CIVIL RIGHTS ACT OF 1991*

The following panel discussion was presented on January 20, 1992, free of charge as a service to the bench and the bar of New Jersey, by the New Jersey Institute for Continuing Legal Education, in cooperation with the Garden State Bar Association and the New Jersey State Bar Association Section on Minorities in the Profession.[1]

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INTRODUCTORY REMARKS BY KAROL CORBIN WALKER

Karol Corbin Walker: Good morning. Welcome to the second annual program held in commemoration of the birthday of Dr. Martin Luther King, Jr. Dr. Martin Luther King, Jr. dedicated his life to the achievement of civil rights for all people regardless of race, color or creed. It is fitting that this year's program will address

1 Introductory remarks were delivered by Larry Martin, Executive Director of the Institute for Continuing Legal Education.

2 Senator Bill Bradley, a Democrat from New Jersey, was elected to the United States Senate in 1978 and reelected in 1984 and 1990. The Senator graduated from Princeton University in 1965 with a B.A. in American History. In 1967, he received an M.A. from Oxford University in England where he attended as a Rhodes Scholar. Senator Bradley was instrumental in the passage of the Civil Rights Act of 1991.

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the impact of the Civil Rights Act of 1991.[6]

This Act is the most meaningful civil rights legislation enacted since the passage of the Civil Rights Act of 1964.[7] In a society where racism, bigotry, sexism and tolerance are rampant, it is gratifying to witness such a tremendous response by the legal profession in support of such a program. This affirms the belief that we as a profession recognize our responsibility to foster the type of understanding and sensitivity that is necessary for us to co-exist in a multi-cultural society.

REMARKS BY NEIL MULLIN

Neil Mullin: For a while the real issue was obscured by the public debate on the Civil Rights Act of 1991. It seemed as though the real problem was the President. He vetoed the first version of the bill that came up in June.[8] The Senate failed by a single vote to override the veto.[9] Here we had a President who, when he campaigned for the United States Senate in Texas in 1964, campaigned against passage of the Civil Rights Act of 1964. He said it would violate peoples' constitutional rights[10] and now the President was saying that the Civil Rights Bill was a quota bill and had to be overturned.[11]

Within days of the Clarence Thomas hearings, however, the President's objections to the bill mysteriously vanished, almost as though his consent to the Act was a *quid pro quo* for the confirmation of Justice Thomas or maybe to undo the terrible political

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6 Pub. L. No. 102-166, 105 Stat. 1071 (1991) (to be codified as amended at 2 U.S.C §§ 60*l*, 1201-1224; 29 U.S.C. 626; 42 U.S.C. §§ 1981, 1981a, 1988, 2000e to 2000e-17, 12101-12213).

7 Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1988)).

8 P.L. 102-166, 105 Stat. 1071 (1991). *See generally*, Symposium, *The Association of American Law Symposium on the 1990 Civil Rights Bill*, 15 SETON HALL LEG. J. 483-544 (1991).

9 *See* Symposium, *supra* note 7 at 539-40.

10 *See* Jefferson Morley, *Bush and the Blacks: An Unknown Story*, N.Y. REV. OF BOOKS (suggesting that political expediency rather than moral belief influenced George Bush's changing stand on civil rights over the years). *See also* 102 CONG. REC. S9410-9412 (daily ed. July 10, 1991)(statement of Sen. Bradley); Adam Clymer, *Bush Defends Rights Record But Says He Fears Distortion*, N.Y. TIMES, July 11, 1991, at A17.

11 *See* Clymer, *supra* note 9, at A17; Adam Clymer, *Bush's Stance on Job Standards is Said to Contradict Court Rulings*, N.Y. TIMES, July 28, 1991, at I-14 (referencing President Bush's arguments that the civil rights bill would create pressure on employers to use quotas); *see also* Adam Clymer, *White House Attacks Compromise on Rights Bill*, N.Y. TIMES, October 24, 1991, at A22 (noting an executive agency's denouncement of civil rights bill as a quota bill, apparently at the prompting of the White House).

damage that the Republicans and Democrats perceived worked by those ugly hearings. Once the battle between Congress and the President stopped, the real issue became clear: The Supreme Court of the United States is increasingly outside the mainstream of the nation's moral and political commitment to equal opportunity.

The Republican and Democratic majority, joined now by a Republican President, have overturned at least seven, and actually more, Supreme Court decisions[12] that have cut the heart out of our Civil Rights Laws. That is really tragic—it is really tragic that the Supreme Court of the United States has devoted so much energy to harming those that are most oppressed in our society and, of course, the harm goes beyond the field of civil rights legislation. This Supreme Court has recently allowed the execution of individuals like Mr. McCleskey[13] in violation of the tradition of the writ of habeas corpus. This Supreme Court shows a lack of interest in and a lack of understanding for the powerless in our society; it is a sad day for all of us.

Congress is trying to undo the damage. They have tried to overturn a good piece of *Wards Cove*,[14] *Price Waterhouse*,[15] *Patterson v. McClean Credit Union*,[16] *Lorance v. AT&T Technologies*,[17] *Martin v. Wilks*,[18] *EEOC v. Arabian American Oil Co.*,[19] *West Virginia University v. Casey*.[20] This is not the first time Congress has had to respond to the current Supreme Court in this way. For example, the *Grove City* amendment[21] overturned the Court's effort to permit federal

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12 *See infra* notes 12-19 and accompanying text.

13 *McCleskey v. Zant*, 111 S. Ct. 1454, *reh'g denied*, 111 S. Ct. 2841 (1991).

14 490 U.S. 642 (1989).

15 490 U.S. 228 (1989).

16 491 U.S. 164 (1989).

17 490 U.S. 900 (1989).

18 490 U.S. 755 (1989).

19 111 S. Ct. 1227 (1991).

20 111 S. Ct. 1138 (1991).

21 Civil Rights Restoration Act of 1988, Pub. L. 100-259, 102 Stat. 28 (Supp. 1989) (codified as amended at 20 U.S.C. § 1681) (overriding Grove City College v. Bell 465 U.S. 555 (1984)). *See also* Equal Employment Amendments Act of 1972, Pub. L. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. § 2000e (1988) (overruling Dewey v. Reynolds Metal Co., 402 U.S. 689 (1971)); Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e (1988) (overruling General Electric v. Gilbert, 429 U.S. 125 (1976)); Age Discrimination in Employment Act Amendments of 1978, Pub. L. 95-256, 92 Stat. 189 (1978) (codified as amended at 29 U.S.C. § 621 (1978) (overruling United Airlines, Inc. v. McMann, 434 U.S. 192 (1977)); Voting Rights Amendments of 1982, Pub. L. 97-205, 96 Stat. 131 (1982) (codified as amended at 42 U.S.C. § 1971 (1988) (overruling City of Mobile v. Bodden, 446 U.S. 55

funds to go to institutions that discriminate.[22]

In many instances, the Supreme Court's position in these cases was more extreme than the position taken even by the Executive Branch under Reagan and Bush. For example, the brief submitted by the United States Justice Department in *Wards Cove*[23] did not urge as extreme a position as the Court eventually took.[24] Indeed, the United States Supreme Court was at odds with the business community in the *Wilks*[25] decision that allowed endless attacks on consent decrees.[26] After all, what reasonable business person would enter into a consent decree to settle a civil rights suit, perhaps a class action, if, for the next twenty years, anyone could come into court and reopen it?

In overturning the *Griggs* decision with *Wards Cove*, the Supreme Court was not attacking the liberals on the Warren Court. The *Griggs* decision was a unanimous opinion by Chief Justice Warren Burger. So this Supreme Court is outside the mainstream of our society. In *Patterson v. McClean Credit Union*,[27] there were amicus briefs in opposition to the Court's efforts submitted by no less than the AFL/CIO,[28] forty-five state attorneys general, the NAACP[29] and the NOW Legal Defense Fund.[30] In many of the cases overturned by the 1991 Act, there were equally substantial *amicus* submissions. In one of the overturned cases, there was a submission by over one hundred members of Congress opposing what the Supreme Court ultimately did.

In reaching the decisions that are the subject of the Civil Rights Act, the Supreme Court of the United States violated elementary principals of judicial restraint, statutory construction and intellectual honesty. We all learn in law school that remedial statutes are to be liberally construed. And there is no doubt but that our civil rights acts are remedial statutes. As Represen-

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(1980)); Older Workers Benefit Protection Act of 1990, Pub. L. 101-433, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. § 621 (Supp. 1991) (overruling Public Employees Retirement System of Ohio v. Betts, 109 S. Ct. 256 (1989)).

22 Grove City College v. Bell, 465 U.S. 555 (1984).

23 490 U.S. 642 (1989).

24 *Amicus Curiae* Brief for the United States at 22, Wards Cove Packing v. Antonio, 490 U.S. 642, 660 (1989)(No. 87-1387).

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

26 *Amicus Curiae* Brief for the Equal Employment Advisory Council at 3, Martin v. Wilks, 490 U.S. 755 (1989)(No. 87-1614).

27 491 U.S. 164 (1989).

28 *Id.* at 167.

29 *Id.* at 166-67.

30 *Id.* at 167.

tative Snellaborger, the floor leader of the Civil Rights Act of 1871 so eloquently put it:

> This Act is remedial, and in aid of human liberty and human rights. All . . . such statutes are liberally and beneficially construed. It would be strange, and in civilized law monstrous, were this not the rule of interpretation. As has been again and again decided by [the] Supreme Court of the United States . . . the largest latitude consistent with the words employed is uniformly given in construing such statutes. . . .[31]

The Reagan/Bush appointees to the Supreme Court tend to hold themselves out as textualists eschewing legislative history and intent, and instead looking to the plain language of statutes and applying common law principles of statutory construction. But these textualists took no issue with Justice Kennedy's narrow and stingy construction of section 1981[32] in *Patterson v. McClean*[33]. That decision, typically devoid of legislative history or any meaningful reference to the revolution that gave rise to the Civil War amendments and statutes, violated the principle that 42 U.S.C. section 1981 is a remedial statute deserving liberal construction. So much for Kennedy and Scalia'a professed textualism.

The Reagan/Bush appointees, so committed to judicial restraint in their confirmation hearings, have violated basic appellate jurisprudential principles by aggressively reaching out for issues not raised by parties in their petitions for certiorari. In *Patterson v. McClean*, the Supreme Court required the parties to address an issue not raised by them, the vitality *vel non* of *Runyon v. McCrary*.[34] Again, the Supreme Court has acted in an intellectually dishonest, activist manner, violating its avowed commitment to restraint.

In *Wards Cove*, there is a paragraph which pretends that eighteen years of judicial precedent did not say what it said, that the burden of proof in a disparate impact case shifts to the employer once a prima facie case is made out.[35] The Justices tipped their hats toward that language, but pretended that pre-*Wards Cove* cases did not require burden shifting. This intellectual dishonesty runs throughout the opinions that are the subject of the Civil Rights Act of 1991.

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31 CONG. GLOBE, 42d Cong., 1st Sess. App. 68 (1871).

32 42 U.S.C. § 1981 (1988). For an excellent analysis of the Supreme Court's textualism, see Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005 (1992).

33 491 U.S. 164 (1989).

34 427 U.S. 160 (1976).

35 "We acknowledge that . . . opportunity." Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 660 (1989).

So this Act reflects a sad day in our judicial history. Sadly too, the Supreme Court's intellectual dishonesty has metastasized to the circuit and district courts which also are increasingly hostile to civil rights litigants. The circuit courts themselves generate intellectually dishonest opinions that undermine our civil rights. Congress's response has necessarily been to limit judicial discretion by passing a very detailed, highly codified Civil Rights Act. Thus, we have a hypertechnical statute today which goes so far as to define the shifting burdens of proofs. In one section, it even tells the courts where they should look to find legislative history about a specific subject matter.[36] Through codification, Congress is trying to limit the discretion of the United States Supreme Court and the federal courts generally. The codification, however, will not be an adequate response to this Court.

Within days of this statute's passage, the district courts went to work to deny the retroactive application of this Act,[37] despite the plain language that suggests it should be applied to pending cases except in narrowly specified cases.[38] The Bush EEOC, which has no expertise on the issue of retroactivity and is supposed to champion the rights of discrimination victims, has issued a report calling for prospective application only.[39]

At the very time the Civil Rights Act of 1991 tried to limit the damage done to consent decrees by the *Wilks* decision, the Supreme Court lowered its standards and made it easier to attack consent decrees substantively.[40] It may be that a social upheaval similar to that

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[36] *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 105(b) (1991) (to be codified as amended at 42 U.S.C. § 1981).

[37] *See, e.g.*, Poston v. Reliable Drug Stores, Inc., 783 F. Supp. 1166, 1168 (S.D. Ind. 1992) (noting that initial indications appeared to disfavor retroactive application, but that the authorities are now more evenly divided); *compare* Thompson v. Johnson & Johnson Man. Info. Center, 783 F. Supp. 893, 897-98 (D.N.J. 1992) (finding that non-retroactive application is probably in accord with the opinion of the U.S. Supreme Court) *with* Sanders v. Culinary Workers Union Local No. 226, 783 F. Supp. 531, 539 (D. Nev. 1992) (explaining that without clear legislative intent to make the Act either prospective or retroactive, manifest injustice would not result with retroactive application in this case). *See also infra* note 136.

[38] Section 402(a) of the Act provides: "In General — Except as otherwise specifically provided, this Act shall take effect upon enactment." Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 402 (1991) (to be codified as amended at 42 U.S.C § 1981).

Where the Act does not warrant retroactive application, it so states. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, §§ 109(c) and § 402(b) (to be codified respectively as amended at 42 U.S.C §§ 2000e, 1981).

[39] Robert Pear, *Agency Prohibits Use of New Law in Old Bias Cases*, N.Y. TIMES, Dec. 31, 1991, at A1.

[40] Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748 (1992).

which gave rise to the 1964-65 civil rights legislation and decisional law of the 1960's will be needed to act as a "check and balance" upon the Supreme Court of the United States. I hope that is not necessary. I hope the Supreme Court hears the message, not just of Congress, but of enormous segments of society—that society wants civil rights of all people respected. Society wants to root out the evil and obscenity of discrimination.

Choosing Between Federal and State Courts

The litigation bottom line is the same as it was when I spoke last year. If you are a plaintiff's lawyer in the civil rights or employment field, stay out of federal court and stay away from federal law, — even with the Civil Rights Act of 1991. New Jersey has an excellent civil rights law, the Law Against Discrimination (LAD).[41] The LAD provides uncapped compensatory and punitive damages and the right to a jury trial.[42] LAD has a finding of fact, as amended in April, 1990, which sets forth the different kinds of suffering people incur as a result of discrimination,[43] a passage that I have asked to be charged to juries.

New Jersey's sweeping LAD is unburdened by the sort of decisional law that weighs down the federal Act. Plaintiffs should use the LAD and should stay out of federal court, especially the Third Circuit, whenever possible.

Defense attorneys generally know that they should try to drag plaintiffs into federal court. They energetically use the removal statutes.[44] At the very time Justice Rehnquist was on Capital Hill lobbying Congress about the overload of the federal courts, his courts were liberalizing removal law. The district courts have been making it easier for a defense attorney to bring plaintiffs (kicking and screaming) into federal court. That is a flip. In the 1960's, civil rights lawyers wanted to stay out of the state courts and get into federal court. Then, the Burger Court established procedural barriers to getting into federal court by expanding doctrines of justiciability and abstention.[45] Now plaintiff's attorneys have little choice but to stay out of federal court and try to make progressive state civil rights law, both statutory and constitutional.

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41 N.J. STAT. ANN §§ 10:5-1 to 10:5-42 (West 1976 & Supp. 1991).
42 N.J. STAT ANN. § 10:5-13 (West Supp. 1991).
43 N.J. STAT. ANN. § 10:5-3 (West Supp. 1991).
44 28 U.S.C. §§ 1441 to 1443 (1988).
45 *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971).

So, if you are a plaintiff's lawyer, ruin diversity when you can. Join individuals—if in good faith you can and they deserve to be joined—who are New Jersey citizens even when the corporation is not a New Jersey citizen. Stay away even colorably from the federal statutes when you can to avoid federal question removal. There is no need to use the federal laws except when you are representing, for example, some categories not covered by the state act such as federal employees, e.g., postal workers, or Environmental Protection Agency employees. When you have those cases, you are going to end up in federal court and that is why, if you do this work, you have to know about the Act.

There is another reason why you have to know about federal law, even if you heed my advice and stay in state court under state law. When you receive a trial brief on jury instructions from an experienced defense firm in one of these cases, you will note that they attempt to import large segments of federal law because its so conservative and pro-corporation. It is important for you to know federal court rights law even in state court proceedings and it is important for you to know how and to what degree the 1991 Act liberalized federal law.

In *Goodman v. London Metals Exchange*,[46] the court suggested that we look to federal law for guidance in construing our state discrimination law. But *Castalano v. Linden Bd. of Education*[47] was a case in the New Jersey appellate division, upheld by the New Jersey Supreme Court in part, which overruled a United States Supreme Court decision undermining the rights of pregnant workers. The appellate division stated "we are free to apply our own concept of what is right and proper in the circumstances."[48] So let us remind the state courts that they should not blindly follow federal civil rights law. Let us remind the appellate division judges, the trial judges and the Supreme Court of New Jersey that to a great degree federal law is a conservative body of law which is hostile to civil rights. We should follow the liberalized areas of federal law, the precedents that really are remedial in spirit, but let us reject the conservative elements of the federal law.

Overturning Patterson v. McClean Credit Union

Let us turn to an overview of some of the more important

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[46] 86 N.J. 19, 31, 429 A.2d 341, 349 (1981).
[47] 158 N.J. Super. 350, 386 A.2d 396 (App. Div. 1978).
[48] *Id.* at 360, 386 A.2d at 401.

provisions of the Civil Rights Act of 1991 and some of their litigation implications. In *Patterson v. McClean Credit Union*,[49] Brenda Patterson testified that she was being harassed for racial reasons on the job. She had a supervisor who was fond of telling her that blacks were inferior to whites, blacks were lazier than whites, and that blacks worked more slowly than whites. Her employer gave her menial assignments not given to whites and took other offensive actions.[50] She brought her action under 42 U.S.C. section 1981, which provides in part, that minorities should be given the same right "to make and enforce contracts" as whites.[51] "Make and enforce contracts" is the key operative phrase. The Supreme Court of the United States chose to read that phrase as narrowly as possible. They held, in effect, that the Congress that passed this Act, the radical Congress that existed immediately after the Civil War, had a very narrow interpretation in mind.[52]

Justice Kennedy held that "make and enforce contracts" means that an employee has section 1981 rights only with respect to whether or not there is discrimination in the *initial* hiring process.[53] That is, section 1981 applies only to the moment you make the employment contract, and nothing subsequent to that, unless a new and distinct employment contract comes into existence through promotion to a position covered by a new contractual understanding. Justice Kennedy held that the plaintiff must prove that a subsequent promotion involved a distinct new employment relationship to come within section 1981's ambit.[54] The *Patterson* Court further held that the word "enforce" in section 1981 referred to unions, for example, who enforce a contract in a racially discriminatory way.[55] Under this interpretation, the humiliating discrimination that Brenda Patterson suffered could not be remedied. In that regard, Justice Kennedy explicitly held that 42 U.S.C. does not cover racial harassment.[56]

Stop for a minute and think about what the employment contract analysis means. When you enter an employment relationship or contract, normally the contract does not say that "we are going to discriminate against you and harass you on the basis

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49 491 U.S. 164 (1989).
50 *Id.* at 178.
51 42 U.S.C. § 1981 (1988).
52 *Patterson*, 491 U.S. at 178.
53 *Id.* at 176-77.
54 *Id.* at 179-80.
55 *Id.* at 178.
56 *Id.* at 188.

of your race." Under Justice Steven's sensible analysis in *Patterson*, the employer has, in effect, amended the employment contract and made a new contract when he or she discriminates. That was not in the original contract. No one in their right mind would take a job with that in the contract. When the harassment starts, a new (albeit unilateral) contract forms or an existing contract is materially changed and that is why *Patterson* was wrong just on a common sense level. *Patterson* is a tortured reading of simple statutory language.

In Section 101 of the 1991 Act[57], there is a provision that overturns *Patterson*. In this section, the phrase "make and enforce contracts" is defined to include the making, performance, modification and termination of contracts and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.[58]

To avoid any possible overturning of *Runyon v. McCrary*[59] by the Supreme Court of the United States in the future, section 101 also provides that 42 U.S.C. section 1981 applies to private sector action as well as public sector action.[60] This is important. Section 1981 is a useful statute for litigators. Like New Jersey's LAD, it provides uncapped, unlimited, punitive and compensatory damages, the right to a jury trial and attorneys' fees. Plaintiffs are allowed to bring actions under that federal statute in state court. The trouble is, when the plaintiff brings them, the corporate defendants invariably remove the case to federal court on federal question grounds. From time to time, however, plaintiffs should consider bringing actions under section 1981. If the plaintiff does file in state court and gets removed to federal court, he or she can dismiss the case voluntarily under Rule 41[61] and then refile the claim in state court on state law grounds.

There is a possible trap for the unwary in the new 42 U.S.C. section 1981 statutory scheme. Section 102,[62] which now gives the plaintiff the right to compensatory and punitive damages under Title VII,[63] provides for damages in a jury trial under Title

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57 Pub. L. No. 102-166, 105 Stat. 1071, § 101 (1991) (to be codified as amended at 42 U.S.C. § 1981).

58 § 101(b).

59 427 U.S. 160 (1976).

60 § 101(c).

61 FED. R. CIV. P. 41(a).

62 Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 102 (1991) (to be codified as amended at 42 U.S.C. § 1981(a)).

63 § 102(b)(2).

VII *only if the plaintiff cannot get a recovery under 42 U.S.C. Section 1981.*[64]

In the Third Circuit, the statute of limitations for a section 1981 action arising in New Jersey is two years. Assume a lay person files a race discrimination complaint with the EEOC under Title VII, and it sits there for two years. The complaint comes to your office having passed the statutory period for filing the 1981 claim. Is the plaintiff barred from receiving damages under Title VII because he/she was once entitled to receive damages under section 1981?

The legislative history favors an interpretation of the Act which holds that if a plaintiff cannot recover under 42 U.S.C. 1981 *for any reason*, including plaintiff's missing the statute of limitation, the plaintiff is entitled to a jury trial and relief under Title VII. Conceivably, however, the courts may go the other way. There are no reported decisions on this yet and the courts may hold that if the plaintiff could, at any time, have recovered under 42 U.S.C. section 1981, but missed the statute of limitations, the plaintiff is not entitled to recover compensatory and punitive damages or have a jury trial under Title VII.

Racial or Sexual Harassment

Now that *Patterson* is undone and racial harassment is back in 42 U.S.C. section 1981,[65] the Supreme Court and the federal courts will likely turn their attention to upping the substantive standard for proving harassment. Presently, the standard is pretty high. *Patterson*[66] and *Meritor Savings Bank v. Vincent*[67] hold that the harassment has to be sufficiently severe or pervasive to alter the conditions of the victims' employment and create an abusive working environment. The federal courts are fond of saying that a stray comment or stray action does not constitute harassment. The plaintiff must show a pattern or a pervasive atmosphere. It is shocking how many racial or sexual slurs or awful types of behavior are deemed by the federal courts not to constitute a sufficient pattern to be harassment under 42 U.S.C. section 1981 or Title VII. Plaintiffs should turn their attention to that playing field when drafting a complaint under Title VII for har-

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64 § 102(a)(1).

65 *See, e.g.*, CONG. REC. H9527 (1991) (Congressman Edwards's interpretive memorandum of the Civil Rights Act of 1991).

66 Patterson v. McClean Credit Union, 491 U.S. 164 (1989).

67 477 U.S. 57 (1986).

assment. If justified by the facts, allege that the harassment was pervasive and be sure to read *Meritor Savings Bank, FSB v. Vincent*[68] to understand how the entity can be held liable for the harassment by a co-worker or supervisor. It is not automatic. There must be some evidence of reasonable knowledge of the harassment by the superiors, managers or executives. Again, there is a very conservative interpretation prevalent in the courts on those issues. What has been gained by the Act's reversal of *Patterson* will be lost if the courts up the standard for proving harrassment and up the standard for demonstrating corporate responsibility. I alert plaintiffs to that for their proofs and for drafting their pleadings.

Price Waterhouse v. Hopkins[69] involved sexual stereotype discrimination against a woman who wanted to become a partner at Price Waterhouse. At that time she sought a partnership only 7 of 662 partners were female. She was advised by a senior partner to try to act more feminine; that might help her get the position. He even gave her some specifics about how she should wear her makeup, how she should walk, and how she should to talk.[70] The Supreme Court of the United States, deviating from its tendency to eviscerate civil rights laws, held that sexual stereotyping is discriminatory under Title VII.[71] Moreover, the Court held that where there is direct evidence of discrimination, e.g., direct evidence of blatantly discriminatory remarks by decision-makers, then the burden of proof should shift in a disparate treatment case to the employer to show that an impermissible factor did not motivate the adverse employment decision. Justice O'Connor's separate opinion sets forth that holding.[72] That is something that should be adopted in New Jersey and applied to our Law Against Discrimination. The bad part was actually in Justice Brennan's opinion.[73]

Justice Brennan, perhaps in an effort to reach a compromise with the rest of the Court, held that where a plaintiff proves that a discriminatory factor was *a motivating factor*—not the only factor that led to the demotion or the firing—that would be sufficient to

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68 *Id.* at 69-73. *See also* T.L. v. Toys 'R' US, Inc., No. A-2037-9075, 1992 WL 95659, (N.J. Super. App. Div. April 16, 1992).

69 490 U.S. 228 (1989).

70 *Id.* at 235.

71 *Id.* at 258.

72 *Id.* at 261-79.

73 *Id.* at 231-58.

prove discrimination.[74] He further held, however, that the employer would then have the right to prove that the adverse employment decision would have been taken even absent the improper motivating factor.[75] If the employer could do that, Justice Brennan acknowledged, then the employer could avoid a finding of *liability*.[76] That did not make sense. If an employer uses race, gender or handicap as a motivating factor, that is discrimination, even if the motivation is only improper in part. There should be some finding of liability; perhaps, arguably, the damages should be limited if the adverse employment decision would have been taken absent the discriminatory factor. That is what Congress has fixed in section 107.[77] If you prove that an impermissible factor was "a motivating factor" under section 107, there is a finding of liability but the relief is very limited if the employer can prove that the adverse action would have been taken absent the impermissible factor.

If the employer can carry that burden of proof, the plaintiff can still obtain a declaratory judgment or very limited injunctive relief, *not* including reinstatement, and attorneys' fees. This is a very complicated setting.

In my firm's recent trial against IBM,[78] we decided not to charge *Hopkins*. We had direct evidence of discrimination; therefore, the burden should have shifted to the employer to prove that the discrimination was not the reason for the adverse employment decision. When we drew up the jury charges, they were so hopelessly complicated that we decided to go with a straight *McDonnell Douglas*[79] standard which kept the burden of proof on the plaintiff.[80]

When there is "a motivating factor" jury instruction pursuant to the 1991 Act and *Hopkins*, the danger of jury confusion is great indeed. A way to avoid confusion, I suggest, may be to bifurcate the trial. First, the case should be sent to the jury under the standard *McDonnell Douglas* test. Under that instruction, the plaintiff must establish a prima facie case that there was imper-

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74 *Id.* at 244-45.

75 *Id.*

76 *Id.*

77 Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 107 (1991) (to be codified as amended at 42 U.S.C. § 2000e-2).

78 Rathemacher v. IBM, Civ. No. 88-3463, 1992 U.S. Dist. LEXIS 2618 (D.N.J. Feb. 27, 1992).

79 McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

80 *Id.* at 802.

missible discrimination. The employer must then carry the burden of producing, but not proving, a legitimate business reason for what it did. The plaintiff must then be given the opportunity to demonstrate the pretexuality of the employer's reasons. The jury should be instructed that in order to prevail, the plaintiff must prove that discrimination was "a determinative factor." That standard is well set out in our state appellate division case, *Slohoda v. United Parcel Service, Inc.*[81]

If the jury finds that the impermissible factor was not "a determinative factor," then the plaintiff should be entitled to compensatory and possibly punitive damages. If the jury finds that discrimination was not "a determinative factor," then—under Title VII as amended—the plaintiff should be entitled to argue, in the second bifurcated phase of the trial, that the discrimination, while not determinative, was "a motivating factor." If the plaintiff prevails, he or she should be entitled to the more limited relief of section 107.

There is a danger that section 107's "motivating factor" language may muddy waters that are already very muddy about what a plaintiff in an employment discrimination case must prove. Do you have to prove that discrimination was "a determinative factor?" Do you have to prove that discrimination was the "sole factor?" Do you have to prove that discrimination was only a "motivating factor?" New Jersey state and federal courts should stand firmly with the *Slohoda* test.[82] The plaintiff must prove discrimination was a determinative factor. If the plaintiff fails to prove that, he or she still should be entitled to attorneys' fees if he or she can prove that discrimination was at least "a motivating factor." Again, as a practical matter, I doubt that many trial lawyers will enter the maze of section 107.

Disparate Impact Cases

This is a hypertechnical statute aimed at undoing the hypertechnical damage caused by several Supreme Court decision. Now we come to the most hypertechnical area of all: The portions of the Act that address *Wards Cove Packing v. Atonio*,[83] a disparate impact case. A disparate impact case is one in which a plaintiff identifies a seemingly neutral employment practice by an

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81 207 N.J. Super. 145, 155, 504 A.2d 53, 59 (App. Div.) (citation omitted), *cert. denied*, 104 N.J. 400, 517 A.2d 403 (1986).

82 *Id.*

83 490 U.S. 642 (1989).

employer concerning conditions of employment, e.g., hiring, firing, promotion, etc. The plaintiff argues that the facially neutral party has a statistically measurable negative impact upon protected groups. In an impact case, the plaintiff does not set out to prove that there was an intent to discriminate or that the facially neutral policy was intended to discriminate. Thus, a disparate impact case should not be confused with a pattern and practice case in which a plaintiff proves that a facially neutral policy was motivated by intentional discrimination.

Prior to *Wards Cove*, the leading disparate impact cases, *Griggs v. Duke Power Co.*[84] and *Albemarle Paper Co. v. Moody*,[85] the leading cases, had been followed for eighteen years. *Wards Cove* undid that precedent to a large degree.[86] In the first part, *Wards Cove* sets out what is statistically necessary to establish a prima facie case of disparate impact. Is it enough to make out a prima facie case simply to prove that 90% of a corporation's unskilled jobs are held by minorities, but 90% of the managerial and skilled jobs are held by whites? Is that enough? *Wards Cove* says such statistics do not establish a prima facie case.[87]

Under *Wards Cove*, the plaintiff must compare the percentage of minorities in the skilled jobs to the percentage of minorities in the relevant regional population who have skills sufficient to qualify for the skilled and managerial positions at issue. For some reason, at the Supreme Court of the United States, if minorities are doing all of the menial work and whites are doing the clean, skilled and managerial jobs, that is *not* sufficient to raise, prima facie, a question of whether or not there is a discriminatory disparate impact. No doubt, the outcome of *Wards Cove* probably would have been different if the whites had all the dirty jobs and the minorities had all the management jobs. In any event, the bad news is that the Civil Rights Act of 1991 does not overturn the statistical rigors of *Wards Cove*. So if the plaintiff is going to bring a disparate impact case, he or she should read the *Wards Cove* statistical section very carefully and make sure the plaintiff's statistical expert also reads that section carefully. A relevant, regional, qualified statistical base must be identified for compari-

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84 401 U.S. 424 (1971).

85 422 U.S. 405 (1975).

86 *See generally* Emilie M. Meyer, Note, *United States Supreme Court Clarifies Standards for Statistical Evidence and Burdens of Proof in Private Litigation Under the Disparate Impact Theory*, 20 SETON HALL L. REV. 831, 854-59 (1990) (noting the subtle, "disquieting aspect[s]" of *Wards Cove* that clearly upset precedent).

87 490 U.S. at 655.

son with the stratum of employees the plaintiff views as suffering from a disparate impact.

Wards Cove holds further that if a plaintiff is to make a prima facie case of disparate impact, it is not enough simply to meet the statistical rigors I just discussed. The plaintiff must also identify the specific employment practice that has a statistical disparate impact on a protected class. Was it the nepotism policy? Was it the use of subjective criteria in performance appraisals? What was it that caused minorities, for example, to be statistically underrepresented? The plaintiff must find out. The employer has all that information, but *Wards Cove* placed the burden on the plaintiff to identify the adversely impacting practice.

Wards Cove thus placed the burden on the plaintiff to figure out what the specific discriminatory practice was and then to have the statistician reveal the specific statistical impact of each challenged employment practice. It is interesting that, shortly after *Wards Cove* made it more necessary than ever to hire very expensive statistical experts, the Supreme Court of the United States held that 42 U.S.C. section 1988[88] does not cover expert fees.[89]

Even if the plaintiff can jump through these hoops and show that a disparate impact statistically caused an identifiable policy, then the Supreme Court held, in *Wards Cove*, that the burden of proof does not shift to the employer as it previously had under *Griggs* and *Albemarle*. Overruling eighteen years of precedent, the Court held that to overcome a plaintiff's prima facie case, the employer need only *articulate* a real business necessity for the practice that had the negative impact.

So, in *Wards Cove*, the Court shifted the burden of proof from the employer to the plaintiff. Moreover, it diluted the definition of "business necessity" to include any "legitimate" employment goal of the employer. If the defendant articulates such a goal, however, *Wards Cove* allowed that plaintiff to prevail if he or she could prove that there was some less discriminatory alternative practice that could have been used to satisfy the goal.

Thus, *Wards Cove* established a three-step approach to disparate impact that impossibly burdened plaintiffs. Before turning to the impact of the 1991 Act on *Wards Cove*, I should note that *Griggs*,[90] which was undone by *Wards Cove*, was a socially invaluable decision. While *Griggs* seemed arcane and complex, it opened

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88 42 U.S.C. § 1988 (1988).

89 West Virginia Univ. Hospital, Inc. v. Casey, 111 S. Ct. 1138 (1991).

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

the doors of the corporate world for minorities and women[91], and will now do so for handicapped people, given the Americans with Disabilities Act.[92] Disparate impact cases can still have an enormous positive impact upon society. The defense bar can play a very important role when representing corporations that must have affirmative action plans because they do business with the federal government. Defense attorneys can play a positive and constructive role, and often do, by ensuring that these corporations abide by EEOC guidelines governing disparate impact and hiring and firing.[93] Of course, there will be a new round of regulations that reflect the overturning of *Wards Cove*.

As mentioned before, the 1991 Civil Rights Act did not overturn the statistical burden established in *Wards Cove*.[94] Section 105 of the 1991 Act, however, does modify the causation standard of *Wards Cove*.[95] Under section 105, the plaintiff still must try to figure out the specific policy or practice of the corporation that caused the disparate impact. If, however, the plaintiff cannot do that because it is, as a practical matter, impossible to identify the policy or practice, the plaintiff is relieved of the obligation to specifically parse out the offensive policies.[96]

Thus, Congress has tried to undo that very burdensome standard of causation that was set forth in *Wards Cove*. Often, all or most minority workers in a corporation are in menial jobs while all or most white workers hold management positions. It has been that way for years and it is often almost impossible to figure out the specific policies that, in the past, gave rise to the current disparate impact. Under the 1991 Act, if the plaintiff can demonstrate that it is not possible to specifically identify the offensive policies, the plaintiff may rely upon a non-specific reference to employment practices. I expect a great deal of litigation on this issue; the legislative history is contradictory and unhelpful.

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91 As the House Education and Labor Committee acknowledged, "[t]he *Griggs* decision had an extraordinarily positive impact on the American [w]orkplace." HOUSE COMMITTEE ON EDUCATION AND LABOR, THE CIVIL RIGHTS ACT OF 1991, H.R. REP. No. 102-40(I), 102d Cong., 1st Sess., pt. III(A)(1), at 25 (1991) (footnote omitted), *reprinted in* 1991 U.S.C.C.A.N. 549, 563.

92 Pub. L. No. 101-336, 104 Stat. 328 (1990) (codified at 42 U.S.C. §§ 12101-12213).

93 41 C.F.R. § 60 (1991).

94 *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 105 (1991) (to be codified as amended at 42 U.S.C. § 2000e-2).

95 § 105(a).

96 *Id.*

Reversing *Wards Cove*, in part, the 1991 Civil Rights Act shifts the burden of *proof* back to the employer, as it was under *Griggs*, once the plaintiff has made out a prima facie case.[97] If the plaintiff has jumped through all the prima facie hoops, the burden of *proof*—not the burden of *production* as in *Wards Cove*—shifts to the employer to show that there was some "business necessity" for the practices that gave rise to the discrimination and that the standards the employer set as job qualifications are related to the specific job. The employer cannot, for example, simply assert that it required an MBA for the lowest level management job because the employer hoped some day to upgrade its industry and improve its image. That is insufficient. Rather, the employer must show that the job in question required the MBA—thus, the word "necessity" has been put back into "business necessity." The *Wards Cove* dilution of the business necessity concept has been undone to a large degree. Furthermore, the right of a plaintiff to demonstrate a less discriminatory alternative business practice, has been codified.[98]

International Application

The 1991 Act overturns *EEOC v. Arabian Oil Co.*,[99] which held that Title VII did not apply to employees of American corporations abroad or employees abroad of foreign entities controlled by American Corporations.[100] Now, overseas American citizens employed by American corporations or employed by foreign firms controlled by American corporations have the benefit of Title VII.[101]

Compensatory Damages, Punitive Damages and Front Pay

Under the Act, Title VII complainants are entitled to jury trials if in their complaints, they demand compensatory and/or punitive damages. The damages are subject to certain caps dependent upon the size of the defendant firm.

There is going to be an interesting issue that develops with respect to front pay. Front pay usually represents a substantial percentage of the recovery in wrongful discharge cases. For ex-

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97 *Id.*
98 *Id.*
99 111 S. Ct. 1227 (1991).
100 *Id.* at 1234
101 Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 109 (1991) (to be codified as amended at various places in 42 U.S.C.).

ample, suppose someone fired at age 44 from a $70,000 per year job goes out and tries to find another job but can only find a job that pays $25,000 per year. The plaintiff will commonly hire an economist to take that salary gap, sum it for the plaintiff's remaining work life, take the present value of that figure and, at least in federal courts, actually put that number on a blackboard in front of a jury.[102] Does the 1991 Act cap front pay? Apparently not.

Compensatory damages which are capped, are defined in section 102 of the Act to exclude back pay, interest on back pay *or any other type of relief previously authorized under section 706(g) of the Civil Rights Act of 1964*.[103] Thus, by definition, "compensatory damages" do *not* include the types of relief previously available under Title VII, such as front pay. The statute then limits compensatory and punitive damages to a range of $50,000 to $300,000 depending on the size of the firm.[104]

Because front pay is excluded from the statutory definition of compensatory damages, the cap arguably should not limit front pay awards. I predict that defense attorneys, however, will make use of a reference in the cap section to "future pecuniary losses"[105] to argue that Congress intended to cap front pay on this issue. I do not think they will find a warm welcome in the legislative history.

The Act makes punitive damages available under a two-part standard.[106] The plaintiff can recover punitive damages if he or she can show actual malice *or* reckless indifference to his or her rights. This is the standard we plaintiffs' attorneys have argued for in New Jersey. In the appellate division case *Jackson v. Consolidated Rail Corp.*,[107] the court adopted that very standard[108]—although defendants sometimes argue it's steeper. In any event, reckless disregard or actual malice will justify punitive damage under the 1991 Act.

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102 *But see* Tenore v. Nu Car Carriers, 67 N.J. 466, 482-483, 341 A.2d 613, 622 (1975) (prohibiting introduction of an economist's bottom line figures in a wrongful death action). Arguably, *Tenore* should not apply to a wrongful discharge action because the plaintiff is typically alive and thus income projections are less speculative.

103 § 102(b)(3).

104 *Id.*

105 *Id.*

106 *Id.*

107 223 N.J. Super. 467, 538 A.2d 1310 (App. Div. 1988).

108 *Id.* at 482-83, 538 A.2d at 1319.

Attorneys' Fees

The Act overturns *West Virginia Hospital v. Casey*,[109] which held that experts fees are not covered by the attorneys' fees clause of 42 U.S.C. section 1988.[110] Plaintiffs can now recover expenditures on experts fees if they prevail.[111]

Preserving Consent Decrees

Preserving consent decrees is a complicated area that most practitioners do not encounter, but I will touch on it briefly. In *Martin v. Wilks*,[112] white firemen complained when black firemen in the Birmingham, Alabama fire company—implementing a consent decree—tried to get promotions. There had been no black firemen in the Birmingham fire department until 1968. The second black gained employment in 1972 and no black firemen were promoted until 1982. At the same time, some white firemen, who had been the beneficiaries of a *de facto* affirmative action program for whites for almost one hundred years, brought a reverse discrimination suit.[113]

The white firemen challenged an existing consent decree which guided the promotion policies. The court held that the white firemen had the right to challenge the consent decree and that consent decrees were not as sacred as they had been prior to *Wilks*.[114] Now, under section 108, Congress has established that people cannot undo consent decrees, except in certain exceptional circumstances.[115] If able to show a lack of notice or reasonable opportunity to be heard at the time of the entry of a consent decree, a plaintiff may be able to challenge the decree, but not if the plaintiff had been represented by a party who had the same interest as they had at the time the consent decree was entered.[116]

For example, if the white firemen's union was party to the consent decree under the Act, the union might be deemed to have adequately represented the interests of future white firemen

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109 111 S. Ct 1138 (1991).
110 *Id.* at 1148.
111 Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 113 (1991) (to be codified as amended at 42 U.S.C. § 1988).
112 490 U.S. 755 (1989).
113 *Id.* at 758.
114 *Id.* at 767-68.
115 Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 108 (1991) (to be codified as amended at 42 U.S.C. § 2000e-2).
116 *Id.*

and, thus, later challenges to the decree might be barred. It is similar to the representative plaintiff standard used in Rule 23[117] governing class actions, where an individual or a group of individuals represent the interest of a class. If they represent those interests adequately, if they have the same interests at heart, why should others be allowed later to undo the product of the class action? This does not violate due process.[118] Bankruptcy practitioners know that future creditors or future claimants are foreclosed provided that there has been proper notice given and an adequate opportunity to be heard.[119] So *Wilks* is overturned and now it is appropriately difficult to undo consent decrees.

Challenges to Seniority Systems

Lorance v. AT&T Technologies Inc.[120] has been undone. Bona fide seniority systems may not be challenged on a disparate impact theory, but may be challenged under a disparate treatment theory. In *Lorance*, female employees of AT&T alleged that the company's seniority system intentionally discriminated against women. The Supreme Court of the United States, however, held that the challenge was untimely. The seniority system had been in place several years before the women were injured by it. The Supreme Court held that the women should have brought the challenge before they were injured, when the seniority system was put in place.[121] Of course, lacking a palpable injury, the Lorance Co. plaintiffs would have been dismissed for lack of standing had they sued prior to injury. Under the Act, a plaintiff can now challenge a seniority system on a disparate treatment theory *either* when it is put into place or when the injury occurs.

The Age Discrimination In Employment Act (ADEA)[122]

There has also been a modification to the Age Discrimination in Employment Act.[123] Under ADEA, plaintiffs must file a charge with the EEOC before bringing a federal Age Discrimination suit.[124] Sixty days thereafter, but before two years from the

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117 FED. R. CIV. P. 23.
118 *See infra* note 119 and accompanying text.
119 *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).
120 490 U.S. 900 (1989).
121 *Id.* at 911.
122 29 U.S.C. §§ 621-634 (1988 & Supp. I 1989).
123 Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 115 (1991) (to be codified as amended at 29 U.S.C. § 626(e)).
124 *Id.*

date of the incident, the plaintiff was allowed to file a complaint in court. Now, if the EEOC issues a notice indicating that it has terminated its proceedings, then a plaintiff must file in court within 90 days of receipt of such notice. Thus, an ADEA lawsuit might be filed, in court, no earlier than 60 days after filing an EEOC charge, but no later than 90 days after receipt of notice that the EEOC has terminated the proceedings.[125]

Arbitration Under Section 118

Section 118[126] encourages the use of alternate dispute resolution techniques to resolve discrimination claims. There has been some action on this in the courts. In *Alexander v. Gardner-Denver Co.*[127], a 1974 decision, the Court held that a union could not give up an individual employee's right to use Title VII and the EEOC to address sex discrimination claims. The union agreement could not require the plaintiff to arbitrate her claims.[128] This was a pro-plaintiff decision. Recently, the United States Supreme Court held in *Gilmer* that a securities industry employee who signed a registration form, in which he agreed to arbitrate his claims, *could* be compelled to arbitrate his age discrimination claims before securities industry arbitrators.[129]

In the legislative history, Representative Hyde argues that section 118 means that *Gilmer* should be applied to Title VII and that employees may now be compelled to arbitrate their Title VII claims.[130] Representative Edwards argues that was not intended and that *Alexander v. Gardner Denver Co.* is still good law.[131]

People should not be required to involuntarily arbitrate their discrimination claims. I have yet to encounter an arbitrator who knows federal or state discrimination law. We can, however, expect the federal judiciary to rely on section 118 to deprive plaintiffs of juries by forcing them into the inadequate arbitration forum.

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125 *Id.*

126 Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 118 (1991) (to be codified as amended at 42 U.S.C. § 1981).

127 415 U.S. 36 (1974).

128 *Id.* at 59-60.

129 Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1657 (1991).

130 *See* HOUSE JUDICIARY COMM., CIVIL RIGHTS ACT OF 1991, H.R. REP. NO. 102-40(II), 102d Cong., 1st Sess. at 78, *reprinted in* 1991 U.S.C.C.A.N. 689, 694, 766.

131 *See* HOUSE JUDICIARY COMM., *supra* note 130, at 41, *reprinted in* 1991 U.S.C.C.A.N. 735.

Retroactive Application

There are hundreds of cases under 42 U.S.C. section 1981 and Title VII now pending in the federal district courts; there are thousands throughout the country. The big question is whether the Act applies retroactively. Certain provisions of the Act explicitly state that those sections do not apply retroactively.[132] The extraterritoriality requirement is explicitly excluded from retroactive application.[133] There is also a clause that, ironically, prevents application of the Act to the parties in the *Wards Cove* case itself.[134] Outside those provisions, there are no bars to retroactive application, and, in fact, section 402 says that, except as otherwise specifically provided, the Act and the amendments made by the Act shall take effect upon enactment.[135] One would conclude that where Congress did not specifically prohibit retroactive application, there should be application at least to pending cases. Unfortunately, that is not happening in the federal courts. I expect this federal judiciary to continue violating the principle that remedial statutes should be liberally construed. I fully expect the federal courts to bar retroactive application of this remedial Act.[136]

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132 §§ 109, 402.

133 § 109(c).

134 § 402(b).

135 § 402(a).

136 At the time of this writing, the only three circuit courts addressing the issue of retroactivity have ruled that the Civil Rights Act of 1991 is to be applied prospectively. Mozee v. American Commerical Marine Serv. Co., No. 90-2660, 1992 WL 92511 (7th Cir. May 7, 1992); Fray v. The Omaha World Herald Co., Nos. 91-2439, 91-2443, 91-2713, 1992 WL 65663 (8th Cir. Apr. 3, 1992); Vogel v. City of Cincinnati, No. 91-3474, 1992 WL 45451 (6th Cir. Mar. 13, 1992).

There are dozens of district court opinions deciding retroactive application. For courts holding retroactive application, see Lute v. Consolidated Freightways, Inc., No. S91-10M, 1992 WL 87918 (N.D. Ind. Apr. 27, 1992); McKnight v. General Motors Corp., No. 87-C-248, 1992 WL 92770 (E.D. Wis. Apr. 22, 1992); Robinson v. Daivs Mem. Goodwill Indus., No CIV.A. 91-1085, 1992 WL 82960 (D.D.C. Apr. 21, 1992); Carpenter v. Ford Motor Corp., No.-90-C-5822, 1992 WL 80061 (N.D. Ill. Apr. 10, 1992); Lee v. Sullivan, No. C-89-2873, 1992 WL 59020 (N.D. Cal. Mar. 26, 1992); Croce v. V.I.P. Real Estate, Inc., No. CV-89-2121, 1992 WL 57970 (E.D.N.Y. Mar. 21, 1992); Griddine v. Dillard Dep't Stores, Inc., No. CIV. 89-0333-CV-W-6, 1992 WL 59277 (W.D. Mo. Mar. 16, 1992); Anrade v. Crawford & Co., No. 1:91 CV 1902, 1992 WL 55196 (N.D. Ohio Mar. 10, 1992); Sample v. Keystone Carbon Co., No. CIV. A-90-285E, 1992 WL 50378 (W.D. Pa. Mich. Mar. 4, 1992); United States v. Department of Mental Health, 785 F. Supp. 846 (E.D. Cal. 1992); Aldana v. Raphael Contractors, Inc., CIV. No. H91-137, 1992 WL 53741 (N.D. Ind. Feb. 26, 1992); Holmes v. Carolina Power & Light Co., 91-508-CIV-5-F, 1992 WL 82485 (E.D.N.C. Feb. 13, 1992); Sanders v. Culinary Workers Union Local No. 226, 783 F. Supp. 531 (D. Nev. 1992); Watkins v. Bessemer State Tech. College, 782 F. Supp. 581 (N.D Ala. 1992); Joyner v. Monier Roof Tile, Inc., 784 F. Supp. 872 (S.D.

Fla. 1992); Long v. Carr, 784 F. Supp. 887 (N.D. Ga. 1992); Bristow v. Drake Street, Inc., No. 87 C4412, 1992 WL 14262 (N.D. Ill. Jan. 21, 1992); Goldsmith v. City of Atmore, 782 F. Supp. 106 (S.D. ala. 1992); Saltarikos v. Charter Mfg. Co., Inc., 782 F. Supp. 420 (E.D. Wis. 1992); Stender v. Lucky Stores, Inc., 780 F. Supp. 1302 (N.D. Cal. 1992); King v. Shelby Medical Center, 779 F. Supp. 157 (N.D. Ala. 1991); Mojica v. Gannett Co., Inc., 779 F. Supp. 94 (N.D. Ill. 1991).

For cases holding prospective application only, see Davis v. Therm-O-Disc, Inc., No. 5:91 CV1602, 1992 WL 90345 (N.D. Ohio Apr. 23, 1992); Sudtelgte v. Sessions, No. 90-1016-CV-W-6, 1992 WL 82738 (W.D. Mo. Apr. 21, 1992); Louis v. Community and Economic Dev. Ass'n, of Cook County, Inc. 1992 WL 80972 (N.D. Ill. Apr. 16, 1992); Abdelmagid v. Board of Regents, No. 89-3100, 1992 WL 84962 (C.D. Ill. Apr. 15, 1992); Sava v. General Elec. Co., No. CIV. A. 3-886-3591CZ, 1992 WL 78055 (D. Conn. Apr. 10, 1992); Moore v. Burlington N.R. Co., No. 91 C 0286, 1992 WL 71781 (N.D. Ill. Apr. 1, 1992); West v. Pelican Mgmt Serv. Corp., No. CIV. A. 91-0363-A, 1992 WL 76877 (M.D. La. Mar. 31, 1992); Brown v. Anheuser-Busch, Inc., CIV. A. No. 91-A-1677, 1992 WL 78065 (D. Colo. Mar. 31, 1992); Ribando, v. United Airlines, Inc., No. 90 C 5904, 1992 WL 55194 (N.D. Ill. Mar. 20, 1992); McCormick v. Consolidation Coal Co., CIV. A. Nos. 89-52-C, 89-53-C, 1992 WL 57603 (N.D. W. Va. Mar. 20, 1992); Hatcher-Capers v. Haley, CIV. A. No. 90-1162, 1992 WL 59040 (D.D.C. Mar. 20, 1992); Craig v. Ohio Dep't of Admin. Serv., No. C-2-87-0987, 1992 WL 76777 (S.D. Ohio Mar. 20, 1992); Rowson v. County of Arlington, Va., No. CIV. 91-1619-A, 1992 WL 52182 (E.D. Va. Mar. 19, 1992); Reynolds v. Frank, No. 2:89-CV0817, 1992 WL 55197 (D. Conn. Mar. 18, 1992); Simmons v. City of Kansas City, CIV. A. No. 88-2603-0, 1992 WL 88022 (D. Kan. Mar. 16, 1992); Sofferin v. American Airlines, Inc., 785 F. Supp. 780 (N.D. Ill. 1992); Taylor v. The Nat'l Group of Cos., Inc., No. 3:99 CV 7009, 1992 WL 84103 (N.D. Ohio Mar. 6, 1992); Guillory-Wuerz v. Brady, 785 F. Supp. 889 (D. Colo. 1992); McLaughlin v. New York, 784 F. Supp. 961 (N.D.N.Y. 1992); Toney v. Alabama, 784 F. Supp. 1542 (M.D. Ala. 1992); McCullough v. Consolidated Rail Corp., No. 90 C 1226, 1992 WL 41489 (N.D. Ill. Mar. 3, 1992); Hameister v. Harley-Davidson, Inc., 785 F. Supp. 113 (E.D. Wis. 1992); Percell v. Internat'l Bus. Mach., Inc., No. CIV. 90-538-CIV-5-D, 1992 WL 46478 (E.D.N.C . Feb. 28, 1992); Steinle v. Boeing Co., No. 90-1337-C, 1992 WL 454000 (D. Kan. Feb. 26, 1992); Conerly v. CVN Companies, Inc., 785 F. Supp. 801) (D. Minn. 1992); Thompson v. Johnson & Johnson Mgmt Info. Center, 783 F. Supp. 893 (D.N.J. 1992); Patterson v. McLean Credit Union, 784 F. Supp. 268 (M.D.N.C. 1992); Kimble v. DPCE, Inc., 784 F. Supp. 250 (D.C. Pa. 1992); Lange v. Cigna Individual Financial Services Co., CIV. A. No. 90-2053-0, 1992 WL 66322 (D. Kan. Feb. 10, 1992); Curry v. Chicago Cent. and Pacific R.R., No. CIV. 90-2013, 1992 WL 25459 (N.D. Iowa Feb. 10, 1992); Johnson v. Mast Advertising and Pub., Inc., CIV. A. No. 90-2451-2, 1992 WL 41352 (D. Kan. Feb. 10, 1992); Tyree v. Riley, 783 F. Supp. 877 (D.N.J. 1992); Maddox v. Norwood Clinic, Inc., 783 F. Supp. 582 (N.D. Ala. 1992); West v. Pelican Mgmt Serv. Corp., 782 F. Supp. 1132 (M.D. La. 1992); Doe v. Board of County Comms., 783 F. Supp. S.D. Fla. 1992); Burchfield v. Derwinski, 782 F. Supp. 532 (D. Colo. 1992); Oliva v. Trans World Airlines, Inc., No. 89-1111-CV-W-9, 1992 WL 64878 (W.D. Mo. Jan. 29, 1992); Johnson v. Rice, CIV. A. No. 2:85CV-1318, 1992 WL 16284 (S.D. Ohio Jan. 24, 1992); Graham v. Bodine Elec. Co., 782 F. Supp. 74 (N.D. Ill. 1992); Simons v. Southwest Petro-Chem, Inc., CIV. A. No. 243-V, 1992 WL 25218 (D. Kan. Jan. 22, 1992); Khandelwal v. Compuadd Corp., 780 F. Supp. 1077 (E.D. Va. 1992); Guess v. City of Portage, CIV. No. H 90-276, 1992 WL 8722 (N.D. Ind. Jan. 14, 1992); Sorlucco v. New York City Police Dep't, 780 F. Supp. 202 (W.D. Mo. 1992); High v. Broadway Industries, Inc., No. 90-1066-CV-W-3, 1992 WL 33860 (W.D. Mo. Jan. 7, 1992); Van Meter v. Barr, 778 F. Supp. 83 (D.D.C. 1991); Hansel v. Public Serv. Co.

Mojica v. Gannet Co.[137] applied the statute retroactively. *Hansel v. Public Service Co. of Colorado*,[138] a December 1991 case, held that where the legislative intent is unclear, laws should not be applied retroactively and denied retroactive application of the Act.[139] The court found legislative unclarity not by looking at the language of the Act itself, but by looking at the legislative history and concluding that Congress was at odds. Under this theory, no act would ever be retroactive because there is always someone standing on the floor arguing against retroactive application.

A well-reasoned defendant's case, although I think it is wrong, is *VanMeader v. Barr*.[140] There is a tension in the United States Supreme Court on the standards to be used in determining whether or not a statute should be applied retroactively. Therefore, unfortunately, the issue is ripe for certiorari. There are conflicting United States Supreme Court decisions on the issues that are alluded to in these opinions, and I hope the Supreme Court of the United States does the right thing for a change.

Question: Does the $300,000 statutory cap on compensatory and punitive damages mean that the sum of the damages may not exceed $3000,000?

Neil Mullin: Yes. It's a total of compensatory and punitive damages. One of the issues that may be litigated is whether the cap applies to each claim. Suppose the plaintiff has several claims in a cause of action: failure to promote, termination and harassment. The language is not clear and obviously plaintiffs will argue that it should be applied separately to each claim and not aggregately to a cause of action.

Question: What legislative federal or state measures are still necessary to protect individual civil liberties?

Neil Mullin: That will have to be the topic of my next speech. Just very briefly focusing on what is missing, one of the things that is preventing statutes such as the 1991 Act from having a major societal impact is that the courts are gutting the attorneys' fees statute and making it harder for plaintiff's attorneys to recover fees after they win.

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of Colo., 778 F. Supp. 1126 (D. Colo. 1991); Alexandre v. Amp, Inc., No. 1:CV-90-0868, 1991 WL 322947 (M.D. Pa. Dec. 5, 1991).

137 779 F. Supp. 94 (N.D. Ill. 1991).

138 778 F. Supp. 1126 (D. Colo. 1991).

139 *Id.* at 1136.

140 778 F. Supp. 83 (D.D.C. 1991).

In a trial which my partner, Nancy Erika Smith just concluded, a $1.3 million fee application was submitted. The corporate defendent fought tooth and nail in that case. It is not unusual for plaintiff's attorneys to commit a million or a half million dollars, or even more in some cases, worth of time to bring one of these cases. Then, as the case winds down there is a hostile body of law that favors reducing those fees while the defense firm for the losing side has no problem collecting its fees.

So the Vice President talks about tort reform and even Senator Bradley calls for tort reform that will make sure that plaintiff's lawyers do not make a whole lot of money while defense firms make plenty of money. I do not hear Dan Quayle complaining that large defense fees constitute a problem for international competitiveness. I think it would really help if we had a statutory provision that codified some of the increasingly rare good decisional law concerning availability of attorneys' fees to prevailing plaintiffs.

The Supreme Court has done damage in many areas like the Freedom of Information Act[141] and the Habeas Corpus statute.[142] These statutes need an overhaul like Title VII to undo what the Supreme Court has done, but that is really beyond the scope of this talk.

Question: Doesn't it make sense for plaintiff's attorney to subpoena the invoices of the defendants' attorney when defendants oppose fee applications?

Neil Mullin: Yes, that is a good strategy. Whenever these defense firms object to your fee application, subpoena their fees; there are some district court cases that allow that. After all, their fees should be a good way to help the court measure whether your fees are reasonable.

Question: What should be considered to determine whether you should file in federal or state court?

Neil Mullin: Well, never file in federal court if you can avoid it. That is really the way we run our firm. Never, ever file in federal court if you can avoid it. Sometimes you file in state court with counts under some of the federal statutes or things that implicate some federal statutes and you end up getting removed to federal court. Then, if you get a judge who has a history of being hostile to civil rights, do a voluntary dismissal immediately. You have to do that before they file the answer. Get out and refile in state

141 5 U.S.C. § 552.
142 28 U.S.C. § 2252.

court on state law grounds. In this climate, stay out of federal court and stay out of the federal agency, the EEOC.

Question: Aren't some of the federal district court venues more hospitable to plaintiffs than others? Should one nevertheless stay out of all federal venues in our circuit?

Neil Mullin: You are right. You are picking up on an important regional difference. My answer is still stay out of federal court because you are dealing with the Third Circuit Court of Appeals which is overwhelmingly a Reagan/Bush court and very conservative. One of the things they did recently in our firm's *Christmas v. Manson*[143] was write a very inaccurate decision imposing a two-year statute of limitations on federal civil rights claims under 42 U.S.C. 1983. The court held up my case—which was fully briefed including legislative history of our statute of limitations going back to 1799—then waited and took a pro se, poorly briefed case, *Cito*[144], wrote the opinion and then applied that to my case without addressing the statute's legislative history.

Judge Menza, recently held[145] that a six-year statute of limitations applied to an action under the LAD which is a correct reading and is what I urged in the Third Circuit.

Question: What are the relative merits of filing under the LAD in Superior Court as distinguished from filing administratively in the Division of Civil Rights?

Neil Mullin: You can go directly into superior court law division under our state civil rights act. Sometimes we do not do it if the claim does not involve a substantial loss. The client will not lose that much by having a hearing in front of an administrative law judge. Judges generally do not award the kinds of damages that juries do. If you have a case that has simple economic damages or limited emotional distress damages and you want to litigate it in an economical way—because discovery is very limited in the Division on Civil Rights and in the administrative law courts—then you might choose to go that route. If you have a substantial case with substantial damages, I would recommend filing in Superior Court Law Division. The Director may have a different view of this; I do not know.

Question: I just recently filed a suit in Atlantic County Superior Court where it takes only a year, sometimes less than a year to get

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143 No. 84-5042 (3d Cir. January 3, 1990).

144 Cito v. Bridgewater Twp. Police Dept., 892 F.2d 23 (3d Cir. 1989).

145 Lautenslager v. Supermarket General Corp., 252 N.J. Super. 660 (Law Div. 1991).

a trial. On behalf of a black owned limousine company we sued each and every casino for failure to do business with them. The judge in his infinite wisdom threw it out of court telling us the law on discrimination does not apply to independent contractors. Does the LAD apply?

Neil Mullin: There is a case we litigated in which an administrative law judge held that an independent contractor is covered by the LAD.[146]

Question: Why is it more economical to litigate in the administrative, D.C.R. forum?

Neil Mullin: I am going to oversimplify it now, but generally discovery is done with leave of the court. You do not just start firing out a whole bunch of interrogatories and depositions and all that kind of good stuff. It is generally done with permission of the administrative judge and is narrow. Usually, you have the burden of showing why you need the discovery.

The whole point of the administrative scheme is to provide an economical, speedy and efficient remedy so you do not get the same kind of discovery. That is another factor to take into account when you determine whether to go to the court or the administrative agency. You might need a very liberal discovery process to really get to the point where you can prove your case. You may not want to shoulder the burden of proving to an administrative law judge that you need that discovery. Then you might choose to go to the superior court where you have that discovery as a matter of course.

Question: Why wouldn't you submit the "determinative factor" and the "motivating factor" issues to the jury simultaneously?

Neil Mullin: As a matter of trial tactics, I would not submit both questions on a jury questionnaire because it opens up the door to a bargaining posture similar to a criminal trial with a big indictment where the jury goes through and say, "well, let's get him on something." I do not want to win on a motivating factor because it is a little easier and takes less jury time to think it through; I want to win the whole ball of wax. Therefore, I would first want the jury to determine whether or not I proved a determinative factor. If the jury comes back with a no cause on that, only then do I want to resubmit it on the motivating standard factor. I do not want the jury to even know that is a possibility at the outset.

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146 Capriglione v. Ricoh Co., No. EG07513-25266E (Dec. 21, 1987) (Opinion of D.C.R. Branch Manager Anne F. Guarino).

Question: I agree with that tactic but have you found state court judges willing to bifurcate that question?
Neil Mullin: Well, the determinative v. motivating factor is new. It arises with the Act. We have bifurcated our trials in many strange ways and the federal courts are used to bifurcating civil rights trials. It is commonplace to bifurcate punitive damages from compensatory damages and you will see a state decision, *Jackson v. Consolidated Rail Corp.*,[147] which went up to the appellate division where punitive damages were bifurcated. Therefore, there is precedent to allow creative bifurcation in an employment law setting.

REMARKS BY SENATOR BILL BRADLEY

Senator Bill Bradley: Because I am not a lawyer, I will not be one today. I will, however, try to give you a little context for the Civil Rights Act of 1991. I think to get a sense of the legislative context, you have to get a feel of the political context and also the international context. I would argue that the Civil Rights Bill of 1991 took on added importance for a number of reasons. One reason was related to what might be thought to be an extraneous event—the end of communism in the Soviet Union. The way legislation develops is inseparable from the development of events outside of Congress. In August, 1991, communism ended in the Soviet Union. That is related to the Civil Rights Act of 1991 in the following way. Since about 1945, our leadership in the world has been shaped primarily by our ability to protect other nations from an obvious military threat coming from the Soviet Union. In August 1991, that threat was conclusively ended. They still have missiles and they still have a military but, in fact, they are no longer the threat they used to be to the United States. That then posed a question: "if our leadership in the world for forty-five years had been derived from our ability to protect other nations from an obvious military threat and that threat was now disappearing, what would be the nature of our leadership in the world?"

More and more people came to see the notion that I have been talking about for two or three years since Gorbachev first began to make changes: we are in the irrevocable direction of a dramatic change in the nature of what the Soviet Union used to be. That is, our leadership has to derive more from our example

[147] 223 N.J. Super. 467, 538 A.2d 1310 (App. Div. 1988).

than from our ability to protect other people from an obvious military threat.

What is the nature of that example from which our leadership and power will derive in the world? It has to be the example of a pluralistic society—pluralistic in the sense of race, ethnicity, religion, and culture with a vibrant democracy; one in which citizens are enfranchised and participate in a growing economy that takes everybody to the higher ground. If that was posed as what our leadership has to be derived from, then one only has to look around and see how far we have to go.

It is not that we have not made progress. One thinks back to Dr. Martin Luther King's speech on the steps of the Lincoln Memorial when he called to move out of the quick sands of racial injustice and to the solid rock of brotherhood and when he talked about the promises of our democracy. Since that speech, we have seen how many African-Americans have moved into the corporate board rooms and have moved up into the higher echelons of the military and the political process. One only has to look at how many African-American families have moved into middle-class status and how many are solid community citizens to recognize that we have made some progress. But we still have a long, long way to go.

If this is the case, then we pose the question: "Well, what does that mean?" In a very fundamental sense, it means that we have to begin to lead by example by perfecting and moving down that path of progress. We cannot lead by example of a pluralistic, democratic society whose economy takes everybody to higher ground as long as kids kill kids in the cities, people sleep on the streets, politicians talk in half truths about our predicaments, hard working families cannot get ahead, crosses are burnt on lawns in America, and candidates like David Duke can say that Jews should go into the ash pit of history. So, if you see this historical development, the need for us to change the nature of our leadership in the world—with that change coming primarily from Americans perfecting and moving our pluralistic and democratic society further down the road to progress, you have a little different feel for the 1991 Civil Rights Act.

We won the Cold War! That is not an insignificant victory. We won the Cold War but it came with cost and you begin to see the nature of that cost when you take a look at other countries like Japan and Germany. Whether it is infrastructure investments where they have invested 3% of the GNP for the last twenty years

while we have invested 1%, whether it is health care where they have universal health insurance and we still have 37 million people who have no health insurance, whether it is worker retraining and life-time education opportunities where they have moved much further along the road of perfecting those, it is clear that they can compete in an increasingly competitive international economy and we are just beginning to address the challenges of that international economy.

So we won the Cold War but it came with a cost and now we have to begin to say, "Well, how do we lead?" Just think for a moment about the forty-five years of the Cold War, the terrain that was frozen by that conflict and how out from under that terrain, which is now thawing, are crawling religious, ethnic and racial disputes that have been frozen for forty-five years. Even as we meet today in New Brunswick, sons and daughters are taking up weapons to fight the battles of their grandfathers. The question is going to be posed anew in increasingly pointed and sharp ways: "How do we get along?"

How do we get along in the world? I would hope that when that question is posed as directly as I think it will be, people will be able to look at the United States and say, "Now, there is a society that is doing it the right way." Not in paradise or not to perfection, but at least doing it the right way, so that the words of Steven Vincent Benet will ring true to the peoples in many places of the world. Those words, referring to American diversity were: "All of these you are, and each is partly you and none is false and none is wholly true."

So there is that fundamental historical change going on in the world today. That change puts a much greater emphasis on the need and the sense of urgency for America to continue the promises of its democracy. When I say the promises of its democracy, I think it is an appropriate moment to reflect on what a couple of those promises were. Essentially, America is formed by two primary political values. One is liberty, conceived in liberty, free from a king, free from intrusive government. Americans want to be left alone. That is a very rich and deep historical strain.

The other is democracy or equality. You have to be a pretty good historian and a pretty optimistic American to look at the Declaration of Independence and realize that it enfranchised white male property to see how in those words were embodied the promise of democracy to all Americans. That is clearly what

Lincoln said when he enlarged the franchise. That is clearly what Wilson thought when he went ahead and said: "Okay, we're enlarging it further and allowing women to vote." I do not have the exact historical reference, but maybe that is what Andrew Jackson thought when gaining the right to vote for white males who don't have property. Maybe that is what Eisenhower thought when he started the effort to broaden the right to vote to include the young.

The history of American democracy is a continued march for further participation in our process and that is why it is not only indefensible, but outrageous to consider that on any election day in America if forty percent of the population wanted to vote, it would not be allowed to vote because it was not registered. And it has not registered because, forget the intimidation practices that are followed in some places and in certain elections, obstacles have been put in the way of people registering to participate in the democratic process, thereby denying to forty percent of America one of the fundamental rights promised in the idealism of the Declaration of Independence to all Americans—the right to participate in that democracy.

That is denied across America. In my own personal view, not only should you get a voter registration form when you get your driver's license, but you should also receive one when you receive your tax return. Your name should stay on the rolls for seven or eight years. Job interviews should include voter registration forms and same-day voter registration for a whole variety of procedures to broaden participation. Otherwise the legitimacy of government decisions themselves are called into question.

If you see this dramatic change in the world, the need for us to lead by example, you see the two strains of American history—liberty and democracy—and how we moved along the paths of democracy by broadening participation to a point. Procedurally, however, we have subverted participation from time to time and we continue to do so in many places in America. You then have a context for understanding the debate about the 1991 Civil Rights Act.

The 1991 Civil Rights Act is not a radical proposal. The 1991 Civil Rights Act was an attempt to essentially overturn several Supreme Court rulings in 1989 that turned the clock back on the way business was done in America for the previous twenty years. It was a modest objective: simply return the situation to the status quo before the Supreme Court rulings.

As you also know, it has been the tendency in American politics from time to time to play the race card to get votes. Usually this is a move made by people who want to get the 15% or 20% of the vote that can be moved by playing by the race card. What do I mean by playing the race card? I mean dividing Americans as opposed to uniting Americans. By saying to white Americans that "black Americans should not have the same rights" or "you understand that they should be denied" and communicating to them in a code so that they will understand that. This is an old practice in American politics.

It is a practice, unfortunately, that I have seen in my own thirteen years in the United States Senate. Whether it was Jesse Helms demogogging on the creation of a holiday for Dr. Martin Luther King, Jr. or whether it was the campaign in 1988 that used Willie Horton to essentially divide America, political calculations enter into any discussion of policy and political calculations and ultimately mean, "well, how is this going to effect me at the polls."

I saw that in 1990 when the Civil Rights Act was passed by Congress but was vetoed and was not enacted. People thought it was a dead issue and then it came back in 1991. One summer afternoon, I was walking through a room and the television was on. I happened to see President Bush demogogging the House considerations in the 1990 Civil Rights Act. By demogogging, I mean essentially everything from words to actions. Here comes Willie Horton, circa 1992, at which point I said "over my dead body" and went home. I remember it was the weekend of June 9th. I sat down on a Saturday morning, wrote furiously on a yellow pad, and finished a rough draft of a speech at about 4 p.m. That one speech evolved into two speeches on race in America. One purpose of these speeches was to ask the President to play the role of racial healer and to avoid playing the role of racial divider.

Those speeches, in my opinion, hit home. They were spoken from my heart. There was no political calculation. One of the main reasons I am in politics today relates to the passage of the 1964 Civil Rights Act. I was a student intern in Washington during the summer of 1964 and sat up in the corner of the Senate chamber when the Civil Rights Act that desegregated motels and restaurants was passed. I saw the votes cast and I said to myself, "look, something important has happened in this chamber today and maybe some day I can help make things better in America."

That was the moment that crystallized in my mind. I said, "look, this is what I care about as much as anything else in public life and I'm going to hold them accountable."

I will not repeat the speeches here. They were long and I think they made the case not only against President Bush, but also against liberals and conservatives alike who ignore problems of race in their own separate ways. A funny thing happened two weeks after I made the speeches: the press called up for interviews. The first question they asked threw me off balance. The question was "what's the political calculation?" I said, "the political calculations, what's the politics of this?" When any politician is asked a question he or she has not thought of from time to time, even if it is an obvious question, the politician gives a quick response. The more I reflected on my quick response, however, the more I realized that there was substance to the quick response. The quick response was "look, it has been a free ride for those politicians in America who have used race to divide." In fact, it is not a free ride because, in this case, I was making my speech in partisan circles. So I pointed out that Republicans have used the race card, but I also pointed out that there are a lot of liberal Republicans who would be appalled if they knew precisely how the national campaigns have used the race card.

I asserted that there was a downside for Republicans to play the race card if everyone knew how and where they were doing it. A lot of Americans—Republicans, Democrats, whites, blacks, yellows, reds, browns, all religions—believe that we are better off now as a society than we were in 1963 when Dr. King made the speech on the steps of the Lincoln Memorial. If they understood what was the political calculation, they would be so turned off that they would flip their votes. After I responded the first time, I took a little energy from the response and responded a second time or a third time and suddenly that became my mantra. I was going to say it everywhere I went because it was taking on power and it was clear that it was connecting with people.

The next event on the road to the passage of the 1991 Civil Rights Act was, of course, the phenomenon of David Duke. David Duke embodied in bright neon letters, all of the subtleties that others had practiced in racial politics for a generation or two. Suddenly, the President, in my view, saw in David Duke the darker impulses of his coalition and it caused him to reflect. It gave him pause. Thus, you had on the one hand a democrat laying out in great detail the President's record—and no one has

questioned any of the facts that I have used—and called to him to heal America.

On the other hand you saw someone who was running in a Republican primary revealing the darker impulses. At the same time, you had another liberal Republican in the person of Jack Danforth of Missouri who was tenacious in his effort to get a Civil Rights bill that returned the situation to the status quo. I mean tenacious. This was before Clarence Thomas. This was after Clarence Thomas. In a sense, Danforth was calling the President to his better self so that there would be portrayed vividly for people both the good self and the bad self for the President, the bad self being David Duke, the good self being Jack Danforth.

The legislative process tends to mirror what people used to say about tax laws: "tax laws and sausage have one thing in common; you don't want to see how they are being made." One might say the same thing about this bill. There were endless arguments about details that actually were a little beyond me as a non-lawyer. I had enumerable meetings with Republicans who had gone to the White House on behalf of getting a Civil Rights Bill and who came back shocked and throwing their hands in the air that the position was worse when they finished the negotiation than when they began the negotiation.

The basic point is that the impact of those larger forces, the race speeches, the emergence of David Duke and the consistency of Jack Danforth created a context where the passage of the 1991 Civil Rights Bill became possible. Suddenly, that which was condemned as a quota bill was celebrated within a month as a major civil rights triumph by the same President. That kind of detail about the 1991 Civil Rights Act is a story that I hope marks a watershed in our politics, a watershed not in the sense of this enormous legislative triumph, although it was significant because it basically returned things to where they were before the Supreme Court changed them in 1989—but a watershed in terms of what it implies for our future. The real test of whether it is a watershed or not is the 1992 campaign.

Hopefully, in the 1992 campaign, we can have a campaign that does not divide Americans, in which the race card is not played. I would hope that the signing of the bill by the President in the Fall of 1991 will be that watershed and that we can move on to some of the real issues: the economic circumstances of all Americans, healthcare for all Americans, stopping the violence that blasts from our TV's and onto our streets, halting the illegit-

imacy rates and the poverty levels that continue intractable in some areas in our cities and in some rural areas of America. I believe that those are the central questions for us to deal with as a society. The 1991 Civil Rights Act, while it is important and returns things to status quo, will not, absent a much bigger and deeper commitment on the part of government as well as the private sector, solve the larger problems that confront us.

I had a prepared text here but I decided not to read it because I am not a lawyer and I would be reading things that you know more than I anyway. I have a great counsel though and he wrote a great speech, let me assure you. So if Ari Fitzgerald ever asks, tell him he did a great job. But that is really the story of the 1991 Civil Rights Act from a politician's perspective and not from a lawyer's perspective or a legal scholar's perspective.

Question: What if anything is missing from the 1991 Civil Rights Act?

Senator Bradley: From what I know, we covered most bases. Basically, we returned things to the status quo on seven or eight cases. The one we focused on most was returning the *Griggs* decision to where it was before the Supreme Court ruling. The Act now places the burden of proof in disparate impact cases on the employer to show a business necessity—that the practice was directly related to the job or the test was directly related to performance on the job. That is probably the most highlighted aspect in the Bill.

I am not a civil rights lawyer and, in this battle, I am responsive to lawyers and I hear their advice. We just finished this after three years so I have put it to bed and I have not focused on what the next step will be. Do you have any thoughts?

Questioner: No.

Senator Bradley: No, okay. (laughter)

Question: Sir, I wonder with a highly technical bill like the Act passed, do you find it a plus or minus to be a non-attorney?

Senator Bradley: I find it a plus because then I do not pretend to get into the arcane discussions. I have a good attorney who is very bright and gives me advice. I think he gave me better advice than Boyden Gray gave the President. (laughter)

Question: I have read in the press and also heard on television that the President's position on the Civil Rights Act was driven less by big business and more by conservatives. This is a two part question, who were those conservatives and whose interest were they representing?

Senator Bradley: I would agree with you that it was not driven by big business. As a matter of fact, in the spring and early summer a number of America's larger corporations were actively negotiating with the civil rights community to get a compromise. Then the White House called in some corporate executives and told them they did not appreciate their efforts and to cease. I personally called one of those executives who runs a very large New Jersey company and told him that I did not appreciate him ceasing and he was very direct that it had been the call from the White House.

You do not have conversations when you are in the White House, right? You send smoke signals and shocks. But this executive could not continue to negotiate to get a bill against the wishes of the President and the White House. This is evidence, in my view, that some of the major corporations in America saw it in the long term interests of our society that we resolve the issue or that we take this next step.

Who was the President responding to? I think he was responding to his pollsters and political advisors. He could have been responding to those people who have never really tried to work this issue through but are afraid and would prefer not to change. Those are not identifiable individuals, but they are revealed through his polling data. The President saw that if he pushed the card, if he characterized this as quotas, he would score points with the electorate. Notwithstanding that it was never a quota bill, he would assert that it was and get points. I believe that was what he was responding to.

It is a little bit like in 1964 when he ran for the Senate in Texas and opposed the 1964 Civil Rights Act. This was about two years after his father retired from the Senate. In one of his acts as a Connecticut Senator, he introduced the civil rights bill that was a precursor of the 1964 Civil Rights Act. But, in the 1964 Senate race, George Bush asserted that it was "unconstitutional." You do what you need to do in the course of a political campaign. I think that the people who were arguing that he should continue this line were those who sought political payoffs for him, probably political advisors. There was a broader lack of appreciation that, in a diverse society, this is not some kind of gift.

A diverse work force benefits everybody. The objective is not just to reach out; the objective is to reach out and find people who can do the job and to make the effort to find people who can

do the job. It is as simple as that. The President's actions for two or three years misconstrued the issue to make it appear that something was being given. Whether he did it intentionally or not remains to be seen. Under the law nothing is being given, no special favors exist in executive orders or in the law. It is a question of how you go out and prove the overall quality of your work force. Diversity is a central element in my view of that quality.

Question: I would like to know what you believe will be the immediate long term impact of the Title VII government employees' rights act?

Senator Bradley: The substance of the Act is probably going to happen one way or another. One of the issues is how to retain separation of powers. For example, the White House does not abide by any of the Civil Rights Acts and that is because it is excluded. The legislative branch is also excluded from the enforcement mechanism. I think we are heading, however, toward a time where, notwithstanding the fact that both the White House and a Congressman's office are political jobs, we will have to begin applying those laws to all people in America. It is very difficult to make the separation of powers argument effectively. Therefore, you have to have a clearer and better enforcement mechanism or bring yourself under the law.

Question: Senator, what direction do you think the Congress should be taking to further promote individual rights and civil liberties?

Senator Bradley: Probably the most important, well it is difficult to say which is the most important, but the right that is under assault most frequently is freedom of speech. I think the best way right now to promote that right is to defend that which exists from further erosions and exclusion. Where does this lead? I am not advocating this today, I am just thinking of a response to your question. But the Declaration says "life, liberty and the pursuit of happiness." By "pursuit of happiness," in my view, the Founders did not mean doing "whatever you want at whim to indulge yourself."

A case can be made that the Founders intended to guarantee the needs for a decent life. You can see the whole debate move in the direction of certain economic rights as being consistent and integral to the Founder's vision. If you ask me, that is a more likely direction than any other new amendments. I do not think, for example, the amendment banning school prayer or amendments on abortion or balanced budgets or any of those issues are

likely to pass. Those are sometimes suggestions that are made when you find yourself in a legislative jam and do not have the votes.

Question: Given President Bush's past history do you think the Civil Rights Act signals any change?

Senator Bradley: It is hard to say. That is a $64,000 question. Is it or is it not ? If it is a watershed, then he is coming back to his better self. If it is not, it is a tactical move because then he will come from the other direction in 1992. I hope it is a shift. I must say, however, that his coalition is inherently fragile and I think, for example, the Republican coalition is in jeopardy.

The party could easily go the way of the Wigs, frankly. That could happen on issues related to abortion and civil rights in particular where you have divisions in the party. Those who have either been pro-choice or pro-civil rights have preferred silence over going to battle in Republican conventions. Therefore, there has been this false sense of unity created. When they do battle, because these are issues that tend to divide people as well as their serious moral issues in some cases, they might end up with a party that has such deep divisions that it can not get back together. Most people voted in 80' and 84' and 88' because they believed their middle income status was going to be enhanced by a Republican President. That has proven to be a false promise. When we raised these issues in the past, Republicans said, "Oh yes, but we agree. We know the distance between Jessie Helms and Jack Danforth is too great on civil rights that they could never really get together, but they have an appreciation for the need for a strong defense to fight communism." Because that argument is now gone because communism has disappeared, I think that the coalition itself is very shaky.