Saint Louis University Law Journal

Volume 49
Number 4 *"Feedback Loop": The Civil Rights Act of 1964 and its Progeny (Summer 2005)*

Article 8

2005

Walking the Walk of Plain Text: The Supreme Court's Markedly More Solicitous Treatment of Title VII Following the Civil Rights Act of 1991

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WALKING THE WALK OF PLAIN TEXT: THE SUPREME COURT'S MARKEDLY MORE SOLICITOUS TREATMENT OF TITLE VII FOLLOWING THE CIVIL RIGHTS ACT OF 1991

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There is a great deal to celebrate on the occasion of the fortieth anniversary of Title VII.[1] Professor Days and the respondent participants collectively recount the positive differences that Title VII has made in the lives of ordinary Americans. Its influence, however, goes well beyond labor statistics. Unlike the Depression-era legislation regulating wages and hours, Title VII addressed not merely the terms and conditions of employment; it has shaped the very composition of the work force. Its prohibitions on race, gender, and national origin discrimination in particular have brought significant numbers of different kinds of people into proximity and partnership with one another for the first time in our history. Because Americans spend so much of their time at work, it may even be plausibly claimed that no other twentieth-century statute can match Title VII's impact on general societal attitudes and culture.

There is also genuine ground for regret. The statute has only partially and fitfully fulfilled its promise. Like any other statute, Title VII means what judges say it means. As Judge Mary L. Dudziak wrote in a response to last year's Childress Lecture, "[u]nderstanding the contingency . . . in the act of judging keeps us vigilant about one of the most contingent of judicial variables . . . —which judges happen to be on the train."[2] From its effective date of July 2, 1965, until roughly 1977, when the Supreme Court decided *International Brotherhood of Teamsters v. United States*,[3] federal judges were in full missionary mode, construing Title VII's substantive prohibitions and remedies expansively while relaxing its procedural requirements. Thereafter, and culminating in the notorious 1989 trilogy of decisions construing Title VII

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1. 42 U.S.C. §§ 2000e–2000e-17 (2000).

2. Mary L. Dudziak, Brown *and the Idea of Progress in American Legal History: A Comment on William Nelson*, 48 ST. LOUIS U. L.J. 851, 857 (2004).

3. 431 U.S. 324 (1977).

and § 1981,[4] the Court embarked on a period of restriction, retrenchment, and restoration of traditional managerial prerogatives.[5] Although it began before the new Reagan appointees assumed places on the Court,[6] their arrival certainly accelerated the trend.

Congress responded with the Civil Rights Act of 1991,[7] which accomplished the following: (1) reinvigorated Title VII's mainstay claim of individual disparate treatment; (2) formally endorsed, but somewhat tepidly implemented, claims asserting that neutral practices have a disproportionate adverse impact on groups protected by the statute; (3) fundamentally reinvigorated § 1981 claims alleging intentional race discrimination in employment; and (4) failed to address the Age Discrimination in Employment Act ("ADEA")[8] or to revive constitutional claims under § 1983 that had been under steady assault since 1984 when the Court began reformulating and expanding the government officer's defense of qualified immunity.[9] Since 1991, the federal district bench has by all accounts become even more conservative, and therefore presumptively even more sympathetic to management.[10] At the same time, however, the Supreme Court, purporting to adhere to traditional judicial values, has frequently, loudly, and controversially trumpeted its fidelity to "plain text."[11] After passage of the Civil Rights Act of

4. *See* Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989); Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

5. Some scholars have dated this retrenchment to the "late 1970s," citing some developments in 1976 and others occurring after 1978. *See* Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1082, 1094–95 (1992).

6. The new conservative approach to discrimination "occurred among judges of all political affiliations." *Id.* at 1180. After an initial decade of stringent enforcement of Title VII, "federal judges apparently began to share the general public's belief that employment discrimination against minorities had been largely eradicated." *Id.*

7. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

8. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621–34 (2000)).

9. I have elsewhere discussed in more detail the scope and extent of the 1991 Act's reversal of the restrictive employment discrimination decisions of the late 1970s and 1980s. *See generally* Harold S. Lewis, Jr., *The Civil Rights Act of 1991 and the Continued Dominance of the Disparate Treatment Conception of Equality*, 11 ST. LOUIS U. PUB. L. REV. 1 (1992).

10. It has been reported, for example, that in the 1990s more than half the sitting federal bench had been appointed by President Reagan or the first President Bush. *See* KATHERINE YURICA, THE NEW MESSIAHS, *at* www.yuricareport.com/Art%20Essays/The%20New%2020 Messiahs%20Excerpts.htm; Michael Fumento, *A Lot Riding on the Federal Bench: Clinton Win Could Derail Conservative Dominance*, INVESTOR'S BUS. DAILY, Sept. 30, 1993, *at* http://www.fumento.com/federalbench.html.

11. *See* Dole Food Co. v. Patrickson, 538 U.S. 468, 478 (2003) (interpreting 28 U.S.C. § 1603(b)(2) based on the plain text of the statute); Norfolk Southern Ry. Co. v. Shanklin, 529 U.S. 344, 356 (2000) (rejecting an interpretation of 23 C.F.R. § 646.214(b) because it "contradict[ed]

1991, then, have federal judges continued to indulge, or indulge to the same degree, their personal preferences for employers, despite the generally pro-employee tenor of that law? Or have they been largely obedient to the apparent intention underlying the Congressional intervention, putting their own preferences to one side?

An appraisal of the federal courts' reaction to the 1991 Amendments to Title VII and § 1981 strongly suggests that Congressional intervention has made a distinct, durable difference. In the ensuing thirteen years, the Court has charted an interpretive course that may best be described as moderately facilitative of disparate treatment claims under both statutes. In marked, instructive contrast, the Court has continued to follow its own evident preferences by eviscerating the effectiveness of § 1983 and somewhat sapping the vitality of the ADEA. The heartening conclusion is that the federal bench, and especially the Supreme Court, has indeed walked the walk of plain statutory text when Congress has plainly expressed its displeasure with the course of the Court's decisions. This conclusion is if anything fortified by the contrary example of the Court's chary and hostile constructions of, respectively, the ADEA and § 1983, statutes that were not defended from judicial incursion by a Congressional counterweight. The balance of this essay will sketch signal decisional developments that illustrate and support these conclusions.

The 1991 Act amended Title VII to authorize, for the first time, compensatory and punitive damages.[12] In a related constitutional context, the Court has shown it is no friend of outsize punitive awards, placing Due Process limits on punitive awards.[13] Yet just three years after *Gore*, in *Kolstad v. American Dental Association*, the Court adopted a traditional, moderate standard governing the recovery of punitive damages for Title VII actions.[14] The Court left undisturbed numerous lower court decisions approving the award of emotional distress damages based solely on the plaintiff's own testimony.[15] The Court also strengthened Congress's express authorization of

the regulation's plain text"); Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 213 (1998) (relying on the plain text of Title II of the ADA to affirm judgment of the Third Circuit).

12. Pub. L. No. 102-166, § 102(c), 105 Stat. 1071, 1075 (1991); *see also* Mara Kent, *"Forced" vs. Compulsory Arbitration of Civil Rights Claims*, 23 LAW & INEQ. 95, 97 (2005).

13. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

14. 527 U.S. 526 (1999).

15. *See, e.g.*, Williams v. Trans World Airlines, Inc., 660 F.2d 1267, 1273 (8th Cir. 1981) (holding that "plaintiff's own testimony may be solely sufficient to establish humiliation or mental distress" in a Title VII case); Muldrew v. Anheuser-Busch, Inc., 554 F. Supp. 808, 811 (E.D. Mo. 1982) (holding that an emotional damage award is available in Title VII actions and that "such an award may be supported solely on plaintiff's own testimony").

front pay in the 1991 Act by holding that relief exempt from the monetary caps Congress had placed on compensatory and punitive damages.[16]

Five years before the 1991 Act, the Court approved Title VII claims based not just on "quid pro quo" sexual harassment but on the far more common variety of "hostile environment" discrimination.[17] At the time, however, the only available remedies for the latter type of sexual harassment were declaratory and injunctive relief and attorney's fees, which dampened the enthusiasm of putative Title VII plaintiffs and their lawyers. The 1991 Act's authorization of punitive and, especially, compensatory damages spurred a huge increase in the number of claims alleging hostile environment sexual harassment.[18] Had the Court followed its approach in civil rights cases, discussed below, it might have been expected to close these "floodgates." In fact, however, the Court's post-1991 sexual harassment decisions have been generally supportive.

In *Harris v. Forklift Systems, Inc.*, for example, the Court rejected a per se circuit court rule that would have required a hostile environment plaintiff to demonstrate that employer harassment had "seriously affected [her]. . .psychological well-being."[19] Instead, the Court adopted a test that asks, from the standpoint of a hypothetical reasonable person, whether the sum of gender-related remarks, insults, propositions, conduct and innuendo was sufficiently severe or pervasive to alter the conditions of the victim's environment and create abusive working conditions.[20] Because the "sufficiently severe or pervasive" inquiry framed by the Court is a question of degree, it also left room for plaintiffs to argue—admittedly with mixed success in the lower federal courts—that the question was one of fact for a jury.[21]

In three 1998 decisions, the Court adopted a flexible, moderately accommodative concept of the kind of harassment that meets the statutory definition "because of sex." *Oncale v. Sundowner Offshore Services, Inc.* held that the speech or conduct of an employer agent is actionable if undertaken because of the plaintiff's particular gender.[22] This is a test that will be met,

16. Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843 (2001).

17. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

18. *See* Susan Bisom-Rapp, *Discerning Form from Substance: Understanding Employer Litigation Prevention Strategies*, 3 EMPLOYEE RTS. & EMP. POL'Y J. 1, 2 n.3 (1999) (observing that the 1991 Act's addition of compensatory and punitive damages has "transformed civil rights law into a meaningful vehicle for curtailing hostile environment harassment").

19. 510 U.S. 17, 22 (1993).

20. *Id*.

21. *See, e.g.*, McCowan v. All Star Maint, Inc., 273 F.3d 917, 923 (10th Cir. 2001) (treating inquiry as a question of fact); Hardin v. S.C. Johnson & Son, Inc., 167 F.3d 340, 245 (7th Cir. 1999) (treating inquiry as a question of law); Beardsley v. Webb, 30 F.3d 524, 530 (4th Cir. 1994) (treating inquiry as a question of fact); Woods v. Graphic Communications, 925 F.2d 1195, 1201 (9th Cir. 1991) (treating inquiry as a question of law).

22. 523 U.S. 75, 79 (1998).

regardless of whether the employer agent and the plaintiff are of the same sex, when factual development reveals that an employer agent manifested hostility towards the plaintiff's gender (or race, religion or national origin) or was animated by sexual desire in pursuing the plaintiff.[23]

The Court also sketched a surprisingly plaintiff-friendly formula for fastening liability on defendant employers for both "tangible terms" and hostile environment harassment perpetrated by supervisors, co-employees, suppliers, or customers. In *Burlington Industries, Inc. v. Ellerth*[24] and *Faragher v. City of Boca Raton*,[25] the Court announced liability standards that hold defendant employers strictly liable for "tangible terms" (formerly "quid pro quo") harassment; for supervisors or managers who condition jobs, pay, or promotions on plaintiff's submission to their sexual demands; and for hostile environment harassment by supervisors or co-employees unless they could plead and prove a detailed, two-pronged affirmative defense. Because one of these prongs requires the employer to demonstrate that the plaintiff unreasonably failed to avail herself of a fair and explicit internal complaints procedure maintained by the employer, the employer's ability to maintain the affirmative defense is ultimately beyond own control.[26]

Further, the Court adopted a surprisingly lenient approach to Title VII's timely filing requirements in the most common type of harassment case, where the law violation is not "discrete" but consists of a series of incidents over time. In *National Railroad Passenger Corp. v. Morgan*, the Court authorized hostile environment cases to proceed if even one of the incidents constituting an alleged pattern of severe or abusive sex or race harassment occurred within the Title VII period for filing a timely charge with the U.S. Equal Employment Opportunity Commission (EEOC) or state antidiscrimination agency.[27] In *Pennsylvania State Police v. Suders*, the Court allowed the employer the *Ellerth/Faragher* defense in cases where constructive discharge results from a "tangible" employment action, such as decisions affecting the plaintiff's position, pay, or promotion.[28]

Perhaps the most significant encouragement the Court has lent to the amended Title VII is its relaxation of the evidentiary requirements for plaintiffs to survive motions for summary judgment and judgment as a matter of law. The Court's opinion in *St. Mary's Honor Center v. Hicks*[29] contained conflicting passages that left lower courts unsure whether the plaintiff needed affirmative evidence of unlawful employer motive to get to a jury, or withstand

23. *Id.* at 80–81.
24. 524 U.S. 742 (1998).
25. 524 U.S. 775 (1998).
26. *Faragher*, 524 U.S. at 807–08; *Burlington Indus.*, 524 U.S. at 765.
27. 536 U.S. 101, 122 (2002).
28. 124 S.Ct. 2342, 2355 (2004).
29. 509 U.S. 502 (1993).

an attack on a verdict, or if she could present that ultimate question indirectly merely with mere "pretext" evidence impeaching or contradicting the employer's asserted legitimate nondiscriminatory reason. In *Reeves v. Sanderson Plumbing Products, Inc.*, however, the Court resoundingly clarified the point, holding that a plaintiff's verdict should be sustained whenever the jury could reasonably find, simply from evidence of the falsity of the employer's asserted reason, that the employer had acted for a reason prohibited by statute.[30] The opinion also cautioned lower federal courts against discounting plaintiffs' evidence of falsity.[31] While *Reeves* was an ADEA decision, the Court made clear that its reasoning also applied to Title VII claims.[32] At least as significant, the opinion also equated the standard for sustaining jury verdicts under Federal Rule of Civil Procedure 50, at issue in *Reeves*, with the Federal Rule of Civil Procedure 56 summary judgment standard.[33] It is difficult to imagine a plaintiff's case worth taking as far as federal court in which the plaintiff is unable to offer evidence impeaching or contradicting the asserted legitimate nondiscriminatory reason proffered by the defendant. Accordingly, if applied straightforwardly by the lower federal courts, *Reeves* had the potential to ensure a trial on the merits for virtually all capably presented Title VII cases, thereby reversing one-and-a-half decades of federal jurisprudence that had routinely granted or upheld the granting of defendants' motions for summary judgment and judgment as a matter of law.[34]

Unsurprisingly, some lower courts—which, unlike the Supreme Court, must actually conduct or regularly review trials—have evaded a literal application of *Reeves.* One, for example, adds the gloss that the plaintiff's evidence of the falsity of the employer's asserted legitimate reason must be substantial, or at least more than slight.[35] Nevertheless, other circuit court decisions display fidelity to *Reeves.* Its enduring power is perhaps best seen in decisions that overturn summary judgment by reference to *Reeves*'s lenient standard even where plaintiff's evidence of pretext is tested under a stringent legal definition of unlawful discrimination.[36]

30. 530 U.S. 133, 147 (2000).

31. *Id*. at 147–48.

32. *Id*. at 142; *see also* Hinson v. Clinch County, 231 F.3d 821, 827-32 (11th Cir. 2000) (applying *Reeves* to Title VII action).

33. *Reeves*, 530 U.S. at 150; *see also* Evans v. City of Bishop, 238 F.3d 586, 590-92 (5th Cir. 2000) (applying *Reeves* at summary judgment).

34. That solicitude dates to *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

35. *See, e.g.*, Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, 94 (2d Cir. 2001) (involving ADEA claims); James v. NY Racing Ass'n, 233 F.3d 149, 154-155 (2d Cir. 2000) (same); Schnabel v. Abramson, 232 F.3d 83, 90-91 (2d Cir. 2000) (same).

36. *See, e.g.*, Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1090-91 (11th Cir. 2004) (reversing summary judgment, citing *Reeves*, in applying a promotion standard that required plaintiff to show that she was so better qualified than the selectee that the discrepancies "jump off the page and slap you in the face").

Complementing *Reeves* is the Court's unanimous decision in *Desert Palace, Inc. v. Costa*,[37] which permits plaintiffs to impose on an unwilling defendant a mixed-motive instruction raising the "same-decision" defense, even when plaintiff's prima facie evidence of unlawful discrimination is not "direct" but consists of the far more common and readily producible inferential showing authorized by *McDonnell Douglas Corp. v. Green*.[38] Justice Thomas's opinion for the Court, in explicit reliance on the supposed "plain text" of the 1991 amendments to Title VII, upheld the view of the Ninth Circuit, thereby rejecting the approach of every other circuit that had decided the question.[39]

At first blush it would appear that the Court's willingness to enforce individual agreements to arbitrate federal statutory discrimination claims, extracted as a "take-it-or-leave-it" condition of initial employment, stands as a notable exception to this trend. The Court initially expressed this support for what the EEOC considers involuntary, quasi-compulsory arbitration in an ADEA case, *Gilmer v. Interstate/Johnson Lane Corp*.[40] In 2001, in *Circuit City Stores, Inc. v. Adams*, the Court extended the reach of *Gilmer* by upholding the enforceability of agreements to arbitrate statutory claims contained in the vast majority of employment contracts in interstate commerce—even where state law purported to preserve a state court forum for employment-based claims.[41] This is not, however, special hostile treatment of Title VII claims. Rather, the Court's encouragement of arbitration has long taken precedence over virtually all competing considerations, including federalism.[42]

Indeed, the Court has proceeded rather incrementally in approving the arbitration of Title VII claims. In *E.E.O.C. v. Waffle House, Inc.*, for example, the Court held that the EEOC's public policy role relieves it from being bound by an individual employee's agreement to arbitrate, enabling the agency to recover victim-specific, not just classwide, relief in court.[43] Similarly, in *Wright v. Universal Maritime Service Corp*., the Court declined an opportunity to extend *Gilmer* to a collectively bargained agreement to arbitrate statutory

37. 539 U.S. 90 (2003).

38. *Id.* at 101-02. For a further elaboration of the inferential showing authorized by the Court in *McDonnell Douglas Corp. v. Green*, see 411 U.S. 792 (1973).

39. *Desert Palace, Inc*., 539 U.S. at 98–102.

40. 500 U.S. 20, 27 (1991).

41. 532 U.S. 105, 119, 123-24 (2001) (narrowly interpreting an exception to the Federal Arbitration Act as rendering unenforceable only agreements to arbitrate contained in employment contracts of employees actually engaged in interstate or foreign transportation).

42. *See, e.g.*, Perry v. Thomas, 482 U.S. 483, 492–93 (1987) (holding that the Federal Arbitration Act preempts California Labor Code provision that wage collection actions are maintainable in state court without regard to private agreements to arbitrate).

43. 534 U.S. 279, 296-97 (2002).

discrimination claims.[44] It did not overrule *Alexander v. Gardner-Denver Co.*,[45] holding instead that a union's pre-dispute agreement to arbitrate the statutory discrimination claims of its members, and hence to waive their right to a judicial forum, is, unlike an agreement to arbitrate contained in an individual employment contract, not entitled to a presumption of validity and must be clear and unmistakable. [46] Further, the Court has left undisturbed a number of arbitration escape hatches devised by the lower federal courts, which have invalidated even individual agreements to arbitrate statutory claims unless they do the following: plainly describe the claims the employee agrees to arbitrate,[47] afford a fair measure of the discovery that would ordinarily be available in federal court,[48] preserve most or all of the federal statutory remedies in arbitration,[49] and cast a significant part of the cost of arbitrating on the employer,[50] and although the Federal Arbitration Act severely restricts judicial review, the Court has not expressly decided that de novo litigation is foreclosed once arbitration of a federal statutory employment discrimination claim is complete.

In one respect, it is true, the 1991 Amendments shored up Title VII only weakly. In addressing the Court's 1989 decision in *Wards Cove Packing Co., Inc. v. Atonio*,[51] Congress restored the Title VII disproportionate adverse impact proof mode for challenging the discriminatory effects of neutral practices far more tepidly and ambiguously than they revitalized the standard disparate treatment claim we have been considering until now. *Wards Cove* undermined attacks on neutral practices by stiffening requirements for the prima facie evidence that a particular practice caused a specified disproportionate adverse impact on a group protected by Title VII, by diluting the nature and quantum of the employer's defense to such a showing, and by requiring plaintiffs in rebuttal to identify an alternative practice that would serve the employer goals underlying the challenged practice with lesser adverse impact on their group.[52] The 1991 amendments somewhat alleviated these new burdens but only very vaguely. Most strikingly, Congress asserted in a preliminary provision on legislative purpose, and in an interpretive memorandum (which it purported to tell the courts was their sole legitimate guide to any legislative history related to *Wards Cove*), that the job-relatedness and business necessity defenses an employer must use to justify the

44. 525 U.S. 70, 82 n.2 (1998).
45. 415 U.S. 36 (1974).
46. 525 U.S. at 81–82.
47. *See, e.g.*, Brisentine v. Stone & Weber Eng'g Corp., 117 F.3d 519 (11th Cir. 1997).
48. *See* Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999).
49. *See, e.g.*, Paladino v. Avnet Computer Tech., Inc., 134 F.3d 1054, 1059 (11th Cir. 1998).
50. *See, e.g.*, Cole v. Burns Int'l Security Serv., 105 F.3d 1465, 1485 (D.C. Cir. 1997).
51. 490 U.S. 642 (1989).
52. *Id.* at 656–61.

disproportionate adverse effects of a neutral practice mean what the Supreme Court had said such defenses meant in its decisions before *Wards Cove*.[53] The calculated ambiguity of this approach lies in the fact that in its pre-*Wards Cove* decisions the Court had articulated widely divergent formulations of those defenses.[54] In the wake of this conflicted Congressional revision of the Title VII neutral practice claim, it is understandable that post-1991 enforcement of those claims has been inconsistent and lax.[55]

But the main point is underscored by contrasting the Court's general support for Title VII disparate treatment claims since 1991 with its relatively indifferent treatment of ADEA claims and its positively frigid response to claims under the Reconstruction Civil Rights Acts, particularly § 1983 and § 1985(3). Significantly, the would-be beneficiaries of those statutes have not had effective constituencies in Congress, or at least have not been able to mobilize a majority like that which passed the 1991 Act, to reverse the Court's own retrenching tendencies.

The ADEA suffered in the 1990s from the Court's not-so-benign neglect. In *Hazen Paper Co. v. Biggins*, for example, the Court held that an employer does not violate the ADEA by basing its employment decision on a factor other than age, even if that factor strongly correlates with age.[56]The *Hazen* opinion also stated, without supporting authority or reasoning, that the ADEA plaintiff must show that age was a "determinative" factor in the adverse employment decision.[57] This is linguistically, as well as practically, a higher hurdle than the Title VII plaintiff's burden to show that race, sex, religion or national origin was a "motivating factor"—language added by the 1991 amendments in an apparent attempt to ease the plaintiff's prima facie case.[58]

Further, only Title VII, not the ADEA, was amended to eliminate the employer's ability to escape all liability in mixed-motive cases by proving that it would have made the same decision even absent a partial unlawful motivation. Consequently, at least one circuit is assuming that *Desert Palace* does not apply to ADEA claims, so the plaintiff may not foist the same-decision defense on an unwilling ADEA defendant.[59] And this year the Court

53. *See* H.R. REP. NO. 102-40(I), at 23–45 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 561–83.

54. For a detailed discussion of the pre-*Wards Cove* Supreme Court decisions, *Wards Cove* itself, the modifications made by the 1991 amendments in response, and the post-1991 developments, see HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE 327–30 (2d ed. 2004).

55. *See, e.g.*, Lanning v. Southeastern Pa. Transp. Auth., 308 F.3d 286 (3d Cir. 2002); Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir. 1993).

56. 507 U.S. 604, 612-13 (1993).

57. *Id.* at 610.

58. 42 U.S.C. § 2000e-2(m) (2000).

59. Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 284–85 n.2 (4th Cir. 2004).

held that the neutral practices/disproportionate advance impact theory, while available under the ADEA, is narrower in scope that its Title VII counterpart, in two significant respects.[60] The Court's specifically relied on Congress's failure in the 1991 amendments to fortify the ADEA neutral-practice claim as to some degree it did the counterpart in a claim under Title VII.[61] Moreover, while numerous decisions confirm that race discrimination under Title VII is a two-way street available to white as well as black plaintiffs,[62] the Court recently held that the ADEA's ban on discrimination because of age applies only when the discrimination is directed against persons over forty who are relatively older, not younger, than a comparator.[63]

The Court's consistent antipathy towards constitutional claims under § 1983, pronounced in the 1980s, only intensified after it went unchecked by the Civil Rights Act of 1991. From 1982 to 1987, for example, the Court famously and radically reformulated the common law doctrine of qualified immunity to protect individual government officer defendants against damages claims by shielding them from extensive discovery,[64] relieving them via summary judgment from standing trial except where a judge concluded that a reasonable officer would have realized she was violating clearly established law,[65] and affording the officer an exceptional, interlocutory appeal from the denial of a summary judgment motion based on qualified immunity.[66]

When the 1991 amendments made no reference to this § 1983 doctrine, the Court applied it with renewed vigor. True, it later denied qualified immunity twice—when a constitutional violation was so obvious that it could be deemed clearly established even absent on-point precedent[67] and when physical punishment was inflicted on prisoners under circumstances the Court considered analogous to those condemned by a circuit's prior decisions.[68] Nevertheless, the Court in 2001 extended to excessive-force situations the factual and legal "double reasonableness" protection the Court already had conferred in the 1980s on officers claiming qualified immunity in the context of probable cause.[69] Moreover, in gratuitous dictum in another case, the Court wrote flatly that proof of a government official's subjective intent to harm the plaintiff does not forfeit the immunity; it also sketched an elaborate pleading,

60. Smith v. City of Jackson, 125 S. Ct. 1536, 1544–45 (2005).

61. *Id.* at 1545.

62. The Court itself so held in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279–80 (1976).

63. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004).

64. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

65. Anderson v. Creighton, 483 U.S. 632, 646 (1987); Harlow, 457 U.S. at 818.

66. Mitchell v. Forsyth, 472 U.S. 511, 517, 530 (1985).

67. United States v. Lanier, 520 U.S. 259, 270–71 (1997).

68. Hope v. Pelzer, 536 U.S. 730, 741–42 (2002).

69. Saucier v. Katz, 533 U.S. 194, 203–05 (2001).

discovery, and summary judgment blueprint for individual government defendants who claim it.[70] Finally, the Court amplified the pre-1990 availability of interlocutory appeal by holding that a government official whose summary judgment motion based on qualified immunity was twice denied on legal or quasi-legal grounds might make two successive interlocutory appeals.[71]

The same pattern may be observed with § 1983 claims against government entities. In recognizing those claims for the first time in 1978, the Supreme Court, concerned about opening the floodgates, limited those claims to situations where the government agent subjected the plaintiff to a constitutional violation through the implementation of the entity's official "policy."[72] The Court applied this concept with increasing severity in a series of decisions in the late 1980s.[73] When the 1991 Amendments to Title VII made no mention of these restrictions on the use of § 1983, the Court continued to apply and even expand them.[74]

Section 1985(3) was even more thoroughly eviscerated after Congress failed to revive it in the 1991 Act. In an early 1980s decision, the Court mentioned a principle that, if applied generally, would render § 1985(3) a virtual nullity in actions against private defendants: The only actionable private-party conspiracies would be those aimed at depriving plaintiffs of the very few constitutional rights protected against private, as well as governmental, invasion.[75] By 1993 the Court relied on that principle directly, clarifying that § 1985(3) private-defendant conspiracies are actionable only where the defendants seek to subject persons to involuntary servitude or deprive them of the limited right to interstate travel.[76]

The importance of legislative text that the federal judiciary deems "plain" is perhaps most vividly revealed by the post-1991 status of 42 U.S.C. § 1981, the Reconstruction Act statute most used in employment cases. The 1991 Amendments addressed two of the § 1981 decisions in the Supreme Court's 1989 trilogy, *Patterson v. McClean Credit Union*[77] and *Jett v. Dallas Independent School District*,[78] but they used significantly clearer language in

70. Crawford-El v. Britton, 523 U.S. 574, 592–93, 597–601 (1998).

71. Behrens v. Pelletier, 516 U.S. 299, 309 (1996).

72. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694–95 (1978).

73. City of St. Louis v. Praprotnik, 485 U.S. 112, 121 (1988) (adopting the *Monell* holding in a plurality opinion); *see also* Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 738 (1989) (adopting the *Praprotnik* rule as a majority holding); City of Canton v. Harris, 489 U.S. 378, 385–86 (1989).

74. *See, e.g.*, Bd. of County Comm'rs v. Brown, 520 U.S. 397, 403 (1997).

75. United Bhd. of Carpenters & Joiners v. Scott, 463 U.S. 825, 833–34 (1983).

76. Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 278 (1993).

77. 491 U.S. 164 (1989).

78. 491 U.S. 701 (1989).

overruling the former. The lower federal court decisions in the years that followed reflect the difference starkly.

Patterson, for example, held that the § 1981 prohibition on racial or ethnic discrimination in the "making" and "enforcement" of private employment contracts does not extend to conduct occurring after the employment relation is established.[79] The Court thus made the statute unavailable for complaints about any kind of "postformation conduct," that is to say conditions of continuing employment after initial hire including promotions, discharges, harassment, and retaliation.[80] Section 101 of the 1991 Act specifically overruled *Patterson* by adding to § 1981 the following new subparagraph: "[f]or purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[81]

In the ensuing years, lower federal courts have agreed that this sweeping text effectively restores § 1981 to its pre-*Patterson* status by applying its ban on race-based contract discrimination to the full range of terms and conditions of employment protected by Title VII.[82] While the Supreme Court has seldom interpreted 42 U.S.C. § 1981 since the 1991 Amendments overruled *Patterson*, it recently relied on the "plain text" of a different statute to apply a generous national four-year period of limitations to most § 1981 claims.[83]

Jett, on the other hand, had limited governmental liability under § 1981 to circumstances that would also result in liability under the more stringent standards of § 1983—including, most notably, the stricture that local government is liable for only those acts of its agents undertaken in fulfillment of the agency's official policy.[84] In § 101 of the 1991 Act, Congress responded ambiguously, adding to § 1981 the following new subparagraph: "[t]he rights protected by this section are protected against impairment . . . under color of State law."[85] This language does confirm the *Jett* premise that the § 1981 right to be free of race discrimination in contracting is enforceable against local government. The text, however, fails to deal directly with the *Jett* holding that, in order to enforce this § 1981 right, plaintiffs suing government,

79. *Patterson*, 491 U.S. at 176–78.

80. *Id.* at 180–81.

81. 42 U.S.C. § 1981(b) (2000).

82. *See, e.g.*, Foley v. Univ. of Houston Sys., 324 F.3d 310, 315–16 (5th Cir. 2003) (finding that the 1991 Act restored a § 1981 claim of retaliation); Hawkins v. 1115 Legal Serv. Care, 163 F.3d 684, 693 (2d Cir. 1998) (concluding that, as amended, § 1981 reaches claims of unlawful retaliation, harassment, and discrimination in demotion, promotion, transfer and discharge, as well as hiring).

83. Jones v. R.R. Donnelley & Sons Co., 124 S.Ct. 1836, 1840, 1845 (2004).

84. Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 735–38 (1989).

85. 42 U.S.C. § 1981(c) (2000).

unlike private defendants, must establish the additional elements of liability under required § 1983. Unsurprisingly, therefore, after some initial confusion, the few federal circuit courts to address the issue have all held that subsection (c) does not effectively overrule *Jett*.[86] As a consequence, plaintiffs in search of a federal statutory remedy for race discrimination in employment against local government are relegated to Title VII, with all of its restrictive procedural prerequisites and caps on damages. Section 1981, with its immediate access to court and uncapped damages, remains unavailable as an additional tool in the arsenal against government defendants.

In brief, the history of Title VII after the Civil Rights Act of 1991, especially when viewed against the less favorable judicial treatment of companion employment statutes that the 1991 Act ignored or failed to reinvigorate with clarity, suggests that the Rehnquist Court has put its "plain text" mantra into practice. If this conclusion is correct, it might somewhat restore the faith of academic and public interest group critics that the Court is discharging its role as elaborator of legislative meaning legitimately. Certainly our tradition leaves room for the justices of the Supreme Court to imbue ambiguous statutory text with meanings that reflect their own predispositions and preferences—that is inherent in the nature of the Presidential appointment power. What we can minimally ask of the Court is that where a constituency, like employed persons, is sufficiently potent to extract from Congress relatively determinate statutory text, the Justices will give Congress its due. In interpreting Title VII after the 1991 Amendments, the Court appears to have done so.

Of course this ultimately subjects potential claimants to the tender mercies of Congress, which must speak on their behalf and speak plainly. Woe betide the group—like prisoners—that is unable to assemble an effective legislative constituency.[87] One may well lament that Congressional will has been mobilized in the last two decades for only selective reinvigoration of the employment discrimination statutes. One may lament even more that Congress has not come to the aid of civil rights claimants at all. One may also lament that the Rehnquist Court, left by Congress to its own devices, has so sedulously, strenuously, and severely shredded enforcement of the

86. *See* Felton v. Polles, 315 F.3d 470, 481–82 (5th Cir. 2002); Butts v. County of Volusia, 222 F.3d 891, 894 (11th Cir. 2000); Dennis v. County of Fairfax, 55 F.3d 151, 156 n.1 (4th Cir. 1995); Williams v. Little Rock Mun. Water Works, 21 F.3d 218, 224 (8th Cir. 1994) (continuing to follow *Jett*). Similar in practical effect is *Federation of African American Contractors v. City of Oakland*, 96 F.3d 1204, 1216 (9th Cir. 1996), holding that § 1981 provides both a right and a remedy against local government but that municipal liability under that statute must be determined by reference to the additional § 1983 element of policy.

87. In *Crawford-El v. Britton*, the Court catalogues the several significant impediments Congress placed in the path of prisoners' civil suits in the Prison Litigation Reform Act. 523 U.S. 574, 596–97 (1998).

Reconstruction Civil Rights Acts, particularly § 1983. Those are, however, natural byproducts of the cultural and social tides that have driven our electoral and judicial appointment politics, byproducts not curable by any theory of statutory interpretation that has gained widespread acceptance in a democratic republic. To give the Court its due, our glimpse at the post-1991 history of Title VII suggests that when Congress has reasserted itself in plain terms on the side of employment discrimination claimants, the federal judiciary has come to heel, even in the face of its own contrary predilections.