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Congress and the Supreme Court's Conflict over Antidiscrimination Law

By David B. Oppenheimer

In the current era, when Congress starts writing antidiscrimination legislation, the five conservative members of the Supreme Court, and their allies throughout the federal judiciary, start to sharpen their blue pencils. As fast as Congress can expand civil rights, the federal bench can redact them.

There was a time in American history, not so long ago, when progress in antidiscrimination law came from the courts, not Congress. And in the 1960s, Congress and the Supreme Court shared a unified vision supporting civil rights. Yet, by the late 1970s, the Court had changed, and its decisions increasingly rejected efforts by Congress to protect the rights of women and minorities.

What happened?

Equal Protection Limitations

In the 1940s, the NAACP, under the leadership of Thurgood Marshall and Charles Hamilton Houston, developed a litigation strategy aimed at undermining *Plessy v. Ferguson* (1896). After a series of victories in cases finding facilities unequal, and thus impermissible even under *Plessy*, they fully succeeded in 1954 in *Brown v. Board of Education of Topeka*, which found that “[s]eparate educational facilities are inherently unequal.” A series of cases soon followed finding equal protection violations in cases of segregated public transit systems, hospitals, libraries, parks, and other publicly owned facilities.

Under *Brown*, the Fourteenth Amendment, with its guarantee of equal protection, became the nation’s most important source of antidiscrimination law. It provided a constitutional mandate that states and their subdivisions and agents refrain from treating persons and groups of persons differently without good cause. As formulated under *Brown*, when inequality is directed at a discreet and insular minority, the state’s conduct is subject to “strict scrutiny” to determine whether the inequality is (1) justified by a “compelling governmental purpose” and (2) “narrowly tailored” to achieve that purpose.

But in the post-*Brown* era, an increasingly conservative Supreme Court limited the equal protection principle through three doctrines. First, it only applies to discrimination by the state and its subdivisions and agents (the “state action” requirement). Second, it is limited to intentional discrimination (the “intent” test). Third, the Supreme Court has recently read the principle as applying with nearly as much force to policies favoring minority groups as those disfavoring them (the “colorblindness” doctrine), thus narrowing the ability of Congress and the states to take affirmative actions to promote opportunities for disadvantaged minorities. Because of these limitations, the most common sources of U.S. non-discrimination law are statutes, regulations, and executive orders, which are also in danger of being limited, as they are increasingly subject to rejection by the Court.

Antidiscrimination Legislation Through the Decades

In the 1960s, Congress enacted four major civil rights statutes. Along with their implementing regulations and an executive order, they remain the principal sources of statutory antidiscrimination law in the field of sex, race, age, and ethnicity discrimination. Three of these four statutes can be tied to the progress of the social movement for civil rights, and
the strained, yet critical working relationship between Rev. Dr. Martin Luther King Jr. and President Lyndon B. Johnson.

The first of the statutory acts was the 1964 Civil Rights Act, which was initially introduced during the President John F. Kennedy administration in response to the Birmingham, Alabama, crisis but was passed following the longest Senate filibuster in U.S. history at the urging of his successor, President Johnson. The act prohibits discrimination based on race, color, religion, or national origin by private and public entities for access to public accommodations (such as hotels, restaurants, and theaters); and prohibits discrimination based on these same factors (race, color, religion, national origin) or sex by private employers of fifteen or more employees. It prohibits discrimination based on race, color, or national origin by publicly funded educational institutions and by public entities that receive funds from the federal government. In 1972, it was amended to prohibit employment discrimination by public, as well as private, employers.

The employment discrimination prohibition (Title VII) was initially broadly construed by the U.S. Supreme Court and circuit courts of appeal, which held that the act applies to facially neutral policies that have a disparate impact (subject to affirmative defenses for business necessity and job relatedness); the burden of proof is easily shifted to the employer; harassment, including sexual harassment without economic consequences, is covered by the prohibition of discrimination; and the class action device is favored. But subsequent decisions have cut back on each of these principles and raised a variety of roadblocks, setting off a series of longstanding disputes with Congress, which has amended the employment discrimination section several times to reverse decisions by the Court.

In 1965, on the heels of the Selma, Alabama, crisis, Congress passed the Voting Rights Act, providing for federal oversight of states and communities with a record of suppressing minority voting. The act was reauthorized in 1970, 1975, 1982, and 2006, but the Court has shown increasing skepticism about its legitimacy.

Also in 1965, President Johnson issued Executive Order 11246, which prohibits private companies providing goods or services to the federal government from discriminating based on race, and requires them to establish “affirmative action” programs and policies to increase the number of minority employees and subcontractors. This expanded an earlier Executive Order (10925) by President Kennedy, which is generally identified as the initial source of the U.S. policy of affirmative action. Here again, the Court has become skeptical of the legitimacy of such policies.

In 1967, Congress passed the Age Discrimination in Employment Act, protecting workers over age forty from age discrimination.

In 1968, in the days following King’s assassination, Congress passed the Fair Housing Act, prohibiting most housing discrimination based on race, color, religion, or national origin. And later that same year, the Supreme Court found that the long-dormant 1866 and 1867 Civil Rights Acts, prohibiting private racial discrimination, which had been ignored since the end of Reconstruction, remained valid.

Since 1968, Congress has passed several laws intended to broaden federal civil rights, either to include more groups or, with increasing frequency, simply to reverse Supreme Court decisions. In 1972, Congress extended the prohibition of discrimination by educational institutions to prohibit sex discrimination (Title IX). In 1973, Congress passed the Rehabilitation Act, which prohibited government employers and contractors from discriminating on the basis of disability. In 1975, Congress passed the Education for All Handicapped Children Act, subsequently renamed the Individuals with Disabilities Education Act, which requires public schools to provide equal access to students with disabilities. In 1990, Congress passed the Americans with Disabilities Act, prohibiting discrimination in employment and requiring access to public accommodations for persons with disabilities. In 1994, Congress enacted the Violence Against Women Act.

Responding to Supreme Court decisions narrowing civil rights, in 1978, Congress passed the Pregnancy Discrimination Act, reversing the Supreme Court’s decision that “pregnancy discrimination” was not “sex discrimination” under the 1964 Civil Rights Act. In 1990, Congress passed a Civil Rights Restoration Act to reverse several Supreme Court decisions, but it was vetoed by President George H. W. Bush. It was repassed and signed in a slightly different form in 1991. In 2008, the American with Disabilities Act was amended to reverse several Supreme Court decisions limiting its effect.

In 2009, Congress passed the Lilly Ledbetter Fair Pay Act, reversing a Supreme Court decision that held that the statute of limitations in pay cases ran from the first pay disparity, even if the plaintiff didn’t know she was being paid less than her male co-employees. It was the first bill signed by President Barack Obama.

**Congress vs. the Supreme Court**

The revisits and revisions by Congress listed above were necessary because, beginning in the late 1970s, congressional expansion of anti-discrimination law has been resisted by an increasingly conservative Supreme Court. For example, in the Griggs case (1971) the Court initially held that Title VII prohibited not only intentional but also unintentional (or “adverse impact”) discrimination. The Supreme Court limited this doctrine in 1989, though it was restored by Congress in the Civil Rights Act of 1991.

Similarly, in the McDonnell Douglas case (1973), the Court held that the claimant’s burden in an employment discrimination case was
easily shifted to the defendant, but a line of cases beginning in the 1980s restricted this holding. In several cases, the Court has rejected congressionally authorized affirmative action regulations requiring government contractors to attempt to use more minority and women-owned subcontractors, on the grounds that the regulations interfered with the equality rights of white men.

The Court had initially broadened the prevailing view of the reach of the sex discrimination prohibition in the Vinson case (1986) when it held that sexual harassment in the workplace is unlawful sex discrimination, even when it causes no tangible economic effect. But in the Burlington case (1998), it provided defenses for employers that have undercut the effectiveness of sexual harassment claims.

Brown itself has come under fire. When it was decided, Brown was widely understood to condemn segregation because it caused harm to the segregated minority children. Efforts by school boards to achieve integration were applauded. But now a majority of the Court views the Equal Protection Clause as concerned with the state’s paying attention to race rather than segregating children based on race. Thus, the Court recently held that efforts by school districts to prevent racial segregation of schools by assigning students based, in part, on their race, violates the Fourteenth Amendment. As if repeating a truism, Chief Justice John Roberts equated desegregation with discrimination, complaining with apparent exasperation that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”

In several cases, the Court has restricted federal antidiscrimination law by finding that Congress exceeded its constitutional authority. Thus, the Court has held that Congress acted improperly in extending the protections of the Age Discrimination in Employment Act and the Americans with Disabilities Act to state government employees. And the Court ruled that Congress exceeded its authority when, in the Violence Against Women Act, it created a federal court civil claim for damages for women who were victims of sexual violence.

In two recent cases expected to have a dramatic effect on employment discrimination cases, the Supreme Court in 2007 and 2009 interpreted the procedural requirements for pleading a claim in federal court, overruling long-standing precedent. The new interpretation requires plaintiffs to plead many more facts to avoid dismissal, which is particularly difficult in cases where an employer/defendant is in possession of most of the relevant information. A third case in 2009 exacerbated the problem by requiring a higher degree of proof in age discrimination cases. It is already being extended by the lower courts in disability discrimination cases. Bills have been introduced in Congress to require courts to return to the earlier standards.

**Beginning in the late 1970s, congressional expansion of antidiscrimination law has been resisted by an increasingly conservative Supreme Court.**

State Law Takes a Stand

One response to the Court’s efforts to scale back federal antidiscrimination law has been an increase in reliance on state law. Several states, beginning with New York in 1945, and including New Jersey, Massachusetts, Illinois, and California, had enacted antidiscrimination statutes prior to the federal 1964 Civil Rights Act. The federal law recognized that these state laws provided an independent basis for relief.

For example, a 1982 decision by the California Supreme Court permits claimants to be awarded emotional distress and punitive damages, in an amount determined by a jury. Federal law first permitted the award of emotional distress and punitive damages in the 1991 Civil Rights Restoration Act, and limits the damages awarded to $250,000. Thus, although the state and federal courts have concurrent jurisdiction over employment discrimination cases, a study (by this author) of employment discrimination jury verdicts in California reveals that nearly all reported verdicts were in cases tried in state court, rather than federal court.

State law may cover types of discrimination for which there is no protection under federal law. For example, nearly half the states prohibit employment discrimination based on sexual orientation and many also offer the same protection in the area of public accommodations and/or housing, while federal law does not. Some states offer protection from discrimination based on political viewpoint or expression, a protection offered under federal law only to public employees. While the federal antidiscrimination employment statute applies only to employers of fifteen or more employees, some states cover smaller employers. (California’s statute applies to employers of five or more employees and prohibits harassment by all employers, regardless of size.)

And although the public enforcement agencies that assist discrimination claimants are nonpartisan and required to be nonpolitical, many civil rights advocates believe that in times when the federal executive branch is controlled by conserva-
tives, claimants may receive greater assistance from some of the state antidiscrimination agencies.

Local governments may also pass antidiscrimination legislation, which may expand (but not contract) rights under state and federal law. Many large cities, including New York, Chicago, Los Angeles, and San Francisco, have their own antidiscrimination laws with administrative agencies to enforce them.

In some states, the state constitution may have broader equality guarantees than those provided under the federal Constitution. For example, under the California Constitution, actions may be brought against private parties, as there is no "state action" requirement, and all persons are provided a right to pursue an occupation without discrimination based on sex. This provision has been held to apply in situations where the state and federal statutes are, for various reasons, inapplicable.

In many states, the common law of torts and contracts provides additional sources of equality law. These sources may be favored by claimants at times because they may supply longer statutes of limitations; because they may not be subject to an exhaustion of administrative remedies, as required by some antidiscrimination statutes; or because they apply to employers too small to be subject to the antidiscrimination statutes.

Under tort law, in appropriate cases, discrimination claimants may bring claims of defamation, assault, battery, negligent hire, negligent supervision, wrongful discharge in violation of public policy, and myriad related theories. Many of the early developments in U.S. sexual harassment law developed as tort law prior to the recognition of sexual harassment as a form of sex discrimination prohibited by the antidiscrimination statutes. In some states, these tort theories (or some of them) may expose the defendant to emotional distress and/or punitive damages in amounts higher than those recoverable under the antidiscrimination statutes.

Discrimination may also be regarded as a breach of the employment contract, or a breach of the implied covenant of good faith and fair dealing, which is generally regarded as an unstated term in U.S. contracts. In most states, however, contract claims are a last resort for claimants because they only permit the remedy of economic damages and probably don't permit shaming attorney fees.

As long as a majority of the Supreme Court, and the rest of the federal bench, remains reliably conservative on civil rights, new laws passed by Congress may have a short shelf life. A person making a claim of discrimination is wise to cast a wide net in the search for remedies, rather than relying on only the federal civil rights statutes, because as quickly as Congress is expanding these rights, the U.S. Supreme Court is restricting them.

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**Aftermath**

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This nightmare of racial prejudice has been purposefully reawakened because the American presidency, historically owned by white men, was suddenly usurped by a black man. He may be, as he likes to say, the American Dream come true. He may be a truly decent man, a loving father and loyal husband, and a brilliant Constitutional Law professor. But he is also a real threat to the illusion of white power continuity. As the most powerful man in the world, President Obama represents that which should not be: a black man in the seat of white authority and power. The white power brokers have come to understand that the election of Barack Hussein Obama, far from being the beginning of a post-racial society, was a liberal coup d'état. Compound-

ing this conundrum, it is now clear that white society understands that it is fast becoming the American minority. Demographics are trending toward a white minority by 2040. Far from being emblematic of the dream of post-racial politics, for the white power brokers, Obama is the harbinger of an unimaginable minority status.

As blacks, we have witnessed, endured, and learned to flourish in the aftermath of the worst that the Anglo-European patriarchs have inflicted on us across five centuries. Perhaps as the white population loses its dominant majority status, there will be an inevitable affirmation of a less racially divided America. But, as we have seen, that inevitability will not come without determined resistance.

We in the civil rights movement have met such resistance before, and we must continue to meet it with firm resolve and insistence that the American legal system do what is right to protect the freedoms of all Americans regardless of race.

We should not despair that we are not likely to see a post-racial America in our lifetimes. We must inspire our youth and rally our forces with truth, faith, courage, and strategic wisdom to fight back. I was in Memphis on a cold overcast day April 8, 1968 at an outdoor memorial rally in front of City Hall for Dr. King, assassinated just four days earlier. Walter Reuther, the United Auto Workers leader, took to the podium: "Wipe away the tears," he exhorted, "there is work to be done."

Judge D'Army Bailey, a graduate of Yale Law School, joined the law firm of Wilkes & McHugh, P.A. after retiring from his position as a circuit court judge in Memphis, Tennessee.