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### The Rehnquist Court, Statutory Interpretation, Inertial Burdens, and a Misleading Version of Democracy

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# ARTICLES

## THE REHNQUIST COURT, STATUTORY INTERPRETATION, INERTIAL BURDENS, AND A MISLEADING VERSION OF DEMOCRACY

*Jeffrey W. Stempel\**

“[I]n the area of statutory interpretation, . . . the legislative power is implicated, and Congress remains free to alter what we have done.”

Justice Anthony Kennedy  
*Patterson v. McLean Credit Union*  
109 S. Ct. 2363, 2370 (1989)

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## INTRODUCTION

JUSTICE Kennedy's statement contains more than a little ammunition for the skeptic. When Congress sought to change the *Patterson* result (holding that 42 U.S.C. § 1981, which bans discrimination in the making and enforcement of contracts,

applies only to the initial formation of the contract and access to official legal procedures and remedies but not to subsequent discrimination),<sup>1</sup> it clearly exercised its purported "freedom" (by nearly a two-to-one margin)<sup>2</sup> only to be thwarted in its colloquy with the Court by President Bush's veto of the Civil Rights Act of 1990 ("the Act").<sup>3</sup> An attempt to override the veto fell one vote short in the Senate.<sup>4</sup> The House of Representatives determined not to attempt an override unless the Senate was successful.<sup>5</sup> The Act's fate casts doubt on Justice Kennedy's blithe confidence in the ability of Congress to modify Court decisions,<sup>6</sup> painting it as more myth than reality. Seemingly

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1. *Patterson v. McLean Credit Union*, 491 U.S. 164, 171 (1989).

2. Barrett, *House Approves Broad Civil Rights Bill Despite the Threat of a Presidential Veto*, Wall St. J., Oct. 18, 1990, at A18, col. 1 (House passage of the Civil Rights Act of 1990, which provided that 42 U.S.C. § 1981 applies to race or ethnic discrimination occurring after initial formation of employee's contract, by vote of 273 to 154 in House). The Senate had previously passed the Act by a 64-36 margin.

3. Holmes, *President Vetoes Bill on Job Rights; Showdown is Set*, N.Y. Times, Oct. 23, 1990, at A1, col. 4. The Act sought to overrule portions of the *Patterson* decision and several other Supreme Court decisions rendered during 1989. See New York City Bar Ass'n, *The Civil Rights Act of 1990*, 45 THE RECORD 430 (1990) (Committees on Civil Rights, Federal Legislation, and Sex and Law) [hereinafter Bar Committee Report].

4. Campbell, *By One Vote, Senate Fails to Overturn Rights Veto*, Chicago Tribune, Oct. 25, 1990, at C2, col. 3. The veto override may have actually fallen two votes short. Near the end of the voting, when it appeared the override would not succeed, Minnesota Independent-Republican Senator Rudy Boschwitz, who had previously voted against the bill, voted to override in an action seen as merely cosmetic by many, as the veto override was certain to fail. *Id.* (Boschwitz "supported the override once it was clear there were enough votes to sustain the president's veto."); Fulwood, *Bush's Veto of Rights Bill Survives in Senate By One Vote*, L.A. Times, Oct 25, 1990, at A1, col. 5.

5. Holmes, *supra* note 3, at col. 3.

6. Many commentators, although appreciating the complex world of congressional agenda control and other political forces, support the view that the Court should at least assume that Congress can act fluidly to make its will felt in matters of statutory concern. See Marshall, *Let Congress Do It: The Case for an Absolute Rule of Stare Decisis*, 88 MICH. L. REV. 177 (1989). This view has, of course, tended to dominate conventional thinking among bench and bar. See Eskridge, *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988) [hereinafter Eskridge, *Overruling Statutory Precedents*].

the Justices have invoked a grossly oversimplified view<sup>7</sup> of the political process as a reductionist strategy for rendering decisions in the face of a crushing caseload.<sup>8</sup>

A second skeptic might also, as did the *Patterson* dissenters, question the Court's holding and other 1989 civil rights cases, irrespective of the possibility of congressional response to the Court decisions.<sup>9</sup> One might term these readers "micro-skeptics." A third group of skeptics, which I term "macro-skeptics," could question Justice Kennedy's allegiance to the icon of fluid and accurate congressional response to disfavored Court decisions by noting that he and the *Patterson* majority were more than willing effectively to overrule, or at least undermine, other civil rights precedent that seemed to enjoy the continuing favor of Congress. For example, another 1989 case, *Wards Cove Packing Co. v. Atonio*<sup>10</sup> severely restricted "disparate impact" cases under title VII of the 1964 Civil Rights Act, a theory first given Supreme Court approval in *Griggs v. Duke Power Co.*<sup>11</sup> and buttressed by much intervening Congressional activity. Justice Kennedy and the *Wards Cove* majority seemed considerably less enamored of precedent at that time, at least the precedent of

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7. Ironically, conservative judges such as Justice Kennedy have been some of the harshest critics of overly romanticized notions of American politics. See, e.g., *United States v. Margiotta*, 688 F.2d 108, 142 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) (Winter, J., dissenting) (legal standard for applying mail fraud statute to dishonest politicians "amounts to little more than the rhetoric of sixth grade civics classes").

8. *Patterson* was decided on June 15, 1989, near the end of the Court's decisionmaking Term. Although the Court's Term does not officially end until fall, the Court has historically attempted to complete decisions on pending cases prior to the July 4 holiday. Like the other cases targeted by the Act, *Patterson's* analysis falls short of the Court's finest work, with both majority and dissenting opinions often infused with more combative tone than persuasive analysis. I believe it is no accident that nearly all of these cases were announced in June, under undoubted pressure to finish these.

9. 491 U.S. at 189 (Brennan, J., concurring and dissenting in part with Marshall, Blackmun and Stevens, JJ.). The four-judge minority agreed with the majority that § 1981 reaches private action and that the important case so holding, *Runyon v. McCrary*, 427 U.S. 160 (1976), should not be overruled. They dissented on the question of whether § 1981 applied to contract discrimination after initial contract formation.

10. 490 U.S. 642 (1989).

11. 401 U.S. 424 (1971).

*Griggs* and other cases giving a more expansive meaning to civil rights legislation.<sup>12</sup> Rather, the *Wards Cove* majority sought shelter in the more recent but perhaps contradictory—and less congressionally approved—cases placing a more restrictive construction on civil rights legislation.<sup>13</sup>

In this article, I suggest that skepticism is justified about both the Court's rose-colored view of politics and its inconsistent reverence for precedent. However, there lies a common thread in the 1989 views of the conservative justices, who usually commanded a majority in the cases the failed 1990 Act sought to reverse.<sup>14</sup> In all these instances, the "working majority" of

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12. See *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) (finding title VII not to prohibit voluntary affirmative action plans despite collateral adverse affect on whites and language in title VII forbidding any use of race in hiring and promotion); *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) (requiring defendant employers in title VII action to demonstrate business necessity to justify continued use of facially neutral employment criteria with disparate impact).

13. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (requiring greater specificity in plaintiff's proof of causation in disparate impact cases, in effect narrowing range of cases in which plaintiffs can prevail under disparate impact theory).

14. The Act was designed to overrule parts of seven of the Court's 1989 decisions: *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 225 (1989); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701 (1989); *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989). The Act also sought to overrule in part two decisions from earlier Court Terms: *Crawford Fitting v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987) (holding in an employment discrimination case that expert witness fees are limited to statutory limit); *Evans v. Jeff D.*, 475 U.S. 717 (1986) (holding that defendant's attempt to condition settlement of civil rights claim upon waiver of plaintiff's right to counsel fees under 42 U.S.C. § 1988 did not violate statute). Supporters of the Act objected to the *Hopkins* decision in that it allowed title VII defendants to argue that, notwithstanding discrimination, the plaintiff employee would have been discharged in any event. Nonetheless, *Hopkins*, authored by Justice Brennan, is generally seen by civil rights proponents as less of a setback than the other 1989 cases in that it recognized that plaintiffs could make out a violation of title VII based on gender stereotyping. The other cases are usually regarded by commentators as significant setbacks for civil rights plaintiffs, primarily decided by narrow majorities of Republican appointees and Justice White, with dissents by what were in 1989 regarded as the Court's most liberal members (Justices Brennan, Marshall, Blackmun and Stevens).

the Rehnquist Court<sup>15</sup> decided issues of inertia in favor of those urging the more restrictive view of civil rights law. By this, I mean that the Court decided its controversial 1989 cases so that those favoring a more expansive view of the civil rights laws could ultimately prevail only if they were able to surmount all obstacles to enacting legislation. By contrast, those backing the restrictive view were given the benefit of inertia, even if it required some precedential backpedaling by the working majority. As beneficiaries of the Court's approach, opponents of civil rights law could adopt a defensive posture, which normally entails a greater likelihood of success.<sup>16</sup>

Although there is something comforting about maintaining a presumptive burden in favor of the status quo (*i.e.*, those who seek change must demonstrate the need for change), I find this

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15. By working majority, I mean the nucleus of Justices who have, for the most part, constituted the majority in close and politically charged cases during the Chief Justice's tenure: Chief Justice Rehnquist and Justices White, O'Connor, Scalia, and Kennedy. During this same period, the "loyal opposition" in such charged, close cases has been Justices Brennan, Marshall, Blackmun, and Stevens. To be sure, the working majority is not monolithic. See *Texas v. Johnson*, 491 U.S. 397 (1989) (Justice Kennedy joins loyal opposition in majority opinion holding Texas criminal statute banning flag burning to violate first amendment); *Morrison v. Olson*, 487 U.S. 654 (1988) (Justice Scalia the lone dissenter in case upholding constitutionality of independent counsel law). Justices White and O'Connor, in particular, have shown significant independence and unpredictability. See Davis, *Power on the Court: Chief Justice Rehnquist's Opinion Assignments*, 74 JUDICATURE 66, 71 (Aug.-Sept. 1990) (Chief Justice assigned more opinions to Justice White than to himself, assigned important opinions with less even distribution than predecessor Chief Justices, suggesting that assignments to Justice White were tactically placed to ensure cohesion of working majority); Taylor, *Swing Vote on the Constitution*, AM. LAW. 66 (June 1989) (noting Justice O'Connor's position at Court's ideological center and importance to both working majority and loyal opposition as potential swing vote).

16. It is normally harder to change the status quo than to maintain it. In litigation, the accusing party bears the burden of persuasion, sometimes a burden to prove entitlement to relief by "clear and convincing evidence" or "beyond a reasonable doubt." In the legislative arena, the weight of scholarship seems to suggest that those with a stake in legislation, particularly organized interest groups, are more effective at blocking legislation than in obtaining new or amended legislation. See K. SCHOLZMAN & J. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 317 (1986). For a brief but excellent introduction to interest group literature, see W. ESKRIDGE & P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 46-64 (1987) [hereinafter W. ESKRIDGE & P. FRICKEY].

approach inappropriately applied to the civil rights cases by the Rehnquist Court's working majority. First, the Court's assignment of inertial burdens in the civil rights cases is at odds with prevailing approaches to statutory interpretation. Second, I am persuaded (as were the dissenters) that the majority misread statutory language and case precedent to make the status quo seem more restrictive of civil rights claims than was actually the case. At a minimum, these were closer questions than acknowledged by the majority. Third, the Court unfairly assigned the inertial burden to Congress and the proponents of change. Fourth, this approach was particularly inapt for construction of the civil rights laws, which by design were to grant special protections to disempowered groups.<sup>17</sup>

#### I. THE LEGAL TOPOGRAPHY OF STATUTORY INTERPRETATION

No one theory or school of thought consistently dominates judicial application of statutes, but the basic methodology employed by courts seems well-established if not always well-defined. Most mainstream judges and lawyers faced with a statutory construction task will look at (although with varying emphasis) the text of the statute, the legislative history of the provision, the context of the enactment, evident congressional purpose, and applicable agency interpretations, often employing the canons of construction for assistance.<sup>18</sup> Although orthodox judicial thought suggests that the judge's role is confined to discerning textual meaning or directives of the enacting legislature,<sup>19</sup> courts also often examine subsequent legal developments and the overall legal terrain in rendering an interpretation.<sup>20</sup>

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17. See generally J. ELY, *DEMOCRACY AND DISTRUST* (1980) (arguing, on grounds of fidelity to democratic ideals, that unelected courts should not exercise activist constitutional review of properly enacted laws unless such laws work to the disadvantage of identifiable persons or entities denied meaningful access to the democratic political process).

18. See *Amgen, Inc. v. United States Int'l Trade Comm'n*, 902 F.2d 1532, 1538 (Fed. Cir. 1990); W. ESKRIDGE & P. FRICKEY, *supra* note 16, at 639; Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 451-62 (1990) [hereinafter Sunstein, *Regulatory State*].

19. See R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 7-9 (1975); Farber, *Statutory Interpretation and Legislative Supremacy*, 78



Despite general similarities, lawyers, judges, and scholars continue to debate the supreme construct for statutory interpretation, although the parameters of the various schools are often blurred. Adherence to particular approaches seems to vary with the results desired.<sup>21</sup> Amid the debated and shifting positions, several distinct approaches emerge: textualism, intentionalism, purposivism, dynamism, and eclectic pragmatism. The most established schools of interpretative thought are textualism, intentionalism, and purposivism. In addition, although it has yet to result in a particular "method" of statutory construction, interest group/public choice analysis often illuminates statutory inquiry.

### *Textualism*

Textualists place great emphasis on the language of the statute and argue for a "plain meaning" approach to construction, one that forbids consideration of other sources of meaning where the statute's text is deemed sufficiently clear.<sup>22</sup> Although one

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GEO. L.J. 281 (1989); Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 22 (1988) (major interpretative schools "premised on legislative supremacy and separation of powers").

20. See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 223 (1987) (finding growth of popularity in arbitration and perceived improvements in arbitration important in refusing to find exception to arbitrability of claims under Securities Exchange Act of 1934); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 408 (1970) (court influenced by evolution of tort law regarding wrongful death claims in holding that modern federal maritime laws support such claims). The Supreme Court, as the highest court, can afford to be more adventurous in this realm.

21. Compare *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 508 (1979) (Justices Brennan, Marshall, Blackmun, White argue in dissent for giving effect to original legislative intent to give NLRB jurisdiction over working conditions at church-run schools) with *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 207 (1979) (Justices Brennan, Stewart, Marshall, Blackmun, White find original legislative intent only a minor factor in rendering perceived correct interpretation of whether title VII permits affirmative action plans that take race into account).

22. See *Caminetti v. United States*, 242 U.S. 470 (1917) ("Where the language [of a statute] is plain and admits of no more than one meaning, the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion."); Note, *Intent, Clear Statements & the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982).

scholar has implicitly criticized the narrowness of the approach by labeling it "statutory nominalism,"<sup>23</sup> this school has many adherents, particularly among conservative judges<sup>24</sup>—which means it has many adherents in today's bench, more than half of which was appointed by former President Reagan or President Bush. Critics contend the textual approach has substantial inherent limits for resolving many cases.<sup>25</sup> Much statutory language admits of no plain meaning and requires resort to other data for interpretation.<sup>26</sup> This, of course, does not stop courts from declaring even hopelessly ambiguous language to have an inarguably plain textual meaning.<sup>27</sup> Not surprisingly, some criticize

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23. See Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1069, 1078 (1989) [hereinafter Eskridge, *Public Values*]. Prof. Eskridge and others have noted that current textualist fashion differs from the traditional "plain meaning" rule in that new textualists are both quicker to find clear meaning and less willing to view non-textual interpretive aids as legitimate. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621, 650-56 (1990) [hereinafter, Eskridge, *Textualism*]; 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, 285 (1990); Farber & Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 445 (1988) ("Scalia-led attack upon the use of legislative history" differs from earlier concerns in vehemence, use of unsupported and incorrect factual assumptions, admitting of little or no role for bona fide indices of legislative intent extrinsic to text).

24. See Wald, *supra*, at 281 (textualism's "spiritual leader is Justice Scalia, but others, in particular Justice Kennedy, have taken up the torch"). See also R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 289 (1985).

It is not an accident that most "no constructionists" are political liberals and most "strict constructionists" are political conservatives. The former think that modern legislation does not go far enough and want the courts to pick up the ball that the legislators have dropped; the latter think it goes too far and want the courts to rein the legislators in. Each school has developed interpretative techniques appropriate to its political ends.

*Id.*

25. But see Wald, *supra* note 23, at 286 (finding advance of textualism more rhetorical than real, with only five 1988-89 Term Supreme Court decisions involving use of legislative history to overcome prominently adverse text).

26. See *United States v. Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting) ("[The] notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification."). W. ESKRIDGE & P. FRICKEY, *supra* note 16, at 590-95; Wald, *supra* note 23, at 302 ("People frequently do not say precisely what they mean.").

27. See, e.g., *Bankamerica Corp. v. United States*, 462 U.S. 122, 128

textualism as occasionally leading only to result-oriented analysis, since one person's ambiguity is another's plain meaning.<sup>28</sup>

### *Intentionalism*

Intentionalism seeks to ascertain the intended meaning of the provision held by the legislature that enacted the statute.<sup>29</sup> Whether one terms this an "original intent" jurisprudence<sup>30</sup> or the less connotatively attractive "archeological" approach,<sup>31</sup> it involves looking at the text, legislative history of the statute, immediate purpose of the enacting body, and politico-legal climate at the time of the statute's passage.<sup>32</sup> Although like the

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(1983), in which the Court stated that the following statutory passage clearly did not forbid interlocking directorates between a bank and an industrial corporation:

No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than \$1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers . . . if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors . . . .

*Id.* Justice White had a better grip on linguistic reality in stating that "it escapes me how either the Court or the litigants can seriously maintain that the meaning of § 8 is unambiguous." *Id.* at 141 (White, J., dissenting).

28. See, e.g., *Welch v. State Dep't of Transp.*, 483 U.S. 468, 477-78 (1987) (Brennan, J., dissenting) (arguing that the venerable case of *Hans v. Louisiana*, 134 U.S. 1 (1890), misconstrued the meaning of text of eleventh amendment while purportedly taking a plain meaning approach; utilizing legislative history to support different textual reading of the amendment). See also Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 543, 592 n.213 (1988) ("Literalism . . . is often a subterfuge for judicial activism.").

29. See *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 42-45 (1989); *Train v. Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1, 23-25 (1976); A. SUTHERLAND, *STATUTORY CONSTRUCTION* (N. Singer & C. Sands 4th ed. 1985) [hereinafter A. SUTHERLAND, *STATUTORY CONSTRUCTION*].

30. See Wald, *supra* note 23, at 301 (D.C. Circuit Judge states, "I want to advance rather than impede or frustrate the will of Congress. . . . Congress makes the laws, I try to enforce them as Congress meant them to be enforced.").

31. See Eskridge, *Politics Without Romance: Implications of the Public Choice Movement for Statutory Construction*, 74 VA. L. REV. 275 (1988) [hereinafter Eskridge, *Politics Without Romance*]; Aleinikoff, *supra* note 19, at 22.

32. See *R. Dickerson*, *supra* note 19, at 87-102; A. SUTHERLAND, *STATU-*

textualist approach the intentionalist view purports to be one limiting judicial power, it differs from the textualist view in that it regularly resorts to extrinsic aids in construction. Intentionalism differs from the other, seemingly more judicially active approaches, however, in that it focuses on historical extrinsic material and tends to eschew attempts to "update" a statute.

An important variant of intentionalism seeks not so much to ascertain legislative intent but rather seeks to interpret a statute as the originally enacting legislature would have, had it been faced with the instant dispute. This view assumes that most difficult questions of statutory application involve situations not envisioned at all by the enacting legislature, but that the enacting body, if it had confronted the instant situation, would have held some view as to the statute's application to the matter. The most noted modern proponent of this approach has been Judge Richard Posner, who urges a type of "imaginative reconstruction" in which reviewing courts attempt to decide statutory issues as the enacting legislature would have wanted them decided.<sup>33</sup> However, the approach has deeper roots, including use by Judge Learned Hand.<sup>34</sup> It is tacitly but frequently used by courts today, as judges often find "legislative intent" dispositive when the legislature in question seemingly gave no consideration to the matter in dispute.<sup>35</sup> Although other scholars argue that reconstructing original intent to fill gaps or resolve ambiguities is too problematic,<sup>36</sup> many courts occasionally appear

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TORY CONSTRUCTION, *supra* note 29, § 45.05, at 20-21; Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325-26 (1990) [hereinafter, Eskridge & Frickey, *Practical Reasoning*].

33. R. POSNER, *supra* note 24, at 286-93; Posner, *Statutory Interpretation—In the Classroom & in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983).

34. W. ESKRIDGE & P. FRICKEY, *supra* note 16, at 608.

35. See, e.g., *Leo Sheep Co. v. United States*, 440 U.S. 668, 678-88 (1979) (finding no federal government easement reserved in government granted lands based on historical context). Although two scholars observed "the unanimous Court is obviously following the approach of Judge Hand and Judge Posner—putting oneself in the mindset of the 1862 Congress," W. ESKRIDGE & P. FRICKEY, *supra* note 16, at 707, the *Leo Sheep* opinion reads as though it were declaring an archaeologically unearthed congressional intent.

36. Sunstein, *Regulatory State*, *supra* note 18, at 433 n.99 (imaginative reconstruction "suffers from difficulties" in addition to those facing pure originalism: "legislature may have intended that the statute not contradict contemporary values when applied to unforeseen situations"; "would perpetuate

to be applying this approach rather than the strict intentionalism courts often profess to apply.<sup>37</sup>

### *Purposivism*

Purposivism, an approach often associated with Professors Henry Hart and Albert Sacks,<sup>38</sup> views all legislative acts as purposive and seeks to interpret statutes so as to further those purposes, avoiding absurd results that might obtain from literal readings of text or confusing elements of legislative history.<sup>39</sup> Although related, purposivism differs from intentionalism in that it focuses more on the legislature's general goals in enacting the statute and the appropriate result in the case at hand, rather than seeking a specific indication of legislative intent.

Although the central assumption of purposivism—rational legislatures seeking the public interest<sup>40</sup>—has fallen under

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anachronistic views" by failing to adapt law to changed circumstances where such adaptation would not violate norm of legislative supremacy; "background norms of interpretation play an inevitable part in the process, and those norms cannot readily be captured in the notion of imaginative reconstruction"); Eskridge & Frickey, *Practical Reasoning*, *supra* note 32, at 330-31 (same list of criticisms); Aleinikoff, *supra* note 19, at 26 n.31 (criticizing Posnerian view as setting nearly impossible task of accurate empathy with or mind-reading of past legislatures); Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983) (finding notion of legislative intent too nebulous to support either originalism or modified originalism) [hereinafter Easterbrook, *Statutes' Domains*].

37. *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979) (finding no federal government easement reserved in government granted lands based on historical context); *Confederated Tribes of Yakima Nation v. County of Yakima*, 903 F.2d 1207, 1214-15 (9th Cir. 1990) (repudiation of statutory policy by Congress does not undermine unpealed law, which courts must enforce as intended by enacting Congress).

38. See H. HART & A. SACKS, *THE LEGAL PROCESS: MATERIALS IN THE MAKING AND APPLICATION OF LAW* (1958). See also Eskridge & Frickey, *Legislation Scholarship & Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 693 (1987).

39. After having awkwardly used the term "purposivism" in class, I am comforted to see it in the legal literature. Eskridge & Frickey, *Practical Reasoning*, *supra* note 32, at 332 (labeling Hart & Sacks legal process approach as "purposivism").

40. W. ESKRIDGE & P. FRICKEY, *supra* note 16, at 246 (Hart & Sacks "assumed that the legislative process is a public-seeking one and that statutes will embody rational public policy.").

increasing attack,<sup>41</sup> it remains a major mode of statutory interpretation.<sup>42</sup>

I include as purposivist the "new" legal process that has emerged. While backing away from claims of pure neutrality, clearly discernible statutory purpose, or unarguably rational results capable of replication in case after case, the new legal process adherents argue that lawmaking is as much the ongoing product of an interpretative community as it is isolated statutory enactment or administrative agency pronouncement.<sup>43</sup>

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41. See J. GWARTNEY & R. WAGNER, *Public Choice and the Conduct of Representative Government*, in *PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS* 7 (1988) ("Public choice analysis is to governments what economic analysis is to markets."); D. MUELLER, *PUBLIC CHOICE* 1 (1979) ("The basic behavioral postulate for public choice, as for economics, is that man is an egoistic, rational, utility maximizer.").

Critical legal studies writers have also attacked the concept of neutrality, often finding supposedly neutral rules to mask power structures. See M. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 2-5 (1987) (Critical writers have generally found legislative and judicial application of inherently contradictory or bipolar concepts weighted in favor of those with property, money, or physical power.); Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1152 (1985) (attacking concept of neutrality, finding almost all propositions or rules internally contradictory).

Critics of both left and right today see politics as a complex struggle for power in which certain interests are better positioned to accomplish their ends, even in the face of popular sentiment to the contrary. See M. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF THE POLITICAL PROCESS* (1981); T. LOWI, *THE END OF LIBERALISM* (2d ed. 1979); M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (2d ed. 1971); E. SCHATTSCHNEIDER, *THE SEMI-SOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* (1960); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

42. See Sunstein, *Regulatory State*, *supra* note 18, at 440 (employing notion of institutional competence to argue for more active judicial role in statutory construction and to retreat from version of legislative supremacy paradigm that makes courts too much the agents of legislatures).

43. W. ESKRIDGE & P. FRICKEY, *supra* note 16, at 333. But see M. KELMAN, *supra* note 41, at 14:

Even if such a unified [interpretative] community did exist, which it doesn't, and even if everyone in it didn't carry within him contradictory maxims and ideals that are available to resolve every controversy, the "community" would consist of a bunch of stuffy old privileged white males, whose opinions would scarcely be worth tossing onto a trash heap.

Like textualism and originalism, purposivism has roots far deeper than modern legal writings.<sup>44</sup> Purposivism might well be summarized by the classic English cases that call for courts to locate the "mischief" that prompted passage of the statute and then to advance the remedy roughly outlined in the law.<sup>45</sup>

### *Dynamism*

Adherents of evolutive or dynamic statutory interpretation<sup>46</sup> attempt to interpret a statute beginning with the meaning intended by the legislature that drafted it, but also as transformed through the crucible of intervening legal developments in order to render a meaning as consistent as possible with text and original intent but one that will fit well with other statutes, current case law, and public norms.<sup>47</sup> One author describes his version of evolutive

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If one takes a less cynical view, classification nonetheless remains difficult in that "interpretative community consensus" can also be seen as a form of dynamism or eclectic pragmatism.

44. See Macey, *Promoting Public-Regarding Registration Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 250 (1986) (referring to purposivism as the "traditional" American judicial approach to statutory construction).

45. Heydon's Case, 30 Co. 7a, 76 Eng. Rep. 637 (Exchequer 1584).

46. Prof. Eskridge has popularized the term "dynamic" statutory interpretation and has outlined the most well-developed version of this evolutive approach. See Eskridge, *Overruling Statutory Precedents*, *supra* note 6, at 1385-91; Eskridge, *Dynamic Interpretation*, 135 U. PA. L. REV. 1479, 1482-87 (1987) [hereinafter, Eskridge, *Dynamic Statutory Interpretation*]. See also W. ESKRIDGE & P. FRICKEY, *supra* note 16, at 278 (addressing "evolutive" approaches) and at 613 (addressing "dynamic" approach). More recent writings of Prof. Eskridge could be read to suggest that he views evolutive analysis as a subset of the eclectic pragmatism school. See Eskridge & Frickey, *Practical Reasoning*, *supra* note 32, at 345-54.

Whatever the terminology, however, many have long argued that judicial interpretation of law should keep pace with the times. See, e.g., Elliott, Ackerman & Millian, *Toward a Theory of Statutory Evolution*, 1 J.L. ECON. & ORG. 313 (1985); Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799 (1985); Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949); Blaustein & Field, "Overruling" *Opinions in the Supreme Court*, 57 MICH. L. REV. 151 (1958).

47. See Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 360-62 (1989) (summarizing dynamic statutory perspectives of Prof. Eskridge and Dean Guido Calabresi in A COMMON LAW FOR THE AGE OF STATUTES (1982)) [hereinafter Zeppos]. Public norms or values are fairly

interpretation as a "nautical" approach in which courts set sail on a course mapped by the legislature but adjust the voyage in response to new information.<sup>48</sup>

The evolutive approach is traditionally favored by those on the bench regarded as "liberals"<sup>49</sup> and is often attacked as "judicial activism" by those supporting the textualist or intentionalist view.<sup>50</sup> Nonetheless, it is a widely accepted approach<sup>51</sup> and is often used by judges described by themselves or others as moderate or conservative.<sup>52</sup> Conservatives, however,

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ascertainable, widely and firmly held societal beliefs (e.g., treat like cases alike, punishment should fit the crime, individual justice matters more than technical legality) that may legitimately influence statutory interpretation when more textual, commanding factors do not require a contrary result. See Eskridge, *Public Values*, *supra* note 23. Accord Sunstein, *Regulatory State*, *supra* note 18, at 460-62.

48. See Aleinikoff, *supra* note 19, at 57-61.

49. See R. POSNER, *supra* note 24, at 269. See also Gora, *Justice William J. Brennan Jr.*, 72 A.B.A. J. 19, 21 (June 15, 1986) (Justice Brennan: "I interpret the Constitution the only way I can, as a 20th Century American."). It appears that Justice Brennan used a similar evolutive approach in construing statutes. See, e.g., *Smith v. Wade*, 461 U.S. 30 (1983) (interpreting 42 U.S.C. § 1983 to permit awards of punitive damages, in part because of legal and social evolution easing path to recovery of punitive damages as means of deterring and punishing legal wrongs); *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) (reading title VII, despite seeming literal language barring race-conscious affirmative action program, to permit such programs because of evolving views as to what means are necessary to redress race discrimination).

50. See, e.g., Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 375 (use of extra-statutory information to refine statutory meaning inconsistent with democratic theory); Easterbrook, *Statutes' Domains*, *supra* note 36 at 533; Horack, *Congressional Silence: A Tool of Judicial Supremacy*, 25 TEX. L. REV. 247 (1947).

Among jurists, Justice Hugo Black is thought the most illustrative proponent of this view. See, e.g., *Boys Mkts., Inc. v. Retail Clerks Union*, Local 770, 398 U.S. 235, 256-59 (Black, J., dissenting) (judicial change in interpretation usurps Congress's legislative powers and violates Article I of the Constitution). See also Ely, *supra* note 17, at 4-8.

51. See Zeppos, *supra* note 47, at 412 ("What Calabresi and Eskridge have shown is that in many cases, originalism never really served as the actual basis for deciding statutory cases. For years, judges have been profoundly nonoriginalist in deciding cases but have used originalism as a means for justifying their results.").

52. See Eskridge, *Overruling Statutory Precedents*, *supra* note 6, at 1389 n.147.



are (or at least profess to be) less likely to engage in the approach unless a textual or originalist meaning is impossible to ascertain fairly, while liberals are less tenacious in searching for a textualist or intentionalist answer.<sup>53</sup> Some appear to accept evolutive jurisprudence, so long as it is done quietly.<sup>54</sup>

### *Eclectic Pragmatism*

Although not sounding in grand unifying theory, the least defined but perhaps most used school of statutory construction may be a blending of the more venerable approaches of textualism, intentionalism, and purposivism. For lack of a better term, I label the mixed approach eclectic pragmatism, although the term "practical reasoning" in the writings of some scholars<sup>55</sup> essentially encompasses the approach I envision. By eclectic, I mean that the statutory interpreter willingly uses insights from all three of the previously discussed schools, as may be apt in the individual case, to resolve a statutory question. By pragmatic, I mean that the interpreter is more concerned with a sound and equitable case result than achieving a theoretical consistency or advancing a world view.<sup>56</sup> The goal of statutory interpretation is not to render formalistically consistent decisionmaking so much as it is to render acceptably wise and fair decisionmaking consistent with the prevailing political construct. In addition, the eclectically pragmatic approach is more functional than formal and attempts to appreciate the practical consequences of the interpretation for future litigation under the statute being construed. Many judges use an approach of eclectic pragmatism to interpret statutes,<sup>57</sup> which accounts for a good deal of the

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53. Even though finding courts, particularly the Supreme Court, to be applying a variegated approach to statutes, Profs. Eskridge & Frickey conclude that the evolutive factor has been given inadequate weight by the courts. See Eskridge & Frickey, *Practical Reasoning*, *supra* note 32, at 371-73.

54. See Zeppos, *supra* note 47.

55. See Eskridge & Frickey, *Practical Reasoning*, *supra* note 32, at 323.

56. Both purposivism and evolutivism have the additional advantage of appealing to the judicial ego in that both posit an important role for the judiciary in "making sense" of the acts of other government actors.

57. See Eskridge & Frickey, *Practical Reasoning*, *supra* note 32, at 321-22 ("Judges' approaches to statutory interpretation are generally eclectic, not inspired by grand theory, and this is a good methodology. . . . [W]e find an underlying coherence in the Supreme Court's practices of statutory interpre-

perceived inconsistency in statutory construction opinions, although lack of intellectual rigor, partisanship, and subterfuge also account for a large share of inconsistency as well.<sup>58</sup>

### *Less Fettered Inquiry*

#### *Free Inquiry*

Although scholars have identified a separate school of "free inquiry" statutory interpretation used in continental Europe,<sup>59</sup> few in the United States argue for completely unrestrained judicial choice in assigning meaning to statutory terms.<sup>60</sup> The approach closest to free inquiry is found where commentators argue for reading statutes to emphasize fairness, equality, aid to the disempowered, or aid to the politically favored.<sup>61</sup> Although this approach is less moored to text, legislative intent, and other

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tation."); Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431, 450 (1989) (pragmatic approach is "taken by the best judges, and it is thus an attainable ideal"). See, e.g., *Amgen, Inc. v. United States Int'l Trade Comm'n*, 902 F.2d 1532, 1538 (Fed. Cir. 1990) (courts should examine text, legislative history, purpose in applying law to instant dispute).

58. See Eskridge & Frickey, *Practical Reasoning*, *supra* note 32, at 345-50, 364-78 (finding aspects of practical reasoning model in several recent Supreme Court cases though they were incorrectly applied or hindered by Court's reluctance to discuss practical reasoning factors, especially evolutive aspects, with candor).

59. See, e.g., W. ESKRIDGE & P. FRICKEY, *supra* note 16, at 329-30 (citing F. GENY, *METHOD D'INTERPRETATION ET SOURCES EN DROIT PRIVE POSITIF* (1899)); Zweigert & Kötz, *Statutory Interpretation—Civilian Style*, 44 TUL. L. REV. 704 (1970).

60. But see Sunstein, *Regulatory State*, *supra* note 18, at 438-39 ("[C]ourts should be authorized to depart from the ordinary or original meaning [of a statute] and to press ambiguous words in particular directions if the context suggests that this would lead to superior outcomes." (footnote omitted)).

61. This perspective is perhaps most often reflected in writings of Critical Legal Studies (CLS) authors. See, e.g., Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986); Singer, *The Player & the Cards: Nihilism & Legal Theory*, 94 YALE L.J. 1 (1984); Peller, *supra* note 41, at 1152. For criticisms of the CLS perspective, see Chow, *Trashing Nihilism*, 65 TUL. L. REV. 221 (1990).

factors used by evolutionists to assess the legal topography, it is not a completely free inquiry. At a minimum, it seeks to achieve a result consistent with a prevailing politico-philosophical construct.<sup>62</sup> Nonetheless, it is more openly result-oriented and thus comes close to being a free inquiry approach.<sup>63</sup>

### *Statutes as Common Law*

Dean Guido Calabresi became something of a one-man interpretative school when he proposed that courts treat statutes not as delphic writ but "merely" the equivalent of judicial precedent.<sup>64</sup> Under this approach, a reviewing court would apply the statute as written, including evidence of legislative intent as part of the writing of the statute, so long as the statute is well-designed, fits with current legal topography, and does not bring an undesirable result.<sup>65</sup> Where the statute, however clear, is unrepresentative of current legal or political consensus, the court can overrule or modify the statute just as a court may modify or overrule common-law precedent.<sup>66</sup> Thornier questions of application emerge when the impact of the statute (as enacted in its original context) is unclear or the legal landscape difficult to determine. In these instances, the Calabresian judge behaves much like an ordinary court applying other schools of construction or conventional guides to interpretation in order to resolve gaps, conflicts, and ambiguities of statutory application. The novel trump card of common-law treatment of statutes is a potentially powerful but infrequently used tool.

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62. See W. ESKRIDGE & P. FRICKEY, *supra* note 16, at 329-30; Hutchinson, *Democracy and Determinacy: An Essay on Legal Interpretation*, 43 U. MIAMI L. REV. 541, 573-76 (1989).

63. See Kennedy, *supra* note 61, at 526-27.

64. See G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). Most commentators criticized Calabresi with relish even while praising the intellect and breadth of the work. See, e.g., Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213 (1983); Hutchinson & Morgan, *Calabresian Sunset: Statutes in the Shade*, 82 COLUM. L. REV. 1752 (1982). Nonetheless, it is a distinct school of thought both on its own terms and because the Calabresian perspective has both defined and generated debate about statutory interpretation. See Zeppos, *supra* note 47, at 357-60.

65. See G. CALABRESI, *supra* note 64, at 163-66.

66. *Id.*

*An Aside About Covert Operations*

Commentators frequently see courts as lacking candor and moving in partisan or result-oriented directions under the guise of applying neutral doctrine. Over time, the criticism of the accusers has shifted. During the legal realist era (approximately 1920-45), most critics saw a conservative bench hiding behind a formalist facade.<sup>67</sup> During the Warren Court (1954-69), the focus shifted, with conservatives accusing the bench of having a hidden liberal agenda pursued through tortured construction of the Constitution and statutes.<sup>68</sup> In most of the public arena, conservatives have continued to keep up the rhetorical pressure, even though the Warren Court has been gone for more than twenty years and the current Rehnquist Court and federal bench can hardly be seen as distinctly more leftist than society or Congress—although it may well be more liberal than the executive branch and many state legislatures. Within the legal academic community, the current accusers (coming from the left) find courts again rendering conservative decisions via subterfuge.<sup>69</sup> It seems safe to say that judges of all political hues often conduct a covert operation of sorts, rendering decisions that further their preferred agendas while leading the establishment to believe that the decisions resulted from mere application of the required law.<sup>70</sup>

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67. See Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930). Examples of judicial formalism favoring the status quo abound in American law. See, e.g., A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down New Deal legislation establishing forty-hour work week, minimum wage, ban on child labor, and right to collective bargaining in poultry industry as unconstitutional impediment upon American business); *Lochner v. New York*, 198 U.S. 45 (1905) (striking down state limit on hours worked per week as violative of substantive due process of employers and liberty interests of employers and employees); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (commerce clause construed not to allow Congress to regulate manufacturing because manufacturing not the same as commerce); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869) (holding that the buying and selling of insurance does not constitute commerce subject to commerce clause).

68. See Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

69. See W. ESKRIDGE & P. FRICKEY, *supra* note 16, at 329-30; Ross, *Reaganist Realism Comes to Detroit*, 1989 U. ILL. L. REV. 399.

70. See Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. &

*An Afterward About Overlap*

There exists considerable overlap among both the tools of the various approaches and in their joint use. Two or more statutory schools may compete for the hearts and minds of individual scholars or judges. For example, Judge Posner is seen both as an intentionalist who urges "imaginative reconstruction" of legislative intent in difficult cases, but also as one supporting an economic analysis/public choice perspective.<sup>71</sup> Judge Posner admits his interpretative views have been eclectic, and perhaps evolutionary in that he now suggests a less foundationalist, pragmatic approach.<sup>72</sup>

In similar fashion, prominent judicial proponents of particular statutory schools are frequently found employing other schools of analysis. For example, Justices Kennedy and O'Connor as well as Chief Justice Rehnquist are often seen as textualists, but they also invoke legislative background materials to bolster an intentionalist or purposivist approach to decisions.<sup>73</sup> Justice Scalia

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HUM. 201 (1990) (different assumptions, starting points, and rhetorical styles used to mask true bases for different court outcomes, using flag salute cases as examples); Zeppos, *supra* note 47, at 362-79 (using recent bank regulation cases as examples).

71. See Posner, *Economics, Politics & the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982); Posner & Landes, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875 (1975).

72. See Posner, *supra* note 57, at 449-50:

Legislation scholarship has become cacophonous. I admit to having contributed to the noise. In a series of articles written mainly in the 1970s I pushed the economic interest-group line hard. . . . More recently I proposed renewed reliance on the method of imaginative reconstruction; more recently still, I suggested a command theory of interpretation; still more recently . . . a pragmatic approach.

*Id.* at 434.

73. See, e.g., *Gomez v. United States*, 490 U.S. 858 (1989) (Justice Kennedy joins unanimous Court in finding U.S. Magistrate presiding over jury selection improper because not intended by Congress without consent of the parties); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (O'Connor, J., concurring in judgment) (sexual stereotyping may make out title VII claim, relying on legislative history, with intentionalist orientation); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (per Rehnquist, C.J.; legislative history suggests Congress did not intend jurisdiction in instant case under Foreign Sovereign Immunities Act). See also Eskridge & Frickey, *Practical*

is the most rigid textualist but has accepted a host of Court results where the majority applies intentionalist or purposivist reasoning.<sup>74</sup> Judge Easterbrook has alternately espoused something resembling strict textualism for private-regarding statutes<sup>75</sup> and a purposivist method for public-regarding legislation.<sup>76</sup> Justice Brennan's opinions often took something of a "kitchen sink" approach, marshalling almost every major school where it supported his disposition of the matter, but primarily utilizing evolutive, intentionalist, and purposivist methods.<sup>77</sup>

### *The Brooding but Ignored Presence of Interest Group Analysis*

A rich body of literature has emerged discussing the impact of interest group activity on lawmaking.<sup>78</sup> A good deal of this writing is written from the "public choice" perspective, in which the author applies economic concepts such as individual utility

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*Reasoning*, *supra* note 32, at 350 n.115 ("Chief Justice Rehnquist will sometimes disregard text or legislative history [but not both] to reach results supported by current policy or fairness.").

74. See Wald, *supra* note 23, at 288-300.

75. See Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984) [hereinafter Easterbrook, *The Court and the Economic System*].

76. *Id.* at 14-15. See also W. ESKRIDGE & P. FRICKEY, *supra* note 16, at 612-13 (comparing Easterbrook writings under the provocative subheading "Easterbrook v. Easterbrook").

77. See, e.g., *Smith v. Wade*, 461 U.S. 30 (1983) (employing both intentionalist and evolutive approaches to find punitive damages recoverable under § 1983). Compare *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (Justice Brennan takes strong textualist and intentionalist approaches) with *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) (Justice Brennan relies heavily on evolutive and purposive approaches). See also Eskridge & Frickey, *Practical Reasoning*, *supra* note 32, at 350 n.114 ("Justice Brennan has sometimes even adopted a textualist perspective—*contra Weber*—in cases where a clear text supports a result at odds with contextual evidence and policy considerations.").

78. See, e.g., R. DAHL, *DILEMMAS OF A PLURALIST DEMOCRACY* (1986); K. SCHLOZMAN & J. TIERNEY, *supra* note 16; J. KINGDON, *AGENDA, ALTERNATIVES, AND PUBLIC POLICIES* (1984); M. HAYES, *supra* note 41; T. LOWI, *supra* note 41; M. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (1977); R. RIPLEY, *CONGRESS: PROCESS AND POLICY* (1977); D. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974); M. OLSON, *supra* note 41; J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* (1962).

maximization and presumed rationality to predict that political actors, particularly legislators, will vote (or avoid voting) in a manner designed to increase their job security, wealth, or personal power and prestige rather than to reflect a particular ideology or policy assessment.<sup>79</sup>

Public choice theory largely proceeds by applying to legislative behavior an economic model of rational behavior. The fulcrum of public choice theory is the notion that interest groups compete for monopoly "rents" established by the legislature<sup>80</sup> through lobbying, promising support, marshalling opposition, or corrupting legislators, and that legislators respond to powerful interest groups in order to stay in power.<sup>81</sup> The surge in public choice literature has occasioned a number of writings criticizing the public choice model or finding it empirically inaccurate,<sup>82</sup> but public choice theory has nonetheless been extremely influential in both the political science<sup>83</sup> and legal academies.<sup>84</sup> Renewed

79. See, e.g., M. HAYES, *supra* note 41; T. LOWI, *supra* note 41; M. FIORINA, *supra* note 78; R. RIPLEY, *supra* note 78; D. MAYHEW, *supra* note 78; M. OLSON, *supra* note 41; J. BUCHANAN & G. TULLOCK, *supra* note 78.

80. See J. GWARTNEY & R. WAGNER, *supra* note 41, at 22 ("Rent-seeking is a term used by economists to describe actions taken by individuals and groups to alter public policy in order to gain personal advantage at the expense of others."); Macey, *supra* note 44, at 224 ("Rent seeking refers to the attempt to obtain economic rents [i.e., payments for the use of an economic asset in excess of the market price] through government intervention in the market.").

81. See J. GWARTNEY & R. WAGNER, *supra* note 41, at 7-24; W. ESKRIDGE & P. FRICKEY, *supra* note 16, at 323-26; Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HASTINGS L.J. 905, 945-48 (1990); Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-[J]KENT L. REV. 123, 126-28 (1989).

82. See, e.g., K. SCHLOZMAN & J. TIERNEY, *supra* note 16 (finding well-financed interests groups not completely dominant as lobbyists); A. MAAS, CONGRESS AND THE COMMON GOOD (1980) (characterizing legislative process as deliberative and issue oriented rather than merely reflective of interest group strength and activity); R. FENNO, CONGRESSMEN IN COMMITTEES (1973) (finding legislators to want respect for their expertise and sound policy choices rather than only electoral support).

83. Compare R. DAHL, DILEMMAS OF A PLURALIST DEMOCRACY: AUTONOMY VERSUS CONTROL (1982) with R. DAHL, WHO GOVERNS? (1960) and R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956) (leading pluralist theorist reassessed views in light of intervening public choice scholarship).

84. See, e.g., Macey, *supra* note 44; Easterbrook, *The Court and the Economic System*, *supra* note 75, at 14-15; Easterbrook, *Statutes' Domains*,

(but to date frustrated) calls for campaign finance reform<sup>85</sup> also reflect the impact of public choice thought.

Interest group analysts not only exhibit a wide range of views about what actually happens in the political process but also diverge widely regarding normative prescriptions. Some writers find the market-based political arena acceptable while others criticize it, seeking to mute the power of interest groups.<sup>86</sup> Correspondingly, these scholars take different views of the implications of interest group theory for statutory construction. Some suggest reading statutes strictly and textually to best preserve the "deal" between the legislature and affected interest groups.<sup>87</sup> Others argue for a more active judicial role employing various broad tools of statutory interpretation to minimize naked power grabs by interest groups.<sup>88</sup>

By contrast, the judiciary has said little about interest group analysis or has applied the public choice perspective in an asymmetrical way. For example, Justice Scalia has invoked public choice skepticism about the legal process to argue against use of legislative history. One prong of his attack is based on notions of legal positivism and legitimacy: much legislative history is prepared by congressional staff rather than members themselves.<sup>89</sup> Another prong invokes the Hobbesian, private-

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*supra* note 36, at 534; Posner, *supra* note 71, at 264; Posner & Landes, *supra* note 71, at 876 (authors' views on statutory interpretation influenced by economics or public choice scholarship).

85. Other calls for structural reform have been influenced by the pessimism of public choice interest group theory. See, e.g., Note, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163 (1989).

86. See, e.g., Easterbrook, *Statutes' Domains*, *supra* note 36, at 534; Becker, *supra* note 41, at 371 (approving of political "market" outcomes). But see Easterbrook, *The Court and the Economic System*, *supra* note 75, at 14-18 (suggesting that courts give narrow construction to legislative "deals" with interest groups).

87. See Easterbrook, *Statutes Domains*, *supra* note 36, at 534.

88. See, e.g., Minda, *supra* note 81, at 1013-24 (arguing that public choice insights suggest more judicial scrutiny under antitrust laws of efforts to influence government notwithstanding first amendment concerns); Macey, *supra* note 44 (suggesting use of purposivism to minimize impact of rent-seeking language of aspects of legislation).

89. See Farber & Frickey, *supra* note 23, at 437-46. Justice Scalia's most scathing attack on legislative history is probably found in *Hirschey v. Federal Energy Regulatory Comm'n*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring in the judgment), written during his time as an appellate judge.



regarding subterranean world of legislative politics: much legislative history results not from collective expressions of intent or purpose but from strategic behavior by those backing particular interest groups.<sup>90</sup> Along with other factors (primarily strictly delimited notions of separation of powers<sup>91</sup> and judicial authority<sup>92</sup>), these criticisms prompt Justice Scalia and other judges to argue for textualism.<sup>93</sup> As noted, several commentators

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His Supreme Court writings have often reiterated the arguments and tone of *Hirschey*. See, e.g., *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527-30 (1989) (Scalia, J., concurring in the judgment); *Johnson v. Transportation Agency*, 480 U.S. 616, 670-72 (1987) (Scalia, J., dissenting).

90. See *Johnson v. Transportation Agency*, 480 U.S. 616, 670-71 (Scalia, J., dissenting); *Hirschey v. Federal Energy Regulatory Comm'n*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring in the judgment). Other judges regarded as "conservative" also make this observation. See, e.g., *In re Sinclair*, 870 F.2d 1340, 1343-44 (7th Cir. 1989) (Easterbrook, J.); *Wallace v. Christensen*, 802 F.2d 1539, 1559-60 (9th Cir. 1986) (Kozinski, J., concurring).

91. See *Morrison v. Olson*, 487 U.S. 654, 696 (1988) (Scalia, J. dissenting).

92. See *Maryland v. Craig*, 110 S. Ct. 3157, 3171-73 (1990) (Scalia, J., dissenting); Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (focus on text and clear statement rules limits judicial discretion and power). Justice Scalia's views in this regard reflect those of other conservative judges. See, e.g., Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821 (1990) (deferral to administrative agency interpretations of statutes provides positive benefit by limiting judicial aggrandizement of power).

93. See Zeppos, *Justice Scalia's Textualism: The New "New Legal Process"*, 12 CARDOZO L. REV. \_\_\_\_ (1991) (forthcoming); Eskridge, *Textualism*, *supra* note 23, at 650-66. Perhaps the best public choice rationale advanced to support textualism is the notion that ignoring legislative history (which can result from a single "bought" staffer or member) in lieu of text raises the cost of interest group rent-seeking. See J. BUCHANAN & G. TULLOCK, *supra* note 78, at 43; Macey, *supra* note 44, at 248.

To date, interest group analysis appears to have made courts more skeptical of legislation and less inclined automatically to assume a remedial, public-regarding, socially just purpose for every enactment. Courts now also exhibit increasing skepticism about source materials of legislative intent and purpose, regarding some elements of the legislative background as self-serving attempts to misdirect interpretation of the statute or to achieve victories in court that proved unattainable in the legislature.

Although public choice/interest group notions have affected some proponents of textualism, intentionalism, purposivism, and dynamism, CLS scholars have been largely resistant to public choice postulates. See, e.g., Kelman, *On Democracy Bashing: A Skeptical Look at the Theoretical and "Empirical" Practices of the Public Choice Movement*, 74 VA. L. REV. 199 (1988). But see Minda, *supra* note 81, at 1013-26 (critical legal studies scholar employs

have applied public choice theory to argue for more active, usually more liberal, judicial interpretation to advance public-regarding laws and confine rent-seeking victories of special interest groups.<sup>94</sup> Judges, however, have largely failed to adopt this perspective except to the extent that purposivist analysis leads a court to expand or contract its reading of a statute based on an implicit notion about whether the law is public-regarding or private-regarding.<sup>95</sup>

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public choice theory to argue for revised view of antitrust immunity under first amendment).

94. See Macey, *supra* note 44; Posner, *supra* note 71, at 264. Prof. Eskridge uses different terminology but argues for a similar approach based on a court's assessment of the distribution of the law's costs and benefits, which serves as a rough indicator of whether the legislation is public-spirited and "good," or rent-seeking and "bad." See Eskridge, *Politics Without Romance*, *supra* note 31, at 323-36. See also Mashaw, *supra* note 81, at 155 ("The Eskridge approach is a considerable advance over its predecessor's application of public choice ideas to statutory construction . . . [but] it would be extremely dangerous to adopt the Eskridge approach as a set of interpretative rules.").

95. See the dissenting opinions in *Patterson v. McLean Credit Union* and *Jett v. Dallas Indep. School Dist.* I regard this as unfortunate because interest group analysis can be used to illuminate the particular statute in question so that the reviewing court can classify the statute under scrutiny. See, e.g., Easterbrook, *The Court and the Economic System*, *supra* note 75, at 14-15:

If statutes generally are designed to overcome "failures" in markets and to replace the calamities produced by unguided private conduct with the ordered rationality of the public sector, then it makes sense to use the remedial [broad, liberal construction] approach to the construction of statutes—or at least most of them. If, on the other hand, statutes often are designed to replace the outcomes of private transactions with monopolistic ones, to transfer the profits ("rents") of productive activity to a privileged few, then judges should take the beady-eyed contractual [narrow, strict construction] approach.

*Id.* at 15. This approach can be seen as inconsistent with the more textually driven literal approach to interpretation seemingly urged by Judge Easterbrook in *Statutes' Domains*, *supra* note 36, at 533. See W. ESKRIDGE & P. FRICKEY, *supra* note 16, at 612-13.

A moderate view of the classification issue might envision a continuum of statutes. Some laws, such as the 1964 Civil Rights Act, are at the public interest end of the continuum while others, such as the Smoot-Hawley Tariff, are at the private deal end of the spectrum. Smoot-Hawley is private-regarding because its passage resulted from the directed activities of a relatively small group (American manufacturers facing foreign competition) who stood to gain much from passage of the higher tariff while the diffuse public stood to lose only a small amount as individual consumers but a large amount as a society. See W. ESKRIDGE & P. FRICKEY, *supra* note 16, at 40-46. Depending upon

In the 1989 civil rights cases, this asymmetry, in which the Court's conservative working majority seemed affected by only part of the public choice/interest group perspective, worked against democratic values, contradicting the notion prevailing among conservatives that narrow judicial construction furthers democratic values. In part this resulted from misapplied textualism, perhaps adding further evidence to the claim that textualism is an inherently flawed methodology even when applied by archetypically wise, fair, nonpartisan jurists. In part this resulted from the working majority's fickle attraction to textualism. In the 1989 civil rights cases as a whole, the working majority exhibited a strange hybrid interpretative style: what I call "oscillating intextvalism."<sup>96</sup> Equally troubling, the sad results of the 1989 civil rights cases also seem derived either from the Court's lack of concern with the realistic political ramifications of its decisions preference for placing the bulk of inertial burdens on the disempowered.

## II. ASSESSING THE 1989 CIVIL RIGHTS CASES AGAINST THE TOPOGRAPHICAL MAP OF STATUTORY INTERPRETATION

### A. *Patterson v. McLean Credit Union*

In *Patterson* the question was whether 42 U.S.C. § 1981 applied to an employer's racial harassment of an employee in

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where a reviewing court consciously or subconsciously places a law under review, the court may apply a differing approach according to the degree to which it wishes to interpret expansively or buttress a "good" law or limit the damage of a "bad" law.

96. Despite its perhaps excessive cuteness, the term "oscillating intextvalism" encompasses succinctly my view of the current Court's approach to the interpretation of civil rights laws. The Court has been inconsistent (oscillating) in its shifting application of the two dominant approaches, intentionalism and textualism (the "intext" and "ism" of intextvalism), and it has favored these approaches over purposivism, dynamism, or other approaches. Just as important and more disturbing has been the Court's silent (but apparent) invocation of its own value structure, irrespective of the statute in question, its text, legislative intent, legislative purpose, or objectively verifiable social factors or other evidence. The Court in 1989 gave the civil rights laws under review narrow construction because a majority of the Court simply disagreed in substance with the laws and thought that the law had taken a wrong turn or gone too far in favor of civil rights plaintiffs. Armed with this belief, the Court's conservative working majority alternated between textualism and intentionalism seeking to justify case results consistent with its own political values and preferences.

Oscillating intextvalism is discussed more fully *infra*.

the workplace.<sup>97</sup> The Court majority of five, per Justice Kennedy, held that section 1981 did not apply to ongoing racial harassment or discrimination in an existing job.<sup>98</sup> Section 1981 states that all persons "shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."<sup>99</sup> The Court majority reasoned that post-hiring race discrimination did not involve the "making" or "enforcement" of a contract but only its performance, thus placing such discrimination outside section 1981.<sup>100</sup> Justice Brennan, writing for the Court's four liberals, waged a vigorous dissent against the majority's limited reading of section 1981.<sup>101</sup>

In reaching its determination, the majority claimed to be taking both a textualist and intentionalist view. The majority rested most of its assessment on its own lexicon: the "making of contracts" was synonymous with the "formation of contracts" and nothing additional; the "enforcement of contracts" meant only formal access to the judicial machinery for redress of contract breaches rather than suggesting that job contracts marred by race discrimination had not been enforced within the meaning of the law.<sup>102</sup> Although the majority seemed confident of its

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97. 491 U.S. 164, 171 (1989). The Court also considered the correctness of the district court's jury instruction, which had required plaintiff Brenda Patterson to "prove that she was better qualified than the white employee who allegedly received the promotion" Patterson sought. *Id.* at 186. The Court unanimously found the instruction to be erroneous, stating that the apt proof framework for a claim of intentional discrimination under § 1981 was similar to the *prima facie* case approach applied in title VII cases. Thus, Patterson needed only prove that she was qualified for the promotion, and this then shifted the burden of production to the employer on the issue. *Id.* at 186-87. See also *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Patterson's remaining claims were therefore remanded for further proceedings. 491 U.S. at 189.

98. 491 U.S. at 171.

99. 42 U.S.C. § 1981 (1988).

100. 491 U.S. at 175-80. The majority did, however, agree that Patterson's allegations of being unable to obtain a promotion due to discrimination stated a claim under § 1981 since this involved discrimination that prevented her from "making" a new job contract for the higher position, thus necessitating the remand because of the trial court's erroneous jury instruction on this point. *Id.* at 185.

101. *Id.* at 189. Plaintiff's claim was ultimately dismissed on remand. See 887 F.2d 484 (4th Cir. 1989); 727 F. Supp. 35 (M.D.N.C. 1990).

102. 491 U.S. at 175-80.

narrow view, at least as to the meaning of "enforce,"<sup>103</sup> it invoked some intentionalist argument as well, suggesting that Congress intended section 1981 to protect only a limited category of rights.<sup>104</sup>

For the most part, however, the majority's statutory analysis is brief, almost superficial. The majority pauses hardly at all to ponder whether it should really be so confident of its reading of the text but instead devotes its attention to whether Patterson's claims fit within the textual interpretation of the majority. The examination of congressional intent is almost embarrassingly scant and tends toward the tautological, referring to the majority's connotative reaction to the text in order to undergird its assessment of congressional intent.<sup>105</sup> By contrast, the dissent

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103. 491 U.S. 164, 183 (1989) ("It is impossible to give such language any other meaning.") (quoting *Runyon v. McCrary*, 427 U.S. 160, 195 n.5 (1976) (White, J., dissenting)). The differing treatment of *Runyon* by the *Patterson* majority and dissent is revealing and troubling. *Runyon* held that § 1981 applied to wholly private race discrimination in contracts, in that case a private school's refusal to consider accepting black students. 427 U.S. at 175. Justice Kennedy's *Patterson* opinion expresses lukewarm enthusiasm for *Runyon* but concludes that *Runyon* should not be overruled since it has become a part of the legal fabric and is not so demonstrably erroneous as to warrant overruling. 491 U.S. at 171-75. In other words, *stare decisis* concerns outweigh arguments against *Runyon*'s holding. Justice Kennedy also bows, as he inevitably must, to the apparently positive congressional response to *Runyon*, but only a little. *Id.* at 172-73. One gets the distinct impression that the *Patterson* majority, which included *Runyon* dissenters Rehnquist and White, is joyless in affirming the validity of the pro-civil rights *Runyon* decision. By contrast, the dissent celebrates *Runyon* and argues for an extension of its spirit to the question faced in *Patterson*. *Id.* at 190-91 (in reaffirming *Runyon*, majority "glosses over" two factors: "that *Runyon* was correctly decided, and that in any event Congress has ratified" *Runyon*).

104. 491 U.S. at 183-84 (quoting *Georgia v. Rachel*, 384 U.S. 780, 791 (1966)).

105. See *id.* at 175-78 (discussing legislative intent in brief and then asserting that § 1981 "by its plain terms" must have been intended to be limited in scope). In view of the massive discrimination, some of it authorized by state law, found at all points of the economy in the former Confederacy—discrimination Congress intended § 1981 to correct—the Court's legislative intent analysis is surely as erroneous as it is thin. See Greene, *Race in the 21st Century: Equality Through Law?*, 64 TUL. L. REV. 1515 (1990):

It is not surprising, then, that Justice Kennedy's opinion does not dare venture into the nineteenth century. Had it done so, he would have had to acknowledge that harassment, intimidation, verbal abuse, subjugation,

engages in a lengthy and detailed assessment of both legislative intent and congressional purpose in enacting what became section 1981.<sup>106</sup> The majority's willingness to consider intent, at least in passing, but silence as to purpose is consistent with its narrower view of section 1981. Almost by definition, an inquiry into legislative intent asks what specific applications Congress had in mind, while an examination of purpose searches for the broader goals sought by Congress and suggests a willingness to apply the statute to cover a wrong—and, presumably, all members of the Court would agree that race discrimination is wrong—even if such coverage was not clearly foreseen by the enacting legislators.<sup>107</sup>

The majority's rejection of purposivism is consistent with its implicit rejection of eclectic pragmatism and dynamism.<sup>108</sup> At the time of the Civil Rights Acts, Congress sought to establish a strong federal presence in the former Confederate States and to arm former slaves with legal tools for fighting discrimination in those states.<sup>109</sup> Today, members of racial minorities, like whites, are, except for unionized workers and high profile employees (e.g., executives, athletes), "at-will" employees who may be discharged at any time without cause. In that sense,

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threats of violence, and violence were the conditions of the slave experience. He would also have had to note that after emancipation, and despite some protective laws, former slave masters continued to act as if the master-slave relation had never been dissolved.

*Id.* at 1527-28.

106. 491 U.S. 164, 190-201 (1989) (Brennan, J., concurring in part and dissenting in part).

107. See *supra* notes 29-45 and accompanying text (discussing intentionalism and purposivism).

108. The context of *Patterson* also suggests some hostility toward § 1981 by the Court majority. Oral argument on *Patterson* originally occurred in February 1988, with the Court then announcing that it wished reargument on the question of whether the Court should overrule *Runyon v. McCrary*, 427 U.S. 160 (1976), which applied § 1981 to discrimination by private persons. The reargument decision engendered a strong adverse reaction, as amicus briefs in *Patterson* were filed by 47 state attorneys general, 66 Senators, and 140 House members. See Bar Committee Report, *supra* note 3, at 431. The Court determined not to overrule *Runyon*, based on *stare decisis* considerations, with lukewarm language that suggested a distinct lack of enthusiasm for the *Runyon* holding. 491 U.S. at 171-75.

109. 491 U.S. at 192-94 (Brennan, J., concurring in part and dissenting in part).

employees like Brenda Patterson (who was an at-will employee of the McLean Credit Union) "form" or "make" a new contract every day that they show up for work, are permitted to work by the employer, and receive compensation for that work. The nature of modern at-will employment thus makes it awkward to view contract formation rigidly as one discreet moment (in 1972 in Patterson's case), with enforcement another widely separated moment should the employee file suit after discharge (which occurred for Patterson in 1982). During the ten years between these events, the majority found no protection for Patterson under section 1981. This seems both inconsistent with the broad remedial purpose of the Reconstruction Civil Rights Acts and oblivious to the realities of modern employment.

The majority opinion is also static in that it gives only grudging acceptance of intervening judicial precedent favoring an expansive view of section 1981 and other Civil Rights Acts.<sup>110</sup> The majority addresses these precedents only in passing during its discussion of whether to overrule *Runyon v. McCrary* but does not suggest more than minimal dynamism favoring broad construction of civil rights law. The *Patterson* holding in fact turned back the clock of judicial precedent, overruling decisions in all circuit courts except the Fourth.<sup>111</sup> The majority is perhaps dynamic to the extent that it concludes *Runyon* should not be overruled. It is anti-dynamic to the extent it refuses to seek to expand the principles of *Runyon* and other cases to reach the race discrimination alleged by Patterson.<sup>112</sup> By contrast, the dissent shows strong elements of dynamism, arguing that the Court's pro-civil rights decisions of the 1960s and 1970s show a willingness to apply statutes like section 1981 to areas not clearly within their text or specific legislative intent where such application is consistent with the broad congressional purpose of the statute and contemporary social and legal values.<sup>113</sup>

The majority and dissent divide along the line of eclectic pragmatism and on functionalist grounds as well. As noted

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110. For example, 42 U.S.C. § 1982 (1988), which prohibits discrimination in housing, derives from the same legislation as § 1981, has nearly identical language, and has been steadily given a more expansive reading by the courts. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

111. See Bar Committee Report, *supra* note 3, at 433.

112. 491 U.S. at 171-75.

113. *Id.* at 189-201 (Brennan, J., concurring in part and dissenting in part).

above, the majority essentially eschews the functional analysis of eclectic pragmatism regarding employment realities. It is perfectly content with the formalist notion that contract formation occurs at only one discreet moment, even for at-will employees. The dissent is considerably more pragmatic in realizing that the daily working conditions of an employee may be as much a part of the contract as the initial job interview and offer. On the issue of the relation of section 1981 to other statutes, however, the majority does touch upon both pragmatic and dynamic concerns when it considers the relation between section 1981 and title VII.

The majority suggests that the liability standards and remedies of title VII, which was passed nearly a century after section 1981 and provides a comprehensive framework of employment discrimination law and enforcement, should have nearly exclusive governance of the field without interference from other laws.<sup>114</sup> But the majority's functionalism is pro-employer and anti-civil rights in that it expresses more concern for avoiding any "circumvention" of title VII by section 1981 than for preventing and punishing race discrimination, implying that there is something suspect about a civil rights plaintiff utilizing the most advantageous statute for pursuing a claim.<sup>115</sup>

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114. 491 U.S. 164, 180. Justice Kennedy states:

Interpreting § 1981 to cover postformation conduct . . . would also undermine the detailed and well-crafted procedures for conciliation and resolution of title VII claims. . . . Where conduct is covered by both § 1981 and title VII, the detailed procedures of title VII are rendered a dead letter, as the plaintiff is free to pursue a claim by bringing suit under § 1981 without resort to those statutory prerequisites. . . . We should be reluctant . . . to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute.

*Id.* at 180-81.

115. *Id.* at 181 ("In the particular case before us, we do not know for certain why petitioner chose to pursue only remedies under § 1981, and not under title VII."). Section 1981 has advantages over title VII in that the plaintiff may demand a jury trial, can benefit from a longer statute of limitations, and may recover other compensatory and punitive damages. Title VII provides only back pay as a monetary remedy. *Id.* at 182 n.4. On this point as well, the majority may have displayed faulty law and economics reasoning when it declared that "employee and employer will be unlikely to agree to a conciliatory resolution of the dispute under title VII if the employer can be found liable for much greater amounts under § 1981." *Id.* On the



By favoring this judicially created "streamlining" of the civil rights laws, the majority reveals its conservative colors. One is hard pressed to imagine that the Court would construe other statutes narrowly in order to avoid permitting commercial litigants a full range of choices provided by Congress even if those choices created some inconsistency among related laws. By contrast, the dissent's view is that the courts should not limit civil rights plaintiff options unless it concludes Congress declared or intended the limitation.<sup>116</sup> In addition, of course, *Patterson* is not confined to employment contracts but limits the civil rights remedies of minority Americans facing discrimination in their commercial and personal contracting.<sup>117</sup> Even confined to the employment context, title VII is more restrictive than section 1981 in that title VII does not apply to businesses with fewer than fifteen employees,<sup>118</sup> which employ approximately eleven million workers<sup>119</sup> who now have no federal law protection against race based job discrimination. Thus, the majority's preoccupation with harmonizing section 1981 and title VII has the practical effect of vastly reducing the protections of civil rights law for many Americans. It is also a slanted view of harmony. Rather than noting the advantages of a section 1981 claim over a title VII claim (*e.g.*, jury trial right, punitive damages, longer statute of limitations) and deploring the limited scope of title VII, the Court works to make that limited scope

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contrary, a larger exposure should encourage the employer to resolve disputes without risking liability for the full claim should plaintiff employee win at trial. What Justice Kennedy presumably meant to say was that the *Patterson* holding made race discrimination settlements cheaper for employers to obtain. Whether this is good or bad depends upon one's view of which group is at a comparative disadvantage and "needs" the aid of the Court's restrictive *Patterson* holding.

116. *Id.* at 200-05.

117. *See, e.g.*, *Rich Nolan's Auto Body Shop v. Allstate Ins. Co.*, 718 F. Supp. 721 (N.D. Ill. 1989) (claim of race discrimination in canceling auto repair agreement dismissed under *Patterson*); *Clark v. State Farm Ins. Co.*, No. 89-0977, slip op., (E.D. Pa. Sept. 8, 1989) (insurance benefits discrimination claim); *Perry v. Command Performance*, 913 F.2d 99 (3d Cir. 1990) (the appellate court reversed the lower court and viewed a refusal to cut and style a black customer's hair as discrimination in the making of a contract although plaintiff had been a regular customer of another stylist at defendant shop).

118. *See* 42 U.S.C. § 2000e(b) (1988).

119. *See* Bar Committee Report, *supra* note 3, at 467.

the overall law of employment discrimination. Clearly, a conservative political agenda dominates the *Patterson* majority.

Neither the majority nor the dissenting opinion deals explicitly with interest group analysis. However, the majority opinion proceeds as if it were deciding the question of overlap between section 1981 and title VII by trying to limit the "deal" forged by a malignant interest group and Congress. While the majority opinion contains some eloquent rhetoric in support of civil rights,<sup>120</sup> its resolution of the statutory overlap question as well as its asymmetrical dynamism suggest the majority viewed civil rights proponents as some sort of oily interest group, a body akin to some "National Association of Widget Manufacturers" seeking favorable legislation at the expense of the commonweal. The *Patterson* majority held that title VII must trump section 1981 unless the statutory text clearly stands in the way. However, an evolving consensus by courts and Congress favorable to civil rights was not invoked as an interpretative factor. The Court was also unwilling to look at the broader historical context<sup>121</sup> and purpose of section 1981. By contrast, the dissent implicitly adopts the more widely accepted view of the civil rights laws: They are public-regarding statutes that represent a broad national consensus against discrimination and favor a more integrated and egalitarian society.<sup>122</sup>

In sum, *Patterson* is primarily a textual opinion backed by some intentionalist reasoning, but lacking either a clear text or

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120. See 491 U.S. 164, 188 (1989) ("Neither our words nor our decisions should be interpreted as signaling one inch of retreat from Congress' policy to forbid discrimination in the private, as well as the public, sphere.").

121. For example, at one point the majority invokes a substantive canon of statutory construction—statutes should not be interpreted to alter traditional state-federal relations absent clear text or indicia of congressional intent—and concludes that this augers for a narrow reading of the law because "interpreting § 1981 to cover racial harassment amounting to a breach of contract would federalize all state-law claims for breach of contract where racial animus is alleged, since § 1981 covers all types of contracts, not just employment contracts." *Id.* at 183. As the dissent noted, however, federalizing the law to prevent race discrimination was exactly what Congress set out to do in the Civil Rights Acts. *Id.* at 192-99 (Brennan, J., concurring in part and dissenting in part). The majority's concern for the federalism canon also rings hollow in that the greater reach of § 1981 (to all contracts) argues for less constriction of § 1981 in order to avoid overlap with title VII (which applies only to employment), an inconsistency the dissent pointed out. *Id.* at 210-11 (Brennan, J., dissenting).

122. *Id.* at 188 (Brennan, J., concurring in part and dissenting in part).

clear evidence of legislative intent to support the holding. The majority silently rejected purposivism and functionalist eclectic pragmatism and silently adopted a private-regarding view of what most would deem a public-regarding law. In addition, the majority uses a smidgen of asymmetric dynamism and questionable efficiency analysis. The odd brew of interpretative thought in *Patterson* suggests that there was also at work in *Patterson* a heavy dose of "public values."<sup>123</sup> The implicit animating values are: statutory order (arguing for a narrow construction of section 1981); efficiency (arguing for harmonizing and streamlining coverage of section 1981 and title VII); accommodation of employer interests (which led the majority to be so skittish about allowing section 1981 to tip the statutory balance against employers and to undermine conciliation of disputes); states' rights (arguing for a minimalist view of section 1981 in order to minimize the impact of the statute on state contract and discrimination law); a preference for private ordering of employment relationships (leading to narrow construction of the law absent compelling text or evidence of intent); and fear of strike suits by disgruntled minority workers. The majority spurned the values implicit in the dissent's analysis: the national policy against antidiscrimination; recognition of the Civil War and Reconstruction as a paradigm shift in American government and law; appreciation of the often precarious position of the at-will employee; the importance of mining completely available evidence of congressional intent and purpose in order to minimize the decisive power of the judiciary's own values. In short, *Patterson* was very much a value-determined holding.

#### B. *Jett v. Dallas Independent School District*

*Jett* also focused upon section 1981, with the majority holding that a municipality could not be held liable under the statute on grounds of *respondeat superior* and also holding that the statute did not provide an independent federal claim against local government entities, 42 U.S.C. § 1983 having implicitly made section 1981 inapplicable to municipalities.<sup>124</sup> *Jett*, a white

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123. See Eskridge, *Public Values*, *supra* note 23, at 1007-08 (defining public values as background norms from which judges gain aid in deciding close questions).

124. 491 U.S. 701, 731-36 (1989).

high school football coach, sued his school district employer and the black principal of the high school, alleging that his discharge resulted from race discrimination. He obtained a large (\$700,000) jury award, which was remitted (to \$200,000) before being partially reversed by the Fifth Circuit.<sup>125</sup> The gravamen of Jett's claim was that the black principal was out to replace him with a black coach because of racial animus.

In rejecting Jett's section 1981 claims, the Court shifted substantially from the *Patterson* approach. In *Patterson* the majority's reading of text drove the result. In *Jett* the majority showed relatively little concern for text, taking the view that the text did not speak to the issue of vicarious liability.<sup>126</sup> However, the silence of a statute providing for mandatory liability for race discrimination in contracting—section 1981 states that all persons "shall" have contract rights equal to white citizens—is deafening in that vicarious liability is a baseline norm of legal liability (and apparently was in 1866 as well). One would therefore expect Congress to articulate any intended exception to this general rule. The dissent, finding no such exception stated in the text of the law or its legislative history, argued for municipal vicarious liability.<sup>127</sup>

Similarly, the majority did not invoke text on the issue of section 1981's applicability to municipalities. The *Jett* majority held that section 1983 provided the exclusive federal civil rights

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125. 798 F.2d 748, 755 (5th Cir. 1986). Since the firing of Coach Jett presumably did not relate to the "making" of his employment contract, one might expect Jett's claim to be barred by the Court's *Patterson* holding. However, the school district had not raised this defense below. The Court assumed applicability of § 1981 for purposes of deciding the government claims and *respondeat superior* issues, although the *Patterson* defense (that Jett was the victim of unactionable post-formation contract discrimination) presumably remains available on remand. 491 U.S. at 711.

126. 491 U.S. at 711-12 ("Petitioner concedes that the text of the 1866 Act itself is completely silent on this score.").

127. *Id.* at 750-52 (Brennan, J., dissenting). The dissent further noted that although 42 U.S.C. § 1983 (1988) did not impose vicarious liability upon municipal governments for due process or equal protection violations, the language of § 1983 was significantly different in that it contains causation language (state actors may not "subject [someone] or cause [someone] to be subjected" to constitutional deprivations), language the Court has consistently viewed as requiring "some official policy" for liability. See *Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658 (1978).

statutory remedy for discriminatory conduct by local government units.<sup>128</sup> Neither the text of section 1981 nor that of section 1983 spoke to the issue. However, as with the vicarious liability question, the textual silence could be viewed (and the dissent so viewed it) as speaking volumes.<sup>129</sup> When Congress passed two major pieces of civil rights legislation in close proximity,<sup>130</sup> one would expect that both laws are applicable wherever their literal language permit it unless there is specific language making one law inapplicable in favor of the other. Section 1981 contains no restriction and neither does section 1983, suggesting to the untrained eye that one might make a section 1981 claim against a municipality.<sup>131</sup>

Faced with textual evidence that at least implicitly favored Jett's section 1981 claims, the same majority that had given

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128. 491 U.S. at 719-30.

129. *Id.* at 745-50 (Brennan, J., dissenting).

130. At a minimum, §§ 1981 and 1983, which some conservatives see as stemming from the 1866 and 1871 Civil Rights Acts, respectively, were passed in close proximity. Thus, even if one sees the more recently passed § 1983 as controlling, one would expect language in § 1983 to limit the reach of § 1981 to municipal governments if that was the intent of the Congress that enacted § 1981. If the liberals are correct and § 1981 derives from both the 1866 and 1871 Acts and is authorized by both the thirteenth and fourteenth amendments, the case of an implicit § 1983 restriction on § 1981 becomes even weaker.

131. Justice Scalia concurred separately but did not join the portion of the opinion relying upon legislative history. He argued that the specific coverage of § 1983 should govern the general thrust of § 1981 and that "statutes dealing with similar subjects should be interpreted harmoniously." 491 U.S. 701, 738-39 (1989) (Scalia, J., concurring).

I disagree with the "specific-general" dichotomy asserted by Justice Scalia and the majority. The legislative history evidence is inconclusive at best and can be equally read as suggesting that § 1983 was aimed at a different problem but was not intended as the exclusive remedy for that problem. Textual considerations, although not clear, auger for the dissent's view of the *Jett* question. Further, Justice Scalia's view glosses over political reality and holds great potential for judicial activism in derogation of Congress. Many statutes are passed separately with no intent toward or thought of harmonization. Although courts must resolve some gaps, conflicts, or ambiguities in the statutory fabric, the *Jett* problem is not so much gap or conflict as ambiguity (the *Jett* holding in fact serves to create a gap in the coverage of federal anti-discrimination law). Although statutory harmony may be a virtue, so is a strong body of anti-discrimination law that will deter and punish discrimination by local governments. Under these circumstances, a judicial license to harmonize undercuts the anti-discrimination goal, possibly runs counter to congressional intent, and probably is inconsistent with congressional purpose.

intent only cursory explanatory power in *Patterson* turned deeply intentionalist. Justice O'Connor's majority opinion devotes ten pages to intentionalist analysis of section 1981 (as compared to approximately ten lines in Justice Kennedy's *Patterson* opinion), particularly the defeat of Senator Sherman's proposed amendment to the 1871 Act, which would have made municipalities liable for constitutional injuries occasioned by civil disobedience.<sup>132</sup> According to the Court, the "strong adverse reaction to the Sherman amendment, and continued references to its complete novelty in the law of the United States, make it difficult to entertain petitioner's contention that the 1866 Act had already created a form of vicarious liability against municipal governments."<sup>133</sup> Unfortunately, as the dissent points out, the majority has engaged in something of an apples-oranges comparison.<sup>134</sup> The political climate may not have been willing to impose liability on local government merely because civil disobedience (in which the locality had no hand, *i.e.*, not the southern lynch mob at which the sheriff winked) was uncontrollable. It is quite another matter to conclude that Congress was unwilling to hold localities accountable for intentional race discrimination in its contracting practices. Clearly, the latter is both less of an imposition upon the locality and more controllable by the locality.

Notwithstanding this fundamental problem in its reasoning, the majority undertakes sophisticated legislative background analysis, attempting to persuade the reader that section 1981 must not forbid local government race discrimination in contracting because section 1983 already forbids local government race discrimination in its enforcement of the laws, so long as that discrimination stems from official policy. Not only does the syllogism fail at its weakest link—the existence of a due process/equal protection remedy for official policy discrimination

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132. *Id.* at 726-27. The Sherman amendment was passed by the Senate, rejected by the House, and died in the conference committee process because, according to the Court, opposition was "vehement, and ran across party lines." *Id.* Of course, the *Jett* majority does not explain how such a broadly and vehemently opposed proposition managed to gain the approval of the Senate.

133. *Id.*

134. *Id.* at 742-50 (Brennan, J., dissenting).

simply does not seem inconsistent with a ban on intentional contract discrimination—but the majority also derogates the venerable substantive canon that repeals by implication are not favored. In essence, *Jett* views section 1983 as implicitly repealing any reach of section 1981 to local governments, a fact not lost on the dissenters.<sup>135</sup>

However, the *Jett* majority, as did the *Patterson* majority, invoked a different canon of construction: Federal laws are not to be presumed to intrude upon state sovereignty absent clear statutory language or indicia of intent.<sup>136</sup> What is troubling is that the *Jett* majority does more than recognize the federalism canon. Rather, it privileges the federalism canon over the no-presumption-of-implied-repeals canon. In the abstract, there is no reason to favor the federalism canon. In the context of the Civil Rights Acts, which were part of a massive reordering of federal-state relations, elevation of the federalism canon seems particularly inappropriate.

The majority avoids facing this impropriety, at least rhetorically, simply by eschewing purposivism. This allows the majority to overlook the central thrust of section 1981 and the Civil Rights Acts, which, if fully acknowledged, tends to argue for broad statutory construction in close cases. Similarly, the majority displays some dynamism, but only a minimalist asymmetric dynamism. *Jett* is dynamic to the extent that its holding serves to aid local government bodies (on both solvency and decisionmaking courage) at a time of increasing concern over their solvency and the impact of litigation against them. *Jett* is undynamic or perhaps even anti-dynamic to the extent that it fails to appreciate that social and legal events have made private contract race discrimination even more disfavored than in 1866 and 1871. *Jett* also overlooks that race discrimination in contract has not been a major factor in recent concern over municipal solvency (as have "ordinary" and constitutional tort liability) and that, unlike many possible section 1983 violations (e.g., the white racist policeman beating the black citizen), section 1981 violations are unlikely to result from episodic

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135. *Id.* at 745-46 (Brennan, J., dissenting).

136. *Id.* at 727-31. See also *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978) (stating that federal laws are not to be superseded by a statute unless Congress' intent is clear and manifest).

conduct which the local government body is unable to control before damages befall the potential plaintiff. Put another way, the city of Dallas, even if diligent, cannot prevent a bad white cop from occasionally beating up an innocent black citizen; the Dallas school district could prevent a "bad" black principal from unfairly ruining the career of a white football coach. By failing to consider these and other factors such as access to proof, difficulty of prevailing in litigation, and so on, *Jett* also appears not to be a functionalist opinion or one utilizing eclectic pragmatism.

As in *Patterson*, neither the majority nor the dissent has much time for interest group analysis. Also as in *Patterson*, I contend that the law under review is a public-regarding statute that should be given an expansive construction where other, more commanding factors (e.g., text, clear evidence of intent, inconsistency with purpose) do not counsel against that result. The group benefitting from section 1981 is diffuse, as *Jett* itself shows: A white football coach asserts protection under a statute originally passed to aid black former slaves. The beneficiary group is potentially large but very diffuse, not very well-organized, and unlikely to wield great economic or political power. By contrast, the group upon which costs are imposed by a broader reading of section 1981 (local government entities) is large, established, well-funded (by taxpayers no less), contains repeat players with similar portfolios of litigation exposure, has incentive to band together, and should wield significant political clout. If section 1981 is given a broad interpretation, the school boards of America are far better equipped to seek legislative change than are prospective plaintiffs.

In sum, *Jett* identifies itself as an intentionalist opinion, but, like *Patterson*, it is one in which the majority's background values play a significant role. The *Jett* majority seems driven toward the holding by strong federalism concerns and a healthy deference to state entities and prerogatives. It also implicitly was influenced by norms of: statutory order (municipal liability should be governed by one primary statute rather than several statutes); efficiency (local government liability should be subject to one federal statute and set of criteria); accommodation of employer interests; a preference for private ordering of employment relationships (leading to narrow construction of the law absent compelling text or evidence of intent); and fear of strike suits by disgruntled minority workers. As in *Patterson*,



the dissent appeared to rest on different values: the national policy against antidiscrimination; recognition of the Civil War and Reconstruction as a paradigm shift in American government and law; appreciation of the employee's position; fidelity to the broader purpose of legislation more than specific intent of coverage, especially for older statutes; and an openness to functional, pragmatic, and dynamic factors.

*C. Wards Cove Packing Co. v. Atonio*

*Wards Cove* appears to be a combination of the majority's returning to textualism by way of overwhelming dynamic and pragmatic factors, and it also demonstrates the implicit importance to the majority of "old-school" values. In *Wards Cove* a group of former "unskilled" workers, mostly Filipinos and Native Americans, at salmon canneries in Alaska sued under title VII, contending that they had been discriminated against by the cannery employers in that the employers had treated them unfairly relative to the largely white "skilled" workforce, and had discriminated by using facially neutral criteria for selecting skilled workers—although the requirements for obtaining the skilled positions effectively eliminated the Filipino and Native American workers from consideration.<sup>137</sup> The Court essentially held: (1) that a mere disparity in the racial composition of the workforce would not suffice to state a prima facie case of discrimination under a title VII disparate impact theory;<sup>138</sup> (2) that disparate impact plaintiffs, even if making the required showing of statistical disparity in light of the relevant labor market rather than the local population as a whole, must identify the specific challenged employment practice leading to the disparity;<sup>139</sup> and (3) that an employer facing a plaintiff's prima facie showing of workforce disparity may rebut the presumption

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137. 490 U.S. 642, 650 (1989). Skilled jobs included positions such as machinists and engineers responsible for canning equipment, quality control personnel for inspections and recordkeeping, the crew operating the canning vessel, and other support personnel including cooks, carpenters, construction workers, and bookkeepers. Unskilled workers were those who performed the actual canning of salmon on the assembly line. *Id.* at 650 n.5.

138. *Id.* at 651. The Court held that disparity between the workforce and the local or general population was irrelevant and that the apt basis for statistical comparison was the relevant labor market. *Id.*

139. *Id.* at 655.

of discrimination by presenting evidence that the criteria creating the disparate impact were occasioned by a valid business purpose (rather than a "business necessity," as had been required by most past title VII decisions).<sup>140</sup> On this last point, *Wards Cove* is particularly significant in that it changed the employer's articulated defense from a "business necessity" to a "valid business purpose" and required that plaintiff bear the burden of persuasion to convince the court that the discriminating criteria were not legitimate considerations for running the employer's business. The defendant employer need only produce some evidence of business purpose to require plaintiff to shoulder the persuasion burden.<sup>141</sup>

In reaching its conclusions, the majority places significant reliance on text, which, even to critics of the *Wards Cove* decision, can be seen as arguing for a limited reading of disparate impact theory, especially on the question of the relevant labor market as the apt base for statistical analysis. For example, when disparate impact theory was first urged on the Court and accepted in *Griggs v. Duke Power Co.*,<sup>142</sup> the Court's unanimous opinion came as a "surprise to many pundits."<sup>143</sup> Most legal analysts agree that the text of title VII alone would not support the *Griggs* result, at least not in the first instance. However, the *Griggs* holding rested heavily on statutory purpose, though perhaps not specific legislative intent, the Court finding that title VII was directed toward "the consequences of employment practices" and that Congress sought economic opportunity for America's minorities at least as much as it sought to prohibit overt discrimination.<sup>144</sup> *Griggs* was also undoubtedly influenced by 1970 amendments to title VII that strengthened the role of the Equal Employment Opportunity Commission ("EEOC"), which issued guidelines for title VII compliance and "took the

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140. *Id.* at 659.

141. *See id.* at 655-60; Kovacic-Fleischer, *Proving Discrimination After Price Waterhouse and Wards Cove: Semantics As Substance*, 39 AM. U.L. REV. 616, 658-64 (1990); Belton, *Causation and Burden-Shifting Doctrines in Employment Discrimination Law Revisited: Some Thoughts on Hopkins and Wards Cove*, 64 TUL. L. REV. 1359, 1375-83 (1990); Bar Committee Report, *supra* note 3, at 431-32, 435-45.

142. 401 U.S. 424 (1971).

143. W. ESKRIDGE & P. FRICKEY, *supra* note 16, at 69.

144. 401 U.S. at 432.

position that results are important: An employer could not hide behind facially neutral job criteria if blacks continued to be underrepresented in their workforces."<sup>145</sup> *Griggs* was thus significantly dynamic and also, in my view, a good example of eclectic pragmatism, not only in the manner in which it blended interpretative approaches but also in its common sense.<sup>146</sup>

Perhaps most important of all, *Griggs* was the law for nearly two decades prior to *Wards Cove*. During that time, additional Court decisions built upon the *Griggs* approach,<sup>147</sup> and Congress focused upon civil rights legislation, including title VII, on several occasions without ever suggesting that *Griggs* was in error.<sup>148</sup> Moreover, some of the congressional attention to civil rights that tacitly approved *Griggs* was directed at overturning Court decisions taking a narrow view of the application of civil rights laws.<sup>149</sup> Against this backdrop, the *Wards Cove* return to text, coupled with the majority's value-laden "common sense" assessment of what the statute requires of a disparate impact case, seems odd and suggests retrenchment more than

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145. W. ESKRIDGE & P. FRICKEY, *supra* note 16, at 69.

146. The distinguished Third Circuit Judge A. Leon Higginbotham provides a memorable and easily grasped anecdote that illustrates disparate impact. During the late 1930s, Judge Higginbotham, who is black, was required to attend one of the designated junior high schools for blacks in Trenton, New Jersey's then-segregated system. Its curriculum did not offer Latin. There existed at the time several high schools, including an honors high school that did not expressly bar black students. However, Latin was a prerequisite for admission. Judge Higginbotham, who had never had the opportunity to take Latin, applied and was rejected (naturally) because he had not satisfied the Latin prerequisite. See Higginbotham, *The Dream with Its Back Against the Wall*, 36 YALE L. REP. 34, 35 (Spring 1990). Although disparate impact litigation need not flow from such obvious intentional discrimination, one can substitute a job requirement of a high school diploma, college experience, or minimum scores on standardized tests for the Latin prerequisite and see the obvious potential for race discrimination through facially neutral criteria.

147. See, e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1971). See also Belton, *supra* note 141, at 1360 (*Griggs* "most important Supreme Court decision" in seeking remedies sufficient to correct legacy of slavery).

148. 490 U.S. 642, 661-65 (1989) (Stevens, J., dissenting).

149. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 200-01 n.9 (Brennan, J., concurring in part and dissenting in part) (citing examples).

interpretation.<sup>150</sup> Nonetheless, the first holding of *Wards Cove*—that labor force, rather than population, must be the basis for disparate impact statistical analysis—was essentially accepted by the dissenters, who took bitter issue with the causation, business purpose, and burden of persuasion holdings of the majority.

The *Wards Cove* majority moved quickly to the view that disparate impact case causation requires specific proof of racial disparity from a particular practice or practices (rather than resulting from an amalgam of practices) and that practices with a valid purpose (but not required for operation of the employer entity) cannot violate title VII absent discriminatory intent. The latter conclusion is clearly undynamic in that it overlooks the legal terrain persuasively mapped by the dissent.<sup>151</sup> The substitution of business purpose for business necessity also suggests a rejection of purposivism and eclectic pragmatism. A discriminatory employment practice may well make some rational business sense but not be necessary to continued successful operation by the employer. Once again, the conservative working majority has tacitly invoked its value structure as a key basis for decision: Employer prerogatives win out over federal antidiscrimination policy.

The requirement of a targeted causation theory also runs counter to purposivist or eclectic pragmatist interpretation. If the purpose of title VII is movement toward the non-discriminatory society, job discrimination plaintiffs further this purpose whenever they identify a discriminatory employment situation, irrespective of whether they are able to identify the key reason for the disparate impact. In such circumstances,

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150. See Belton, *supra* note 141, at 1361. However, one can argue that *Wards Cove* has some dynamism, building upon earlier efforts of the working majority to retrench on title VII. See, e.g., *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977 (1988) (Justice O'Connor's plurality opinion urges imposition of higher evidentiary burdens on disparate impact plaintiffs).

151. 490 U.S. at 668 (Stevens, J., dissenting).

Decisions of this Court and other federal courts repeatedly have recognized that while the employer's burden in a disparate treatment case is simply one of coming forward with evidence of legitimate business purpose, its burden in a disparate impact case is proof of an affirmative defense of business necessity.

*Id.* at 669. See also *id.* at 669-70 (Justice Stevens analogizing employer's burden to affirmative defense under FED. R. Civ. P. 8(c)).

requiring employers to change the situation, perhaps by utilizing their superior expertise to isolate the discriminatory factor or factors, better comports with title VII's purpose. Similarly, the pragmatics of title VII litigation suggest that employers are far better positioned to understand the impact of job selection criteria and to reform job selection procedures in order to eliminate disparate impact discrimination.

Weighed against the backdrop of an indeterminate text and intent (albeit one that can readily be read as establishing only disparate treatment actions),<sup>152</sup> and strong purpose, dynamism, and pragmatist arguments against the result, including a strikingly good case for legislative acquiescence/approval/reliance on *Griggs* and its progeny, *Wards Cove* strikes a dissonant tone. To have reached its result, the majority must have been heavily influenced by unstated values: solicitude for employers; concern over strike suits and litigation costs; efficiency; and perhaps a view (related to dynamic interpretation but with a different slant) that society had now reached a stage where disparate impact litigation engendered more costs than benefits. All of these notions are, at a minimum, subject to serious question. Particularly troubling is the possibility that the Court has entered a period of, to twist Senator Daniel Moynihan's memorable phrase, "benign semi-neglect," in which the judiciary views complex disparate impact litigation as a luxury the system should not continue to fund or indulge.<sup>153</sup>

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152. One might argue that the *Wards Cove* majority is neither completely hostile to title VII nor completely textualist or original intentionalist since the majority did not eliminate disparate impact actions per se. However, the requirement of causation targeting, coupled with the "business purpose" defense that will, in the hands of a sympathetic factfinder, be easy for employers to satisfy effectively, reduces disparate impact litigation to a shadow. Certainly, the civil rights plaintiff's bar views *Wards Cove* as the practical reversal of *Griggs* and the end of disparate impact litigation.

153. See 490 U.S. at 678 (Blackmun, J., dissenting) ("One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against non-whites—is a problem in our society, or even remembers that it ever was."); Greene, *supra* note 105, at 1540 ("A new legal structure is being erected . . . [by the Court that] legitimizes the racial status quo."); Gould, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TUL. L. REV. 1485 (1990) (Court's 1989 civil rights cases took "a deregulatory stance"); Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407, 1428 (1990) (1989 Civil Rights cases reversed hard-fought antidiscrimination progress of 1954-1979 era).

However, in practice, employers who discriminate have if anything progressed to the stage where more stringent and far-reaching laws are needed.<sup>154</sup> Gone are the days of overtly discriminatory policies and smoking gun statements and documents. Defendants have become more sophisticated and will seldom let themselves be caught in open discrimination. At the same time, minorities and women remain badly underrepresented in many occupations, particularly those with most compensation, prestige, and opportunity for advancement and growth. In this environment, it would seem that the *Griggs* rationale remains as powerful as ever. Nonetheless, the *Wards Cove* majority abandoned *Griggs* based on a value—"quota phobia"<sup>155</sup>—that could be considered pragmatic were it not so lacking in empirical support.<sup>156</sup>

#### D. *Price Waterhouse v. Hopkins*

The Court's *Hopkins* decision presents a similar problem in that, while taking the view that gender stereotyping is gender discrimination, it limits the reach of title VII by allowing defendants to defeat liability if they can marshal enough evidence showing that the adverse employment decision would have been made even in the absence of discrimination.<sup>157</sup> Plaintiff Ann Hopkins had unsuccessfully sought partnership at Big Eight accounting firm Price Waterhouse after five years of service as an associate. Despite many glowing assessments of her work, there were several negative comments concerning her allegedly

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154. See Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 HASTINGS L.J. 1301, 1305-06, 1338-47 (1990) (noting drop in title VII class actions and growth of individual lawsuits, increasing problems of proof after early title VII success in attacking facially or obviously discriminatory practices, and emerging inadequacy of title VII remedial scheme for current cases).

155. See Belton, *supra* note 141, 1379 ("grounded in the majority's fear that under more rigorous rules [such as *Griggs*], employers will adopt policies that prefer minorities"); Freeman, *supra* note 153, at 1429 (conservative justices fear employers will seek to avoid disparate impact suits by establishing affirmative action programs for minorities).

156. See Trost, *Job Bias Law Would Put Bite Into Penalties*, Wall St. J. Oct. 18, 1990, at B1, col. 2 (National Womens Law Center Study shows § 1981 suits succeed only 20 percent of the time, with few large damage awards.).

157. 490 U.S. 225, 240-45 (1989).

abrasive deficiencies. Hopkins contended that such comments directed at her and deemed important in her case but not for similarly situated men gave rise to an inference of sexual stereotyping and gender discrimination.<sup>158</sup> The Court recognized this as a valid title VII claim, remanding for trial in which defendant could raise the "we-would-have-reached-the-same-decision-even-without-discrimination" defense.<sup>159</sup> This defense is an affirmative one, but defendant bears the burden to persuade only by a preponderance of evidence, rather than the "clear and convincing" evidence standard applied by the D.C. Circuit and trial court.<sup>160</sup>

The Court's decision, although not as substantial a setback for civil rights advocates as were the other 1989 decisions, was only a tepid victory by a hairbreadth margin. Justice White concurred in the judgment, essentially to suggest that courts grant employers the benefit of the doubt in such cases.<sup>161</sup> Justice O'Connor also concurred in the judgment, suggesting a pro-employer spin but intimating that the causal standard under title VII was "but-for" causation (a point the plurality did not really dispute), though seemingly arguing for a version of but-for standard in which discrimination must be the only or predominant reason for the adverse employment decision.<sup>162</sup> This view seems unduly narrow in the post-Prosser era, where law schools have long taught that there may be several proximate (but-for) causes acting in sequence or combination to produce a given result.<sup>163</sup>

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158. *Id.* at 231-36.

159. *Id.* at 250-54.

160. *Id.*

161. *Id.* at 260 (White, J., concurring).

162. *Id.* at 262, 276 (O'Connor, J., concurring). Although I find this view of proximate cause too crabbed, it has support in earlier constitutional litigation. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 492 U.S. 224 (1977).

163. See W. PROSSER, *HORNBOOK OF THE LAW OF TORTS* § 41, at 238-40 (4th ed. 1971). I cite an older version of Prosser to prove a point: the causation notions expressed in text are hardly new and certainly were dominant at the time title VII was enacted. See also Belton, *supra* note 141, at 1363 (characterizing causation requirement as mandating that race be essential to adverse employment decision); *id.* at 1368-69 (referring to terms such as "motivating factor" and "substantial factor," as similar causation concepts). To the extent that Justice O'Connor's opinion suggests the need to find a primary "but-for" cause, it is in error. However, her view that true "but-for" causation

Justice O'Connor seems to focus on the formalism of causation doctrine rather than the functions served by causation doctrine. As Prosser and Keeton put it:

Legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.<sup>164</sup>

One can argue that lower courts were correct as a matter of causation policy in allowing proven gender discrimination to determine liability and treating as a remedies matter issues of whether the adverse employment decision would have occurred absent discrimination. This hybrid approach recognizes that determining outcomes in mixed motive cases is difficult, and also appreciates that a discrimination victim is hurt by discrimination in and of itself, irrespective of the employment decision. To be fired is bad enough. To be fired and discriminated against is humiliating as well. Furthermore, defendants who discriminate have violated at least the spirit of title VII and probably its letter as well, so long as the courts do not take an overly narrow notion of causality.

In addition, Justice O'Connor argues that the burden of persuasion should, because of problems of evidentiary spoliation, be shifted to the employer,<sup>165</sup> but only when the plaintiff has offered direct evidence of discrimination.<sup>166</sup> Like her views on causation, this seems out of alignment with the prevailing notion

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requires overcoming the "same-decision-even-absent-discrimination" defense has support. The Fifth Edition Prosser text both treats substantial-factor and but-for causation as near equivalents and implies that a wrongful act is not the proximate cause of harm if the harm would have occurred even absent the wrongful act. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 265 (5th ed. 1984) [hereinafter PROSSER & KEETON] ("An act or an omission is not regarded as a cause of an event if the particular event would have occurred without it."); *id.* at 267 ("Defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about."); *id.* at 268 ("In the great majority of cases [substantial factor test] produces the same legal conclusion as but-for test [and generally] no case has been found where the defendant's act could be called a substantial factor when the event would have occurred without it.").

164. PROSSER & KEETON, *supra* note 163, at 264.

165. 490 U.S. 225, 272 (1989) (O'Connor, J., concurring).

166. *Id.* at 276.



that circumstantial evidence can also prove a case.<sup>167</sup> To compound the oddness, Justice O'Connor's opinion could be read as refusing to count direct evidence that does not amount to an authorized statement by one in authority.<sup>168</sup> In sum, although it is hard to understand just what Justice O'Connor is driving at, it seems that ultimately Justice O'Connor, like Justice White, stands ready to join the dissenters (Justices Kennedy and Scalia) to side with the employer in potential subsequent gender discrimination cases.

With so many views, placing *Hopkins* on the interpretative map is no easy task. It seems, however, safe to conclude that all opinions are purported to be textualist (although differing significantly about what terms such as "because of" discrimination actually meant) and purposivist (although liberals and conservatives divided over how best to achieve the congressional goal of workplace equality).<sup>169</sup> The dissent spurns dynamism but the plurality opinion and Justice O'Connor's concurrence show traces of the dynamic approach, but distinctly different visions of it. Eclectic pragmatism suffers a similar fate. The Court also has little to say regarding interest group analysis.

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167. See C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 311 (1954); J. MAGUIRE, J. WEINSTEIN, J. CHADBOURN & J. MANSFIELD, *EVIDENCE: CASES AND MATERIALS* 867 (6th ed. 1973).

168. 490 U.S. at 275 (O'Connor, J., concurring):

Thus, stray remarks in the workplace, while perhaps probative of sexual harassment, cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondiscrimination makers unrelated to the decisional process itself suffice to satisfy the plaintiff's burden in this regard.

169. A deeply intentionalist approach to gender discrimination is problematic at best. The original 1964 Civil Rights Act dealt only with race discrimination. Opponents of the bill added "sex" to the list of prohibited bases for discrimination, thinking that it would make the bill "so controversial that it would fail." See W. ESKRIDGE & P. FRICKEY, *supra* note 16, at 17. However, with a coalition of strategically voting opponents of civil rights legislation, women, and some liberals behind it, the ban on sex discrimination in employment was added to the bill and survived throughout the floor voting and conference process. As a result of its strange history, however, there is no hearing testimony or committee discussion of legislative intent. Floor statements in support of the amendment suggest only that congressional intent regarding gender discrimination should mirror congressional intent regarding race discrimination.

However, the net effect of *Hopkins*, as with the other 1989 civil rights cases, is to err on the side of imposing any burden of effecting change on the less powerful group (women) rather than the more powerful group (employers) concerned with the issue under review.

Also familiar is the majority's implicit set of values fueling the *Hopkins* result: deference to employers; a preference for market ordering; fear of strike suits or preferential treatment; and a view that the judiciary was becoming too entangled in the economy while yielding diminishing returns. By contrast, the dissenters were influenced by a value that held discrimination to be a significant dignitary wrong, one which should incur legal sanction regardless of other factors. The dissent also suggests a pragmatic distrust of employers and fears their ability to manufacture pretextual reasons that will sway a judge.

My own pragmatic objection to *Hopkins* is this: *Hopkins* adopts the "same result absent discrimination" approach of *Mt. Healthy City School District Board of Education v. Doyle*,<sup>170</sup> in which the discharged employee asserted he was dismissed because of his assertion of first amendment rights. Part of what prompted the *Mt. Healthy* Court to permit a "same result" defense was fear that an employee seeing an impending discharge might suddenly begin speaking out on public issues in order to set up a lawsuit, gain settlement leverage, or deter a firing. The employee can, of course, at least theoretically, exert this sort of influence. By contrast, a title VII plaintiff cannot choose his or her race, gender, or national origin.

#### *E. Lorance v. AT&T Technologies*

Plaintiff Patricia Lorance worked at an AT&T Technologies electronics plant beginning in the early 1970s. At that time, seniority was determined by years spent at the plant. In 1979, a new collective bargaining agreement took effect, one that provided that seniority would be calculated by position. Lorance and other plaintiffs obtained more skilled, better paying "tester" positions between 1978 and 1980. In 1982, layoffs occurred and they were demoted from the tester positions based on the 1979 agreement's method of calculating seniority, even though they

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170. 429 U.S. 274 (1976).

had more plantwide seniority than some of the male testers who had been hired for the tester positions at an earlier date than plaintiffs.<sup>171</sup>

Plaintiffs took brisk action to bring their claim that the 1979 agreement discriminated against them on the basis of gender (since women had allegedly been frozen out of the more desirable tester positions during the early and mid-1970s).<sup>172</sup> However, the Court held their claims to be time-barred, ruling that the statute of limitations (a scant six months in title VII actions) began to run on the day the collective bargaining agreement was adopted.<sup>173</sup> In essence, the Court stated that seniority systems violate title VII only if adopted with intent to discriminate, and that an intentionally discriminatory agreement should have been recognized and sued upon at the outset.<sup>174</sup> The majority rejected plaintiff's claims that use of the seniority system constituted a continuing violation and that considering the limitations period to expire prior to plaintiffs' knowledge of any damage from the collective bargaining agreement was unfair.<sup>175</sup>

Justice Scalia's majority opinion is somewhat textualist, but not what one would expect from the Justice known as an apostle of the textualist faith.<sup>176</sup> He makes an attempt to argue that the words of the statute and words commonly used in statute of limitations cases require that the statute be construed to run from the time of offending conduct. However, he does not push this line, probably because an increasing number of jurisdictions have adopted the "discovery" rule, which posits that a statute of limitations does not begin to run until plaintiff discovers or through the exercise of reasonable diligence could discover harm from the conduct subject to the limitations period.<sup>177</sup> Rather, he

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171. 490 U.S. 900, 901-02 (1989).

172. *Id.* at 902.

173. *Id.* at 904.

174. *Id.* at 904-06.

175. *Id.* at 906-08.

176. See Eskridge, *Textualism*, *supra* note 23, at 650-56.

177. See, e.g., *O'Brien v. Eli Lilly & Co.*, 668 F.2d 704 (3d Cir. 1982) (recognizing trend toward discovery rule and purporting to apply it, but using broad notion of when plaintiff, a minor, should have reasonably known of claim). Of course, Justice Scalia would presumably conclude that Lorraine reasonably should have discovered the potential harm to her of the collective bargaining agreement from its terms, which she knew in 1979.

takes something of a dynamic approach, finding that precedent regarding seniority systems (requiring that they intentionally discriminate to violate the law), even if not correctly decided, became the law of title VII and thus helped to compel the result.<sup>178</sup> Justice Stevens' concurrence takes essentially this view.<sup>179</sup>

The *Lorance* majority also invokes intentionalism and purposivism, suggesting that congressional purpose was, although antidiscriminatory, strongly oriented toward respect for seniority systems—hence the absence of a disparate impact claim attacking a seniority arrangement. The Court's opinion borders on the unpragmatic, adopting a view of statutes of limitation that effectively turns them into statutes of repose.<sup>180</sup> Coupled with the short limitations period applicable in title VII actions, the practical impact is to severely limit challenges to seniority systems because (1) many potential plaintiffs, like *Lorance*, will simply not realize they are adversely affected by a seniority rule until it is too late, or (2) even if the potential discrimination is recognized, it remains only potential discrimination; someone like *Lorance* could rationally decide to gamble on not being laid off or demoted rather than incurring the cost and inconvenience of being a title VII plaintiff.

By contrast, the *Lorance* dissent invoked intentionalism, purposivism, and eclectic pragmatism to reach quite different conclusions.<sup>181</sup> The dissent also invoked textualism, suggesting

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178. 490 U.S. 900, 908 (1989).

179. *Id.* at 911 (Stevens, J., concurring) ("Although I remain convinced that the Court misconstrued Title VII [in earlier cases], the Court has correctly applied those decisions to the case at hand. And it is the Court's construction of the statute—rather than the views of an individual Justice—that becomes a part of the law.").

180. A statute of limitations sets a time period governing an individual's right to bring an action. A statute of repose sets a time period limiting all rights to bring an action. For example, many states (particularly those with strong architects' lobbies) have a statute of repose applicable to any actions arising out of the design or construction of any improvement to real property. See, e.g., MINN. STAT. ANN. § 541.05 (West 1988) (15 years). For example, if the eighth floor of Brooklyn Law School should list suddenly to the right and cause me injury, I must bring the claim within a certain limitations period. However, if the statute of repose has already expired, I may not bring the claim, no matter how quickly I act after suffering injury.

181. 490 U.S. at 919-20 (Marshall, J., dissenting) ("Because I do not believe that Congress, in framing title VII, even remotely contemplated putting employees into the predicament which the majority today makes inevitable, I dissent.").

that the language of title VII supported its interpretation, a view not seriously contested by the majority,<sup>182</sup> which instead countered with its evolutive argument about past precedent foreclosing a reargument of the textual meaning. As a jurisprudential matter, *Lorance* is interesting because it differs from the other 1989 civil rights cases and Justice Scalia's usual approach in that textual concerns are dismissed as of little moment.

At the root of *Lorance* are the usual assortment of public values. For the majority, the favored values are stability, an aversion to "stale" claims (but recall that *Lorance* brought her action well within the general four-year federal statute of limitations enacted in 1990),<sup>183</sup> preservation of and respect for seniority, and repose. For the dissenters, the prime values are fealty to the antidiscrimination principle, workplace equality, and access to the courts for aggrieved litigants.

#### F. *Martin v. Wilks*

This case held that a group of white firefighters could, through a separate action, attack a consent decree entered into by the defendant City of Birmingham several years before after a bench trial, and where an association with similar incentives to challenge the consent decree had appeared and filed objections as *amicus curiae*.<sup>184</sup> Although a number of circuit courts had established a doctrine of "impermissible collateral attack" barring such independent actions attacking title VII consent decrees,<sup>185</sup> the Court rejected this approach, finding it inconsistent with "the general rule that a person cannot be deprived of his legal rights in a proceeding to which he is not a party."<sup>186</sup>

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182. *Id.* at 913.

Nothing in the text of Title VII compels this result. On the contrary, even the majority concedes that a plausible reading of Title VII would regard the employer as having violated [the statute] not only at the time of the system's adoption, but also when each concrete effect of that system is felt.

*Id.* at 914.

183. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 1658, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat. 5089) 650.

184. 490 U.S. 755, 758-59 (1989).

185. *Id.* at 763 n.3.

186. *Id.* at 758.

In essence, *Martin v. Wilks* is a common-law opinion. Although it construes title VII and considers Federal Rules of Civil Procedure 19 and 24 (regarding joinder of parties and intervention), it finds no textual imperative and little intentionalist influence.<sup>187</sup> The majority opinion is to some degree purposivist, dynamic, and even pragmatic in that it purports to build upon venerable principles of fairness and finality as applied in the modern title VII context. The dissent, which reaches a different conclusion (that the white firefighter's attack should be barred), exhibits more of these qualities, placing greater weight on the purpose of title VII, the particular legal topography of social and legal commitment against race discrimination, and pragmatic considerations. The majority view greatly reduces the utility of consent decrees, thereby undermining the antidiscrimination and voluntary resolution goals of title VII.<sup>188</sup> The dissent also exhibits greater pragmatism in appreciating the distinction between being bound by a judgment (it agreed with the majority that the *Wilks* plaintiffs were not strictly bound by the first judgment) and being affected by the judgment (it saw the *Wilks* plaintiffs as affected in that they could not set aside the judgment absent a showing of fraud or similar misconduct in the first action).

The dissent also adopts a different view of the fairness question. The majority suggests it is unfair to bind the *Wilks* plaintiffs to the consent decree since they were not parties to the litigation. The dissent finds it unfair to the original title VII plaintiffs and those who have relied on the consent decree to face the expense and uncertainty of the collateral challenge.<sup>189</sup> What really separates majority and dissent in *Wilks*, however, is the familiar divide of values. The majority favors individualism, participation (a value it seemed unimpressed by in adopting the short statute of

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187. *But see id.* at 763, in which the majority suggests that the language of Rule 24(b) governing permissive intervention must, in light of historical context, suggest an intent not to bind non-intervenor to prior judgments, even if they are interested in the subject matter of the prior case.

188. *See id.* at 768; Strickler, *Martin v. Wilks*, 64 TUL. L. REV. 1557, 1599 (1990).

189. 490 U.S. at 768-72 (Stevens, J., dissenting) (Prior judgments did not deprive white firefighters of legal rights but did "have a practical impact on . . . opportunities for advancement in their profession," giving them standing to contest the validity of consent decrees, but on much more narrow grounds than would be permitted in direct appeal.).

limitations in *Lorance*), and tradition (judgments should not impinge upon non-parties), and fears that discrimination litigation may act as a sort of strike suit engendering consent degrees that reflect too much accommodation and not enough airing of disputes. The dissent's values are promotion of the antidiscrimination objective, finality, aiding reliance on judgments, fostering civil peace, and minimizing costs for successful title VII plaintiffs. As with the other 1989 civil rights cases, the Court continued to weave a consistent inertial thread: The losing party, who must shoulder the inertial burden to change the result, is a group (minority job claimants) without particular access to or clout with Congress, while the group advantaged by the ruling (white employees in unionized industries, which usually have white-dominated unions) has more political power.<sup>190</sup>

*G. Independent Federation of Flight Attendants v. Zipes*

In *Zipes* the Court held that title VII intervenors who failed to prevail in their claims could not be ordered to pay the prevailing plaintiff's legal fees merely for losing, but only if other equitable factors supported an award of fees.<sup>191</sup> The majority opinion only gives a passing glance to text, primarily invoking intentionalist and purposivist approaches to decision. The Court reasoned that title VII intervenors, unlike defendants but like plaintiffs, were not discriminators merely because their arguments did not prevail, and that Congress did not intend fees liability for them as a matter of course.<sup>192</sup> The majority is somewhat dynamic, looking to the precedential evolution of the title VII fees mechanism for guidance. The majority, unlike the dissent, is distinctly unpragmatic, however, in that it dismisses too easily the impact of its ruling, creating incentive for defendants to refrain from certain arguments while intervenors

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190. I realize this view is open to debate in that minority Americans may have more clout than some white-dominated unions. At a minimum, however, the question is sufficiently close that I can say with confidence that the *Wilks* Court certainly did not impose the burden of inertia upon a clearly stronger political force.

191. 491 U.S. 754, 760 (1989). In effect, the Court treated intervenors like losing plaintiffs, who could be ordered to pay fees if their claims were brought in bad faith or were "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978).

192. 491 U.S. at 763-64.

press certain defenses, with even plaintiffs who prevail unable to recover fees as they would if defendants had raised the issues.<sup>193</sup> The majority is also unpragmatic in that it fails to acknowledge the frequent identity of interest between potential intervenors (e.g., a union) and defendants (e.g., the employer).

The dissent's primary focus is textual: title VII grants a right to fees as a matter of course to the prevailing plaintiff; this language is not limited by the identity of the opponent; whether litigating against a defendant or an intervenor, the prevailing plaintiff should receive fees.<sup>194</sup> The dissent invokes intentionalism and purposivism as well, since fee-shifting to assist employment discrimination claimants was a goal of Congress. As noted, the dissent in general fits the eclectic pragmatism approach to interpretation. Justice Blackmun concurred with a hybrid position of sorts. Intervenors were to be treated like plaintiffs rather than defendants under the statute, but where the plaintiff prevailed on a dispute with the intervenor, the defendant should be presumptively liable for fees absent a showing of unfairness.<sup>195</sup>

As before, values and inertial considerations provide the greatest consistency. For the majority, the inertial burden of change is placed upon title VII plaintiffs, a historically disempowered group, with the majority supporting values such as the traditional American Rule against fee-shifting, freedom of litigation access (for intervenors at any rate; plaintiffs may be deterred from litigation and their access effectively diminished by the prospect of extensive but uncompensated litigation with intervenors), and disinclination to disturb typical litigation conduct for a remedial claim such as title VII. By contrast, the dissent would place the burden of seeking legislative change on intervenors (largely unions or organizations of non-minority workers) or defendants. The dissent's values are deterring discrimination, encouraging title VII plaintiffs, and equalizing the litigation posture of plaintiffs and defendants.

#### *H. In Sum: Oscillating Intextualism Placing Inertial Burdens on Civil Rights Advocates*

The Court's 1989 Civil Rights cases, like most judicial decisions, do not easily submit to airtight classification. However, as the

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193. See *id.* at 765-66, 779-80 (comparing the majority and dissent).

194. *Id.* at 771 (Marshall, J., dissenting).

195. *Id.* at 768-69 (Blackmun, J., concurring).



preceding discussion suggests, some common strands and a pattern of sorts emerge. All seven decisions virtually overlook functional and pragmatic considerations in that the results work, as a practical matter, to burden civil rights claimants and thus undercut the national policy against discrimination purportedly endorsed by the Court.<sup>196</sup> In the main, the decisions are undynamic by paying no heed to evolutive factors, or exhibit a biased dynamism that gives credence to narrowing interpretative precedents and developments but overlooks the steady emergence of a pro-civil rights consensus in society, politics, legislative activity, and judicial precedent (in the lower courts as well as the High Court).

The Court majorities generally based their decisions on some combination of textualism and intentionalism. Oddly, purposivism was seldom used, except in fusion with intentionalism. In addition, the Court waxed and waned in its preferences for text versus legislative intent. To some extent, this resulted from the raw material with which the Court had to work in specific cases. For example, the text of title VII does not speak in any clear terms about measurement of the statute of limitations (*Lorance*). In other cases, however, the reader is left with the uneasy impression that the majority's enthusiasm for a given interpretative approach stems from the Court's appreciation of the results flowing from each approach. Thus, in *Patterson*, the majority focuses on text and declares that the right to "make" contracts can only mean initial contract formation and not the ongoing contractual activity.<sup>197</sup> Intent is accorded only a glance

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196. Of course, it is possible the majority appreciated perfectly well the practical impact of its decisions and (a) chose nonetheless to render its decisions out of hostility toward the statutory goal, or (b) felt constrained to render the civil rights burdening result because of more compelling factors such as fidelity to interpretation of language or values favoring market freedom. See Ross, *supra* note 69, at 423-28.

197. At the risk of flogging an already dead horse, an example illustrates the problems of the *Patterson* majority's professed certainty. Assume McLean Credit Union had a supply arrangement with a local black vendor of office supplies and had done business for 10 years. Each week, the vendor restocked the bank's storeroom, encountering race-based harassment and discrimination from the bank's purchasing officer and other bank staff. One day, the vendor arrives and is turned away, told the bank has replaced him with a white vendor. At what junctures has the black vendor made or tried to make a contract within the meaning of § 1981? When first arranging to provide

and purpose is spurned as a tool of analysis. In *Jett*, however, the majority dismisses the language and structure of actual text, which, if explored, would seem to support the opposite result.<sup>198</sup> Instead, the *Jett* majority labors in the vineyards of intentionalism to reach a narrow construction of section 1981 but curiously eschews the closely related and equally legitimate approach of purposivism.<sup>199</sup>

Throughout the 1989 decisions there hangs the brooding omnipresence of public values or perhaps "pseudo-values." I make this cynical observation because most scholars endorsing the use of public values as a basis for decision posit that the values be widely shared.<sup>200</sup> In the 1989 cases, this condition was not met, certainly not by the majorities, whose implicit values seem to stand on thin socio-political ice. At a minimum, the majority and the dissenters divided sharply in their respective visions of American values. Under such circumstances, it seems

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supplies on a weekly basis? Each week when making deliveries and giving an invoice? When turned away? At all these junctures? *Patterson* seems to suggest that only the first and last encounters are covered by § 1981, which seems a crabbed reading, as does the actual *Patterson* result, in that there are strong similarities between the situations of Brenda Patterson and the hypothetical black vendor.

198. 491 U.S. 701, 705-09 (1989).

199. Conservatives often view dynamic or pragmatic interpretation as presenting legitimacy problems. Their conception of the judicial task is to give effect to the will of an enacting Congress, not to update legislation or seek wise and fair application. Thus, one can understand a conservative's desire to avoid dynamism and eclectic pragmatism on philosophical grounds. This does not explain the coolness toward purposivism found in *Jett* and the other 1989 decisions. Purposivism, although regarded as according more power to the judiciary, is widely accepted as legitimate across the political and jurisprudential spectrum. See Eskridge & Frickey, *Practical Reasoning*, *supra* note 32, at 332-34. General conservatism in judicial approach also fails to explain the occasional embrace of dynamism made by conservatives where it renders an outcome favored by conservatives.

200. See Eskridge, *Public Values*, *supra* note 23, at 1008. Many commentators, including me, question whether something as amorphous as public values or public policy should serve as bases for decision except under select criteria, such as when the value or policy is directly discernable from objective evidence and not subject to highly impressionistic balancing against other concededly legitimate values. See Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259 (1990).

particularly inapt to use normative background values as bases for decision. The majority opinions appear influenced by values of private ordering, flexibility for commercial actors (employers), federalism (the states' rights version), and a preference for reduced litigation volume and expenditures. The dissenters implicitly elevated other values of antidiscrimination, equality, access to courts, and individualized fact finding (rather than bright line rules), with comparatively low regard for costs. Although the preferred norms of both majority and dissent are all recognized values in this country, use of any of them requires the Court to find that value superior to any competing values. In the 1989 cases, the Court consistently miscalculated when conducting the weighing process. Americans support markets and employer flexibility/autonomy, but not as much as they endorse nondiscrimination and fairness to employees. Certainly, Congress struck the balance in favor of the dissents' values, as shown by the subsequent legislative reaction to the Court's 1989 decisions.<sup>201</sup>

The 1989 cases are perfectly consistent in one very troubling respect, however: the side that "lost" the statutory construction question was less well positioned to effect a legislative change in the statute than the prevailing parties and interest groups. These cases and the civil rights laws—more than most commercial, property, personal injury, or regulatory litigation—involve clashes between distinct socioeconomic and sociopolitical groups. Plaintiffs invoking these laws, even white men such as football coach Norman Jett, usually have far fewer legal, political, and economic resources than defendants, ordinarily government or commercial institutions. These defendants have money, lawyers, and sophistication. They are repeat players in both litigation and politics. If faced with an adverse case of statutory interpretation, the defendants have a realistic chance of effecting legislative change, both individually and by banding together with similarly situated entities.<sup>202</sup> In other words, the 1989

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201. See 136 CONG. REC. S9823-9853 (daily ed. July 17, 1990).

202. See M. OLSON, *supra* note 41, at 45-55 (observing that effective interest groups are most likely to form when the affected members are not too large in number, each has a significant stake in seeking legislative change, and can pool resources to seek change without subsidizing "free riders"). Employer defendants such as those involved in the 1989 civil rights cases are particularly

decisions were a feast for society's "haves," who achieved a cornucopia of legal victory, and a famine for the nation's "have-nots," who met judicial defeat that created greater difficulty where they seek to vindicate prior statutory congressional objectives set forth in 1866, 1871, and 1964.<sup>203</sup> In addition, the have-nots faced the uphill battle of legislative change, a battle in which they came within a hairbreadth of prevailing.<sup>204</sup>

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well positioned to take collective action through trade organizations and dues assessment as well as through individual and industry Political Action Committees.

203. I realize that scholars have noted that public choice theory and "logic of collective action" thinking also indicate that discreet and insular minorities may in fact have some advantages in seeking legislative change. See Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985). Under this view, American minorities have an incentive to organize to seek stronger civil rights legislation and can make their influence felt through block voting and other uniform support of favorable representatives. Certainly, there are sophisticated organizations representing America's racial minorities (e.g., the NAACP). However, these groups are significantly fewer in number and possess less economic clout than employer associations and individual large corporations that make sizeable PAC contributions. In addition, black and hispanic voters will pose little threat to certain representatives and senators from largely white districts. In short, I recognize that minorities, particularly blacks, have political clout but contend that, on a national level (e.g., in five of the past six presidential elections, the candidate favored by blacks has lost), 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.

Women face a similar situation, but, being more electorally dispersed, differing in socioeconomic status, and bearing the historical weight of second tier citizenship and a tradition of deference to men, women's political activity presents even thornier collective action problems, notwithstanding the large absolute numbers of women voters and sophisticated representative organizations (e.g., the National Organization for Women). The defeat of the Equal Rights Amendment, in which women were successful in Congress and most, but not enough, state legislatures illustrates the potential political efficacy of women and structural aspects of the system that make it difficult for have-nots to achieve their legislative goals.

204. Although scholars display disparate views regarding the effectiveness of interest groups in obtaining legislation, the weight of political science opinion holds that powerful interest groups are particularly effective in blocking legislative or regulatory initiatives. See W. ESKRIDGE & P. FRICKEY, *supra* note 16, at 46-61. This is especially true when the interest group can influence a key legislator. For example, Senator Orrin Hatch (R-Utah), chair of the relevant committee, worked against legislation to overturn *Grove City College v. Bell*, 465 U.S. 555 (1984). See Senate Panel Considers Anti-Discrimination

Taken as a whole, the 1989 cases suggest to me that the working majority applied a disturbing hybrid mode of interpretation in deciding the civil rights cases that I call "oscillating intextvalism" for short reference. The Court oscillated back and forth in its preference for textualism and intentionalism, based not only on the available data for applying each approach but also, perhaps even primarily, because one method was more likely to render the result desired by the conservative working majority. In other words, interpretative approaches were applied not out of commitment to the soundness of the approach but to obtain results. Combined with the shifting blend of textualism and intentionalism was the tacit invocation of conservative values viewed as more compelling than liberal values equally implicated by the cases.<sup>205</sup> In making difficult assessments of text or intent (even while pretending the assessments were not difficult), the majority leaned toward narrow construction because narrow construction comports with its conservative values. The majority's brand of oscillating intextvalism became more conservative in both approach and outcome in that it virtually always rejected the influences of purposivism, dynamism, and eclectic pragmatism, all approaches that tended in the 1989 cases to argue for more expansive statutory construction. Regarding the interest group perspective, the majority does not discuss these issues but in practice has rendered results exacerbating socioeconomic and political inequality.

The fulcrum of the Court's strange jurisprudence of narrow construction of broad remedial statutes designed to aid political out-groups seems to stem from a naive and formalist view of democracy and separation of powers.<sup>206</sup> In this formalist

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Law, Chicago Tribune, Mar. 21, 1987, at C5, col. 4. It would seem to be particularly true when the proponents of change are less powerful than the opposing interest group, a situation obtaining in the aftermath of the 1989 cases.

205. See Greene, *supra* note 105, at 1539-41.

206. The foremost proponent of this view is Justice Scalia. See Eskridge, *Textualism*, *supra* note 23 at 640-56. However, as Prof. Eskridge has observed,

The 1980s witnessed an important revival of formalism, especially in connection with statutory interpretation. Formalism posits that judicial interpreters can and should be tightly constrained by the objectively determinable meaning of a statute; if unelected judges exercise much discretion in these cases, democratic governance is threatened. . . . Several

syllogism, courts are to give strict construction to statutory language and to be wary of legislative history, legislative silence, and subsequent legislative events, since all of these lack the positive proscriptive power of statutory language actually voted upon favorably by both chambers of Congress and signed by the President.<sup>207</sup> Courts are particularly to eschew considerations

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circuit court judges voiced this new formalist concern in the 1980s—including Judge [Frank] Easterbrook of the Seventh Circuit; Judges Kenneth Starr (now Solicitor Counsel), Scalia (now Justice), and James Buckley of the District of Columbia Circuit; and Judge Alex Kozinski of the Ninth Circuit. The Department of Justice has recently relied on their criticisms to rethink its approach in statutory cases.

*Id.* at 646-47 (footnotes omitted).

207. See Greene, *supra* note 105, at 1517 ("One theme embodied in the 1989 civil rights cases is formalism, the tendency to approach the task of interpretation as an enterprise unaffected by either cultural reality or likely result."). Perhaps the highwater mark of the Court's separation of powers formalism during the 1980s occurred in *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983), which invalidated the one-house veto provisions of the Immigration & Nationality Act, 8 U.S.C. § 1254(c)(2) (1988). The Act allowed one chamber to overturn executive branch decisions to permit deportable aliens to remain in the United States. The *Chadha* majority, which numbered then-Justice Rehnquist, took the view that the Constitution's bicameralism and presentment provisions required congressional lawmaking to have both aspects to avoid impermissible intrusion on the executive branch, overlooking that the executive would never have been in the deportation business but for the delegation of power from Congress. 462 U.S. at 942-56.

The result in *Chadha* may well be correct, but the opinion is highly formalistic and, if taken literally, would invalidate any legislation that allowed the legislature to intrude upon an executive branch decision except by passing legislation either signed by the President or passed over his veto. *Chadha* cannot be taken so literally, not only because it suggests absurd results (e.g., perhaps even legislative oversight hearings would be imperiled; if *Chadha* is correct, perhaps the Court must return to the nondelegation doctrine of the anti-New Deal Court) and because the Court seemed so quickly to forget *Chadha's* analysis and rhetoric in *Bowsher v. Synar*, 478 U.S. 714 (1986) (striking down Gramm-Rudman budget law in part because it involved executive functioning by a legislatively appointed official, the Comptroller General).

Chief Justice Rehnquist and judicial conservatives frequently exhibit anxiety about feared smudging of bright lines of federal branch separation of powers and federal-state separation of powers, although the Court's working majority will, of course, not always be in accord. See Gelfand & Werhan, *Federalism and Separation of Powers on a 'Conservative' Court: Currents and Cross-Currents from Justices O'Connor and Scalia*, 64 TUL. L. REV. 1443 (1990) (finding Justice Scalia more concerned about intra-federal separation of pow-

of legal evolution outside the specific statutory provision under review.<sup>208</sup> In addition, concerns of judicial legitimacy counsel against courts modernizing statutes to accord to current political preferences.

Backing up this view is the enduring tenth grade civics notion of judicial-legislative colloquy: If Congress dislikes the Court's statutory decisions, it remains "free" to overrule them.

Although this formalist view has the support of many outside the Court's working majority,<sup>209</sup> it is generally too unrealistic and reductionist a paradigm to merit use by a Court whose decisions are intimately tied to a real and complicated American society.<sup>210</sup> In addition, the Court's formalist, superficially democratic approach can, like most formalist but superficial schemes, easily be turned upon itself. "Why," goes the rhetorical question of our hypothetical skeptics, "should the Court place

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ers, with Justice O'Connor more concerned with federal-state relations). Justice White, although increasingly siding with the Court's conservative working majority, appears least formalist of the group. See, e.g., *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 967 (1982) (White, J., dissenting); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 92 (1982) (White, J., dissenting) (finding majority opinion of Justice Brennan too formalist in concluding that article III forbids article I bankruptcy judges from exercising certain adjudicative powers).

208. See Eskridge & Frickey, *Practical Reasoning*, *supra* note 32 (concluding that the Court in recent terms, although usually adopting an eclectic approach to statutory interpretation favored by authors, has tended to undervalue or reject evolutionary considerations, and that this has led to some of Court's most troubling decisions).

209. See, e.g., Marshall, "Let Congress Do It": *The Case for an Absolute Rule of Stare Decisis for Statutory Cases*, 88 MICH. L. REV. 177 (1989); Marshall, *Contempt of Congress: A Reply to the Critics of an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 2467 (1990) (responding to Eskridge, *The Case of The Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases*, 88 MICH. L. REV. 2450 (1990) (criticizing Eskridge for failure to respect congressional competence and authority)) [hereinafter Marshall, *Contempt of Congress*].

210. For example, Professor Marshall's defense of an absolute rule of *stare decisis* focuses on Congress with a tunnel vision reminiscent of Justice Scalia's seeking to exclude the perceived impurities of legislative history from the Court's opinions. Professor Marshall writes as though Congress operates in an executive-less vacuum, persisting in this fiction even as he makes reference to the 1990 Act. See Marshall, *Contempt of Congress*, *supra* note 209, at 2479 n.47 (noting the Civil Rights Act of 1990 and its objective but not mentioning Bush Administration opposition).

the inertial burden on racial, ethnic, and religious minorities and women? Why not place the inertial burden on employers, who have greater political power, access to the congressional agenda, and influence upon the Executive?" It may be a rhetorical question, but it is probably one most easily answered through legal realism: because the Court's working majority, largely appointed through the efforts of the political agents of employers, unconsciously identified with employers.<sup>211</sup> Although judicial solicitude for one's political kindred spirits is inevitable and undoubtedly explains some of the Rehnquist Court's restriction of civil rights law, my own explanation is less partisan. In my view, the current Court working majority erred because it failed to consider self-consciously the inertial aftermath of its decisions, and because it remained imprisoned by the beguiling but oversimplified conservative paradigm of judicial legitimacy, separation of powers, and democracy. As a consequence, it rendered decisions that in retrospect seem distinctly anti-democratic now that civil rights reform seems effectively thwarted by a minority of citizens with influence upon President Bush and a cadre of Republican lawmakers.

### III. THE WAGES OF OSCILLATING INTXTVALISM: THE NARROW DEFEAT OF THE 1990 CIVIL RIGHTS ACT AS AN ANTI-DEMOCRATIC OUTCOME

#### A. *The Aftermath*

##### 1. *The Legislation*

The immediate adverse congressional response to the 1989 cases suggests that both the case results and the Court's oscillating intxtvalism did not sit well with Congress. Within two weeks of *Wards Cove*, legislation to overrule it was introduced.<sup>212</sup> No

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211. See Belton, *supra* note 141, at 1403; Ross, *supra* note 69 (concluding that court decision in *Michigan Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285 (D.C. Cir.), *aff'd per curiam*, 488 U.S. 958 (1989), which refused to disturb Attorney General's approval of newspaper joint operating agreement, resulted from desire of Republican appointees to enhance power of Republican executive branch and ignored incorrect interpretation of Newspaper Preservation Act, 15 U.S.C. §§ 1801-1804 (1988)).

212. See Bar Committee Report, *supra* note 3, at 433.



action was taken while civil rights advocates and congressional allies worked to craft a broader bill responding to all of the Court's 1989 cases. By February, 1990, a comprehensive bill was assembled and introduced in both chambers.<sup>213</sup> The bill introduced as the Civil Rights Act of 1990 and passed in substantially the same form and with the same title, contained fifteen sections. The first three sections were descriptive and introductory, with a legislative finding disapproving the 1989 cases and viewing them as having curtailed civil rights protections intended by Congress.<sup>214</sup> The final three sections of the bill were primarily technical but were substantively important in providing that any changes in the law would apply to pending cases.<sup>215</sup>

Regarding section 1981, section 12 of the Act was to overturn *Patterson v. McLean Credit Union*,<sup>216</sup> expressly providing that section 1981 applied to race discrimination occurring after the initial formation of a contract.<sup>217</sup> Section 11 was designed to

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213. *Id.* Simultaneously, the Justice Department was drafting legislation to change the *Patterson* and *Lorance* results, in which the Court had rejected its views. *Patterson* and *Lorance* look even more infirm when one appreciates that the generally conservative Republican executive's Justice Department as well as the more liberal Democratic Congress disagreed with the holdings. However, the Justice Department did support the *Wards Cove* and *Wilks* decisions and opposed congressional efforts to change those results. *Id.* at 434.

214. *Id.* I do not claim an absence of negotiation or compromise in the legislative history of the Act. For example, proponents of the Act compromised by agreeing to accept that part of the *Wards Cove* holding that required plaintiffs to direct disparate impact claims at specific employer practices. See Barrett, *House Approves Broad Civil Rights Bill Despite the Threat of a Presidential Veto*, Wall St. J., Oct. 18, 1990, at A18, col. 1. See also Civil Wrongs, Newark Star-Ledger, Nov. 1, 1990, at 20, col. 1 (Act "had been revised to take into account concerns voiced" by Bush Administration). However, the Act's primary thrust was not blunted during negotiations with the Bush Administration, primarily because Congress strongly supported the Act. See generally 136 CONG. REC. S9823-9853 (daily ed. July 17, 1990), in which the Senate votes (62 yes and 38 no) to close debate on the Act in order to speed passage and rejects several amendments offered by Republican senators. Although the amendments were labeled as compromise attempts, they in the main sought to codify the Court's 1989 decisions, efforts the Senate majority correctly characterized as something other than a compromise.

215. Bar Committee Report, *supra* note 3, at 435.

216. 491 U.S. 164 (1989).

217. Bar Committee Report, *supra* note 3, at 434, 464-66. The Act's language provides that § 1981 prohibits discrimination in the "making, per-

overturn *Jett v. Dallas Independent School District*<sup>218</sup> by providing that victims of discrimination by government entities could sue pursuant to section 1981 and that vicarious liability would attach to contract discrimination by employees acting within the scope of their employment.<sup>219</sup> This section also sought to prevent future *Jett* problems by providing that Congress intends to imply repeal of any civil rights legislation by virtue of the passage of subsequent civil rights legislation.<sup>220</sup>

Regarding title VII, the Act sought both to undue the damage of the 1989 cases and to cure perceived deficiencies in the law's remedial scheme that disadvantage plaintiffs. Most important, the Act overturned *Wards Cove v. Atonio*<sup>221</sup> by reinstituting the "business necessity" defense (rather than "business purpose" as articulated by the Court) and squarely requiring that the necessity defense be an affirmative one in which the defendant employer bears the burden of persuasion.<sup>222</sup>

Another provision of the Act was an overruling of the "same result" defense to a title VII action provided by *Price Waterhouse v. Hopkins*.<sup>223</sup> Under the new provision, liability could not be defeated by a defendant's showing that it would have made the same decision even in the absence of discrimination. However, courts could take this factor into account in shaping relief.<sup>224</sup> The practical effect of such a change would be to give the prevailing plaintiff faced with a successful "same decision" defense little in the way of monetary award of back pay, but to entitle her to counsel fees as a prevailing party and to allow the court to render injunctive relief to remedy past discrimination and prevent future discrimination.

Other portions of the Act clarified counsel fees questions to the benefit of title VII litigants. It overruled *Independent*

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formance, modification and termination of contracts and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." *Id.* at 464. For an enlightening but depressing description of the impact of *Patterson* on litigants with pending § 1981 claims, see *id.*, *supra* note 3, at 465-68.

218. 491 U.S. 701 (1989).

219. See 136 CONG. REC. S15355 (daily ed. Oct. 16, 1990).

220. Bar Committee Report, *supra* note 3, at 435.

221. 490 U.S. 642 (1989).

222. Bar Committee Report, *supra* note 3, at 435-37.

223. 490 U.S. 225 (1989).

224. See Bar Committee Report, *supra* note 3, at 434.

*Federation of Flight Attendants v. Zipes*,<sup>225</sup> which had made recovery of fees difficult for plaintiffs prevailing against intervenors. The Act provided that a prevailing plaintiff was entitled to counsel fees (which was, notwithstanding the arguments of the *Zipes* Court, just what the statute said—another instance of textualism spurned in the service of conservative results) from someone (either intervenors or defendants), but that the court could make this apportionment according to the facts and equities of the case.<sup>226</sup> This portion of the Act also provided for full prevailing party recovery of expert witness fees and expenses.<sup>227</sup> In addition, it overruled another Court decision that permitted defendants to condition settlement offers on a waiver of counsel fees, a situation that permitted defendants to divide client and lawyer and put plaintiffs' civil rights counsel at great risk of working for no fee.<sup>228</sup>

On the procedural issues of the statute of limitations (*Lorance v. AT&T Technologies*<sup>229</sup>) and the collateral attack on consent decree judgments (*Martin v. Wilks*<sup>230</sup>), the Act also rejected the Court views. The Act overruled *Lorance* by providing that the title VII statute of limitations for filing a charge of discrimination begins to run either from the adoption of a discriminatory practice or its initial adverse affect on the plaintiff, whichever comes later.<sup>231</sup> The Act overturned *Wilks* as well by providing for mandatory intervention by affected parties in title VII litigation according to the discretion of the court. The Act also provided that even absent joinder, nonparties could not wage a

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225. 491 U.S. 754 (1989).

226. See 136 CONG. REC. S15356-15362 (daily ed. Oct. 16, 1990); Bar Committee Report, *supra* note 3, at 435.

227. See 136 CONG. REC. S15356-15362 (daily ed. Oct. 16, 1990); Bar Committee Report, *supra* note 3, at 434. This would overrule *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), which limited plaintiff's recovery of expert witness fees to the statutory figure of \$30 per day.

228. See 136 CONG. REC. S15356-15362 (daily ed. Oct. 16, 1990); Bar Committee Report, *supra* note 3, at 435 (§ 9 of the Act, overruling *Evans v. Jeff D.*, 475 U.S. 717 (1986)).

229. 490 U.S. 900 (1989).

230. 490 U.S. 755 (1989).

231. See 136 CONG. REC. S15356-15362 (daily ed. Oct. 16, 1990); Bar Committee Report, *supra* note 3, at 434. In addition, the Act provided a more advantageous title VII statute of limitations for federal employee plaintiffs, overruling *Library of Congress v. Shaw*, 478 U.S. 310 (1986).

collateral attack on a title VII consent decree where the court finds that the challenger's interests were adequately represented by another who challenged the original decree or where reasonable efforts were made to notify the challenger. In addition, the Act expresses a preference for assigning collateral attacks to the judge who approved the consent decree.<sup>232</sup>

In one significant regard, the Act went beyond merely overturning the 1989 cases and restoring the status quo. Section eight of the Act provided that title VII remedies were to be expanded to match those of section 1981,<sup>233</sup> thus responding to the *Patterson* majority's concern that recognizing a racial harassment claim under section 1981 would undermine the utility of title VII<sup>234</sup> in the opposite manner (expansion of civil rights coverage and remedies) than the Court (narrowing the reach of a civil rights law). In addition, the Act provided a jury trial right in title VII claims seeking compensatory or punitive damages.<sup>235</sup> These changes would have alleviated what civil rights advocates had come to see as major shortcomings of title VII.<sup>236</sup>

Under the current remedial scheme, a discriminating employer may pay little penalty if the victimized employee is not discharged or quickly finds new employment. Unlike other areas of law, such as tort or contract, discrimination claimants may often not be made whole since title VII currently does not provide for compensatory or punitive damages.<sup>237</sup> In many cases, this modification of the statute could have significant impact. In *Price Waterhouse v. Hopkins*,<sup>238</sup> for example, plaintiff Hopkins could, under the revised title VII, seek damages as well as back pay and injunctive relief. Even without the Act's explicit explanation of a broader causation standard, availability of such

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232. See 136 CONG. REC. S15356-15362 (daily ed. Oct. 16, 1990); Bar Committee Report, *supra* note 3, at 452-57.

233. See 136 CONG. REC. S15356-15362 (daily ed. Oct. 16, 1990), Bar Committee Report, *supra* note 3, at 434.

234. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 180-81 (1989).

235. See 136 CONG. REC. S15356-15362 (daily ed. Oct. 16, 1990), Bar Committee Report, *supra* note 3, at 462.

236. See Kotkin, *supra* note 154, at 1305-06.

237. However, title VII claimants do have a significant remedy usually denied to tort or contract claimants—recovery of counsel fees financed by the losing defendant.

238. 490 U.S. 225 (1989).

remedies would seemingly foreclose the narrow view of causation taken by the Court.<sup>239</sup> Thus, even if the accounting firm could show that it would have denied partnership to Ann Hopkins even absent discrimination, she would still presumably have stated a claim that might entitle her to consequential damages from discrimination she did prove, as well as to a punitive award to punish Price Waterhouse for gender bias and to deter future discrimination against women candidates for partner.<sup>240</sup>

## 2. *Political Reaction to the Act*

Reaction to the Act quickly divided along political and economic lines, but with the Act garnering more support than one would expect under the ordinarily prevailing Republican-Democrat, conservative-liberal division of power.<sup>241</sup> The

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239. *Id.* at 232. If Hopkins possessed a statutory right to punitive damages in order to punish Price Waterhouse for willful discrimination and deter others from discriminating, the "same result" defense would have been harder for the Court to justify in that the "sting" of discrimination, even if the victim would likely suffer an adverse employment decision in any event, may itself justify punitive damages since the punitive damages remedy focuses on the defendant's wrongful conduct and not the plaintiff's actual loss. Although many jurisdictions require that the amount of any punitive damages bear a "reasonable relation" to the amount of compensatory damages, courts have frequently sustained awards well in excess of plaintiffs' actual losses. *See Bankers Life Ins. Co. v. Crenshaw*, 486 U.S. 71 (1988) (punitive award of \$1.6 million stands in case with \$20,000 in compensatory damages).

240. *See* Bar Committee Report, *supra* note 3, at 461-62.

241. The Democratic Party has held the majority of congressional seats since World War II, with the exceptions: 1947-49, where voting was heavily influenced by the unpopularity of President Harry Truman; 1953-55, where voting reflected the popularity of 1952 Republican candidate Dwight Eisenhower; and the 1981-87 Senate, where GOP candidates in 1980 elections were aided by Ronald Reagan's surprisingly large win over incumbent Democrat Jimmy Carter. However, the prevailing ideology of the nation and the balance of congressional power is conservative, which has generally meant resistance to civil rights legislation (and progressive legislation generally). *See, e.g.,* W. ESKRIDGE & P. FRICKEY, *supra* note 16, at 1-29 (describing conservative resistance to 1964 Civil Rights Act but support from moderate Republicans in northern and western states). Most Americans describe themselves as conservatives in Gallup Polls and similar surveys. *See* K. DOLBEARE & M. EDELMAN, *AMERICAN POLITICS* 410-11 (5th ed. 1985) (but noting that conservatism is the prevailing ideological self-definition, while respondents' views on specific issues are more properly classified as liberal) [hereinafter K. DOLBEARE & M. EDELMAN]. The ruling coalition in Congress is often more conservative

Democratic leadership supported the Act, providing it with expedited consideration. Rank-and-file Democrats also supported the Act. In addition, historically conservative Democrats from southern states also tended to support the Act, perhaps because so many of their minority constituents had become an important voting block upon which Democratic candidates running in the South had come to depend. Republicans exhibited general resistance to the Act, but many GOP legislators with urban or significant minority constituencies supported the Act.<sup>242</sup>

Interest group division over the Act was hardly surprising. Civil rights groups, organizations representing minorities and women, and liberals lobbied for the Act. Employers and conservatives opposed the Act. The "swing" or "wild card" groups were church groups and labor unions. Religious organizations, to the extent they became involved, tended to support the Act, probably not a surprising result in light of most theological doctrines (which abhor prejudice and urge kindness toward the less fortunate), but surprising to the extent that discrimination policy has traditionally taken a backseat to the churches' traditional frontline concerns: resisting government interference with religion; trying to obtain government support for religion (*e.g.*, parochial school aid); supporting basic sustenance for the poor; and weighing in on social issues addressed by church doctrine (*e.g.*, abortion legality and funding).

Labor unions were mixed in view. On one hand, they profited from a decision like *Lorance v. AT&T Technologies*,<sup>243</sup> which had the practical effect of restricting judicial review of seniority systems. Covertly, some unions with a history of discrimination probably were secretly happy to keep civil rights law as narrow as possible. On the other hand, union leaders lacking a hidden agenda of perpetuating discrimination and acting as true proxies

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than one might expect given the numbers of Democrats. However, the more conservative Republican delegation is usually substantially united and joined by a group of southern Democrats who share similar conservatism on many issues, notwithstanding their party's generally liberal platform. *See id.* at 241-51.

242. Compare 136 CONG. REC. S15362 (daily ed. Oct. 16, 1990) (listing House and Senate votes on the Act) with M. BARONE & G. UJIFUSA, THE ALMANAC OF AMERICAN POLITICS (1990) (describing Congress members and their constituencies).

243. 490 U.S. 900 (1989).

for the majority of workers (only a minority of whom will be white males by the year 2000), were naturally drawn to support the Act, although it was certainly a lower priority than traditional union concerns: labor law content; Labor Department and National Labor Relations Board appointments; wage and hour laws; right-to-work laws; and related concerns. An important interest group favoring the Act was the bar. Lawyers' organizations, which logically knew something about the law, the practicalities of litigation, and statutory interpretation, tended strongly to support the Act.<sup>244</sup>

Another wild card was President Bush and his Administration. Some indication of both support and resistance came from the Justice Department, which had taken more expansive readings of section 1981 in *Patterson* and title VII in *Lorance* than did the Court, and had supported the portions of the Act designed to overrule these decisions.<sup>245</sup> However, the Department announced formal opposition to the Act's reversal of *Wards Cove* and *Wilks*, contending that these portions of the Act sought to promote racial quotas.<sup>246</sup> Through mid-1990, Administration politics on the Act, like public discussion of the Act, was muted while the Act was considered by Congress. After hearings, which largely involved favorable witnesses, and Committee consideration, some changes were made in the Act, though it retained its essential thrust.<sup>247</sup> With a surprising head of steam, the Act was reported out and, as noted previously, favorably voted upon by substantial majorities in both the House and the Senate. In the latter stages of the process during fall 1990, the Bush Administration began to take a more public role,<sup>248</sup> actively attacking the bill in public forums and strongly

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244. See, e.g., Bar Committee Report, *supra* note 3, at 430 (three major committees of Association of the Bar of the City of New York, on behalf of entire organization, issue strongly favorable analysis of the Act with only six of 75 Committee members dissenting in part).

245. See *id.* at 433-34.

246. See *id.* at 434. On April 3, 1990, Attorney General stated that President will veto any legislation to overturn *Wards Cove* and *Wilks*.

247. See *id.* at 473 n.20.

248. I do not suggest that the Administration waited until the eleventh hour to register opposition to the law. On the contrary, the Justice Department and other representatives of the Administration appear to have consistently opposed the Act in the less visible arena of congressional lobbying. However,

reiterating the President's intention to veto the Act.<sup>249</sup> The focus of the Administration's attack, both in the halls of Congress and in public, was the effort to overturn *Wards Cove*.<sup>250</sup> Of course, stripped of rhetoric the Administration's position appears simply to be that it does not like disparate impact title VII litigation and, to the extent it is willing to acknowledge this theory of recovery at all, it is quite happy with the burdens placed on disparate impact suits by the *Wards Cove* decision. In particular, it saw the "business necessity" standard as too burdensome for employers and concluded that this would have the deleterious effect of making employers lose more close cases.<sup>251</sup>

As the dust settled on the eve of the 1990 congressional elections, President Bush prevailed when his veto was narrowly sustained in the Senate.<sup>252</sup> The House determined to take no action unless the Senate was successful in overriding the veto. Although Republicans appeared to have used the "quota scare" with some success in the 1990 elections,<sup>253</sup> it is unclear whether

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the Administration's position became widely publicized and fixed beyond compromise or retreat during the fall as the Act came closer to passage and achieved higher profile with the news media and the public.

249. See, e.g., 136 CONG. REC. S9824 (daily ed. July 17, 1990) (statement of Sen. Danforth suggesting continued negotiation over Act because "this bill is not going to become law unless the President agrees with it"); *Civil Rights Microscope on the Senate*, N.Y. Times, Oct. 24, 1990, at A24, col. 1.

250. See 136 CONG. REC. S2823-2853 (daily ed. July 17, 1990). This is how the message came through to traditionally conservative media outlets that undoubtedly received some courting by the Bush Administration on this matter. See, e.g., Kilpatrick, *Civil Rights Bill Shouldn't Make Lawyers Rich*, Newark Star-Ledger, Nov. 5, 1990 (*Wards Cove* "was the big one," and "Section 4 of the bill, overturning the *Wards Cove* decision, was the lawyers' playpen."). Although his counsel fees focus is, I think, incorrect (despite its interesting variant of interest group analysis), columnist Kilpatrick was, however, refreshingly more candid and accurate in his criticism of the Act than the Administration: "The quota argument . . . was a scarecrow. A more convincing objection was to the costly litigation that the bill would have produced."

251. See 136 CONG. REC. S9828 (daily ed. July 17, 1990) (Remarks of Sen. Kennedy).

252. See Fulwood, *supra* note 4; Lewis, *President's Veto of Rights Measure Survives by One Vote*, N.Y. Times, Oct. 24, 1990, at A24, col. 1.

253. For example, Senator Jesse Helms (R-N.C.), facing what was thought to be a close contest, pulled away in the final days, a surge many attribute to an "anti-quota" advertisement that aired widely on North Carolina tele-



this tactic had much impact in Congress. Rather, the coalitions clashed. Civil right groups, liberals, and lawyers had the clear bulk of votes—they represented the majority on this issue—but not a two-thirds majority sufficient to override the veto, which was sustained by a coalition of conservatives and business groups. Thus, in reality, Congress was not as “free” to change judicial outcomes as surmised by Justice Kennedy and the *Patterson* majority. Congressional freedom was quite circumscribed by the executive.

### 3. *The Future*

It remains to be seen whether Congress now has the “freedom” to try again to pass the Act. Clearly, it can reissue the Act but is unlikely to do so absent some indication of favorable political change. The President has not announced any change in position. His presumptively key advisors on the issue remain the same.<sup>254</sup> The 1990 congressional elections appear to have resulted in a net gain of one vote for the Act in the Senate, but this continues to leave the Act’s proponents one vote short. In this environment,

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vision. See Daley, *TV Holds Power in Politics*, Chicago Tribune, Nov. 19, 1990, at C1, col. 1. The Helms advertisement featured a white hand crumpling an employment rejection letter, with the voiceover saying: “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?”

254. Although determining who has the ear of the President on certain matters can resemble an attempt to determine future romantic entanglements while watching a television soap opera, the Bush Administration is not quite so opaque. Attorney General Dick Thornburgh, Solicitor General Kenneth Starr, and Justice Department division heads presumably are important sources of assessment for the President on issues of civil rights law.

White House Chief of Staff John Sununu appears to be a key advisor on all issues. See Lobe, *El Salvador: Concern Over Prosecution Rises*, INTERPRESS SERV. (Nov. 8, 1990) (Sununu is “one of the most powerful members of Bush’s inner circle”); Arnst, *John Sununu: Bush’s Controversial Man For All Seasons*, REUTERS (Nov. 17, 1988). Sununu’s role in arranging the veto of the Act appears to be no exception to his generally powerful influence. In discussing negotiations between Congress and the President over the Act, Senator John Danforth (R-Mo.) repeatedly refers to Sununu as the Bush Administration representative in terms suggesting a strong Sununu role. See 136 CONG. REC. S9824 (daily ed. July 17, 1990) (Remarks of Sen. Danforth) (“Senator [Edward] Kennedy [D-Mass., the lead author of the Act] told me the specific phrase of the proposal of Governor Sununu that he did not agree with.”). It remains to be seen whether Sununu will continue to have an important policy-making role in light of subsequent scandal regarding his posh travel arrangements.

advocates of the Act are unlikely to repeat themselves, absent some indication of a change in the vote of some members, but presumably will apply political pressure where there appear both the means and some likelihood of success. Applying additional political pressure to the White House, for reasons discussed at greater length below, is unlikely to be effective in light of the saliency of presidential campaign issues (where civil rights are not decisive)<sup>255</sup> and the timing of the election (if President Bush can be "coerced" into signing the Act through electoral pressure, he is unlikely to succumb until 1992, when he faces re-election and can obtain some political credit).

Civil rights advocates now face a tough situation. The Act was impressive in its breadth, seeking in one fell swoop to correct both a number of erroneous Court decisions and shortcomings in antidiscrimination law. Taking on so much at once, particularly the effort to overturn *Wards Cove* and to address disparate impact litigation, provided a wider target for the counterfire of opponents, particularly the mistaken but rhetorically compelling allegation that shifting the burden in disparate impact cases promotes quotas. By the same token, however, the Act's comprehensiveness may have been its genius in that it allowed a number of interests to rally around legislation that had something for practically all antidiscrimination progressives. If the Act is divided into more "bite-sized" parts for easier political digestion, the conglomerate coalition supporting the Act may begin to disaggregate, leaving piecemeal attempts to change the 1989 cases less successful than the Act.

Proponents of the Act must, of course, make their own assessment and act accordingly. One immediate small scale attempt at legislative change comes to mind: a bill to overturn only *Patterson* and *Lorance*, since the Justice Department has supported these initiatives in the past. At a minimum, civil rights reform has an uncertain future. The net effect of the 1989 cases has been judicial restriction of the scope and utility of section 1981 and title VII. Despite strong congressional sentiment to the contrary, the Court's countermajoritarian restrictions remain the law and will probably remain so during the Bush presidency.

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255. See M. EDELMAN, *CONSTRUCTING THE POLITICAL SPECTACLE* (1990) (discussing importance of symbolism rather than specific issue positions in politics, particularly presidential politics).

*B. The Court's Vision of Democracy and Congressional Colloquy Versus Political Reality*

*1. The Further Ascension of the Executive*

Without doubt, the events of May 1, 1989 to October 25, 1990 add further evidence to the already strong case suggesting that current judicial approaches championed by conservatives tend to enhance greatly the power of the Executive Branch in derogation of Congress and the courts. Legal realists, critical legal scholarship, and traditional scholarship have warned of this outcome, essentially by suggesting that politics, like nature, abhors a vacuum. Where courts rein themselves and the reach of statutes in too tightly, the executive takes on enhanced power as a front-line operator of government, one that determines who gets benefits, which complaints get investigated, which charges are filed, how aggressively they are prosecuted, and so on.<sup>256</sup> However, one hardly need be radical (or even liberal) to appreciate the executive aggrandizement resulting from recent judicial developments.<sup>257</sup> Candid conservatives admit that a narrow approach to statutory interpretation generally favors the conservative agenda.<sup>258</sup>

Since 1968, when Republican candidates began to dominate presidential politics, conservatives in general have shown increasing affection for executive power.<sup>259</sup> It should hardly be

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256. See M. KELMAN, *supra* note 41, at 111, 151-212; Sunstein, *Regulatory State*, *supra* note 18, at 430; Ross, *supra* note 69, at 422-32.

257. See, e.g., Sunstein, *Regulatory State*, *supra* note 18, at 430 n.91:

The combination of textualism, disregard of legislative history, and the *Chevron* principle [requiring great deference to authorized agency interpretations of a statute] would produce a dramatic increase in the executive's power to make law. When the language is ambiguous, the executive's interpretation will control, even if the legislative history argues in the other direction. Consider in this regard Justice Scalia's general enthusiasm for executive power. See *Mistretta v. United States*; *Morrison v. Olson*.

*Id.* (citations omitted).

258. See, e.g., R. POSNER, *supra* note 24, at 292-93 ("Most 'strict constructionists' are political conservatives [who think legislation usually] goes too far and want the courts to rein the legislators in.").

259. See L. CROVITZ & J. RABKIN, *THE FETTERED PRESIDENCY* (1988) (collection of essays arguing that executive power should be expanded). One might accuse the "fettered presidency" crowd of being sore winners. Many

surprising to suggest that conservative justices and judges, who owe their positions largely to the post-1968 dominance of Republican presidential candidates, decide close cases in favor of their political soulmates and benefactors. What is both surprising and depressing about the 1989 civil rights cases is that the Court majorities did so in an area of law where Congress has in the past corrected similar errors with some vigor.<sup>260</sup>

## 2. *An Odd Response to Congressional Feedback*

Obviously, the track record of judicial legislative colloquy cuts both ways. On one hand, it actually lends some credence to Justice Kennedy's assertion in the epigraph of this article: If Congress dislikes the Court's statutory interpretation, it can rewrite the statute in no uncertain terms and force the Court apply the new law, rendering the outcomes it previously spurned. On the proverbial other hand, however, congressional efforts to make pro-civil rights constructions of the law clear to a resisting Court suggest either that the enacting legislature was very incompetent at making the legal text and its intent clear or that the Court has too often in the past simply been overly antagonistic to civil rights statutes. Viewed from a historical perspective, however, the civil rights legislation colloquy of the past fifteen years suggests not that the Court should rely on Congress to police its mistakes but rather that the Court should improve its

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derogatory adjectives were applied to George Bush during the fall of 1990 as the budget, the Persian Gulf, and even the Texas electorate (which elevated his arch-enemy Anne Richards from Treasurer to Governor despite Bush's substantial efforts on behalf of her opponent) seemed to defy him. On the issue of shaping domestic civil rights policy, however, he was anything but fettered. Rather, he had the last word. See also Glennon, *Will the Real Conservatives Please Stand Up?*, 76 A.B.A. J. 48, 49 (Aug., 1990).

260. See, e.g., The Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (Supp. 1989) (overturning *Grove City College v. Bell*, 465 U.S. 555 (1984)); The Handicapped Children's Protection Act of 1986, 20 U.S.C. §§ 1415(e)(4)(B)-(G) (1988) (overturning *Smith v. Robinson*, 468 U.S. 992 (1984)); The Voting Rights Act Amendments of 1982, 42 U.S.C. § 1973 (overturning *Mobile v. Bolden*, 446 U.S. 55 (1980)); The Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1988) (overturning *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976)); The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1988) (overturning *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975)).

interpretation to minimize such democracy-undermining mistakes of statutory interpretation.

Congress successfully trumped the Court in 1976 when it passed the Civil Rights Attorney's Fees Awards Act, which permits prevailing antidiscrimination and constitutional rights plaintiffs to recover reasonable counsel fees from the defendants.<sup>261</sup> The Court had previously refused to recognize an exception to the "American Rule" of each litigant bearing its own expenses and lawyer's fees where a claimant sought to vindicate the public interest or an important national policy.<sup>262</sup> That same year, Congress overturned another Court holding that discrimination against pregnant women did not violate title VII<sup>263</sup> when it passed the Pregnancy Discrimination Act.<sup>264</sup> In 1982, it overturned the Court's narrower 1980 view of voting rights,<sup>265</sup> and in 1986 similarly expanded handicapped rights beyond the narrow holding of a 1984 Court decision.<sup>266</sup> Most recently and dramatically, Congress overturned *Grove City College v. Bell*,<sup>267</sup> which held that title IX of the 1964 Civil Rights Act barred federal aid only to a gender discriminating program (e.g., athletics) and not to the offending educational institution as a whole.<sup>268</sup> The Civil Rights Restoration Act of

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261. 42 U.S.C. § 1988 (1988).

262. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 246 (1975).

263. *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976). *Gilbert* reached this result with near tautological reasoning that continues to inspire snickers among even the most male chauvinist of law students: title VII forbids discrimination because of gender, but only women can become pregnant; therefore pregnancy discrimination is not gender-based and does not violate title VII. Perhaps the Court's oscillating intextualism predates 1989.

264. 42 U.S.C. § 2000e(k) (1988).

265. Voting Rights Act Amendments of 1982, 42 U.S.C. § 1973 (1988), overturning *Mobile v. Bolden*, 446 U.S. 55 (1980).

266. Handicapped Children's Protection Act of 1986, 20 U.S.C. § 1415(e) (1988), overturning *Smith v. Robinson*, 468 U.S. 992 (1988).

267. 465 U.S. 555 (1984).

268. The Court in *Grove City* took a crabbed view of the language of title IX, worked hard to misread congressional intent as supporting its holding, and seemed immune to the other statutory interpretation perspectives (purposivism, dynamism, eclectic pragmatism, public choice/interest group). See Czapsky, *Grove City College v. Bell: Touchdown or Touchback?*, 43 MD. L. REV. 379 (1984) (criticizing *Grove City*). *Grove City* appears to be another instance in which the court displays oscillating intextualism in interpreting a civil rights law to the actual and inertial disadvantage of a disempowered group that was supposed to obtain protection under the law.

1987<sup>269</sup> passed both chambers in 1988, was vetoed by President Reagan, but passed over veto by a hairbreadth margin.<sup>270</sup>

### 3. *Growing Hurdles for the Civil Rights Movement*

Even the casual observer of this stylized dialogue between the Court and Congress must notice: (1) the congressional response, for the most part, sought to reinstate the status quo prior to the Court's narrowing of the laws in question;<sup>271</sup> (2) congressional corrections have been slower in coming with each succeeding episode;<sup>272</sup> and (3) the President and the Executive Branch have increasingly resisted congressional desire to overturn a disapproved Court decision. For example, President Reagan and the Civil Rights Division of the Justice Department opposed modest expansion of the Voting Rights Act of 1965.<sup>273</sup> Although the extension and amendments such as the one overturning in part the Court's *Mobile v. Bolden* decision did not meet an outright veto, the White House was clearly an obstacle to congressional correction of a Court decision seen as erroneous.

Efforts to overturn *Grove City* and restore the strength of title IX faced two antagonistic forces that did not obstruct earlier civil rights legislation responding to the Court's narrow view of the civil rights laws: Republicans not only controlled the Senate, but a very conservative Republican, Senator Orrin

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269. 20 U.S.C. § 1687 (1988).

270. See *Civil Rights Veto Overridden; Religious Right's Effort Falls Short*, Chicago Tribune, Mar. 23, 1988, at C1, col. 1 [hereinafter *Civil Rights Veto Overridden*] (Senate votes 73-24 to override; House votes 292-133 to override).

271. In virtually all of the situations cited above, the Court's narrower statutory holdings ran counter to the bulk of opinion in the federal circuit and district courts. See, e.g., *Grove City v. Bell*, 465 U.S. 555, 562 (1984) (listing cases finding title IX to support institution-wide funding cutoff for gender discrimination in program administration).

272. Although one can argue that the legislature was thus not so certain that the Court had erred, the delays appear to have resulted from a combination of agenda crowding (i.e., Congress had other important things to do), the reduced enthusiasm for civil rights laws held by Republican Senate leadership during the 1981-87 period in which the GOP controlled the Senate and the legislative agenda, and resistance from the Executive Branch.

273. 42 U.S.C. § 1973 (1988). See Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1338 n.28 (1988); McDonald, Book Review, 19 GA. L. REV. 459, 461 (1985).

Hatch of Utah, also chaired the Senate Committee on Labor and Human Resources to which the bill to overturn *Grove City* was assigned.<sup>274</sup> He strongly opposed the bill (ultimately acting as Senate floor manager in efforts to sustain President Reagan's veto) and effectively prevented the bill from being heard and reported to the full Education and Labor Committee during the period 1984-87, despite as many as 58 co-sponsors of the bill.<sup>275</sup> After the 1986 elections swept Senate Democrats back into power, the absence of key hostile leadership allowed the bill to virtually sail through hearings and committee markups, as one might expect of widely co-sponsored legislation.

Clearly, even majoritarian legislation overturning judicial decisions depends on a conducive legislating climate. Achieving such a climate and acting within it consumed nearly four years after *Grove City*, four years during which women collegians were not accorded the protections of title IX that the enacting Congress probably thought had been provided.

The shift in Senate control permitted civil rights advocates and Congress to enact a bill overturning *Grove City*, but White House opposition remained. President Reagan not only opposed the reinvigoration of title IX, but did so vociferously, characterizing the law as federal government meddling in derogation of freedom of religion.<sup>276</sup> He vetoed the act, but the veto was overridden by the House and by a narrow margin in the Senate.<sup>277</sup> Unlike past efforts of Congress to correct the

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274. Congressional leaders often have some discretion to refer a new bill to one of several potentially applicable committees, using that discretion to aid or hinder the bill. See, e.g., W. ESKRIDGE & P. FRICKEY, *supra* note 16, at 7-8 (House Judiciary Committee Chair Emmanuel Celler (D-N.Y.) assigns 1964 Civil Rights Act to his own subcommittee, normally one for antitrust matters, to assure favorable subcommittee treatment of the bill). Senator Hatch is one of the most conservative members of Congress and ordinarily receives high ratings from conservative groups such as the Americans for Constitutional Action (ACA) and zero or low scores from liberal ratings groups such as the Americans for Democratic Action (ADA). In addition, he is a Mormon representing a state with a strong Mormon constituency, and Mormons as well as other religious groups that operate private schools tended to favor the *Grove City* decision, as many of them were unwilling to equalize all programs by gender.

275. See *Civil Rights Veto Overridden*, *supra* note 270, at col. 1.

276. *Id.*

277. *Id.*

Supreme Court's misreading of a civil rights law, this one required a super-majority. Of course, initial passage of title IX did not require such massive congressional support, as President Nixon signed the original law.

#### 4. *A Continued Asymmetry About Public Choice/Interest Groups*

Against this backdrop, the 1989 civil rights cases become even more troubling. The Court's conservatives could not help but be aware that enacting strong civil rights legislation had become a more difficult task, not only because of the current political climate<sup>278</sup> but also because interest groups adverse to the legislation and to broad construction of it were powerful, well organized, and especially well-positioned to obtain the assistance of the White House. One is left with the uneasy impression that the conservative bloc, presented with cases that permitted it to do so, welcomed the opportunity to dispatch civil rights advocates to this lion's den, an opportunity realized through the vehicle of fractured statutory interpretation.

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278. By "political climate," I do not suggest that the majority of Americans have become less supportive of civil rights than they were in 1970, 1964, 1871, or 1866. Rather, I am suggesting that the composition of Congress, the position of the Presidency, and the influence of interest groups with reason to oppose civil rights legislation, render the climate less hospitable to passage of civil rights legislation than during any of those years. *But see Wake-Up Call*, THE NEW REPUBLIC 7 (Dec. 3, 1990) ("If the Democrats were particularly vulnerable to any Republican thrust, it was race. Using the Civil Rights Act of 1990 and affirmative action generally, the GOP shocked the Democrats with the cattle-prod of quotas. This raised welts from California to North Carolina."). Maybe—with the exception of the re-election of Jesse Helms (R-N.C.), over a black opponent, credited by many to an anti-Civil Rights Act of 1990 television blitz—there is no solid evidence that Republicans won or Democrats lost because of the Act. Minnesota Republican Senator Rudy Boschwitz, a supporter of the administration's anti-Act position until the last minute, was defeated by a vocal supporter of the Act. Furthermore, the effectiveness of attacks on the Act (*i.e.*, labeling it a quota bill when it merely restored the non-quota world of *Griggs v. Duke Power*) should not be confused with the views of an informed electorate. Democrats strongly supported the Act and picked up congressional seats. President George Bush strongly opposed the Act and had negligible influence on the 1990 elections. *See, e.g.*, Blumenthal, *Entr'acte*, THE NEW REPUBLIC 12, 13 (Nov. 26, 1990) ("In Hawaii . . . Republican Senate candidate Patricia Saiki was ahead when the president arrived to bestow his endorsement and fatally behind hours later when he departed.").



### 5. *Exacerbating the Situation Through Inadvertent Judicial Bait and Switch*

I would find it easier to be charitable in assessing the Court's 1989 civil rights cases if only I could view the bulk of the statutory questions as close. As the discussion in Part II, *supra*, indicates, I believe the majority erred by a wide margin in most of these cases. *Patterson v. McLean Credit Union*<sup>279</sup> and *Jett v. Dallas Independent School District*<sup>280</sup> (restricting the scope of 42 U.S.C. § 1981) seem wrongly decided, even if the Court were writing upon a clean slate. *Lorance v. AT&T Technologies*<sup>281</sup> (where the short statute of limitations expires before a layperson can see herself as suffering injury) seems wrong as a matter both of interpretation and common sense.

*Wards Cove v. Atonio*<sup>282</sup> could be defended according to the language and intent of title VII had it been decided afresh; *Griggs v. Duke Power*<sup>283</sup> was considered a surprising victory for civil rights plaintiffs. However, *Griggs* had been the law for nearly twenty years prior to *Wards Cove*. During that time, Congress, litigants, and the legal community had grown to rely on *Griggs* as the law of title VII. Absent a better case against disparate impact liability than that made by the *Wards Cove* Court, *stare decisis* counsels strongly for retaining the *Griggs* view.

Further, the political environment changed during the 1971-89 period in ways that made successful civil rights legislation difficult to obtain. If, hypothetically, the Court had rejected disparate impact theory in *Griggs*, the lawmaking apparatus probably would have responded with legislation adding disparate impact liability as part of title VII. Both chambers of Congress had Democratic leadership and sizeable Democratic majorities. Many Republican members were progressive on civil rights issues; the GOP was generally more moderate than it now is, due to the Reagan Revolution, and the rise of the religious right and the pro-life movement as important components of the Republican electoral coalition. Republican President Richard Nixon, who

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279. 491 U.S. 164 (1989).

280. 491 U.S. 701 (1989).

281. 490 U.S. 900 (1989).

282. 490 U.S. 642 (1989).

283. 401 U.S. 424 (1971).

was acting "liberal" with an eye toward reelection (e.g., imposing wage and price controls, opening relations with Mainland China), would surely have signed the bill. Speculation is inherently uncertain, but the bulk of the evidence suggests that by enunciating the *Griggs* standard, allowing reliance on it, and abruptly changing the rules, the Court put civil rights advocates at a strong net disadvantage in the political marketplace.

#### 6. *Failing the Functional Test as Well*

In addition, *Wards Cove* flunks the functional test required of good statutory construction. My version of the functional test asks: Does the interpretation aid or hinder accurate litigation outcomes? For title VII, where defendants now seldom leave a smoking gun for plaintiffs to find, disparate impact theory and a not overly deferential standard are essential to prevent culpable defendants from effectively concealing their discrimination. Moving from a "business necessity" to a business "purpose" or "justification" will surely allow more discriminating defendants to escape accountability, exacerbating a trend toward defense victories as the easy cases of overt, admitted, or documented discrimination become memory.<sup>284</sup>

*Price Waterhouse v. Hopkins*<sup>285</sup> and *Martin v. Wilks*<sup>286</sup> similarly fail the functional test in that they ignore human nature and litigation realities. *Hopkins* allows culpable parties to escape being held accountable for discrimination in mixed motive cases. *Wilks* made it easier for tardy litigants who previously failed to intervene to frustrate both civil rights plaintiffs and the public policy embodied in the civil rights laws. Similarly, *Flight Attendants v. Zipes*<sup>287</sup> enhances the chances that intervenors will frustrate civil rights goals by adding to the plaintiff's many hurdles, with little prospect of recovery of counsel fees and significant prospect of collusion between intervenors and defendants.

However, even if the analysis of Part II, *supra*, is incorrect and these decisions were all legitimate close calls, the Court seems to have added a strange default option to its oscillating

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284. See Kotkin, *supra* note 154, at 1377-79.

285. 491 U.S. 164 (1989).

286. 490 U.S. 755 (1989).

287. 491 U.S. 754 (1989).

intextvalism: a preference for restrictive reading of the civil rights laws so that proponents of civil rights laws must successfully shoulder the inertial burden. As previously noted, these burdens were large in 1990. They will continue to be large during the remainder of the century. In the future, then, the Court must display greater sensitivity to both political reality and the fairness of its statutory interpretation for those facing a disadvantage in the legislative arena. Following is an outline of considerations and some preliminary thoughts regarding their application.

*C. Graduate Level Civics Tempered With Cynicism: A Multi-Dimensional Perspective on Inertial Burdens*

If the Court is to render nonpartisan statutory interpretation it must, ironically, receive and consider more political information, even information dealing with partisan strength such as interest group competition and party politics. At a minimum, the Court must be willing to consider all of the implications of modern public choice/interest group theory. The Court cannot, for example, continue to suggest that interest group strength requires a diminution of concern for legislative history but pretend that this same interest group perspective does not also auger in favor of tiebreaking constructions favoring those with least access to the congressional agenda, and in favor of imposing inertial burdens on those best able to bear them. Similarly, the Court cannot continue to write (and presumably think) as if the only political actor responding to statutory interpretation decisions is some mythical, monolithic Congress that is free to overturn judicial decisions with ease. As an exploratory attempt at improving statutory construction, the judiciary should expand upon the traditional civics text view in several ways.

*1. Appreciating the Role of the Executive*

The President is obviously the key actor in modern American politics. Proponents of presidential authority can muster considerable arguments in support of the President's role in shaping and resisting legislation. Most obviously, the Constitution establishes a role for the President, who has power to veto legislation<sup>288</sup> and therefore the power to shape legislation through

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288. U.S. CONST. art. I, § 7, cl. 3.

threatened vetoes and acceptance of compromise. The President also has a significant legislative role beyond that established in the Constitution in that he serves as symbolic leader of both his country and political party, and is expected both to have a legislative program and to harness executive staff and party behind that program.<sup>289</sup> The President is elected by the nation at large and can thus lay claim to a broader constituency than can individual congresspersons, giving him greater ability to resist interest group pressures.<sup>290</sup>

This last point is one often made and usually overstated by proponents of a strong presidency. Not surprisingly, these proponents tend to be political conservatives who have supported the Reagan and Bush Administrations. Although it is true that the President is elected nationally and legislators are elected in single districts, it does not necessarily follow that the President has either a greater mandate or a broader perspective on issues such as civil rights legislation. Presidential elections have not, historically, focused on particular domestic legislation. Occasionally, civil rights become a national concern, but this is the exception rather than the rule. When civil rights legislation was a high profile issue in 1964, Democrat Lyndon Johnson, the proponent of the 1964 Civil Rights Act, won a landslide victory over Republican Barry Goldwater, who opposed it.<sup>291</sup> In 1968 as well, civil rights (and white backlash about it) was an issue, and the candidacy of George Wallace did astoundingly well, although it fell short of many predictions.<sup>292</sup> Since then,

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289. See, e.g., W. ESKRIDGE & P. FRICKEY, *supra* note 16, at 1-29 (describing importance of actions of Presidents Kennedy and Johnson in pushing for introduction and passage of 1964 Civil Rights Act).

290. *Id.* at 734-35.

291. See R. SCAMMON, *AMERICA VOTES* 265 (1965).

292. *Id.* See also R. SCAMMON & B. WATTENBERG, *THE REAL MAJORITY* (1970). Of course, the strength of the Wallace third-party candidacy certainly suggests a hard-core of opposition to civil rights legislation. In addition, Republican Richard Nixon, who was considerably less identified with support for civil rights legislation than Democrat Hubert Humphrey, won the election, with many observers believing that the Wallace candidacy took votes away from Nixon. See K. PHILLIPS, *THE EMERGING REPUBLICAN MAJORITY* 56 (1970). I argue only that progressive civil rights laws are, at a minimum, not automatic losers as a presidential issue. I further contend that American sentiments have become more favorable to civil rights legislation, certainly in the legal community, and that the focus of presidential politics has moved in other directions since 1968.

presidential politics, as always, have focused on economic and "leadership" issues, which generally test the electorate's fondness for and confidence in each candidate as a person rather than the candidate's views on legislation.<sup>293</sup> In a world of complex issues and political campaigns conducted by evening news "sound bites" and 30-second television commercials, most voters do not choose presidents based on particular policies. George Bush may successfully seek re-election in 1992, but this would not suggest that the majority of voters favored his veto of the 1990 Act.

In addition, the notion of the President as guardian against private-regarding legislation seems highly suspect to me. To be sure, a wealth of literature suggests that Congress is highly influenced by well-positioned interest groups.<sup>294</sup> Although research on the executive is less developed, I have seen nothing to suggest that the President behaves differently than other human beings, or that the institutional traits of the presidency immunize the office from the negative implications of public choice theory.

Although the President has a wider constituency, it is also a constituency in which positions on legislation appear to be less

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293. These baseline concerns have been viewed through the electorate's current perception as focused by events. For example, the 1974 Watergate scandal led many voters to distrust President Nixon and to carry that lack of confidence over in the 1976 election to his hand-picked successor, Gerald Ford, who pardoned Nixon before there could be a public investigation of allegations that Nixon engaged in criminal wrongdoing. In the 1980 election, the Iran crisis of a U.S. embassy held hostage suggested to many voters that President Jimmy Carter was a weak leader and fueled the election of Ronald Reagan. Notwithstanding the impact of events, I see both elections (and all the recent presidential elections) as focusing on "who can do the job" rather than "what policies does the candidate support." Of course, the 1988 defeat of Michael Dukakis, who saw the election as "not about ideology" but about "competence," can be seen as refuting my thesis. On the contrary, I think it illustrates my point: Non-legislative issues such as the pledge of allegiance ("is he patriotic?") and the death penalty ("is he tough on crime?") dominated the debate, while Bush consistently appeared more decisive and likeable to the electorate than did Dukakis. Dukakis, despite the derision heaped on him for the competence line, was accurate in his assessment. However, the voters simply had more confidence in Bush as a leader. I do not mean opinions played no role, only that the opinions at issue (crime) did not revolve around legislative issues. Regarding presidential selection generally, see K. DOLBEARE & M. EDELMAN, *supra* note 241, at 277-94; M. EDELMAN, *supra* note 255, at 37-130.

294. See *supra* note 278 and accompanying text.

salient. For example, a congressional election will often focus on the incumbent's voting record. By contrast, the presidential election focuses on issues of overall theme, vision, character, toughness, and the like. In addition, assessments of the executive tend to rise and fall with the overall state of the economy, whether war is imminent, and so on.<sup>295</sup> Thus, the President is subject to a broader constituency but, at least as to some aspects of his performance, is less likely to be supervised and disciplined by the constituency than are legislators.

In addition, proponents of the "President as leader of us all" view overlook the fact that a presidential candidate's electoral needs are similar to those of legislators (whom fans of the presidency seem to regard as virtual lackeys for interest groups). Much like a legislative candidate, the presidential candidate needs money (lots more of it, actually, notwithstanding public financing of the general election, since he has a broader constituency among which to electioneer) and interest group support (endorsements, access to mailing lists, appearances, favorable press).

In some ways the "public choice problem" attending the president may be worse than that surrounding Congress. Legislators can be "gotten to" on an issue, but Congress is sufficiently a gathering of equals (notwithstanding the importance of leadership posts) and an arena of checks and balances (e.g., different powerful members or subgroups can block one another) that interest groups generally need to "get to" a number of members or at least broker a compromise of competing interests. By contrast, the President is a single power source and the 500-pound gorilla of American politics (he can sit anywhere he wants): Whatever the President decides is the White House position, period. To be sure, the President listens to a coterie of advisors and takes into account the views of other political power centers. However, if the President wishes to veto a bill, it will be vetoed regardless of the wisdom and consequences of the decision.<sup>296</sup> Further, the solitary power of the president opens the possibility that idiosyncratic factors will loom large in

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295. See K. DOLBEARE & M. EDELMAN, *supra* note 241, at 285-89.

296. President Bush has exercised this prerogative with frequency and success, having vetoed 16 bills in less than two years in office, with Congress unable to override a single veto. See Campbell, *supra* note 4, at col. 3.

decisionmaking. For example, if President Bush defers to the opinions of White House Chief of Staff John Sununu, the interest groups favored by Sununu (generally commercial interests) become particularly important even if they are unrepresentative of public opinion. Sununu appeared to have a substantial role in convincing President Bush to veto the Family Leave Act of 1990, legislation that enjoyed strong but not veto-proof support in Congress.<sup>297</sup> If this is even partially true, the implications are disturbing. President Bush may have been elected by millions of voters, but no one ever voted federal office to Sununu, Attorney General Thornburgh, Solicitor General Starr, Secretary of State James Baker, former Drug Czar William Bennett, political consultant Roger Ailes, or any other "influential" in the Bush Administration.<sup>298</sup>

## 2. *Appreciating the Historical Context of Legislation*

According to one metaphor, liberalism is like a sprinter, occasionally dashing through the political terrain to enact a political program (e.g., Reconstruction, the New Deal, the Great Society), while conservatism is like the distance runner, left behind by the sprinter in times of progressive ferment but normally prevailing in politics as the sprinter gets winded and rests. Whether one prefers to personify the distinction or invoke the even more familiar tortoise and hare theme, the analogy is apt. Substantial liberal legislative initiatives, particularly the enactment of broad-based civil rights laws, are not an everyday occurrence. Solicitude for the social, legal, and commercial

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297. See Kurkjian, *Bush Vetoes Family Leave Legislation*, Boston Globe, June 30, 1990, at A1, col. 1. See also McMillion, *Family Leave Revived in Congress*, 76 A.B.A. J. 118 (Nov. 1990). The Family Leave Act, passed by substantial majorities, was vetoed by President Bush in late June, with a July veto override unsuccessful. The bill, endorsed by a coalition of feminist, parental, bar, church, and liberal groups but opposed by private industry, would have required employers of minimum size to allow leave for parents to care for children or sick relatives for up to six months, with the employer required to restore the returning employee to his former position.

298. Although one could, of course, say the same thing about congressional staff, the power of Congress' staffers is more limited. They can influence a number of members, including key leaders. They cannot influence the entire legislative branch in a metaphorical "one fell swoop." Key White House insiders can potentially influence executive branch policy to that degree.

status quo is the business as usual in American politics.<sup>299</sup> It is no accident that a hundred year gulf separated the post-Civil War Civil Rights Acts and the 1964 Civil Rights Act. Structural changes in American politics such as the 1965 Voting Rights Act, the legal requirement of one person-one vote,<sup>300</sup> and the institutionalization of a civil rights lobby have created a Congress in which civil rights initiatives are unlikely to continue to be as rare as Halley's Comet. The 1990 Act eloquently demonstrates that point.

It remains true, however, that civil rights legislation continues to require a substantial push, an activation energy of sorts, that occurs only when many normally dormant elements in American politics are activated. Such efforts, almost by nature, are episodic. Legislative campaigns of this sort simply cannot be mounted effectively on an annual basis. The civil rights community is not like some association of "widget" manufacturers that can move quietly and effortlessly to arrange swift, low-profile responses to its problems of foreign competition or low profit margins. In addition, civil rights advocates face the institutionalized opposition of commercial interests and baseline ideological resistance from political conservatives, one of whom happens to be President.

In short, enacting civil rights legislation is, even more than with most reformist legislation, an uphill fight. Many observers see the pro-civil rights events of the Reconstruction legislation and the 1964 Act as transformative moments in American politics, when the progressive sprinter surged beyond the barricades of business as usual.<sup>301</sup> In the former instance, the peculiarities of the Civil War and Reconstruction created a "radical" Republican Congress that could override President Andrew Johnson's veto, while the latter event was aided by Presidents Kennedy and Johnson. As noted above, presidential politics has shifted since the 1960s, with more conservative Republican candidates enjoying

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299. See Freeman, *supra* note 153, at 1408, 1418 ("In 1965 the federal government formed a unique coalition committed to do something about racism. No chief executive has ever insisted on substantive racial progress as much as Lyndon Johnson."); Sullivan, *Dedication: For Judge Wisdom on His Eighty-Fifth Birthday*, 64 TUL. L. REV. 1341, 1343 (1990) (summarizing hostile reaction of southern electorate to judicial decisions upholding civil rights for blacks).

300. See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186, 193 (1962).

301. See W. ESKRIDGE & P. FRICKEY, *supra* note 16, at 65-70.



the upper hand during the past twenty years. There may not be active presidential support for civil rights legislation during the remainder of this century.

Against this backdrop, the Court should be wary of rushing to a narrow construction of laws passed during transformative events of American politics. The nature of the legislative process requires "something extra" for successful enactment of civil rights reforms. When the Court narrows the reach of these laws, it may contravene the will of the elected officials who enacted the law and will almost certainly return the issue to Congress in a climate less favorable to civil rights legislation. A favorable climate for civil rights legislation is the exception; a climate favoring employer and commercial interests is the rule.<sup>302</sup>

As the fate of the 1990 Act shows, the issue is not one solely of congressional sentiment, but involves public debate, competing events (the Persian Gulf crisis overshadowed much of American politics in late 1990 and may have affected the Act by shifting attention to international issues), and the White House. In construing a statute, conservative jurists generally place great emphasis on fidelity to views of the original enacting legislature.<sup>303</sup> Paradoxically, a narrow construction of civil rights laws sends at least the close questions<sup>304</sup> back into the political arena where

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302. As previously noted, changes since the 1960s have allowed some greater institutionalization of the progressive civil rights presence in Congress. Equally important, however, changes during that same period have provided more clout to commercial and employer interests: modern electoral techniques (television, polling, direct mail), which require more funds; political action committees (PACs), which allow businesses to provide those funds; the growth of "independent" groups that can spend money for a candidate without violating campaign spending limits in presidential races. All of these changes tend to accrue to the advantage of commercial interest groups likely to resist civil rights initiatives.

303. See *supra* notes 22-37 and accompanying text discussing textualism and intentionalism.

304. Where the prevailing approaches to statutory interpretation make a narrow construction the clearly reasonable, correct, or required interpretation, all judges (conservative or liberal) will of course adopt the narrow view. Such decisions are the classic instances where progressives find decisions disappointing (they wish there were a broader version of civil rights law, environmental law, health care benefits, etc.) but accept the result. I believe the 1989 cases were instances in which the weight of conventional legal analysis weighed strongly against the narrow holdings taken by the Court. At a minimum, these were cases where the narrow construction was not the clearly ordained view. Therefore, the Court should have legitimately considered the consequences of its decisions and the realistic prospects for legislative alteration of those decisions.

forces favoring the more expansive view of the legislation may face a markedly less favorable environment than they did when the original legislation was enacted.

Civil rights laws provide a graphic and troubling example of this characteristic of even the most open democracies. Reform laws are difficult to obtain in first instance. It was no accident that passage of the 1964 Act required progressives to defeat the longest filibuster in the history of Congress.<sup>305</sup> Over the intervening years, the unelected Court frequently gave restrictive readings to the laws, but Congress responded to correct the Court's misreadings. In some instances the Court adopted broad interpretations of the laws and was affirmed in its choice by the reaction of Congress, the lower courts, and society. Twenty-five years after the longest debate, a Court majority composed primarily of Justices appointed by Presidents who were the political descendants of the 1964 Act's opponents announced major restrictions in the reach of civil rights law. As a result of the Court's efforts, civil rights advocates now must engage in colloquy with the Court with their voices partially gagged: the President's opposition necessitates a two-thirds vote to change the 1989 decisions while passage of the 1964 Act required only a simple majority. Fate and the Court have played a cruel joke on the civil rights laws.

### 3. *Allocating Inertial Burdens for Fair Play*

I do not suggest the Court must always err on the side of broad construction of a law when the current President is less supportive of the law than was the signing President. I do suggest that the Court take this reality into account before assuming that Congress can correct any judicial misreading of the law, particularly laws that historically are passed only at transformative political moments.

Faced with difficult statutory issues, the Court should legitimately consider the consequences of its decisions. Where the adverse consequences fall upon a group well positioned to seek legislative change in the judicial result, the Court can more

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305. See W. ESKRIDGE & P. FRICKEY, *supra* note 16, at 1-19.

easily decide close cases against the powerful interests. Where the "losers" in a case are historically disempowered groups or groups facing a distinctly less advantageous environment than they confronted when the law was enacted, the Court should rule against them only when objective factors (e.g., clear text, clear expressions of legislative intent, obvious obsolescence of the statute) or the bulk of analysis under the various interpretative approaches auger for this result.

Undoubtedly, many readers find appalling the suggestion that civil rights, equity, and statutory interpretation would have been better served if the 1989 cases had come out the other way (in favor of civil rights advocates and against employers). Although there was some risk that pro-civil rights outcomes were at odds with the meaning intended by the enacting Congresses, this risk was not greater than the risk the Court actually accepted (that the anti-civil rights outcomes contravened Congress's lawmaking efforts). The hypothetical pro-civil rights results would have permitted the "losing" employers to repair to the political arena, where they needed but a simple majority of Congress to pass legislation mandating the *Patterson*, *Jett*, *Wards Cove*, *Hopkins*, *Wilks*, *Lorance*, and *Zipes* results. Although the House and Senate Democratic leadership would probably have resisted these efforts, other political issues suggest that professed liberals are more than a little amenable to being won over to the conservative cause through aggressive interest group lobbying (e.g., lots of campaign contributions).<sup>306</sup> Certainly, President Bush would have

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306. The "Keating Five" episode provides perhaps the most visible example of the feasibility of conservative interest group access to power even where congressional leadership is largely "liberal." Recall that former savings and loan operator and financial entrepreneur Charles Keating, a prominent lifelong Republican, was able to enlist the assistance (improper, in my view, as it included arm-twisting of federal banking regulators in an effort to encourage them not to do their jobs aggressively and well) of four Democratic Senators, including Whip Alan Cranston (D-Cal.) and Banking Subcommittee Chair Donald Riegle (D-Mich.), as well as John Glenn (D-Ohio) and Dennis DeConcini (D-Ariz.). Cranston, Riegle, and Glenn are generally regarded as liberals, while DeConcini is usually characterized as a moderate. See M. BARONE & G. UJIFUSA, *supra* note 242, at 51. The fifth member of the Keating Five, Sen. John McCain (R-Ariz.), is the only one of the group for whom aid to Keating made much sense under the traditional 10th grade civics view of American politics, in that McCain was Republican and conservative like Keating, who was arguably a constituent (having substantial business interests

signed such legislation, with the possible exception of codifying the *Patterson* and *Lorance* results, since the Justice Department opposed the Court on these points. Nonetheless, President Bush has through the years shown himself to be a flexible politician—malleable, according to his critics. If approached by a coalition of employers, a historically Republican group and a part of his 1988 victory coalition, he might well be induced to support legislation codifying the *Patterson* and *Lorance* results. Certainly, he appears more likely to be swayed on these issues than he is to adopt the liberal perspective on *Wards Cove*, *Hopkins*, *Wilks*, and *Jett*. In sum, then, opposite holdings by the Court in the 1989 cases would have relegated the judicial losers to a much more level playing field than the one faced by the civil rights advocates against whom the Court did in fact rule.

#### CONCLUSION

In the name of democracy, conservative jurists have historically urged strict construction of the laws, even watershed laws such as the Civil Rights Acts and title VII.<sup>307</sup> Although its oscillating intextualism in the 1989 civil rights cases was not a pretty sight for legal reasoning purists, its net effect was quite conventional strict construction bordering on the crabbed, so crabbed that Congress, urged on by a broad-based coalition, reacted quickly to undo the Court's damage. But the will of Congress and seemingly the preference of most Americans was thwarted by the President, urged on by an influential coalition of commercial and ideologically conservative interests. The effectively anti-democratic or counter-majoritarian outcome of the saga of the 1990 Civil Rights Act boldly underscores the frequent inaccuracy of conservative claims to further representative and majoritarian outcomes through narrow interpretative approaches. It did, however, serve to advance the conservative political agenda. In

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in Arizona). In addition to making a great case for campaign finance reform, the Keating Five scandal provides significant support for a public choice/interest group theory of politics. See Berke, *Regulator Singles Out DeConcini for 'Impropriety' on Failed S. & L.*, N.Y. Times, Dec. 1, 1990, at A10, col. 1.

307. See, e.g., Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. 581, 581-86 (1989-90) (arguing against notion of liberal or expansive construction of remedial statutes).

my view, however, this conservative approach is inappropriate for statutory interpretation generally, particularly in civil rights cases, so long as the Court's vision of democracy remains so oversimplified and inaccurate. Continued myopia will only lead the nation further from the path of the enlightened society.