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The Civil Rights Act of 1991 and Disparate Impact: The Response to Factionalism

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The Civil Rights Act of 1991 and Disparate Impact: The Response to Factionalism

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“Power, not reason, is the new currency of this Court’s decisionmaking.”¹

I. INTRODUCTION

When Congress passed the Civil Rights Act of 1991² (“1991 Act” or “Act”) on November 21, 1991, it proclaimed that one of its purposes was to respond to recent decisions of the Supreme Court of the United States by expanding the scope of relevant civil rights statutes.³ In the Act, Congress made a clear finding that the Supreme Court’s decision in *Ward’s Cove Packing Co. v. Atonio*⁴ had weakened the scope and effectiveness of federal civil rights protections.⁵ This Comment explores the change in the Court’s method of interpreting Title VII’s disparate impact analysis⁶ by comparing the seminal case,

1. *Payne v. Tennessee*, 111 S. Ct. 2597, 2619 (1991) (Marshall, J., dissenting).

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

3. *Id.* § 3(4).

4. 490 U.S. 642 (1989).

5. Civil Rights Act of 1991 § 2(2).

6. Disparate impact analysis attempts to prove employment discrimination by showing that employment practices, regardless of intent, adversely affect one group in comparison to another. See EEOC Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.3(A) (1991). Under disparate *treatment* analysis, on the other hand, discrimination is proven by demonstrating that an employer intentionally treats an employee or applicant differently from other employees or applicants because of his or her membership in a protected group. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); BARBARA L. SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 13 (2d ed. 1983).

Griggs v. Duke Power Co.,⁷ with subsequent controversial decisions by the Rehnquist majority.⁸ It discusses why that change in method of statutory interpretation necessitated the intervention of Congress through the 1991 Act to reset the course of Title VII law. Finally, it argues that the 1991 Act may not succeed in fulfilling two of its stated purposes in the area of disparate impact: (1) responding to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes; and (2) confirming statutory authority and providing guidelines for adjudication of disparate impact suits under Title VII.

Part I of this Comment demonstrates that the *Griggs* Court relied heavily on the legislative purpose of Title VII in developing judicial tests for proving employment discrimination. The term "legislative purpose" was explained by Henry Hart and Albert Sacks of the Harvard legal process school of statutory interpretation as the general aim of Congress in passing the statute.⁹ The pre-Rehnquist Court's use of Title VII's purpose in determining legislative intent was essential because neither the statute's wording nor its legislative history precisely indicated how far the statute should extend. Purpose analysis permitted the Court to fill gaps that Congress had left in the legislation, rather than artificially constraining itself by the provisions' lack of specificity. In terms of statutory construction, the Court's view of Title VII as public interest legislation called for a liberal construction addressing those injustices compelling the passage of the legislation and advancing broad national interests. Judge Richard A. Posner defines the term "public interest" legislation as that which corrects market failures, such as the avoidance of a monopoly of political power, or which can be justified in terms of some widely held concept of just distribution of wealth.¹⁰

Part II demonstrates that the formation of the Rehnquist major-

7. 401 U.S. 424 (1971).

8. The "Rehnquist majority" refers to the block of Justices on the Supreme Court who consistently voted together in those decisions interpreting Title VII that were reversed or modified by Congress in the 1991 Act. This block consists of Chief Justice William Rehnquist, Justice Antonin Scalia, Justice Sandra Day O'Connor, Justice Byron White, and Justice Anthony Kennedy. The most recent additions to the Court, Justice David Souter and Justice Clarence Thomas, were not members of the Court during the string of decisions leading to the 1991 Act, and are therefore not included in this Comment's analysis of the Rehnquist majority's interpretation of disparate impact cases.

9. Henry Hart & Albert Sacks, 2 *The Legal Process: Basic Problems in the Making and Application of Law* (1958) (unpublished manuscript, on file with the Florida State University Law Library).

10. Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 270 (1982); see also Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1693-1704 (1984).

ity marked the rejection of Title VII's legislative purpose as the guide for the Court's decisions. In its place, the Rehnquist majority adopted a plain language approach that focused on the text but refused to recognize the evil that Congress sought to remedy. Additionally, the Rehnquist majority embraced an interest group analysis¹¹ in construing Title VII. According to Posner, "interest group" legislation is legislation that appears to promote the narrow self-interest of a particular group.¹² Using such an approach, the Rehnquist majority views Title VII as special interest group legislation, unjustifiably benefitting minorities at the expense of the majority. Through its radical alteration of the interpretation and construction of the legislation, the Rehnquist majority revealed itself to be the personification of a "faction" as described by John Madison in the *Federalist Papers*.¹³ Over two hundred years ago, Madison correctly foretold the danger of such factions when he wrote, "When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens."¹⁴

Part III analyzes the congressional response in the Civil Rights Act of 1991 to the Rehnquist faction's weakening of disparate impact theory. This section recognizes that the 1991 Act addressed broad and diverse areas of civil rights law and reverses much of the violence done to Title VII jurisprudence by the Rehnquist majority's slanted reasoning. Nevertheless, it concludes that although Congress advertised the 1991 Act as a bill that would return disparate impact analysis to its pre-*Ward's Cove* status, in reality, the Act largely represents a compromise. The Act only partially restores disparate impact analysis, while concurrently codifying some of the Rehnquist majority's mischief.

II. INTERPRETING THE CIVIL RIGHTS ACT OF 1964

"This . . . deals with no mere abstract legal question. It confronts us with the most vexing problems touching racial justice and tests the integrity and credibility of the legislative and judicial process."¹⁵

11. See Posner, *supra* note 10, at 271.

12. *Id.*; see also William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875 (1975) (analyzing the judiciary's role in interest group politics).

13. THE FEDERALIST No. 10, at 104 (John Madison) (John C. Hamilton ed., 1892).

14. *Id.* at 108.

15. *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1248 (4th Cir. 1970) (Sobeloff, J., dissenting), *rev'd*, 401 U.S. 424 (1971).

A. *Historical Background*

In the years leading to the passage of the Civil Rights Act of 1964¹⁶ ("1964 Act"), African-Americans waited for fulfillment of the promise made in 1954 in the landmark decision *Brown v. Board of Education*.¹⁷ In *Brown*, the Supreme Court held that racial segregation in public education denied equal protection under the Fourteenth Amendment.¹⁸ *Brown* overruled *Plessy v. Ferguson*,¹⁹ the 1896 decision establishing the "separate but equal" doctrine and giving legal sanction to institutional discrimination.²⁰ *Plessy's* segregationist rationale pervaded all institutions: housing, schools, transportation, and places of public accommodation.²¹

Nine years after the *Brown* Court mandated desegregation with "all deliberate speed,"²² however, racial segregation remained entrenched in America. On May 2, 1963, police officers with dogs and firefighters armed with water hoses attacked non-violent protesters in Birmingham, Alabama.²³ On June 11, the Governor of Alabama, George Wallace, carried out his threat to "stand in the schoolhouse door" of the University of Alabama in open defiance of the Supreme Court's desegregation order.²⁴ Significant numbers of Americans supported Governor Wallace, the symbol of massive

16. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1988).

17. 347 U.S. 483 (1954).

18. See U.S. CONST. amend. XIV, § 1.

19. 163 U.S. 537 (1896).

20. See Nathaniel R. Jones, *The Justification for Race-Conscious Remedies*, 9 HARV. J.L. & PUB. POL'Y 71, 73 (1986).

21. See *id.* See generally RICHARD KLUGER, *SIMPLE JUSTICE* (1977) (describing the legal efforts of civil rights attorneys to overturn *Plessy*).

22. 349 U.S. 294, 301 (1954).

23. FLIP SCHULKE & PENELOPE O. MCPHEE, *KING REMEMBERED* 132 (1986).

24. *Id.* at 138.

Southern resistance.²⁵ The tension and frustration²⁶ surrounding racial injustice reached uncontrollable levels in the summer of 1963. President Kennedy and the Congress pondered a solution,²⁷ while

25. The large vote given Alabama's Gov. George Wallace in [the] Democratic presidential primary reflected growing disenchantment with civil rights legislation now before the U.S. Senate. . . . As I see it, the militancy of the Negro struggle for civil rights legislation is alienating many normally fairminded people who have always been sympathetic to the Negro cause. . . . Unhappily, the more aggressive Negro leaders are not content with orderly progress. They want the millennium, now. They encourage the nationwide rash of demonstrations, the unlawful sit-ins at cityhalls and State capitals, the pressures upon Members of Congress There is also rising resentment over a section of the civil rights bill now before the Senate which provides for an Equal Employment Opportunity Commission empowered to investigate the hiring, firing, and advancement policies of employers and unions. . . . This is not the American way. . . . Americans can be led, but never pushed.

110 CONG. REC. 7801-02 (1964) (editorial by John S. Knight, publisher of *The Miami Herald*, read into the record by Sen. Smathers).

26. We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed. Frankly, I have yet to engage in a direct-action campaign that was "well-timed" in view of those who have not suffered unduly from the disease of segregation. For years now I have heard the word "Wait!" It rings in the ear of every Negro with piercing familiarity. The "Wait" has almost always meant "Never." We must come to see, with one of our distinguished jurists, that "justice too long delayed is justice denied."

We have waited for more than 340 years for our constitutional and God-given rights Perhaps it is easy for those who have never felt the stinging darts of segregation to say, "Wait." But when you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; when you have seen hate-filled policemen curse, kick, and even kill your black brothers and sisters; when you have seen the vast majority of your twenty million Negro brothers smothering in an airtight cage of poverty in the midst of an affluent society; when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year old daughter why she can't go to the public amusement park that has just been advertised on television, and see tears welling up in her eyes when she is told that Funtown is closed to colored children, and see ominous clouds of inferiority beginning to form in her little mental sky, and see her beginning to distort her personality by developing an unconscious bitterness toward white people; . . . when you are harried by day and haunted by night by the fact that you are a Negro, living constantly at tiptoe stance, never quite knowing what to expect next, and are plagued with inner fears and outer resentments; when you are forever fighting a degenerating sense of nobodiness—then you will understand why we find it difficult to wait. There comes a time when the cup of endurance runs over, and men are no longer willing to be plunged into the abyss of despair.

Letter from Martin Luther King to Fellow Clergymen (April 16, 1963), *reprinted in* SCHULKE & MCPHEE, *supra* note 23, app. at 278.

27. Last week I addressed to the American people an appeal to conscience I emphasized that "the events in Birmingham and elsewhere have so increased the cries of equality that no city or State or legislative body can prudently choose to ignore them." "It is time to act," I said, "in the Congress, in State and local legislative bodies and, above all, in our daily lives. In the days that have

several American cities erupted in race riots.²⁸

In the House of Representatives and in the Senate, bipartisan majorities favored the passage of a civil rights bill.²⁹ Yet, in both Houses of Congress, a vocal and determined Southern alliance bitterly opposed the enactment of any civil rights bill,³⁰ charging that it would result in quotas,³¹ preferential treatment of African-Americans,³² thought-control,³³ an unprecedented intrusion on property rights,³⁴

followed, the increased violence have been tragically borne out. The "fires of frustration and discord" have burned hotter than ever. . . . In short, the time has come for the Congress of the United States to join with the Executive and Judicial Branches in making it clear to all that race has no place in American life or law.

President's Special Message to the Congress on Civil Rights and Job Opportunities, 1 PUB. PAPERS 483 (June 19, 1963) (John F. Kennedy) [hereinafter President's Special Message].

28. Raleigh, Knoxville, New Orleans, Chicago, Detroit, New York, Sacramento, and Philadelphia were among the cities in which riots and burning occurred. See CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT* at xix-xx (1985).

29. See *id.* at 100-57.

30. See *id.* at 100-226 (recounting Congressional debate).

31. One important right which the colored citizen will have by virtue of the bill is to be hired, to get a job, when he has taken an examination and has come out even with another man. Because of the bill and the employer's fear that the Employment Commission will move against him after it has ruled that he has discriminated because he has not had a certain percentage of colored people in his plant heretofore, he will give the colored citizen the job. . . . It would lead to a quota system So [the employer] will protect himself by hiring a certain number of colored people in order to keep the majesty and might of the Federal law and its bureaucracy off his neck.

110 CONG. REC. 7800 (1964) (statements of Sen. Smathers).

32. In the Civil Rights cases of 1883, Mr. Justice Bradley . . . placed his finger squarely on the fatal defect in the pending civil rights bill Here is what he said in that respect:

When a man has emerged from slavery, and by the aid of beneficial legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws

[This] bill would . . . make the Negro race a special favorite of the laws by excusing them from having their rights adjudicated by the same laws by which all other men's rights are adjudicated.

110 CONG. REC. 13077 (1964) (statement of Sen. Ervin).

33. This bill undertakes to control the thoughts of the American people in respect to racial matters, and to compel the American people to conform their thoughts in this field to the dictation of the Government. It is a thought control bill. No man will be adjudged guilty of an illegal act under Title VII of the bill on account of the nature or quality of his act. He will be judged guilty or innocent on the basis of the contents of his mind at the time he commits the act, because discrimination is a mental process.

110 CONG. REC. 13078 (1964) (statement of Sen. Ervin).

34. This whole bill is an invasion of personal and property rights that are more sacred to me under the Constitution than the so-called duty to bring about compulsory integration and compulsory dictates from the Government as to how

and an unconstitutional interference with state rights.³⁵ The 1964 Act passed in the House by over a two-thirds majority vote—289 to 126.³⁶ Eighty-eight southern Democrat Representatives opposed the bill.³⁷ In the Senate, badly outnumbered southern Democrats attempted to defeat the bill through the longest sustained filibuster in the history of the Senate, from March 9 until June 10, 1964.³⁸ The bill, requested by a Democrat President, passed the Senate by a 73-to-27 vote with 21 Democrats opposed.³⁹

B. *The Birth of Disparate Impact Theory*

After the longest legislative debate in the history of the Congress, President Johnson signed the 1964 Act into law on July 2, 1964.⁴⁰ The enactment contained eleven Titles or major pieces of civil rights legislation.⁴¹ Title VII addresses employment discrimination by regu-

a private employer should conduct his business. We should not sacrifice important constitutional personal and property rights of the many for something of doubtful benefit to the few. Therefore we should delete Title VII.

110 CONG. REC. 13076 (1964) (statement of Sen. Sparkman).

35. [A]t least two sections of this bill which, in my opinion, are unconstitutional will, in fact, bring about discrimination in reverse by establishing the principle of special privilege for some Negroes at the expense of the rights of the overwhelming majority of our citizens of all races. . . . [T]he public accommodations section . . . will take a long step toward abolishing the right of ownership and management of private property. . . . Equally dangerous to the freedoms of all Americans . . . is the section which will force employers to hire workers on the basis of color rather than ability. . . . [I]t shatters completely the concept of States rights by abolishing State laws now in operation by the will of the people of the individual States.

110 CONG. REC. 1645 (1964) (statements of Rep. Alger).

36. WHALEN & WHALEN, *supra* note 29, at 226.

37. *Id.*

38. *Id.* at 200.

39. *Id.* at 215.

40. The purpose of the law is simple. It does not restrict the freedom of any American, so long as he respects the rights of others. It does not give special treatment to any citizen. . . . It does say that there are those who are equal before God shall now also be equal in the polling booth, in the classrooms, in the factories, and in the hotels, restaurants, movie theaters, and other places that provide service to the public. . . . Its purpose is not to punish. Its purpose is not to divide, but to end divisions—divisions which have lasted too long. Its purpose is national, not regional. Its purpose is to promote a more abiding commitment to freedom, a more constant pursuit of justice, a deeper respect for human dignity.

Radio and Television Remarks Upon Signing the Civil Rights Bill, Lyndon B. Johnson, 2 PUB. PAPERS 842, 843 (July 2, 1964) (Lyndon B. Johnson) [hereinafter Radio and Television Remarks].

41. The various Titles provided protection against discrimination for the covered groups. They include Voting Rights (Title I), Public Accommodations (Title II), Public Facilities (Title III), Public Education (Title IV), Federally Assisted Programs (Title VI), and Employment (Title VII).

lating the relationship between employers, their employees and applicants; between unions, their members and potential members; and between employment agencies and their clients.

The language of section 703(a) of Title VII provides that it is an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.⁴²

Although Congress drafted a section of definitions,⁴³ Title VII curiously lacks a definition of discrimination—the very subject of the legislation. Congressional opponents of the bill continuously cited this omission and predicted difficulties arising from its absence.⁴⁴ Congress' failure to provide an explicit test for dispute resolution by the judiciary further complicates Title VII. Thus, before applying the legislative standard, the Supreme Court had to divine Congress' meaning of discrimination and establish effective tests of discriminatory employment practices.

The Court first confronted this difficulty in *Griggs v. Duke Power Co.*⁴⁵ In *Griggs*, a group of African-Americans alleged that their employer violated the 1964 Act by requiring a high school diploma and a passing score on an intelligence test for certain jobs previously limited to white employees, in order to preserve the effects of the employer's past discrimination. Chief Justice Burger, writing for a unanimous Court, reasoned that "the objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."⁴⁶ Based on that reasoning, the Court held that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo

42. 42 U.S.C. § 2000e-2(a).

43. 42 U.S.C. § 2000e.

44. See Minority Report Upon Proposed Civil Rights Act of 1963, Committee on Judiciary Substitute for H.R. 7152, 1964 U.S.C.C.A.N. 2431, 2436.

45. 401 U.S. 424 (1971).

46. *Id.* at 429-30.

of prior discriminatory employment practices."⁴⁷

The *Griggs* decision established what became disparate impact analysis of employment discrimination and the business necessity test. Under that analysis, an employment practice shown to have a significant adverse impact on an applicant, employee or other qualified member of a protected group is an unlawful employment practice, unless the employer demonstrates business necessity.⁴⁸ Even if the employer demonstrates business necessity, the applicant or employee can still prevail by showing an available, less discriminatory alternative rejected by the employer.⁴⁹

C. *The Legal Process Rationale*

The plain language of section 703(a) does not refer specifically to a test of unlawful employment practices based on an analysis of its impact on a particular group.⁵⁰ Southern Democrats opposing the bill feared precisely this type of test because it could potentially root out discriminatory effects even where intent could not be proven. The plain language of the statute could be understood as a prohibition of intentional discrimination, based on an employer's flat refusal to hire minorities.⁵¹ As the *Griggs* decision shows, the Court did not restrict itself to a stingy textualist reading of the 1964 Act.

The lack of specificity in these provisions is not unique to Title VII. The nature of our democratic system ensures that reasonable people can disagree as to the correct reading of a law. Securing approval from all groups that could block enactment frequently requires vagueness in important statutory terms or in legislative history.⁵² Societal pressures may cause a legislature to pass a bill addressing a certain issue, but the legislators may not agree on the bill's precise effect.⁵³ A controversial subject will lead to agreement only "through escape to a higher level of discourse with greater ambiguity."⁵⁴ This ambiguity protects individual legislators from countervailing pressures in their home districts.⁵⁵ Moreover, *ad hoc* amendments to a statute during the course of bicameral passage often

47. *Id.* at 430.

48. *Id.* at 431.

49. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1974).

50. See Drew S. Days, III, *The Court's Response to the Reagan Civil Rights Agenda*, 42 VAND. L. REV. 1003, 1004-06 (1989).

51. *Id.*

52. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 32 (1982).

53. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 30 (1949).

54. *Id.* at 31; see also Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 380-83.

55. LEVI, *supra* note 53, at 31.

adds to statutory confusion and internal conflicts.⁵⁶

Because of the inevitable failure of legislation to anticipate all possible disputes, courts bear the responsibility of resolving interpretive doubts.⁵⁷ The *Griggs* Court, in the tradition of the Harvard legal process school,⁵⁸ looked to Title VII's *purpose* to discover Congress' intent. From the perspective of legal process theorists, statutory purpose signifies a general aim or policy of a statute.⁵⁹ While members of Congress may disagree about the broad purposes to be accomplished by a bill they all support, their conflicting views blend in an end result.⁶⁰ Purpose, therefore, is the essential part of the context of every statute and the reason for the legislative effort expended in its enactment.⁶¹

Legal process theory distinguishes between statutory purpose and legislative intent. Legislative intent refers to that meaning or idea which the legislature attempted to express by the wording of the statute.⁶² The fact that words are inexact and imperfect symbols for the communication of ideas complicates the expression of that intent.⁶³ Therefore, for judges to fulfill their interpretive responsibility, they must endeavor to reconstruct the setting or context in which the statutory words were employed.⁶⁴

The words and the context surrounding the statute's passage form the basis for determining its possible purposes.⁶⁵ Later, the words serve as checks in proving the hypotheses.⁶⁶ Hart and Sacks argued that the court should accept the formally enacted statement of purpose in a statute if it appears that Congress intended it to serve as

56. Harry W. Jones, *Statutory Doubts and Legislative Intention*, 40 COLUM. L. REV. 957, 962 (1940).

57. *Id.* at 965; see also Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice* 38-42 (May 23, 1989) (unpublished working paper No. 39, on file with the University of Miami Law Library). *Contra* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547-51 (1983) (criticizing concept of legislative intent of framers).

58. See Hart & Sacks, *supra* note 9, at 1156, 1411-15; see also T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 24-27 (1987).

59. See Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 370-71 (1947); Hart & Sacks, *supra* note 9, at 1156. *Contra* Steven R. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37, 52-55 (1991) (discussing textualism's assertion that legislative purpose and intent are incoherent concepts).

60. Cox, *supra* note 59, at 370-71.

61. Hart & Sacks, *supra* note 9, at 1156.

62. Cox, *supra* note 59, at 371.

63. Harry W. Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U. L.Q. 2, 3 (1939).

64. *Id.* at 3.

65. Hart & Sacks, *supra* note 9, at 1411.

66. *Id.*

a guide to interpretation, it is consistent with the words and the context of the statute, and is relevant to the question of meaning at issue.⁶⁷ The court may also seek to discover the implied statutory purpose by comparing the new law to the old law, asking, "Why would reasonable [people], confronted with the law as it was, have enacted this new law to replace it?"⁶⁸ This requires judicial scrutiny of the perceived "mischief" inherent in the old law and "the true reason of the remedy" underlying the new one.⁶⁹

Under legal process analysis, once the court ascertains the purpose of the statute, the purpose should form the basis for interpreting the words and the legislative history in order to derive the specific intent of Congress.⁷⁰ Interpretations by administrative agencies bearing official responsibility under the statute also merit respect.⁷¹

The unanimous *Griggs* Court began its opinion by stating that Title VII's plain language clearly indicated the congressional objective in its enactment.⁷² The Court then interpreted the statute, not in terms of its plain language, but in terms of the Court's perception of the statute's purpose—"to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."⁷³

In 1971, the Court could not possibly have misconstrued the social context surrounding the passage of the 1964 Act in light of the long years of segregation leading to its passage,⁷⁴ the national crisis compelling its enactment,⁷⁵ the efforts of two Presidents in sponsoring the legislation,⁷⁶ and the overwhelming bipartisan support for a legislative solution to America's racial problems.⁷⁷ The Court's definition

67. *Id.* at 1413.

68. *Id.* at 1415.

69. *Id.* at 1415 (quoting Heydon's Case, 76 Eng. Rep. 637 (Ex. 1584)).

70. Cox, *supra* note 59, at 378-82. *Contra* Kenneth W. Starr, *Observations about the Use of Legislative History*, 1987 DUKE L.J. 371, 375-79.

71. Hart & Sacks, *supra* note 9, at 1417.

72. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971).

73. *Id.* at 429-30.

74. *See supra* notes 16-25 and accompanying text.

75. *See supra* notes 23-28 and accompanying text.

76. *See supra* notes 27, 40 and accompanying text.

77. The General Statement in the House Report on the 1964 Act reflected its bipartisan support:

In various regions of the country there is discrimination against some minority groups. Most glaring, however, is the discrimination against Negroes which exists throughout our Nation. Today, more than 100 years after their formal emancipation, Negroes, who make up over 10 percent of our population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens.

of the statute's purpose was consistent with the setting or context in which it arose.

Upon that solid ground, the *Griggs* Court examined the 1964 Act's legislative history.⁷⁸ The Senate debate, the votes on offered amendments, and an interpretive memorandum by the floor leaders of the Senate debate sustained the Court's formulation of Title VII's purpose. Based on a thorough analysis, the Court found ample proof of the congressional intent to prohibit non-job-related employment tests discriminating solely on the basis of race, color, religion, sex, or national origin.⁷⁹

The language of the statute read in light of its purpose did not necessarily compel the conclusion that unlawful employment practices could be proven by disparate impact analysis merely because the Court had determined that the 1964 Act's purpose was "removal of artificial, arbitrary, and unnecessary barriers to employment" and that Congress intended to prohibit non-job related tests. A more hesitant Court might have required proof of intent. The Court's liberal construction suggests that an additional factor buttressed its purpose analysis.

D. *Public Interest Legislation*

Posner's "public interest theory" helps explain the Court's expansive interpretation of Title VII. Public interest legislation is justified on the grounds that it corrects market failures, such as monopolization of political power, and that it comports with some widely held concept of just distribution of wealth.⁸⁰ Such legislation serves the public interest because broad cross sections of the population receive its benefits and support it.⁸¹ In contrast, narrow interest group legislation only benefits a small portion of the population, who presumably are most able to lobby for benefits.⁸² Interest group theory reflects pessimism concerning the purpose and effects of legislation, whereas public interest theory remains optimistic.⁸³

The *Griggs* decision reveals that the Court, like Presidents Ken-

H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2393; *see also supra* text accompanying notes 36-39.

78. *Griggs*, 401 U.S. at 434-36.

79. *Id.*

80. Posner, *supra* note 10, at 270; *see also* Easterbrook, *supra* note 57, at 541-43.

81. Posner, *supra* note 10, at 270-71.

82. *Id.* at 265-68, 271-72; *see also* Landes & Posner, *supra* note 12, at 876-85.

83. Posner, *supra* note 10, at 266.

nedy and Johnson⁸⁴ and the great majority of both Houses of Congress,⁸⁵ viewed the 1964 Act as a correction to the long festering societal failure to resolve racial injustice and its increasingly visible polarization of society. As such, it qualified as public interest legislation designed to correct the market failure of a monopoly of employment power. The proponents of the 1964 Act believed that all Americans would benefit from ending the strife caused by the grossly inhumane treatment of a substantial segment of the population.⁸⁶ As pointed out in the 1964 Congressional debate, "in 28 States . . . there [were] fair employment practices laws or ordinances," but "[n]ot a single State of the Old Confederacy ha[d] such a law."⁸⁷ Only the southern states fervently resisted all efforts to bow to even symbolic equality in the workplace.⁸⁸ Thus, the South's stubborn insistence on preserving the status quo pitted regional interests against national interests.⁸⁹ The violent events in Birmingham and in other cities, witnessed worldwide, forcefully demonstrated the need for expansive

84. We believe that all men are created equal. Yet many are denied equal treatment.

We believe that all men have certain unalienable rights. Yet many Americans do not enjoy those rights. We believe that all men are entitled to the blessings of liberty. Yet millions are being deprived of those blessings—not because of their own failures, but because of the color of their skin. The reasons are deeply imbedded in history and tradition and the nature of man. We can understand—without rancor or hatred—how this all happened. But it cannot continue. Our Constitution, the foundation of our Republic, forbids it. The principles of our freedom forbid it. Morality forbids it. And the law I will sign tonight forbids it.

Radio and Television Remarks, *supra* note 40, at 842-843; see also *supra* notes 27, 40 and accompanying text.

85. See *supra* text accompanying notes 36-39.

86. [E]nactment of the "The Civil Rights Act" . . . is imperative. It will go far toward providing reasonable men with the reasonable means of meeting these problems; and it will thus help end the kind of racial strife which this Nation can hardly afford. Rancor, violence, disunity, and national shame can only hamper our national standing and unity.

President's Special Message, *supra* note 27, at 493.

87. 110 CONG. REC. 13080 (1964) (statement of Sen. Clark).

88. I agree that a man should be permitted to operate his own private business in the way he wishes. He should also be permitted to hire all white people, if he wishes to do that; or all Chinese, or all Filipinos, or people of any other race; or to hire some of each. He should be permitted to hire people in whatever proportion he wants to hire them.

110 CONG. REC. 7903 (1964) (statement of Sen. Thurmond).

89. Mr. Long of Louisiana: Is not the entire bill predicated on the theory that the people are incapable of running their own State governments; . . . therefore . . . the great Federal Government must impose its will on the people and must tell the States—or at least, according to the view of certain of the people in the Northern States, must impose its will on the 11 Southern States . . . ?

Mr. Thurmond: That seems to be the premise of the bill.

110 CONG. REC. 7905 (1964) (statements of Sen. Long and Sen. Thurmond).

efforts to enforce the purpose of the legislation, in the face of open defiance by the states.

The Court also recognized the difficulty of proving employment discrimination where a wide array of seemingly neutral but effectively insurmountable prerequisites to employment conceal discriminatory intent.⁹⁰ Judge Sobeloff, whose dissenting opinion in the Fourth Circuit Court of Appeals was largely adopted by the *Griggs* Court, emphasized that the "vitality of the employment provisions" depended on whether the court would allow "more cunning devices designed to impart the appearance of neutrality, but to operate with the same invidious effect as before" to supplant prohibited overt bias.⁹¹ The Court's role in regard to this public interest legislation consisted of policing attempts to disguise unlawful employment practices. Thus, the Court faced a choice between liberally construing section 703 to effectuate its purpose⁹² or reducing Title VII to "mellifluous but hollow rhetoric."⁹³

The *Griggs* interpretation gave greater content to the statutory text, providing a basis for the process of reasoning by example.⁹⁴ Subsequent decisions by the Court and the lower federal courts used *Griggs* as a benchmark for disparate impact analysis and consistently followed it until the 1988 plurality decision in *Watson v. Fort Worth Bank and Trust*.⁹⁵

III. DISPARATE IMPACT REVISITED: THE REHNQUIST MAJORITY

"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."⁹⁶

90. *Griggs*, 401 U.S. at 424.

91. *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1238 (4th Cir. 1970) (Sobeloff, J., dissenting), *rev'd*, 401 U.S. 424 (1971).

92. See KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 90 (10th ed. 1989) ("At his need, as the case before him urges, [the judge] can construe the statute strictly (as 'in derogation of the common law') when it would seem to work hardship, or liberally (as 'remedial') if that seems indicated.").

93. *Griggs*, 420 F.2d at 1238 (Sobeloff, J., dissenting).

94. LEVI, *supra* note 53, at 1-2 (reasoning by example is a three step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a subsequent similar fact pattern).

95. 487 U.S. 977 (1988).

96. *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642, 662 (1989) (Blackmun, J., dissenting).

A. *Textualist Interpretation*

Watson involved a Title VII action by former employees against their employer, alleging discriminatory hiring and promotion practices. The named plaintiff, an African-American woman, had been passed over several times for promotion at a bank on the basis of informal subjective evaluation criteria. On appeal, the Court considered whether disparate impact analysis might "appl[y] to hiring or promotion systems that involve the use of 'discretionary' or 'subjective' criteria."⁹⁷

Justice O'Connor, joined by Chief Justice Rehnquist, and Justices Scalia and White, delivered the plurality decision. Still involved in the confirmation process, Justice Kennedy, the other member of the Rehnquist majority, did not take part in the decision. The Court held subjective criteria amenable to disparate impact analysis. The other four Justices concurred in the judgment.⁹⁸ Beyond the immediate issue, the plurality felt compelled to make a "fresh and somewhat closer examination of the constraints that operate to keep [disparate impact] analysis within its proper bounds."⁹⁹

Rather than beginning with the legislative purpose as a guide to interpretation, the plurality began with the text of section 703(j).¹⁰⁰ Focusing on the word "require," the plurality found that the *Griggs* requirement that the employer validate the job-relatedness of employment practices unavoidably conflicted with subjective evaluation criteria.¹⁰¹ The plurality found that qualities, such as common sense, good judgment, ambition, and tact, defied measurement by standardized tests, although self-evident and crucial in certain jobs.¹⁰² Under the *Griggs* standard, the plurality assumed that employers would have to defend their subjective evaluations in expensive lawsuits, since they could not validate them, or adopt hiring and promotion quotas to

97. *Watson*, 487 U.S. at 978.

98. *Id.* at 1000 (Blackmun, J., concurring in part and concurring in the judgment).

99. *Id.* at 994.

100. *Id.* at 992. Section 703(j) of Title VII states in pertinent part:

Nothing contained in [Title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force . . .

101. *Watson*, 487 U.S. at 992.

102. *Id.* at 991-92. But see David L. Rose, *Subjective Employment Practices: Does the Discriminatory Impact Analysis Apply?*, 25 SAN DIEGO L. REV. 63 (1988) (arguing that subjective procedures can be validated).

eliminate the basis for a prima facie case.¹⁰³ In the plurality's view, forcing employers to use quotas would violate Congress' express intent in section 703(j) that Title VII not be interpreted to require any employer to grant preferential treatment to any individual to avoid disparate impact.¹⁰⁴

To prevent a result contrary to its vision of Congress' intent, the plurality adjusted the evidentiary standards established in *Griggs*.¹⁰⁵ *Watson* increased the complainant's burden in establishing a prima facie case in two ways. First, *Watson* required the complainant to "isolat[e] and identify[] the specific employment practices . . . allegedly responsible for any observed statistical disparities."¹⁰⁶ Second, the complainant had to offer statistical evidence proving that the identified practice "caused the exclusion of applicants for jobs or promotions because of their membership in a protected group."¹⁰⁷ The decision also redefined and lessened the employer's burden of demonstrating business necessity for employment practices adversely affecting qualified members of a protected group. Directly contradicting seventeen years of settled case law, the plurality agreed that *Griggs* "should not be interpreted as implying that the ultimate burden of proof [of business necessity] can be shifted to the [employer]."¹⁰⁸ Finally, *Watson* limited the applicability of the complainant's rebuttal of a business necessity defense in two ways. First, it deemed business costs and other burdens relevant factors in deciding whether proffered alternatives and the challenged practices equally served the employer's business goals.¹⁰⁹ Second, it directed courts not to restrict business practices unless mandated by Congress to do so.¹¹⁰

Justice Blackmun, in a concurring opinion joined by two other members of the Court, criticized the plurality for "mischaracteriz[ing] the nature of the burdens this Court has allocated for proving and rebutting disparate-impact cases," finding these burdens "inconsistent with the . . . central purpose of Title VII."¹¹¹ The concurrence forcefully argued that the *Watson* decision "would encourage employers to abandon attempts to construct selection mechanisms subject to neutral application for the shelter of vague generalities."¹¹²

103. *Watson*, 487 U.S. at 992-93.

104. *Id.*

105. *Id.* at 993-99.

106. *Id.* at 994.

107. *Id.*

108. *Id.* at 997.

109. *Id.* at 998.

110. *Id.* at 999.

111. *Id.* at 1000 (Blackmun, J., concurring in part and concurring in the judgment).

112. *Id.*

The different readings of Title VII by the plurality and the concurring judges correlate with their methods of interpreting Title VII. The plurality's myopic focus on one word in the text, "required," and its desire to protect employers from quotas and racial preferences contrasts with Justice Blackmun's reliance on *Griggs'* purpose analysis and its desire to protect against improper effects that cannot be explained by business necessity. The plurality whole-heartedly embraced textualism or legal formalism¹¹³ as the correct method of interpreting Title VII. Textualism's central premise dictates that the court should apply the plain meaning of a statute.¹¹⁴ One finds this plain meaning by presuming that the legislature employed the statute's words in their ordinary sense, thus enabling the jurist to understand the statute through careful reading.¹¹⁵ This frees the textualist from the burden of inquiring into legislative purpose and intent, as understood by the legal process theorists, or studying legislative history.¹¹⁶ Those tools are dismissed as susceptible to manipulation and as judicial means of undermining the reasoned decision of the legislature.¹¹⁷ Textualism's critics counter that words do not interpret themselves and that the textualist's plain meaning depends on the interpreter's perspective and preferences.¹¹⁸ From the plurality's perspective, "required" provided a key word and a directive to the courts. The solid Rehnquist majority soon reiterated the *Watson* interpretation of disparate impact theory in *Ward's Cove Packing Co., Inc. v. Atonio*.¹¹⁹

B. Majoritarian Protection

In *Ward's Cove*, Filipino and Eskimo employees brought a dispa-

113. See generally Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1987); Steven M. Quevedo, Comment, *Formalist and Instrumentalist Legal Reasoning and Legal Theory*, 73 CALIF. L. REV. 119 (1985).

114. See William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 676-77 (1991); cf. Paul T. Brest, *The Misconceived Quest for the Original Intent*, 60 B.U. L. REV. 204, 205-09 (1980) (discussing textualism and constitutional interpretation).

115. See Greenberger, *supra* note 59, at 52. But see Cox, *supra* note 59, at 377 (characterizing textualism as "dictionary school" interpretation).

116. See Aleinikoff, *supra* note 58, at 22-23; Starr, *supra* note 70, at 373-79.

117. See Easterbrook, *supra* note 57, at 539; Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 809 (1983); Posner, *supra* note 10, at 275. *Contra* Mikva, *supra* note 54.

118. See Eskridge, *supra* note 114, at 677; cf. Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 61, 465 (1897) ("Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.").

119. 490 U.S. 642 (1989).

rate impact action against an employer in the seasonal Alaska salmon cannery industry.¹²⁰ The employer maintained two groups of workers, one classified as non-cannery employees and the other as cannery employees.¹²¹ Filipinos and white Alaska natives, recruited from the local area, comprised over two-thirds of the cannery workers.¹²² These were considered unskilled positions. Almost all of the non-cannery workers were white and had been recruited in Washington and Oregon by word of mouth and through family relationships.¹²³ Of the 100 non-cannery positions, the district court found all except fifteen to be skilled positions.¹²⁴ All of the non-cannery positions paid more money than the cannery positions.¹²⁵ The cannery and non-cannery employees lived in separate housing and ate at separate mess halls.¹²⁶ Cannery jobs did not receive promotions to non-cannery jobs, and jobs were rarely posted or advertised.¹²⁷

The Rehnquist majority, in a 5-4 decision, reversed the en banc Ninth Circuit Court of Appeals decision.¹²⁸ Largely adopting *Watson's* reasoning, the majority held that the plaintiffs had failed to make a prima facie case of disparate impact in violation of Title VII.¹²⁹

Relying on *Watson* and its interpretation of the word "require" in section 703(j), the Rehnquist majority expressed its concern that a liberal interpretation of Title VII would lead employers to adopt racial quotas because of their fear of being haled into court to defend business practices in expensive litigation.¹³⁰ On that basis, *Ward's Cove* embraced *Watson's* specificity requirement and its shift of the evidentiary burden. The Rehnquist majority, without reference to the legislation's purpose, its context, or the legislative history, rejected the *Griggs* premise that the "touchstone" of disparate impact "is business necessity."¹³¹ Instead, the Court recast this "touchstone" as "a reasoned review of the employer's justification for his use of the challenged practice."¹³² The majority conceded that prior cases had

120. *Id.* at 647.

121. *Id.*

122. *Id.* at 677.

123. *Id.* at 647.

124. *Id.* at 674-75 n.21.

125. *Id.* at 647.

126. *Id.* at 677-78.

127. *Id.* at 674.

128. *Id.* at 661.

129. *Id.*

130. *Id.* at 652-53.

131. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

132. *Ward's Cove*, 490 U.S. at 659.

placed a burden of persuasion, not production, of business necessity on the employer, but ruled that "they should have been understood to mean an employer's production. . . ." ¹³³ Having finally succeeded in elevating the *Watson* plurality opinion to the status of law, the Rehnquist majority adopted the *Watson* position on the acceptability of a complainant's offer of alternative, less discriminatory selection practices. ¹³⁴

The *Ward's Cove* dissent decried the Rehnquist majority's retreat from "our national goal of eliminating barriers that define economic opportunity not by aptitude and ability but by race, color, national origin and other traits that are easily identified but utterly irrelevant to one's qualification for a particular job." ¹³⁵ The dissent accused the Rehnquist majority of "turning a blind eye to the meaning and purpose of Title VII." ¹³⁶ To support its accusation, the dissent reviewed the development of Title VII jurisprudence, focusing on *Griggs'* purpose analysis, the subsequent legislative history leading to the 1972 Amendments to Title VII approving the *Griggs* decision, the 1972 Amendments themselves which extended its application, and the law of evidence. "Why," Justice Stevens wondered, "the Court undertakes these unwise changes in elementary and eminently fair rules is a mystery to me." ¹³⁷

The fact that neither the purpose of Title VII nor the Congressional intent changed over the seventeen-year period between *Griggs* and *Watson*, but "[o]nly the personnel of th[e] Court did," ¹³⁸ provides a clue to solving the mystery. Although the Civil Rights Acts of 1963 and 1964 had the strong support of President Kennedy and President Johnson, ¹³⁹ the installment of the Reagan Administration in 1980 marked a sharp change in the stance of the presidency on civil rights. ¹⁴⁰ The Reagan Administration feigned support for civil rights while declaring its opposition to race-conscious remedies employed solely for the purpose of achieving racial balance. ¹⁴¹ The Reagan Administration specifically targeted affirmative action and school

133. *Id.* at 660.

134. *See supra* text accompanying notes 109-10.

135. *Id.* at 662-63 (Stevens, J., dissenting).

136. *Id.* at 663.

137. *Id.* at 679.

138. *Payne v. Tennessee*, 111 S. Ct. 2597, 2619 (1991) (Marshall, J., dissenting).

139. *See supra* notes 27, 40.

140. Drew S. Days, III, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309, 313 (1984).

141. *Id.* at 321 n.59 (reprinting 1981 statements of Reagan's Assistant Attorney General for Civil Rights, William B. Reynolds).

desegregation,¹⁴² and began a public campaign in favor of a color-blind view of civil rights and against "special interest groups," such as African-Americans.¹⁴³ The administration placed much emphasis on opposition to "the use of quotas or any other numerical or statistical formulae designed to provide to *nonvictims* of discrimination preferential treatment based on race, sex, national origin or religion."¹⁴⁴

Among other efforts to turn back the clock on civil rights, President Reagan named three members of the current Rehnquist majority to the Supreme Court and elevated then Justice Rehnquist to Chief Justice.¹⁴⁵ Each appointment shifted the Court farther to the right.¹⁴⁶ Justice Kennedy's confirmation in 1988, the year of the *Watson* decision, completed the formation of the Rehnquist majority. The language in the *Watson* plurality and the *Ward's Cove* majority reflects the Reagan Administration's preoccupation with quotas and preferential treatment. Following the regressive trend of these two decisions, the Rehnquist majority subsequently decided six other employment discrimination cases, adversely affecting civil rights.¹⁴⁷ Faced with the significant combined effect of these decisions, Congress felt compelled to modify or reverse them through the Civil Rights Act of 1991.

C. Interest Group Theory

Posner's "interest group" theory helps explain the language, method of analysis, and decisions in *Watson* and *Ward's Cove* when

142. *Id.* at 319-30, 339-46.

143. Sondra Hemeryck et al., *Reconstruction, Deconstruction and Legislative Response: The 1988 Supreme Court Term and the Civil Rights Act of 1990*, 25 HARV. C.R.-C.L. L. REV. 475, 501-03 (1990).

144. Days, *supra* note 140, at 318 n.47 (quoting Reagan's Assistant Attorney General for Civil Rights) (emphasis added).

145. President Reagan named Justice O'Connor, Justice Scalia, and Justice Kennedy to the Supreme Court in 1981, 1986, and 1987, respectively. Chief Justice Rehnquist became Chief Justice in 1986.

146. See Eskridge, *supra* note 114, at 659-61.

147. The post-*Ward's Cove* Rehnquist majority cases restricting civil rights laws were *EEOC v. Aramco*, 111 S. Ct. 1227 (1991) (Title VII does not apply to U.S. citizens working for American companies abroad); *West Virginia University Hospitals v. Casey*, 111 S. Ct. 1138 (1991) (recoverable legal fees under Title VII do not include costs of hiring expert witnesses); *Lorance v. AT&T*, 490 U.S. 900 (1989) (statute of limitation for discriminatory practice begins at time discriminatory practice adopted, not at time the effect of the practice was experienced); *Martin v. Wilks*, 490 U.S. 755 (1989) (allowing white firefighters who were neither parties nor intervenors to challenge court-approved consent decree); *Patterson v. McLean*, 491 U.S. 164 (1989) (limiting coverage of § 1981 of Title 26 to hiring); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (no liability for employer even if intentional discrimination was proven, if employer had another non-discriminatory motive for action).

viewed in the light of the six subsequent anti-civil rights decisions.¹⁴⁸ Interest group theory considers legislation as a good, subject to supply and demand forces like other goods.¹⁴⁹ The legislature, as the supplier, dispenses legislation to those groups who create the highest demand, and thus value to the legislators, regardless of overall social welfare.¹⁵⁰ In this context, President Reagan's special interest groups are competitors attempting to derive benefits from the government.

The Rehnquist majority's reasoning in *Watson* and *Ward's Cove* is consistent with a view of the *Griggs* standard of disparate impact theory as narrow interest group legislation, benefitting a small class of citizens at society's expense. *Watson* emphasized the term "preferential treatment," suggesting that it would be the unacceptable result if disparate impact analysis required the employer to justify the unrepresentative composition of its workforce.¹⁵¹ This term expresses the Rehnquist majority's idea that, under a *Griggs* standard, a narrow interest group, such as African-Americans or women, would receive benefits that they would not otherwise receive and that they have not earned. Likewise, the use of the word "quotas" gives rise to the same fear that a narrow interest group gains at society's expense.¹⁵² From this vision of disparate impact and other group-conscious remedies benefitting special interests, the Rehnquist majority finds justification for limiting the scope of these remedies by increasing the burdens on their beneficiaries.

In this light, it is not surprising that the Rehnquist majority does not follow the legal process theorists' approach to interpreting Title VII.¹⁵³ The perceived danger of rewarding a narrow interest and "taking" from society argues against examining the purpose of the statute, the context of its birth, or its legislative history.¹⁵⁴ Consequently, the Rehnquist majority uses two strategies. One invokes a textualist interpretation of Title VII, such as the *Watson* and *Ward's Cove* decisions' emphasis on the word "required" as the essence of section 703(j). The other attempts to change the focus of the legislation. The Rehnquist majority speaks of "legitimate business goals" and "costs and other burdens on the employer" rather than proof of

148. Posner, *supra* note 10, at 265.

149. *Id.*; see also Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 878-83 (1987) (discussing *Lochner* era vision of raw interest group transfers).

150. Posner, *supra* note 10, at 265; Landes & Posner, *supra* note 12, at 877-78.

151. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992-93 (1988).

152. See *Watson*, 487 U.S. at 989-93; *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642, 652-53 (1989).

153. See *supra* text accompanying notes 59-71 (explaining legal process theory).

154. Cf. Sunstein, *supra* note 10, at 1689-93.

business necessity, because it has changed the focus of the Civil Rights Act.¹⁵⁵ The interest group perspective of *Ward's Cove* and *Watson* replaced *Griggs'* objective of the "removal of artificial, arbitrary, and unnecessary barriers to employment" with an objective of preserving property rights. Simply put, the Rehnquist majority views Title VII from the point of view of the employer or the "identifiable group of white employees."¹⁵⁶

D. *Factious Spirit*

The most disturbing aspect of the Rehnquist majority's reasoning in *Watson* and *Ward's Cove* and its raising of fears of preferential treatment, quotas, loss of property rights, and the unconstitutionality of remedying discriminatory practices is that those themes mirror the Southern Democrats' strategy in attempting to defeat the passage of the Civil Rights Act of 1964.¹⁵⁷ The words of those who unsuccessfully fought to maintain a racially segregated status quo in America almost 30 years ago are now used by the majority in the Supreme Court to undermine the employment discrimination provisions.¹⁵⁸ The Rehnquist majority's decisions and the familiar language and reasoning of *Watson* and *Ward's Cove* suggest the danger of which James Madison warned in *The Federalist* over 200 years ago—the danger of factious spirit.¹⁵⁹

Madison understood a faction as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."¹⁶⁰ Madison counseled that

155. See D. Marvin Jones, *Unrightable Wrongs: The Rehnquist Court, Civil Rights, and an Elegy for Dreams*, 25 U.S.F. L. REV. 1, 12-16 (1990).

156. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

157. See *supra* notes 30-35 and accompanying text (recounting Southern Democrats' efforts to stop passage of 1964 Civil Rights Act).

158. Compare *supra* notes 30-35 and accompanying text with *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642, 652-53 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 989-93 (1988).

159. See THE FEDERALIST No. 10, *supra* note 13, at 104-12; Steven G. Calabresi, Note, *Madisonian Interpretation of the Equal Protection Doctrine*, 91 YALE L.J. 1403, 1404-05 (1982) (describing Madisonian view that the formation of a permanent majority coalition endangers pure democracies); cf. MORTON WHITE, PHILOSOPHY, THE FEDERALIST AND THE CONSTITUTION 102-12 (1987) (discussing the Federalists' view of passion and self-interest as motives or causes of action).

160. THE FEDERALIST No. 10, *supra* note 13, at 105; cf. JOHN ELY, DEMOCRACY AND DISTRUST 153 (1980) ("Race prejudice, in short, provides the 'majority of the whole' with that 'common motive to invade the rights of other citizens' that Madison believed improbable in a pluralistic society.").

"[i]f a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views, by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the constitution."¹⁶¹

But, he cautioned "[w]hen a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interests, both the public good and the rights of other citizens."¹⁶² Thus, the danger of a faction lies in its members achieving majority status in a decision-making group, thereby subordinating the public good and the rights of minorities to its superior force through democratic procedure.

Madison's first prophecy proved correct in 1964 during the longest debate in United States legislative history.¹⁶³ A faction of Southern Congressmen, united by the common interest of maintaining a separate but unequal society, did clog the administration and convulse society; but the republican principle enabled the majority of Americans to defeat its sinister views by regular vote.¹⁶⁴

The Rehnquist majority represents Madison's second prophecy for those groups entitled to the protection of the Civil Rights Act of 1964.¹⁶⁵ Five Justices, united to protect the property rights of the white majority and to limit "takings" by special interests groups, sacrificed to its ruling passion and interests a legislative act designed for the public good. The small but vocal faction of Southern legislators who used the same words and reasoning when opposing legislation in 1964 would have been content if the civil rights bill had required the complainant to do the following: isolate and identify the specific discriminatory practices used by the employer; to prove that each identified discriminatory practice caused the injurious result; to carry the burden of proving that an employer's excuse was a mere insubstantial justification; and to prove that any alternative was cost-efficient, non-burdensome, and equally effective from the standpoint of the discriminating employer's legitimate business practices. They would have been content because such requirements nullify disparate impact anal-

161. THE FEDERALIST No. 10, *supra* note 13, at 108.

162. *Id.*; cf. Kimberle W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1369-87 (1988) (arguing that the political and ideological role of race consciousness is a primary factor in isolating African-Americans as "others").

163. See *supra* notes 29-40 and accompanying text.

164. See *supra* notes 29-40 and accompanying text.

165. Cf. Eskridge, *supra* note 114, 677-80.

ysis. The factious minority could not achieve legislatively what the Rehnquist majority wrought through its revisionist interpretations.

IV. THE RESPONSE TO FACTIONALISM

"To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them"¹⁶⁶

In earlier eras, factional strife required governmental response. The Civil War and the Reconstruction period responded to the Confederate States' insistence on enslaving African-Americans, Taney's *Dred Scott* decision,¹⁶⁷ and secession. Subsequently, Madisonian factionalism resurfaced in the form of the Black Codes and Bradley's *Civil Rights Cases*.¹⁶⁸ Many years later, the government, acting through the judiciary, responded to majoritarian oppression with *Brown v. Board of Education*.¹⁶⁹ Finally, the Civil Rights Act of 1964 countered the massive southern resistance to the Court-ordered integration of public schools and public accommodations.¹⁷⁰

In 1989, the Rehnquist majority, through its restrictive interpretation of section 703 of Title VII and the judicially-created disparate impact doctrine, challenged Title VII's beneficiaries to marshal sufficient political support to codify the *Griggs* standard. Congress quickly reacted by passing the Civil Rights Bill of 1990;¹⁷¹ however, President Bush's veto effectively nullified their efforts. The conservative alignment of the President and a hand-picked majority on the Supreme Court presented Congress with the additional obstacle of passing restorative legislation with veto-resistant strength.¹⁷² As a result, reinstatement of the *Griggs* standard required not a will of a simple majority of the people but a clear and convincing rejection of the Rehnquist faction.

After the Senate failed by one vote to override the President's veto in 1990, the House of Representatives opened the 102nd Con-

166. THE FEDERALIST No. 78, at 574 (John Madison) (John C. Hamilton ed., 1892).

167. 60 U.S. (19 How.) 393 (1856) (holding Act of Congress which prohibited a citizen from holding and owning slaves in the Louisiana Territory void).

168. 109 U.S. 3 (1883) (holding provisions in Civil Rights Act of 1875 prohibiting discrimination in public accommodations unconstitutional); see also Hemeryck et al., *supra* note 128, at 486-93.

169. 347 U.S. 483 (1953); see also *supra* text accompanying notes 16-21.

170. See *supra* notes 22-40 and accompanying text.

171. S. 2104, 101st Cong., 2d Sess. (1990).

172. See Eskridge, *supra* note 114, at 659-64; Abner J. Mikva & Jeff Bleich, *When Congress Overrules the Court*, 79 CAL. L. REV. 729, 739 (1991).

gress in 1991 with a reintroduction of strong civil rights legislation,¹⁷³ its first bill¹⁷⁴ ("H.R. 1"). In an effort to circumvent the House bill, President Bush introduced a restrictive civil rights bill through Senator Orrin Hatch.¹⁷⁵ Concurrently, the President and a group of Congressmen, favoring the Rehnquistian view, vocally campaigned for several months against the House bill, characterizing it as a "quota bill."¹⁷⁶ Faced with the continuing threats of Presidential veto and the "quota bill" assault, the Senate accepted Republican Senator Danforth's compromise bill.¹⁷⁷ After attempting to appease President Bush with various weakening amendments,¹⁷⁸ Congress passed the Civil Rights Act of 1991, which the President ultimately signed.

The most impressive aspect of the congressional response to Rehnquistian factionalism lay in the wide range of civil rights laws addressed by the 1991 Act. The Act reversed parts of seven Rehnquist majority decisions¹⁷⁹ and amended Title VII, Section 1981 of the Civil Rights Act of 1866 and three other statutes. Among its four express purposes, Congress stated its clear intent "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."¹⁸⁰ In terms of the sheer scope of the

173. 137 CONG. REC. H4431 (daily ed. June 12, 1991) (statement of Rep. Scriff).

174. H.R. 1, 102d Cong., 1st Sess. (1991).

175. S. 611, 102d Cong., 1st Sess. (1991).

176. Let me give you an example [of disparate impact]. . . . [O]ne of the biggest cities in my district, La Crosse, WI happens to have, I believe, a 5-percent Hmong population. What that would mean is that every employer in La Crosse, WI, must have a 5-percent Hmong population not only in the work force but at every level of their work force. Otherwise they run the risk of being subject to what is known as a disparate impact case.

137 CONG. REC. H3730 (daily ed. May 30, 1991) (statement of Rep. Gunderson); *see also* 137 CONG. REC. S15318 (daily ed. Oct. 29, 1991) (statements of Senator Hatch expressing his and the President's quota worries). *But see* Roger Kosson, *Times Hits Sen. Danforth Without Reason*, NEWS WORLD COMM. INC., Oct. 7, 1991, at D2 (opponents have engaged in intellectual sloppiness and outright distortions, and ignored that disparate impact depends on proof of a qualified labor pool).

177. *See* 137 CONG. REC. S7020 (daily ed. June 4, 1991) (statement of Sen. Danforth) ("We believe that we have kept the middle ground in dealing with Wards Cove."); *Kennedy Pledges Cooperation with Danforth on Civil Rights Bill*, EMPLOYMENT (BNA), at A11 (Aug. 5, 1991).

178. *See* 137 CONG. REC. H3481 (daily ed. May 22, 1991) (statement of Rep. Mink) ("[T]o gain support for this legislation, and to make it, as legislators say, veto-proof, by getting more than two-thirds vote on the passage by this body. I think it is a very bad mistake to compromise away the rights, the very basic, fundamental rights, of a group of citizens within this country . . ."); 137 CONG. REC. S15472 (daily ed. Oct. 30, 1991) (statement of Sen. Dole) ("[T]his compromise is not perfect. . . . [b]ut it is the best we can do under the circumstances."); *see also* 137 CONG. REC. E3832-01 (daily ed. Nov. 7, 1991) (statement of Rep. Dixon).

179. *See supra* note 147.

180. Civil Rights Act of 1991 § 3(4).

response, the Act fulfilled its promise to expand civil rights protections.

Notwithstanding the omnibus nature of the 1991 Act, the legislative response to *Ward's Cove* lay at the center of the Act and the controversy surrounding its passage.¹⁸¹ Calling attention to the Rehnquist majority's errors, Congress explicitly found that "the decision of the Supreme Court in *Ward's Cove* . . . has weakened the scope and effectiveness of Federal civil rights protections."¹⁸² Congress expressed two additional purposes of the Act: (1) codifying the "business necessity" and "job related" standards enunciated in *Griggs* and other Supreme Court decisions prior to *Ward's Cove*;¹⁸³ and (2) confirming statutory authority and its provision of guidelines for the adjudication of disparate impact suits under Title VII.¹⁸⁴

Careful scrutiny of the provisions addressing the disparate impact doctrine reveals that the 1991 Act does not live up to the promise expressed by its stated purpose. In this area, Congress made extensive compromises to gain passage of the Act. The Act only partially restores disparate impact theory to its pre-*Ward's Cove* standard, while adopting some of the *Watson* and *Ward's Cove* restrictions on equal employment opportunity.

The 1991 Act's redistribution of the disparate impact plaintiff's burden of proof provides the most obvious gain to plaintiffs under the Act. *Ward's Cove*, mirroring *Watson*, lessened the burden on the employer by substituting a burden of production of evidence of a business justification for the *Griggs*' requirement of a burden of persuasion on the issue of business necessity.¹⁸⁵ Thus, the Rehnquist majority placed the burden of persuasion on the plaintiff at all stages of litigation. This redistribution of burdens unearthed the foundation of the *Griggs* formulation of disparate impact—that the plaintiff show the adverse impact subject to the employer's defense of business necessity. Section 105 of the 1991 Act amended section 703 of Title VII and replaced the employer's burden of proof with one of persuasion as to

181. See 137 CONG. REC. S7027 (daily ed. June 4, 1991) (statement of Senator Danforth) (describing the *Ward's Cove* provisions as the bill's most controversial part); *Senate Republicans Seek Compromise on Civil Rights, Introduce Three Separate Bills*, Employment (BNA), at A11 (June 5, 1991) (commenting on the separation of the civil rights bill into three separate pieces of legislation with the *Ward's Cove* provisions constituting one of the bills so as to focus debate on the legislation's sticking points).

182. Civil Rights Act of 1991 § 2(2).

183. *Id.* § 3(2).

184. *Id.* § 3(3).

185. *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989).

job relatedness and business necessity.¹⁸⁶ Thus, Section 105 codifies the *Griggs* burden-shifting scheme and overturns that part of *Ward's Cove*. Absent Section 105, the employer could escape liability for proven adverse impact on an identifiable group merely by offering excuses that the plaintiff could not prove illegitimate.¹⁸⁷ However, the ultimate effectiveness of this burden-shifting scheme rests heavily upon the definition of business necessity. If the business necessity standard is easily met then the employer's burden is commensurately lessened.

The specificity requirement provides a prime example of the Act's failure to return disparate impact theory to the *Griggs* standard. Section 105 of the 1991 Act adopted this requirement as an amendment to Title VII, section 703.¹⁸⁸ The pertinent part of the new subsection states that

"the complaining party shall demonstrate that each particular challenged practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process can be analyzed as one employment practice."¹⁸⁹

This requirement significantly increases the plaintiff's initial burden in trying to establish a prima facie disparate impact case.¹⁹⁰ Even if a suitably qualified minority applicant pool exists and statistical evidence clearly demonstrates the adverse impact of the employment practices, the rejected minority applicant must determine which specific practices resulted in the employer's rejection of qualified minorities. Moreover, such practices range from purely objective, easily quantifiable practices to vague, subjective ones, thereby further increasing the plaintiff's burden.

Rather than returning to a *Griggs* standard for establishing a prima facie case of disparate impact, the specificity requirement codifies the *Watson* and *Ward's Cove* rulings on this issue. Prior to *Watson*, this requirement did not exist. In *Ward's Cove*, the majority,

186. Civil Rights Act of 1991 § 105 (amended 42 U.S.C. § 2000e-2 by adding § 2000e-2(k)(1)(A)(i)).

187. "It is virtually impossible for employees to prove a negative: that there is no business justification whatsoever for an employment practice. To make the party challenging a discriminatory practice bear the burden of persuasion on business necessity is unfairly burdensome, inefficient, and contrary to the purpose of the Act." H.R. REP. NO. 40, at 29.

188. Civil Rights Act of 1991 § 105 (amended 42 U.S.C. § 2000e-2 by adding subsection 2000e-2(k)).

189. *Id.* § 105 (amended 42 U.S.C. § 2000e-2 by adding subsection 2000e-2(k)(1)(B)(i)).

190. H.R. REP. NO. 40, 102d Cong., 1st Sess., pt. I, at 31 (1991) (relating obstacles raised by a specificity requirement).

following the *Watson* plurality's lead, ruled that a plaintiff must isolate and identify the specific employment practices responsible for the disparate impact.¹⁹¹ Once accomplished, the majority required the plaintiff to "specifically [show] that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites."¹⁹² The vetoed Civil Rights Act of 1990 did not contain such a requirement.¹⁹³ Senator Orrin Hatch, an early opponent of the "quota bill," indicated that in the 1991 Act "particularity is preserved and causation is required This approach is consistent with *Ward's Cove*."¹⁹⁴ Even the section's mitigating clause,¹⁹⁵ which permits unitary treatment of analytically inseparable employment practices, forces the plaintiff to undertake a time-consuming and costly analysis of the defendant's employment practices, although it is the employer himself who can best identify and isolate them. Aided by the power of the Presidency, the Rehnquist majority clearly prevailed on this issue, leaving Congress unable to meet the challenge.

Another failure of the 1991 Act is that it does not define business necessity.¹⁹⁶ Section three of the Act states that one of the purposes of the Act is "to codify the concepts of 'business necessity' and 'job related' enunciated in *Griggs* . . . and in other Supreme Court decisions prior to *Ward's Cove*"¹⁹⁷ But this statement provides an ambiguous standard. The House bill, H.R. 1 contained a clear standard defining business necessity as "a significant and manifest relationship to the requirement for effective job performance."¹⁹⁸ In the same subsection, it identified this as the *Griggs* standard.¹⁹⁹ The Act's failure to include a definition of business necessity reflects an obvious compromise. The Act obscured the meaning of business necessity by specifying some consensus interpretation arrived at over an eighteen-year period of case law. Among the cases decided during that period, the *Watson* plurality decision first equated business necessity with legitimate business reasons and laid the groundwork for *Ward's Cove*. By giving courts such a wide time frame from which to select a definition, the duty of a court remains vague and dependent upon its discretion. The indefiniteness of this codification of business necessity,

191. *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989).

192. *Id.*

193. S.2104.

194. 137 CONG. REC. S15319 (daily ed. Oct. 29, 1991) (statement of Sen. Hatch).

195. Civil Rights Act of 1991 § 105(a) (amended 42 U.S.C. § 2000e-2 by adding 2000e-2(k)(1)(B)(i)); see also *supra* text accompanying note 189.

196. Civil Rights Act of 1991 § 104.

197. *Id.* § 3(2).

198. H.R. 1 § 101.

199. *Id.*

coupled with the Rehnquist majority's perspective on interest group theory, may prevent the realization of the *Griggs* standard.

Congress' expressed desire to codify the concept of "job related" suffers from the same indefiniteness as "business necessity," due to the eighteen-year period of definition. Requiring job relatedness of employment hiring and promotion practices is critical to ensuring, as *Griggs* aptly stated, that employers "measure the person for the job and not the person in the abstract."²⁰⁰ Absent this requirement, factors not affecting job performance could disqualify minority candidates. Unfortunately, although *Griggs* recognized that Congress intended a close correlation between employment practices and actual job duties, several pre-*Ward's Cove* Rehnquist majority decisions did not remain faithful to that vision. During the Senate debate, Senator Hatch cited several Rehnquist majority opinions as standing for the proposition that "job related" was a flexible term which "did not mean a requirement had to be tied to performance or actual work activities or behavior important to the job."²⁰¹ He specifically referred to *Watson* as presenting an "excellent summary of the Supreme Court's position that an employer can justify its selection and other employment practices on grounds other than how they relate to job performance, and that the term "job-related" encompasses more than job performance."²⁰² Senator Hatch's remarks illustrate how the Rehnquist majority could use the absence of precise definitions in the 1991 Act and *Watson's* plurality decision to limit the effectiveness of the congressional response.

The 1991 Act also addresses the disparate impact plaintiff's offer of equally effective but less discriminatory alternatives to rebut the employer's business necessity defense. This amendment has resulted in debate as to its effect. Section 105 of the Act added a subsection to section 703 of Title VII declaring that an employment practice is unlawful when an employer refuses to adopt an alternative employment practice shown to be less discriminatory.²⁰³ This appears to restate the *Ward's Cove* standard. The prior standard, cited in *Albemarle Paper Co. v. Moody*,²⁰⁴ recognized an unlawful employment practice when a plaintiff rebutted the employer's business necessity defense by demonstrating an equally effective alternative with less adverse impact. Several commentators have observed that, under the

200. *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971).

201. 137 CONG. REC. S15318 (daily ed. Oct. 29, 1991) (statement of Sen. Hatch).

202. *Id.*

203. Civil Rights Act of 1991 § 105 (amended 42 U.S.C. § 2000e-2 by adding § 2000e-2(k)(1)(A)(ii)).

204. 422 U.S. 405 (1975).

Ward's Cove standard, an employer could avoid liability at any time in the litigation by accepting the plaintiff's demonstrably effective alternative.²⁰⁵ Senator Kennedy, a sponsor of the vetoed Act of 1990, disputed this result, stating that "an employer cannot escape liability under this 'third-prong' by adopting the practice at a later time."²⁰⁶ If the commentators are correct, this last minute escape valve would allow an employer to discriminate by providing a "settlement-if-you're-caught" option. Such a result would clearly contravene the original purpose of Title VII to remove artificial, arbitrary and unnecessary barriers to employment which discriminate on the basis of an impermissible classification. Nevertheless, the Rehnquist Court, preferring to use a textualist interpretation of Title VII, instead of its purpose, as a guide, could conceivably adopt a reading of this amendment that protects employers and remains faithful to *Ward's Cove*.

In an effort to provide greater certainty to the interpretation of disparate impact theory, the 1991 Act declared the Act's intent to "confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under Title VII"²⁰⁷ This, in conjunction with the statute's other express purposes, indicates that Congress wished to place limits on the Rehnquist majority in light of its dramatic limitations on civil rights protections. Compromise before passage eliminated a much stronger Rules of Construction section that had been part of the original bill introduced in the House of Representatives. This section would have ordered that "all Federal laws protecting the civil rights of persons shall be interpreted consistent with the intent of such laws, and shall be broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies."²⁰⁸ That language clearly reflects the exasperation felt by many members of Congress with the Rehnquist majority's civil rights decisions and those members' desire that the Court use legal process or purpose analysis. Unfortunately, like the language expressly overruling *Ward's Cove*, congressional compromise eliminated the Rules of Construction. As a result, Congress ironically relies on its statement of legislative purpose to guide the Court's majority, whose rejection of purpose analysis forms the basis of this very legislation.

205. Hemeryck et al., *supra* note 143, at 522; William L. Kandel, *Current Developments in Employment Litigation*, 15 EMPLOYEE REL. L.J. 267, 272 (1989).

206. 137 CONG. REC. S15234 (daily ed. Oct. 25, 1991) (statements of Sen. Kennedy).

207. Civil Rights Act of 1991 § 3(3).

208. H.R. 1 § 1107.

V. CONCLUSION

The absence of precise definitions regarding disparate impact concepts, and the mix of *Griggs* and *Ward's Cove* or quasi-*Ward's Cove* standards, generates confusion regarding the proper interpretation of the 1991 Act. Through this statute, Congress envisioned itself as responding to the Court's restriction of disparate impact analysis and its judicial challenge to legislative authority and well-settled precedent. Although the intent of the congressional majority deserves admiration, proponents of disparate impact analysis lacked the political strength to overturn the Court's rulings when combined with presidential support. By settling for the compromise alternative, the end product of two years of legislative debate over disparate impact signaled congressional weakness. The compromise codified enough of the *Watson* and *Ward's Cove* reasoning to allow the Rehnquist majority to restrict the effectiveness of disparate impact theory through a textualist reading of Title VII based on an interest group perspective.²⁰⁹ In this confrontation among the branches of government, the Rehnquist majority prevailed by altering the path of law laid down by Presidents Kennedy, Johnson, the Congress and the Court over twenty years.

Congress' response to factionalism thus reflected two institutional failures. First, the necessity of the response underscored the failure of the Court to faithfully interpret the law as demonstrated by the Rehnquist majority's rejection of legislative purpose as the touchstone of reasoned analysis when construing disparate impact cases. Second, the significant compromises that Congress made to avoid a Presidential veto revealed Congress' inability to overcome a factional uprising on the Court and to reassert its lawmaking authority when the Court was supported by the President.

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209. See *supra* text accompanying notes 105-106, 130.