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The Legislative Response

Isabelle Katz Pinzler

THE LEGISLATIVE RESPONSE

by Isabelle Katz Pinzler*

I. INTRODUCTION

From *Brown v. Board of Education*[1] in 1954 through the 1960's and, in some instances, into the 1970's and even the 1980's, civil rights advocates had become accustomed to looking to the Supreme Court as the major bulwark in the struggle for civil rights and women's rights. The last decade, however, has seen the Court shift towards a more conservative stance and changed this perception.[2] Now, as Justice Blackmun observed, "[o]ne wonders whether the majority still believes that . . . discrimination . . . is a problem in our society, or even remembers that it ever was."[3]

In 1989, the Supreme Court dealt a series of crippling blows to the statutory framework of established civil rights laws and, in the process, sent the struggle for equality in the American workforce plummeting.[4] The Court's decisions reversed time-honored judicial precedents under two of the most important laws that Congress has enacted to provide opportunities that were historically denied to racial, ethnic and religious minorities and women: § 1981[5] and title VII.[6] The Court has shown that it is no longer willing to protect civil rights with its former vigor; civil rights advocates must look elsewhere. This search for a new protector of civil rights in the federal government has forced advocates to turn to Congress to play the new leadership role in this area. Congress, in turn, has responded by taking on this leadership role and drafting legislation designed to counteract this dangerous trend by the Court and to shore up the weakened statutory infrastructure of the Congress' civil rights

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* Director, American Civil Liberties Union Women's Rights Project. A.B. 1967, Goucher College; J.D. 1970, Boston University School of Law. The author gratefully acknowledges the assistance of Wade Henderson, Associate Director, American Civil Liberties Union Washington Office, and Susan Damplo, Esq., in the research and preparation of this article.

1. 347 U.S. 483 (1954).

2. *See, e.g.*, City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989).

3. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2136 (1989) (Blackmun, J., dissenting).

4. *See, e.g.*, *Croson*, 109 S. Ct. at 706; Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989); Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989).

5. 42 U.S.C. § 1981 (1988).

6. 42 U.S.C. §§ 2000e to 2000e-17.

legislation.[7]

II. THE CONGRESSIONAL ROLE

It is entirely appropriate and certainly within Congress' power to correct erroneous readings of legislative intent by the Supreme Court.[8] The interplay between Congress' legislation and constitutional considerations is a traditional one. Historically it has always been within the Supreme Court's power to overturn a statute found to be unconstitutional.[9] For example, a statute protecting minority interests might conflict with fourteenth amendment notions of equal protection, and the Court may act to bring the statute and the amendment into harmony.

However, the Court's recent anti-civil rights decisions, which the proposed Civil Rights Act of 1990 is designed to correct, do not, for the most part, involve interpretations of the Constitution.[10] Thus, this legislation involves little more than a congressional response to restrictive judicial interpretations of federal statutes that are wholly within the purview of Congress to enact and to modify.[11] In the face of decisions which deprive civil rights laws of their practical effectiveness, it is necessary for Congress to revisit the enforcement practices which provided for comprehensive coverage under the anti-discrimination laws.

Congress has corrected judicial misreading of the intent of civil rights laws on previous occasions.[12] Indeed there is a long and growing tradition of congressional restoration of previously legislated civil rights.[13] Most recently, Congress rejected the Court's reasoning in *Grove City College v. Bell*.[14] In *Grove*, the Court held that only the particular program within an institution receiving federal financial assistance had to

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7. *See* Civil Rights Act of 1990, H.R. 4000, 101st Cong., 2d Sess. (1990); S. 2104, 101st Cong. 2d Sess. (1990) [hereinafter Civil Rights Act of 1990] (as introduced both the Senate and House bills are textually the same).

8. U.S. CONST. art. III., §§ 1-2.

9. *See* Marbury v. Madison, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

10. *See* Lorance v. AT & T Technologies, Inc., 109 S. Ct. 2261 (1989); Martin v. Wilks, 109 S. Ct. 2180 (1989); Wards Cove Packing Co. v. Antonio, 109 S. Ct. 2115 (1989) (all involving interpretations of title VII and other civil rights legislation and not any constitutional provisions).

11. *See* Civil Rights Act of 1990, *supra* note 7, § 2.

12. *See infra* notes 14-32 and accompanying text.

13. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (codified as at 20 U.S.C. § 1681) [hereinafter Civil Rights Restoration Act] (the law was passed over a presidential veto).

14. 465 U.S. 555 (1984).

comply with the civil rights laws while other programs within the same institution which are not federally funded, and the institution as a whole, did not have to comply.[15] In response to *Grove*, Congress passed the Civil Rights Restoration Act of 1987[16] which mandated institution-wide coverage of civil rights laws.[17]

Another important example of congressional leadership in the area of civil rights involved the decision in *General Electric Co. v. Gilbert*.[18] The majority in *Gilbert* held that an employer's health insurance policy, which excluded pregnancy coverage, did not constitute discrimination based on sex, although the Equal Employment Opportunity Commission had promulgated regulations to the contrary.[19] Once again Congress moved to, in effect, overrule the Court's decision by passing the Pregnancy Discrimination Act.[20] The Act stated that discrimination on the basis of sex included discrimination because of pregnancy, childbirth or related conditions.[21] In this instance all three branches of government had an opportunity to act on an important social question, with the congressional action being the final and decisive one.

Congress has also acted in the area of voting rights. In *City of Mobile, Alabama v. Bolden*,[22] the Supreme Court held that an at large election scheme which had deprived black voters of representation did not violate the fifteenth and fourteenth amendments.[23] Two years later, Congress explicitly amended the Voting Rights Act to cover the *Bolden* fact pattern by enacting the Voting Rights Amendments of 1982.[24]

In 1986, Congress acted to overturn two Supreme Court decisions which were contrary to congressional intent in limiting the rights of the

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15. *Id.* at 570-74.

16. *See* Civil Rights Restoration Act, *supra* note 13.

17. *Id.*

18. 429 U.S. 125 (1976).

19. *Id.* at 140-46. The EEOC guidelines were not given deferential treatment by the court because they were found to conflict with an earlier pronouncement by the agency. *Id.* at 142.

20. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e).

21. *Id.*

22. 446 U.S. 55 (1980).

23. *Id.* at 61-80. *See also* U.S. CONST. amends. XIV, XV.

24. Voting Rights Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. § 1973aa-1a).

disabled.[25] In *Atascadero State Hospital v. Scanlon*,[26] the Court ruled that money damages could not be awarded against a state agency which violated § 504 of the Rehabilitation Act of 1973.[27] The Congress then amended the 1973 act to ensure that injured parties could recover from state agencies.[28] Similarly, the Handicapped Children's Protection Act of 1986[29] overturned the holding in *Smith v. Robinson*,[30] where the Court held that the Education of the Handicapped Act had repealed by implication rights created by earlier statutes.[31] Congress' 1986 act expressly reinstated these rights.[32]

As demonstrated by this line of Supreme Court cases and the legislative responses to counteract them, it is clear that Congress not only has the right, but that it has the responsibility to reverse the Court's decisions which misread congressional intent so fundamentally. Many members of Congress are attempting to do just that and at the writing of this article a bill has been proposed which will effectively overturn the Court's recent decisions and strengthen civil rights in general.[33]

III. THE PROPOSED CIVIL RIGHTS ACT OF 1990

The proposed Civil Rights Act of 1990[34] was introduced in early February for several purposes. One purpose is that of reversing the five recent Supreme Court decisions discussed herein as well as several

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25. *See* The Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 100 Stat. 1807 (codified at 29 U.S.C. §§ 701-791i) [hereinafter Rehabilitation Act]; Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (codified at 20 U.S.C. §§ 1400-1420) [hereinafter Handicapped Children's Protection Act]. For the cases that Congress sought to correct, see Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985); Smith v. Robinson, 468 U.S. 992 (1984). *See also supra* notes 26-32.

26. 473 U.S. 234 (1985).

27. *Id.* at 245-47. *See also* Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified at 29 U.S.C. §§ 701-709, 720-724, 730-732, 740-741, 750, 760-764, 770-776, 780-787, 790-794).

28. *See* Rehabilitation Act, *supra* note 25.

29. Handicapped Children's Protection Act, *supra* note 25.

30. 468 U.S. 992 (1984).

31. *Id.* at 1020-21.

32. Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (codified at 20 U.S.C. § 1415).

33. *See* Civil Rights Act of 1990, *supra* note 7.

34. *Id.*

others.[35] The Act is also designed to ensure that sexual, religious and ethnic discrimination can be remedied as fully as race discrimination under the civil rights laws.[36] Lastly, the Act has the purpose of sending a very strong and hopefully unmistakable message to the Court; that the Congress and the people whom it represents, have *not* forgotten that discrimination has been, and still is, a major problem in our society and that they are determined to preserve and strengthen the legal protections against it.[37] The major features of the bill are, for the most part, addressed to the various cases which were handed down last year and which have been discussed in detail earlier in this Symposium.[38] These features are, for the most part, amendments of the Civil Rights Act of 1964[39] and are intended to reverse, overturn or otherwise "fix" each of the Supreme Court's recent anti-civil rights decisions.

A. The *Wards Cove* "Fix"

The centerpiece of the bill, is § 4 which is designed to overturn *Wards Cove Packing Co. v. Atonio*.[40] The plaintiffs in that case were cannery workers at a salmon processing facility where minorities held most unskilled positions while whites predominated in higher paid, skilled positions.[41] The plaintiffs challenged the defendant's employment practices such as separate hiring channels, a policy of not promoting from within, and segregated living and eating facilities as violative of title VII.[42] The Court held that the plaintiffs had failed to establish that the employer's practices created a disparate impact adversely affecting minorities.[43] Effectively reversing eighteen years of case law beginning

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35. *Id.* §§ 2(a)(1)-2(b)(1). The Act states 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. . . . [T]his Act . . . respond[s] to the Supreme Court's recent decisions by restoring the civil rights protections that were . . . limited by those decisions . . . ." *Id.* *See infra* notes 40-130 and accompanying text.

36. Civil Rights Act of 1990, *supra* note 7, § 5.

37. *Id.* § 2.

38. *See, e.g.*, Martin v. Wilks, 109 S. Ct. 2180 (1989).

39. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1971, 1975 to 1975d, 2000a to 2000d-4, 2000e to 2000h-5 (1988)).

40. 109 S. Ct. 2115 (1989).

41. *Id.* at 2119.

42. *Id.* at 2120.

43. *Id.* at 2124-27.

with *Griggs v. Duke Power Co.*,[44] the *Wards Cove* Court held that the burden of proof never shifts to the employer in a disparate impact case.[45] Moreover, the Court held, for the first time, that the race or sex-based effect of overall challenged practices could be ignored unless the plaintiff could demonstrate the impact of each particular employment practice, within the overall practice, on a protected class.[46]

These holdings severely undermine the likelihood of successful challenges to employment practices that have an indisputable discriminatory impact.[47] In essence, the burden has shifted to the plaintiff who must prove that an employer had no legitimate business reason for its discriminatory practices. Moreover, the plaintiff must now sort through the various components of hiring and promotion systems to determine precisely the component that caused the discrimination, even though employers have better access than do plaintiffs to information needed to evaluate such components. By instituting such a requirement, the Court prevents employees from challenging employment systems that may have an adverse impact only cumulatively.[48] Closely related to that, plaintiffs may not now be able to establish a prima facie case especially in the most egregious, complex, and subtle selection systems, such as those utilized in *Watson v. Fort Worth Bank & Trust.*[49] Nor is it clearly defined in these decisions whether a subjective selection process, without clearly identifiable component parts, is a single employment practice or series of practices.

Section 4 of the bill is subtitled "Restoring the Burden of Proof in

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44. 401 U.S. 424 (1971).

45. *Wards Cove*, 109 S. Ct. at 2126. The Court states that "the employer carries the burden of producing evidence of a business justification. . . . The burden of persuasion, however, remains with the disparate impact plaintiff." *Id.* In *Griggs* the Court had previously stated that "Congress has placed on the employer the burden of *showing* that any given requirement must have a manifest relationship to the employment in question." *Griggs*, 401 U.S. at 432 (emphasis added). The Court has shifted from the meaning that this puts the burden of *persuasion* on the disparate impact defendant to show business necessity to merely a burden of *production* of any legitimate business purpose. *Compare* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) *with* NLRB v. Transportation Management Corp., 462 U.S. 393, 404 (1983).

46. *Wards Cove*, 109 S. Ct. at 2124-25. "As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack." *Id.* at 2124.

47. *Id.*

48. *See generally id.*

49. 108 S. Ct. 2777 (1988). The employment practice in question was a promotion system for which there were no formal guidelines. All promotions were based solely on the subjective judgment of white supervisors who were found to discriminate on the basis of race. *Id.* at 2779.

Disparate Impact Cases"[50] and amends § 703 of title VII clarifying existing law which prohibits facially neutral employment practices that have a disparate impact on protected groups.[51] It provides that upon a prima facie showing of disparate impact by the plaintiff, the burden of proof shifts to the employer to prove business necessity.[52] Under this section of the bill, as originally introduced and discussed at this symposium, a practice could be justified as a business necessity if it is essential to effective job performance.[53] The bill underwent a number of revisions as it made its way through Congress. One of the most important changes was in the definition of business necessity. Under the bill which was reported out of the Conference Committee there is a two prong definition: First, in the case of employment practices involving selection, the practice or group of practices must "bear a significant relationship to successful performance of the job"; second, in the case of employment practices which do not involve selection, the practice or group of practices must "bear a significant relationship to a significant business goal of the employer."[54] Section 4 further clarifies that if the plaintiff proves that a group of employment practices causes a disparate impact, the plaintiff need not prove which specific practices within the group caused the disparate impact.[55]

B. The *Martin v. Wilks* "Fix"

Section 6 of the bill is subtitled "Facilitating Prompt and Orderly Resolution of Challenges to Employment Practices Implementing Litigated or Consent Judgments or Orders"[56] and amends § 703 of title VII to address the issue of collateral attacks on judgment or consent orders.[57] The provision prohibits, under certain circumstances, challenges to employment practices which implement the terms of a judgment or consent

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50. Civil Rights Act of 1990, *supra* note 7, § 4.

51. *Id.*

52. *Id.*

53. *Id.*

54. *See* CIVIL RIGHTS ACT OF 1990, H.R. CONF. REP. NO. 856, 101st Cong., 2d Sess., § 3(o)(1)(A), (B) (1990) [hereinafter CONFERENCE REPORT]. This document amended the House bill, H.R. 4000, and is to accompany S. 2104.

55. Civil Rights Act of 1990, *supra* note 7, § 4. Subsequent additions make it clear that an employer may demonstrate that a specific practice within a group of practices does *not* have disparate impact and thereby be relieved of the burden of showing business necessity as to that practice. *See* CONFERENCE REPORT, *supra* note 54, § 4.

56. Civil Rights Act of 1990, *supra* note 7, § 6.

57. 42 U.S.C. § 2000e-2.

order resolving previous claims of discrimination.[58] The provision does not, however, affect the current law of intervention, the rights of parties and class members or, where the government litigates in the public interest, the rights of those persons on whose behalf relief is sought.[59] Nor does the proposed bill affect such traditional collateral attack bases as collusion or fraud.[60] Persons collaterally barred under the bill would include those who had notice of the outcome of the previous proceedings or consent order that might affect their interests, as long as these persons had a reasonable opportunity to present objections.[61] Others who would be barred are those whose interests were already adequately represented in the proceedings, and those to whom the court determines reasonable efforts were made, consistent with due process, to provide notice.[62]

Martin v. Wilks,[63] the case which prompted this section of the bill, arose when white firefighters, who forewent the opportunity to object to settlement decrees between black firefighters and the City of Birmingham, Alabama, in a title VII suit, challenged these decrees in a separate action.[64] The two consent decrees set forth long term and interim annual goals for hiring blacks as firefighters and also provided promotional goals for blacks within the department.[65] The white firefighters claimed that they had been denied promotions in favor of less qualified blacks.[66] The city admitted that it had made race conscious personnel decisions, but argued that it had acted lawfully in compliance with the consent decrees.[67] The Supreme Court, contrary to the predominant view of the circuit courts, held that persons who were not parties to a court approved consent decree may challenge its provisions in a separate action.[68] The Court determined that the Federal Rules of Civil Procedure do not bar collateral attack unless the person has been joined as a party under Rule 19 and that Rule 24, which provides the procedure for intervention, does not mandate intervention where an action implicates a person's rights.[69]

Martin jeopardizes judgment or consent orders resolving claimed

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58. Civil Rights Act of 1990, *supra* note 7, § 6.
59. *Id.*
60. *Id.* § 8.
61. *Id.* § 6.
62. *Id.*
63. 109 S. Ct. 2180 (1989).
64. *Id.* at 2183.
65. *Id.*
66. *Id.* at 2182.
67. *Id.* at 2183.
68. *Id.* at 2184.
69. *Id.* at 2185-88.

violations of title VII and discourages the use of settlements and consent decrees as a means of resolving future disputes. If not overturned, *Martin* would permit persons who sat on the sidelines while the case was being litigated or settled to later challenge the result in separate proceedings.[70] It would also permit continued re-litigation of the same issues and objections of the previous litigation, depriving the parties to the judgment or consent orders, of the stability to which they are entitled.[71]

The proposed language of § 6 of the proposed act remedies the adverse consequences of *Martin* in the resolution of employment discrimination disputes. By generally prohibiting collateral attacks, the section imposes a certain standard for resolving discrimination disputes, while specifying methods for the notification of nonparties and affording them an opportunity to be heard.[72] The provision does not affect the rights of parties or rights of intervention.[73] Moreover, under the bill, collateral attack may be permissible for those who do not fall into any of the three categories of § 6 or where the objection is founded on collusion or fraud or other traditional grounds for collateral attack.[74] Thus the due process rights of parties and non-parties alike are fully protected.

C. The *Price Waterhouse v. Hopkins* "Fix"

Section 5 of the bill is subtitled "Clarifying Prohibition Against Impermissible Consideration of Race, Color, Religion, Sex or National Origin in Employment Practices."[75] It amends § 703 Of the Civil Rights Act of 1964 to provide that, as a general rule, it is a violation of title VII for an employer to use race, ethnicity or gender as a motivating factor in employment decisions.[76] This provision addresses the implication of recent Supreme Court opinions that federal laws may, under some circumstances, tolerate discrimination and, instead, makes clear that actions

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70. *Id.* at 2188 (Stevens, J., dissenting).

71. *Id.* at 2195-96 & n.21.

72. Civil Rights Act of 1990, *supra* note 7, § 6.

73. *Id.*

74. *Id.* The three categories of persons prohibited from attacking a judgment or consent order are: (1) persons who had notice of the previous litigation or had a reasonable opportunity to present objections to the judgment or order; (2) persons whose interests were adequately represented by another in the previous litigation; and (3) those who were not adequately represented or apprised of the previous proceedings but reasonable efforts were made to provide notice. *Id.*

75. *Id.* § 5.

76. *Id.* This section would amend 42 U.S.C. § 2000e-2 (1988).

in which discrimination is a motivating factor violate title VII.[77]

Price Waterhouse v. Hopkins,[78] illustrates the Court's trend away from full protection against discrimination. In that case, the plaintiff, a female senior manager, sought partnership in a major, national accounting firm.[79] Based upon her peer review evaluations, some of which praised her for "outstanding professionalism" while others criticized her "macho" and abrasive manner, her employer denied her a partnership.[80] She sued alleging sex discrimination in violation of title VII.[81] In analyzing the case a plurality of four justices adopted a rule of causation which held that once a plaintiff shows discrimination as a motivating factor, the employer must prove, by a preponderance of evidence, that it would have made the same decision absent that factor.[82] Under this rule no violation occurs if an employer can make such a showing.[83]

Section 5 of the proposed legislation directly addresses this problem and provides that to redress a violation the courts may provide a remedy under § 706(g), but that it shall not place individuals discriminated against, or employers, in a better position regarding hiring, firing or promotion than they would have been absent the impermissible motivating factor.[84] The result of this language is that if an employer would have discharged the individual for a permissible reason anyway, a court may not order reinstatement of the individual.[85]

D. The *Patterson v. McLean Credit Union* "Fix"

Section 12 of the bill is designed to reverse *Patterson v. McLean Credit Union*,[86] and is subtitled "Restoring Prohibition Against All Racial

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77. Civil Rights Act of 1990, *supra* note 7, § 5.

78. 109 S. Ct. 1775 (1989).

79. *Id.* at 1780-81 (Brennan, J., plurality opinion).

80. *Id.* at 1782. Still another evaluation of Ms. Hopkins stated that she should "walk more femininely, talk more femininely, dress more femininely, wear make up, have her hair styled, and wear jewelry." *Id.*

81. *Id.* at 1781.

82. *Id.* at 1780 (Justice Brennan's plurality opinion was joined by Marshall, Blackmun and Stevens, JJ.). Justices White and O'Connor would have made the employer's burden less stringent, but, nevertheless, concurred in the result. *Id.* at 1795-96 (White, J., concurring); *id.* at 1796 (O'Connor, J., concurring).

83. *See id.* at 1795 (Brennan, J., plurality opinion).

84. Civil Rights Act of 1990, *supra* note 7, § 5.

85. *Id.* § 5.

86. 109 S. Ct. 2363 (1989).

Discrimination in the Making and Enforcement of Contracts."[87] This section amends 42 U.S.C. § 1981, which prohibits racial discrimination in the making and enforcing of contracts, to prohibit racial discrimination in the making, performance, modification and termination of contracts, including the enjoyment of all benefits, terms and conditions of the contractual relationship.[88]

The Supreme Court's decision in *Patterson* created the impetus for this provision. The case involved a suit by a black woman who alleged that, because of her race, her employer had harassed her, refused to promote her to an intermediate accounting clerk position, and then fired her.[89] The Court held that § 1981 did not prohibit a private employer from racially harassing its employees.[90] The Court reasoned that the defendant's harassment of the plaintiff and failure to promote her did not interfere with her right to make and enforce contracts but rather interfered only with her right of performance of the contract.[91] The majority opinion stated that the provision did not extend to problems of racial discrimination during employment.[92] The majority reasoned that § 1981, which applies only to the right to make and enforce contracts, was not implicated because the time the contract was formed between employer and employee is the date of hiring.[93]

In response to this restrictive interpretation, § 12 of the proposed Act will restore the broad scope of § 1981.[94] This will have the effect of ensuring that individuals have equal treatment in employment contracts regardless of race. An employer who discriminates based on race when hiring is currently subject to liability for compensatory and punitive damages under § 1981.[95] Under § 12 of the proposed act, if that same employer discriminates against employees because of their race after hiring, he or she will now be liable for compensatory and punitive damages

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87. Civil Rights Act of 1990, *supra* note 7, § 12.

88. *Id.*

89. *Patterson*, 109 S. Ct. at 2368-69.

90. *Id.*

91. *Id.* at 2373.

92. *Id.* at 2374.

93. *Id.*

94. Civil Rights Act of 1990, *supra* note 7, § 12.

95. *See, e.g.*, Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) The Court stated that "it is well settled . . . that § 1981 affords a federal remedy against discrimination in private employment on the basis of race. An individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages." *Id.* at 459-60 (citations omitted).

as well.[96] This will have the effect of reversing the Court's decision in *Patterson* by including "performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship,"[97] in the definition of the right to make and enforce contracts as provided by § 1981.

E. The Provision of Damages for Cases of Intentional Discrimination

In the course of any discussions concerning the need to reverse the Court's holding in *Patterson*, it quickly becomes clear that punitive damages have never been available for forms of intentional discrimination other than racial.[98] Thus, no matter how egregious the sexual harassment a title VII plaintiff may suffer, she is not, under current law, able to recover anything other than injunctive relief and back pay, even if she prevails.[99] Section 8 of the bill, which is subtitled "Providing for Damages in Cases of Intentional Discrimination,"[100] is designed to address that problem and to provide equal remedies for all types of discrimination under title VII.[101] It provides for compensatory and punitive damages in appropriate cases and excludes these remedies for disparate impact violations and bars punitive damages against governmental entities.[102] One of the significant changes made in the bill during its progress through the two Houses was the addition of a cap on the amount of punitive damages available under it. The Conference version provides for a cap of $150,000 or an amount equal to the sum of compensatory damages and equitable relief, whichever is greater.[103]

As noted above, § 8 is specifically designed to address the anomaly in fair employment law regarding damages. Currently, § 1981 includes

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96. Civil Rights Act of 1990, *supra* note 7, § 12.

97. *Id.*

98. *Compare* 42 U.S.C. § 2000e-5g (1988) *with* 42 U.S.C. § 1981. Under § 1981 an interference with the right to make and enforce contracts on the basis of race will result in liability for compensatory and punitive damages and injunctive relief. *See generally* Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). However, under title VII, which prohibits, *inter alia*, discrimination in employment on the basis of race *and* gender, a claimant is entitled to full equitable relief but may only obtain back pay and is not entitled to punitive damages. 42 U.S.C. § 2000e-5(g).

99. 42 U.S.C. § 2000e-5(g).

100. Civil Rights Act of 1990, *supra* note 7, § 8.

101. *Id.*

102. *Id.* (this section also expressly provides the option of jury trial for damage suits).

103. *See* CONFERENCE REPORT, *supra* note 54, § 8(b).

compensatory and punitive damages as remedies for violations[104] while title VII has no such similar provision.[105] A grievant may only obtain equitable reliefs such as an injunction and/or back pay.[106] Under current law, a black woman who is harassed on the job because of her race would be able to obtain damages under § 1981, yet unless a remedy is provided under title VII, the same woman would obtain no relief if the basis for the harassment were sex.[107] The proposed Civil Rights Act of 1990 would change this obvious oversight.

Section 8 of the proposed legislation also provides a partial solution to the Supreme Court's decision last term in *Jett v. Dallas Independent School District*,[108] in which the Court held that local governments cannot be held liable for their employee's violations of § 1981 under a *respondent superior* theory because the statute does not provide an independent federal damages remedy for racial discrimination by local governmental entities.[109] Instead, the court held that only the remedies available under § 1983, requiring that the discrimination by the local or state government be the product of official governmental policy, are available in the context of § 1981 actions against state actors.[110]

While *Jett* applies to all contractual relationships in which race discrimination occurs, this section of the proposed Act, as part of an employment law bill, addresses the problem in the context of title VII.[111] Consequently, the proposed amendment would subject state employers to compensatory damages under a theory of *respondent superior* for employment discrimination.[112] The proposed language not only addresses *Jett* but also expands the basis for employers' liability for damages under title VII.[113] Prior to *Jett*, under § 1981, state employers were liable for

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104. 42 U.S.C. § 1981. *See supra* note 98 and accompanying text.

105. 42 U.S.C. § 2000e-5(g). *See supra* note 98 and accompanying text.

106. *Id.*

107. 42 U.S.C. § 1981; 42 U.S.C. § 2000e-5(g).

108. 109 S. Ct. 2702 (1989).

109. Id. at 2720. Section 1981 provides only that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981.

110. *Jett*, 109 S. Ct. at 2720.

111. Civil Rights Act of 1990, *supra* note 7, § 8.

112. *Id.*

113. *Id.*

> With respect to an unlawful employment practice (other than an unlawful employment practice established in accordance with section 703(k)) . .

employees' violations of § 1981 under a *respondent superior* theory while under title VII employers' basis for liability exceeds the scope of *respondent superior*, under certain circumstances.[114] Therefore, to the extent the proposed language does not address the theory of an employer's liability, the courts are free to construe its provisions to expand the basis of an employers' liability beyond vicarious liability.

F. The *Lorance v. AT & T Technologies, Inc.*, "Fix"

Lorance v. AT & T Technologies, Inc.,[115] served as the primary impetus for § 7 of the bill. In that case, the Supreme Court denied plaintiffs, who were female employees, the right to claim discrimination in a seniority plan.[116] The plaintiffs alleged that, even though the plan was facially neutral, it had been conceived to discriminate against women.[117] Although the plaintiffs were not adversely affected by the plan until 1982, the Court concluded that they were required to file charges with the Equal Employment Opportunity Commission, a prerequisite to bringing civil suit, within 180 days of the adoption of the plan in 1979.[118] In essence, the Court required the employees to anticipate and initiate suit to prevent future adverse applications of the system no matter how speculative or unlikely that application might be.[119] The decision insulates employers from liability for facially neutral seniority systems that have discriminatory effects subsequent to their implementation.

Section 7 of the bill replaces the term "occurred" in § 706(e),

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> . (A) compensatory damages may be awarded; and (B) if the respondent (other than a government, government agency, or a political subdivision) engaged in the unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others, punitive damages may be awarded against such respondent . . . .

Id. See also 42 U.S.C. §§ 2000e to 2000e-17.

114. 42 U.S.C. § 1981; 42 U.S.C. § 2000e. *See* Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1564 n.22 (11th Cir. 1987) (employer strictly liable for an employee's quid pro quo sexual harassment); *id.* at 1559-60 (employer liable under hostile work environment theory based on employee's use of apparent authority to harass co-worker).

115. 109 S. Ct. 2261 (1989).

116. *Id.* at 2268-69.

117. *Id.*

118. *Id.* at 2267-68.

119. *Id.* at 2270 (Marshall, J., dissenting).

describing unlawful employment practices, with the terms "has occurred, or has been applied to affect adversely the person aggrieved, whichever is later."[120] This section would also extend the current statute of limitations from six months to two years in order to conform with the statutes of limitations for charges filed either initially with state and local agencies or directly with the Equal Employment Opportunity Commission.[121] The section further provides that

> [w]here a seniority system, or seniority practice is part of a collective bargaining agreement and was included in such agreement with the intent to discriminate on [a prohibited basis], . . . the application of such a system or practice during the period that the collective bargaining agreement is in effect shall be an unlawful employment practice.[122]

This provision is intended to reverse the *Lorance* decision by redefining "occurred" to include "affect adversely" signalling that the statute of limitations does not run until the concrete effects of the injury are felt by the charging party.[123]

Another effect of § 7 will be to extend the statute of limitations period under title VII to coincide more closely with those under other employment laws.[124] For example, the Equal Pay Act of 1963,[125] which has the same statute of limitations as the Fair Labor Standards Act of 1938,[126] provides a two year statute of limitations for a violation, three, if willful.[127] Claims arising under the Reconstruction Era Statutes[128] are generally subject to state statutes of limitations, ranging generally from one to three or more years.[129] title VII's existing statute of limitations, while intended to encourage prompt resolution of discrimination, has, in practice, hampered such resolutions, prohibiting potentially meritorious claims

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120. Civil Rights Act of 1990, *supra* note 7, § 7.

121. *Id.* § 7.

122. *Id.* § 7.

123. *Id.* § 7. *See generally* Lorance v. AT & T Technologies, Inc., 109 S. Ct. 2261 (1989).

124. Civil Rights Act of 1990, *supra* note 7, § 7. *See also infra* notes 125-30 and accompanying text.

125. 29 U.S.C. § 206(d) (1988).

126. *Id.* §§ 201-219.

127. *Id.* § 206(d).

128. 42 U.S.C. §§ 1981-1983, 1985-1986, 1988.

129. *See generally id.* at § 1981.

because of untimeliness.[130]

IV. THE RULES OF CONSTRUCTION FOR CIVIL RIGHTS LAWS

Section 11 of the bill is designed to send a very explicit message to the Supreme Court. It provides, in pertinent part:

> (a) EFFECTUATION OF PURPOSE -- 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.
>
> (b) NONLIMITATION -- Except as expressly provided, no Federal law protecting the civil rights of persons shall be construed to restrict or limit the rights, procedures, or remedies available under any other Federal law protecting such civil rights.[131]

This language is intended to restore generally accepted rules of statutory construction which require the courts to liberally construe federal civil rights laws and to avoid restricting or limiting rights under other existing civil rights laws unless that law otherwise so expressly provides.[132] This has been a problem for the past decade and a half as the Supreme Court, and to some extent the lower courts, have begun to depart from the generally accepted rule of statutory construction that civil rights statutes are to be interpreted broadly to effectuate their underlying purposes.[133] As a result, Congress has repeatedly had to amend these laws to achieve the same result as would have been achieved under a broad statutory rule of construction.[134]

Last term's decisions were no exception to the Court's trend of unsettling traditional statutory construction and may indicate even further erosion.[135] For example, in *Patterson*, where the Court held that 42

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130. *Id.* § 2000e.

131. Civil Rights Act of 1990, *supra* note 7, § 11.

132. *Id.* § 2(b). The language of the subsection is inspired by a comparable provision of § 3 of the Handicapped Children's Protection Act of 1986. *See* Handicapped Children's Protection Act, *supra* note 25, § 3 (codified at 20 U.S.C. § 1415(f) (1988)).

133. Civil Rights Act of 1990, *supra* note 7, § 2(a).

134. Remedying this recurring problem has been costly. Congress has had to expend massive amounts of time and resources to address problems previously addressed, and to reinstate rights that had been suspended between the time of the Supreme Court decisions and Congress' response. *See supra* notes 10-32 and accompanying text.

135. *See supra* notes 40-130 and accompanying text.

U.S.C. § 1981 generally did not address discrimination in the execution of and compliance with contracts; the Court expressly insisted that it would be undesirable "to read [§ 1981] broadly."[136] Moreover, the Court made no effort to consider whether its proposed interpretation of § 1981 would advance or defeat congressional purpose. *Lorance*, as discussed previously, provides an additional example of the Court's departure from established rules of statutory interpretation.[137] There the Court held that the plaintiffs, challengers of an allegedly discriminatory seniority system, had to sue within 300 days of the adoption of the system rather than when the system adversely affected them, years after the adoption.[138] The majority, in *Lorance*, conceded that its broad construction of the exception to title VII for seniority systems was not required by the statute's language nor was its interpretation the most natural reading of the statute.[139] Nowhere in its opinion did the majority rely on or refer to the purposes of title VII.

In order to counteract this alarming trend subsection (a) of the proposed section would restore the liberal rule of construction.[140] When a statute's terms may be construed in several ways this section mandates that courts shall select the construction which most effectively advances the congressional purposes underlying the law.[141] Subsection (b) is intended to restore the rule of construction that civil rights statutes should be construed in light of "a general intent to accord parallel or overlapping remedies against discrimination."[142] The Court, most recently in *Patterson*, has failed to apply this rule and instead regarded the relationship between civil rights laws § 1981 and title VII as exclusive, opting to "preserve the integrity of Title VII's procedures" by abolishing, for most victims of employment discrimination, the greater substantive remedies under § 1981.[143]

V. THE CHANGES FOR SUCCESS

Predicting the future is always a very dangerous proposition. Nevertheless, I believe that we can be reasonably optimistic about the chances of eventual success for the laws proposed in the Civil Rights Act

136. Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2375 (1989).

137. Lorance v. AT & T Technologies, Inc., 109 S. Ct. 2261 (1989).

138. *Id.* at 2268-69.

139. *Id.* at 2265-66.

140. Civil Rights Act of 1990, *supra* note 9, § 11(a).

141. *Id.* at § 11(b).

142. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974).

143. *Patterson*, 109 S. Ct. at 2375.

of 1990. The Act was introduced to Congress in February of 1990 and has enjoyed significant bi-partisan support in both Houses.[144] At the time of this Symposium, the bill had passed the Senate Committee on Labor and Human Relations without major or weakening amendments.[145] On October 16, 1990, the bill passed in the Senate by a 62 to 34 vote[146] and on October 17, 1990, the House approved the bill by a 273 to 154 vote.[147] However, President Bush continues to threaten to veto the bill.[148] This legislation, nonetheless, sends a strong, unmistakable, and very necessary message to the courts, in particular the Supreme Court, that the majority of Congress, if not the Court or the Administration, is determined to address forcefully the continuing problem of discrimination on the basis of race, sex, national origin and religion.

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144. *Efforts at Compromise on Civil Rights Bill Fail to Produce Agreement*, Daily Lab. Rep. (BNA) No. 194, at A-12. *See also* Civil Rights Act of 1990, *supra* note 7.

145. *Id.*

146. Berke, *Senate Passes Rights Bill, but Vote Is Not Enough to Override Veto*, N.Y. Times, Oct. 17, 1990, at A25, col. 1.

147. Rosenthal, *House Passes Rights Bill on Job Bias; White House Vows Veto*, N.Y. Times, Oct. 18, 1990, at D25, col. 2.

148. *A Veto Mr. Bush Can Still Avoid*, N.Y. Times, Oct. 1, 1990, at A20, col. 1.