

Taking Seriously Title VII's "Floor, Not a Ceiling" Invitation

Craig Gurian

Introduction

For more than twenty-five years, it has been the practice of federal and state judges around the country to throw victims of workplace sexual harassment out of court because they have not been harassed "enough." The practice is a function of the judicially created doctrine that only "severe or pervasive" harassment is actionable under Title VII.¹ In New York City, however, the "severe or pervasive" requirement has been rejected by virtue of case law² that developed in the wake of the 2005 Local Civil Rights Restoration Act,³ a law designed to "underscore that the provisions of New York City's Human Rights Law are to be construed independently from similar or identical provisions of New York state or federal statutes"⁴ in a manner to accomplish the City Human Rights Law's "uniquely broad and remedial purposes."⁵

This sea change in harassment doctrine is but one of several ways in which the Restoration Act has brought new strength to local antidiscrimination provisions. Some of the Act's changes sought to vindicate provisions in the comprehensive 1991 amendments to the City Human Rights Law⁶ that judges had long ignored; others responded to Supreme Court decisions hostile to civil rights enforcement that were issued subsequent

to the 1991 Amendments. All reflected an intent to develop a distinct — and distinctly plaintiff-friendly — jurisprudence.

While the animating perspective of the Restoration Act is a striking departure from the norm, the authority of New York City (or any other jurisdiction) to forge protections stronger than those provided by federal law was not new. From the beginning, Title VII disclaimed preemption, stating that:

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present *or future* law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.⁷

Title VII was designed to act as a floor below which civil rights protections could not fall, not a ceiling above which those protections could not rise. Over the decades, this invitation has been used most commonly in states and cities around the country to extend employment discrimination protection to workplaces with fewer than the fifteen-employee minimum required by Title VII. It has also been used to provide compensatory damages beyond those available under Title VII and to prohibit on a state level additional types of discrimination (such as discrimination on the basis of sexual orientation) beyond that proscribed by Title VII.

It is less common, however, for a state or local law to be designed specifically to fight back against the narrowing contours of Title VII, especially by means of directing state and federal judges to modify their approach to statutory interpretation. Under the Restoration Act, judges are required to probe critically the question of whether interpretations of federal or state civil rights law provisions genuinely further the purposes of their local counterpart.⁸

This chapter identifies the approach and architecture of the Restoration Act and explains the ways in which the local law's attempt both to protect the New York City Human Rights Law against erosion and to expand the law's reach still further has begun to have an impact. It then illustrates several additional barriers to strong coverage and enforcement that could be tackled if civil rights advocates focused more of their efforts on the state and local level. Finally, it offers some observations about what is needed to deepen the Restoration Act's early success locally and to spur efforts like the Restoration Act in jurisdictions across the country.

I. Why Was a Restoration Act Needed?

The short answer to the question “Why was the Restoration Act needed?” is that courts were not paying heed to either the language of the 1991 Amendments or the City Council’s intention in passing them.⁹

Every change made by the 1991 Amendments — whether dealing with protected classes, vicarious liability, theories of discrimination, or damages — had been aimed at augmenting coverage, limiting evasion, or otherwise strengthening enforcement. And the City Council’s intentions had been unmistakable. As then-Mayor David Dinkins stated when he signed the bill, the intention was that “judges interpreting the City’s Human Rights Law...take seriously the requirement that this law be liberally and independently construed.”¹⁰ Nevertheless, prior to the Restoration Act, courts were almost universally refusing to do more than engage in what I have elsewhere dubbed “rote parallelism,”¹¹ simply assuming that the result under the City Human Rights Law would be identical to that under federal civil rights law or New York State human rights law.¹²

A year before the enactment of the Restoration Act, New York’s highest court made plain just how completely it was prepared to ignore the plea for independent interpretation that underlay the 1991 Amendments and the liberal construction requirement of the City Human Rights Law as it existed in 2004.

The case before the court related to the private right of action that had been created by the 1991 Amendments — one that provided for uncapped compensatory damages, uncapped punitive damages, and attorneys’ fees.¹³ Only that kind of regime allows for the possibility of making a victim whole, punishing a wrongdoer sufficiently to create an actual deterrent, and providing a sufficient incentive for private counsel to undertake representation. At the time that the 1991 Amendments were enacted, the Supreme Court had not yet cut back on the availability of fees in cases that resulted in the award of only nominal damages, and prevailing doctrine in the Second Circuit was that attorney’s fees were available in such cases.¹⁴ The federal limitation on those fees occurred a year later, in 1992, when the Supreme Court issued its 5–4 decision in *Farrar v. Hobby* and concluded that, where nominal damages are awarded, “the only reasonable fee is usually no fee at all.”¹⁵

In *McGrath v. Toys “R” Us, Inc.*,¹⁶ New York’s court of appeals acknowledged that the City Council, in passing the 1991 Amendments, could not have had the intention to apply the yet-to-be-decided *Farrar* doctrine but the court imported *Farrar* nonetheless because of the court’s “general practice of interpreting comparable civil rights statutes consistently,” asserting that policies underlying the City Human Rights Law

were "identical" to those underlying federal civil rights statutes.¹⁷ In importing *Farrar*, *McGrath* engaged in no analysis of whether *Farrar* had actually been consistent with either federal or local civil rights policy.

Perhaps most important, *McGrath* stated that the City Council's failure to take affirmative action to rebut *Farrar* represented the Council's implicit ratification of the importation of *Farrar*.¹⁸ As such, the protections of the City Human Rights Law would be subject to being automatically ratcheted down every time federal or state law was narrowed by judicial construction.

Along with this sort of refusal to construe the City Human Rights Law liberally, the period between 1991 and 2005 was characterized by the wholesale failure of courts to recognize even basic modifications in statutory text. For example, it had already been illegal under the City Human Rights Law "to retaliate...against any person," but the 1991 Amendments modified that language so that it became illegal "to retaliate *in any manner*...against any person."¹⁹ Surely, the addition of the phrase "in any manner" was intended to mean and do *something*. Year after year, however, judges failed to appreciate that the legislative change had any meaning at all.

In a particularly acute example of judicial lawlessness in 2003, a state appellate court, in the case of *Priore v. New York Yankees*,²⁰ conjured up an entirely imaginary legislative history to get around the fact that the 1991 Amendments had made individuals liable for their own discriminatory workplace conduct. The City Council had taken the phrase common to Title VII and many state employment discrimination statutes that it was unlawful for "an employer" to engage in certain actions and broadened that to make it unlawful for an employer "or an employee or agent thereof" to engage in those actions.²¹ Mayor Dinkins had explained that the 1991 Amendments had taken "the fundamental step of making all people legally responsible for their own discriminatory conduct."²²

Several courts had started to abide by the plain language (and plain import) of this change.²³ All of this, however, was of no moment to an intermediate appeals court panel that simply did not want to believe that anyone would (or should) want to impose individual liability. To achieve its ends, the *Priore* court claimed that the added language ("or an employee or agent thereof") was simply reflecting language that had been in a New York State Human Rights Law provision dealing with licensing agencies. This was a complete fabrication. The section of the City Human Rights Law at issue did not have anything to do with licensing agencies (a different section was created for that), and the added language about employees or agents was language *not* found in the State Human Rights Law.²⁴ But the *Priore* court needed to create a "context."

Priore rejected the idea that the change in statutory language “automatically open[s] the door to an entirely new category of defendants” stating that the new language had to be read “in context” (that is, the context it had invented) and asserted that there was “no indication in the local ordinance, explicit or implicit, that it was intended to offer a separate right of action against any and all fellow employees based on their independent and unsanctioned contribution to a hostile environment.”²⁵ For the First Department of the Appellate Division (covering cases arising in Manhattan and the Bronx), individual liability was dead.²⁶

For civil rights advocates, City Human Rights Law development since 1991 — or, more precisely, the *lack* of independent development since 1991 — meant that the City Council had to send a message to the judiciary that could not be ignored.

II. A Hybrid Approach

In some respects, the Restoration Act proceeded conventionally, making specific changes to specific provisions. Thus, for example, protection against discrimination based on domestic partner status was added to the City Human Rights Law’s proscriptions against discrimination in employment, housing, and public accommodations,²⁷ and the maximum civil penalty available in a case brought administratively was raised to \$250,000.²⁸

The Restoration Act also went back to try to give force to the City Council’s intent to have a broad antiretaliation provision (the “in any manner” language having been insufficient to do the job). It explicitly set forth in the antiretaliation provision the proviso that retaliation complained of need not result in either an “ultimate action” or a “materially adverse change” in terms and conditions in order to be actionable.²⁹

In a direct rejection of the Supreme Court’s dramatic narrowing of the circumstances in which attorney’s fees would be available in cases where the litigation had acted as a catalyst for a change in policy on the part of the defendant,³⁰ the Restoration Act explicitly declared that fees would be available in such cases.³¹

But the most important contribution of the Restoration Act was the undoing of rote parallelism. Section 1 of the Restoration Act stated that the “sense of the Council that New York City’s Human Rights Law has been construed too narrowly to ensure protection of the civil rights of all persons covered by the law.”³² It went on to “underscore” that the law’s provisions “are to be construed independently from similar or identical provisions of New York state or federal statutes.”³³ And, in contrast

to *McGrath's* downward ratchet effect, it created an upward ratchet effect: interpretations of the provisions of counterpart federal and state statutes could be viewed "as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise."³⁴

Section 1 of the Restoration Act set forth its purpose; section 7 did the work of amending the construction section of the law. Rather than requiring liberal construction to accomplish the "purposes" of the law, the Council now required such construction to accomplish the "uniquely broad and remedial" purposes.³⁵ Any decision that asserted that the purposes of the City Human Rights Law were equivalent to the purposes of counterpart statutes simply could not be harmonized with this language.

For good measure, the Council added additional language making clear that the liberal construction was required "regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed."³⁶

Each element of the Restoration Act's legislative history focused on the importance of independent construction³⁷ and included this statement made on the floor of the City Council at the meeting at which it voted on the Restoration Act:

Insisting that our local law be interpreted broadly and independently will safeguard New Yorkers at a time when federal and state civil rights protections are in jeopardy.

There are many illustrations of cases, like *Levin* on marital status, *Priore*[,] *McGrath* and *Forrest* that have either failed to interpret the City Human Rights Law to fulfill its uniquely broad purposes, ignore the text of specific provisions of the law, or both.

With [the Restoration Act], these cases and others like them will no longer hinder the vindication of our civil rights.³⁸

The question, of course, was whether the courts would heed what the Council had done.

III. The Courts Take Notice

In civil rights, as in other areas of life, victory can be fleeting. Nevertheless, the tentative judgment to be made ten years after the passage of the Restoration Act is that an independent City Human Rights Law jurisprudence has indeed begun to take shape, despite some continuing resistance in the judiciary. Much work remains for the law to fulfill its intended potential. Ironically, the greatest need is for civil rights advocates to be willing to take up more wholeheartedly what the Restoration

Act has offered through its enhanced liberal construction provision and articulate in specific cases the specific reasoning that demands specific departures from existing legal doctrine.

Williams v. New York City Housing Authority,³⁹ decided early in 2009, was not the first case to take account of the passage of the Restoration Act, but it represented the most thorough and important exposition by any court, let alone an appellate court, of the Act's intent, and demonstrated how the process of independent construction should proceed. The overview from *Williams*:

[T]he Restoration Act notified courts that (a) they had to be aware that some provisions of the City HRL were textually distinct from its State and federal counterparts, (b) *all* provisions of the City HRL required independent construction to accomplish the law's uniquely broad purposes, and (c) cases that had failed to respect these differences were being legislatively overruled.⁴⁰

Reiterating that the Restoration Act had legislatively overruled *McGrath*, the court was careful to point out that the City Council envisioned the enhancement of the liberal construction provision as "obviating the need for wholesale textual revision of the myriad specific substantive provisions of the law."⁴¹ The court continued:

While the specific *topical* provisions changed by the Restoration Act give unmistakable *illustrations* of the Council's focus on broadening coverage, § 8-130's specific *construction* provision required a "process of reflection and reconsideration" that was intended to allow independent development of the local law "in all its dimensions..."⁴²

The legislative history provided guidance from multiple sources as to how courts should proceed to perform the task of deciding how provisions of the City Human Rights Law should be interpreted. *All* of the legislative history pointed in the direction of choosing an interpretation that maximized coverage;⁴³ a related lesson was that it would be a mistake to imagine that, for City Human Rights Law purposes, the upper bound of coverage was in any way a "settled" question. Every provision of the law had to be examined in light of the direction to courts to interpret to fulfill the law's uniquely broad and remedial purpose. Consistent with this, the court cited with approval the argument I had made in *Return to Eyes on the Prize*:

[A]reas of law that have been settled by virtue of interpretations of federal or State law "will now be reopened for argument and analysis...As such, advocates will be able to argue afresh (or for the first time) a wide range of issues under the City's Human Rights Law..."⁴⁴

One of the specific issues before the *Williams* court was the scope of protection against sexual harassment, and the court demonstrated how the process of "reflection and reconsideration" was supposed to be handled. In the first instance, the court, true to the language of the statute before it, treated sexual harassment as one type of gender-based discrimination in terms and conditions of employment. It then asked "what constitutes inferior terms and conditions based on gender."⁴⁵

Rather than taking the Supreme Court's approach as the necessary answer for City Human Rights Law purposes, *Williams* stated that the "severe or pervasive" doctrine — characterized by the Supreme Court as a "middle path"⁴⁶ — hindered those local objectives: "Experience has shown," the court stated, "that there is a wide spectrum of harassment cases falling between 'severe or pervasive' on the one hand and a 'merely' offensive utterance on the other."⁴⁷ Keeping with its focus on whether conduct created inferior terms and conditions, the court got to the heart of workplace reality: "It would be difficult to find a worker who viewed a job where she knew she would have to cope with unwanted gender-based conduct (except what is severe or pervasive) as equivalent to one free of unwanted gender-based conduct."⁴⁸

Williams concluded that the purposes of the City Human Rights Law could best be achieved by allowing severity and pervasiveness to go only to the question of damages, not to the question of underlying liability. In the ordinary case, therefore, liability is established when there is evidence of an employee being treated less well than others because of gender.⁴⁹ To "narrowly target" concerns about "truly insubstantial" cases, the court recognized an affirmative defense "whereby defendants can still avoid liability if they provide that the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider 'petty slights and trivial inconveniences.'"⁵⁰

Critically, *Williams* illuminated how to tie an enhanced liberal construction analysis to each of the guideposts for interpretation set out in the Committee Report that accompanied the Restoration Act:

1. "Traditional methods and principles of law enforcement ought to be applied in the civil rights context."⁵¹ Determining liability by the existence of differential treatment without regard to severity or pervasiveness creates a greater incentive for employers to "create workplaces that have zero tolerance," and, the court ruled, maximizing deterrence is a traditional method and principle of law enforcement.⁵²
2. "Discrimination should not play a role in decisions made by employers, landlords, and providers of public accommodation."

The court stated that the “severe or pervasive” rule was inconsistent with the “play no role” principle because it means that “discrimination is allowed to play *some significant role* in the workplace.”⁵³

3. “Victims of discrimination suffer serious injuries for which they ought to receive full compensation.” The court stated that “severe or pervasiveness” contradicts the principle that discrimination injuries, without limitation, are serious injuries.⁵⁴ It should be immediately apparent that this kind of analysis is transferable to virtually any issue that would arise in the antidiscrimination law context.

New York’s Court of Appeals has grappled with the Restoration Act in two important cases. The first was principally a matter of accepting that the City Human Rights Law meant what it appeared to say. In *Zakrzewska v. New School*,⁵⁵ the court took up the question of whether the *Faragher-Ellerth* affirmative defense to employer liability⁵⁶ applied to employment discrimination claims in the City Human Rights Law context.⁵⁷

The court concluded it did not: section 8-107(13) of the City Human Rights Law “creates an interrelated set of provisions to govern an employer’s liability for an employee’s discriminatory conduct in the workplace” that “simply doesn’t match up with the *Faragher-Ellerth* defense.”⁵⁸ For acts of those employees or agents who exercised managerial or supervisory authority, the section provides for strict liability,⁵⁹ and the existence of antidiscrimination policies and procedures can only go to the question of whether civil penalties (administratively) or punitive damages (in a civil action) should be mitigated.⁶⁰ The court ruled that the statutory text made clear that the provision, contrary to the employer’s position, applied to *all* supervisors and managers,⁶¹ a very different result from the Supreme Court’s decision finding that an employee is a “supervisor” for Title VII vicarious liability purposes only if he or she is empowered by the employer to take tangible employment actions against the victim.⁶² It is only in the context of actions of nonsupervisory coworkers that the existence of antidiscrimination policies and procedures can be considered in determining liability (and only where the conduct is *not known* to managers or supervisors but *should have been*).⁶³

Beyond the implications of confirming strict liability, the case represented a belated recognition that the 1991 Amendments (of which the addition of section 8-107(13) was part) constituted a “major overhaul” of the City Human Rights Law.⁶⁴

New School, of course, represented a circumstance where all the court needed to do was resist the *Priore*-like urge to say, "The statute just *can't* mean what it says." An even more important pronouncement from the New York Court of Appeals came the following year (2011) in a retaliation case brought against the New York City Police Department.⁶⁵ The question at issue was the meaning of the term "oppose"—that is, whether action was taken against the plaintiff for having opposed discrimination. One can say with absolute certainty that, in the pre-Restoration Act, *McGrath* era, the court would simply have looked at how Title VII and the State Human Rights Law had interpreted the term.

Now, however, a unanimous court recognized that the enhanced liberal construction provision introduced by the Restoration Act required it to construe the language of the retaliation provision, "*like other provisions of the City's Human Rights law, broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible.*"⁶⁶

This holding could not be more significant. First, the requirement of enhanced liberal construction analysis is applicable not only to the term "oppose" but also to *every* term found in the law.⁶⁷ Second, it captures the intent of the Restoration Act to require judges to weigh alternative interpretations, not to pick the road that has previously been most frequently selected. Third, it dispenses with the prominent notion in Title VII jurisprudence that Congress wanted Title VII tailored to "balance" the interests of employers. Fourth, courts are *not* asked to indulge their own policy preferences in rendering interpretations but rather to adhere to a policy decision already made by the City Council to take the most pro-plaintiff position that is reasonably possible.

In the case at hand, the only evidence that the plaintiff had opposed discrimination was that, at a meeting, she reacted to her supervisor's criticism of her recommendation to transfer a third party into the unit in which she worked by telling the supervisor that the person she had recommended "was the better candidate for the job" and that "[i]f I had to do it all again, I would have recommended [the same person] again."⁶⁸ This is not the usual basis for a finding that discrimination has been opposed. But the court found: "While [plaintiff] did not say in so many words" that her preferred candidate "was a discrimination victim" on the basis of perceived sexual orientation, "a jury could find that both [the supervisor and plaintiff] knew that he was, and that [plaintiff] made clear her disapproval of that discrimination by communicating to [her supervisor], in substance, that she thought [the supervisor's] treatment of [her candidate] was wrong."⁶⁹

By the time *Albunio* was decided, the Second Circuit Court of Appeals had also, separately, provided direction on the Restoration Act. In *Loef-*

fler v. Staten Island University Hospital,⁷⁰ a public accommodations case, the Second Circuit ruled that the Restoration Act “confirm[ed] the legislative intent to abolish ‘parallelism’ between the City HRL and federal and state anti-discrimination law....”⁷¹ The court aptly described the City Human Rights Law as having a “one-way ratchet” where state and federal enactments serve only as a floor for coverage, not the ceiling.⁷² *Weiss v. JPMorgan Chase* is an example of a district court following *Loeffler*’s command.⁷³ *Weiss* declined to apply the Supreme Court’s decision in *Gross v. FBL Financial Services*,⁷⁴ the case that had required a showing of but-for causation in age discrimination cases (rejecting what, at least in some circuits, had been the use of mixed-motive analysis). Noting that the City Human Rights Law does not differentiate between age and other types of discrimination claims, the court reasoned that application of *Gross* in an age case would mean that mixed-motive analysis would not be available in any employment discrimination claims, including those involving protected classes where Title VII provides for mixed-motive analysis.⁷⁵ Reducing the City Human Rights Law below that Title VII floor was impermissible, the court ruled, also finding that an independent interpretation of the City Human Rights Law allowing liability where protected class basis was “a motivating factor” was consistent with the law’s text.⁷⁶

In sum, the application of the Restoration Act has generated a strong body of basic case law on which to build.

IV. Unfinished Business and Attempts at Sabotage

In many respects, though, the Restoration Act’s work has just begun. I am not aware, for example, of any case that has specifically recognized that *Priore*’s excision-by-fiat of individual liability has been legislatively overruled.⁷⁷ And another element of *Williams*, that which rejected the Supreme Court’s limitations on continuing violation doctrine for City Human Rights Law purposes,⁷⁸ has only, to my knowledge, been applied by one federal court.⁷⁹ More broadly, large areas of the law simply have not been subject to any reexamination yet.

The most troubling developments in the last few years are circumstances where courts have not very subtly attempted to evade the requirements of the Restoration Act. Two areas have stood out: the treatment of sexual harassment claims and the attempt to wall off “procedural” matters from enhanced liberal construction analysis.

*Wilson v. N.Y.P. Holdings, Inc.*⁸⁰ is a 2009 case out of the Southern District of New York that came to be cited repeatedly.⁸¹ What did the court treat as no more than “petty slights and trivial inconveniences” (the

Williams affirmative defense)? Comments that included "training females is like 'training dogs'" and "women need to be horsewhipped."⁸² Among the cases citing *Wilson* is *Mihalik v. Credit Agricole Cheuvreux North America, Inc.*,⁸³ another case where the conduct complained of — which included evidence that the chief executive officer "explicitly told [plaintiff] that male employees should be respected because they were 'male' and thus 'more powerful' than women"⁸⁴ — was found to fit the "petty slights and trivial inconveniences" exception.⁸⁵ The district court's decision in *Mihalik*, too, was then cited again and again by other judges in the Southern District Court of New York.⁸⁶

That these cases contravene *Williams* (and the intent of the Restoration Act) was first pointed out in a remarkably critical footnote reference in a subsequent case decided by the appellate court that had decided *Williams*. The principal focus of 2011's *Bennett v. Health Management Systems, Inc.*⁸⁷ will become clear later in this section, but the court was also concerned that the *Williams* affirmative defense should be treated as the "narrowly drawn affirmative defense" it was intended to be, that it was important for "borderline" fact patterns to be allowed to be heard by a jury, and that it should be understood that one could "easily imagine a single comment that objectifies women being made in circumstances where [the] comment would, for example, signal views about the role of women in the workplace and be actionable."⁸⁸ The court skewered *Wilson* and *Mihalik* for, among other things, "ignoring the *Williams* holding," relying on cases that "nominally acknowledge *Williams* but ignore its teaching."⁸⁹

Two years later, the Second Circuit vacated and remanded *Mihalik* and taught many of the lessons of the Restoration Act again. Specifically in the context of sexual harassment, the circuit rejected the district court's analysis for placing "too much emphasis on *Williams*'s recognition that the NYCHRL should not 'operate as a "general civility code,"' and too little emphasis on its exhortation that even 'a single comment' may be actionable in appropriate circumstances."⁹⁰ The question remains whether lower courts will take the guidance provided (and the rebukes) seriously.

Another area of resistance or confusion is found in connection with what are sometimes called procedural matters. Is the manner in which the *McDonnell Douglas* framework is or is not used a matter beyond enhanced liberal construction analysis? *Bennett* found that it was not: "the identification of the framework for evaluating the sufficiency of evidence in discrimination cases does not in any way constitute an exception to the Section 8-130 rule that all aspects of the City HRL must be interpreted to accomplish the uniquely broad and remedial purposes of

the law,” and for the court to “create an exemption from the sweep of the Restoration Act for the most basic provision of the City HRL — that it is unlawful ‘to discriminate’ — would impermissibly invade the legislative province.”⁹¹

Yet a divided panel of the same appellate court later issued a ruling in *Melman v. Montefiore Medical Center* that states that neither the Restoration Act nor the Committee Report “set forth a new framework for consideration of the sufficiency of proof of claims under the [City Human Rights Law] or indicates that the *McDonnell Douglas* framework is to be discarded.”⁹² The statement of the *Melman* majority is a non sequitur: that the Restoration Act did not set forth specific modifications to *McDonnell Douglas* does nothing to limit a court’s obligation to interpret the term “to discriminate” as it must interpret all other terms of the law: pursuant to the direction of the enhanced liberal construction provision. It is as though that majority could not (or did not wish to) appreciate that *McDonnell Douglas* is not an immutable principle of the physical universe that predates all legislation but rather is a judicial creation designed to give one of many possible answers to how to give shape to identifying what constitutes discrimination.⁹³

As a practical matter, *Melman* adhered to *Bennett*. It was, for example, confirmatory of the principle that the City Human Rights Law insists that discrimination “play no role” and that mixed-motive analysis is applicable to every case. *Melman* accepted *Bennett*’s direction that summary judgment of City Human Rights Law claims should only be granted if “no jury could find defendant liable under any of the evidentiary routes — *McDonnell Douglas*, mixed motive, ‘direct’ evidence, or some combination thereof....”⁹⁴

The Second Circuit in *Mihalik* also confirmed that the “no evidentiary route” principle was to be applied in all City Human Rights Law cases,⁹⁵ but observed in a footnote that, comparing *Bennett* with *Melman*, “[i]t is unclear whether, and to what extent, the *McDonnell Douglas* burden-shifting analysis has been modified for NYCHRL claims.”⁹⁶ In fact, however, apart from its opening statement about what the Restoration Act had not explicitly done, *Melman* did not speak to or rebut some of *Bennett*’s other conclusions.

For example, *Bennett* had rejected the *Reeves* standard for failing to take sufficiently into account:

- (a) The traditional power to be accorded to the inference of wrongdoing that arises from evidence of consciousness of guilt; (b) the importance of deterring a defendant’s proffer of false reasons for its conduct; and (c) the impropriety of a court weighing the strength of evidence in the context of a summary judgment motion.⁹⁷

Picking up themes sounded by the dissent in *Hicks*,⁹⁸ *Bennett* had ruled that:

Once there is some evidence that at least one of the reasons proffered by defendant is false, misleading, or incomplete, a host of determinations properly made only by a jury come into play, such as whether a false explanation constitutes evidence of consciousness of guilt, an attempt to cover up the alleged discriminatory conduct, or an improper discriminatory motive co-existing with other legitimate reasons.⁹⁹

Melman simply did not attempt to articulate a substantive objection to *Bennett*'s reasoning or conclusion.

In light of the dictates of *Albunio*, it is difficult to imagine that "to discriminate" will be walled off from enhanced liberal construction analysis. Likewise, it is hard to believe that *Bennett*'s interpretation (picking up on what was, after all, a four-Justice dissent in *Hicks*) will be found not to fall within a "reasonably possible" pro-plaintiff construction of "discrimination," but the ultimate willingness of judges to follow *Albunio* faithfully remains to be determined.

V. How Might Other Jurisdictions Proceed?

I do not suggest that a push for state and local legislation would represent a cure-all for the problems and limitations in federal antidiscrimination law doctrine. First, and most obviously, there are many jurisdictions that would not be politically congenial to such an effort. Second, states and localities are not empowered to undo congressional or Supreme Court efforts to stymie state-based remedies. The Class Action Fairness Act of 2005 (CAFA) is a particularly notable example of the former;¹⁰⁰ the Supreme Court's repeated expansions of the Federal Arbitration Act are examples of the latter.¹⁰¹

Nevertheless, the list of nonpreempted problems or limitations in antidiscrimination law doctrine is very long indeed; hence, the list of ways that state or local legislation can be helpful is very long, too. Some are suggested by the kinds of changes made either by the Restoration Act directly or by the 1991 Amendments before them,¹⁰² but there are many more.

From the point of view of the restoration of rights, an examination of closely divided Supreme Court decisions on civil rights is the obvious place to begin. *Bennett* went back to 1993 to draw on the dissent in *St. Mary's Honor Center v. Hicks*,¹⁰³ but one could just as easily turn to the Supreme Court's 2013 decisions in which the term "supervisor" was defined extraordinarily narrowly for the purpose of the determination

of vicarious liability under Title VII,¹⁰⁴ and plaintiffs were stripped of the ability to use mixed-motive analysis in Title VII retaliation cases.¹⁰⁵

Another source for potential state or local legislative activity is legislation that has been stymied on the federal level. The Paycheck Fairness Act,¹⁰⁶ for example, has not been able to get through Congress. It would prohibit retaliation against employees for discussing salary information and would require the defense to a claim under the Fair Labor Standards Act that women were being paid less than men to be a bona fide factor other than sex that the employer proves is job related, consistent with business necessity, and “not based upon or derived from a sex-based differential in compensation.”¹⁰⁷

Disparate impact liability is another obvious area for state and local legislating. Although national civil rights organizations have, surprisingly, failed to take advantage of it, the City Human Rights Law’s provision is a useful model of a disparate impact scheme more robust than provided by Title VII.¹⁰⁸ First, it applies to all protected classes and to all contexts of discrimination. This avoids (and fixes) the problem that arose in *Smith v. City of Jackson*;¹⁰⁹ it also provides a basis for the building of a broader coalition than is offered when legislation extends protection for a single protected class group.

Second, unlike Title VII (even as amended by the Civil Rights Act of 1991), the City Human Rights Law’s disparate impact provision permits a plaintiff to identify a *group* of practices that cause a disparate impact without demonstrating “which specific policies or practices within the group results in such disparate impact” (something that can be devilishly difficult for a plaintiff).¹¹⁰

The City Human Rights Law also gives the concept of less discriminatory alternative an important tweak: where the plaintiff “produces substantial evidence that an alternative policy or practice with less disparate impact is available to the covered entity,” the burden is on the covered entity to “prove that such alternative policy or practice would not serve the covered entity as well.”¹¹¹ There is no limitation on compensatory or punitive damages set forth in the City Human Rights Law, either in the context of a civil action generally or for disparate impact claims in particular.¹¹²

Robust state and local legislation proscribing conduct that causes disparate impact based on protected class status might also help reduce the impact of *Ricci v. DeStefano*,¹¹³ the 2009 case in which the Supreme Court, treating the desire to *avoid* race-based disparate impact to be a species of intentionally discriminatory action, held that an employer’s decision not to certify the results of a job examination that it believed had a racially disparate impact was “impermissible under Title VII

unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."¹¹⁴ According to *Ricci*, "a threshold showing of a significant statistical disparity...and nothing more" is "far from a strong basis in evidence that the [employer] would have been liable under Title VII had it certified the results."¹¹⁵

A state or local law that makes disparate impact claims easier to prove would likewise make it easier for an employer to have the requisite "strong basis in evidence." Such a case would place Title VII's floor-not-a-ceiling provision under a rare highlight: those in favor of broader disparate impact provisions would argue that § 2000e-7 blessed such extensions of civil rights protections; those seeking to limit disparate impact would argue that disparate impact proscription beyond that provided by Title VII represented intentional discrimination that § 2000e-7 does *not* permit a jurisdiction to sanction on the basis that such legislation "purports to require or permit the doing of any act which would be an unlawful employment practice."¹¹⁶

One set of important questions that each state or locality has to answer concerns who is proscribed from committing discriminatory conduct, who is responsible for such conduct, and what relationship a person needs to have with a discriminatory actor to be protected. At the most basic level, there is the question of the size at which an employer becomes covered. For example, those working at the smallest employers, while not a large part of the labor force, are not a trivial part, either. In California alone, there are more than 1.2 million people working in firms with fewer than five employees.¹¹⁷ Should those people not have protection against discrimination? Though California has extended protection against discriminatory harassment to employees of employers of all sizes,¹¹⁸ employers with fewer than five employees are exempt from the other employment discrimination provisions (like discriminatory hiring and firing).¹¹⁹

Decisions as to who is covered are no less subject to political compromise than other legislative matters (perhaps more so, given the hold that the idea of not "burdening" small businesses has on the American imagination). But as a matter of what discrimination law seeks to provide baseline protection against, size should not matter. Another context of discrimination — that which occurs in public accommodations — provides interesting perspective on this question. The value sought to be upheld in state statutes that commonly have a list of places — bowling alleys, ice cream parlors, and so forth — where discrimination shall not be allowed is that *public life* shall not be polluted by bias, regardless of how transitory an interaction might be.¹²⁰ One's employment — even at

the smallest employer — is no less a matter of public life and should not be polluted by discrimination.

Similarly, a person victimized by bias in connection with work is harmed regardless of whether the victimizer is an “employer” or the victim is an “employee” or “independent contractor.” California has taken some steps here, as well, although only in the harassment context. Harassers are individually liable, persons “providing services pursuant to a contract” are protected, and extensive vicarious liability is set forth.¹²¹ Other states have the opportunity to expand coverage as much or more, including, for example, considering whether to protect one business entity from discrimination by another business entity because of the protected class status of the first entity’s employers, agents, or associates.¹²²

I would be remiss if I did not touch on one additional prospective addition to state and local antidiscrimination statutes. Ever since 1982, standing for fair housing organizations and their testers has existed to the furthest limits of Article III of the Constitution (there are no prudential limitations that may be imposed on standing in this context); if a tester has been deprived of accurate information about housing availabilities, that is one injury; if an organization has “diverted resources” from nontesting activities, that is another injury.¹²³ Testing is a crucial technique: discrimination often will not announce itself to an individual victim of a practice. Someone looking for a home, for example, knows the listings that he has been shown but very well may not know (even in the Internet age) of listings that he has not been shown.

The utility of testing to ferret out employment discrimination should be obvious. An individual is not going to be able to get a picture of hiring patterns that exist; with the exception of government entities,¹²⁴ only an organization that engages in testing can decipher the patterns (whether based on using names on resumes as proxies for race or otherwise).

There has not been very much employment testing, however, subsequent to *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corporation* in 1994.¹²⁵ There, the D.C. Circuit denied the testers standing altogether, holding that neither Title VII nor § 1981 contemplated such standing.¹²⁶ As for the Fair Employment Council, the court reached the same result with respect to § 1981 and only allowed Title VII organizational standing as the organization may have proven injuries (a) flowing from actions taken against bona fide job applicants (not testers); and (b) only insofar as there was “perceptible injury” to the Council’s nontesting programs (beyond the decision to shift funding from nontesting to testing activities).¹²⁷ The hurdles apparent from the preceding description make it difficult as a practical matter for an organization

to achieve standing with respect to its employment discrimination testing.¹²⁸

As I have argued elsewhere, fair housing injuries are easily conceptualized as injuries to the government that warrant the construction of a "private attorney general" provision.¹²⁹ Employment discrimination injuries should be accorded the same importance. A straightforward approach would be to specifically grant organizations standing when they are deprived of accurate information about employment openings because of the protected status of their agents (testers) or when they have expended funds that result in the discovery of discrimination (avoiding collateral litigation over whether they have "diverted resources").¹³⁰

All of the foregoing discussion in this section has identified various substantive goals, but there are important strategic and tactical decisions that have to be made when mounting a state or local legislative effort. One is the importance of creating as robust a legislative history as possible.¹³¹ The problem of judge incredulity at efforts to maximize coverage is not going to disappear, and that legislative history can be an important tool to persuade judges that "we really meant it."

The question that will need to be addressed on a case-by-case basis is the extent to which an effort should rely on the adoption of an enhanced liberal construction provision and how much on specific changes to a law's substantive and procedural coverage. To me, an enhanced liberal construction provision that emphasizes independent construction is essential to prevent retrogression. Beyond that, a legislative direction to reexamine how a statute should be interpreted can empower civil rights advocates who are seeking to explain to courts the reasons a variety of provisions deserve a broader reading than they have gotten. This can be especially important in connection with matters that may seem technical to legislators — the ability to inspire a layperson to focus on who bears the burden of persuasion, for example, is not unlimited¹³² — but have tremendous practical importance on the ability of victims of discrimination to achieve redress.

If specific changes are made, it is crucial that the legislation state explicitly that the changes are *not* intended to ratify prior judicial construction of provisions not modified (again highlighting the importance of having an enhanced liberal construction provision to reference).

VI. Closing Observations

The promise of expanding civil rights at the state and local level — or, one might say, the expedience of doing so given the political and judicial environments that currently exist in Washington — is unmistakable.¹³³

But efforts to make this sort of change have been sporadic. An informal survey of the websites of several major national civil rights organizations reveals relatively little attention being paid to this area (legislative advocacy with respect to marriage equality is an important exception to the rule). Why isn't more being made of the political space that is available? Especially given the trajectory of marriage equality, why wouldn't the model of seeding an effort in the most congenial jurisdictions first be more generally appealing?

I am acutely aware that civil rights organizations and their allies do not have limitless funds, but my own experience over the last twenty-seven years as a civil rights lawyer tells me that limited funding is only a small part of the problem.

Many of the issues discussed in this chapter — the nuts and bolts of employment discrimination litigation over the decades — are not among the areas seen as either new or exciting (in the academy, among civil rights organizations, and elsewhere) and thus are not ranked as high priorities. Some of the problem comes from a habitual distaste among some civil rights lawyers to have to be litigating in state court instead of federal court. Another element of the problem is the failure to take the time to study and appreciate how much stronger nonfederal causes of action can be.

Many civil rights organizations and advocates focus attention on only one protected class and, sometimes, on one context of discrimination. It should not be difficult to appreciate that a coalition seeking to make changes across the lines of protected class (e.g., those affecting age, gender, race, and disability) and across the lines of discrimination context (e.g., changes affecting both employment and housing) will generally be able to bring more pressure on a legislative body than a single-issue group acting alone. But despite frequent invocations of the importance of coalition, its practice—both in developing multi-issue legislation and in terms of coordinating advocacy—has remained more the exception than the rule.

In my own judgment, the single most important factor is that most attorneys have not considered, or are uncomfortable with, the idea that it is still possible to write on a clean slate. I have seen this reticence hinder the development of the City Human Rights Law as broadly as it otherwise could be,¹³⁴ and I think the same reticence does a lot to explain the paucity of similar efforts elsewhere.

It is surely more difficult to accomplish one's goals when judges have to be directed to take an active role in developing a statute to its full potential than when there are judges already inclined to do so. But it is worth thinking about state and local legislation as in many ways being

at the earliest stage of development, comparable to where Title VII was immediately after its passage more than fifty years ago. Neither *McDonnell Douglas*, nor *Griggs*, nor any other case came packaged with the law; advocates had to see the potential, imagine the doctrines needed, and marshal evidence and reason to get those doctrines established as best they could. Those kinds of efforts are needed at the state and local levels today.

About the Author

Executive director, Anti-Discrimination Center. Mr. Gurian was the principal drafter of the 2005 New York City Local Civil Rights Restoration Act and a principal drafter of the comprehensive 1991 revisions to the New York City Human Rights Law.

Notes

1. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). In many cases, judges are more hostile to these claims than the originally articulated doctrine required. *See, e.g.,* Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to Be "Severe or Pervasive" Discriminates Among "Terms and Conditions" of Employment*, 62 MD. L. REV. 85, 87 (2003).
2. *Williams v. New York City Hous. Auth.*, 872 N.Y.S.2d 27 (N.Y. App. Div. 2009).
3. New York City, Local Law No. 85 Int. (2005) [hereinafter Restoration Act]. The Restoration Act is found in N.Y.C. Legislative Annual, at 528–35 (2005), available at <http://www.antibiaslaw.com/RestorationAct.pdf>.
4. Restoration Act § 1.
5. Restoration Act § 7, amending N.Y.C. Admin. Code tit. 8, § 8-130. The "City Human Rights Law" composes the entirety of Title 8 of the N.Y.C. Administrative Code.
6. N.Y.C., Local Law No. 39 (1991) [hereinafter 1991 Amendments]. The 1991 Amendments are found in N.Y.C. Legislative Annual 145–81 (1991), available at <http://www.antibiaslaw.com/LL39.pdf>.
7. 42 U.S.C. § 2000e-7 (2013) (emphasis added) (originally enacted as § 708 of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (July 2, 1964)).
8. *Cf.* William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) (warning against the practice of reflexively importing federal constitutional decisions when interpreting counterpart state constitutional guarantees, instead of making sure that the relied-upon decisions are "logically persuasive and well-reasoned" and pay due regard to "the policies underlying specific constitutional guarantees").
9. The long answer, a comprehensive examination of the intent and intended consequences of the Restoration Act written in the immediate aftermath of the passage of the legislation, is found in Craig Gurian, *A Return to Eyes on the Prize*:

Litigating Under the Restored New York City Human Rights Law, 33 FORDHAM URB. L.J. 255 (2006).

10. Remarks by Mayor David N. Dinkins at Public Hearing on Local Laws 2 (June 18, 1991) (on file with the New York City Council's Committee on General Welfare), *available at* <http://www.antibiaslaw.com/MayorsRemarks061891.pdf> [hereinafter Dinkins' Remarks]. The requirement referred to by the mayor was set forth in section 8-130 of the City Human Rights Law (textually unchanged by the 1991 Amendments).
11. *See* Gurian, *supra* note 9, at 262.
12. Prior to the 1991 Amendments, those complaining of discrimination had no private right of action and were forced to proceed administratively. After the 1991 Amendments established a private right of action, many cases were filed. Before the passage of the Restoration Act, literally hundreds of cases were disposed of on the basis that a City Human Rights Law claim must fail where a federal or state civil rights claim had not been made out, often in nothing more than a footnote that asserted the (unanalyzed) proposition of equivalence and citing other courts that had habitually made the same error.
13. New York City, N.Y., Admin. Code § 8-502(a) [hereinafter N.Y.C. Admin. Code § 8-502(a)].
14. *See, e.g.,* Ruggiero v. Krzeminski, 928 F.2d 558, 564 (2d Cir. 1991).
15. 506 U.S. 103, 115 (1992).
16. 821 N.E.2d 519 (N.Y. 2004).
17. *Id.* at 525.
18. *Id.* at 525-26.
19. 1991 Amendments § 1; N.Y.C. Legislative Annual 160 (1991) (emphasis added).
20. 761 N.Y.S.2d 608 (N.Y. App. Div. 2003).
21. 1991 Amendments § 1; N.Y.C. Legislative Annual 152-53 (1991).
22. Dinkins' Remarks, *supra* note 10, at 4. The statement was consistent with the committee report that had accompanied the legislation. *See* COMM. ON GEN. WELFARE, REPORT ON PROP. INT. NO. 465-A AND PROP. INT. NO. 536-A, at 9-10 (1991) [hereinafter 1991 COMMITTEE REPORT], *available at* <http://www.antibiaslaw.com/LL39CommitteeReport.pdf> (noting that the employment discrimination provisions had been "silent" as to individual liability of employees and agents but that the "amendment would make explicit such individual liability").
23. *See, e.g.,* Murphy v. ERA United Realty, 674 N.Y.S.2d 415, 417 (N.Y. App. Div. 1998) (Section 8-107(1)(a) of the New York City Human Rights Law "expressly provides that it is unlawful for 'an employer or an employee or agent thereof' to engage in discriminatory employment practices. Accordingly, the plaintiff has a cause of action under this provision against the employer as well as her co-employees"); Harrison v. Indosuez, 6 F. Supp. 2d 224, 233-34 (S.D.N.Y. 1998) ("As the [City law] specifically allows for employee liability, there is no question that the law is applicable against [the defendant] in his individual capacity."); Alvarez v. J.C. Penney Co., No. 96 CV 5165, 1997 WL 104772, at *2 (E.D.N.Y. Feb. 14, 1997) ("[T]he plain language of the Code provides for liability against individual employees.").
24. *Priore* is discussed in more detail in Gurian, *supra* note 9, at 272-75.
25. *Priore v. N.Y. Yankees*, 761 N.Y.S.2d at 614.

26. The decision did not purport to remove liability for aiding and abetting an act of discrimination, proscribed separately by N.Y.C. Admin. Code § 8-107(6). But the idea that the added language would add nothing to that aiding and abetting proscription violated elementary rules of statutory construction.
27. Restoration Act (amending N.Y.C. Admin. Code §§ 8-107(1), (2), (4), (5), (9), and (18)).
28. *Id.* (amending N.Y.C. Admin. Code § 8-126(a)).
29. *Id.* (amending N.Y.C. Admin. Code § 8-107(7)).
30. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001).
31. Restoration Act (amending N.Y.C. Admin. Code § 8-502(f)). The Committee Report that accompanied the Restoration Act specifically adopted the analysis set forth in Justice Ginsburg's dissent in *Buckhannon*. See COMM. ON GEN. WELFARE, REPORT ON PROP. INT. 22-A (2005) [hereinafter 2005 COMMITTEE REPORT]; N.Y.C. Legislative Annual 536–39 n.9 (2005), available at <http://www.antibiaslaw.com/2005CommitteeReport>.
32. Restoration Act § 1.
33. *Id.*
34. *Id.*
35. Restoration Act § 7 (amending N.Y.C. Admin. Code § 8-130).
36. *Id.*
37. The sources of construction are discussed in detail in Gurian, *supra* note 9, at 260–62.
38. Annabel Palma, Statement at the Meeting of the New York City Council 41–42 (Sept. 15, 2005) (transcript on file with the office of the New York City Clerk).
39. 872 N.Y.S.2d 27 (N.Y. App. Div. 2009).
40. *Id.* at 32.
41. *Id.* at 36–37.
42. *Id.* (quoting Gurian, *supra* note 9, at 280).
43. *Id.* at 37 n.20.
44. *Id.* at 39 n.24.
45. *Id.* at 37.
46. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).
47. *Williams*, 872 N.Y.S.2d at 38 (citation omitted).
48. *Id.* at 38 n.22.
49. The holding of *Williams* as to sexual harassment, and its approach more broadly, was adopted by New York's Appellate Division, Second Department—the intermediate-level appeals court with jurisdiction over the boroughs of New York City not covered by the First Department in *Nelson v. HSBC Bank USA*, 929 N.Y.S.2d 259 (N.Y. App. Div. 2011). *Nelson* deployed the liberal construction requirement of the City Human Rights Law as enhanced by the Restoration Act to find as well that the Restoration Act had retroactive effect. *Id.* at 262–63.
50. *Williams*, 872 N.Y.S.2d at 41 (internal citation omitted).
51. This and the following two guideposts are found in the 2005 Committee Report, *supra* note 31.

52. *Williams*, 872 N.Y.S.2d at 88.
53. *Id.*
54. *Id.* (internal citation omitted).
55. 928 N.E.2d 1035 (N.Y. 2010).
56. See *Faragher v. Boca Raton*, 524 U.S. 775, 777–78 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (the two cases, decided on the same day, hold that an affirmative defense to a harassment claim, available where the bad actor is a supervisor or manager, “comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise”).
57. *New School*, 928 N.E.2d at 1038–39.
58. *Id.* at 1039.
59. *Id.* at 1039–40.
60. *Id.* at 1039 (discussing paras. (b)(1) and (e) of N.Y.C. Admin. Code § 8-107(13)). Strict liability also exists where the acts of a nonsupervisory employee were known to someone exercising managerial or supervisory responsibility and the employee failed to take “immediate and appropriate corrective action.” *Id.*
61. *Id.* at 1040.
62. *Vance v. Ball State Univ.*, 570 U.S. , 133 S. Ct. 2434 (2013).
63. *New School*, 928 N.E.2d at 1039.
64. *Id.*
65. *Albunio v. City of New York*, 947 N.E.2d 135 (N.Y. 2005).
66. *Id.* at 137 (emphasis added).
67. The continuing desire to exempt “to discriminate” the most basic term in the law from this analysis (a desire that may stem from conceptual confusion or ideological resistance) is discussed *infra* Section IV.
68. *Albunio*, 947 N.E.2d at 136.
69. *Id.* at 138.
70. 582 F.3d 268 (2d Cir. 2009).
71. *Id.* at 278.
72. *Id.*
73. No. 06 Civ. 4402 (DLC), 2010 WL 114248 (S.D.N.Y. Jan. 13, 2010).
74. 557 U.S. 167 (2009).
75. *Weiss*, 2010 WL 114248, at *3.
76. *Id.* at *4.
77. Although when a judge simply looks at the text of the statute without reference to *Priore*, he or she has no problem concluding that individual liability is provided for. See, e.g., *Malena v. Victoria's Secret Direct, LLC*, 886 F. Supp. 2d 349, 366 (S.D.N.Y. 2012).
78. In *Williams*, the court noted that, both before the 1991 Amendments and until such time as the Supreme Court decided *National Railroad Passenger Corp. v.*

Morgan, 536 U.S. 101 (2002), "discrete acts" of discrimination otherwise outside the limitations period had been actionable in the Second Circuit as continuing violations if they were part of a continuing pattern. *Williams*, 872 N.Y.S.2d at 35. *Williams* rejected the *Morgan* limitation for City Human Rights Law purposes: "the Restoration Act's uniquely remedial provisions are consistent with a rule that neither penalizes workers who hesitate to bring an action at the first sign of what they suspect could be discriminatory trouble, nor rewards covered entities that discriminate by insulating them from challenges to their unlawful conduct that continues into the limitations period." *Id.*

79. In *Sotomayor v. City of New York*, 862 F. Supp. 2d 226, 250–51 (E.D.N.Y. 2012), the federal district court followed this analysis.
80. No. 05 Civ. 10355, 2009 WL 873206 (S.D.N.Y. Mar. 31, 2009).
81. See, e.g., *Bermudez v. City of New York*, 783 F. Supp. 2d 560, 593 (S.D.N.Y. 2011); *Fullwood v. Ass'n for the Help of Retarded Children, Inc.*, No. 08-CV-6739, 2010 WL 3910429 (S.D.N.Y. Sept. 28, 2010).
82. *Wilson*, 2009 WL 873206, at *28 (internal citation omitted).
83. 09 Civ. 1251, 2011 WL 3586060 (S.D.N.Y. July 21, 2011), *vacated and remanded*, 715 F.3d 102 (2d Cir. 2013).
84. This fact was not adverted to in the district court's opinion but was cited in the Second Circuit remand. See *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 113 (2d Cir. 2013).
85. *Mihalik*, 2011 WL 3586060, at *9–10.
86. See, e.g., *Ardigo v. J. Christopher Capital, LLC*, No. 12 Civ. 3627, 2013 WL 1195117 (S.D.N.Y. Mar. 25, 2013); *Clarke v. Pacifica Found.*, No. 07-CV-4605, 2011 WL 4356085 (S.D.N.Y. Sept. 16, 2011).
87. 936 N.Y.S.2d 112 (N.Y. App. Div. 2011).
88. *Id.* at 123 n.16.
89. *Id.*
90. *Mihalik*, 715 F.3d at 114 (citations omitted). There was also a retaliation claim in the case. In vacating the district court's grant of summary judgment on this claim, the circuit built on both *Albunio* and the retaliation holding of *Williams* (not previously discussed in this article). A court needs to make the assessment of whether complained-of conduct was "'reasonably likely to deter a person from engaging in protected activity[]'" with "a keen sense of workplace realities, of the fact that the 'chilling effect' of particular conduct is context-dependent, and of the fact that a jury is generally best suited to evaluate the impact of retaliatory conduct." *Id.* at 112 (internal quotation marks omitted) (quoting *Williams*, 872 N.Y.S.2d at 34).
91. *Bennett*, 936 N.Y.S.2d at 116–17 (citation omitted).
92. *Melman v. Montefiore Med. Ctr.*, 946 N.Y.S.2d 27, 30 (N.Y. App. Div. 2012).
93. Cf. *Albunio v. City of New York*, 947 N.E.2d 135, 137 (N.Y. 2005) (requiring the selection of the broadest, most plaintiff-friendly interpretation reasonably possible).
94. *Melman*, 946 N.Y.S.2d at 30 (internal quotation marks omitted) (quoting *Bennett*, 936 N.Y.S.2d at 124).
95. *Mihalik*, 715 F.3d at 113.

96. *Id.* at 110 n.8. New York's Appellate Division, Second Department has also issued a *Melman*-like decision. *Brightman v. Prison Health Serv., Inc.*, 970 N.Y.S.2d 789 (N.Y. App. Div. 2013). As in *Melman*, the court asserts that the Restoration Act's enhanced liberal construction provision did not "alter the procedural framework" applicable to City Human Rights Law claims, but neither addresses the reasoning in *Bennett* nor engages in its own liberal construction analysis. *Id.* at 791. Likewise, it fails to cite its decision in *Nelson* (which accepted the need for broad construction in all respects), and its decision in *Furfero v. St. John's University*, 941 N.Y.S.2d 639, 642 (N.Y. App. Div. 2012), by which it adopted *Bennett*.
97. *Bennett*, 936 N.Y.S.2d at 122.
98. *Hicks v. St. Mary's Honor Ctr.*, 509 U.S. 502, 525 (1993) (Souter, J., dissenting).
99. *Bennett*, 936 N.Y.S.2d at 123.
100. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in various sections of 28 U.S.C.). CAFA provides for the removal of most class actions initiated in state court under state law regardless of the absence of complete diversity between and among the parties. *See* 28 U.S.C. § 1332(d). This is not to say that potential workarounds might not exist (perhaps, for example, creating a state-based pattern-and-practice declaratory judgment action with the availability of attorneys' fees). One such workaround was attempted by a panel of the Ninth Circuit Court of Appeals in *Romo v. Teva Pharmaceuticals USA, Inc.*, 731 F.3d 918 (9th Cir. 2013), *cert. denied* ___ U.S. ___, 124 S.Ct. 2872 (2014). The court rejected removal to federal court under CAFA's mass action provision, 28 U.S.C. § 1332(d)(11)(B)(i), because a request to "coordinate" proceedings in state court did not explicitly state that the coordination would involve a joint trial (a joint trial being the trigger for removal). *Id.* at 920–25. After the Circuit decided to rehear the matter *en banc*, 742 F.3d 909 (9th Cir. 2014), it concluded that the cases had to be removed to federal court after all. *Corber v. Xanodyne Pharmaceuticals, Inc.*, 771 F.3d 1218 (9th Cir. 2014). *Cf.* *Standard Fire Ins. Co. v. Knowles*, 568 U.S. , 133 S. Ct. 1345 (2013) (holding unanimously that a voluntary stipulation by a representative of a putative class not to seek damages in excess of the CAFA threshold for removal does not remove the case from CAFA's scope because the representative cannot bind members of the class).
101. *See, e.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (mandatory arbitration applies to all employment contracts other than those of transportation workers); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (preempting a California Supreme Court doctrine that had defined some class arbitration waivers in consumer arbitration agreements as unconscionable and hence unenforceable).
102. *See* Gurian, *supra* note 9, at 284–87 for a discussion of many of the issues tackled by the 1991 Amendments.
103. *Hicks*, 509 U.S. at 525–43.
104. *Vance v. Ball State Univ.*, 570 U.S. , 133 S. Ct. 2434 (2013).
105. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. , 133 S. Ct. 2517 (2013).
106. Most recently introduced as Paycheck Fairness Act, S. 862, 114th Cong. (2015).
107. *Id.* §§ 3(a) and (b). The defense would not apply where the employee proves that there is a less discriminatory alternative available that the employer refuses to adopt despite the alternative's ability to meet the employee's business need. *Id.* § 3(a).
108. N.Y.C. Admin. Code § 8-107(17).

109. 544 U.S. 228, 240 (2005) ("The scope of disparate-impact liability under [the] ADEA is narrower than under Title VII.").
110. N.Y.C. Admin. Code § 8-107(17)(a)(2).
111. *Id.*
112. N.Y.C. Admin. Code § 8-502(a) (providing that a civil action shall allow a plaintiff to seek "damages, including punitive damages, and...injunctive relief and such other remedies as may be appropriate"); *see also* N.Y.C. Admin. Code § 8-107(17) (setting forth disparate impact claims contains no damage limitation).
113. 557 U.S. 557 (2009).
114. *Id.* at 563.
115. *Id.* at 587 (citation omitted).
116. 28 U.S.C. § 2000e-7.
117. Data on number of employees by size of employer for 2014 is available at the website of California's Employment Development Department, http://www.calmis.ca.gov/file/indsize/chart_sob2014_3.pdf (last accessed on Aug. 20, 2015).
118. CAL. GOV. CODE §§ 12940(j)(1), (j)(4)(A) (West 2013).
119. *Id.* §§ 12940(4)(A), 12926(d).
120. It was this recognition that led to a provision in the 1991 Amendments that changed the focus on the public accommodations provisions of the City Human Rights Law from one focused on "place" to one that covered "providers, whether licensed or unlicensed, of goods, services, facilities, accommodations, advantages or privileges of any kind." N.Y.C. Admin. Code § 8-102(9).
121. CAL. GOV. CODE § 12940(j); *see* Roby v. McKesson Corp., 219 P.3d 749 (Cal. 2010) (confirming individual liability and discussing statutory provision generally). The state, however, is still stuck with the "severe or pervasive" standard. *See, e.g.,* Miller v. Dep't of Corr., 115 P.3d 77, 89–92 (Cal. 2005).
122. Minnesota has made it unlawful for a person who engages in a trade or business or in the provision of a service "to intentionally refuse to do business with, to refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person's race, national origin, color, sex, sexual orientation, or disability, unless the alleged refusal or discrimination is because of a legitimate business purpose." MINN. STAT. ANN. § 363A.17 (West 2013). The Minnesota Supreme Court gave effect to the language insofar as permitting an injured business to sue but excluded the individual discriminated against (who was not a party to a contract) from being able to sue. *Krueger v. Zeman Constr. Co.*, 781 N.W.2d 858 (Minn. 2010). The court majority asserted that the statutory language unambiguously did not provide for such liability but noted in the alternative its fear: under the plaintiff's theory, every person affected by the defendant's conduct could have an individual cause of action, and "[t]here is no indication that the legislature intended such an expansive reading of the statute." *Id.* at 864.
123. *See generally* *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).
124. Nothing stops a governmental entity from engaging in employment testing except the lack of political will.
125. 28 F.3d 1268 (D.C. Cir. 1994).

126. *Id.* at 1271–72.
127. *Id.* at 1276–79.
128. In the fair housing context, it is not at all clear that *Havens* would survive if the standing issue arose before the current Supreme Court. Even if it would, “diversion of resources” claims require an organization to engage in complicated choreography (or hope that a defendant does not probe too hard). A more direct statement of standing would be preferable but is not currently politically feasible on the federal level.
129. See Craig Gurian, *Using Local and State Legislation to Preserve and Expand the Ability of Fair Housing Organizations to Prosecute the Discrimination They Uncover*, HARV. L. & POL’Y REV. ONLINE (Oct. 2007), available at http://www.antibiaslaw.com/sites/default/files/all/Private_Attorney_General.pdf (last visited Aug. 30, 2015). The concept of a private attorney general provision is best known through its use in the False Claims Act, 31 U.S.C. § 3729 et seq.
130. Nassau County, N.Y., incorporated such a provision in 2006. Nassau Cty. Local Law 9-2006, available at <http://www.nassaucountyny.gov/DocumentCenter/View/1686> (last visited Aug. 30, 2015). That law added, *inter alia*, section 21-9.7(d)(3)(vi). This private attorney general provision, which, to my knowledge, has not yet been the subject of a court decision, did not contain a definition that limited the cause of action to certain organizations but allowed any person to proceed who had made the substantive showing required. A way to delimit the class of persons eligible would be to provide standing for an “eligible civil rights organization,” defined as “any not-for-profit organization that is recognized as exempt from taxation pursuant to section 501(c) of the Internal Revenue Code and whose primary mission is fighting discriminatory practices made unlawful under local, state, or federal anti-discrimination law.”
131. In the case of the Restoration Act, the Committee Report served a useful function, but the fact that a councilmember was able to incorporate into the record the testimony of the Anti-Discrimination Center and the statements of the Brennan Center and the Association of the Bar (now the New York City Bar Association) turned out to be helpful as well.
132. The broad support created for the restorative Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), does provide an important counterexample.
133. Certainly, the American Legislative Exchange Council (ALEC), an organization devoted to “limited government,” “free markets,” and “federalism” has understood the importance of state-level advocacy for many years and has achieved significant success in having its agenda adopted.
134. Unfortunately, I have seen many occasions where a practitioner, having taken on a weak case, develops an argument that is really no more than “the Restoration Act says I win anyway.” Especially because judicial obedience to legislative command can never be taken for granted, those pursuing cases under the City Human Rights Law, therefore, have an obligation to make that obedience as easy as possible. At the core of that obligation is making sure that, when relying on the enhanced liberal construction provision, the practitioner develop for the judge an interpretation that is grounded in the purposes of the City Human Rights Law, fully explaining how that interpretation, as compared with others, best serves the law’s purposes.