rights forces, since Justice Brennan wrote the plurality decision over a strong dissent by Justice Kennedy joined by the Chief Justice and Justice Scalia. The central issue of the case was whether the rule of *Mt. Healthy City School Dist. Bd. of Ed. v.*

47. *See, e.g.*, the briefs filed by the Solicitor General and the Civil Rights Division in Goodman v. Lukens Steel Co., 482 U.S. 656 (1987)(Nos. 85-1626 & 85-2010), Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (No. 86-6139), and Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (No. 87-1387). In all of these cases the government, led by the Civil Rights Division of the Department of Justice, urged the Court to narrow the interpretation of Title VII.

48. *Compare* Goodman v. Lukens Steel, 482 U.S. 656 *with* Watson v. Fort Worth Bank & Trust Co., 487 U.S. 977.

49. Pub. L. No. 88-352, 78 Stat. 241.

50. 427 U.S. 160 (1976).

51. Patterson v. McLean Credit Union, 485 U.S. 617 (1988)(per curiam order setting case for reargument).

52. 109 S. Ct. 1775 (1989).

Doyle[53] should apply in a Title VII case. *Mt. Healthy* held that a public employer could defeat a showing that it had dismissed an employee because she exercised her first amendment rights by proving that the employee would have been dismissed anyway. The lower federal courts split severely over the issue. Some held that the plaintiff had the burden of proving not only discrimination, but that she would have received the same employment benefit in the absence of discrimination. Others held that once a plaintiff proved discrimination, the employer could escape liability by proving that the same employment decision would have been made. Still others declined to apply *Mt. Healthy* in deciding *liability* under Title VII, holding that if discrimination constituted a motivating factor, a violation of Title VII had been established. However, the employer could avoid the grant of full *relief*, e.g., back pay and a promotion, by proving that the same decision would have been made had there not been discrimination.[54] The Supreme Court in *Price Waterhouse* adopted the second approach and held that an employer can avoid a finding that it violated Title VII, even though discrimination was a significant factor in the employment decision, by proving by a preponderance of the evidence that the same decision would have been made in the absence of discrimination.

B. Wards Cove Packing Co. v. Atonio *(June 5, 1989)*[55]

On June 5, 1989, the new majority of the Chief Justice and Justices White, O'Connor, Scalia, and Kennedy handed down probably the most important civil rights decision of the Spring Term. In 1971, in *Griggs v. Duke Power Co.*,[56] the Court, in a unanimous decision by Chief Justice Burger, held that an employer who used practices or policies that had the effect of barring minorities from jobs violated Title VII even in the absence of an intent to discriminate. *Griggs* itself, and subsequent decisions in *Albermarle Paper Co. v. Moody*[57] and *Dothard v. Rawlinson*,[58] seemed to indicate that once there was a showing that an employment practice had a disparate

53. 429 U.S. 274 (1977).
54. *See Price Waterhouse*, 109 S. Ct. at 1784 n.2, for a listing of the circuits and the results they reached on this issue.
55. 109 S. Ct. 2115 (1989).
56. 401 U.S. 424 (1971)
57. 422 U.S. 405 (1975).
58. 433 U.S. 321 (1977).

impact on a protected group, the employer had the burden of *proving* that the practice was job-related, i.e., that it was required by business necessity.[59] Justice White, who wrote the majority opinion in *Wards Cove,* did not accept this reading. Although acknowledging that *Griggs*, *Albermarle*, and *Dothard* might have been so read, Justice White declared it error to do so. (Of course, the "error" had been committed by Congress,[60] both plaintiffs' and defendants' Title VII attorneys, the Equal Employment Opportunity Commission, every lower federal court, and the leading commentators.[61]) According to the Court, after a showing of adverse impact, the employer only has the burden of "producing evidence of a business justification for his employment practice."[62] Moreover, the employer need not demonstrate that the challenged practice be " 'essential' or 'indispensable' to the employer's business."[63] The Court concluded by admonishing the lower federal courts that they were less competent than employers to decide that alternative selection methods, which did not have an adverse impact, should be used.[64]

C. Martin v. Wilks[65] *and* Lorance v. AT&T Technologies *(June 12, 1989)*[66]

One week after *Wards Cove,* the Court handed down two decisions dealing with when discrimination charges can be made. In *Martin* the same majority that decided *Wards Cove* held that white firefighters, who claimed that a settlement of a Title VII action brought by African American firefighters against Birmingham, Ala. violated their own rights under both the fourteenth amendment and Title

59. *See Albemarle*, 422 U.S. at 425 ("If an employer does then meet the burden of *proving* that its tests are 'job related'. . . ."), and *Dothard*, 433 U.S. at 329 ("If the employer *proves* that the challenged requirements are job related . . . .")(emphasis added).

60. *See, e.g.*, the legislative history of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 cited *supra* note 25.

61. *See* B. SCHLEI AND P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (2d ed. 1983), ch. 4. In the most recent supplement, which evidently went to press just before *Wards Cove,* ch. 4, § V was still titled, "Triggering Defendant's Duty to *Prove* Job-Relatedness: . . .", B. SCHLEI AND P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 39 (2d ed. Supp. 1989) (emphasis added).

62. 109 S. Ct. at 2126.

63. *Id.*

64. *Id.* at 2127. *Wards Cove* is disturbing not simply because of its result, which will totally change the thrust of employment discrimination law (and not for the better), but also for its cavalier treatment of clearly contrary precedent. Also disheartening is the Court's assertion, supported by no evidence whatsoever, that requiring an employer to demonstrate that a practice that excludes minorities from jobs is in fact "essential" to his business will lead to "a host of evils," including the ultimate bugaboo, quotas. 109 S. Ct. at 2126.

65. 109 S. Ct. 2180 (1989).

66. 109 S. Ct. 2261 (1989).

VII, could bring a collateral action challenging the settlement when they were personally affected by it. *Lorance*, on the other hand, a decision joined by four of the same five (Justice O'Connor did not participate) and concurred in by Justice Stevens,[67] held that women who were adversely affected by a seniority system could not wait until their personal seniority rights were affected to bring suit. According to the Court, since the claim was that the seniority system was adopted with the intent to discriminate, the time for filing charges with the Equal Employment Opportunity Commission (EEOC) began as of the date of adoption, even though the plaintiffs' own rights were not harmed until five years later. The plaintiffs in *Lorance*, who were joined by the Department of Justice and the EEOC, had argued that the time for filing should not commence until their rights were actually affected.

D. Patterson v. McLean Credit Union *(June 15, 1989)*[68]

The five person majority announcement that the Court was setting *Patterson* down for reargument to decide whether to overrule *Runyon v. McCrary*[69] set off a veritable firestorm. Amicus briefs in opposition to the overruling of *Runyon* were filed by the attorneys general of 47 states, 66 members of the Senate, over 140 members of the House, and more than 100 civil rights and public interest organizations. Although the majority declined, somewhat grudgingly, to overrule *Runyon,* it did so only because of the force of *stare decisis*.[70]

The majority then proceeded to eviscerate § 1981 by deciding adversely the issue on which the Court had originally granted certiorari. The issue before the Court was whether the 1866 Civil Rights Act's prohibition against discrimination in the making and enforcement of contracts covered post-formation conduct that resulted in discrimination in the terms and conditions of the contract. Although a number of earlier decisions of the Court seemed to settle the issue,[71] the Court held that the statute did not prohibit harassment of an employee because of her race. Consequently, she could not obtain damages; the only relief available was injunctive

67. Justice Stevens concurred solely on the ground that prior decisions, with which he disagreed, required the result reached by the majority. 109 S. Ct. at 2269.

68. 109 S. Ct. 2363 (1989).

69. 427 U.S. 160 (1976) (holding that 42 U.S.C. § 1981 prohibited private discrimination).

70. 109 S. Ct. 2371 n.1.

71. In Goodman v. Lukens Steel Co., 482 U.S. 656, 659-60, 668-69 (1987) one of the plaintiff's sucessful claims was that the defendant unions had tolerated and tacitly

relief under Title VII.[72] The Court again went beyond the position of the Department of Justice, which had filed an amicus brief in support of Mrs. Patterson, and overruled decisions in all the circuits except the Fourth. The Court even rejected the Fourth Circuit's holding that § 1981 prohibited discriminations in all promotions,[73] and left in doubt the unanimous holdings of lower courts that the section also covered discrimination in discharges.[74] To date, *Patterson* has had the most direct impact on pending cases. One study found that in the first four and one-half months after the decision was handed down, nearly 100 pending § 1981 cases were dismissed by the lower federal courts.[75]

E. Jett v. Dallas Indep. School District *(June 22, 1989)*[76]

The following week, in the most surprising decision of the Term, the same five Justice majority, with Justice O'Connor writing, held that § 1981 did not cover discrimination in employment by state and local governmental bodies. The Court said the section had not prohibited such discrimination since 1871 when it was impliedly repealed by § 1983, which prohibits all types of governmental discrimination. As Justice Brennan noted in dissent, the one thing that seemed clear to everyone when the Court announced in *Patterson* that it would reconsider its holding in *Runyon* was that § 1981 *did* prohibit discrimination by public bodies.[77] Prior to *Patterson* and *Jett*, § 1981 had been used to cover all aspects of discrimination in employment, including hiring, firing, promotion, and terms and conditions of employment. With the exception of federal government

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encouraged racial harassment in violation of 42 U.S.C. § 1981; in Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 616 (1987), the Court interpreted the companion statute, 42 U.S.C. § 1982, as prohibiting harassment in the use of property.

72. 109 S. Ct. at 2375 n.4.

73. 109 S. Ct. at 2377.

74. *See* Lytle v. Household Manuf. Inc., 494 U.S. —, 110 S. Ct. 1331 (1990), in which the Supreme Court declined to decide the question of whether § 1981 reached discrimination and retaliation in discharge. 110 S. Ct. at 1336 n.3, 1338 (O'Connor, J. and Scalia, J., concurring). The Eighth Circuit, noting that the federal courts are split on the issue, recently held that the statute does cover racially discriminatory discharges. Hicks v. Brown Group Inc., No. 88-2769/2817, slip op. at 18 n.24 (8th Cir. Apr. 16, 1990).

75. NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., THE IMPACT OF PATTERSON V. MCLEAN CREDIT UNION (Nov. 20, 1989). *See also* Wash. Post, Nov. 20, 1989, at A6, col. 1.

76. 109 S. Ct. 2702 (1989).

77. Justice Brennan, in dissent, aptly said, "To anyone familiar with this and last Terms' debate over whether Runyon v. McCrary . . . should be overruled, see Patterson v. McLean Credit Union . . . , today's decision can be nothing short of astonishing." 109 S. Ct. at 2724.

agencies covered by Title VII of the Civil Rights Act of 1964,[78] § 1981 had also been read to apply to every employer in the nation, including the large number not covered by Title VII, which is limited to employers with fifteen or more employees.[79] In the ten days beginning with *Patterson* and ending with *Jett*, § 1981 had been reduced to covering virtually nothing in the area of employment discrimination.

F. Independent Fed'n of Flight Attendants v. Zipes *(June 22, 1989)*[80]

On the same day as *Jett,* the same majority, this time in an opinion by Justice Scalia, held that attorneys' fees could not be assessed against an intervenor who sought to challenge a decree entered in a Title VII action unless the intervention was frivolous, unreasonable, or without foundation. Justice Blackmun concurred, but objected to the majority's apparent holding that a Title VII plaintiff who prevails by successfully defending the decree could not recover her fees from *anyone,* including the original defendant.[81] Under the majority decision, the burden of defending falls solely on the plaintiff, a result inconsistent with the purpose of the fees statutes.

IV. Congress' Response—The Civil Rights Act of 1990

The response of the civil rights community and Congress to the Court's work was immediate. Senator Howard Metzenbaum introduced a bill[82] within two weeks that would have overruled *Wards Cove Packing Co. v. Atonio.* That bill was tabled, however, while the text of a comprehensive bill was developed. On February 7, 1990, Senator Edward M. Kennedy and Congressman Agustus Hawkins introduced the putative Civil Rights Act of 1990 in the Senate and the House. On the same day, the Department of Justice announced that it was drafting legislation to overrule the two cases in which the Court rejected its views, *Patterson v. McLean Credit Union* and *Lorance*

78. *See* Brown v. General Services Administration, 425 U.S. 820 (1976).

79. *See generally* the discussion of the coverage of 42 U.S.C. § 1981 in B. SCHLEI AND P. GROSSMAN, *supra* note 61 ch. 21, and the many cases cited therein. It is clear from that discussion that it was settled that 42 U.S.C. § 1981 was broadly applicable to all aspects of employment in cases where discrimination was based on race, color, alienage, national origin, and lineage.

80. 109 S. Ct. 2732 (1989).

81. 109 S. Ct. at 2739-41.

82. S. 1261, 101st Cong., 1st Sess. (1989). The provisions of this bill have been incorporated into the Civil Rights Act of 1990, H.R. 4000, S. 2104, 101st Cong., 2d Sess. (1990).

v. AT&T Technologies, Inc., but that it opposed overruling *Wards Cove* and *Martin v. Wilks* because they involved "racial quotas."[83]

The provisions of the Civil Rights Act of 1990 can be briefly summarized:

Sections 1-3 are descriptive or explanatory, and include the findings that the Supreme Court has cut back on civil rights laws and that existing protections and remedies are not adequate.

Section 4 would overrule *Wards Cove Packing Co. v. Atonio*, and return the law regarding disparate impact and the relative burdens of proof to its pre-*Wards Cove* condition. Under Section 4, once a plaintiff has demonstrated by statistically sound evidence that either the employer's overall employment procedures or a specific employment practice exclude minorities or women disproportionately, the burden of proof will shift to the employer to justify the use of the practice. This burden must be met by demonstrating that the practice—whether a test, educational requirement, or subjective appraisal process—is required by business necessity.

Section 5 would overrule *Price Waterhouse v. Hopkins,* and establish that *liability* under Title VII could not be defeated by a showing that factors other than impermissible bases motivated an employment decision. However, this section would allow a court, when fashioning relief, to take into account a showing that the same employment decision would have been made in the absence of discrimination.

Section 6 would largely overrule *Martin v. Wilks,* and may become the most controversial provision. It attempts to insulate litigated or settled decrees that remedy employment discrimination from collateral attack by third parties. The section provides that three circumstances would bar third parties from challenging a litigated or consent judgment: (1) when the third party had actual notice of the proposed judgment that was sufficient to inform her that the judgment might affect her interests, and she had a reasonable opportunity to present objections; (2) when the third party, who did not

83. Department of Justice Press, Release (Feb. 7, 1990) (on file at the YALE LAW & POLICY REVIEW). The views of the Administration were elaborated in testimony by then Deputy Attorney General Donald B. Ayer, D. Ayer, Statement before the House Committee on Education and Labor and the Subcommittee on Civil and Constitutional Rights of the Committee on Labor and Human Resources (Feb. 20, 1990) (transcript on file at the YALE LAW & POLICY REVIEW) and in a letter from Attorney General Thornburgh, Letter from Attorney General Thornburgh to the Chairman of the Committee on Labor and Human Resources (Apr. 3, 1990) (on file at the YALE LAW & POLICY REVIEW). The sponsors of the bill disavow any intention to require or even address the issue of quotas. *See* CONG. REC. S1019 (daily ed. Feb. 7, 1990) (remarks of Sen. Kennedy).

have such notice and opportunity, had her interests adequately represented by another person who challenged the judgment prior to or after its entry; or (3) when reasonable efforts were made to provide notice to interested persons.

Section 7 extends the statute of limitations for filing an administrative charge to two years and would overrule *Lorance v. AT&T Technologies* by providing that the statute of limitations for filing a charge of discrimination runs from either the adoption of a prohibited employment practice or from the time the practice adversely affected the complainant, whichever is later. Section 7(b) states that the application of a seniority system or practice that (1) is part of a collective bargaining agreement and (2) was adopted with the intent to discriminate shall be an unlawful employment practice; the subsection was specifically included to assuage labor unions' concerns that the bill would modify existing law protecting seniority systems from challenge.

Section 8 is designed to provide groups protected under Title VII the same broad monetary relief previously available only for claims of racial or national origin discrimination brought under § 1981. Prior to *Patterson,* while a plaintiff could obtain compensatory and punitive damages for a claim of racial discrimination in employment brought under § 1981, only back pay was available under Title VII. Since § 1981 does not encompass discrimination based on sex or religion,[84] such relief has not previously been available to, for example, a plaintiff who proves sexual harassment in violation of Title VII. Section 8 would permit compensatory damages in all cases and punitive damages against non-governmental defendants in cases of intentional discrimination upon proof that the employment practice was engaged in with malice or with reckless or callous indifference to a plaintiff's rights.

Section 9 addresses a number of issues relating to attorneys' fees that have arisen as a result of recent Supreme Court decisions. It would overrule *Crawford Fitting Co. v. J.T. Gibbons, Inc.*[85] by ensuring recovery for expert witness fees and expenses and would overrule *Evans v. Jeff D.*,[86] which held that the civil rights fees acts permitted a defendant to condition a settlement on plaintiff's counsel waiving any claim to an award of fees. By providing that fees could be recovered from the defendant, Section 9 would also overrule the part of

84. Runyon v. McCrary, 427 U.S. 160, 167 (1976).
85. 482 U.S. 437 (1987).
86. 475 U.S. 717 (1986).

Independent Fed'n of Flight Attendants v. Zipes that suggested that plaintiffs who prevail against a challenge to a decree by third parties could not get their fees from anyone.

Section 10 would give federal employees a more generous statute of limitations for filing Title VII cases. By providing that interest could be assessed on monetary awards against federal agencies, the section would also overrule *Library of Congress v. Shaw,*[87] which held that federal employees could not be compensated for delay in payment of fees or back pay in the same way as all other employees covered by the act.

Section 11, subsection (a), in an attempt to avoid Congress's repeatedly having to pass civil rights restoration statutes, imposes a liberal rule of construction of civil rights statutes upon the courts. Subsection (b) would overrule *Jett v. Dallas Indep. School Dist.*, by providing that there are no implied repealers, in whole or in part, in civil rights legislation.

Section 12 would overrule *Patterson v. McLean Credit Union* and the nearly 100 subsequent lower federal court decisions that have read § 1981 restrictively. The provision would restore the law to what it had been in all the circuits except the Fourth before *Patterson* by adding the following subsection to § 1981:

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

Sections 13-15 are various technical and conforming provisions, the most significant of which deal with the applicability of the act to pending cases. Under Sections 13-15 the Act would apply to all proceedings pending on or commenced after the date of the particular decision overruled. Moreover, section 15 (b)(1) would permit a party to obtain an order vacating any decision entered between the date of the Supreme Court decision overruled and the date of the Act's enactment if the decision is inconsistent with the section of the Act overruling the appropriate Supreme Court decision.

V. The Future of Civil Rights

Any practitioner before the Supreme Court learns quickly that it is folly to predict what the Court will do in any particular case. However, as was wisely noted many years ago, the Supreme Court

87. 478 U.S. 310 (1986).

often appears "to follow the election returns."[88] What is most significant about the cases discussed above is that all of them, with the possible exception of *Martin v. Wilks*,[89] deal exclusively with statutory interpretation. Nothing the Court has said so far suggests any retreat from its holdings that Congress possesses broad powers to pass legislation that addresses all forms of discrimination.[90] Thus, if it chooses, Congress can overrule each and every one of those decisions.

What, then, will be the response of the Supreme Court to the Civil Rights Act of 1990 if it is passed? The provision that mandates a broad reading of the statutes in order to effectuate their remedial purpose should have a salutary effect. The impact of legislative history, however, is more uncertain. Justice Scalia has taken the position, so far not adopted by any other member of the Court, that legislative history is virtually meaningless, since it tells a court nothing about what any particular member of Congress actually understood or had in mind when she voted for a bill.[91] However, in this case the legislative history is clear and explicit: the bill intends to overrule particular decisions. Presumably, any member of the legislature who votes for the bill will know what she is doing, and it would be the height of judicial activism—which, after all, the new appointees to the Court eschew—for any member of the Court to do anything but carry out Congress's explicit instructions.

The larger question remains, however, about how the Civil Rights Act of 1990, if passed in its present form, will affect the Court's interpretation of civil rights statutes the bill does not amend. Will the admonition to interpret all federal civil rights statutes "broadly" be taken to heart? And what will that admonition mean to those members of the Court who assured us that the decisions of last Term did

88. F. DUNNE, *The Supreme Court's Decisions*, in MR. DOOLEY ON IVRYTHING AND IVRYBODY 160 (1963).

89. Although the decision in *Martin* is based on a reading of Rules 19 and 24 of the Federal Rules of Civil Procedure, there are references throughout to due process concerns of notice and the opportunity to be heard. *See, e.g.*, 109 S. Ct. 2180, 2184-86 (1989).

90. *See* City of Richmond v. Croson, 490 U.S. at —, 109 S. Ct. 706, 717-18 (1989). Contrast the dissent of Justices Stewart and Rehnquist in City of Rome v. United States, 446 U.S. 156, 219-220 (1980), noting that the Civil Rights Cases, 109 U.S. 3 (1883) had never been expressly overruled and that, therefore, portions of the Voting Rights Act were unconstitutional as beyond Congress's powers.

91. *See, e.g.*, his concurring opinion in Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702, 2724 (1989).

not in any way mark a retreat from a commitment to vigorous enforcement of the civil rights laws?[92] This is not the first time that Congress has explicitly endorsed the liberal rule of construction for civil rights statutes. The legislative history of the Civil Rights Restoration Act of 1987,[93] which overruled *Grove City College v. Bell's*[94] restrictive reading of Title IX of the Education Amendments of 1972,[95] is replete with admonitions that it and other civil rights statutes should be interpreted broadly.[96] This did not seem to have much effect on the majority of the Court last term.[97] Both the Reagan and Bush Administrations have purported to appoint judges who are "strict constructionists" and who will defer to legislative judgments. However, both Administrations have also designed civil rights agendas bent on limiting the scope of the substantive and remedial aspects of the civil rights acts. It appears more and more that the "strict constructionist" Justices appointed since 1981 share that agenda. Therefore, it is increasingly likely that conservative administrations will prevail before the Supreme Court on issues they lose in Congress.

Nonetheless, supporters of the Act hope it will end the repeated need for Congress to overrule civil rights decisions of the Supreme Court. If the bill fails, it is hard to imagine what Congress can do except act on a case-by-case basis every time the Court narrowly interprets one of its statutes. Of course, such an outcome would unfortunately divert scarce time and resources to legislative issues that seemed already settled. Moreover, the Supreme Court's credibility might erode if the public believes the Court persistently refuses to carry out Congressional mandates.

The continued conflict between the Court and Congress disrupts the normal balance between the legislative and judicial branches of our government. It is one thing for the courts to insist that a statute

92. See Justice Kennedy's assurance in Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2379 (1989) quoted at the beginning of this article. Justice Scalia has adopted a more confrontational tone: "Justice Marshall's dissent rolls out the ultimate weapon, the accusation of insensitivity to racial discrimination—which will lose its intimidating effect if it continues to be fired so randomly." Holland v. Illinois, 110 S. Ct. 803, 810 (1990).

93. Pub. L. No. 100-259, 102 Stat. 28 (1988).

94. 465 U.S. 555 (1984).

95. Pub. L. No. 92-318, 86 Stat. 235.

96. S. REP. No. 64, 100th Cong., 1st Sess., 5-9, 23 (1987).

97. In earlier civil rights decisions the Court expressly followed the canon that remedial statutes are to be broadly and liberally construed. United States v. Price, 383 U.S. 787, 801 (1966); Jones v. Alfred H. Mayer, Co., 392 U.S. 409, 437 (1968); Griffin v. Breckenridge, 403 U.S. 88, 97 (1971).

be carefully drafted and to refuse to extend a vaguely worded statute beyond its natural meaning. It is quite another for a narrow majority of the Supreme Court to resist giving remedial statutes the breadth and effectiveness that Congress clearly intends in order to further its own political agenda.

Finally, the 1989 decisions and Congress's response raise an even more fundamental question—whether the Supreme Court and Congress are the appropriate forums for advancing civil rights today. Certainly from 1964 through the early 1970s, when the two institutions were acting in concert, there seemed to be no question that the federal courts, armed with far-reaching and effective statutes, were the most effective forums for vindicating the civil rights of long-oppressed minorities and women. Indeed, throughout most of this period, the executive branch was a consistent and effective force in the same direction. With the political shift away from full commitment to end, once and for all, discrimination, it may be necessary to reassess the civil rights movement's traditional reliance on the federal courts. Litigation in state courts, often under interpretations of state law and constitutions that are more progressive than current federal law, is one alternative. The other alternative is political organization and action that will move the federal courts back at least to the center of the political spectrum on civil rights.