Professor Harold McDougall:

I have here three speakers on the Civil Rights Act of 1990. The person in front is Ralph Neas, the Executive Director of the Leadership Conference on Civil Rights. The Conference has as part of its membership the NAACP, National Urban League, the National Council of the Raza, the Japanese American Council, as well as a variety of church organizations. If my memory serves me correctly, this is the coalition that put together the march on Washington in 1963. Next to him is Roger Clegg, who has been working with the Justice Department since 1987. He now supervises Appellate Housing and Public Accommodation litigation for the Justice Department's Civil Rights Division. Next to him is William Eskridge, who teaches legislation at Georgetown University and is the initiator of a very interesting development in legislative scholarship called the New Legal Process. He probably would argue with me that he is not the initiator of New Legal Process, but he has commented on it extensively. I will start the program with Mr. Neas.

Ralph Neas:

Thank you and thank you all for being here. It is certainly an honor for me to have an opportunity to share my perspective and the perspective of the Leadership Conference on Civil Rights. I commend the conveners. There is an extraordinary array of speakers throughout this conference and I am very proud to be here as one of them. It also could not be a more auspicious time to discuss this topic, as we are in the wake of the 1990 elections. We will obviously be getting a new Congress, the 102nd. With respect to the decision-making process within the Executive, Judicial, and Legislative branches, and how they all relate to civil rights, obviously we have had a revolution over the last ten years. I will be making the case that the Executive and Judiciary branches have abandoned the roles that they have had for a quarter of a century, and the Legislative branch has had to pick up the slack (and is doing quite well I might add).

First, I have a confession to make. Contrary to the expectations of some in this room, I am actually a registered Republican. I should point out that I am a liberal Republican, a Rockefeller Republican, once considered an endangered species. We did

fairly well in the November elections with a number of candidates who campaigned on behalf of the Civil Rights Act of 1990.

You have heard that the Leadership Conference on Civil Rights is a coalition. We are. We have been around for 40 years. A. Philip Randolph, Roy Wilkins and Arnold Aranson set it up in 1950. It started out as the Black Labor Religious Coalition, and of course in the 1960's and 1970's grew exponentially with the advent of the Hispanic movement, the women's movement, older Americans movement and the Disability movement. We now have, believe it or not, 185 national organizations. Fifty million Americans pay dues to 185 organizations in the Leadership Conference. We are essentially a coordinating mechanism for civil rights advocacy before the Congress and before the Executive branch. Many of the organizations also litigate. We do not litigate at the Leadership Conference Headquarters. We are a consensus organization; our greatest strength is, some would say, sometimes our greatest weakness. We do not have positions on abortion quotas, but I would say that about 95% of the time we do eventually work out a consensus position on legislation. What I would like to do is take you swiftly through the last decade. I want to end up with the Civil Rights Acts of 1990 and 1991, what the politics are, what I think is going to happen, and the role of the Bush administration, the court and the legislature.

First the bad news. The 1980's was an awful decade. One bad thing after another happened in the Executive branch, no question about it. I could give a three hour speech on the Reagan administration and civil rights but I will try to do it in two minutes right now. In every area they used quotas as a smoke screen to try to cut back in civil rights enforcement and to weaken civil rights laws. They repudiated the enforcement policies of not just the past Democratic administration, but the Republican administration as well. If you just think of some of the big battles of the 1980's: the *Bob Jones*[1] fiasco, the attempt to permit racist schools to get taxes on status, the destruction of the Civil Rights Commission, the independence of the Civil Rights Commission, the opposition of a strong and effective Voting

[1] Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (holding that nonprofit private schools that prescribe and enforce racially discriminatory admission standards on the basis of religious doctrine do not qualify as tax exempt under the Internal Revenue Code).

Rights Act extension, the efforts to eliminate all affirmative action, not just what they perceived to be quotas but goals and timetables - all kinds of numerical relief, you name it, with respect to affirmative action. I think Meese and Reynolds put it this way - it was immoral, impermissible and unconstitutional.

The *Grove City*[2] case is another example. President Reagan vetoed the Civil Rights Restoration Act of 1988.[3] Of course, he was overturned. He opposed the fair housing amendments until the last month or so, when the Leadership Conference was able to work with then Vice President Bush and Samuel Pierce, Director of Housing and Urban Development, with the acknowledgement that we would keep the Department of Justice out of the negotiations and that worked out pretty well. Under Title VII, § 504,[4] every area of civil rights law was tremendously weakened with respect to enforcement. In the criminal law section and sometimes in voting rights enforcement, however, there were some positive spots. I can cite a number of statistics as to how many cases were initiated. Of course, we have to talk about quality as well as quantity. With respect to the criminal division over the civil rights division, enforcing the Ku Klux Klan type of case certainly was consistent with the Meese/Reynolds view on a specifically identifiable victim of discrimination theory.

I wish I could say the Bush Administration was better. It has basically been a continuation of the Reagan administration's policies. I do want to praise Attorney General Richard Thornburgh and the President for their work on the Americans with Disabilities Act.[5] That was a notable exception to what I am going to be talking about. The work done in Roger's area of responsibility was quite impressive. A man by the name of Paul Hancock has established a good record in that department. With respect to many of the major civil rights issues, however, the *Metro*[6] case

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[2] Grove City College v. Bell, 465 U.S. 555 (1984) (holding that a private college that was the recipient of federal financial assistance was subject to Title IX of the Education Amendments (20 U.S.C. §§ 1681(a) - 1682), which prohibits sex discrimination, but that the effect of the statute would be limited to the college's financial aid program).

[3] *See* 134 CONG. REC. H1037-08 (1988) for the text of the President's veto message.

[4] *See infra* notes 10 and 11.

[5] 42 U.S.C. § 12101 *et seq.*; 47 U.S.C. §§ 152, 221, 225 & 611.

[6] Metro Broadcasting, Inc. v. Federal Communications Comm'n, 110 S. Ct.

before the Supreme Court, the Lucas nomination (someone who did not have experience either legally or in the civil rights area) and the segregation cases before the Supreme Court, some of the worst briefs on civil rights ever by Ken Starr, Solicitor General, and the minority scholarship program illustrated that Bush's positions are more extreme than those of the Reagan Administration. And then, of course, there is the Civil Rights Act of 1990, where President Bush became the third President in our history to veto a civil rights bill (joining Ronald Reagan and Andrew Johnson).

I am going to address the quota issue in a second, but the quota issue is a smoke screen for the Bush and Reagan Administrations to cover up what they are really about with respect to race and sex discrimination. That is, basically getting the Federal Government out of the business of actively being involved in eliminating discrimination and assuring equality of opportunity. What is interesting about the Civil Rights Act of 1990 - and the position of the Bush Administration with respect to *Wards Cove*,[7] *Price Waterhouse*[8] and *Wilks*[9] and other issues - is that the positions were actually worse than the positions of the Reagan Administration when that Administration presented briefs to the Supreme Court in 1987, 1988 and 1989.

Now for the good news: Congress has been terrific. Republicans and Democrats worked well together throughout the 1980's and in 1990. In fact, this might be one of the best periods of bipartisan cooperation in the area of civil rights. For example, look at the Voting Rights Act Extension of 1982,[10] the Martin Luther King Bill[11] of 1983, the efforts to preserve the Executive Board on affirmative action in 1985 and 1986, the reversal of three Supreme Court decisions in 1986 which had limited disability laws, the defeat of William Bradford Reynolds to be Associate Attorney General in 1985 and then in the last four years maybe the best series of legislative successes in civil rights ever. Next of

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2997 (1990) (upholding rules providing preferences to minorities in comparative licensing procedures).

7 Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

8 Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

9 Martin v. Wilks, 490 U.S. 755 (1989).

10 42 U.S.C. §§ 1973, 1973b, 1973aa-1a to -6.

11 Martin Luther King, Jr., Federal Holiday Comm. Extension Act, 36 U.S.C. §§ 169j-1 to 8.

course was the Bork nomination in October of 1987,[12] the Fair Housing Amendments Act of 1988[13] (which for the first time gave a meaningful enforcement remedy on fair housing and extended it to persons with disabilities and also to families with children), the Civil Rights Restoration Act[14] overturning the *Grove City*[15] decision, and the Japanese/American Redress Act.[16]

This year the Americans with Disabilities Act[17] was maybe the most revolutionary and dramatic improvement in civil rights law in the last twenty-five years. I am not sure I am prouder of working on anything in all my years in Washington. I think it will profoundly transform America in a very positive way. Finally, there was the Child Care bill,[18] the Family and Medical Leave Act[19] (although the Family and Medical Leave Act was vetoed) and then the Civil Rights Act of 1990 (which was also vetoed).

You might note that I just named several major bills. On every one of these bills there was at least 55% bipartisan majority support.[20] The exception was the Civil Rights Act of 1990, which received a 64% majority vote.[21] This was just a little bit short of the veto override. Every other legislative initiative had at least 70% to 75% majority. So the legislative story of the 1980's on bipartisan reaffirmation of civil rights laws and civil rights remedies was a bipartisan repudiation of the right wing idealogues that controlled the Reagan Administration, and now control the Bush Administration, justice at the White House and the Department of Education and elsewhere. Regarding the Judiciary - this is the one success of the right wing idealogues. The right wing has captured the Federal Judiciary. From 1981 to 1989 the Judi-

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12 Judge Bork's confirmation to the Supreme Court was opposed by most major civil rights groups.

13 42 U.S.C. §§ 3601 *et seq.*

14 20 U.S.C. §§ 1687 to 1688; 29 U.S.C. §§ 706, 794; 42 U.S.C. §§ 2000d-4a, 6107.

15 *See supra* text at 485.

16 P.L. 100-383, 102 Stat. 903 (1988).

17 P.L. 101-336, 104 Stat. 327 (1990).

18 P.L. 101-508, 104 Stat. 1388 (1990).

19 H.R. 770, 101st Cong., 1st Sess. (1989), vetoed by President Bush on June 29, 1990. *See* 136 CONG. REC. H4451-52 (daily ed. July 10, 1990).

20 The House passed the Family and Medical Leave Act on May 10, 1990, by a vote of 237-187, or 56% of the House. 136 CONG. REC. H2239-40 (May 10, 1990).

21 The House passed the Conference Report accompanying the Civil Rights Act of 1990 by a vote of 273-154, or 64% of the House. *See* Appendix B *infra*.

ciary was actually part of the checks and balances system which kept in check the excesses of Meese, Reynolds and company during the Reagan years. If you look at the *Gingles*[22] case on the voting rights act, the *Arline*[23] case on Section 504, and the cases of *Bob Jones*,[24]*Johnson*,[25] *Paradise*,[26] *Vanguards*,[27] and *Metal Workers*[28] with respect to affirmative action; in all of these decisions up until 1988 and 1989, the Supreme Court expressly mentioned by name and repudiated the Department of Justice officials that had argued the cases before the Supreme Court, especially the whole concept of the specifically identifiable victim of discrimination theory.

Furthermore, it is important to remember when talking about the 1980's, we are talking about a conservative court. We are talking about a Court that saw its last Democratic appointment in 1967. But things changed and in 1989, there is no question that the right wing faction in the Reagan Administration immediately perceived that it was not going to be successful in the legislature. In the House and the Senate the right wing can command no more than 30% to 35% of the vote. Their high water mark passed this year on the Civil Rights Act, when they got 34% of the vote, and in the Senate, unfortunately one less than they needed with respect to the veto override.[29] But they knew also in 1982, 1983 and 1984 that they could not win in the Supreme Court the way it was constituted. So they made a decision early on that they were going to pack the Federal Judiciary, and pack the Federal Judiciary they did. Three-hundred-seventy-six Judges were named by President Reagan. I guess its about 60 or 70 more so far in the first Congress and I believe there are 85 new judgeships that we are going to see in the next year or two.

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22 Thornburgh v. Gingles, 478 U.S. 30 (1986).

23 School Board v. Arline, 481 U.S. 1024 (1987).

24 *See supra* note 1.

25 Johnson v. Transportation Agency, 480 U.S. 616 (1987).

26 United States v. Paradise, 480 U.S. 149 (1987) (holding that a promotion preference was justified under the fourteenth amendment).

27 Local Number 93, Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501 (1986).

28 Local 28 of the Sheet Metal Worker's Int'l Ass'n v. Equal Employment Opportunity Comm'n, 478 U.S. 421 (1986).

29 The Senate voted 66-34 to override the veto of the Civil Rights Restoration Act of 1990. Sixty-seven votes were needed to pass the Act into law. *See* Appendix B *infra*.

So a vast majority now of the Federal Judiciary has been appointed by Ronald Reagan and George Bush. As you all know well, a vast majority of that Judiciary is white, male, young and very conservative. I think that description covers about 92% or 93% of the Reagan nominees. I am sure it is just about as high with respect to the Bush nominees.

Packing the court - what has it gotten us? We saw more damage to civil rights laws in the four weeks of June 1989 than we had seen in the previous four decades. The Supreme Court abandoned its role as the principal protector of individual rights and individual liberties. In fact, I would say the Supreme Court has become the greatest threat to civil rights and civil liberties in the country at this time. There has been a marked revolution in this Court. We saw in June of 1989 with *Ward's Cove*,[30] *Patterson*[31] and *Wilks*[32] a case by case erosion of civil rights. We do not know yet for sure until this term is over but we are probably a vote short of completely overturning just about everything that comes before the Court. But even that is in question. We certainly see a steady erosion, one case after another. There is no question that there were bad decisions in the 1970's and 1980's, and I think that William Eskridge is going to go through some of this with the attorneys' fees decision in 1976,[33] the *Gilbert*[34] case in 1977-1978, and *Grove City*.[35] We have a number of them and usually they were once every year or two, maybe once every three years. Now we are getting about five or six in one year and I am sure we are going to have a lot more. The Civil Rights Restoration Act is another example where the legislature has to once again establish what its congressional intent was 10, 20 or 25 years ago. It is going to be the norm rather than the exception to the rule.

The Civil Rights Acts of 1990-1991 has two purposes. The first major purpose is to restore Title VII in Section 1981 to where it was before June of 1989. The Civil Rights Act has nothing to do with affirmative action remedies. There was a signifi-

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30 *See supra* note 7.

31 Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

32 *See supra* note 9.

33 Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (stating that the eleventh amendment did not preclude back pay and attorneys' fee awards under the Civil Rights Act of 1964 (42 U.S.C. § 2000 *et seq.*)).

34 General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

35 *See supra* note 2.

cant debate for some time about whether to include the *Richmond*[36] decision in the Civil Rights Act of 1990. A decision was made to keep affirmative action remedies out of the bill. What the bill does is allow victims of discrimination the ability to get into court and once they are there the opportunity to prove discrimination. The second purpose of the bill is to make sure that women and religious minorities can get monetary damages for intentional discrimination. This bill would give women and religious minorities under Title VII what racial minorities have under Section 1981 of the 1866 Civil Rights Act - punitive damages only when there are egregious circumstances. So women and religious minorities are getting what racial minorities have had for some time under Section 1981.

Monetary damages are also a big issue, especially for the business community. President Bush actually supported monetary damages for intentional discrimination in the *Patterson*[37] case. The President worked with us when he was Vice President together with the realtors lobby and the Republicans in Congress, to get monetary damages for housing discrimination. While the Thornburgh Department of Justice is opposing monetary damages for women and religious minorities under the Civil Rights Act, they have been going after monetary damages for housing discrimination. This is an inconsistency; I am not sure the President is aware of it. The supporters of monetary damages include many of those I would consider on the right wing, people like the Heritage Foundation. Even Meese and Reynolds came in early and said that they supported monetary damages for intentional discrimination. Section 1981 studies show that there should not be any great cause for alarm about monetary damages. In 85% of the cases reported under section 1981, there were no monetary damages awarded. I think of the remaining 15% the average monetary award under section 1981, during a 10 year study of all the cases in the country that were reported, was $40,000, not $100,000, not $500,000, not $1,000,000 or $2,000,000 which are figures quoted by the business community. The bill has no quotas. It merely restores *Griggs.*[38] The *Griggs*[39]

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[36] Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

[37] *See supra* note 31.

[38] Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding that the Civil Rights

case did not lead to quotas. The Department of Justice and the business community could not come up with any example of quotas from 1971 through 1989. We merely restored the *Griggs* language. With the *Griggs* language comes the significant relationship, the successful performance of the job, which is found on page 426 of the *Griggs* decision.[40] More importantly, it comes from the negotiations with Governor John Sununu. He came up with the language on July 12th of 1990. Sen. Edward Kennedy (D-Mass.) agreed with the language and it was put in the bill as part of that Kennedy-Jeffords compromise. Obviously there were other parts of it, but the "significant relationship", the "successful performance of the job" comes from Sununu and Kennedy. It was also approved by Senator Orrin Hatch (R-Ut.), not exactly one of the foremost proponents of quotas in this country. It is also in the administration bill of October 20 (which is awful in every other respect). The amendments that were added were significant.

The bill cannot be construed to require or even to encourage quotas. The mere existence of a statistical imbalance is not enough to prove disparate impact. These are all amendments that are stated in the legislation. Monetary damages or jury trials are not available for disparate impact cases. Plaintiffs must show which specific practices resulted in disparate impact unless the defendant employer destroyed, concealed or failed to keep the records. The diversity of supporters is unbelievable if you think about it. They included not just conservatives like Senator John C. Danforth (R-Mo.), Senator Pete Domenici (R-N.M.) and Representative Tom Campbell (R-Calif.), but also Arthur Fletcher, the Bush appointment to be Chairman of the Civil Rights Commission, Louis Sullivan of the Department of Health and Human Resources, Connie Neuman, the Jewish groups (probably the most vigorous opponents of quotas in the Leadership Conference), the American Defense League, the American

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Act of 1964 prohibits employment practices which cannot be shown to be related to job performance).

[39] *Id.*

[40] *Id.* at 426. The Court stated that it granted certiorari in part to resolve the question of whether the Civil Rights Act of 1964 prohibits employers from requiring high school diplomas or "passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when neither standard is shown to be *significantly related* to successful job performance." (emphasis added).

Jewish Committee and the American Jewish Congress. They all vigorously support the bill and say the Bush Administration is absolutely crazy. Again, this bill has nothing to do with quotas. James Kilpatrick supported the bill and asked the President to sign it. Business Week, in addition to two-thirds of the nation's editorial boards, the National Black Republican Council, the American Bar Association and of course, most important, 65% to 66% of the House and the Senate supported the bill. A quota bill would not be supported by 66% of the Senate. By the way, if *Griggs* ever did lead to quotas or if this bill ever led to quotas, all the Bush Administration would have to do is enforce the law because defensive quotas - quotas used to get away from litigation - would be in violation of the law.

I think quotas were not the real reasons for opposition. After the business community, together with Danforth, Sununu, Kennedy and Hatch, worked it out, the real reason became known. They do not want monetary damages for intentional discrimination, especially with respect to women. That I believe is the major reason for the business community. The Bush Administration's bow to the big business community certainly is one thing, but I think it is more a question of conservative idealogues who just agree with the 1989 Court decisions. They think those cases were decided correctly and everything that they did over the last year or two was meant to ratify those decisions, not overturn them. On the damages issue, the Bush Administration says yes, we want damages after all this debate, but there will be a $150,000 cap on monetary damages, both compensatory and punitive. In addition, there will be no jury trial. Finally, judges would have vast discretion to say that there could not be damages, either because it would not be a deterrent or because it would not be in the public interest. The bill is going to be law this year. It will go to the President by April or May.

In summary, I am very optimistic, obviously, about the Republicans and Democrats in Congress. I think they will continue to overturn Supreme Court decisions which were wrongly decided. I am pessimistic about the Supreme Court. I think we are in for a long haul with the Supreme Court. Unfortunately, after a brief bit of optimism with the Bush Administration, I am pessimistic. Their rhetoric, their accessibility, their tone was good for the first 12-15 months, but they have shown themselves

to be very similar to the Reagan Administration. In fact, in some respects they are even worse. When we were fighting Meese and Reynolds during the 80's on the Executive Board on Affirmative Action, on the Fair Housing bill or on the Voting Rights Extension, we always had pragmatic conservatives at the White House, the Jim Baker types, the Donald Regan types, the Howard Baker types. Many times they would curb the excesses of Meese and Reynolds. We do not have that any more. Now we have John Sununu and Boyd Gregg, and believe me, there is no difference between John Sununu, Boyd Gregg and Dick Thornburgh and the people at the Department of Education who came up with this minority scholarship issue.

Unfortunately, on civil rights, the right wing controls the policy processes within the Bush Administration. And thus far, President Bush is afraid of the right wing. He has given the right wing a blank check on civil rights. But we are going to come back on the Civil Rights Act of 1991 and any other civil rights restoration act that has to be put in over the next few years. We have had a marvelous 25 years when you think about it. It has been a second American Revolution in which many of the dreams embodied in the Constitution have been realized. There is a bipartisan consensus in this country that was proven during the Bork nomination and has been proven many times before and since. What I think we need in the end is an electorate which votes its positions in a presidential election. Then we will get either a moderate Republican or Democrat in the White House who will nominate Justices who will bring the Court back to the center. Thanks a lot.

Harold McDougall: I would like to hear from Roger Clegg now.

Roger Clegg:

Let me begin by responding directly to Mr. Neas. Nothing that he said is true. I am smiling but I mean that. He says that the Bush administration has been uniformly hostile to civil rights, and then immediately begins to carve out exceptions to that statement. He acknowledges in the criminal law enforcement area that it is not true. In the housing area he concedes it is not true. He acknowledged that the Americans with Disabilities

Act,[41] which he rightly characterizes as the most dramatic improvement in civil rights law over the last twenty-five years, was passed with strong administration support. That support included a very active role by U.S. Attorney General Richard Thornburgh, who pushed that legislation through the Senate and House.

Mr. Neas also did not mention enforcement of the Voting Rights Act under the Bush Administration. I think he would be hard pressed to come up with any legitimate criticism of our policy in that area either. What you are left with, then, is employment discrimination policy and school desegregation. What the latter boils down to is that the Bush administration, like the Reagan Administration, opposes interminable busing and judicial supervision of school districts once they have successfully desegregated. I think that most Americans would agree, but this issue is really not on the table today.

In the employment area, we oppose reverse discrimination. I make no apologies for our opposition to reverse discrimination. I think that it is poisonous, whether hard and fast quotas or surreptitious preferences, it is all bad. Let me turn to the Civil Rights Bill of 1990,[42] which is now the focus of the reverse discrimination debate.

Soon after this bill (also called the Kennedy-Hawkins bill) was introduced, President Bush stated that he would work with Congress to pass civil rights legislation. But he set out four principles which he said would have to be honored by any legislation were he to sign it.[43] The first of course was that he could not sign a bill that called for or led inevitably to racial quotas. Second, he required that any legislation be procedurally fair to employers and also to innocent third parties who might be kept by the Kennedy-Hawkins bill from challenging elicit quotas in court. Third, he agreed that there should be legislation providing for relief in the area of sexual harassment, but that it had to be structured in such a way that it would not lead to a bonanza for plaintiffs' lawyers (something which the Kennedy Hawkins bill would have

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41 42 U.S.C. §§ 12101 *et. seq.*; 47 U.S.C. §§ 152, 221, 225 & 611.

42 The 1990 Civil Rights Bill has also been referred to as the Kennedy-Hawkins bill.

43 Remarks of President Bush at a Meeting with the Commission on Civil Rights, 26 WEEKLY COMP. PRES. DOC. 778 (May 17, 1990).

done). Finally, he said that Congress should be willing to play by the same kinds of rules that it was setting for everyone else and that Title VII should be extended for the first time to cover Congress.

The Kennedy-Hawkins bill that was vetoed by the President last year, and which has now been reintroduced, failed to meet any of those criteria. In its provisions overturning *Wards Cove*,[44] the bill would result in employers being pushed irresistibly to adopt quotas. The bill is *not* restorative of *Griggs*.[45]

The bill would also overturn *Wilks*[46] so that, for the first time, something called a "Civil Rights Bill" would bar legitimate civil rights plaintiffs from having their day in court, since they would be unable to challenge consent decrees and other relief which they felt contained quotas or were otherwise illegally discriminatory against them. Our opponents always say that their bill is designed only to keep white firefighters from challenging legitimate consent decrees, but in fact, of course, the legislation would prevent Hispanic firefighters or black firefighters or people of any race, as well as women and religious minorities from challenging these decrees.

The bill is unfair in other ways, too. It would, for instance, overturn the Supreme Court's decision in *Price Waterhouse*. But the decision that the Supreme Court reached there was at least, if not more, favorable to plaintiffs than the case law in most of the courts of appeals which addressed the issue. *Price Waterhouse* was also not a departure from Supreme Court precedents.

The damages provisions in the bill, of course, cannot purport to restore anything. They were not included in response to any Supreme Court decision. The position of the administration is simply that Title VII has worked very well for the last 26 years, and that dramatic rewriting of Title VII along the lines of a medical malpractice-tort model is something that is in the long term of interest of no one. Again, the Administration has made it clear that where inequities do exist in the law, particularly in the areas of harassment - whether it is racial harassment after *Patterson*[47] or

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44 *See supra* note 7.

45 *See supra* note 38.

46 *See supra* note 9.

47 *See supra* note 31.

sexual harassment - that we are willing to sign legislation that remedies those inequities. But you cannot use that as an excuse to jettison completely the carefully balanced and well proven remedial scheme in Title VII. Finally, the bill also failed to provide for a private cause of action in court for employees of members of Congress who suffer discrimination.

Before making a few remarks on the institutional competence of the political branches and the judiciary in this area, let me make just one last point in reponse to Mr. Neas. The gravest injustice that is done by Mr. Neas' concentration of his energies on this bill, which is bad on its own terms, is that it seduces us into ignoring what are the real and serious problems that confront minorities and poor people of all races and ethnic backgrounds. Certainly discrimination is still a problem, but the real problems Congress should be addressing are education, training, the failure of our public education system, particularly in our inner cities, drugs and drug related crimes, housing, health and unemployment. These are the real issues, the issues it seems to me that members of groups like the Leadership Conference should be addressing.[48]

With respect to the competence of the political and judicial branches in the area of affirmative action, it seems to me that the question has to do with norm-setting and there are two sub-questions: there is the question of who is best at *setting* the norms; then there is the question of who is best at *protecting* the norms once they are set.

It seems to me that the norm has already been set, or at least

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[48] As William Raspberry recently put it: "And if the Leadership Conference on Civil Rights [Mr. Neas's organization] will forgive me, in the context of the problems confronting Black America, [the bill] may not be all that important." WASHINGTON POST, Mar. 13, 1991, at A17 ("Why Civil Rights Isn't Selling"). Mr. Raspberry also points out that an "unpublicized survey commissioned by the Leadership Conference on Civil Rights" revealed that "[w]hite Americans see the black leadership as no longer concerned with fairness but only with group advantage," and that whites oppose "efforts to provide preferential benefits for minorities, which they see as the main commodity of the civil rights leadership." *Id.* *See also* S. LIPSET, EQUALITY AND THE AMERICAN CREED: UNDERSTANDING THE AFFIRMATIVE ACTION DEBATE 21 (1991) ("It is doubtful that affirmative action policies or quotas have done or will do much for the . . . fatherless black ghetto youth, who grow up in poverty and receive an inferior education at best.").

the norm that I am very comfortable with was set in 1868[49] and in 1964[50] - and basically that norm is the principle of color-blindness. There should not be discrimination against anyone on the basis of immutable characteristics. To say that discrimination is justified as being only a little bit of discrimination because it is only a preference, rather than a hard and fast racial quota, is really ducking the issue. We are talking here about discrimination. Furthermore, I think discrimination of any kind is a poison in our society. As America becomes increasingly a multi-racial society, the vulcanization that is an inevitable by-product of divvying up jobs, housing and government contracts on the basis of race becomes more and more untenable. The intellectual arguments that have been made in the past supporting those preferences are becoming increasingly discredited and are eventually going to collapse of their own weight.

So the fight now is not about setting that norm. I think our law in the 1964 Act[51] and in the equal protection clause[52] sets the correct norm. The fight now is between those who are defending that norm, the Administration, and those who want to institutionalize reverse discrimination to some degree or another by pushing legislation like Mr. Neas's bill.

As protecting that norm, I begin from the following two premises: that racial allocations are bad, but that there are enormous political pressures to make allocations on the basis of race. This was true in the Jim Crow South and it is true now. The question is who is better at withstanding the pressures that are inevitably brought to bear to use race as a means of putting a thumb on the scale.

The courts, in theory, are better at withstanding political pressures. I think that what the Supreme Court did in 1989 in cases like *Ward's Cove*[53] and *Martin v. Wilks*[54] was to ensure a level playing field. However, the courts can act only in cases and only where there are blatant violations. The Equal Protection and

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49 *See* U.S. CONST. amend. XIV; *see also* The Civil Rights Act of 1866, 42 U.S.C. §§ 1981, 1982 *et seq.*; 18 U.S.C. §§ 242.

50 *See* The Civil Rights Act of 1964, 42 U.S.C. § 2000a *et seq.*

51 *Id.*

52 *See* U.S. CONST. amend. V & XIV.

53 Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

54 Martin v. Wilks, 490 U.S. 755 (1989).

Due Process clauses are good backstops, but they are no more than backstops.

So I have to acknowledge that the battleground now is Congress. When I came back to the Yale Law School after working for President Reagan in 1980, I attended a seminar in my last semester which was being taught by Professor Charles L. Black, Jr.. As you can imagine, at Yale the general consensus of the student body was that what had happened in November of 1980 was a tremendous disaster. But Professor Black began the seminar by remarking that he had learned a long time ago that nothing you win in the courts cannot be lost in the political process. I am learning that lesson again in the wake of the Court's 1989 decisions. I think that there is a chance, unfortunately, that a great deal of what was won in vindicating the principle of color-blindness in the 1980's, and the 1960's for that matter, may be lost. Make no mistake about it, that it is what is at stake.

This is not an activist Supreme Court. This is a Court that is simply no longer doing a liberal Congress's job for them. I think there is a role for both Congress and the courts in the field of affirmative action. But Congress needs to spell out what it is doing if reverse discrimination is to be institutionalized. It should not expect the Court to do its dirty work for it, as I think it hoped it would do in the past.[55]

Harold McDougall: Thank you, Roger. We will ask for Bill Eskridge to speak now.

Professor William Eskridge:

I want to put this in a larger political context for the gentlemen who preceded me. They are intelligent men of good will. I think their wide divergence of views is attributable to the divided government we have had essentially for the past 20 years. The people have consistently, except once, voted for a conservative presidency (relatively speaking) that is hostile to some of the agenda of civil rights groups (such as affirmative action). Yet they voted for conservative presidents, such as Ronald Reagan and George Bush, and voted for liberal Congresses, particularly

55 *See* H. BELZ, EQUALITY TRANSFORMED: A QUARTER-CENTURY OF AFFIRMATIVE ACTION.

in the House of Representatives. I want you to keep that as sort of a general overview of the different perspectives that I think have been reflected so far.

I want to do three things: first, I want to set forth a political model for what has been going on in the last 30 years in the Court, and Congress, Executive Branch interaction in civil rights cases. Second, from that model, I am going to draw some descriptive predictions and observations. Third, I will conclude with some normative observations about judicial activism.

My game is reflected in a handout that you either have or can get (and is reproduced on this page).[56] The basic analytic is a sequential political game in which the players are Congress, the

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FIGURE 1
Court/Congress Preferences
in Civil Rights Cases, 1962-71

C(H) J C H
x

FIGURE 2
Court/Congress Preferences
in Civil Rights Cases, 1972-81

C(H) C H J
x

FIGURE 3
Court/Congress Preferences
in Civil Rights Cases, 1981-90

C(H) C H V J/P
x

J = Preferences of Court
H = Preferences of median member of chamber
C = Preferences of median member of gatekeeping committee
C(H) = Gatekeepers' indifference point (namely, point where median committee member is indifferent between that point and the chamber median)
P = Preferences of the President
V = Preferences of chamber's veto median (namely, legislator dividing one-third of chamber from two-thirds needed to override a veto)
x = Equilibrium result: where Court will interpret statute

President and the Court. Obviously, the first player is Congress, which passes statutes; but statutes have an indefinite lifetime and can go on forever. We really start the game sequentially with a court decision; a court decision followed by possible Congressional response; possible Congressional response followed by possible veto by the President, followed by possible override. Thus, the first feature of the game is that it is sequential in nature.

The second feature of the game is the assumption that no player likes to be overruled. For example, the game assumes that the Supreme Court, when it hands down a decision, ordinarily is not going to want to be overruled by Congress. Congress, in deciding whether or not to overrule, will tend not to overrule a decision which is subject to a presidential veto which can be sustained. The President, in turn, will tend not to veto a statute when the veto can be overridden. So the second feature of this thought experiment is that no player wants to be overruled.

The third feature is that on the issues that are before the political process, each player starts off with certain raw or preexisting preferences. In other words, there is a certain preference about that issue, a preference which might be subject to some change over time but which I will graph in a moment.

I want to divide this game into three periods: the Warren Court and the early Burger Court (1960 to 1972); the early and middle Burger Court (essentially 1972 into the 1980's); and then the late Burger and Rehnquist Courts. This is how the game operates.

The configuration of the Warren Court's preferences concerning civil rights were those graphed by Figure 1 above:[57] Congress was very much to the right of the Court. The Warren Court was much more sympathetic on the whole to civil rights than the median member of Congress. Remember, this was a Congress with Strom Thurmond (R-S.C.), a lot of southern Democrats, and a lot of conservative Republicans. Interestingly enough, the key people in this game are neither the members of Congress nor the Court, but are the Gatekeepers. Gatekeepers are the people who have some control—namely, but not absolute control, over the agendas of Congress, i.e., the relevant commit-

57 *See* Figure 1, *Id.*

tees and the majority leadership. I think the committees and majority leadership in the 1960's on most civil rights issues were to the left of the median member of Congress.

All of these preferences—of the Court, median member of Congress, and the median member of a gatekeeping Committee can be graphed. (J, H and C, respectively). One final point relevant to Figure 1 is the Committee's "indifference point." That is a point somewhat to the left of the gatekeepers' preferences, which they prefer exactly as much as what the median member of Congress would reach.

This is the way the game worked in the 1960's. The Supreme Court was substantially to the left of Congress yet never got overruled in interpreting civil rights statutes. Some of their interpretations from the point of view of original intent were very far to the left. The *Griggs*[58] case is not a serious effort to divine the original intent of the 1964 Congress, nor is the *Allen*[59] case a serious or successful effort to discern the original intent of the Voting Rights Act. In addition, *Alfred H. Mayer*[60] is probably not a correct interpretation of the original intent of the 1866 Civil Rights Act. That is just to mention three very controversial Warren Court decisions.

Yet, none of the decisions was overruled. And, indeed, *Griggs* was talked about approvingly in the committee reports to the amendments of Title VII in 1972.[61] *Allen* was talked about approvingly throughout the process of the reenactment of the Voting Rights Act.[62] *Alfred H. Mayer*, which was the only of these decisions to be seriously challenged in the legislature, was essentially headed off from a legislative overruling by the gatekeepers, who in conference were able to drop a provision which would have cut back on *Alfred H. Mayer*.

My explanation for this phenomenon (the Court's very liberal interpretations) is the Court was imposing its own preferences on the statute. The preferences were such, however, that

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

59 Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

60 Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

61 *See* Equal Opportunity Act of 1972, H.R. REP. No. 238, 92d Cong., 1st Sess., *reprinted* in 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2144 & 2156.

62 *See* Voting Rights Act Extension, H.R. REP. No. 397, 91st Cong., 1st Sess., *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 3277, 3284.

the gatekeepers had no incentive to overrule the Court. This is because either the Court put itself close enough to the gatekeepers that the gatekeepers liked the Court's result, or they liked it more than what would happen if they were to introduce an overruling bill and Congress passed a bill adopting its own preferences (H). (Once you give a bill to Congress, it is going to tend to go to H.) So the gatekeepers will attempt to protect the Court's result even when it is to the left of the position preferred by the Gatekeepers.

In the 1960's, there were no major overrulings, even though the Court was not implementing original intent and was not implementing the preferences of current legislative majorities. That period was the Warren and early Burger Court. The next period spans from about 1972 into the early 1980's.[63] The preferences for this period are those mapped out in Figure 2.

In this period, the members of Congress moved gradually but inexorably to the left. In turn, Congress became more liberal on civil rights issues. A substantial number of people became more liberal, including a lot of liberal Republicans. The gatekeepers remained slightly to the left of the median member of Congress, but the Court, (and this is the important shift) shifted gradually but inexorably to the right. The key events of that period were the Powell and Rehnquist Supreme Court appointments. Once Justice Powell and Justice Rehnquist started voting, the preferences of the Court moved sharply to the right. I think this is the important movement.

The most interesting thing that happened during this period (1972-1981) is that there were more overrulings: *Gilbert*[64] in 1976 was overruled in 1978;[65] *Alyeska Pipeline*[66] was overruled in

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63 *See* Figure 2, *supra* note 56.

64 General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (holding that an employer's benefits plan, which excluded benefits for disabilities resulting from pregnancy, did not violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*).

65 On October 31, 1978, Congress amended Title VII by adding a prohibition against disparate treatment of pregnancy as a disability. Pub. L. No. 95-555, 92 Stat. 2076, codified as amended at 42 U.S.C. § 2000e(k) (1988). This legislation overturned the Court's holding in *Gilbert*. *See, e.g.*, Islesboro School Comm. v. Califano, 593 F.2d 424, 430 (1st Cir.) *cert. denied*, Harris v. Islesboro School Comm., 444 U.S. 972 (1979); Somers v. Aldine Indep. School Dist., 464 F. Supp. 900, 902-03 (S.D. Tex. 1979), *aff'd* 620 F.2d 298 (5th Cir. 1980).

66 Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) (5-2 deci-

1976;[67] the *McMann*[68] case was substantially overruled within months in 1978 of the decision of the Supreme Court;[69] and the *Bolden*[70] case, which was overruled in a couple of years after its decision in 1980.[71] The reason, it seems to me, that there were more overrulings in this period was because the Burger Court was not playing this game. The main reason that you had more overrulings was that the Burger Court missed the Congressional median (H) in several of the cases. In some of the cases it was truly hard to figure out where the legislative median was. In *Gilbert*, the Burger Court apparently believed there was no sex discrimination, since the world in pregnancy can only be divided between pregnant women on one side and men and non-pregnant women on the other side.[72] In *McMann*, the Burger Court's decision was handed down around the same day as a bill to codify

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sion) (prevailing party in civil rights suit to prevent the issuance of government permits required for construction of Alaskan pipeline sought attorneys' fees under "private attorney general" theory. Court denied fee award holding that where Congress did not contemplate the granting of attorneys' fees, the court did not have authority to do the same).

67 Congress abrogated the holding in *Alyeska* in 1976 when it passed the Civil Rights Attorney's Fees Awards Act. Pub. L. No. 99-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (1982)).

68 United Air Lines v. McMann, 434 U.S. 192 (1977) (court reversed the U.S. Court of Appeals for the Fourth Circuit and held that a retirement plan, which mandated retirement at age 60, did not violate the Age Discrimination in Employment Act of 1967. Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. 621 *et seq.*)).

69 The Supreme Court's holding in *McMann* was expressly overruled one year later by the enactment of the Age Discrimination in Employment Act Age Discrimination Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (codified as amended at 29 U.S.C. § 623(f)(a) (1978)). In that Act, Congress amended Section 4(f)(2) of the ADEA of 1967 (codified at 29 U.S.C. 623(f)(2)) to read "and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual." Congress added this language provision because it specifically "disagree[d] with the Supreme Court's holding and reasoning in the [*McMann*] case," House Conf. Rep. No. 950, 95th Cong., 2d Sess., *reprinted* in 1978 U.S. CODE CONG. & ADMIN. NEWS 529. *See, e.g.*, Carpenter v. Continental Trailways, 635 F.2d 578 (6th Cir. 1980) (court held that 1978 amendment did not apply retroactively to bona fide pension plans existing before amendment).

70 Mobile v. Bolden, 446 U.S. 55 (1980) (plurality) (court held that the Mobile, Alabama, at-large electoral system did not violate the fifteenth amendment).

71 On June 29, 1982, President Reagan signed the Voting Rights Amendments of 1982 overturning the *Bolden* decision. Pub. L. No. 97-205, 96 Stat. 134 (codified as amended at 42 U.S.C. § 1973 (1982)).

72 429 U.S. 125, 134-40 (1976).

the fourth circuit's decision in *McMann* which the Supreme Court reversed.[73]

The Burger Court was not quite as politically savvy as the Warren Court was. Many of them were a little bit cloistered perhaps in their approach. So you see more overrulings at this stage by the Court. But one terribly significant thing is that the relatively conservative Burger Court still came down with a considerable number of liberal decisions. The *Weber*[74] and *Bob Jones*[75] cases, and several others have been mentioned. Very often the Burger Court's articulation of its liberal decisions said nothing about original legislative intent but instead referred to subsequent congressional signals—legislative inaction, subsequent legislative history, or the temper of the times. This proposition is seen in *Bob Jones* and implicitly in *Weber*. All of these things show that the Burger Court was trying, albeit sporadically and sometimes unsuccessfully, to catch the temper of the times and prevent being overruled.

Furthermore, it is important to keep in mind in these circumstances that there is no room for error. The Warren Court was lucky. It may have misperceived the gatekeepers position, but that was fine, because they had a whole area of fudge room to play around in and still reach liberal results. Burger's Court, however, did not have the playing around room. The Burger Court was often in grave danger of being overruled unless its reasons were persuasive enough to shift it somewhat to the right. Historically, the Burger Court can be viewed as somewhat unlucky.

My third diagram (Figure 3) graphs the changes that took place in the 1980's.[76] In the 1980's, Congress went a little bit further to the left, except for the period when the Republicans controlled the Senate. The Court proceeded further to the right.

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[73] *See supra* note 64.

[74] United Steelworkers of America v. Weber, 443 U.S. 193, 202 (1979) (respondent, a white male production worker, instituted a class action suit against petitioner, alleging that its set-aside programs for black craftworkers discriminated against him and those similarly situated in violation of §§ 703(a) and (d) of Title VII. The Supreme Court in holding for petitioner ruled that such programs were not prohibited by Title VII since that legislation was enacted to ameliorate the plight of the African American in our economy).

[75] *See supra* note 1.

[76] *See* Figure 3, *supra* note 56.

The big difference was that the President started playing a major role. The Reagan and Bush Administrations had preferences about civil rights which were sharply to the right of Congress, not just a little bit to the right, but sharply to the right, and much more lined up with the Court's preferences. Thus, the President started aligning his civil rights preferences with the Court, introducing the possibility of a veto.

What that meant in the 1980's was that the Court had a lot more maneuvering room to implement conservative preferences into civil rights statutes because it did not have to hit the legislative median (H). Indeed, the Court could miss the median by a country mile. All it has to hit now is V, (V is the point in Congress where two-thirds of them are to the left and one-third of them are to the right), which is the veto median. If the Court can get to the left of V, even if it does not reflect current or past or any legislative preferences, it will not be overruled. In this way, the Rehnquist Court is historically lucky like the Warren Court.

The irony of all of this is that in 1981, with Reagan in the White House, you would expect to see a marked conservative shift in Title VII and some of the other statutes. There were exceptions: *Bob Jones*, where they knew where the congressional median was and they knew that the veto media was supportive of the liberal position, not the President's position, and they knew they would get overruled. Justice Powell and Chief Justice Burger and the rest of them went the liberal way in *Bob Jones* because of strong legislative signals. Similarly, in *Johnson*,[77] *Arline*,[78] and *North Haven*[79] the Court cited subsequent legislative history and

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[77] Johnson v. Transportation Agency, 480 U.S. 616, 642 (1987) (voluntarily adopted affirmative action plan was upheld as consistent with Title VII's goal of "eliminating vestiges of discrimination in the work place").

[78] School Board v. Arline, 480 U.S. 273, 282-86 (1987) (court held that employment discrimination against person who had a contagious disease was a violation of Section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 394 (codified at 29 U.S.C. § 794)). Section 504 provides that an "otherwise qualified handicapped individual" shall not be discriminated against solely based on his handicap in a federally-funded state program. The Court, in interpreting congressional intent, stated that "discrimination based on contagious effects of a physical impediment would be inconsistent with the basic purpose of section 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or ignorance of others."

[79] Board of Ed. v. Bell, 456 U.S. 512 (1982) (pursuant to section 902 of Title IX of the Education Amendments of 1972, the Department of Health, Education &

evidence of current legislative preferences.

The anomaly here is the amount of conflict in the late 1980's. There were a number of overrulings: the Restoration Act,[80] the bill overruling *Betts* this year,[81] the nine cases that would have been overruled by the statute that was vetoed last year and will probably be passed this year. There was at this stage much more conflict, more statutes overruled, and more vetoes.

The way I analyze the situation is that in the late 1980's there was a significant group on the Court, led by Justice Scalia, that did not want to play this game anymore. Likewise, they did not want to play the original intent game either. This group wanted to follow the text of the statute. That is, Scalia, Kennedy, sometimes O'Connor and sometimes Rehnquist, followed the text of the statute, even if they reached what could be called stupid results. They clearly viewed their role as not making new law, but rather applying the text as written. Moreover, if anybody is going to update the text, in their view, it should be Congress.

That is my description of what has been going on in the last 30 years. Here are some descriptive hypotheses that I have derived from the little thought experiment you can do. Hypothesis number one is that original intent does not matter for any of these people. Mainly because none of what these Courts were doing involved original intent or the implementation of original intent. When you read these decisions you notice either zero discussion of original intent or a ridiculous construction of original

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Welfare (H.E.W.) issued regulations which prohibited federally funded education programs from discriminating against employees on the basis of sex. Petitioner brought suit challenging H.E.W.'s authority to issue such regulations. In addition, Petitioner alleged that Title IX applied to students only. The Supreme Court held that Title IX does prohibit employment discrimination in the education field and that such interpretation was wholly consistent with Congressional intent).

[80] 20 U.S.C. §§ 1687 to 1688; 29 U.S.C. §§ 706, 794; 42 U.S.C. §§ 2000d-4a, 6107 (1982).

[81] Public Employees Retirement Sys. v. Betts, 492 U.S. 158 (1989) (Court held that an employer need not show a legitimate cost justification in order to deny employee benefits based on age). *Betts* was overruled by the Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (codified at 29 U.S.C. §§ 621 *et seq.* (1967)) which permits age based reductions in employee benefits only where justified by significant cost considerations, thus placing burden on employer to demonstrate his actions are lawful).

intent as in *Alfred H. Mayer*[82] and *Patterson.*[83]

I think the best explanation of what was, and is, going on was the raw imposition of judicial preferences into statutes within political balance. During the Burger Court, if there was responsiveness to anything it was not original intent, but rather current legislative intent and subsequent legislative history. In the Rehnquist and Scalia Court, you have seen a retreat away from that. The Scalia Court is much more consistent in inveighing against the use of subsequent legislative history or other indicia of current legislative preferences. All that is, in my opinion, is a signal that they are not going to play this game any more. They are going to play the game of textualism. That is point number one.

Point number two is that the new textualism is really where the action is today. The new textualism is the ideology of the Scalia Court. It is not just a philosophy of judicial interpretation of statutes. It is a whole cluster ideology about the Court's role vis-a-vis legislation. All you do is follow the text, you do not look at legislative history, and you certainly do not care about current legislative preferences. And if Congress does not care about it, let Congress go back and rewrite the statutes. From Congress' point of view this is an exorbitant waste of its valuable resources and its highly limited agenda. Congress is not very happy about this and the Court is not very happy with Congress. That is the second observation.

The third observation is what should be expected for the 1990's. I think two things are set for the 1990's. I think number one is Congress is going to be much more liberal with the Court. I think Congress is going to remain in Democratic hands. Even when the Republicans took over the Senate, there were enough liberal Republicans on the particular committees that there was a majority for the liberal civil rights agenda. And I think that is basically set. I think the Court is also basically set. It is going to

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[82] Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (petitioner filed suit under 42 U.S.C. § 1982 claiming that respondent refused to sell him a home because he was an African-American. The Eighth Circuit held that Section 1982 applied to state action only, not private entities. After a comprehensive explication of the legislative history of the Civil Rights Act of 1866, the Court held that Section 1982 did apply to private entities, because Congress intended to eliminate any and all forms of discrimination against African-Americans).

[83] Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

be conservative. Its preferences are conservative. And will remain so, since the older Justices tend to be the more liberal ones. It is all white, male, except for Justice O'Connor, who is as conservative as the white males, and Justice Marshall, who is very elderly and will probably be replaced by a fairly conservative black.[84] So I think the Court is also set.

Does that mean that I think there is going to be conflict? I do not think there will necessarily be conflict. It is going to depend entirely on the reaction of the moderate right wing of the Court to all of this fuss over the Restoration Act and the Civil Rights Act of 1990 and 1991. The Court has normally retreated in the past when it has been slapped on the hands and slapped on the wrist. They said OK, we missed current legislative preferences, we made a mistake and now we are going to do it right. We saw that in *Gingles*,[85] we see that in the reaction to the pregnancy discrimination act[86] and in all sorts of other statutes. And that message would be the message for O'Connor and White and maybe Rehnquist. If they abandon Justice Scalia and Justice Kennedy, then you will see a movement of the Court back to the 1970's. Not because it is not a right wing Court, but because it is playing this game again. And there are a lot of incentives for them to want to play the game. I think if they do not play the game, you will see a lot more conflict.

Here are my normative observations. I think this game makes us think differently about judicial activism. I define judicial activism in the traditional way as the imposition of judicial non-elected preferences into legislation that has been enacted by

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[84] Justice Thurgood Marshall stepped down from the United States Supreme Court after the conclusion of the Court's October 1990 term. President George Bush nominated Judge Clarence Thomas, a conservative African-American who presided on the United States Court of Appeals for the District of Columbia. Thomas was confirmed by the Senate on October 15, 1991 by a vote of 52 to 48 as an Associate Justice of the Supreme Court. 137 CONG. REC. S14704-05 (daily ed. Oct. 15, 1991).

[85] Thornburgh v. Gingles, 478 U.S. 30 (1986) (African-American citizens of North Carolina challenged a redistricting plan claiming that it impaired black citizens' ability to elect representatives of their choice in violation of the Voting Rights Act of 1965. The Court found, based on the totality of the circumstances, that the redistricting plan acted to impair "geographically insular and politically cohesive groups of black voters to elect candidates of their choice").

[86] *See* Pub. L. No. 95-555, 92 Stat. 2076, codified as amended at 42 U.S.C. § 2000e(k) (1982).

the legislature. Under that traditional definition, yes, the Warren Court is activist. Yes, they imposed their preferences on the statutes. They did not get overruled because they were lucky. But the Burger Court was just as activist. It just had less maneuvering room. In my topology the most activist court is the Rehnquist Court.

I think what we will see in the 1990's, particularly to the extent that the ideology of Scalia and Kennedy prevails, is the Rehnquist Court moving away from constitutional activism. I think we will see less of that than we did with the Burger and Warren Courts. I think, however, that we will see a lot more statutory interpretation activism where the judges will impose their preferences on statutes completely contrary to legislative preferences but where the legislature can at least respond. The mechanisms they have already used are not only the new textualism, but also this whole group of clear statement rules that the Court has come up with.

I think that is activism and it is much more substantial activism than under the Warren Court or even under the Burger Court. That is the first thing I think you will see. I think the second thing you will see is that Congress is going to have to come up with more creative responses. It will do it every time a Supreme Court decision comes down just to pass more statutes. Congress cannot do that all the time. The legislative agenda is very limited. From the point of view of a progressive civil rights agenda, it is insanity to have to keep going back time after time and restoring what you thought you already had. There is discrimination, hate speech, heartless oppression of gays and lesbians, problems in inner cities, and other problems that deserve to be on the legislative agenda and are not being studied because old battles must be refought. It seems to me if you are progressive in Congress, you would think this is just insanity. What Congress must do is come up with more creative strategies to deal with the Supreme Court.

One thing that might be considered is to give more civil rights law making power to agencies. These may be either agencies Congress controls or agencies the President controls so long as they will play the game. Agencies play this game a little bit more consistently than the Court. You might end up with V or H, but at least you will end up with V. One way you can do that

even under current law is to give the EEOC ruling authority. In *Gilbert*[87] the EEOC has all of its rules. Rehnquist in the opinion said the EEOC's rules are irrelevant because they do not have some kind of formal authorization, as if that should make any difference.

To escape such reasoning, Congress must give the agencies formal authorization for rule making. But I do not think Congress will have to go that far. I think Souter and O'Connor will see the handwriting on the wall. Last term was not the disaster that had been predicted for civil rights groups. Maybe we will see a move back to playing this game, which is the most that you can hope for until there is an election of a new President. If Vice-President Dan Quayle is elected President, you are going to see the same game. If Governor Mario Cuomo (D-N.Y.) were elected, it will obviously be a very different game, because the President will no longer be here to make you go to the veto median. That is my basic model. Thank you very much.

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[87] General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

APPENDIX A[1]

S. 2104. A bill to amend the Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment, and for other purposes; to the Committee on Labor and Human Resources.

Civil Rights Act of 1990

Mr. Kennedy: Mr. President, on behalf of Senator Jeffords and Senators Metzenbaum, Durenberger, Gore, Hatfield, Mikulski, Packwood, Pell, Simon, Adams, Biden, Bingaman, Bradley, Burdick, Cohen, Conrad, Cranston, Dodd, Fowler, Harkin, Inouye, Kerrey, Kerry, Kohl, Lautenberg, Leahy, Levin, Matsunaga, Mitchell, Moynihan, Riegle, Sarbanes, Specter, Wirth, and I introduce the Civil Rights Act of 1990.

From the beginning, civil rights has been the unfinished business of America—and it still is. In the past 35 years, America has made significant progress in removing the stain of bigotry and segregation from our land. We have had our own ongoing peaceful revolution, and its accomplishments are a tribute to the remarkable resilience of our democracy and its institutions.

In achieving this progress, the role of one of these institutions—the Supreme Court—has been indispensable. For a generation, a long line of landmark decisions has kept the Nation true to the standard of the Constitution and the principle of equal justice under law.

In the past year, however, the Supreme Court has issued a series of rulings that mark an abrupt and unfortunate departure from its historic vigilance in protecting civil rights. The fabric of justice has been torn. Significant gaps have been opened in the existing laws that prohibit racism and other types of bias in our society.

The Civil Rights Act of 1990 is intended to overturn these Court decisions and restore and strengthen these basic laws.

The *Patterson* decision, interpreting an 1866 civil rights law, drew an artificial distinction that prohibits race discrimination in

[1] Appendix A contains excerpts from the Senate debate on S. 2104, 101st Cong., 2d Sess. (1990) beginning at 136 CONG. REC. S1018 (daily ed. Feb. 7, 1990).

hiring workers, but leaves workers on the job unprotected from harassment or from being fired or denied promotion because of racial prejudice. At a single stroke, the Supreme Court nullified the only Federal anti-discrimination law applicable to the 11 million workers in the 3.7 million firms with fewer than 15 employees. Already, the damage is unmistakable. The *Patterson* decision has caused the dismissal of at least 96 claims of race discrimination in the past 8 months—and it should be overruled by Congress.

In the *Wards Cove* decision, the Court unfairly shifted a key burden of proof from employers to employees in cases involving practices that operate to exclude minorities and women. Hundreds of cases in the past two decades have struck down subtle and not so subtle practices designed to keep minorities and women from participating fully and fairly in our economy. By shifting the burden of proof to workers, the Supreme Court has made it far more difficult and expansive for victims of discrimination to challenge the barriers they face.

Wards Cove was a 5 to 4 decision in 1989 that overruled the unanimous *Griggs* decision by Chief Justice Burger in 1971. Chief Justice Burger was right in 1971, and Congress should restore the law in 1990.

What is at stake in this apparently technical restoration of the law is of profound importance for the future of our country. Ninety-one percent of the growth in the Nation's work force in the 1990's will be women and minorities. If America is to compete successfully in the world, Congress cannot look the other way while the Supreme Court erects artificial and senseless barriers to their full participation in our economy.

My friend and colleague, Senator Howard Metzenbaum, has previously introduced S. 1261, a measure to overrule the *Wards Cove* decision, which has been substantially incorporated into the Civil Rights Act of 1990, and I am pleased that he is a co-sponsor of this important legislation.

In a third objectionable decision, *Martin v. Wilks*, the Court held that consent decrees settling job discrimination cases may be reopened in future lawsuits. In the wake of that decision, longstanding decrees have been challenged in new lawsuits in cities across America. The Civil Rights Act proposes fair proce-

dures to limit this endless litigation and ensure that fairly settled cases stay settled.

The Act also contains a number of provisions to fill additional gaps in our anti-discrimination laws resulting from other Supreme Court decisions and to ensure fair and effective civil rights enforcement.

For example, victims of sexual harassment on the job currently have no effective federal remedy. The Act will close this serious loophole by granting victims of intentional discrimination the right to recover compensatory damages, and, in particularly flagrant cases, punitive damages as well.

Finally, one subject not addressed in our bill deserves mention. The rhetorical smoke screen that our opponents are already laying down is a blatant attempt to divert this important civil rights debate into a dead-end debate over quotas, minority set-asides and affirmative action. That is not the measure we are proposing. The bill does not address those questions, and it does not require quotas. The same die-hard opponents of civil rights will attempt to derail this legislation, just as they have attempted to block every other civil rights bill in Congress in recent years.

Second only to the Supreme Court, the bipartisan coalition for civil rights in Congress has been a powerful force for justice and equality of opportunity in America. All of us here today regret the Supreme Court's recent change of course, and we hope that it is only fleeting.

But as Senators and Representatives from both parties committed to civil rights, we intend to see this battle through. The Bush Administration has expressed a wait-and-see attitude about the need for this legislation. But our case is strong and our cause is just. As our bill moves through Congress, I urge the President to join us in enacting it this year. This is no time for Congress, the White House or America to retreat on civil rights.

I urge my colleagues to support the Civil Rights Act of 1990 . . .

Mr. Jeffords:[2] Mr. President, I am here today joining with a distinguished and bipartisan group of colleagues for the purpose of introducing the Civil Rights Act of 1990. This legislation,

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[2] 136 CONG. REC. S1021 (daily ed. Feb. 7, 1990).

which has been eagerly anticipated since the Supreme Court issued the series of decisions last summer radically altering the civil rights landscape, is a direct result of and response to this effort by the Supreme Court to roll back the hard fought gains in employment equality for minorities and women won over the past 25 years.

Only the few have hailed the actions of the Court, while the many have condemned this retrenchment as a wrongheaded ideological attack, needlessly stirring up dissent where, more often than not, accord and accommodation had come to rule. Mr. President, I find myself with the many on this issue. One characteristic of these decisions that has particularly troubled me was the expansiveness of the holdings. Rather than observing the dictates of judicial restraint and issuing decisions on the cases presented to them, the conservative majority often leapt over the boundaries of the legal disputes involved in order to reach broad and wholly unnecessary conclusions and answering questions which had neither been raised by the parties nor mandated by the presented facts.

Like most Americans, I am proud of the progress our country has made over the past few decades in attacking job discrimination. In my opinion, the civil rights legislation enacted during that time has represented a historical high water mark and has created standards worthy of our continued, vigilant defense. By its recent actions, the Supreme Court has made it necessary for us to rise to the defense of those standards, and we are here today to do just that.

The Civil Rights Act of 1990 was drafted with the specific intention of overruling some of these decisions, as well as to restore and strengthen our civil rights laws. Mr. President, it is my understanding that the text of the bill and a copy of a summary of its terms have been placed in the record. If this assumption is incorrect, I now ask unanimous consent that these items be included in the record after my remarks and that the bill be appropriately referred. I will not belabor the record with a lengthy and detailed recitation of the terms of the bill. However, I would like to highlight a few significant points.

First. In *Patterson v. McLean Credit Union*, the Court reached the astounding conclusion that the Reconstruction-era civil rights statute (42 U.S.C. § 1981), which bars intentional discrimination

in contracts, pertained only to the formation of contracts and not to any conduct occurring thereafter. Thus, in the employment context, the Court held that racial harassment on the job and other forms of post-hiring discrimination were not prohibited by that act. The Civil Rights Act of 1990 amends section 1981 to reaffirm that the right to make and enforce contracts includes the enjoyment of all the benefits, privileges, terms and conditions of the contractual relationship. This is all the more significant because section 1981 is the only federal statute which bars race discrimination in employment by the 3.7 million employers with fewer than 15 employees. Thus, absent this restoration, and despite the existence of Title VII (which governs only larger employers), a sizable population of employees would be without this vital federal protection. To those who contend that state law provides coverage for such employees, I must respond that the hodgepodge of state tort and/or wrongful discharge actions is not an adequate substitute for federal protection. The happy accident of state residence should not be the factor determining the measure of protection an employee will receive in so vital a right.

Second. The Court's decision in *Martin v. Wilks* reversed the longstanding and judicially-accepted doctrine of impermissible collateral attack. By application of this doctrine, courts previously have permitted court-ordered or consensual settlement decrees to have finality after allowing ample opportunity for affected persons to challenge their formulation on a before-the-fact basis. However, once such challenges had failed, or the duly notified potential challengers had failed to come forward, the doctrine would bar the raising of subsequent disputes about the operation of the decrees. The *Wilks* decision reversed this trend and allowed persons who had sat on their rights while a decree was being approved by the district court to attack it later in a separate lawsuit.

While it does not specifically reinstate the impermissible collateral attack doctrine, the Civil Rights Act of 1990 achieves a similar effect by mandating that notice be given to persons who might be adversely affected by a proposed court order, and guaranteeing them a reasonable opportunity to challenge the order before it is instituted. Subsequent lawsuits challenging the court order would be barred except under the same unusual circumstances (for example, fraud, collusion, lack of subject matter ju-

risdiction), which previously were accepted as exceptions to the doctrine. Thus, the interests of all parties are preserved in a context which provides for the due process rights of notice and opportunity to be heard. Accordingly, despite the protestations to the contrary which undoubtedly will be raised, none will be denied their day in court as a result of this legislation.

Third. We can also expect the detractors of this bill to rail against the imposition of a statistical standard of discrimination which they contend will result in the legitimization of quotas. We have already heard it stated on the floor of the Senate that this will be the inevitable result of that section which deals with the Court's decision in *Wards Cove v. Antonio*. However, this assessment is incorrect, for the Act specifically makes clear that it does not mandate quotas in any fashion. All that is intended by the framers of this provision and, we believe, all that is accomplished therein, is the restoration of the *Griggs v. Duke Power* rule that once a plaintiff has proven an employment practice produces a disparate impact on the basis of sex, race, or other protected category, the burden shifts to the employer to justify the practice on the basis of business necessity.

Obviously, there are other portions of the Act which I have not chosen to highlight here. These partake of both the need to correct or reverse the incursions made by the Court on the existing body of civil rights law (for example, reaffirming that mixed motive discrimination is still unlawful discrimination (Price Waterhouse) and that civil rights laws are to be construed in a fashion which furthers, rather than hinders, the objectives of equal opportunity), as well as the desire to strengthen the protections provided under those laws (for example, equalizing the remedies available to women, religious, ethnic and racial minorities, extending the statute of limitations, and assuring that job discrimination victims will be able to obtain adequate legal representation).

In these times when so many of the world's injustices are beginning to be addressed forthrightly and openly, when walls are coming down in eastern Europe and the doors of political prisons are being swung open in South Africa, now is not time for this Nation to backtrack on the civil rights promises it has been in the vanguard making. I have previously stated that I believe the Supreme Court's recent rulings represent an effort to

renege on history and I, for one, am more than prepared to resist the effort. Equal employment opportunity is a worthy objective for this Nation. Whereas we have made great strides, we have not reached our goal and we must continue to strive onward. This bill presents us with an opportunity to do the right thing in this regard. Thus, I exhort my colleagues; let's continue to be the vanguard; let's do the right thing; let's give this legislation the prompt and complete attention it so rightly deserves; let's pass the Civil Rights Act of 1990.

Mr. Metzenbaum:[3] Mr. President, I am proud to rise as an original co-sponsor of the Civil Rights Act of 1990. At the outset, I want to commend Senator Kennedy for his outstanding leadership on this bill. This is the latest example of his lifelong commitment to make America a better and fairer Nation.

The fact that there is a crying need for this legislation as we enter the 1990's is a sobering reminder that we are not moving forward as quickly as we should be to ensure justice and equality for all Americans. In 1965, I was privileged to join Dr. Martin Luther King, Jr.'s march in Selma. One could not help but share his spirit of optimism and commitment to justice for every man, woman, and child in our society. Those were heady days. A year earlier, Congress had enacted the historic Civil Rights Act of 1964. That was a hard-fought victory—thousands of Americans struggled, marched, prayed, and some even died to convince Congress to protect the basic civil rights of all people. One of these basic civil rights is embodied in Title VII of the Civil Rights Act of 1964. That title holds out the promise of equal employment opportunity for all workers, regardless of race, creed, color, national origin, or gender.

Twenty-five years later, despite significant progress, that promise remains unfulfilled. Women and minorities still fight major hiring and promotion barriers in our society. According to recent government statistics, on average, a woman still earns some 30 percent less than a man. Black and Hispanic workers earn some 25 percent less than white workers. Even when women and minorities prove themselves at the highest levels of the corporate ladder, they face discrimination. A major accounting firm recently denied a partnership to a woman because she was

[3] 136 CONG. REC. S1022 (daily ed. Feb. 7, 1990).

considered too "aggressive" and her managers suggested she stood a better chance if she would act "more femininely." A survey of black corporate executives indicated they feel frustrated and angry because they are continually stymied and they have not gained a level of acceptance from their white peers.

Regrettably, the situation is getting worse, not better. The Supreme Court led by President Reagan's appointees has taken aggressive action to turn back the clock on civil rights. In a stunning series of 5-to-4 decisions announced last spring, the new majority on the Court reversed longstanding precedents and denied protection to the victims of employment discrimination.

The Civil Rights Act of 1990 is a direct response to those decisions. It sends a resounding message to the Court and to the public: our march toward a more fair and just Nation will not be turned back. We must quicken the pace of reform to stop, once and for all times, discrimination and harassment against women and minorities.

This is a bipartisan initiative. Protecting civil rights is not a political issue. It is a matter of justice and fairness. But equal employment opportunity is also an economic necessity if we are to remain competitive in the world. As the Labor Department has reported, the demographic trends indicate that women and minorities will be the fastest growing segment of our work force. Irrational barriers to employment and promotion based on erroneous stereotypes, cannot be tolerated. We, as a nation, cannot afford to exclude any workers as we strive to remain competitive.

Opponents of this initiative will attempt to downplay the significance of the Supreme Court decisions. But the impact of these decisions is devastating. For example, in the *Patterson* case, the newly constituted majority dramatically narrowed the scope of section 1981. That is one of the landmark statutes enacted immediately after the Civil War to enable newly freed slaves to enjoy the full rights of citizenship. The *Patterson* decision declared that section 1981 could not be used to remedy intentional racial discrimination or harassment that occurs on the job. The impact of *Patterson* has been sharp and swift; in the 6 months since the decision was announced, lower courts, relying on *Patterson*, have dismissed nearly 100 pending, intentional racial discrimination cases.

The decision in *Wards Cove v. Antonio* represents another stunning example of unwarranted judicial activism. That decision was particularly disturbing because the majority, in a case where the facts pointed to the worst kinds of institutionalized discrimination, reached out to repudiate a settled area of the law. Nonwhite employees were challenging an employment system that, according to dissenting Justice Stevens, resembled a "plantation economy" complete with racially segregated housing and dining facilities. Despite these egregious circumstances, the majority ignored the plight of these workers and effectively gutted the established precedent in this area. In particular, the majority rejected the 1971 unanimous decision in the *Griggs* case, a decision authored by Chief Justice Burger. Earlier this year, I introduced S. 1261, the Fair Employment Reinstatement Act, to reinstate the law set forth in the *Griggs* decision. I am pleased that the Civil Rights Act of 1990 incorporates fully the provisions of the Fair Employment Reinstatement Act.

We have already scheduled hearings in the Labor and Human Resources Committee on this important matter. Make no mistake, we intend to push forward with the legislation this year. I urge all of my colleagues, on both sides of the aisle, to support this bill so that the victims of discrimination will receive the protection of our laws to which they are entitled. The Civil Rights Act of 1990 is landmark legislation. Its passage will bring us closer to the day when there is full equal employment opportunity for all Americans.

Mr. Hatfield:[4] Mr. President, I rise today in support of the Civil Rights Act of 1990. I am pleased to be an original co-sponsor of this important legislation and look forward to its prompt passage.

During the 1988-89 term, the Supreme Court issued a series of unfortunate decisions that cut back on the scope and effectiveness of various civil rights protections, particularly those protections applicable in employment discrimination matters. The Civil Rights Act of 1990 would essentially overturn those Supreme Court decisions.

Specifically, this Act would do the following:

First, it would restore the prohibition against racial discrimi-

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[4] 136 CONG. REC. S1023 (daily ed. Feb. 7, 1990).

nation in the making and enforcement of contracts. The Act reaffirms that "the right to make and enforce contracts" includes the making, performance, modification, and termination of contracts, including the enjoyment of all benefits, terms, and conditions of the contractual relationship.

Second, the Act restores the burden of proof of unlawful employment practices in disparate impact cases. In other words, it restores prior law that once an employee proved an employer's employment practices had a discriminatory effect, then the employer must prove that such practices were based upon business necessity.

Third, the prohibition against impermissible consideration of race, color, religion, sex, or national origin in employment practices would be clarified. The law would be amended to provide that as a general rule an employer may not use race, religion, gender, or ethnicity as a motivating factor in employment decisions, regardless of whether such discrimination is accompanied by legitimate motives.

Fourth, the Act would facilitate the prompt and orderly resolution of challenges to employment practices that carry out litigated or consent judgments or orders. Those who might be adversely affected by a proposed court order would be given the opportunity to be heard prior to the entry of the order. Once an order is entered, however, challenges would generally not be allowed.

Finally, a damages remedy for international discrimination would be added.

Mr. President, I commend my colleagues for their efforts in producing a comprehensive bill that reaffirms Congress' commitment to meaningful civil rights protections. The majority of the current Supreme Court, with its narrow interpretations of our civil rights laws, seems to lack the necessary commitment. It is up to Congress, therefore, to restore and strengthen the legal protections necessary to ensure equal employment opportunity for all. The Civil Rights Act of 1990 would do just that.

Mr. Simon:[5] Mr. President, I am pleased to be an original cosponsor of the Civil Rights Act of 1990. All Americans, as part of our birthright as citizens of this great Nation, should have equal

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[5] *Id.*

opportunity to obtain a job, and should have equal opportunity for promotion and advancement once on the job. Today, more than ever before, our Nation must utilize the talents and productive capacity of all of its citizens in the work force, particularly that of minorities and women who frequently face the greatest barriers to employment opportunity.

Unfortunately, decisions reached by the Supreme Court last year, put into place procedural and substantive roadblocks that serve to undermine the protections that Congress intended to be available to minorities and women under Title VII of the Civil Rights Act of 1964. The recent Supreme Court decisions reflect a major shift away from equal employment rights established more than a quarter century ago when Title VII of the Civil Rights Act was enacted.

Title VII has been an important weapon in the Nation's arsenal to eradicate discrimination in the workplace. As a result, women and minorities are integrated into the workforce and have made major inroads where overt discriminatory practices once presented insurmountable barriers. But, the job is far from over. More subtle and intangible forms of bias still surface all too frequently in the workplace.

Last year, the Court changed its course drastically, narrowing the reach of Title VII in ways that I believe Congress never intended. These decisions have already made it far more difficult for victims of bias to prove civil rights violations not only of Title VII but also of section 1981, a long-established civil rights act guaranteeing equality in the making and enforcement of contracts. The protections that remain are not sufficient to provide women and minorities the justice that is their due. These recent decisions have, in effect, left many victims of discrimination with only hollow protection under Title VII and section 1981.

It is now up to Congress to correct the mistakes made by the Court last year and to signal our clear intent that discrimination against women and minorities—no matter how unintentional or subtle—has no place in the workplace or in our society.

The Civil Rights Act of 1990 would reverse five Supreme Court decisions that do particular harm to the notion of equal employment rights for all. The bill would reverse *Patterson v. McLean Credit Union* to protect Americans against racial discrimina-

tion on the job and in private contracts. A legal system that does not include protection against racial harassment on the job as a substantive part of an employment contract, as the Court ruled in *Patterson*, is unfair to employees and needs revision. Equal employment opportunity means little when it is limited only to the doorway of employment. What is opportunity when, as in *Patterson*, employers may not—under section 1981—discriminate against employees when the initial contract is formed, but as soon as the employee begins work, the employer has a free hand to discriminate against that worker on the basis of his or her race?

The Civil Rights Act of 1990 would restore the burden of proof in cases that involve employment practices that on their face seem neutral, but that in practice exclude minorities and women. A legal system that requires an employee who claims discriminatory treatment to unravel the complexities of an employer's personnel policies, as the Court ruled in *Wards Cove Packing Co. v. Antonio*, places a particularly unfair and unreasonable burden on employees and needs revision.

The Court's ruling in *Wards Cove* is especially troubling because it reverses a unanimous 1971 decision, *Griggs v. Duke Power Co.* Under *Griggs*, Title VII has been used effectively by women and minorities to overcome not only individual bias, but also more subtle employment practices that have been used to screen out entire classes of people. Now we must repair the damage of the *Wards Cove* decision simply to maintain standards the Court established 18 years ago.

The Civil Rights Act of 1990 would correct the Court's ruling in *Lorance v. AT&T Technologies* that would require an employee to anticipate, and to bring suit in advance of, a future adverse application of a seniority system in order to protect his or her rights.

The *Lorance* case involved an Illinois woman, Patricia Lorance, who lost her job and was denied any remedy by the Court. Patricia Lorance challenged a seniority system that she believed had been changed to prevent her and other women from competing for mostly male, higher paying jobs in a manufacturing plant. She was laid off under this system in 1983, although the seniority system was actually adopted in 1979. The Supreme Court adopted the most narrow interpretation possible,

holding that employees must file charges within 300 days after a seniority system or other employment practice is adopted; that is, 300 days from the date of adoption, not when the actual discrimination takes place. That's not a long time, especially in this world of complicated management, labor and legal practices. The discriminatory effect of a seniority system may not play itself out until well after its adoption, until well into those 300 days. It is easy to imagine the confusion an employee encounters when her company adopts a complicated seniority or benefit system, let alone keep track of when the courts allow a plaintiff to file charges or whether or not a system will affect her adversely months down the line. The Civil Rights Act of 1990 would protect those who do not realize, until too late, that certain employment practices jeopardize their ability to advance, as in the *Lorance* case.

The Civil Rights Act of 1990 would also reverse the Court's decision in *Price Waterhouse v. Hopkins*, a decision that permits an employer to discriminate without ramification if the predominant reason for the employment decision was something other than the plaintiff's gender, and *Martin v. Wilks*, a decision that could undermine many affirmative action plans currently in place and discourage the voluntary settlement of disputes. These decisions seriously undermine the statutory objectives of fair employment laws and need to be revised.

Unfortunately, discrimination still limits work opportunities for many of our citizens in today's world, and the ideal of a workforce based on equal opportunity and advancement through hard work and merit is a difficult goal to reach. That goal is pushed further from reach when the Supreme Court, long viewed as the protector of civil rights, restricts the scope and undermines the effectiveness of two of our most important anti-discrimination laws. Fortunately, Congress can, and should, step in to restore the civil rights safety net ripped open by the Supreme Court, to ensure that all victims of bias are afforded adequate remedies in our judicial system.

The Civil Rights Act of 1990 is legislation that deserves our attention and swift approval.

Mr. Packwood:[6] Mr. President, I rise today along with Sena-

[6] 136 CONG. REC. S1024 (daily ed. Feb. 7, 1990).

tors Kennedy and Jeffords and a number of our colleagues, both Republican and Democrat, to introduce the Civil Rights Act of 1990. Identical legislation is being introduced in the House of Representatives today.

The genesis of all civil rights in our great country is the U.S. Constitution. This document prohibits the federal government from depriving any person of life, liberty, or property without due process of law. Our Constitution also forbids states from denying any person the equal protection of the laws. States are further obliged to protect the rights of persons equally, that is, without discrimination against any class of persons. Slavery is prohibited and voting rights are guaranteed to all citizens.

The Constitution gives Congress the power to enforce our civil rights by appropriate legislation. The first Civil Rights Act, passed in 1866, guaranteed to every U.S. citizen the same rights that white citizens have to inherit, purchase, lease, and sell property. A series of other laws in the years following the Civil War made clear that our nonwhite citizens were to enjoy the same rights as whites in other areas such as contracting and sitting on juries.

Twentieth century civil rights laws reflect the growing recognition of Congress and the American people of the need for equal protection in the areas of voting, public accommodation, education, employment, housing, credit, and access to Federal programs. In addition to the protection of these substantive rights, Congress has acted to extend constitutional protection beyond race to religion, sex, handicap, national origin, age, and marital status. Our history reflects a dynamic process, expanding protection to ensure that all basic rights of all groups are safeguarded.

Our courts have played a major role in enforcing the civil rights protections enacted by Congress. Where civil rights have been endangered by denial of equal opportunity to take part in the social, economic, and political life of this great land, those affected have been able to turn to the courts for protection of those rights.

During 1989, however, the U.S. Supreme Court issued a series of decisions in employment discrimination cases that threaten to set back our progress in the area of job opportunity

by decades. As a result of the decision in *Patterson v. McLean Credit Union*, victims of even the most egregious racial harassment in the workplace can obtain no meaningful remedy. Because of the decision in *Price Waterhouse v. Hopkins*, a person who proves that illegal discrimination played a part in an action against them by an employer cannot receive any remedy if the employer shows that there was also a legal reason for the action. In other words, overt sexism or racism in an employment decision is acceptable so long as it is not the only reason for the decision. The Court's opinion in *Wards Cove Packing Co. v. Atonio* makes a person who proves discrimination by an employer also prove that the employer had no justification for the discrimination.

The results in these cases indicate that the Supreme Court needs a clear signal from Congress that employment discrimination is unacceptable in all forms and under all circumstances, and that Congress expects the Court to reflect that in its decisions. That is what the Civil Rights Act of 1990 would do.

I urge my colleagues to support this bill because it is the right thing to do. It is our opportunity to bring in this decade with a renewed commitment to civil rights.

But there is another reason to support this legislation. America's economic well-being depends as never before on the role of women and minorities in our workforce. Work Force 2000, a study commissioned by the U.S. Department of Labor, states that by the end of this century, 47 percent of our workforce will be women and 15 percent will be non-white. At the same time, new jobs will demand much higher skill levels. We will be more dependent on women and minorities as workers, and they must be increasingly better trained. We simply cannot afford the prejudice that keeps women and minorities from obtaining the best possible training and that keeps them from being able to give their best on the job.

I wish that this legislation were not necessary, but I conclude from the actions of the Court that we must now take steps to protect the gains of the last 25 years in eliminating employment discrimination. I am proud and pleased to be a sponsor of the Civil Rights Act of 1990.

Mr. Chafee:[7] Mr. President, I commend my colleagues for

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[7] 136 CONG. REC. S1025 (daily ed. Feb. 7, 1990).

their work in bringing the issue of civil rights before this body. Deeply entrenched in American culture is the belief that all individuals, no matter what their color, race, sex, religion, or national origin—deserve equal and fair treatment. That is the principle upon which Congress has established civil rights laws; today, that principle is being reemphasized.

Congressional intent is one of the tools used by the courts to decipher the meaning of federal statutes. One of the purposes of the bill being introduced today is to make clear congressional intent regarding, and support for, civil rights. I applaud that goal wholeheartedly.

Currently, as my colleagues know, the federal government prevents discrimination in the workplace under two major statutes: the Civil Rights Act of 1866 and 1964. The 1866 statute, known as section 1981, guarantees equal rights, regardless of race, in the making of employment and other contracts. Title VII of the 1964 Act prohibits discrimination based on race, color, religion, sex, or national origin, with regard to employment decisions and practices.

Last year, the Supreme Court handed down a series of civil rights and employment-related rulings that affected the body of civil rights law that had developed from section 1981 and Title VII over the past four decades. Three areas of civil rights law—burden of proof of discrimination, court-approved consent decrees, and on-the-job discrimination—were significantly affected.

The Civil Rights Act of 1990, as introduced, addresses to some degree each of those decisions. In the body of civil rights law, there are clear precedents or standards that served as the guidelines for this legislation. Sections of this Act do faithfully restore civil rights guarantees as outlined by Court precedent; but the Act also goes beyond simply restoring longstanding Court precedents.

First, the Act would address those recent decisions in which no clear precedent or standard had been established by the Supreme Court. Second, there are sections of the bill that may loosely be referred to as compromise provisions: those that codify a position somewhere between the Supreme Court's ruling and the standard assumed prior to that ruling. Third, and finally,

the bill breaks what I consider to be entirely new ground in specific areas.

While I support many of these provisions, I recognize that none are small steps. Given the breadth, the importance, and the potential impact of this bill, I believe we must take the time for careful analysis. It is my understanding that four days of hearings on this measure have already been scheduled. The hearing process should prove invaluable, and the resulting discussion should produce more insight into how best to protect civil rights. Should more hearings be necessary, I hope that they, too, will be scheduled.

Mr. Cranston:[8] Mr. President, I am pleased to join as an original co-sponsor of the Civil Rights Act of 1990. This legislation would clarify and strengthen federal laws which forbid discrimination in employment based on race or sex and ensure that adequate remedies exist for victims of such discrimination.

Since the enactment of the Civil Rights Act of 1964, countless Court decisions and Congressional actions have underscored the need to be vigilant against discrimination. We have made steady progress toward achievement of a juster and fairer society. The current Supreme Court, however, doesn't seem to understand the depth of the problem of invidious discrimination in this country or the importance of maintaining strong and effective remedies to eradicate this problem.

Last year, the Supreme Court handed down a series of decisions which have blunted some of the most effective laws which protect employees from discrimination. The bipartisan legislation being introduced today is designed to reverse the adverse impact of these decisions and to restore our Nation's strong and effective weapons against employment discrimination.

Mr. President, last year's Supreme Court decisions dealt a crippling blow to the ability of victims of job discrimination to litigate cases under federal civil rights statutes. One decision, *Wards Cove*, overturned 18 years of settled law on the burden of proof in employment discrimination cases. Another, *Patterson*, would allow long-accepted settlement agreements discrimination cases to now be re-opened.

Mr. President, the devastating impact of these decisions is

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8 *Id.*

already taking effect. According to a survey conducted by the NAACP Legal Defense and Education Fund, ninety-six claims involving racial and ethnic harassment and discrimination have been dismissed as a result of the *Patterson* decision.

One case thrown out as a result of the *Patterson* decision involved an employer found to have subjected one black employee to verbal and physical abuse, and a racially motivated demotion. The employer demoted the employee because it "wasn't right for a black to occupy such a high position." The trial court had found the employer guilty of illegal discrimination and awarded the victim $150,000 in damages. The appeals court reversed, on the ground that the *Patterson* decision held that section 1981 of Title 42 of the United States Code—the 1866 Civil Rights Law—did not apply to on-the-job discrimination, only discrimination in hiring.

Since the only other remedy—Title VII of the Civil Rights Act of 1964—does not apply to employers with less than fifteen employees, no federal remedy was available to redress the blatant discriminatory treatment of an employee. Mr. President, to leave a victim of this kind of discrimination without a remedy contravenes all that Congress has fought for in ensuring equal treatment for all Americans.

If we truly lived in a color- and sex-blind society, perhaps there would be no need for the type of civil rights laws which exist today. But one need not look far to realize that while progress has been made, we are far from achieving that kind of a color- and sex-blind society. To make that dream a reality we must ensure that federal equal employment laws remain strong and effective. We have come too far on the long and arduous path toward achievement of equality and justice to turn backward now. I strongly support this measure and will fight for its enactment.

A Compromise Civil Rights Bill

Mrs. Kassebaum:[9] Mr. President, today I am introducing, with Senator Gorton, a compromise civil rights bill, which we intend to offer as a substitute for S. 2104, the Civil Rights Act of 1990. I believe this compromise bill provides a reasonable, com-

9 136 CONG. REC. S9756 (daily ed. July 16, 1990).

prehensive approach to issues that remain highly contentious despite weeks of discussion.

Since last February, when S. 2104 was first introduced, I have followed this issue very closely, Mr. President. I participated in the series of hearings held on the bill by the Labor Committee. Most recently, I have watched as changes, largely of a technical nature, have been made while negotiations with the administration and others have continued.

Meetings are held, proposals are offered, and legal refinements are made to the point where I am not sure even the lawyers understand what it means. I fear that we once again are setting the stage for a legislative misadventure with potentially severe, long-term consequences.

Mr. President, the compromise proposal we are putting forward today has two basic goals. The first is to restore our civil rights laws to the same strength and clarity that existed before a series of Supreme Court decisions last year. I think many Senators agree that those decisions have significantly increased the difficulty of proving discrimination and, if allowed to stand, weaken our civil rights laws.

The second equally important goal of this proposal is to maintain the balance first struck by the Civil Rights Act of 1964 and to preserve the basic philosophy of conciliation, cooperation, and equitable relief that is the foundation of all of our civil rights laws.

My concern about S. 2104 is that it has become a vehicle not merely to correct the problems created by recent Supreme Court decisions but goes far beyond that goal. Taken as a whole, S. 2104 represents a basic change in our civil rights laws and undermines that structure created in 1964 and affirmed by succeeding sessions of Congress.

If S. 2104 were to become law, our philosophy of conciliation would eventually be replaced by one of confrontation. Our goal of prompt, mediated settlements that assure certainty for both the victims and the perpetrators of discrimination would be replaced by protracted, divisive, and radically inconsistent judgments. Under the system established by S. 2104, a few victims of discrimination might be enriched by enormous judgments while others would receive little or nothing.

Mr. President, I understand the frustration that lies behind S. 2104. Many Senators believe there must be more effective and aggressive enforcement of our civil rights laws. But even with its imperfections, the current system has been remarkably successful. It is a real deterrent to discrimination. We should think long and hard before we sweep away this structure of Government-enforced settlements and move to a tort-based system of jury trials and jackpot judgments.

Mr. President, our present civil rights laws have little potential to produce fabulous multi-million dollar judgments, but they do offer remedies carefully geared to the damages suffered—back pay, promotions, injunctive relief, and others. Congress deliberately chose this approach in 1964 as the best way to assure prompt and certain justice. Congress reaffirmed this approach in 1972, specifically rejecting jury trials. I believe we should reaffirm that view this year by striking a careful, thoughtful balance on this legislation.

Senator Gorton and I believe that balance is best struck by the compromise language we are offering. We are not locked in concrete on every sentence in this proposal, but we are convinced that this basic approach achieves the two goals we have set—restoring protections that existed before recent Supreme Court decisions while preserving the fundamental structure of current civil rights law. I want briefly to outline provisions of our proposal.

First, the most contentious issue and the main focus of ongoing discussions has been how to correct the Court's decision in *Wards Cove*. The original language of S. 2104 sparked a debate about whether this was a quota bill. As a result, supporters of the bill already have modified language addressing *Wards Cove*, and there have been many long, inconclusive discussions about further changes. Mr. President, whether S. 2104 results in quotas is still unclear, but I believe it is very clear that this section could lead to an explosion of unwarranted and potentially divisive litigation.

In order to address the problems created by *Wards Cove*, the compromise shifts the burden of proof to the employer. This overturns the *Ward Cove* decision. In addition, the definition of business necessity comes right out of *Griggs* and another case that followed *Griggs*, the *New York Transit v. Beazer* case. This defini-

tion is intended to have the same meaning that "business necessity" has been given in *Griggs* and in cases which followed *Griggs*. This is, plain and simple, the law prior to *Wards Cove*, nothing more, nothing less.

Finally, it also allows the employee to establish his or her case by showing that a combination of employment practices causes a disparate impact, provided each practice contributes to the disparate impact. These three measures, taken together, form an appropriate balance between the concerns voiced on both sides: avoiding quotas and excessive litigation versus ensuring equal opportunity in the workplace.

Important as language related to *Wards Cove* is, there are other sections of S. 2104 that require careful scrutiny. Some argue that this bill would overturn as many as fifteen Supreme Court decisions. While this may or may not be the case, it is a fact that S. 2104 does more than merely reverse Supreme Court decisions. Specifically, S. 2104 would allow compensatory and punitive damages, with jury trials for intentional discrimination under Title VII.

Mr. President, I am sympathetic to the need for closing the gap in current law to provide adequate remedies for victims of discrimination, particularly on-the-job harassment. However, I am unwilling to do so at the expense of sacrificing the very intent of Title VII—to encourage settlement and conciliation between employer and employee.

I believe it is particularly important that remedies under Title VII not be replaced by a tort-based system of unlimited damages awards. Instead of encouraging harmony and conciliation in the workplace, this would encourage protracted lawsuits, leading employees to pay a litigation lottery game with no certain outcome. The potential divisiveness—not to mention the time, costs, and the further clogging of our courts—will only serve to undermine the spirit of cooperation and consensus of support our civil rights laws not enjoyed.

Assuring victims an adequate remedy for discrimination must be kept within the present framework of Title VII. Under the compromise proposal, that framework is preserved, but additional protection is provided by giving a judge the discretion to award up to $100,000 where the present remedy of back pay is

unavailable. This approach preserves the equitable remedy scheme that is now an essential part of Title VII.

The compromise does not contain the provisions found in S. 2104, which expand and protect the recovery of attorneys' fees. Again, such provisions would only encourage litigation and impede settlements. Nor does the compromise retain the retroactive provision of S. 2104. Rather, the compromise addresses the other major Supreme Court cases, *Lorance*, *Patterson*, and *Wilks*, in a moderate and reasonable manner.

The compromise bill should be taken as a whole, a complete package, aimed at addressing the Supreme Court's rulings without encouraging litigation.

APPENDIX B

On October 16, 1990 a vote was taken in the United States Senate on S. 2104[1] the Civil Rights Bill:

[Rollcall Vote No. 276 Leg.]

The PRESIDING OFFICER (Mr. LAUTENBERG). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 62, nays 34, as follows:

[Rollcall Vote No. 276 Leg.]

YEAS—62

Adams	Dodd	Lieberman
Akaka	Domenici	Metzenbaum
Baucus	Durenberger	Mikulski
Bentsen	Ford	Mitchell
Biden	Fowler	Moynihan
Bingaman	Glenn	Nunn
Boren	Gore	Packwood
Bradley	Graham	Pell
Breaux	Harkin	Pryor
Bryan	Heflin	Reid
Bumpers	Heinz	Riegle
Burdick	Hollings	Robb
Byrd	Inouye	Rockefeller
Chafee	Jeffords	Sanford
Cohen	Johnston	Sarbanes
Conrad	Kennedy	Sasser
Cranston	Kerrey	Shelby
Danforth	Kohl	Simon
Daschle	Lautenberg	Specter
DeConcini	Leahy	Wirth
Dixon	Levin	

NAYS—34

Armstrong	Hatch	Nickles
Bond	Helms	Pressler
Boschwitz	Humphrey	Roth
Burns	Kassebaum	Rudman
Coats	Kasten	Simpson
Cochran	Lott	Symms
D'Amato	Lugar	Thurmond
Dole	Mack	Wallop
Garn	McCain	Warner
Gorton	McClure	Wilson
Gramm	McConnell	
Grassley	Murkowski	

[1] 139 CONG. REC. S15407 (daily ed. Oct. 16, 1990).

NOT VOTING—4

Exon	Kerry
Hatfield	Stevens

On October 17, 1990 a vote was taken in the United States House of Representatives on the Civil Rights Bill:[2]

[Roll No. 478]

YEAS—273

Ackerman	Glickman	Owens (NY)
Alexander	Gonzalez	Owens (UT)
Anderson	Gordon	Pallone
Andrews	Grant	Panetta
Anthony	Gray	Patterson
Applegate	Green	Payne (NJ)
Aspin	Guarini	Payne (VA)
Atkins	Hall (OH)	Pease
AuCoin	Hamilton	Pelosi
Barton	Harris	Penny
Bates	Hatcher	Perkins
Beilenson	Hawkins	Pickett
Bennett	Hayes (IL)	Pickle
Berman	Hayes (LA)	Poshard
Bevil	Hefner	Price
Bilbray	Henry	Pursell
Bliley	Hertel	Rahall
Boehlert	Hoagland	Rangel
Boggs	Hochbrueckner	Ray
Bonior	Horton	Regula
Borski	Houghton	Richardson
Bosco	Hoyer	Rinaldo
Boucher	Hubbard	Roe
Boxer	Hughes	Ros-Lehtinen
Brooks	Jacobs	Rostenkowski
Browder	James	Roukema
Brown (CA)	Johnson (CT)	Rowland (GA)
Bruce	Johnson (SD)	Roybal
Bryant	Johnston	Sabo
Bustamante	Jones (GA)	Saiki
Byron	Jones (NC)	Sangmeister
Campbell (CA)	Jontz	Savage
Campbell (CO)	Kanjorski	Sawyer
Cardin	Kaptur	Scheuer
Carper	Kastenmeier	Schiff
Carr	Kennedy	Schneider
Chapman	Kennelly	Schroeder
Clarke	Kildee	Schulze
Clay	Kleczka	Schumer
Clement	Kolter	Serrano
Coleman (TX)	Kostmayer	Sharp
Collins	LaFalce	Shays
Condit	Lancaster	Sikorski
Conte	Lantos	Sisisky

[2] 139 CONG. REC. H9994-95 (daily ed. Oct. 17, 1990).

Conyers
Cooper
Costello
Coughlin
Coyne
Crockett
Davis
de la Garza
DeFazio
Dellums
Derrick
DeWine
Dicks
Dingell
Dixon
Donnelly
Dorgan (ND)
Downey
Durbin
Dwyer
Dymally
Dyson
Early
Eckart
Edwards (CA)
Engel
English
Erdreich
Espy
Evans
Fascell
Fazio
Feighan
Fish
Flake
Flippo
Foglietta
Ford (MI)
Ford (TN)
Frank
Frost
Gaydos
Gejdenson
Gephardt
Geren
Gibbons
Gilman
Laughlin
Leach (IA)
Lehman (CA)
Lehman (FL)
Levin (MI)
Levine (CA)
Lewis (GA)
Lloyd
Long
Lowey (NY)
Luken, Thomas
Machtley
Manton
Markey
Martinez
Matsui
Mavroules
Mazzoli
McCloskey
McCurdy
McDermott
McHugh
McMillen (MD)
McNulty
Meyers
Mfume
Miller (CA)
Mineta
Mink
Moakley
Mollohan
Moody
Morella
Mrazek
Murphy
Murtha
Nagle
Natcher
Neal (MA)
Neal (NC)
Nelson
Nowak
Oakar
Oberstar
Obey
Olin
Ortiz
Skaggs
Skelton
Slattery
Slaughter (NY)
Smith (FL)
Smith (IA)
Smith (VT)
Snowe
Solarz
Spratt
Staggers
Stallings
Stark
Stokes
Studds
Swift
Synar
Tallon
Tanner
Tauzin
Thomas (GA)
Torres
Torricelli
Towns
Traficant
Traxler
Udall
Unsoeld
Valentine
Vento
Visclosky
Volkmer
Walgren
Walsh
Washington
Watkins
Waxman
Weiss
Wheat
Whitten
Williams
Wilson
Wise
Wolpe
Wyden
Yates
Yatron

NAYS—154

Annunzio
Archer
Armey
Hastert
Hefley
Herger
Quillen
Ravenel
Rhodes

Baker
Ballenger
Barnard
Bartlett
Bateman
Bentley
Bereuter
Bilirakis
Broomfield
Brown (CO)
Buechner
Bunning
Burton
Callahan
Chandler
Clinger
Coble
Coleman (MO)
Combest
Courter
Cox
Craig
Crane
Dannemeyer
Darden
DeLay
Dickinson
Dornan (CA)
Douglas
Dreier
Duncan
Edwards (OK)
Emerson
Fawell
Fields
Frenzel
Gallegly
Gallo
Gekas
Gillmor
Gingrich
Goodling
Goss
Gradison
Grandy
Gunderson
Hall (TX)
Hammerschmidt
Hancock
Hansen
Hiler
Holloway
Hopkins
Huckaby
Hunter
Hutto
Hyde
Inhofe
Ireland
Jenkins
Kasich
Kolbe
Kyl
Lagomarsino
Leath (TX)
Lent
Lewis (CA)
Lewis (FL)
Lightfoot
Lipinski
Livingston
Lowery (CA)
Lukens, Donald
Madigan
Marlenee
Martin (NY)
McCandless
McCollum
McCrery
McDade
McEwen
McGrath
McMillan (NC)
Michel
Miller (OH)
Miller (WA)
Molinari
Montgomery
Moorhead
Morrison (WA)
Myers
Nielson
Oxley
Packard
Parker
Parris
Pashayan
Paxon
Petri
Porter
Ridge
Ritter
Roberts
Robinson
Rogers
Rohrabacher
Roth
Russo
Sarpalius
Saxton
Schaefer
Sensenbrenner
Shaw
Shumway
Shuster
Skeen
Slaughter (VA)
Smith (NE)
Smith (NJ)
Smith (TX)
Smith, Denny (OR)
Smith, Robert (NH)
Smith, Robert (OR)
Solomon
Spence
Stangeland
Stearns
Stenholm
Stump
Sundquist
Tauke
Taylor
Thomas (CA)
Thomas (WY)
Upton
Vander Jagt
Vucanovich
Walker
Weber
Weldon
Whittaker
Wolf
Wylie
Young (AK)
Young (FL)

NOT VOTING—6

Brennan	Morrison (CT)	Rowland (CT)
Martin (IL)	Rose	Schuette

On October 24, 1990 a vote was taken in the United States Senate which failed to override the Presidential Veto of the Civil Rights Bill S. 2104:[3]

[Rollcall Vote No. 304 Leg.]

The result was announced—yeas 66, nays 34, as follows:

[Rollcall Vote No. 304 Leg.]

YEAS—66

Adams	Dodd	Leahy
Akaka	Domenici	Levin
Baucus	Durenberger	Lieberman
Bentsen	Exdon	Metzenbaum
Biden	Ford	Mikuiski
Bingaman	Fowler	Mitchell
Boren	Glenn	Moynihan
Boschwitz	Gore	Nunn
Bradley	Graham	Packwood
Breaux	Harkin	Pell
Bryan	Hatfield	Pryor
Bumpers	Heflin	Reid
Burdick	Heinz	Riegle
Byrd	Hollings	Robb
Chafee	Inouye	Rockefeller
Cohen	Jeffords	Sanford
Conrad	Johnston	Sarbanes
Cranston	Kennedy	Sasser
Danforth	Kerrey	Shelby
Daschie	Kerry	Simon
DeConcini	Kohl	Specter
Dixon	Lautenberg	Wirth

NAYS—34

Armstrong	Helms	Pressler
Bond	Humphrey	Roth
Burns	Kassebaum	Rudman
Coats	Kasten	Simpson
Cochran	Lott	Stevens
D'Amato	Lugar	Symms
Dole	Mack	Thurmond
Garn	McCain	Wallop
Gorton	McClure	Warner
Gramm	McConnell	Wilson
Grassley	Murkowski	
Hatch	Nickles	

The PRESIDING OFFICER. The Chair would remind the galleries that expressions of approval or disapproval are not permitted under the rules of the Senate.

On rollcall vote 304, the veto override of S. 2104, the yeas are 66, the nays

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[3] 139 CONG. REC. S16589 (daily ed. Oct. 24, 1990).

are 34. Two-thirds of the Senators voting, a quorum being present, not having voted in the affirmative, the bill on reconsideration fails to pass over the President's veto.

APPENDIX C

Veto Message On S. 2104 — Message From the President [1]

The Presiding Officer laid before the Senate the following message from the President of the United States, together with accompanying papers which was ordered to be read and spread upon the Journal:

To the Senate of the United States:

I am today returning without my approval S. 2104, the "Civil Rights Act of 1990." I deeply regret having to take this action with respect to a bill bearing such a title, especially since it contains certain provisions that I strongly endorse.

Discrimination, whether on the basis of race, national origin, sex, religion, or disability, is worse than wrong. It is a fundamental evil that tears at the fabric of our society, and one that all Americans should and must oppose. That requires rigorous enforcement of existing anti-discrimination laws. It also requires vigorously promoting new measures such as this year's Americans With Disabilities Act, which for the first time adequately protects persons with disabilities against invidious discrimination.

One step that the Congress can take to fight discrimination right now is to act promptly on the civil rights bill that I transmitted on October 20, 1990. This accomplishes the stated purpose of S. 2104 in strengthening our Nation's laws against employment discrimination. Indeed, this bill contains several important provisions that are similar to provisions in S. 2104:

- Both shift the burden of proof to the employer on the issue of "business necessity" in disparate impact cases.
- Both create expanded protection against on-the-job racial discrimination by extending 42 U.S.C. 1981 to the performance as well as the making of contracts.
- Both expand the right to challenge discriminatory

[1] 136 CONG. REC. S16457 (daily ed. Oct. 22, 1990). *See also* PRESIDENT'S STATEMENT ON THE CIVIL RIGHTS ACT OF 1990, 26 WEEKLY COMP. PRES. DOC. 1631 (Oct. 26, 1990).

seniority systems by providing that suit may be brought when they cause harm to plaintiffs.

- Both have provisions creating new monetary remedies for the victims of practices such as sexual harassment. (The Administration bill allows equitable awards up to $150,000.00 under this new monetary provision, in addition to existing remedies under Title VII).
- Both have provisions ensuring that employers can be held liable if invidious discrimination was a motivating factor in an employment decision.
- Both provide for plaintiffs in civil rights cases to receive expert witness fees under the same standards that apply to attorneys fees.
- Both provide that the Federal Government, when it is a defendant under Title VII, will have the same obligation to pay interest to compensate for delay in payment as a non-public party. The filing period in such actions is also lengthened.
- Both contain a provision encouraging the use of alternative dispute resolution mechanisms.

The Congressional majority and I are on common ground regarding these important provisions. Disputes about other controversial provisions in S. 2104 should not be allowed to impede the enactment of these proposals.

Along with the significant similarities between my Administration's bill and S. 2104, however, there are crucial differences. Despite the use of the term "civil rights" in the title of S. 2104, the bill actually employs a maze of highly legalistic language to introduce the destructive force of quotas into our Nation's employment system. Primarily through provisions governing cases in which employment practices are alleged to have *unintentionally* caused the disproportionate exclusion of members of certain groups, S. 2104 creates powerful incentives for employers to adopt hiring and promotion quotas. These incentives are created by the bill's new and very technical rules of litigation, which will make it difficult for employers to defend legitimate employment practices. In many cases, a defense against unfounded allegations will be impossible. Among other problems, the plaintiff often need not even show that any of the employer's practices

caused a significant statistical disparity. In other cases, the employer's defense is confined to an unduly narrow definition of "business necessity" that is significantly more restrictive than that established by the Supreme Court in *Griggs* and two decades of subsequent decisions. Thus, unable to defend legitimate practices in court, employers will be driven to adopt quotas in order to avoid liability.

Proponents of S. 2104 assert that it is needed to overturn the Supreme Court's *Ward's Cove* decision and restore the law that had existed since the *Griggs* case in 1971. S. 2104, however, does not in fact codify *Griggs* or the Court's subsequent decisions to *Wards Cove*. Instead, S. 2104 engages in a sweeping rewrite of two decades of Supreme Court jurisprudence, using language that appears in no decision of the Court and that is contrary to principles acknowledged even by Justice Stevens' *dissent* in *Wards Cove*: "The opinion in *Griggs* made it clear that a neutral practice that operates to exclude minorities is nevertheless lawful if it serves a valid business purpose."

I am aware of the dispute among lawyers about the proper interpretation of certain critical language used in this portion of S. 2104. The very fact of this dispute suggests that the bill is not codifying the law developed by the Supreme Court in *Griggs* and subsequent cases. This debate, moreover, is a sure sign that S. 2104 will lead to years—perhaps decades—of uncertainty and expensive litigation. It is neither fair nor sensible to give the employers of our country a difficult choice between using quotas and seeking a clarification of the law through costly and very risky litigation.

S. 2104 contains several other unacceptable provisions as well. One section unfairly closes the courts, in many instances, to individuals victimized by agreements, to which they were not a party, involving the use of quotas. Another section radically alters the remedial provisions in Title VII of the Civil Rights Act of 1964, replacing measures designed to foster conciliation and settlement with a new scheme modeled on a tort system widely acknowledged to be in a state of crisis. The bill also contains a number of provisions that will create unnecessary and inappropriate incentives for litigation. These include unfair retroactivity rules; attorneys fee provisions that will discourage settlements; unreasonable new statutes of limitation; and a "rule of construc-

tion" that will make it extremely difficult to know how courts can be expected to apply the law. In order to assist the Congress regarding legislation in this area, I enclose herewith a memorandum from the Attorney General explaining in detail the defects that make S. 2104 unacceptable.

Our goal and our promise has been equal opportunity and equal protection under the law. That is a bedrock principle from which we cannot retreat. The temptation to support a bill—any bill—simply because its title includes the words "civil rights" is very strong. This impulse is not entirely bad. Presumptions have too often run the other way, and our Nation's history on racial questions cautions against complacency. But when our efforts, however well intentioned, result in quotas, equal opportunity is not advanced but thwarted. The very commitment to justice and equality that is offered as the reason why this bill should be signed requires me to veto it.

Again, I urge the Congress to act on my legislation before adjournment. In order truly to enhance equal opportunity, however, the Congress must also take action in several related areas. The elimination of employment discrimination is a vital element in achieving the American dream, but it is not enough. The absence of discrimination will have little concrete meaning unless jobs are available and the members of all groups have the skills and education needed to qualify for those jobs. Nor can we expect that our young people will work hard to prepare for the future if they grow up in a climate of violence, drugs, and hopelessness.

In order to address these problems, attention must be given to measures that promote accountability and parental choice in the schools; that strengthen the fight against violent criminals and drug dealers in our inner cities; and that help to combat poverty and inadequate housing. We need initiatives that will empower individual Americans and enable them to reclaim control of their lives, thus helping to make our country's promise of opportunity a reality for all. Enactment of such initiatives, along with my administration's civil rights bill, will achieve real advances for the cause of equal opportunity.

President George Bush
The White House, October 22, 1990

Errata

Please note the following corrections for Volume 15:3:

(1) on page 494, line 31, the word elicit should appear as illicit; and

(2) on page 497, line 10 the word vulcanization should appear as balkanization.