The Persistence of Prejudice: Process-Based Theory and the Retroactivity of the Civil Rights Act of 1991

Daniel Patrick Tokaji

On November 21, 1991, President George Bush signed into law the Civil Rights Act of 1991 ("the Act").¹ The President's approval concluded a fierce two-year debate argued not only in the legislative chambers of Capitol Hill but also in the media and throughout the country. This debate exposed our nation's deeply rooted divisions over the issue of race and the meaning of equality. For civil rights advocates, the passage of the Act achieved their primary objective of overturning a series of Supreme Court decisions that had drastically limited the ability of minorities and women to maintain employment discrimination claims.² At the same time, President Bush, who had opposed earlier versions of this legislation, proclaimed satisfaction that the final version of the Act would not result in racial quotas.³

Although the legislative confrontation was over (at least for the time being) battles in the courts over the Act's meaning loomed ahead. Of particular concern was the question of whether or not the Act should apply to cases pending at the time it was passed or, indeed, to any conduct occurring before the date of passage. Congress specified that the Civil Rights Act of 1991

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

2. See William T. Coleman, Jr. & Vernon E. Jordan, Jr., *How the Civil Rights Bill Was Really Passed: The Administration Did Compromise*, WASH. POST, Nov. 18, 1991, at A21. Coleman, the chairman of the NAACP Legal Defense and Educational Fund, and Jordan, former president of the National Urban League, hailed the Act as "a great achievement, both because it significantly strengthens civil rights protections and because it reestablishes a new political consensus on a subject that has historically divided us." *Id.* For a list of Supreme Court decisions reversed by the 1991 Act, see *infra* notes 61 & 73.

3. During negotiations prior to passage, language was inserted to allay the Administration's concern that the Act would promote racial quotas. President Bush subsequently announced that he could "certify it is not a quota bill" and would "enthusiastically" sign the revised bill. *White House Announces Civil Rights Compromise Ending Two-Year Long Dispute*, Daily Rep. for Executives (BNA) No. 208, at A-20 (Oct. 28, 1991). Senator John Danforth of Missouri, one of the bill's principal sponsors, remarked that it was "conceptually . . . the same bill" and that the modifications did not change the substance of the legislation. *Id.* Many employers, however, continued to be displeased with the final version of the Civil Rights Act because of its provisions concerning jury trials, compensatory damages, and punitive damages. *Employer Community Displeased with Substitute Civil Rights Bill*, Daily Lab. Rep. (BNA) No. 208, at A-13 (Oct. 28, 1991).

would become effective upon enactment.⁴ This statement appears to leave open four different possibilities. Starting with the most restrictive interpretation of its applicability, these are: (1) the Act applies only to cases where the alleged *conduct occurred* after November 21, 1991; (2) the Act applies to cases *filed* after November 21, 1991; (3) the Act applies to all cases *tried and decided* after November 21, 1991; and (4) the Act applies to all cases *pending* as of November 21, 1991.⁵

The final version of the Act contained no general statement choosing among these possibilities. The primary sponsors of the bill expressed divergent opinions on the retroactivity issue⁶ and the congressional debates were replete with contradictory statements.⁷ Several circuit courts of appeals have considered whether the Act should apply retroactively to pending cases, with most concluding that it should not.⁸ On February 22, 1993, the U.S. Supreme Court granted certiorari to resolve this question.⁹

4. "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." § 402(a), 105 Stat. at 1099, *reprinted in* 42 U.S.C.A. § 1981 note (West Supp. 1993) (Effective Date of 1991 Amendment).

5. Michele A. Estrin, Note, *Retroactive Application of the Civil Rights Act of 1991 to Pending Cases*, 90 MICH. L. REV. 2035, 2055 n.139 (1992) (noting three possibilities: (1) application of Act only to cases where cause of action arose after effective date; (2) application only to cases filed after effective date; (3) application to all cases pending on effective date); *see also* Mojica v. Gannett Co., 986 F.2d 1158, 1161-62 (7th Cir. 1993) (Cummings, J., dissenting) (distinguishing cases tried and decided before November 21, 1991, from cases tried and decided after that date). In discussing the question of "retroactivity," this Note focuses on the Act's applicability to all cases pending as of November 21, 1991, which is the question that most courts of appeals have examined thus far. *Id.* at 1159.

6. Compare 137 CONG. REC. S15,483, S15,485 (daily ed. Oct. 30, 1991) (interpretative memorandum of Sen. Danforth et al.) (opposing retroactivity) with *id.* at S15,485 (statement of Sen. Kennedy) (arguing that Act should apply to pending cases). President Bush endorsed the statement of Senator Dole and other senators, *id.* at S15472-78, which argued that the Act should not apply retroactively. Statement of President George Bush upon Signing S1745, 1991 U.S.C.A.N. 768, 769 (Nov. 21, 1991).

7. *See, e.g.*, 137 CONG. REC. H9526, H9530 (daily ed. Nov. 7, 1991) (interpretative memorandum of Rep. Edwards) (failing to apply law retroactively would give employers "an undeserved windfall from the intervening Supreme Court errors"); 137 CONG. REC. S15,493 (daily ed. Oct. 30, 1991) (statement of Sen. Murkowski) ("Retroactivity is fundamentally unfair."); 137 CONG. REC. E2086 (daily ed. June 7, 1991) (statement of Rep. Doolittle) (retroactivity would be "a serious blow to fundamental notions of fairness").

8. *See Butts v. City of N.Y. Dep't of Hous. Preservation & Dev.*, 990 F.2d 1397 (2d Cir. 1993) (provisions revising 42 U.S.C. § 1981 do not apply retroactively); *Estate of Reynolds v. Martin*, 985 F.2d 470 (9th Cir. 1993) (supporting retroactive application); *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370 (11th Cir. 1992) (provisions concerning jury trials and § 1981 do not apply retroactively); *Gersman v. Group Health Ass'n*, 975 F.2d 886 (D.C. Cir. 1992) (revisions of § 1981 do not apply retroactively); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992) (same); *Mozee v. American Commercial Marine Serv.*, 963 F.2d 929 (7th Cir.) (no retroactive application), *cert. denied*, 113 S. Ct. 207 (1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992) (revisions of § 1981 do not apply retroactively); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir.) (no retroactive application to damages claim), *cert. denied*, 113 S. Ct. 86 (1992).

9. 122 L. Ed. 2d 649 (1993) (granting certiorari in *Landgraf v. USI Film Products*, 968 F.2d 427 (5th Cir. 1992) and *Harvis v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992), *cert. granted sub nom. Rivers v. Roadway Express, Inc.*). *Landgraf* involved the provisions of the 1991 Act concerning compensatory damages, punitive damages, and jury trials. § 102(a)(1), (c), 105 Stat. at 1072-73 (codified at 42 U.S.C.A. § 1981a (West Supp. 1993)). The Fifth Circuit held that these provisions should not be applied retroactively. 968 F.2d at 432-33. *Harvis* involved the provisions of the 1991 Act that overruled the Supreme Court's holding in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), that § 1981 is not applicable to racial harassment occurring after the formation of an employment contract. § 101(b), 105 Stat. at 1071 (codified at 42 U.S.C.A. § 1981(b) (West Supp. 1993)). The Sixth Circuit held that this

This Note approaches the retroactivity question from a perspective that has been neglected by the courts and by other commentators.¹⁰ It argues that, in answering this question, the Court should consider the divisive climate in which the Civil Rights Act was passed. The debate over the Act exemplifies the barriers that minority groups can generally expect to confront in protecting their interests through the legislative process. During the legislative battle, dialogue in Congress and in the press was dominated by the question of "quotas." This inflammatory rhetoric polarized the electorate, largely along racial lines, causing many voters to perceive the Act in "us-versus-them" terms.

In any analysis, courts must take into account the distorting impact of racial prejudice.¹¹ With respect to the interpretation of antidiscrimination statutes, courts should consider the difficulty that racial minorities are likely to encounter when attempting to correct judicial interpretations that work to their disadvantage.¹² An interpretation of a statute that harms the majority group may be remedied through subsequent legislative action. By contrast, an interpretation that works to the disadvantage of "discrete and insular minorities" will be comparatively difficult to undo through the same legislative process. Where doubt exists as to the best interpretation of a statute, courts should resolve these doubts to the benefit of racial minorities.

Part I puts forward a process-based theory of statutory interpretation,

provision of the 1991 Act should not apply retroactively. 973 F.2d at 495-97.

10. For other recent commentary on this question, see David Allen, Comment, *Retroactivity of the Civil Rights Act of 1991*, 44 BAYLOR L. REV. 569 (1992) (arguing against retroactivity); Estrin, *supra* note 5 (arguing for retroactivity); Linda Urbanik, Comment, *Executive Veto, Congressional Compromise, and Judicial Confusion: The 1991 Civil Rights Act—Does It Apply Retroactively?*, 24 LOY. U. CHI. L.J. 109 (1992) (arguing that question of retroactivity should be determined on case-by-case basis); Kristine N. McAlister, Recent Developments, *Retroactive Application of the Civil Rights Act of 1991*, 45 VAND. L. REV. 1319 (1992) (arguing against retroactivity).

11. My conception of the appropriate role of the judiciary in interpreting and applying antidiscrimination statutes borrows from the work of John Hart Ely, who advocates a process-based theory of judicial review. See generally JOHN H. ELY, *DEMOCRACY AND DISTRUST* (1980). As discussed *infra* Part I.A., Ely's analysis provides a comprehensive elaboration of the theory of heightened scrutiny first suggested in *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938). My analysis also borrows from the work of Dean Guido Calabresi. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). Calabresi argues that courts should have the power to revise statutes that no longer fit the "legal topography"—that is, statutes that have become obsolete, but have not been revised by the legislature. Among the factors that courts should consider in determining whether to revise statutes are "asymmetries in inertia"—the greater difficulty that some groups will have in obtaining legislative reconsideration of a judicial decision. *Id.* at 124-29. As a general rule, Calabresi recommends "putting the burden of inertia on the side that can more easily obtain majoritarian reconsideration of the allocation." *Id.* at 126.

12. See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 602 (1992) (noting tendency of Court in late 1970's "to interpret ambiguous statutes to benefit 'discrete and insular minorities'"); Jeffrey W. Stempel, *The Rehnquist Court, Statutory Interpretation, Inertial Burdens, and a Misleading Version of Democracy*, 22 U. TOL. L. REV. 583, 645 (1991) (suggesting that courts should consider barriers confronted by relatively powerless groups when interpreting statutes). This Note subscribes to Stempel's position that "enacting civil rights legislation is, even more than with most reformist legislation, an uphill fight" and that the courts should "take this reality into account before assuming that Congress can correct any judicial misreading of the law." *Id.* at 669, 671.

arguing that in cases where a statute is ambiguous on its face, the legislative history is inconclusive, and minorities are likely to encounter barriers to full participation in the legislative process, courts should resolve ambiguities in favor of those minorities. Part II details the "us-versus-them" atmosphere in which the Act was discussed, exposing the prominent role of prejudice in congressional and public debates. Because it is precisely under such conditions that the minority groups are often powerless, Part III argues that the ambiguity over the Act's retroactivity should be resolved so as to compensate for the distorting effect of prejudice on the legislative process.

Existing theories of statutory interpretation fail to resolve ambiguities in statutes governing highly polarized questions like employment discrimination. Fairness requires that courts take into account the climate in which the legislation was passed, as well as the obstacles that minority groups can generally expect to face in overcoming racial prejudice.¹³ Courts should compensate for disadvantages in bargaining power by construing ambiguous provisions of antidiscrimination statutes in the light most favorable to racial minority groups. Under this analysis, the Civil Rights Act of 1991 should be applied retroactively.

I. A PROCESS-BASED THEORY OF STATUTORY INTERPRETATION

Scholars have long recognized the importance of protecting the rights of minorities through constitutional adjudication. In the interpretation of antidiscrimination statutes, it is equally critical that courts consider the difficulties that racial minority groups experience in protecting themselves through the legislative process. Existing canons of statutory interpretation prove inadequate to resolve ambiguities in civil rights statutes that concern the rights of racial minorities.¹⁴ Courts should interpret statutory provisions to the advantage of racial minority groups where: (1) the statute is ambiguous on its face; (2) the legislative history is inconclusive or contradictory; and (3) the

13. Though I believe that the argument advanced here could be extended to other groups, this Note focuses on racial minorities. A particularly interesting question is the extent to which the arguments advanced here are applicable to women. Although the Act concerned employment rights of both women and minorities, the legislative battle and public debate focused on the question of racial quotas. As argued *infra* Part II, the tenor of this debate influenced the legislative process and impeded the ability of minorities to advance their legislative interests. Despite the fact that the Act strengthened protections against sex discrimination as well as race discrimination, the public (at least until the final stages of the process) was polarized along racial lines, perceiving the Act in "us-versus-them" terms. Attention to racial quotas fueled the public perception that the Act pitted the interests of the white majority against the interests of racial minority groups. For these reasons, this Note focuses almost exclusively on the burdens racial minorities confront in reversing adverse Supreme Court decisions.

14. For an entertaining review of traditional canons of statutory interpretation, see John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373 (1992). Justice Stevens analyzes the authorship of Shakespeare's plays through five canons of interpretation: (1) read the statutory provision in question; (2) read the statute as a whole; (3) consider the contemporary legal context; (4) consult the legislative history; and (5) use common sense to avoid absurd results.

debate in which the statute was passed was polarized along racial lines *or* the present climate is polarized along racial lines.

A. *Process-Based Theories of Judicial Review*

Process-based theories of judicial review are helpful in understanding the mode of analysis that courts should adopt when interpreting ambiguous antidiscrimination statutes. In *Democracy and Distrust*, John Hart Ely argues that prejudice directed at minority groups obstructs their ability to participate fully in the democratic process.¹⁵ Ely builds upon *Carolene Products'* famous footnote 4 which suggests that more stringent standards of review may be appropriate in evaluating the constitutionality of statutes that reflect prejudice against "discrete and insular minorities."¹⁶ According to Ely, the discreteness and insularity of minority groups—the fact that they are "marked" and readily identifiable as minorities—is likely to engender hostility against them. For this reason, heightened scrutiny is necessary in assessing the constitutionality of measures that disadvantage such groups.

There is no corresponding need for heightened scrutiny, however, where a rule works to the disadvantage of the majority group. As Ely puts it:

There is no danger that the coalition that makes up the white majority in our society is going to deny to whites generally their right to equal concern and respect. Whites are not going to discriminate against all whites for reasons of racial prejudice Whether or not it is more blessed to give than to receive, it is surely less suspicious.¹⁷

While there is a risk of majorities acting in ways that harm racial minorities based on prejudice or animosity, there is no parallel risk that a majority will harm itself as a group.¹⁸ The majority is in a position to protect its own interests through the political process. Racial minorities, by contrast, may have a difficult time in doing so. For this reason, courts should pay special attention to racial classifications that work against minority groups.

15. ELY, *supra* note 11, at 152-53.

16. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

17. ELY, *supra* note 11, at 170-71 (footnotes omitted). Although this passage occurs within Ely's discussion of affirmative action, the reasoning evident here is equally relevant to other rules that work to the advantage (or disadvantage) of racial minorities.

18. This explains why the Court traditionally has subjected classifications based on nationality and race to heightened scrutiny. *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964). The discreteness and insularity of racial minorities may preclude their full participation in the pluralistic "wheeling and dealing" through which groups typically protect their interests. ELY, *supra* note 11, at 151. Heightened scrutiny reflects the Court's concern for groups that are at a relative disadvantage in their ability to influence the legislative process. *See Graham v. Richardson*, 403 U.S. 365, 372 (1971) (referring to aliens as "prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate") (citation omitted).

B. *The Implications for Statutory Interpretation*

At the end of his book, Ely asserts that "constitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know it can."¹⁹ Ely's insight—that courts should ensure the protection of minority groups in the area of constitutional law—may be applied fruitfully to the interpretation of antidiscrimination statutes. Precisely because questions of race discrimination and "quotas" touch a raw nerve among the American public,²⁰ it is vital that courts compensate for deficiencies in the legislative process when interpreting statutes.

According to Ely, statutory rules that disadvantage white majorities are not inherently suspicious, since such majorities can adequately protect their interests through representative government. By the same token, a white majority would presumably be in a better position than minorities to obtain legislative reconsideration of statutory interpretations that work to its disadvantage. It is likely to be much more difficult for racial minorities to reverse a court's interpretation of a statute through subsequent legislative action. To borrow Calabresi's phrase, the burden of legislative inertia—the difficulty with which judicial determinations may be reversed—is greater for minority groups than for the majority group.²¹ When interpreting ambiguous antidiscrimination statutes, courts should compensate for these unequal burdens by giving minority interests the benefit of the doubt.

1. *Precedent for the Theory: Weber and Runyon*

Although the Court has never explicitly embraced this theory of statutory interpretation, the approach suggested here is not entirely unprecedented. During the 1970's, the Court adopted interpretations of two ambiguous antidiscrimination statutes that worked to the benefit of racial minorities over the vigorous protests of dissenting Justices who claimed that the majority had misconstrued congressional intent.²²

Section 1981, passed in the wake of the Civil War, gives all persons the right to make and enforce contracts.²³ In *Runyon v. McCrary*, decided in

19. ELY, *supra* note 11, at 183.

20. See *infra* Part II.

21. Calabresi stresses the importance of considering asymmetrical burdens of inertia in connection with the revision of statutes. CALABRESI, *supra* note 11, at 124-29. Asymmetrical burdens of inertia exist where one side can more easily obtain legislative reconsideration of a judicial determination than the other. See *id.* Stempel brings this idea to bear on the interpretation of employment discrimination statutes. Stempel, *supra* note 12, at 589. For an empirical analysis of cases reviewed and overridden by Congress, see William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

22. See *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979); *Runyon v. McCrary*, 427 U.S. 160 (1976).

23. Prior to its revision, as part of the Civil Rights Act of 1991, § 1981 provided:

All persons within the jurisdiction of the United States shall have the same right in every State

1976, the Court held that § 1981 prohibits racial discrimination by *private* parties in the making and enforcement of contracts.²⁴ Although the Court did not expressly consider the disadvantages faced by “discrete and insular minorities,” this decision may be understood as silently applying *Carolene Products* presumptions.²⁵ The Court adopted a generous reading of § 1981 that ensures the protection of racial minorities against private acts of discrimination.²⁶

The Supreme Court’s consideration of private affirmative action programs, in light of Title VII of the Civil Rights Act of 1964, bears a striking resemblance to the *Runyon* decision. In *United Steelworkers of America v. Weber*,²⁷ the Court held that Title VII did not prohibit affirmative action programs voluntarily adopted by employers. As in *Runyon*, the Court interpreted an ambiguous statute to the benefit of minority groups.²⁸ Although Title VII prohibits discrimination “against any individual because of his race,”²⁹ Justice Brennan, writing for the majority, found the affirmative action plan in question to be acceptable.³⁰

and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

42 U.S.C. § 1981 (1988). This statute was first adopted in § 1 of the Civil Rights Act of 1866. Congress reenacted the provisions contained in § 1981 subsequent to the passage of the Fourteenth Amendment, as part of the Civil Rights Act of 1870. See *Runyon*, 427 U.S. at 168-70 n.8.

24. *Id.* at 170-71. The specific practice at issue in *Runyon* was a private institution’s discriminatory admissions policy.

25. Eskridge & Frickey, *supra* note 12, at 602 & n.28.

26. In a dissenting opinion, Justice White contended that the majority’s extension of § 1981 to include private discrimination was “contrary to the language of the section, to its legislative history, and to the clear dictum of this Court.” *Runyon*, 427 U.S. at 192.

27. 443 U.S. 193 (1979).

28. Eskridge & Frickey, *supra* note 12, at 602 & n.28. Some commentators have criticized the *Weber* court for misreading the legislative history of Title VII. See Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 303 (1989) (criticizing *Weber* because it “contradicts both the plain language and the legislative history of Title VII”); Bernard D. Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423, 456 (1980) (criticizing majority for undercutting legislative bargain). But see Burt Neuborne, *Observations on Weber*, 54 N.Y.U. L. REV. 546, 553 (1979) (defending *Weber* on grounds that legislatures generally enact a “broad philosophical concept—in this case, equality in employment” and cannot foresee many questions that subsequently arise in applying that principle).

29. Section 703(d) of Title VII provides:

It shall be an unlawful employment practice for any employer [or] labor organization . . . to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

42 U.S.C. § 2000e-2(d) (1988). Similarly, § 703(a) makes it unlawful for employers to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex or national origin.” *Id.* at § 2000e-2(a).

30. *Weber*, 443 U.S. at 208. In dissent, Justice Rehnquist lambasted the majority for ignoring “clear statutory language, ‘uncontradicted’ legislative history, and uniform precedent.” *Id.* at 222. Rehnquist undertook an extended review of the legislative history of Title VII, which in his view conclusively demonstrated that Congress “meant precisely what it said.” *Id.* at 230.

For a summary of the legislative process through which the Civil Rights Act of 1964 was passed, see WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 2-28 (1988). Although Eskridge agrees with the *Weber* holding, he

A comparison of the various opinions in these cases reveals the difficulties that courts are likely to experience in applying canons of statutory interpretation to antidiscrimination cases. In *Weber* and *Runyon*, various Justices consulted the text of the statutory provision in question;³¹ considered the statute as a whole;³² relied upon precedent;³³ placed the statute in historical context;³⁴ viewed the statute in light of the "fabric of our law;"³⁵ and examined the statute's legislative history.³⁶ Even Justices applying the same mode of interpretation arrived at different conclusions.

The disparity among the majority, concurring, and dissenting opinions in these cases counsels against putting too much stock in traditional canons to resolve thorny questions surrounding the interpretation of ambiguous antidiscrimination statutes. The various opinions gave differential weight to each canon, illustrating the Justices' widely divergent visions of the principles underlying the legislation in question. While the dissenting Justices in *Runyon* saw § 1981 as prohibiting only discrimination by the state, the majority harbored a much broader vision of the protections afforded by this statute. This difference is even more pronounced in *Weber*. For Justice Rehnquist, the purpose of Title VII is to protect employees against all forms of race-based employment decisions; for Justice Brennan, the purpose at the heart of Title VII is to break down historic patterns of discrimination and to open up opportunities for traditionally subordinated groups. Canons of statutory interpretation provide few helpful guidelines when these visions clash. The disputes among the Justices mirror the dispute within society over the meaning of equality. Collectively, these opinions reveal the necessity of finding some

agrees with Rehnquist's view that the supporters of the Civil Rights Act of 1964 intended to prohibit affirmative action. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1491 & n.46 (1987); see also Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 685, 710 (1991).

31. Compare *Weber*, 443 U.S. at 204 (asserting that Title VII's language was intended to eliminate vestiges of discrimination) with *id.* at 222 (Rehnquist, J., dissenting) (arguing that "clear statutory language" of Title VII prohibited race-conscious measures).

32. *Id.* at 208 (concluding that purposes of affirmative action plan "mirror those of the statute," namely "to break down old patterns of racial segregation and hierarchy").

33. Compare *Runyon v. McCrary*, 427 U.S. 160, 170 n.8 (1976) (arguing that Court's "square holding" in prior case, *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), was "that § 1981 reaches private conduct") with *id.* at 192 (White, J., dissenting) (arguing that majority's interpretation of § 1981 contradicted "clear dictum of this Court in the *Civil Rights Cases*").

34. *Weber*, 443 U.S. at 201 (stating that permissibility of affirmative action program must be considered in view of "historical context from which [Civil Rights Act of 1964] arose"); *Runyon*, 427 U.S. at 204 (White, J., dissenting) (giving § 1981 narrow reading on grounds that it would have been "remarkable if Congress had intended § 1981 to require private individuals to contract with all persons the same as they contract with white citizens").

35. *Runyon*, 427 U.S. at 190-91 (Stevens, J., concurring). Stevens cites the "prevailing sense of justice today," *id.* at 191, as a reason for giving § 1981 broad scope, despite his belief that Congress did not intend to prohibit private racial discrimination. *Id.* at 189-90.

36. Compare *Weber*, 443 U.S. at 203 (asserting that legislative history of Title VII demonstrated that Congress' overarching objective was to open up employment opportunities for blacks) with *id.* at 230-55 (Rehnquist, J., dissenting) (concluding from comprehensive review of legislative history that Title VII was intended to prohibit all forms of racial discrimination whether directed at blacks or whites).

other means by which to resolve ambiguity in antidiscrimination statutes.

Where a statute's language and history are unclear, courts should consider the problems that minority groups will experience in reversing judicial interpretations contrary to their interests.³⁷ Such a process-based theory of statutory interpretation supports the results reached, though not the reasoning employed, in *Runyon* and *Weber*. Decisions that disadvantage racial minorities would be very difficult to remedy through subsequent legislation. Had either *Runyon* or *Weber* been decided the other way—contrary to the interests of minority groups—it is unlikely that these determinations would have been reversed. The burden of inertia would simply be too high for a relatively powerless group to overcome.

On the other hand, the majority is in a stronger position to remedy a judicial decision that disadvantages it, because it may more easily obtain subsequent legislative reconsideration of the decision. The majority can presumably protect itself—at least better than minority groups can. If members of the white majority are unduly burdened by affirmative action programs, the legislature can respond by revising or reversing the court's interpretation.

Of course, decisions that run counter to the interests of the majority will not always be reversed by Congress. In the private affirmative action cases, for example, it would be naive to assume that minority groups have no power to block legislation detrimental to their interests. If a court misreads a statute in a way that benefits minorities, these groups would surely attempt to prevent

37. The discussion in the text assumes that honest interpretation requires fidelity to the legislature's intent where that intent has been clearly expressed. See CALABRESI, *supra* note 11, at 35 (stating that "legislative intent or language" is the "core of honest interpretation"); REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 7-9 (1975); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 301 (1990) (asserting that goal of statutory interpretation is to determine legislature's purpose). For a broader conception of interpretation, see Eskridge, *supra* note 30, at 1479; William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989). Eskridge believes that courts should give effect to contemporary values in interpreting statutes. Like Calabresi, he favors a dynamic approach to the application of statutes that allows courts to update statutes that are out of phase with the contemporary legal and social landscape. But unlike Calabresi, he is comfortable referring to this approach to statutes as a form of interpretation. For a similar view, see T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988). Aleinikoff criticizes "archeological" conceptions of statutory interpretation, in which the statute's meaning is set in stone, and advocates a "nautical" view of statutory interpretation, which conceptualizes the development of a statute's meaning as an ongoing process or "voyage."

Calabresi, Eskridge, and Aleinikoff share the view that courts must sometimes go beyond the actual intent of the enacting legislature and take into account current social or legal norms. For an opposing view, see Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984) (asserting that judges are merely agents of the political branches "carry[ing] out decisions they do not make"); see also Farber, *supra* note 28. Farber takes a middle-of-the-road position, arguing that clear statutory directives should preclude judicial policymaking, while counseling against "blind adherence" to statutory language. *Id.* at 282.

This Note tentatively accepts the conclusion that in the interpretation of statutes, courts are bound by clear expressions of legislative intent. But see *infra* note 38. Where the legislature's intent is unclear and courts must go beyond the language of the statute, reliance upon the "legal topography" or upon "social norms," however, is inadequate. Rather, courts should attempt to correct for inequities in the legislative process by interpreting statutes to the benefit of relatively powerless groups.

reversal of the court's decision. Nonetheless, the burden of inertia would be greater when the court's decision disadvantages a minority group than when it disadvantages the white majority. Given the uncertainty surrounding the meaning of § 1981 and Title VII, the Court acted correctly in adopting the interpretations that protected minority group members.³⁸

2. *Process-Based Theory and Stare Decisis: Patterson and Johnson*

A related question concerns the circumstances under which legislative inaction can be construed as approval of a court's interpretation.³⁹ The same factors that counsel against interpreting a statute to the disadvantage of a racial minority also counsel against overturning an interpretation that benefits racial minorities. Under a process-based theory of judicial interpretation, decisions that work against minority groups are entitled to less precedential weight than decisions that disadvantage members of the majority group in deciding whether to apply stare decisis.

Here again, the Court's interpretations of § 1981 and Title VII are instructive. The interpretation of § 1981 advanced by the majority in *Runyon* was upheld in subsequent decisions, though the Court considered overruling *Runyon* in *Patterson v. McLean Credit Union*.⁴⁰ *Patterson* reaffirmed that § 1981 prohibits discrimination on the basis of race in the making and enforcement of private contracts. The majority applied stare decisis, finding "no special justification" for overruling *Runyon*.⁴¹

The Court's decisions upholding *Weber* are also consistent with the view that courts should be more willing to adhere to precedents that benefit minorities. The Court has consistently upheld *Weber's* interpretation of Title

38. Even where a statute's language and intent are clear, it may be appropriate for courts to revise antidiscrimination statutes that have become obsolete, such that they fail to provide adequate protection to members of minority groups. Both *Weber* and *Runyon* can be understood as examples of judicial revision, inasmuch as the Court silently updated statutes while ostensibly discerning legislative intent. Even if one believes that § 1981 and Title VII are not ambiguous—that Congress did not intend § 1981 to reach private acts of discrimination and that Congress did intend Title VII to prohibit voluntary affirmative action programs—the decisions in these cases may still be supportable as instances of "judicial updating." On this reading, the lesser power of minority groups justified the Court's deviation from congressional intent.

This idea builds upon Calabresi's notion that courts should be empowered to update statutes that have become outdated, but have not been revised by the legislature. See generally CALABRESI, *supra* note 11. The same factors that caution against interpretations of ambiguous antidiscrimination statutes that disadvantage minority groups are relevant to determining whether and when courts should update civil rights statutes. If a statute becomes out of phase and fails to provide adequate protections to minority groups, there is no reason to presume that the statute will be revised by the legislature. Under some circumstances, it may be appropriate for courts to set a new starting point by openly revising such statutes.

39. For an extended discussion of the debate over the meaning that should be attributed to the legislature's failure to take action, see William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988).

40. 491 U.S. 164 (1989).

41. *Id.* at 173. Nonetheless, the Court declined to include racial harassment, subsequent to hiring, as an actionable claim under § 1981, contending that the statute covers only "conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations." *Id.* at 179.

VII, permitting private affirmative action programs in "traditionally segregated job categories."⁴² Particularly enlightening is the lively debate between Justices Brennan and Scalia in *Johnson v. Transportation Agency*⁴³ over the weight to be given to legislative inaction. Writing for a majority in *Johnson*, which upheld *Weber*,⁴⁴ Justice Brennan found "some probative value" in Congress' failure to act in response to the *Weber* holding.⁴⁵ In a dissenting opinion, Justice Scalia disagreed, emphasizing that checks on legislation "create[] an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act" represents approval of the Court's action. In his view, the Court "should admit that vindication by congressional inaction is a canard."⁴⁶ Scalia would give no weight to congressional inaction in response to the Court's rulings.

While Scalia's insight may be true as a general matter, he fails to recognize that the majority faces a much lighter burden in attempting to reverse interpretations that work to its disadvantage. Neither *Johnson* nor *Patterson* considers the crucial fact that the parties that benefitted by *Runyon* and *Weber* were members of racial minority groups. Given that the majority group is better able to effect reversal of statutory interpretations that work to its disadvantage, Congress' silence or inaction in response to *Weber* and *Runyon* may properly be seen as a persuasive factor favoring application of stare decisis.

C. Objections to Process-Based Theories

The argument that ambiguous statutes should be interpreted to the advantage of racial minorities relies on an assumption that discrete and insular minorities will have difficulty passing legislation that benefits them and blocking legislation that works against their interests. But there is reason to believe that, at least under some circumstances, racial minorities are not as

42. See, e.g., *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (holding that employee challenging affirmative action program bears burden of establishing its illegality under Title VII); *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986) (addressing conditions under which parties to employment discrimination suit may enter into consent decree containing numerical quotas); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (remediating past discrimination by state may justify affirmative action plan).

At least one commentator has suggested that the Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), may have signalled its intention to reject the holding in *Weber*. Brian K. Landsberg, *Race and the Rehnquist Court*, 66 TUL. L. REV. 1267, 1314 (1992); see also Farber & Frickey, *supra* note 30, at 720 (suggesting that *Weber* holding may be questioned in the future).

43. 480 U.S. 616 (1987).

44. *Id.* at 619-20.

45. Brennan quoted Calabresi for the proposition: "When a court says to a legislature: 'You (or your predecessor) meant X,' it almost invites the legislature to answer: 'We did not.'" *Id.* at 630 n.7 (quoting CALABRESI, *supra* note 11, at 31-32); see also William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 652 n.221 (1991) ("The *Johnson* majority . . . explicitly relied on current congressional preferences to expand on *Weber*.").

46. *Johnson*, 480 U.S. at 672 (Scalia, J., dissenting).

powerless as this Note has to this point supposed.⁴⁷ If a court revises a statutory rule to benefit or protect minorities, then those groups are certain to fight any legislative attempts at change. The preceding discussion, one might argue, underestimates the clout of racial minority groups.

The view that racial minorities are not, in fact, disadvantaged in the legislative process bears serious consideration. As Bruce Ackerman argues, discreteness and insularity may actually work to the advantage of groups attempting to advance their interests through the legislative process.⁴⁸ Insularity may "help breed sentiments of group solidarity."⁴⁹ Being discrete allows members to "mark out" and identify one another in ways that other groups—homosexuals for instance—cannot. Both these characteristics confer benefits on those attempting to represent their interests in a pluralistic democracy.⁵⁰ All other things being equal, discrete and insular minorities may be a powerful force in legislative bargaining.⁵¹

But all things are not necessarily equal. The protection of discrete and insular minorities through the process of judicial review cannot be understood without examining the role that prejudice plays in impeding the operations of normal democratic processes.⁵² While recognizing that prejudice may in some ways work to the disadvantage of racial minorities, Ackerman argues that it cannot bear the weight that it must bear in the process-based theory of judicial review expounded by Ely. This theory depends upon legislators and their constituents perceiving issues in "us-versus-them" terms. Ackerman denies that this view of human psychology is persuasive. While congressional representatives may sometimes engage in "all-out appeal[s] to prejudice," they are more likely to seek alliances with groups who are not their "natural allies."⁵³

Although this critique is directed towards the *Carolene Products* theory of judicial review, it may also be applied to a theory of statutory interpretation that takes into account the supposed defects in the legislative process. If blacks, for instance, are on the whole advantaged by their status as a "discrete

47. See KAY L. SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 317 (1986) (suggesting that interest groups are more successful in blocking legislation that works to their disadvantage than in passing new legislation that works to their benefit).

48. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

49. *Id.* at 725.

50. Ackerman's analysis builds on the work of Robert A. Dahl. See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956). Dahl argues that "on matters of specific policy the majority rarely rules." *Id.* at 124. Racial minority groups, long excluded from the normal political arena, may "nevertheless often gain entry" as they form a larger part of the electorate and the "normal opportunities of the system become open to them and further protections of the franchise can then depend more and more upon the use of checkpoints in the normal system." *Id.* at 138.

51. Ackerman, *supra* note 48, at 723-24; see also Eskridge, *supra* note 39, at 107 (arguing that failure of Congress to revise *Weber* is not surprising in view of relative strength of groups favoring Court's decision).

52. Ackerman, *supra* note 48, at 731.

53. *Id.* at 734 n.39.

and insular minority," then it seems inappropriate to adopt an interpretive bias that works to their benefit. Indeed, it might make sense to adopt a contrary presumption and interpret statutes so that they work to the disadvantage of minority groups.⁵⁴

As Daniel Farber and Philip Frickey point out in their response to Ackerman's article, his views do not "match political reality."⁵⁵ Ackerman is correct to emphasize the heavy weight that prejudice must carry in *Carolene Products* theories. He is wrong, however, to believe that prejudice cannot meet this burden. Minority groups do have some clout. But at least on the national level, "the clout is subordinate to that of the business community unless minorities succeed in persuading a large number of whites and decisionmaking elites of the correctness of their cause."⁵⁶ Particularly when hot-button issues like job discrimination and affirmative action are at issue, the public is very likely to be divided along racial lines.

Ely's commentary on constitutional law applies equally to considerations of statutory interpretation. Just as the constitutionality of distributions cannot be determined "simply by looking to see who ended up with what,"⁵⁷ the question of what statutory rules adequately protect minorities cannot be answered merely by investigating "who ended up with what." Rather, courts must consider defects in the process of legislation—including the greater burden of inertia that minority groups face.

II. THE DEBATE OVER THE CIVIL RIGHTS ACT OF 1991

A careful examination of the climate in which the Civil Rights Acts of 1990 and 1991 were debated reveals how prejudice can distort the legislative process. On the surface, the passage of the 1991 Act seems to cut against the general view espoused in Part I. After all, minority groups ultimately reversed the Supreme Court's adverse decisions. Judged from this standpoint, the passage of the Civil Rights Act of 1991 lends support to the position that discrete and insular minorities, and particularly African Americans, command enormous power in the legislative process.

While this view may have superficial appeal, it completely ignores the climate in which the Civil Rights Act of 1991 was passed. The debate

54. Justice Scalia's dissenting opinion in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), suggests just such an inversion of the *Carolene Products* presumption. In arguing that an affirmative action program benefitting women should be overturned, Scalia contends that the Court, in upholding *Weber*, has done a disservice to those with the least ability to protect themselves through the legislative process: "The irony is that these individuals [the men disfavored by the affirmative action program]—predominantly unknown, unaffluent, unorganized—suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent." *Id.* at 677; see also Farber & Frickey, *supra* note 30, at 687 ("Justice Scalia's argument flips *Carolene Products* completely . . .").

55. Farber & Frickey, *supra* note 30, at 688.

56. Stempel, *supra* note 12, at 641 n.203.

57. ELY, *supra* note 11, at 136.

surrounding both the 1990 and 1991 Acts exemplifies the "us-versus-them" atmosphere in which the power of minority groups is at its lowest ebb.⁵⁸ The fact that this legislation was enacted does not necessarily mean that its provisions are adequate to protect minorities from employment discrimination. The 1991 Act represents the only comprehensive legislative revision of employment discrimination laws since the Civil Rights Act of 1964.⁵⁹ Given the difficulties that minorities face in getting such legislation passed, ambiguities in the 1991 Act, including the question of retroactivity, should be resolved to their benefit.

The rhetorical strategies employed by both proponents and opponents of the bill shed light on the uphill battle that minorities can generally expect to face in reversing Supreme Court determinations adverse to their interests. Even though neither the 1990 nor the 1991 Act contained provisions requiring employment quotas, the debate surrounding both bills centered on the quota issue.⁶⁰ As originally proposed, the 1990 Act aimed to overturn, at least in part, nine recent Supreme Court decisions unfavorable to civil rights plaintiffs.⁶¹ But from the beginning, conservative opponents of the Civil Rights Act of 1990 attempted to portray the bill as one that would require

58. This Note focuses primarily on the debate surrounding the 1991 Civil Rights Act. For a detailed discussion of the history of the failed 1990 Act, see Stempel, *supra* note 12, at 645-54; James Forman, Jr., Current Topics, *Victory By Surrender: The Voting Rights Amendments of 1982 and The Civil Rights Act of 1991*, 10 YALE L. & POL'Y REV. 133, 150-65 (1992).

59. Prior to the Civil Rights Act of 1991, there were two reversals of Supreme Court decisions adverse to employment discrimination plaintiffs. The Civil Rights Attorney's Fees Awards Act of 1976 permits plaintiffs to recover attorney's fees from defendants. Pub. L. No. 94-559, 90 Stat. 2641 (1976) (codified at 42 U.S.C. § 1988 (1981)). This Act overturned the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). In 1978, the Pregnancy Discrimination Act overturned the Court's holding in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). The 1978 amendment to Title VII provided that discrimination against pregnant women violated Title VII. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1988)).

60. The debate centered on whether the reformulation of the burdens of proof in disparate impact cases would effectively require employers to adopt racial quotas. See Timothy D. Loudon, *The Civil Rights Act of 1991: What Does It Mean and What Is Its Likely Impact?*, 71 NEB. L. REV. 304, 313-14 (1992). The final version of this provision appears at § 105 of the Act. Pub. L. No. 102-166, 105 Stat. 1074-76 (1991) (codified at 42 U.S.C.A. § 2000e-2 (West Supp. 1992)). This section reverses the Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), and reinstates the "business necessity" test originally adopted in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). See Pub. L. No. 102-166, § 3(2), 105 Stat. 1071 (codified at 42 U.S.C.A. § 2000e-2(k)(1)(A)(i) (West Supp. 1992)).

61. *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989) (restricting recovery of attorney's fees against intervenors); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (§ 1981 does not apply to racial harassment subsequent to hiring); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989) (time limit for challenging seniority systems begins to run when plan is adopted); *Martin v. Wilks*, 490 U.S. 755 (1989) (white firefighters may attack consent decree issued several years earlier); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (employer need not show that employment practice was essential to prevail in disparate impact case); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (employer can escape liability in "mixed-motive" case if it can show that same action would have been taken absent discriminatory motive); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987) (prevailing parties not entitled to expert witness fees); *Library of Congress v. Shaw*, 478 U.S. 310 (1986) (federal employees not entitled to all remedies available under Title VII); *Evans v. Jeff D.*, 475 U.S. 717 (1986) (upholding settlement agreement in which counsel for class of plaintiffs was coerced into withdrawing claim for attorney's fees as part of settlement).

employers to hire a certain number of minorities or women. This characterization reflected a strategic decision. As one conservative stated: "If the issue is drawn as quotas, we win . . . If the issue is drawn as civil rights, we lose."⁶² And the strategy appeared to work. In May 1990, Attorney General Richard Thornburgh advised President Bush to veto the Act, arguing that it would introduce "surreptitious quotas."⁶³ Senator John Danforth, the bill's principal Republican sponsor, vigorously denied this interpretation, asserting that "quotas will not be the unintended result of this bill."⁶⁴

The debate over the 1990 Act also exposed white voters deep-seated resentment against affirmative action programs. Polls showed that voters were divided along racial lines on issues of employment discrimination, racial quotas, and government assistance for blacks.⁶⁵ At least one Democratic strategist believed it was "in the best interests of the Democrats to have Bush sign this bill" in order to prevent the Republicans from "playing the race card."⁶⁶ Although the bill was revised in order to defuse the quota issue, President Bush maintained that its offending provisions had not been repaired⁶⁷ and he vetoed it on October 22, 1990. The attempt to override the President's veto failed by one vote in the Senate.⁶⁸

Meanwhile, Republican candidates were parlaying their opposition to the 1990 Civil Rights Act into electoral success. At the beginning of a campaign trip on behalf of Republican candidates, President Bush asserted that the vetoed 1990 Act would have resulted in quotas.⁶⁹ In North Carolina, Senator Jesse Helms won a tight race against Democratic challenger Harvey Gantt, an African American. Though behind in the polls until the final days, Helms turned the race around through the use of intensely negative advertising, accusing Gantt of supporting racial quotas.⁷⁰ One television advertisement

62. Fred Barnes, *Veto-ready*, NEW REPUBLIC, June 11, 1990, at 12, 13 (quoting Patrick McGuigan of Free Congress Center for Law and Democracy).

63. R.W. Apple, Jr., *Tiptoeing, Bush Comes to a Fork on Civil Rights*, N.Y. TIMES, May 15, 1990, at A20.

64. Steven A. Holmes, *Lawmakers Seek a Rights Bill Deal*, N.Y. TIMES, May 18, 1990, at D16.

65. See, e.g., Thomas B. Edsall, *Civil Rights Bill May Hold Pitfalls for Democrats: Strong Feelings About Affirmative Action Programs Divide Voters Along Racial Lines*, WASH. POST, July 23, 1990, at A5 ("Polls show blacks and whites are severely divided on the questions of quotas, preferential hiring and special government intervention in behalf of blacks."); Jack W. Germond & Jules Witcover, *Race Remains a Factor in U.S. Politics*, 22 NAT'L J. 1621 (1990) (noting "growing antagonism towards blacks among younger white voter"); Ethan Bronner, *High Court's Split on Affirmative Action Echoes Nation's Division*, BOSTON GLOBE, June 29, 1990, at 1, 9 (citing Harris poll indicating that 70% of whites, but only 40% of blacks, believe blacks receive equal pay for equal work).

66. Edsall, *supra* note 65 (quoting Robert Beckel, manager of Walter Mondale's 1984 presidential campaign).

67. See Forman, *supra* note 58, at 167 (describing affirmative steps taken in response to objection that bill would promote quotas).

68. Neil A. Lewis, *President's Veto of Rights Measure Survives by 1 Vote*, N.Y. TIMES, Oct. 25, 1990, at A1.

69. Fred Barnes, *Quota, Unquota*, NEW REPUBLIC, Nov. 19, 1990, at 10, 11.

70. Peter Applebome, *Helms Kindled Anger in Campaign, and May Have Set Tone for Others*, N.Y. TIMES, Nov. 8, 1990, at B3.

showed white hands crumpling up a job rejection letter. The narrator's voice spoke: "You needed that job and you were the best qualified, but they had to give it to a minority because of a racial quota. Is that really fair?"⁷¹ In Louisiana, Republican gubernatorial candidate David Duke, a former member of the Ku Klux Klan, who based his campaign in large part on opposition to affirmative action, won forty-four percent of the vote. Running against the Act was not a purely Southern phenomenon. In California, Senator Pete Wilson, who had voted against the Act, used the quota issue in his successful gubernatorial campaign against Diane Feinstein.⁷²

Against this highly polarized backdrop, the Civil Rights Act of 1991 was introduced in the House on January 3, 1991.⁷³ Republicans believed the issue of race, brought to the fore by the Act, "offer[ed] the potential of polarizing the electorate along lines favorable to the GOP."⁷⁴ Democratic pollster Stanley Greenberg agreed, seeing the issue as "not only explosive" but "dangerous" for Democrats.⁷⁵ A study commissioned by the Leadership Conference on Civil Rights revealed that "many white voters believe[d] there [was] pervasive reverse discrimination in the workplace."⁷⁶

Democrats immediately attempted to broaden the appeal of the bill by characterizing it as a measure designed to protect the rights of women in the workplace. In an interesting attempt to turn the Bush Administration's strategy on its head, Representative Jack Brooks of Texas, one of the bill's sponsors, also played the race card, stating: "We need to extend to white women the right to protect themselves in the workplace, just as black women have had that right for years."⁷⁷ Playing upon "us-versus-them" sentiment among white voters, Brooks' remark suggests that the Act would actually put an end to reverse discrimination against *white* women. The attempt to frame the bill as a women's rights issue continued in the House Education Committee, which

71. *MacNeil/Lehrer News Hour: Rights or Wrongs; Gergen and Shields* (PBS television broadcast, May 31, 1991), available in LEXIS, Nexis Library, Transcript File, Friday Transcript #4045.

72. The narration in one Wilson commercial read: "Diane Feinstein has promised as governor to fill state jobs on the basis of strict numerical quotas. Not experience, not qualifications, not ability . . . but quotas . . ." Susan Yoachum, *New Wilson Ad Hammers at "Quotas,"* S.F. CHRON., July 18, 1990, at A8.

73. See 137 CONG. REC. E33 (daily ed. Jan. 3, 1991) (remarks of Rep. Edwards). The Civil Rights Act of 1991 contained provisions overturning the same decisions that would have been reversed by the 1990 Act. See *supra* note 61. In addition, the 1991 Act reversed the Supreme Court's decisions in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991), in which American citizens in foreign countries were held not protected by U.S. civil rights laws; *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), which held expert witness fees not recoverable by the prevailing plaintiffs; and *Marek v. Chesney*, 473 U.S. 1 (1985), which disallowed attorney's fees for time worked after the rejection of a settlement offer, where the amount ultimately awarded was less than the amount originally offered.

74. Thomas B. Edsall, *Quotas: Tempting Issue for GOP in '92; Strategists See Opportunity to Exploit Conflicts Among Democrats*, WASH. POST, Jan. 15, 1991, at A1.

75. *Id.*

76. Thomas B. Edsall, *Rights Drive Said to Lose Underpinnings: Focus Groups Indicate Middle Class Sees Movement as Too Narrow*, WASH. POST, Mar. 9, 1991, at A6.

77. Steven A. Holmes, *New Battle Looming as Democrats Reintroduce Civil Rights Measure*, N.Y. TIMES, Jan. 4, 1991, at A12.

voted to rename the "Civil Rights Act of 1991" the "Civil Rights and Women's Equality in Employment Act of 1991."⁷⁸

Opponents of the bill were quick to charge that the legislation, like the 1990 Act, would necessitate racial quotas.⁷⁹ Proponents denied that the bill would have any such effects.⁸⁰ Although there seemed to be general agreement that a contentious and divisive atmosphere existed, each side claimed that the other was responsible.⁸¹ Senator Bill Bradley compared the Bush Administration's rhetoric to its use of Willie Horton during the 1988 campaign, arguing that Bush was "using race to get votes in a divisive way."⁸² Likewise, House Majority Leader Richard Gephardt accused President Bush of "attempting to exploit working people's fear of losing their jobs in order to justify pitting white working people against black working people."⁸³ On the other side, the conservative National Congressional Club ran commercials accusing Senator Kennedy and other liberals of trying to "require that hiring decisions be based on race."⁸⁴ In June 1991, President Bush blasted supporters of the Act as "Beltway-interest groups" and denounced the "quota bill" that Democrats had proposed.⁸⁵ Republican analysts saw the quota issue as defining the difference between Republicans and Democrats,

78. Richard L. Berke, *Partisan Fights Erupt on Rights Bill*, N.Y. TIMES, Mar. 13, 1991, at A22; see also Forman, *supra* note 58, at 167; William Raspberry, *Why Civil Rights Isn't Selling*, WASH. POST, Mar. 13, 1991, at A17 (noting that advocates of Act were trying to sell it not as a bill for blacks, but as "a bill for the disabled, for working people and, oh yes, of course, for women").

79. The question was whether reformulation of the burdens of proof would force employers to adopt racial quotas. See 137 CONG. REC. E2086 (daily ed. June 7, 1991) (remarks of Rep. Doolittle); 137 CONG. REC. H3725 (daily ed. May 30, 1991) (remarks of Rep. Fawell); 137 CONG. REC. E925 (daily ed. Mar. 13, 1991) (remarks of Rep. Crane); *id.* at S3173 (remarks of Sen. Dole). On February 21, 1991, Senator Alan Simpson introduced a competing bill which he contended would not result in racial quotas. 137 CONG. REC. S2136 (daily ed. Feb. 21, 1991) (remarks of Sen. Simpson).

80. 137 CONG. REC. E14 (daily ed. Jan. 3, 1991) (remarks of Rep. Brooks); 137 CONG. REC. S12,123 (daily ed. Aug. 2, 1991) (remarks of Sen. Metzenbaum). For a more comprehensive account of this debate, see Forman, *supra* note 58, at 152-60, 165-70. Forman criticizes the civil rights lobby for denying that the Act would produce quotas, arguing that the strategy followed "undermined the vision underlying the legislative proposals." *Id.* at 170. My analysis, on the other hand, suggests that the polarized climate created by the "quota" charge left proponents with little choice. Portraying the Act as a measure that would benefit all Americans, rather than one that would benefit racial minorities at the expense of white workers, was essential to securing its passage.

81. See, e.g., 137 CONG. REC. S2136, S2137 (daily ed. Feb. 21, 1991) (remarks of Sen. Simpson) (stating that 1990 debate had become "a highly charged exercise in partisan politics" that left him "quite disappointed and even a bit disgusted"); 137 CONG. REC. H2474 (daily ed. Apr. 24, 1991) (remarks of Rep. Hoyer) (claiming that the Bush Administration, by raising the "specter of quotas," had begun a "self-serving, deceitful, and contemptible effort to, once again, use racial fears in our country for political ends").

82. James Risen, *Bush's Record on Civil Rights, Racial Issues Criticized*, L.A. TIMES, July 29, 1991, at A4.

83. Michael K. Frisby, *Democrats Set New Strategy: Aim at Bush*, BOSTON GLOBE, May 14, 1991, at 3. Speaker of the House Thomas Foley alleged that the President's quota rhetoric was creating divisions. Rep. Charles Wilson of Texas was more blunt, stating that the Act "is never going to become law, so the voters will never get a chance to see how it works. So they will believe all this scare crap." Scott Shepard, *Bush Dominates Debate, Gains Upper Hand on Rights Bill*, ATLANTA J. & CONST., June 6, 1991, at 8.

84. Linda P. Campbell, *Groups Unleash Lobbying Blitz on Rights Bill*, CHI. TRIB., May 27, 1991, § 1, at 2.

85. Jessica Lee, *Campaign Style, Bush Attacks Rights Bill*, USA TODAY, June 4, 1991, at 4A.

"one that could help [President Bush] lift GOP candidates."⁸⁶

An equally fierce battle emerged within the media. Dick Williams of the *Atlanta Journal and Constitution* sided with Bush's view that the 1991 Act stressed the "politics of division" and would effectively legalize racial quotas.⁸⁷ Jim Fain of the same paper argued that Republicans were employing racist rhetoric in an attempt to attract the votes of middle-class whites.⁸⁸ A *New York Times* editorial chastised Bush and other Republicans for their continuing insistence that the Act would promote racial quotas, stating there was "no more incendiary epithet in present public discourse."⁸⁹

Although the bill adopted by House Democrats explicitly prohibited race-based quotas,⁹⁰ the Administration's strategy appeared to be working. David Gergen remarked that Bush's rhetoric was aimed to exploit the "drift of white voters away from the Democratic Party, particularly white males, and this bill is in part being used as a way to lock those people in."⁹¹ The cry of quotas, according to Gergen, played upon the "backlash in this country among whites."⁹²

Polls validated Gergen's assertion of a backlash, particularly with respect to white males. An *ABC News/Washington Post* poll revealed that eighty-eight percent of whites opposed minority preferences to redress past wrongs.⁹³ A nationwide poll conducted by the *Los Angeles Times* found "deep disagreements" between black and white Americans over the question of antidiscrimination laws.⁹⁴ Sixty percent of whites believed that "blacks had an equal or better chance than whites to get good jobs and education."⁹⁵ By contrast, sixty-seven percent of black Americans believed that they had fewer opportunities than white Americans.⁹⁶ The *Los Angeles Times* poll concluded that white opposition to affirmative action policies that "gave minorities

86. *Id.*

87. Dick Williams, *Bush Speaks the Truth; the Left Engages in Fiction*, ATLANTA J. & CONST., June 8, 1991, at A19; see also *Ducking the Quota Issue Again*, WASH. TIMES, Sept. 14, 1991, at D2.

88. Jim Fain, *GOP Readies Racist Pitch for 1992 Vote*, ATLANTA J. & CONST., Apr. 24, 1991, at A15.

89. *Tossing Around the 'Quota' Bomb*, N.Y. TIMES, Apr. 7, 1991, § 4, at 18.

90. 137 CONG. REC. H3924 (daily ed. June 5, 1991) ("Nothing in the amendments made by this Act shall be construed . . . to require, encourage, or permit an employer to adopt hiring or promotion quotas . . .").

91. *MacNeil/Lehrer News Hour*, supra note 71. Milton Morris of the Joint Center for Political and Economic Studies similarly observed that the "Democratic Party is permanently handicapped by its civil rights role." Steven A. Holmes, *Must Democrats Shift Signals on Blacks to Win the Presidency?*, N.Y. TIMES, Nov. 10, 1991, § 4, at 3.

92. *MacNeil/Lehrer News Hour*, supra note 71; see also Larry Tye, *Quota Issue Sizzles, Touches Nerve*, BOSTON GLOBE, June 9, 1991, at 1, 16 (citing interviews indicating that "the Bush Administration's framing of civil rights and hiring issues in terms of racial quotas has touched a nerve and aroused American fears in a way few other issues can").

93. Tom Kenworthy & Thomas B. Edsall, *Whites See Jobs on Line in Debate*, WASH. POST, June 4, 1991, at A1, A4.

94. Ronald Brownstein, *The Times Poll: Black, White Americans Split Over Anti-Bias Laws*, L.A. TIMES, Nov. 5, 1991, at A1.

95. *Id.* at A20.

96. *Id.*

preference in employment" was hardening.⁹⁷ Kerry Scanlon of the NAACP Legal Defense Fund noted that, in view of this divisive atmosphere, many Southern Democrats were "scared to death" of being forced to take a stand on civil rights in an election year.⁹⁸

In June 1991, the House passed the Civil Rights Act by a substantial margin, though not enough to sustain a presidential veto.⁹⁹ White House Press Secretary Marlin Fitzwater reiterated the President's intention to veto the Act: "The [P]resident said that if you don't like it being called a quota bill, change the bill."¹⁰⁰ In the fall, however, the tide began to turn. The Clarence Thomas/Anita Hill hearings focused attention on sexual harassment. Senator Paul Simon remarked that during the vote on the Thomas nomination a Republican Senator said to him, "This will pass the civil rights bill."¹⁰¹ Judy Mann of the *Washington Post* argued that the Civil Rights Act of 1991 gave the Senate the "opportunity to put their votes where their mouths were" by demonstrating their opposition to sexual harassment.¹⁰²

Pressured into taking a stand on sexual harassment, Republican Senators approached President Bush in October to forge a compromise. Recasting the debate in terms of sexual harassment rather than racial justice, Congress and the President moved closer to an agreement.¹⁰³ Senator Tim Wirth remarked that the President's change of heart was largely due to the backlash from the Thomas hearings.¹⁰⁴ In late October, Bush agreed to a compromise bill, negotiated among Republican Senators, and on November 21, 1991, the President signed the Civil Rights Act.

97. *Id.* at A21; see also Susan Schulman & Harold McNeil, *Affirmative Action Spawns a White Backlash*, BUFFALO NEWS, Nov. 30, 1992, at 1 (noting increased white resistance to affirmative action programs).

98. Holmes, *supra* note 91.

99. Adam Clymer, *Rights Bill Passes in House But Vote Is Not Veto-Proof*, N.Y. TIMES, June 6, 1991, at A1.

100. Frank J. Murray, *Quotas: No War, No Truce—Bush*, WASH. TIMES, June 26, 1991, at A1.

101. Mitchell Locin, *Senate's Frayed Image May Help Rights Bill*, CHI. TRIB., Oct. 17, 1991, § 1, at 12.

102. Judy Mann, *Time To Act on Rights*, WASH. POST, Oct. 23, 1991, at D3.

103. See Forman, *supra* note 58, at 169; Loudon, *supra* note 60, at 307 ("[T]he Clarence Thomas confirmation hearings proved to be the final impetus for passage of this new law.").

104. *White House Announces Civil Rights Compromise Ending Two-Year Long Dispute*, *supra* note 3. An additional impetus was the strong showing by David Duke in the Republican primary. A *New York Times* editorial compared the "coded racist appeals" of Duke and Bush, opining that Duke's success scared the President into abandoning his "relentless quota bashing." *Running for President: Hate and Fear*, N.Y. TIMES, Dec. 5, 1991, at A32; see also Forman, *supra* note 58, at 170-73 (analyzing connection between Hill/Thomas hearings, Duke campaign, and Act's passage). But see C. Boyden Gray, *Civil Rights: We Won, They Capitulated*, WASH. POST, Nov. 14, 1991, at A23. White House Counsel Gray asserted that the President's actions were unrelated to the Thomas/Hill hearings and the Duke campaign. According to Gray, Senator Kennedy had capitulated on the issue of quotas. William Coleman and Vernon Jordan criticized Gray's attempt to destroy the consensus surrounding the Act, stating that the final version met virtually all the objectives of the Act's proponents. Coleman & Jordan, *supra* note 2.

III. MAKING SENSE OF THE PRODUCT: THE RETROACTIVITY QUESTION

The racially divisive atmosphere that produced the Civil Rights Act of 1991 provides a potent example of the continuing relevance of the *Carolene Products* presumptions. Throughout the battle over the Act and the 1992 presidential campaign that followed, the issue of civil rights was portrayed by many politicians and understood by many Americans in "us-versus-them" terms.¹⁰⁵ Only when attention was diverted from the question of race toward the question of sexual harassment was a compromise successfully forged. In fact, the retroactivity issue appears to have been left intentionally ambiguous because of congressional reluctance to fight this battle along racial lines. It is critical then for the Court to consider the racial animus that infected the legislative process when assessing the retroactivity question.

A. *Traditional Sources of Interpretation*

Section 402(a) of the 1991 Act states: "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment."¹⁰⁶ Two provisions specifically state that the Act is not to be applied retroactively to particular classes of cases. First, section 402(b) states: "Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983."¹⁰⁷ Its sole effect is to prevent the Act's provisions overruling the holding in *Wards Cove Packing Co. v. Atonio*¹⁰⁸ from being applied to that specific case.¹⁰⁹ Second, the Act specifically provides that section 109, which extends the protections of Title VII to American citizens working for American companies overseas, should only apply prospectively: "The Amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act."¹¹⁰

The Act does not explicitly state whether or not it should otherwise apply to conduct occurring before or to cases pending as of the date of its enactment. Courts have sharply differed in their approach to resolving this issue. While

105. See Thomas B. Edsall, *The 'Values' Debate: Us v. Them?; At Issue Is Which Party Best Represents Heavily White Middle Class*, WASH. POST, July 31, 1992, at A8 (observing "class and racial appeals designed to shape competing partisan perceptions of 'us' and 'them'" in 1992 presidential campaign).

106. 105 Stat. 1071, 1099 (1991), reprinted in 42 U.S.C.A. § 1981 note (West Supp. 1993) (Effective Date of 1991 Amendment).

107. *Id.*

108. 490 U.S. 642 (1989).

109. See *Reynolds v. Martin*, 985 F.2d 470, 473 (9th Cir. 1993).

110. 105 Stat. at 1078, reprinted in 42 U.S.C.A. § 2000e note (West Supp. 1993) (Effective Date of 1991 Amendment)). Section 109 overrules *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991). See *Reynolds*, 985 F.2d at 473-74.

the majority of appellate courts have held that the Act should not be given retroactive effect, the rationale for the holdings differs dramatically.¹¹¹

The debate in the courts has centered on which of two competing lines of Supreme Court cases should be followed.¹¹² One line of cases, represented by *Bradley v. School Board of Richmond*,¹¹³ presumes that a court should apply the law in effect at the time it makes its decision. The other line of cases, represented by *Bowen v. Georgetown University Hospital*,¹¹⁴ presumes that a statute is prospective only, unless it contains an explicit statement to the contrary.

Bradley was a school desegregation suit brought by African-American parents and guardians in Richmond, Virginia. During the course of litigation, the school board conceded that the desegregation plan under which it had been operating was unconstitutional. Subsequent to this admission, Congress enacted section 718 of the Education Amendments of 1972,¹¹⁵ granting courts the authority to award attorney's fees to successful plaintiffs upon entry of a final order. The Court held that section 718 could be applied to attorney's services that were rendered before the provision was enacted, stating: "We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."¹¹⁶

The *Bradley* Court went on to qualify this statement by setting out three factors that might suggest that a "manifest injustice" would be done by applying the statute in question retroactively. First, courts should consider the nature and identity of the parties. Retroactivity should not be presumed in matters of merely private concern.¹¹⁷ Second, courts should consider the

111. For a list of decisions by courts of appeals, see *supra* note 8. These cases are discussed *infra* notes 135-150 and accompanying text. District courts have split on the issue of retroactivity. For decisions upholding retroactivity, see, e.g., *Graham v. Bodine Elec. Co.*, 782 F. Supp. 74 (N.D. Ill. 1992); *Stender v. Lucky Stores, Inc.*, 780 F. Supp. 1302 (N.D. Cal. 1992); *Mojica v. Gannett Co.*, 779 F. Supp. 94 (N.D. Ill. 1991). For courts opposing retroactive application of the Act, see, e.g., *Burchfield v. Derwinski*, 782 F. Supp. 532 (D. Colo. 1992); *Khandelwal v. Compuadd Corp.*, 780 F. Supp. 1077 (E.D. Va. 1992).

112. These two lines of cases have received extensive treatment elsewhere. For more detailed analysis of this conflict, see Allen, *supra* note 10, at 578-90; Estrin, *supra* note 5, at 2038-43; Urbanik, *supra* note 10, at 116-24; McAlister, *supra* note 10, at 1322-33.

113. 416 U.S. 696 (1974).

114. 488 U.S. 204 (1988).

115. 20 U.S.C. § 1617 (1988).

116. *Bradley*, 416 U.S. at 711. The Court traced the roots of this principle to *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), in which Chief Justice Marshall stated:

It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.

Id. at 110, quoted (with spelling and punctuation changes) in 416 U.S. at 711-12.

117. 416 U.S. at 717-19. The Court cited Chief Justice Marshall's declaration in *The Schooner Peggy* that courts should decide matters involving "great national concerns" according to existing laws. 416 U.S. at 719 (quoting 5 U.S. (1 Cranch) at 110). This statement suggests that not merely the identity of the

nature of rights affected, hesitating to apply rules retroactively if they would "infringe upon or deprive a person of a right that had matured or become unconditional."¹¹⁸ Third, courts should consider the impact of retroactivity on existing rights. An "increased burden" or "change in the substantive obligation" weighs against retroactivity.¹¹⁹

Bowen concerned regulations promulgated by the Secretary of Health and Human Services limiting Medicare reimbursements. A unanimous Court denied the Secretary's authority to apply those regulations retroactively. In reaching its conclusion, the Court stated that "[r]etroactivity is not favored in the law" and, consequently, that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."¹²⁰ The Court did not cite *Bradley* in its opinion but relied on a line of cases that had not been mentioned or overruled by *Bradley*.¹²¹ As the D.C. Circuit stated in *Gersman v. Group Health Association*, "the two presumptions continue to exist in apparent inconsistency."¹²² In *Kaiser Aluminum and Chemical Corp. v. Bonjorno*,¹²³ the Court recognized the conflict between these two lines of precedent but did not resolve the issue because "under either view, where the congressional intent is clear, it governs."¹²⁴

The legislative history of the Act offers little guidance, with opinions about the issue of retroactivity divided along party lines. The original version of the 1990 Civil Rights Act provided that all provisions would apply retroactively.¹²⁵ In vetoing this bill, President Bush cited its "unfair retroactivity rules" as one of his reasons.¹²⁶ The Civil Rights Act of 1991, as originally introduced, contained virtually the same retroactivity provision as

parties, but the significance of the issue at hand should bear upon the question of whether a statute should be given retroactive effect.

118. *Id.* at 720.

119. *Id.* at 721.

120. 488 U.S. 204, 208 (1988).

121. *Greene v. United States*, 376 U.S. 149, 160 (1964); *Claridge Apts. Co. v. Comm'r*, 323 U.S. 141, 164 (1944); *Miller v. United States*, 294 U.S. 435, 439 (1935); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-63 (1928).

122. 975 F.2d 886, 895 (D.C. Cir. 1992).

123. 494 U.S. 827 (1990).

124. *Id.* at 837. Justice White expressed the view that the conflict between *Bradley* and *Bowen* is "more apparent than real," since *Bonjorno* did not involve "true retroaction, in the sense of the application of a change in law to overturn a judicial adjudication of rights that had already become final." *Id.* at 864 (White, J., dissenting). White went on to embrace the *Bradley* presumption "in favor of application of new laws to pending cases," essentially abandoning the *Bowen* presumption against retroactivity. *Id.* at 866. Justice Scalia joined the majority's opinion, but wrote separately to address the conflict between *Bradley* and *Bowen*, two cases that he claimed were in "irreconcilable contradiction." *Id.* at 841 (Scalia, J., concurring). Scalia argued that the *Bradley* court had misinterpreted *The Schooner Peggy*, *id.* at 848-50, and reaffirmed the *Bowen* presumption: "A statute is deemed to be effective only for the future unless contrary intent appears." *Id.* at 858.

125. See S. 2104, 101st Cong., 2d Sess. (1990), reprinted in 136 CONG. REC. S9968 (daily ed. July 18, 1990). The 1990 Act would have applied various provisions to cases pending during May and June 1989, the date of the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

126. 136 CONG. REC. S16,562 (daily ed. Oct. 24, 1990) (veto message of President Bush).

the 1990 Act.¹²⁷ The compromise bill drafted during the summer of 1991 deleted the retroactivity provision but inserted no provision stating that the Act was prospective only.¹²⁸ Congress rejected an attempt by the White House and Republican legislators to make the Act explicitly prospective only.¹²⁹

The bill's principal sponsors, as noted above, disagreed on the question of retroactivity. Senator Danforth relied on Justice Scalia's opinion in *Bonjorno*, expressing the view that in the absence of a clear statement to the contrary statutes should not be applied retroactively.¹³⁰ Senator Kennedy relied on the Court's opinion in *Bradley*, asserting that the Act should apply retroactively.¹³¹ Similar debates occurred in the House of Representatives, with Democratic and Republican members advancing opposing views.¹³² In his signing statement, President Bush sided with the opponents of retroactivity, stating that Senator Dole's interpretive memorandum "will be treated as authoritative interpretive guidance by all officials in the executive branch."¹³³

In a floor statement shortly before the Act's passage, Senator Danforth suggested that courts "take with a large grain of salt floor debate and statements placed into the *Congressional Record* which purport to create an interpretation for the legislation that is before us."¹³⁴ For the most part, appellate courts have heeded Senator Danforth's advice and have ignored statements by members of Congress advocating or rejecting retroactivity.¹³⁵ In *Fray v. Omaha World Herald Co.*,¹³⁶ however, the Eighth Circuit found

127. H.R. 1, 102d Cong., 1st Sess. (1991), reprinted in 137 CONG. REC. H3924-25, H3936 (daily ed. June 5, 1991).

128. S. 1745, 102d Cong., 1st Sess. (1991), reprinted in 137 CONG. REC. S15,503-12 (daily ed. Oct. 30, 1991).

129. See 137 CONG. REC. H3898 (daily ed. June 5, 1991) (prospective-only proposal of Rep. Michel).

130. 137 CONG. REC. S15,483 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth).

131. *Id.* at S15,485 (statement of Sen. Kennedy).

132. Compare 137 CONG. REC. H9530 (daily ed. Nov. 7, 1991) (remarks of Rep. Edwards (D-Cal.)) (Act should apply to pending cases) with *id.* at H9548 (remarks of Rep. Hyde (R-Ill.)) (Act should not apply to conduct occurring before effective date).

133. 1991 U.S.C.C.A.N. 768, 769 (Nov. 25, 1991). Shortly after the passage, the Equal Employment Opportunity Commission announced that it would not seek damages for any conduct occurring before the effective date of the Act. *EEOC Policy Guidance on Retroactivity of Civil Rights Act of 1991*, Daily Lab. Rep. (BNA) No. 1, at D-1 (Jan. 2, 1992). The EEOC reversed its position in April 1993, declaring that it would thereafter interpret the Act to apply retroactively. *EEOC Changes Retroactivity View Regarding 1991 Civil Rights Act*, 61 U.S.L.W. 2593 (Apr. 6, 1993); *EEOC Reiterates Vote to Change Policy on Retroactivity of 1991 Civil Rights Act*, Daily Lab. Rep. (BNA) No. 71, at A-1 (Apr. 15, 1993). On April 30, 1993, the Department of Justice and EEOC filed a joint amicus brief arguing in favor of retroactivity. *U.S. Supreme Court Brief Filed by Federal Government in Landgraf v. USI Film Products and Rivers v. Roadway Express, Inc.*, Daily Lab. Rep. (BNA) No. 84, at D-24 (May 4, 1993).

134. 137 CONG. REC. S15,325 (daily ed. Oct. 29, 1991) (statement of Sen. Danforth). For a similar perspective on legislative history, see Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 861-62 (1992) (where legislative history is confusing and contradictory, courts should not attempt to use it as guide); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (reviewing legislative history is "like looking over a crowd and picking out your friends") (quoting conversation with Harold Leventhal).

135. See, e.g., *Gersman v. Group Health Ass'n*, 975 F.2d 886, 892 (D.C. Cir. 1992).

136. 960 F.2d 1370, 1378 (8th Cir. 1992).

the President's rejection of the 1990 Act's retroactivity provision, in conjunction with the subsequent deletion of this provision from the 1991 Act, to be meaningful. The court interpreted the deletion of this provision to indicate that the legislators supporting retroactivity had implicitly acknowledged that the Act would only apply prospectively. In the court's view, the legislative history conclusively prohibited retroactive application under either the *Bradley* or *Bowen* presumptions.¹³⁷ "[A]ny other conclusion," the court stated, "simply ignores the realities of the legislative process."¹³⁸ But as the Second Circuit has pointed out, the *Fray* court ignored Congress' rejection of the Bush Administration's attempts to introduce language that would have made the Act prospective only.¹³⁹ In *Fray*, the court is equally guilty of ignoring "the realities of the legislative process."

Finding the legislative history and statutory language unhelpful, most appellate courts have struggled to come to grips with the *Bradley/Bowen* dilemma. While rejecting the *Fray* court's argument based on legislative history, the Second Circuit in *Butts v. City of New York Department of Housing Preservation & Development* decided against retroactivity. Citing the maxim that new rules by judges apply retroactively while new statutes apply only prospectively,¹⁴⁰ the court adopted *Bowen*'s presumption against retroactivity.¹⁴¹ The Fifth Circuit likewise chose the *Bowen* presumption against retroactivity, citing its "lengthy pedigree reflecting obvious and fundamental concerns of fairness and predictability."¹⁴² The Sixth Circuit argued that *Bradley* should be read narrowly, and that a presumption against retroactivity should apply wherever "substantive rights and liabilities" are at issue.¹⁴³ In *Gersman*, the D.C. Circuit concluded that the greater weight of authority suggested that courts should abide by the *Bowen* presumption.¹⁴⁴

Only the Ninth Circuit has held that the Act should be given retroactive application. In *Reynolds v. Martin*¹⁴⁵ and *Davis v. City of San Francisco*,¹⁴⁶ the court declined to reach the question of whether the *Bowen* or *Bradley* presumption should apply. Both the *Reynolds* and *Davis* panels adopted the rule of statutory construction that no provision should be construed so as to

137. *Id.* at 1378.

138. *Id.* In *Baynes v. AT&T Technologies, Inc.*, the Eleventh Circuit, like the Eighth Circuit, determined that the Act should not apply retroactively, regardless of whether the *Bradley* presumption or the *Bowen* presumption was adopted. 976 F.2d 1370 (11th Cir. 1992).

139. *Butts v. City of N.Y. Dep't of Hous. Preservation & Dev.*, 990 F.2d 1397, 1405 (2d Cir. 1993).

140. *Id.* at 1410.

141. *Id.* at 1411.

142. *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1374 (5th Cir. 1992) (citation omitted). For similar arguments, see *Allen*, *supra* note 10, at 569; *McAlister*, *supra* note 10, at 1319.

143. *Vogel v. City of Cincinnati*, 959 F.2d 594, 597-98 (6th Cir. 1992); *see also* *Mozee v. American Commercial Marine Serv.*, 963 F.2d 929, 936 (7th Cir. 1992) (*Bradley* should apply only when retroactive application would not infringe on vested rights).

144. 975 F.2d at 897.

145. 985 F.2d 470 (9th Cir. 1993).

146. 976 F.2d 1536 (9th Cir. 1992).

make any other provision inoperative. Making note of the two provisions providing for prospective application only, the Ninth Circuit inferred that the other parts of the Act should be given retroactive application. But as several other circuits have pointed out, these provisions could equally be read as “‘insurance policies’ against the possibility that a court would deem the entire Act to apply retroactively.”¹⁴⁷

Somewhat more compelling arguments in favor of retroactivity have been offered in dissenting opinions by Chief Judge Wald of the D.C. Circuit and by Judge Heaney of the Eighth Circuit. Dissenting in *Gersman*, Judge Wald followed the *Bradley* presumption, arguing that courts should interpret the law in effect at the time of decision “unless Congress would not intend the retroactive application of the new law because that would work an unfairness.”¹⁴⁸ In analyzing the question of fairness in this case, Judge Wald concluded that reasonable expectations would not in fact be frustrated, since the 1991 Act primarily restored rights existing before adverse Supreme Court decisions.¹⁴⁹ Similarly, in *Fray*, Judge Heaney engaged in a fairness analysis, concluding that retroactive application “best serves the interests of fairness by restoring the rights of parties as they were when [the plaintiff] began her lawsuit.”¹⁵⁰

B. A Process-Based View of the Retroactivity Question

It is clear then that traditional methods of statutory interpretation provide little assistance in determining whether the 1991 Act should apply retroactively. The statutory language makes no clear statement and the Act’s history shows that proposals to make the Act explicitly prospective and explicitly retroactive were both rejected. As the Second Circuit concluded, courts are faced with a “deliberately ambiguous” statute.¹⁵¹ Given the conflicting presumptions of the *Bowen* and *Bradley* decisions, lower courts have been left with confusing precedent to guide them. Considerations of “fairness” seem to point courts in both directions.

With the exception of *Fray*, none of the courts has considered the effect of the legislative process upon the Act that was eventually approved.¹⁵² None of the decisions, including *Fray*, considered the impact that the “us-versus-

147. *Butts*, 990 F.2d at 1407 (citing *Gersman*, 975 F.2d at 889-90; *Johnson*, 965 F.2d at 1372-73; *Moze*, 963 F.2d at 933).

148. *Gersman*, 975 F.2d at 902.

149. *Id.* at 907-08.

150. *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1382 (8th Cir. 1992) (Heaney, J., dissenting).

151. *Butts*, 990 F.2d at 1406.

152. It is noteworthy that in an en banc decision subsequent to *Fray*, the Eighth Circuit did not follow the *Fray* panel’s reasoning. *Hicks v. Brown Group*, 982 F.2d 295 (8th Cir. 1992). The *Hicks* court based its decision against retroactivity on a preference for the *Bowen* rule, not on its view of the legislative process.

them" attitude pervading the debate had on the Act. Nor have the courts considered the increased difficulty that minority groups face in reversing statutory interpretations that work to their disadvantage.

These considerations militate in favor of giving retroactive application to the 1991 Act. One argument for retroactivity relies upon the asymmetrical burdens of legislative inertia, discussed in the context of *Weber* and *Runyon*.¹⁵³ As in the § 1981 and Title VII cases, the minority groups that would be disadvantaged by a determination against retroactivity would have a more difficult time correcting the Court's interpretation. As the 1990 and 1991 debates show, an "us-versus-them" attitude is likely to dominate whenever the legislature considers race-related questions.¹⁵⁴ By contrast, if the Court determines that the Act should be given retroactive application, employers opposed to retroactivity probably would have an easier time reversing this interpretation of the Act.

There are, however, at least two objections that might be raised to this argument. For one thing, the remarks of legislators, and particularly those of Senators Danforth and Kennedy, indicate that Congress had concluded its deliberations and was leaving the retroactivity issue for courts to decide. These remarks suggest that the Court's determination, whatever it is, is unlikely to be reversed by Congress. While this presumption may be true, it is by no means certain that Congress will not change its mind and reverse the Court. All other things being equal, the Court should err on the side of protecting the group with less power in the legislative process.

A second objection strikes closer to the heart of the process-based theory expounded in this Note. It argues that an interpretive bias in favor of the less

153. See *supra* Part I.

154. The failed nomination of Professor Lani Guinier to the post of Assistant Attorney General for Civil Rights provides another example of the "us-versus-them" climate that commonly attends such questions. Again the term "quota" was employed with explosive results. An editorial column in the *Wall Street Journal* titled "Clinton's Quota Queens" stated that Professor Guinier "sets the standard for innovative radicalism" and "calls for racial quotas in judicial appointments." Clint Bolick, *Clinton's Quota Queens*, WALL ST. J., Apr. 30, 1993, at A12. As Mari Matsuda has observed, the term "quota queen," like President Reagan's term "welfare queen," exploits racial stereotypes for the purpose of "substituting kneejerk prejudice for critical thought." Mari Matsuda, *Washington Runs Scared from a Quality Thinker*, NEWSDAY, June 8, 1993, at 95.

Conservative interest groups viewed the Guinier nomination as an opportunity to capitalize on the issues of quotas and affirmative action. Neil A. Lewis, *Senate Democrats Urge Withdrawal of Rights Nominee*, N.Y. TIMES, June 2, 1993, at A1, A17. In the face of mounting opposition, President Clinton withdrew Guinier's nomination, noting that "this battle unfortunately has already polarized our country" and that continuing to pursue her confirmation would "guarantee a bloody and divisive conflict over civil rights, based on ideas that I, as President, could not defend." *The White House, President Clinton's Announcement About the Lani Guinier Nomination*, FED. NEWS SERV., June 3, 1993, available in LEXIS, Nexis Library, Transcript File. Voters were indeed polarized and, as with the debate over the Civil Rights Act, the split was largely along racial lines. A USA Today/CNN/Gallup poll taken after the withdrawal of Guinier's nomination revealed that 55% of blacks disapproved of Clinton's decision to withdraw her nomination, compared with 31% of whites. Bill Nichols, *For Some Blacks, Guinier Case Part of a Pattern*, USA TODAY, June 8, 1993, at 6A; Catherine Crier & Bernard Shaw, *Polls Show Guinier Withdrawal Hurt Clinton* (CNN television broadcast, June 7, 1993), available in LEXIS, Nexis Library, Transcript File, Transcript # 347-2.

powerful interest groups presumes that there is a “right answer”—some intention on the part of Congress that the Act be applied retroactively or prospectively. But if the legislative history clarifies anything, it is that the enacting legislature harbored no such intention. Thus, the process-based theory cannot be justified by saying that the Court should “err” on the side of protecting minority interests. In the absence of congressional intent, there can be no “right answer” and, consequently, no “error” for Congress to correct.

This objection bears a resemblance to criticisms that have been made of the *Carolene Products*/Ely school of judicial review. In criticizing process-based theories generally, Laurence Tribe observes that “[d]eciding what *kind* of participation the Constitution demands requires analysis . . . of the character and importance of the interest at stake.”¹⁵⁵ As Calabresi puts it, one cannot determine what type of legislative process is constitutionally permissible “without an underlying substantive theory of rights.”¹⁵⁶ In the case of statutory interpretation, a process-based view, it would seem, requires that the legislative rule in question contain some discernable assignment of rights.

It is true that the text of the statute and the legislative history demonstrate no clear intention on the part of the enacting legislature. The “correct” interpretation, then, cannot be the actual intention of the enacting legislature. Under these circumstances, courts should ask what rule the legislature would have chosen in the absence of racial polarization. The test proposed here seeks to replicate the outcome that would have emerged, if not for the distorting “us-versus-them” climate that characterized consideration of the Act.¹⁵⁷

Under this test, minority interests should be given the benefit of the doubt when the statutory language and legislative intent are ambiguous. As a result of lingering racial prejudice, minority groups are, as a general rule, disadvantaged vis-à-vis majority groups. The climate surrounding the 1991 Act’s passage exemplifies the type of difficulties that such groups can

155. Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1069 (1980).

156. Guido Calabresi, *The Supreme Court, 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 84 n.9 (1991).

157. A substantive view of democracy undergirds the approach to statutory ambiguity suggested here. By construing ambiguous statutes to the benefit of the group disadvantaged by racial prejudice, the presumption in favor of minority interests attempts to replicate the outcome that would emerge from a process not infected by racial prejudice. One could conceivably argue that, rather than replicating the outcome that would have emerged in the absence of racial prejudice, courts should attempt to determine what the legislature would have done had it been forced to come to a decision. Alternatively, courts could attempt to determine what the current legislature would do if forced to make the choice. Were courts to choose either of these approaches to interpretation, they might hold that the Act should not apply retroactively. Indeed, the racial polarization evident in the debate might be taken to indicate that, were Congress forced to make a decision on retroactivity, it would satisfy the preferences of the most powerful groups. This Note rejects the view that the Court should attempt to determine what the actual legislature (either past or present) would do if forced to decide. Such an approach is not only indeterminate, but also unfair. Only by resolving ambiguity in favor of the minority interests can courts hope to correct for the corrosive effects of racial prejudice.

generally expect to face in reversing judicial decisions that work to their disadvantage. Minority groups pressing for retroactivity would have been in a stronger bargaining position, relative to the employers' lobby, if not for the strong racial animosity evident during the 1990 and 1991 debates.

Under these circumstances, the Court should adopt an interpretive presumption in favor of minority interests when interpreting ambiguous provisions. The effect of this mode of analysis is to place the burden of clarity upon the majority. If Congress wishes to adopt a statutory rule that works to the disadvantage of minorities, it must do so unambiguously. In the absence of a specific statement to the contrary, courts should presume that the Civil Rights Act of 1991 is to apply to all cases pending at the time of enactment. Only by adopting such an interpretive presumption may the Court compensate for the effects of racial prejudice upon the legislative process.

IV. CONCLUSION

Antidiscrimination law presents special problems to which courts must be attuned when interpreting ambiguous statutes. The relevant legal principles are likely to appear very different depending on the individual judge's perspective. For this reason, courts must consider the greater difficulty that racial minorities are likely to face in protecting themselves through the legislative process, particularly when they try to overcome restrictive judicial interpretations. Courts should be wary of adopting interpretations that disadvantage or fail to protect minorities, without a clear legislative mandate to do so.

The Civil Rights Acts of 1990 and 1991 present salient examples of the continuing relevance of the *Carolene Products* presumptions. When inflammatory issues like employment discrimination and affirmative action are at stake, the American public still tends to view the world in "us-versus-them" terms. The racial animus faced by minority groups will often be less visible than it was during consideration of the 1991 Act. Even where racial polarization is less conspicuous, courts should take into account the relatively greater difficulty that minority groups will generally experience in revising statutory interpretations that disadvantage them.

The uphill battle faced by proponents of the 1990 and 1991 Civil Rights Act should serve as a reminder of the persistence of racial prejudice in the legislative forum. As long as such attitudes exist, courts must take into account their distorting effect on the democratic process. Where Congress has failed to speak clearly, courts should interpret statutes to the benefit of minority groups. In light of these considerations, the Civil Rights Act of 1991 should be given retroactive application.