

SOME OBSERVATIONS ON BROADLY CONSTRUING CIVIL RIGHTS LAWS

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At the Equal Employment Opportunity Commission (EEOC), civil rights are *legal* rights, not merely moral rights. These civil rights come complete with procedural restrictions and limitations on their remedies. Part of my job involves construing the reach of these rights, processes, and remedies, often through briefs filed in the federal courts, including the United States Supreme Court. I formulate EEOC positions based on statutory language, legislative history, judicial decisions, and prior agency interpretations of civil rights. While my decisions are sometimes difficult, they are firmly rooted in majoritarian policy choices. Congress has passed specific civil rights laws, and it is my duty to enforce those laws.

To workers, the civil rights laws that the EEOC enforces are doors of opportunity. But these rights are not immutable. They may be changed by Congress, interpreted divergently by courts, and enforced more or less effectively by individual advocates and government agencies. Though less grandiose than the inalienable rights alluded to in the Declaration of Independence, and the natural and human rights discussed by philosophers and theologians, these statutory rights are specific, practical, and enforceable. Legal rights are very much a part of America's social fabric, and when these legal civil rights change, America's social fabric changes.

Societal changes that result from changes in civil rights laws are manifested in a number of ways. First, people behave differently toward each other. Eventually, they may even think differently about each other and about themselves. Second, wealth transfers occur. Beneficiaries of civil rights laws convert rights into jobs, access to facilities, and the like. Third, secondary cultures and bureaucracies develop. Lawyers earn ample livelihoods plumbing the processes by asserting, or defending against, claims based on these rights. Government agencies are established to regulate compliance with civil rights laws, and

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individuals spend all or part of their professional lives serving in these agencies.

This brings me to the Civil Rights Act of 1990.¹ Some claim that the Supreme Court's 1989 decisions on civil rights issues² worked doctrinal changes that are deleterious to the social fabric that existed before those decisions.³ I will not address the extent to which the Court's decisions departed from or followed the law as it existed before 1989.⁴ I will state categorically, however, that the proposed Civil Rights Act of 1990 would alter America's social fabric fairly dramatically. Workers would have stronger remedies, businesses would face greater liabilities, and incentives for employers to use numerical balancing within their work forces would increase, notwithstanding the disclaimer in Section 13 of the Act.⁵ Furthermore, civil-

1. H.R. 4000, 101st Cong., 2d Sess. (1990); S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S1019-20 (daily ed. Feb. 7, 1990). The Civil Rights Act of 1990, as passed by Congress, was vetoed by President Bush on October 22, 1990, Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632 (Oct. 22, 1990).

2. See *Public Employees Retirement Sys. v. Betts*, 109 S. Ct. 2854 (1989) (employees must prove that an employee benefits plan was intended to serve the purpose of discrimination in some aspect of the employment relationship unrelated to fringe benefits); *Independent Fed'n of Flight Attendants v. Zipes*, 109 S. Ct. 2732 (1989) (award of attorney fees is appropriate only where the intervenor's action was frivolous, unreasonable, or without foundation); *Jett v. Dallas Indep. School Dist.*, 109 S. Ct. 2702 (1989) (a municipality may not be held liable for its employees' violation of 42 U.S.C. § 1981 unless caused by custom or policy of the municipality); *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989) (reevaluating 42 U.S.C. § 1981); *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304 (1989) (neither a state nor its officials acting in their official capacities are "persons" under 42 U.S.C. § 1983); *Lorance v. AT&T Technologies, Inc.*, 109 S. Ct. 2261 (1989) (statute of limitations period begins when seniority system is adopted); *Martin v. Wilks*, 109 S. Ct. 2180 (1989) (nonminority employees may subsequently challenge a consent decree entered into by minority employees and employer); *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989) (plaintiffs must demonstrate that specific elements of an employer's hiring process have a significantly disparate impact; burden of proof does not shift to employer to prove business necessity); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (burden of proof shifts to employer when employee presents evidence that unlawful motive was a substantial factor in an employment decision); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (strict scrutiny applied to race-based relief requires evidence of past discrimination before remedial measures can be adopted).

3. See Clark, *The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization*, 38 CATH. U.L. REV. 795 (1988-89); Hoefflich, *After the War: Poverty Law in the 1980's—Introduction*, 38 EMORY L.J. 565 (1989); Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989).

4. For a more complete discussion of my views, see Shanor & Marcossou, *Battle-ground for a Divided Court: Employment Discrimination in the Supreme Court, 1988-89*, 6 LAB. LAW. 145 (1990).

5. "Nothing in the Amendment made by this Act shall be construed to affect court ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the Law." H.R. 4000, 101st Cong., 2d Sess. § 13 (1990); S. 2104, 101st Cong., 2d Sess. § 13, 136 CONG. REC. S1020 (daily ed. Feb. 7, 1990).

rights lawyering by the plaintiffs' bar would become more attractive financially than it is now. Whether one thinks these are positive changes depends upon one's political and social views.

My focus is on a fundamental though rarely noticed provision of the Act that would greatly change the work that judges, lawyers, and bureaucrats do in construing legal civil rights. Section 11 of the Act would add this rule of construction to the Civil Rights Act of 1964:⁶ "All federal laws protecting the civil rights of persons shall be broadly construed to effectuate the purposes of such laws to eliminate discrimination and provide effective remedies."⁷ While this is a fairly short clause, it is a provision I find deeply troubling, because I have no clue whatsoever as to what it means. It may be more hortatory than substantive, like the Ninth and Tenth Amendments to the Constitution. On the assumption that the clause might be construed to have some meaning, however, I would like to touch upon some areas of its ambiguity.

First, which federal laws "protect civil rights"? Presumably, the Civil Rights Act of 1964 qualifies, as do Sections 1981 and 1983 of Title 42.⁸ How about Executive Order 11,246?⁹ How about the Fourteenth Amendment to the Constitution? Executive Order 11,246 definitely deals with race and sex discrimination, but it never went through the legislative processes that most laws traverse. The Equal Protection Clause of the Fourteenth Amendment¹⁰ clearly deals with discrimination, but it has not yet been broadly construed, for example, to protect individuals from sexual orientation discrimination.¹¹ Furthermore, *Washington v. Davis*,¹² along with *Personnel Administrator of Massachusetts v. Feeney*,¹³ specifically held that the Fourteenth Amendment does not encompass the disparate impact theory of discrimination.

Second, if a particular law is considered a civil rights law,

6. 42 U.S.C. §§ 1971, 2000a-2000h (1988).

7. H.R. 4000, 101st Cong., 2d Sess. § 11 (1990); S. 2104, 101st Cong., 2d Sess. § 11, 136 CONG. REC. S1020 (daily ed. Feb. 7, 1990).

8. 42 U.S.C. §§ 1981, 1983 (1988).

9. Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), reprinted in 42 U.S.C. § 2000e app. (1982) (providing equal opportunity in federal employment).

10. U.S. CONST. amend. XIV, § 1 ("nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws").

11. See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

12. 426 U.S. 229 (1976).

13. 442 U.S. 256 (1979).

how would a court construe it to “provide effective remedies”? The Age Discrimination in Employment Act,¹⁴ for instance, provides back pay to discriminatees and liquidated damages for willful violations.¹⁵ If these remedies are not adequate to protect someone who is harassed because of his or her age, should a court construe the statute to permit awards of punitive damages? Should Executive Order 11,246, currently enforced exclusively by the Department of Labor, be construed to confer a private right of action upon an individual discriminatee when the Department of Labor does not bring suit?

Third, would this provision mandate reexamination of settled Title VII doctrines that narrowly construed provisions of the statute? For example, the Supreme Court held in *International Brotherhood of Teamsters v. United States*¹⁶ that a seniority system that had a disparate impact upon minorities was lawful. According to the Court, Congress only prohibited intentionally discriminatory seniority systems. Yet a broad construction of Title VII, a primary purpose of which was to improve economic opportunities for minorities, might well counsel a contrary holding. Would *Teamsters* still be good law if Section 11 were enacted?

Fourth, the provision assumes that broad construction of “the civil rights of persons” leads directly to the elimination of discrimination. Yet some of the hardest and most controversial cases in recent years belie the simplistic assumption that it is always clear what policies will most effectively eliminate discrimination. In *United Steelworkers of America v. Weber*,¹⁷ for example, the Supreme Court held that a white employee did not have the same right to enter a training program as a black employee, because the company’s exclusion was permissible under a race-conscious affirmative action program. If Brian Weber’s right had been broadly construed, the result would have been different; conversely, a broad construction of black workers’ rights might have led the Court not to place any limits on preferential treatment of minorities. The point is a simple one: In competitive situations, expansion of some employees’ rights will inevitably limit other employees’ opportunities.

14. 29 U.S.C. §§ 621-634 (1988).

15. *See id.* § 626.

16. 431 U.S. 324 (1977).

17. 443 U.S. 193 (1979).

Fifth, this provision would be a dream come true for the secondary civil rights cultures and bureaucracies to which I belong. The provision is so broad and so amorphous that it would provide substantial fodder for lawyers for decades to come. It would promote arguments by any group that chooses to characterize its desires as "civil rights," even if its particular "right" has not otherwise been codified through the legislative process. And it will impose unpredictable potential liability upon American industry and government.

I am a firm believer in civil rights and have devoted much of my professional life to understanding and enforcing those rights. Nevertheless, I do not want unelected federal judges, however able, to be given an undefined mission to seek ever broader ways to "broaden" "civil rights laws." While I have no objections to certain alterations of our social fabric through the revision of civil rights laws, I want to see, think about, and understand each possible revision. I want such changes to occur through democratic consensus-building processes involving elected officials, not through applications of an interpretive rule made by lifetime appointees in the privacy of their chambers. Provisions like Section 11 are not the way to change America's social fabric.