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On November 21, 1991, President George Bush signed into law broad civil rights legislation, amending Title VII of the Civil Rights Act of 1964 and section 1981 of the Civil Rights Act of 1866. Observers labeled the new law, known as the Civil Rights Act of 1991 (the "1991 Act"), a compromise between the Bush Administration and the Democratic congressional leadership. Both sides, however, claimed victory—the Congress in crafting new legislation to expand workers' rights and the Republican White House in signing a civil rights bill that would not require employers to fill quotas.

5. Civil rights advocates wanted to overturn five Supreme Court decisions that worked to restrict employees' ability to successfully sue employers over workplace discrimination. The most important of these Supreme Court decisions was Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). See infra notes 45-53 and accompanying text. Other important cases included: Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (holding that discrimination in the performance of employment contracts is not prohibited explicitly under existing federal law); Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989) (limiting the previous interpretation of federal law regarding the ability of workers to challenge discriminatory seniority systems); Martin v. Wilks, 490 U.S. 755 (1989) (expanding the ability of workers not affected by discrimination to challenge agreements made between previously discriminatory employers and the discriminated party); and Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that employment decisions based on both discriminatory and non-discriminatory reasons may be valid if the employer proves it would have made the same decision based solely on the non-discriminatory factors).
6. Statement on Signing the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOC. 1701, 1701 (Nov. 21, 1991); see also C. Boydgen Gray, Civil Rights: We Won,
Facially, the new law represented the culmination of the best of the American political system: the ability of the elected branches of government to forge a compromise for the good of the nation. The aftermath of this alleged compromise, however, may yet reveal a failure of the elected branches to address adequately the issues of the Civil Rights Act of 1991.

The potential failure lies arguably in the most important provision of the Act, the "business necessity" standard by which employers legitimately may use employment practices that disproportionately impact minority employees. The Act's drafters were intentionally unclear. The actual statutory language never defines business necessity, but merely refers to an "interpretive memorandum" located in the Congressional Record. The interpretive memorandum itself provides little guidance, stating that the "term[] 'business necessity' [is] intended to reflect the concepts enunciated by the Supreme Court in Griggs v. Duke Power Co. and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio." Unfortunately, the interpretation of business necessity prior to Wards Cove was not well defined.

The ambiguity of the "business necessity" standard ensures that the federal courts will have to interpret the Act's intent, and ultimately that the unelected judiciary will determine the true effect of the Civil Rights Act of 1991. Ironically, from the beginning Congress intended that the Act supersede the role of the Supreme Court. Even more ironically, the Civil Rights Act


8. Id.
10. See infra notes 23-44 and accompanying text.
12. See H.R. REP No. 40, 102d Cong., 1st Sess., pt. 1, at 14 (1991) (stating the purpose of the Act was "to respond to the Supreme Court's recent decisions by restoring federal civil rights protections against employment discrimination"); see also
of 1991 may well prove to be a Bush Administration victory, a surprising result in view of the fact that most observers initially judged President Bush the loser in the passage of the Act.¹³

This Note examines the 1991 Act's business necessity standard and the Supreme Court's likely interpretation of this standard. The Note splits its focus between a discussion of competing theories of statutory interpretation and the application of those theories to the definition of business necessity under the Civil Rights Act of 1991. The discussion of the various interpretive methods is of interest because a controversial approach to statutory interpretation is gaining prominence among the federal judiciary. The application of those competing interpretive theories to the Act is necessary for practitioners seeking guidance in future litigation.

The Note continues with a general discussion of disparate impact law and the events surrounding the enactment of the Civil Rights Act of 1991 followed by a look at the tension and conflict created by the Act. It then examines specific methods of judicial interpretation and applies the most prominent method to the specifics of the 1991 Act's business necessity standard. Finally, this Note analyzes judicial interpretation methods and discusses which is the most appropriate to apply and why

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The roots of the debate over the Civil Rights Act of 1991 lay in the unsuccessful attempt to pass a similar law in 1990. Congressional Democrats drafted the Civil Rights Act of 1990 (the "1990 Act") in reaction to a series of 1989 Supreme Court decisions impacting employment discrimination law. Although encompassing many important issues, at the heart of the 1990 Act was its interpretation of the law of disparate impact, or unintentional discrimination, cases. A brief review of the history of disparate impact interpretation follows, which will provide a fuller understanding of the later discussion of the use of legislative history in interpreting the 1991 Act's standard of business necessity.

Title VII and Disparate Impact Discrimination

Title VII of the 1964 Civil Rights Act broadly attacked employment discrimination. The law forcefully, and explicitly, addressed employment practices that intentionally discriminated on the basis of race, national origin, sex, or religion. Thus, Title VII clearly prohibited, for example, the exclusion of blacks from certain jobs solely because of their race. The law's lan-

16. See supra note 5 and accompanying text.
18. For example, the Act states that "[i]t shall be an unlawful employment practice for an employer 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." Id. § 2000e-2(a).
guage, however, was not as explicit with regard to employment practices that \textit{disparately impacted} minorities.

The disparate impact theory permits a plaintiff to recover under Title VII even without showing that the employer intended to discriminate. With the passage of the Civil Rights Act of 1991, Title VII establishes liability when a plaintiff shows that a facially neutral employment practice more greatly affected members of one racial, gender, national origin, or religious class than others.\footnote{Id. § 2000e-2(k) (Supp. III 1991).} Demonstrating this disproportionate effect establishes the plaintiff's \textit{prima facie} case.\footnote{See id.} The employer can escape liability only if it affirmatively proves that the disparate impact was "consistent with business necessity."\footnote{Id. § 2000e-2(k)(1)(A)(i).} Prior to passage of the 1991 Act, neither Title VII nor any federal statute explicitly mentioned the theory of disparate impact liability. Disparate impact theory originated and became the law in the United States Supreme Court's 1971 decision of \textit{Griggs v. Duke Power Co.}\footnote{401 U.S. 424 (1971).}

\textit{Griggs v. Duke Power Co.}

\textit{Griggs v. Duke Power Co.} is the seminal disparate impact case under Title VII. Commentators have described it as "[t]he single most important Title VII decision, both for the development of the law and in its impact on the daily lives of American workers."\footnote{H.R. REP. No. 644, 101st Cong., 2d Sess., pt. 1, at 19 (1990).} In \textit{Griggs}, black employees challenged the defendant's use of educational requirements in determining eligibility for promotion to certain unskilled jobs.\footnote{Griggs, 401 U.S. at 425-26.} The employees brought suit under Title VII, claiming that such requirements violated Title VII because their use resulted in the disqualification of a significantly disproportionate number of blacks.\footnote{Id.}

The Supreme Court held that the purpose of Title VII was to proscribe "not only overt discrimination but also practices that
are fair in form, but discriminatory in operation." The touchstone," the Court continued, "is business necessity" The Court held that once the plaintiff had shown the prima facie case of disparate impact discrimination, a court could only uphold the defendant-employer's questioned employment practice if business necessity justified such practices. Thus, under Griggs, valid employment practices must relate to job performance. The Court failed, however, to clarify the precise nature of that relationship.

Business Necessity and the Griggs Definition

The business necessity standard is concerned with the extent to which employers legally may use employment practices that disparately impact minorities. Viewed from another perspective, the business necessity standard determines the point at which the employer's legitimate interest in effective job performance outweighs the State's interest in prohibiting disparate impact discrimination. As the Court stated in Griggs, "[Title VII] does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group." Griggs, however, left the definition of business necessity unclear.

Five different formulations of the required nexus between the business practice and job performance can be found in Griggs. The formulations are as follows:

1. "standard is shown to be significantly related to successful job performance," 31
2. "neither requirement is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used," 32

26. Id. at 431.
27. Id.
28. Id.
29. "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." Id.
30. Id. at 430-31.
31. Id. at 426 (emphasis added).
32. Id. at 431 (emphasis added).
BUSINESS NECESSITY STANDARD

(3) "[w]hat Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance;" and

(4) "if an employment practice cannot be shown to be related to job performance, the practice is prohibited;" and

(5) "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."

In Griggs, the Court found for the plaintiffs, holding that business necessity did not justify the defendant's educational and test requirements and that such requirements must be "a reasonable measure of job performance" in order to satisfy the 1964 Civil Rights Act. In subsequent cases, however, what became known as the Griggs definition of business necessity was best articulated by the fourth formulation, "related to job performance," and the fifth formulation, "[having] a manifest relationship to the employment in question." For eighteen years, in fact, federal courts and administrative agencies applied and enforced Title VII in disparate impact claim by looking at whether business necessity justified the identified employment practice, or group of practices and, specifically, whether that practice related to either job performance or the employment in question.

33. Id. at 436 (emphasis added).
34. Id. at 431 (emphasis added).
35. Id. at 432 (emphasis added).
36. Id. at 436.
37. Id. at 431.
38. Id. at 432. The fourth and fifth formulations best represent the holding in Griggs and have received the most acceptance in the federal courts. They are straightforward declarations referring to employment practices and requirements in general and, thus, are applicable beyond the facts specific to Griggs. See, e.g., Connecticut v. Teal, 457 U.S. 440, 446 (1982); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) ("In Griggs, this Court unanimously held that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets 'the burden of showing that any given requirement [has] a manifest relationship to the employment in question.'") (alteration in original) (citation omitted); EEOC v. Atlas Paper Box Co., 868 F.2d 1487, 1490 (6th Cir. 1989); EEOC v. Rath Packing Co., 787 F.2d 318, 328 (8th Cir. 1986).
39. From 1972 to 1985, Griggs was cited a total of 49 times by the Supreme Court and 618 times by federal appeals courts. Alfred W Blumrosen, The Legacy of
Following *Griggs*, the courts placed the burden of proof regarding the business necessity standard on the employer.\(^4\) Typically, workers would create a prima facie case of disparate impact discrimination by showing first that an employer had a high percentage of minority workers in lower skilled jobs and a low percentage of such workers in higher skilled jobs, and second, that this disparity was caused, however unintentionally, by some specific practice of the employer.\(^4\) When not able to identify a specific practice as the cause of the disparate impact, courts allowed workers to argue that a group of practices, taken as a whole, caused the disparate impact, even if none of the practices, taken individually, were discriminatory.\(^4\) The burden then shifted to the employer to show that the identified practice, or more nebulous group of practices, was justified by a significant relation to successful job performance.\(^4\) *Griggs* dominated the interpretation of Title VII disparate impact claims until 1989, when the Supreme Court overruled *Griggs* in *Wards Cove Packing Co. v. Atonio*.\(^4\)

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

In *Wards Cove Packing Co. v Atonio*, plaintiffs had brought suit under Title VII against their former employer, an Alaskan salmon cannery, alleging both disparate treatment (intentional discrimination) and disparate impact discrimination.\(^4\) The latter allegations focused on the defendant's use of a number of subjective and objective employment criteria that prevented the promotion of predominantly nonwhite, unskilled employees into skilled positions held almost entirely by whites.\(^4\) Applying a

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42. See, e.g., Powers v. Alabama Dep't of Educ., 854 F.2d 1285, 1293 (11th Cir. 1988).
43. Id.
44. 490 U.S. 642 (1989).
45. Id. at 642.
46. Such practices included an English language requirement, failure to post non-cannery job openings, and nepotism. Id. at 648.
traditional post-*Griggs* disparate impact analysis, the Ninth Circuit Court of Appeals held for the plaintiffs.\textsuperscript{47} The Supreme Court, though, reversed, thus dramatically altering eighteen years of disparate impact theory \textsuperscript{48}

The Supreme Court held first that the plaintiff-worker must identify the challenged employment practice specifically \textsuperscript{49} Thus, workers no longer could employ the easier "group of practices" argument.\textsuperscript{50} Secondly, the Court said that, although "the employer carries the burden of producing evidence of a business justification for his employment practice," the burden of persuasion "remains with the disparate-impact plaintiff."\textsuperscript{51} Prior to the *Wards Cove* decision, the employer carried both burdens.\textsuperscript{52}

Finally, and most importantly for this discussion, the Court attacked the *Griggs* definition of business necessity, stating that "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."\textsuperscript{53}

Griggs and Wards Cove: What's at Stake?

The *Griggs* definition of business necessity can be summarized as follows: an employment practice shown to impact disparately a protected class can still be valid if the employment practice is related to job performance or has a manifest relationship to the employment in question.\textsuperscript{54} The *Wards Cove* position states that: an employment practice that disparately impacts a protected class is valid so long as the challenged practice serves, in a significant way, the legitimate employment goals of the employer.\textsuperscript{55}

The *Wards Cove* standard of business necessity is far more deferential to employers than the *Griggs* standard. After *Wards Cove*, a valid employment practice need not relate to job perfor-
Thus, an employment practice requiring a high school diploma for all positions in a company, similar to the challenged requirement in *Griggs*, could be invalid using the *Griggs* standard because having a high school diploma may in no way be related to the performance of certain unskilled manually intensive jobs. Under *Wards Cove*, though, if one of an employers' legitimate employment goals was to promote education in the community it serves, the practice of requiring a high school diploma for even unskilled positions could be valid, even if it disparately impacted a protected class. *Griggs* addressed this argument and found it wanting, stating that such a goal would not justify disparate impact simply because it "generally would improve the overall quality of the work force." *Wards Cove*, then, is extremely important with regard to the ability of minority employees to protect themselves in the workplace, and civil rights advocates viewed the decision as a significant defeat in the battle against employment discrimination. Against this background, Congress attempted to overturn *Wards Cove* with a new civil rights bill in 1990.

56. See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 484 (1989). Discussing *Wards Cove*, Sunstein says "the Court held that the defendant need not show that a challenged practice is 'essential' or 'indispensable' to the employer's business.' Instead, the question is 'whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer.' " *Id.* (footnote omitted). Sunstein then argues that *Wards Cove* "altered *Griggs*." *Id.* at 484-85.


The Civil Rights Act of 1990

Congress' first attempt to overturn Wards Cove failed. Congress' first attempt to overturn Wards Cove failed. President Bush could not come to an agreement with congressional supporters of the Civil Rights Act of 1990 on two main points: the definition of business necessity and the specificity with which disparate impact plaintiffs would have to identify the discriminatory employment practice. In the face of the President's veto of the 1990 bill, civil rights advocates vowed to introduce new legislation as early as possible in 1991.

The Civil Rights Act of 1991

Introduction

The new attempt at a civil rights bill, House Bill 1, was introduced in the House of Representatives on January 3, 1991. The bill proposed sweeping changes to existing law. Most notable for this discussion, it proposed to overturn Wards Cove in the area of business necessity. In its original form, House Bill 1 defined “required by business necessity” much more restrictively than did the Court in Wards Cove. The bill stated that

(A) in the case of employment practices involving selection, the practice or group of practices must bear a significant relationship to successful performance of the job; or
(B) in the case of employment practices that do not involve selection, the practice or group of practices must bear a sig-

60. See supra text accompanying note 15.
61. Civil rights supporters favored a more lenient requirement that would allow plaintiffs to claim that a group of practices worked together to cause the disparate impact discrimination. Joan Biskupic, Failure to Enact the Civil Rights Bill Laid to Political Miscalculation, 48 CONG. Q. WKLY. REP. 3611 (1990). This “group of practices” argument would be allowed when the plaintiff was unable to identify a particular practice that directly caused the disparate impact. Id.
62. Id.
65. Congress later amended House Bill 1. See infra notes 97-100 and accompanying text.
significant relationship to a significant objective of the employer. 65

The bill's definition of business necessity was "meant to codify the meaning of 'business necessity' as used in Griggs v. Duke Power Co. and to overrule the treatment of business necessity as a defense in Wards Cove." 66

The Bush Administration's Response

Not surprisingly, the Bush Administration attacked the bill on several fronts. First, it questioned the need to overturn Wards Cove. In prepared testimony before the House Education and Labor Committee, Assistant Attorney General for Civil Rights John Dunne argued that Wards Cove provided adequate protection for discrimination victims. 67 Dunne counted thirty cases decided since Wards Cove and noted that the "decisions have divided fairly evenly between plaintiffs and defendants." 68 Dunne argued that Wards Cove did not bring an end to successful disparate impact claims, stating that the post-Wards Cove cases "demonstrate[d] that legitimate disparate impact claims can still be brought and won." 69

The Administration, however, was concerned primarily with House Bill 1's definition of business necessity. 70 Administration officials, as well as business leaders, contended that the standard articulated in the bill was unreasonable "and that employers would turn to hiring quotas to protect themselves from lawsuits." 71 The Administration attacked House Bill 1 as "an engine of litigation" 72 and stated that they "[would] not accept a

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66. H.R. 1, § 3(o)(1) (emphasis added).
67. Id. § 3(o)(3) (citations omitted).
69. Id. at 545.
70. Id.
73. Statement of Assistant Attorney General John Dunne Before House Judiciary Committee.
bill that results in quotas or other unfair preferences." 74 The Administration's labeling of House Bill 1 as a quota bill was in spite of language within the bill stating that quotas were not required. 75

Assistant Attorney General Dunne, nevertheless, did find some common ground with the supporters of House Bill 1. Dunne called for legislation overturning *Patterson v. McLean Credit Union* 76 and *Lorance v. AT&T Technologies, Inc.* 77 and recognized the need for legislation in the area of sexual harassment in the workplace. 78

Finally, the Bush Administration introduced its own Civil Rights Act as an alternative proposal in both the House 79 and the Senate. 80 These bills, House Bill 1375 and Senate Bill 611, were introduced on March 12, 1991. 81

**The Bush Administration's Civil Rights Proposal (House Bill 1375/Senate Bill 611)**

The Administration's proposal differed from House Bill 1 in several respects, most notably in the definition of business necessity. "The term 'justified by business necessity' means that the challenged practice has a manifest relationship to the employment in question or that the respondent's legitimate employment goals are significantly served by, even if they do not require, the challenged practice." 82

The Administration's proposal was a strong challenge to House Bill 1 and actually represented a retreat from some of the compromises Bush agreed to in the 1990 negotiations. 83

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74. Id.
75. See H.R. 1, 102d Cong., 1st Sess. § 13 (1991) (stating that nothing in the bill requires or encourages quotas).
76. 491 U.S. 164 (1989); see supra text accompanying note 5.
77. 490 U.S. 900 (1989); see supra text accompanying note 5.
78. Dunne Statement, supra note 73, at F-1.
82. H.R. 1375, § 3(n) (emphasis added); S. 611, § 3(n) (emphasis added).
83. For example, the 1991 proposal required employees to pinpoint which hiring
cause the Democrats "started more to the left [w]e started more to the right," said a ranking House Republican.\textsuperscript{84} John Dunne called the Administration's proposal a "good-faith effort toward negotiations."\textsuperscript{85} Thus, by March, the initial lines were drawn between the Bush Administration and congressional civil rights advocates.\textsuperscript{86} Substantively, the two sides differed on the definition of business necessity, the amount of specificity required in pleading, and the extent to which damages would be expanded for victims of intentional discrimination.\textsuperscript{87} Politically, however, the battle was over one issue—quotas.\textsuperscript{88}

The Administration strongly attacked House Bill 1 as a quota bill.\textsuperscript{89} Attorney General Thornburgh said the Administration's bill would encourage employers "to provide equal opportunity for all workers without resorting to quotas or other unfair preferences."\textsuperscript{90} In addition, Senator Robert Dole, the sponsor of Senate Bill 611, said House Bill 1 went beyond the standard elaborated in Griggs and implied that it would "impose such a high burden of proof on employers that they would adopt quotas in order to avoid the possibility of litigation."\textsuperscript{91} Such attacks forced congressional leaders to adopt a strategy different from that used in 1990 and attempt to "insulate [House Bill 1] from the quotas argument."\textsuperscript{92}

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\textsuperscript{84} Id. (quoting Republican Rep. Bill Goodling of Pennsylvania).
\textsuperscript{85} Id. (quoting Republican Rep. Bill Goodling of Pennsylvania).
\textsuperscript{86} See generally id. (describing developments in the debate over the proposed civil rights bills).
\textsuperscript{87} See id.
\textsuperscript{88} See id.
\textsuperscript{89} See Dunne Statement, supra note 73.
\textsuperscript{90} White House Bill, supra note 71, at A-4 (citing a letter that Thornburgh sent to congressional leaders accompanying the Administration's bill).
\textsuperscript{92} Biskupic, supra note 72, at 367. See generally id. at 366-73 (discussing congressional reaction to the Administration's position).
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Negotiations and Counterproposals

The Administration's charges that House Bill 1 was a quota bill proved difficult for bill supporters to shake.93 "There is no question that in our vote counts and our meetings with members [of Congress], the overwhelming concern has been the quota issue, much more politically than substantively," lamented one civil rights leader.94 One member of Congress likened attempts to successfully counter the Administration's quota charge to trying to "unring a bell.95 Moderate congressional Democrats, particularly those from the South, were highly susceptible to the quota charges, and proponents of House Bill 1 feared many of these moderates leaned towards voting against the bill.96 Although Democratic leaders had the votes to pass the bill, they fell short of the necessary two-thirds majority needed to override a veto.97 As they were unable to override the 1990 veto even with most of the moderates in tow, such a defection would doom any hope of sustaining the passage of House Bill 1 in its current form.

The Administration's strong position forced supporters of House Bill 1 to react and compromise. In late May, congressional backers of House Bill 1 proposed an amended bill, moving more towards the Administration's position on business necessity.98 It would now define business necessity as "a significant and manifest relationship to the requirements for effective job performance."99 However, the bill kept the language stating

94. Id. (quoting Ralph G. Neas, director of the Leadership Conference on Civil Rights).
96. Id. at 1380.
98. Other changes included a damage cap of $150,000 on punitive damages available to victims of nonracial discriminatory bias. This provision was much more in line with President Bush's, although with some differences. The Bush proposal limited all bias awards to a maximum of $150,000. The amended bill limited punitive damages to $150,000, or an amount equal to compensatory damages, whichever is greater H.R. 1, § 106(b), as amended on June 5, 1991.
99. Id. § 101(o)(1) (emphasis added). The bill also allowed "requirements for effective job performance" to include factors such as attendance and punctuality. Id.
that the Act was intended to overrule the *Wards Cove* definition.\textsuperscript{103}

House Bill 1, as amended, passed the House of Representatives on June 5, 1991.\textsuperscript{101} Despite strong congressional support for a business necessity standard that moved away from *Wards Cove* and back towards *Griggs*, the vote, 273-158, was fifteen votes short of a veto-proof majority.\textsuperscript{102}

*The Administration Response to Amended House Bill 1*

Even before the House vote, Administration officials blasted the amended House Bill 1 as unacceptable and worked to weaken support of the bill. Attorney General Thornburgh said, "[n]othing has changed. The president will veto any legislation which has undergone only cosmetic changes and which still forces quotas."\textsuperscript{103} President Bush further attacked the revised bill, stating that "[e]ven the section that supposedly outlaws quotas endorses quotas" and that House Bill 1 was not the road to racial harmony, but the "road to lawsuits and discord."\textsuperscript{104} Following up his initial attack, Thornburgh labeled House Bill 1 "a hoax" and said it

excludes from the definition of quotas the only kind of quotas that matter and gives safe harbor to quotas already in existence [sic]. The bill would permit an employer to use a quota system in the hiring of others so long as they met minimum standards. The new language therefore would protect the very kind of quotas that employers would be pressured to use in order to avoid the costly and time-consuming litigation that this bill would foster.\textsuperscript{105}

\textsuperscript{\textsection 101(p).}

\textsuperscript{100. *Id.* \textsection 101(o)(2). The amended bill also held onto the earlier version’s language that “nothing in the amendments made by this Act shall be construed to require, encourage, or permit an employer to adopt hiring or promotion quotas.” *Id.* \textsection 111 (emphasis added).}

\textsuperscript{101. See *Biskupic*, supra note 97, at 1498.}

\textsuperscript{102. *Id.*}

\textsuperscript{103. See *Biskupic*, supra note 93, at 1378 (quoting the Attorney General).}

\textsuperscript{104. Remarks at the Federal Bureau of Investigation Academy Commencement Ceremony in Quantico, Virginia, 27 WEEKLY COMP. PRES. DOC. 689, 691-92 (May 30, 1991).}

\textsuperscript{105. *Three Versions of Civil Rights Reform Will Be Considered by House Next Week,*}
President Bush continued the quota argument, touting his proposals as "taking dead aim at those who discriminate unfairly" and "encouraging people to work together, rather than employing quotas." Bush also accused the House Bill 1 supporters of playing politics with the civil rights issue, citing earlier attempts to paint House Bill 1 as a women's issues bill when his bill "would properly protect women's rights—everyone's rights." Finally, the President implied that civil rights advocates were not interested in compromise with the White House, but, instead, sought to draft a bill that they knew would be vetoed and thereby use Bush's veto as political fodder.

After the House passed House Bill 1, President Bush claimed victory. The President promised to veto House Bill 1 if it survived the Senate intact. By the summer of 1991, the Administration's ability to veto House Bill 1 and withstand a vote to override looked assured. If congressional civil rights supporters were to pass a bill in 1991, the political climate suggested that it would have to be more along the lines of the President's proposal than House Bill 1. The congressional focus now shifted to the Senate and settled into a war of words equally as contentious as that which preceded.

Summer Stalemate and the Senate's Attempts at Compromise

Senator John Danforth hoped to be the prime instrument for compromise in the Senate as he sought to find a civil rights bill to please Republican moderates and southern Democrats.

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107. Id.
108. See id. at 709-10.
109. See Statement by Press Secretary Fitzwater on Civil Rights Legislation, 27 WEEKLY COMP PRES. DOC. 724, 724 (June 5, 1991) ("Although the President has indicated that the Democratic leadership's civil rights bill passed by the House of Representatives today is a quota bill that he intends to veto, we are gratified by the number of votes in opposition to the legislation. The 273-158 vote indicates strong support for sustaining a Presidential veto.").
110. Id.
111. See Biskupic, supra note 97.
Danforth’s initial proposal actually consisted of three bills. The first, Senate Bill 1207, addressed the Supreme Court’s rulings other than Wards Cove. The second bill, Senate Bill 1208, reversed Wards Cove and defined “required by business necessity” as “a manifest relationship to requirements for effective job performance.” It also required workers to pinpoint specific discriminatory practices. The final bill, Senate Bill 1209, addressed the issue of money damages, calling for a tighter limit on damage awards than did House Bill 1.

While Danforth’s plan appealed to its target audience of moderate to conservative senators, it failed to win strong endorsement from the more liberal civil rights advocates. Senator Edward Kennedy said Danforth’s proposal “[fell] short of providing the full protection against job discrimination.” More significantly, Danforth’s three bill proposal was the target of considerable comment from the Bush Administration. Initially, the President did not attack Danforth’s plan directly, stating only that he had “reservations” about it. Bush preferred, instead, to deflect questions about the Danforth plan and continue his charges that the congressional supporters of House Bill 1 were playing politics with civil rights.

113. S. 1207, § 2(b); see also Biskupic, supra note 97, at 1499.
115. Id. § 3(a)(i).
116. S. 1209, 102d Cong., 1st Sess. (1991). Senate Bill 1208 would not extend punitive damages to groups not already covered by Title VII, e.g., women. See Biskupic, supra note 97, at 1502. Danforth’s bill allowed new compensatory damage awards in intentional bias cases, such that employers with fewer than 100 employees could be liable up to $50,000 and employers with more than 100 employees could be liable up to $150,000. Id.
117. See Biskupic, supra note 97, at 1502.
118. Id.
120. See, e.g., id. (“I, frankly, resent it when some of my opponents [in Congress] charge me as having some kind of a political agenda here.”); Exchange with Reporters, 27 WEEKLY COMP. PRES. DOC. 782, 782 (June 14, 1991) (“[T]he politics are such that the Democrat leadership simply won’t accept our bill ”); Exchange with Reporters, 27 WEEKLY COMP. PRES. DOC. 728, 729 (June 6, 1991) (“I must say I really still honestly feel that [the politics] are on the other
tively sought the President's approval, stating that "[w]e are doing everything we can do to make it easy for the administration to support this."\footnote{121}

If President Bush was restrained in his comments about Danforth's plan, other Administration officials were not. EEOC Chairman Evan Kemp, Jr. argued that, under Danforth's definition of business necessity, employers would "have little choice but to revert to [quotas]."\footnote{122} Attorney General Thornburgh also had harsh words for Danforth's proposal. Thornburgh argued that the only appropriate standard of business necessity was "manifest relationship to the employment in question," the Administration's language in Senate Bill 611/House Bill 1375 and the language of \textit{Wards Cove}.\footnote{123} As Thornburgh pointed out, this standard was first articulated in \textit{Griggs}, which the House Bill 1 proponents were seeking to restore.\footnote{124}

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\item\footnote{124} \textit{Id.} As noted earlier, one could find several different standards within \textit{Griggs}. \textit{See supra} notes 31-38 and accompanying text. The Attorney General argued that language other than the "manifest relationship" position used in the \textit{Griggs} opinion was confined solely to the facts of \textit{Griggs}:
\begin{quote}
The facts of \textit{[Griggs]}, and the arguments generated by those facts, naturally led the Court to focus on the question of whether the employment practices at issue predicted job performance.

It is equally unsurprising, however, that the Court has never thought or said that every disparate impact case should be shoehorned into a narrow analytical framework dictated by the particular facts at issue in \textit{Griggs}. That is why the Court has always relied on the more general language of \textit{Griggs}—"manifest relationship to the employment in question"—when stating the legal standard established by \textit{Griggs}. \textit{Thornburgh Letter, supra} note 123.
\end{quote}

Thornburgh's last argument, however, is not correct. Although several of the cases following \textit{Griggs} do rely on the language to which he points, other Supreme Court cases apply different language from \textit{Griggs}. \textit{See, e.g., Albemarle Paper Co. v. Moody}, 422 U.S. 405 (1975). The Court in \textit{Albemarle} stated that "discriminatory tests are impermissible unless shown to be 'predictive of or significantly correlated with important elements of work behavior which compromise or are relevant to the job or jobs for which candidates are being evaluated.'" \textit{Id.} at 431. This language is similar to the "related to job performance" standard of \textit{Griggs}. \textit{See also} Merrick
Thornburgh argued that "an unbroken line of Supreme Court opinions overwhelmingly confirm[ed]" the Administration's position.\textsuperscript{125} The Bush Administration's business necessity standard, Thornburgh implied, was preserving twenty years of Supreme Court precedent since\textit{Griggs}.

Senator Danforth made a second attempt to reach a compromise, introducing three new bills in June.\textsuperscript{126} Again, however, Danforth drew scant attention from either Senate Democrats or the Bush Administration. Although the issue of race was clearly at the forefront of the nation, by mid-Summer, the focus was on the nomination of Clarence Thomas to the Supreme Court, not civil rights in employment. Although the Thomas nomination initially stole attention from the civil rights act, Judge Thomas' hearings before the Senate Judiciary Committee eventually played a pivotal role in the final shaping of the Civil Rights Act of 1991.\textsuperscript{127}

Continued efforts to reach a compromise stalled in the Summer of 1991 and the Senate took no substantive action.\textsuperscript{128} Thus, heading into September, both the Bush Administration's business necessity position, "manifest relationship to employment in question," and its opposition to House Bill 1 continued to appear strong.\textsuperscript{129} The Administration effectively had tagged the congressional Democrats' proposal, "significant and manifest relationship to the requirements for effective job performance," as that of a quota bill, a label that doomed House Bill 1 to a sustainable veto.\textsuperscript{130} Attempts to find a compromise between the

\textsuperscript{125} Thornburgh Letter, supra note 123.


\textsuperscript{127} See infra notes 138-54 and accompanying text.


\textsuperscript{129} Id.

\textsuperscript{130} Id., see also Biskupic, supra note 97.
Bush Administration and Democratic civil rights advocates, most notably the Danforth proposals, failed to earn substantial support from either side of the issue. One civil rights advocate argued that with the deck apparently stacked in its favor, the Bush Administration did not want a civil rights bill at all. This argument seems plausible as the Administration's proposal basically codified existing Supreme Court interpretation of the two primary issues: business necessity and specificity. Thus, even if Congress failed to pass a civil rights bill, the President's view, and that of the Supreme Court in Wards Cove, would prevail. The only way the President could come out a loser was if House Bill 1, or some similar bill, received a veto-proof majority. After eight months of fighting over the Civil Rights Act of 1991, the possibility of such a majority appeared highly unlikely.

Anita Hill, David Duke, and Compromise

In September 1991, Danforth tried yet again to fashion a compromise agreement in the form of Senate Bill 1745. Similar in nature to his previous efforts, his new proposal did offer a different business necessity standard:

(1) in the case of employment practices that are used as qualifications standards, employment tests, or other selection criteria, the challenged practice must bear a manifest relationship to the employment in question; and

(2) in the case of employment practices not described in paragraph (1), the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.

Danforth's new definition attempted to merge the Bush Administration's position, "manifest relationship to the employ-

131. See supra notes 111-28 and accompanying text.
133. EEOC Chairman Criticizes Danforth Proposal to Link Language of Civil Rights, ADA Act, Daily Lab. Rep. (BNA) No. 185, at A-12 (Sept. 24, 1991) (emphasis added) (quoting the draft version of Senate Bill 1745) [hereinafter EEOC Chairman Criticizes].
ment in question,” with language from the Americans with Disabilities Act (ADA) and incorporate this new definition into the Civil Rights Act. Danforth thought that because the ADA was acceptable to the President and Congress, use of its wording might help to win bipartisan support for his new bill. The Bush Administration, however, still did not find Danforth’s latest attempt agreeable and threatened to veto the bill in its current form.

Senate Democrats, meanwhile, grasped at Senate Bill 1745 as a last chance to pass a civil rights bill in 1991. In doing so, they were, in effect, led by a moderate Republican against the White House. Significant to the President, this same moderate Republican was the prime sponsor of Clarence Thomas’ nomination to the Supreme Court. If Danforth could attract other moderate Republicans to his position, three factors would greatly weaken the Administration’s position. First, the support of moderate Republicans would help to soothe business leaders who feared that Senate Bill 1745 would lead to quotas.

136. “This past Labor Day Chairman of the EEOC Evan Kemp said of the ADA ‘The ADA does not require, encourage or permit preferences or quotas for those with disabilities. Proponents of civil rights bills of the future should look to the ADA.’” Danforth Introduces Bill, supra note 135, at A-17 (quoting Sen. John Danforth).
137. See EEOC Chairman Criticizes, supra note 133, at A-12.
138. See Joan Biskupic, Senate Passes Sweeping Measure to Overturn Court Rulings, 49 CONG. Q. WKLY. REP 3200 (1991).
139. See id. at 3202-03.
140. See id.
141. See id. at 3202 (noting the influence of Republican “swing” Senators in forcing the Bush Administration to compromise).
ond, only ten Republican senators were needed to provide a veto-proof majority in the Senate. Finally, the President would need Danforth's strong support and influence with his Senate colleagues if the Thomas nomination ran into trouble.

The Administration's worst fears were realized with the explosion of Anita Hill's allegations against Judge Thomas. That Professor Hill charged Thomas with sexual harassment in the workplace only compounded the Administration's problems with respect to the pending civil rights legislation.

Administration officials kept a brave face and continued to renounce Senate Bill 1745. Privately, however, President Bush was locked in negotiations over the bill with Senate Republicans. The bitterness of the year-long debate had some Republican senators worried about the perception that their party opposed civil rights. The storm over sex and race of the Thomas-Hill confrontation further compounded these fears. This storm, particularly with respect to sexual discrimination, gave no indication of dying down if the Senate confirmed Thomas. Senators accused of insensitivity to women's rights were reluctant to vote against a civil rights bill that extended employment discrimination protections for women. Republican Senators Warner and Stevens, for example, told the

142. Biskupic, supra note 97, at 1499.
143. See Biskupic, supra note 138, at 3202-03.
144. Id. at 3200-01.
145. See id. at 3200 (noting that a "confluence of events in October intensified racial and gender politics and shifted the political atmosphere").
147. Fessler et al., supra note 4, at 3124.
148. See id. at 3124-26.
149. Id.
President on October 23, 1991 that they would support Senate Bill 1745.\textsuperscript{151}

Republicans were also concerned how their civil rights record would be perceived in the wake of former Ku Klux Klan leader David Duke's political success as a Republican candidate for governor of Louisiana.\textsuperscript{152} Congressmen on both sides of the debate viewed Duke's emergence as a viable Republican, coupled with the furor over the Thomas confirmation, as significant factors in dulling the effectiveness of Bush's "quota-bill" charges.\textsuperscript{153} With Republican senators pressuring the White House, the President and Congress agreed to compromise and support an amended Senate Bill 1745.\textsuperscript{154}

\textit{Provisions of the Civil Rights Act of 1991}

The Bush Administration announced its support for an amended Senate Bill 1745 on October 25, 1991.\textsuperscript{155} The bill, which the President later signed as the Civil Rights Act of 1991,\textsuperscript{156} did, in fact, represent a compromise of sorts.\textsuperscript{157} On the issue of specificity, the Act requires a complainant to demonstrate the specific practice or practices that caused the disparate impact.\textsuperscript{158} The Act does provide an exception that if the worker "can demonstrate to the court that the elements of a [company's] decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice."\textsuperscript{159}

As to business necessity, however, almost two years of arguing and negotiating yielded no clear-cut definition. The Act states that the plaintiff establishes an unlawful employment practice

\textsuperscript{151} Fessler et al., \textit{supra} note 4, at 3124.
\textsuperscript{152} See id. at 3126; see also Devroy, \textit{supra} note 13; Raspberry, \textit{supra} note 13.
\textsuperscript{153} Fessler et al., \textit{supra} note 4, at 3126.
\textsuperscript{154} Id. at 3124.
\textsuperscript{155} Id.
\textsuperscript{159} Id.
if, after the plaintiff demonstrates that the particular practice has a disparate impact, "the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." Section 105(b) of the Act contains the most instructive statement of how to define "business necessity" under the Act, yet it merely states that

[n]o statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/alternative business practice.161

The interpretive memorandum itself states that "[t]he terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in Griggs v. Duke Power and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio."162 Yet, how should one interpret the interpretive memorandum? This treatment of the business necessity issue created a tremendous amount of confusion, as did the initial position both sides derived from the multiple formulations in the Griggs opinion.163 Griggs itself is not very clear as to the business necessity standard.164 As such, both the Bush Administration and civil rights advocates claimed victory in Senate Bill 1745.

Others, however, weren't so sure their side won. Conservatives were particularly concerned that President Bush betrayed their cause.165 One Republican senator thought the bill would

163. See supra notes 31-38 and accompanying text.
164. See supra notes 31-38 and accompanying text.
165. See, e.g., Marcus, supra note 4 (stating that "some conservative activists said the administration sold out on the quota issue" and quoting Clint Bolick, vice president of the Institute for Justice, who claimed that the Act was a "capitulation to the civil rights groups" and was "so confusing and rigs the rules against employers so
still force employers to adopt quotas, and said he was disappointed with the outcome. Another senator had even harsher words for the Administration:

> It's hard for me to understand how changing a couple of words and modifying a couple of definitions can totally reverse a policy that the Republicans and the White House have had for more than two years. Anything that's acceptable to Ted Kennedy is going to be a hard sell in Indiana.

Stung by such criticism, the President denied that the new bill would cause quotas and denied any flip-flop on his part. "We didn't cave. We worked out a spirit of compromise a negotiated settlement where I can say to the American people, this is not a quota bill." The President did concede that the final bill represented a compromise and that the Administration did have to give in from its position of the previous nine months. "We didn't have the votes to carry my civil rights bill. So, have we compromised some? Yes." Finally, President Bush argued that he did have the votes to sustain a veto, therefore the threat of an overriding vote did not force his agreement to the bill.

White House Counsel C. Boyden Gray also went on the offensive, arguing that the Administration obtained the concessions it wanted from the bill:

> We are very, very satisfied that businesses will not be pressured into using quotas because of re-definitions that had been proposed in other legislation, re-definitions of business necessity, and, in addition, changes in the way cases are brought, so-called cumulation or group of practices. Those changes are also eliminated from this compromise. So we don't think the quota pressure is there.

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166. Fessler et al., supra note 4, at 3126 (quoting Sen. Robert Smith).
167. Id. (quoting Sen. Robert Coats) (omission in original).
169. Id.
170. Id.
171. Id.
172. Id.
173. White House Announces Civil Rights Compromise Ending Two-Year Long Dis-
With both sides in agreement on the bill, Senate Bill 1745 easily passed the Senate and House. Finally, on November 21, 1991, President Bush signed the bill, ending the bitter two year struggle for new civil rights legislation.\[^{174}\]

One final bit of legislative history is important. Prior to the President’s signing of the Act, White House Counsel Gray drafted a signing statement that would order federal agencies to terminate virtually all affirmative action programs.\[^{175}\] When news of the statement reached civil rights advocates, they exploded and accused Bush of doubletalk—saying he supported civil rights and the Act, while issuing executive orders ending civil rights programs such as affirmative action.\[^{176}\] President Bush quickly disavowed any intention of issuing the draft signing statement and called it just that, a draft.\[^{177}\] The President, however, did put his own spin on the Act; in his official signing statement, he instructed that an interpretation of the Act, submitted by Senator Dole during Senate debate, was to serve “as authoritative interpretive guidance by all officials in the executive branch with respect to the law of disparate impact as well as the other matters covered in the documents.”\[^{178}\] The section-by-section analysis of the Act that President Bush referred to stated that “the bill is no longer designed to overrule the meaning of business necessity in Wards Cove. Instead, the bill seeks to codify the meaning of ‘business necessity’ in Griggs and other pre-Wards Cove cases.”\[^{179}\] Through this statement, the

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\[^{175}\] See ALL-ABA VIDEO LAW REVIEW, THE CIVIL RIGHTS ACT OF 1991, at 315 (1992); see also President Signs Bill, supra note 174.

\[^{176}\] See, e.g., President Signs Bill, supra note 174.


\[^{178}\] President’s Statement on Signing the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOC. 1701, 1702 (Nov. 21, 1991). “These highly technical matters are addressed in detail in the analyses of S. 1745 introduced by Senator Dole on behalf of himself and several other Senators and of the Administration. These documents will be treated as authoritative interpretive guidance by all officials in the executive branch.” Id. (citations omitted).

President hoped to influence the final interpretation of the Act and establish a business necessity standard consistent with his long standing opposition to quotas. The President's signing statement directly influences the application of the Act with respect to executive branch agencies. 180

After a two year political battle, the Civil Rights Act of 1991 is now law. Original proponents of the Act intended it to provide guidance in areas that previous civil rights legislation did not cover explicitly 181 Instead, the new law leaves practitioners with no better understanding of what is an allowable business practice and what is illegal. Worse still, following the Act's enactment, many observers concluded that the Act restores the Griggs standard of business necessity—whatever that standard is 182—and overturns Wards Cove. 183 Such conclusions are premature and fail to comprehend disturbing recent trends in the Supreme Court, trends that may reinforce the Wards Cove standard of business necessity.

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Dole). 180. The use of such signing statements to influence statutory interpretation is a relatively new executive branch action which the Reagan Administration used extensively. See William N. Eskridge, Jr., The New Textualism, 37 UCLA-L. REV. 621, 632-33 (1990); see also Kamen, supra note 11. Kamen writes

The White House now gets involved in the process through something called “signing statements.” White House spokesman Marlin Fitzwater told reporters [on November 21, 1991] that such statements are “traditionally” affixed to bills. The “tradition” actually began in the Reagan-Bush administration.

The signing statements are seen, especially by conservatives, as a way to give the president the last, unchallenged word on what a law means to the public and especially to the courts.

It remains to be seen whether such statements—which are a way to make points that couldn’t be made in the legislation—will make any difference in the long run.

Id. at A-14.

181. See supra notes 54-59 and accompanying text.
182. See supra notes 31-38 and accompanying text.
183. See infra note 196 and accompanying text.
A RETURN TO THE GRIGGS BUSINESS NECESSITY STANDARD IS NOT CERTAIN

The debate surrounding the Civil Rights Act of 1991 is representative of many problems surrounding our three branch system of government. For a variety of reasons, the legislative branch refuses, or lacks the ability, to craft laws that specifically set out what it intends the laws to achieve. In large part, Congress relies upon the federal courts to determine its intent. This reliance on, or deference to, the judiciary is understandable, if not well founded, because most members of Congress and their staffs assume that when confronted with ambiguous statutes, the courts will turn to the legislative history to glean Congress’ intent.\(^{184}\)

The judiciary traditionally has used legislative history for statutory interpretation with the approval of courts, legislatures, and the scholarly community, although neither the Constitution nor any other statutory source prescribes the use of legislative history.\(^{185}\)

The introduction and strong congressional support of both the failed 1990 civil rights bill and the successful 1991 Act may indicate a congressional recognition that something is not right with the current application of this method of statutory interpretation.\(^{186}\) One response to this suggestion is that the

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184. "[L]egislative history is available to courts because Congress has made these documents available to us. It has acquiesced in, and often affirmatively promoted our use of [legislative history]." Patricia M. Wald, The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court, 39 AM. U. L. REV. 277, 306 (1990).

185. See generally Eskridge, supra note 180, at 626-40 (discussing legislative history); Burt Neuborne, Background Norms for Federal Statutory Interpretation, 22 CONN. L. REV. 721, 723 (1990) (describing the approach of the federal courts in statutory interpretation to determine the “legislative intent” or “legislative purpose”); Wald, supra note 184, at 280 (stating that American courts have used legislative history for over a century); id. at 286-300 (discussing the Supreme Court’s use of legislative history during the 1988-89 term). On the other hand, Professor Sunstein states that focusing on the legislative purpose of ambiguous statutes was “especially popular” in the 1950’s and 60’s. Sunstein, supra note 56, at 426. He implies that, although still popular, this method of statutory interpretation is losing favor. Id.

186. Indeed, the very purpose of the 1991 Act was to respond to recent Supreme Court decisions. See supra notes 5, 12 and accompanying text. Thus, a majority of Congress must have felt that the Court was not interpreting its intent properly.
Court, in many instances, no longer relies extensively on the legislative intent model, yet Congress has been slow to realize the Court's change in direction. In fact, the Civil Rights Act of 1991 is only one manifestation of congressional dissatisfaction with the Supreme Court's restrictive interpretation of civil rights statutes in recent years. Over the past dozen years, Congress has enacted several statutes overruling Supreme Court decisions in the civil rights field.

Why does the Supreme Court repeatedly arrive at statutory constructions that appear to run counter to the will and intent of Congress? Or, viewing the issue from the other side, why does Congress repeatedly force the Supreme Court to interpret vague statutes, risking the chance that the Court will arrive at statutory constructions that are counter to Congress' intentions? One answer lies in the Court's increasing attraction to the "textualist" approach of statutory construction and the inability of Congress to understand what exactly the Court is doing when it employs this method. The Court's use of the textualist approach is at odds with the legislative intent model that most members of Congress suppose the Court uses to interpret ambiguous statutes.

Additionally, the Court, when it looks outside the statutory language for guidance, increasingly relies on non-legislative

187. See Joan Biskupic, Scalia Takes a Narrow View in Seeking Congress' Will, CONG. Q. WKLY. REP 913 (1990); see also Wald, supra note 184, at 310 (questioning whether Congress will address the Supreme Court's use of textualism).
189. See Biskupic, supra note 187, at 913 (quoting Rep. Robert W Kastenmeir, Chairman of the House Judiciary Subcommittee on Courts, Intellectual Property and the Administration of Justice) ("If the Supreme Court is developing a different point of view on legislative intent and legislative history, we need to know about it."). See generally Mark E. Herrmann, Note, Looking Down from the Hill: Factors Determining the Success of Congressional Efforts to Reverse Supreme Court Interpretations of the Constitution, 33 WM. & MARY L. REV. 543 (1992) (discussing congressional responses to statutory interpretations of the Supreme Court).
190. See infra note 237 and notes 241-76 and accompanying text.
interpretations of legislation. In doing so, the Court primarily looks to the interpretation of the federal agency charged with administering the legislation in question. Such deference to agency interpretation can lead to results counter to the legislative will, but more in line with the policy of the executive branch. The interpretation of the Civil Rights Act of 1991 may very well be such an instance.

The remainder of this Note examines the 1991 Civil Rights Act's business necessity standard in light of the traditional legislative intent approach, the newer textualist approach, and the Supreme Court's doctrine of deference to agency interpretation in certain circumstances. Such an analysis is necessary because the Act's business necessity standard—as articulated in section 105—is clearly ambiguous and will cause extreme confusion in its application. Such confusion already exists and eventually will prompt review by the Supreme Court.

What is truly startling about the Civil Rights Act of 1991 is that so many observers confidently state that the Act overturns Wards Cove, even while noting the Act's ambiguity. These

191. See infra notes 287-306 and accompanying text.
192. Id.
195. See supra note 11 and accompanying text; see also Strasser, supra note 194. Strasser quotes Stephen A. Bokat, Executive Vice President of the National Chamber Litigation Center, who says in reference to the Civil Rights Act of 1991:

It presents a fascinating legal question: What's going to control? The president seems to be saying the EEOC and the Justice Department are bound by the DoLE language, and yet private plaintiffs are not limited to that. We have a Supreme Court that tends to read statutes literally, and that may be what will happen here. But for now, the possibility for confusion is there, as well as the potential for a lot of expensive litigation.

Id.
196. See, e.g., Cook v. Billington, No. 82-0400, 1992 WL 276936, at *2 (D.D.C. Aug. 14, 1992) (holding that "with the passage of the Civil Rights Act of 1991 Congress questioned the Wards Cove analysis and established a more lenient legal stan-
observers see litigation of the business necessity standard as inevitable but also see a return to Griggs, or to some standard very similar to Griggs, as equally inevitable.\textsuperscript{197} Regardless of the desirability of such an outcome, is such a conclusion really that obvious? A more extensive look at this issue reveals that the Bush Administration may have been right after all: the \textit{Wards Cove} standard of business necessity is here to stay.

The continuation of the \textit{Wards Cove} business necessity standard would have an obvious, immediate, and significant impact on the law of employment discrimination. More importantly, and far less obvious, the continuation of \textit{Wards Cove} would symbolize Congress’ inability to understand the current Court’s actions and Congress’ ineffectiveness, after two years of almost constant debate, to assert itself in the face of the executive and judiciary.

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\textsuperscript{197} See supra note 196.
branches. The answer to how such an interpretation of the Civil Rights Act of 1991 is possible lies in a discussion of the Supreme Court's current and future direction in the area of statutory interpretation.

The Supreme Court's Changing View of Statutory Interpretation

Strong debate currently surrounds the proper method of statutory construction particularly of ambiguous statutes.\textsuperscript{198} The dominant approach in the federal courts remains the model that employs "legislative intent" or "legislative purpose."\textsuperscript{199} This approach, however, has come under increasing fire from proponents of a more restrictive view called textualism.\textsuperscript{200} The following discussion looks at these approaches to statutory interpretation in broad, general terms. In addition, the following sections will discuss the \textit{Chevron} doctrine\textsuperscript{201} of deference to

\textsuperscript{198} See, e.g., Frank H. Easterbrook, \textit{The Role of Original Intent in Statutory Construction}, 11 HARV. J.L. & PUB. POLY 59 (1988) (arguing that courts should use an objectively reasonable person standard to interpret statutory language rather than trying to determine what Congress intended); Eskridge, \textit{supra} note 180, at 623 (describing the emergence of "new textualism," a method of statutory interpretation that "posit[s] that once the Court has ascertained a statute's plain meaning, consideration of legislative history becomes irrelevant"); Abner J. Mikva, \textit{A Reply to Judge Starr's Observations}, 1987 DUKE L.J. 380 (arguing for a restrained use of legislative history for statutory interpretation that relies on legislative committee reports); Kenneth W Starr, \textit{Observations About the Use of Legislative History}, 1987 DUKE L.J. 371 (criticizing the easily abused use of legislative history for statutory interpretation and arguing that courts rely strictly on the words of the statute); Sunstein, \textit{supra} note 56 (criticizing traditional theories of statutory interpretation as incomplete and providing a more thorough approach to interpretation); Laurence H. Tribe, \textit{Judicial Interpretation of Statutes: Three Axioms}, 11 HARV. J.L. & PUB. POLY 51, 51 (1988) (suggesting three axioms by which to achieve an "objective, enacted meaning of a legal text"); Wald, \textit{supra} note 184 (recognizing the validity of textualism, but arguing that legislative history, when discriminately used, is a most valuable tool in statutory interpretation).

\textsuperscript{199} See \textit{supra} notes 184-85 and accompanying text.

\textsuperscript{200} See, e.g., Eskridge, \textit{supra} note 180, at 641 ("The traditional approach is in trouble."); Sunstein, \textit{supra} note 56, at 410 n.16 ("[Textualism] is currently enjoying a renaissance in the courts."); \textit{see also supra} note 196 and \textit{infra} notes 226-90 and accompanying text.

agency statutory interpretation. The application of these methods to the Civil Rights Act of 1991 will then follow

The Legislative Intent Model

The legislative intent model remains the dominant approach to statutory interpretation among the federal judiciary. This approach advocates judicial examination of the legislature's intent behind statutory language when a court cannot determine what the legislation dictates from a literal reading of the statute. Under this model, if the statutory language clearly states the law, the judge does not need to interpret the law at all. Only when the language of the statute is unclear does a judge employ the legislative intent model to interpret the statute.

This approach presumes a collective will, or intent, of the legislature in drafting laws. As discussed below, the idea that an entire legislative body, such as 435 members of the House of Representatives, can have one collective will has been severely criticized. Nevertheless, arguably a dominant intention of the legislative body does exist while other, competing intentions are also discernible. To determine this dominant collective legislative intent, a judge will look most commonly at the law's

202. See supra note 185 and accompanying text.
203. As Professor Sunstein states, "[t]he goal is to see more particularly how the enacting legislature would have resolved the question, or how it intended that question to be resolved." Sunstein, supra note 56, at 429.
204. See generally Wald, supra note 184 (discussing the role and necessity of legislative history). Judge Wald states that, "text comes first, and if it is clearly dispositive, then the inquiry is at an end. Legislative history, therefore, still has an important role to play as long as statutory text is not entirely 'plain.' " Id. at 285. But cf. Eskridge, supra note 180, at 621. Professor Eskridge states that "[t]he Supreme Court's traditional resolution of [statutory interpretation questions] has been to consider virtually any contextual evidence, especially the statute's legislative history, even when the statutory text has an apparent 'plain meaning.' " Id. (emphasis added).
205. See Wald, supra note 184, at 285.
206. See, e.g., Eskridge, supra note 180, at 642 (arguing that the "collective intent of a legislature is only a construction of the interpreter").
207. Cf. Sunstein, supra note 56, at 428 ("In some cases, the [legislative] purpose might be characterized in many ways, all of which are faithful to the original enactment. The act of characterization is therefore one of invention rather than discovery.")
legislative history to determine, in a general sense, what the legislature would have done had they been presented with the specific instance now before that judge.  

What Constitutes Legislative History?  

A court delving into a statute's history looks primarily at the publicly recorded statements and reports that the legislative body made during consideration of the legislation. In some instances, courts may also look at legislative history with respect to the issue addressed by the statute. Prior to the 1980's, the Supreme Court routinely interpreted civil rights legislation by reviewing both the history of the specific legislation before the Court and Congress' general view of civil rights legislation.

The statute itself, even when ambiguous with respect to the matter before the court, often provides the best source of the legislature's intent. Most legislation includes at least one statement of purpose crafted in broad terms. For example, a

208. See id. at 429 ("For those who emphasize legislative intent, the legislative history is a central object of concern.").

209. See Eskridge, supra note 180, at 626-40. Professor Eskridge lists the following sources of legislative history, in order of influence: committee reports, sponsor statements, rejected proposals, floor and hearing colloquy, views of nonlegislator drafters, legislative inaction, and subsequent legislative history. Id. at 636.

210. Id.

211. See, e.g., H.R. REP. NO. 40, 102d Cong., 1st Sess., pt. 1, §209, at 87-88 (1991) ("For more than a century, it has been a widely accepted principle of American law that remedial statutes, such as civil rights law, are to be broadly construed."). Professor Sunstein argues in favor of this approach. "In the face of ambiguity, courts should resolve interpretive doubts in favor of disadvantaged groups so as to ensure that regulatory statutes are not defeated in the implementation process. This idea has roots in existing law, though the basic principle has rarely been explicitly recognized." Sunstein, supra note 56, at 483.

212. See Sunstein, supra note 56, at 425. Professor Sunstein states that "an interpretation should be disfavored if it would make the disputed provision fit awkwardly with another provision or produce internal redundancy or confusion. An interpretation that would make sense of the statute as a whole should be adopted." Id. As Sunstein acknowledges, however, such a structural approach suffers from two problems. First, it is "dependent on an assumption that statutes are in fact internally consistent and coherent," a theory Sunstein finds questionable. Second, "in many cases, an examination of [the statute's] structure will reveal ambiguities, silences, or delegations." Id. at 425-26.
statement such as, "The purpose of this Act shall be to provide for stricter civil penalties in the enforcement of ..." clearly provides a structural framework from which the court can begin its examination of the statute. Even if the statute's language does not adequately define what it means by stricter penalties, the intention that any future penalties should be greater than previous penalties is clearly the legislature's general intention. For a court to define the ambiguous statute otherwise would be ludicrous.\textsuperscript{213}

After the statutory language itself, the most common sources courts use in reviewing legislative history are committee and subcommittee reports and debate transcripts.\textsuperscript{214} In federal legislation, Congress routinely produces reams of reports and hearings transcripts containing findings and recommendations (representing both majority and minority views) covering proposed legislation down to the minutiae.\textsuperscript{215} Members of Congress vote on approval of the committee and subcommittee reports, so that these documents serve as a clear and definable expression of the committee's collective intent.\textsuperscript{216} In addition, the entire legislative body may vote on the committee reports, again approving the reports as an expression of that body's collective will.\textsuperscript{217}

Certainly, most legislation does not receive unanimous acceptance from all legislative members. Courts should view majority votes, however, particularly overwhelming votes, as the intent of

\textsuperscript{213} The classic exception to this, of course, would be if the court found the statute's requirements to be unconstitutional such as if the state's application of the statute constituted cruel or unusual punishment.

\textsuperscript{214} Eskridge, supra note 180, at 637, 639.


\textsuperscript{216} See Eskridge, supra note 180, at 637.

\textsuperscript{217} See id.
the entire body. Acceptance of committee reports and eventual passage of legislation does not identify a specific, narrowly defined legislative intent. Rather, these examples of legislative history should provide a narrow range of possible legislative intent.

Judicial use of the legislative intent model is the most appropriate method for interpreting ambiguous statutes for three reasons. First, the use of legislative intent is a pragmatic way to compensate for the difficulties of writing legislation specific enough to meet every possible application of the statute. The legislative intent model also provides the best method for interpreting and reviewing laws, which is the proper role of the judiciary. Finally, use of legislative intent is necessary when a legislative vacuum exists.

The Necessity of Examining Legislative Intent in the Administrative State

Ideally, legislative bodies should write statutes that clearly and plainly state the law. In such an ideal setting, courts would not need to interpret statutory language, but merely decide which party correctly understood and applied the law.

In a complex and ever-changing world, however, this ideal is simply not possible. Legislators cannot foresee every possible scenario or application of the statute. Unintentionally ambiguous statutes, or those written at a time when future events are not foreseeable or imaginable, require a certain amount of flexibility from the judiciary. Some may argue that if unforeseen

218. See Mikva, supra note 198, at 380. Discussing the modern day difficulty of having Congress speak more plainly, Judge Mikva states that “[w]e are not talking about trying to get Congress to agree on something unimportant or noncontroversial, like whether to declare Grandmother’s Day. Instead, we are talking about the hard issues, like the environment, economic decisions, and civil rights.” Id.

219. Compared to a textualist approach, using legislative history provides a means of statutory interpretation in the instance of changed or unforeseeable events. See Sunstein, supra note 56, at 422-24. Sunstein argues that “[t]extualism becomes even more problematic when time has affected the assumptions under which the statute was originally written. Changed circumstances may produce ambiguity or interpretive doubt in the text where neither existed before,” and “[a]n interpretive strategy that relies exclusively on the ordinary meaning of words is precisely that—a strategy that reflects a choice among competing possibilities—and it will sometimes produce irre-
events do occur, the legislature merely has to enact new legisla-
tion to cover such occurrences. Such an approach, however, is
unacceptable. 220 Practicality requires that courts be flexible
and interpret the existing laws by trying to decide as the legisla-

ture would have had they anticipated the issue now before the
court. 221

The Judiciary's Proper Role Demands Use of the Legislative
Intent Model

Judicial review is a function of the courts. Since Marbury v.
Madison, 222 judicial review has been the norm and to abolish
judicial review would wreak havoc on our constitutional system.
Generally, judicial review permits courts to scrutinize legislation
and interpret its meaning and applicability. If courts are to
review and interpret legislation, some interpretive model is
necessary. For reasons stated previously, the use of legislative
intent makes the most sense in aiding a court’s efforts at statu-
tory interpretation. 223 Further, under the separation of powers
doctrine, when the judiciary exercises its constitutional role in
reviewing and interpreting legislation, the legislative branch

tionality or injustice that the legislature did not intend. Textualism of this sort is
not incomplete but instead pernicious.” Id. See generally id. at 493-97 (discussing
how changed circumstances or obsolescence impact statutory interpretation).

220. The burden and strain on the legislature to amend legislation constantly for
even the slightest unforeseen changes would be too great, particularly in a regula-

r
ory state such as ours. Additionally, waiting for the legislature to address the impact
of unforeseen events does not provide a just and fair solution for those who must go
before a court under those unforeseen events. How does the court react in such a
situation? Does it simply not act because no clearly applicable statute exists? Or
does the court apply the statute as it has always done before, thereby refusing to
admit the legitimacy of the unforeseen events.

221. Indeed, Professor Sunstein argues that the growing complexity of the govern-
ment forced the courts to abandon the early narrow interpretation of regulatory stat-
utes: “The demands of the modern administrative state ultimately made it impos-
sible for courts to sustain a theory of interpretation rooted in nineteenth-century
common law.” Sunstein, supra note 56, at 409.

222. 5 U.S. (1 Cranch) 137 (1809).

223. There is some question as to whether legislative history enjoys a long use by
the judiciary. Justice Scalia argues no; that its use is “almost entirely a phenomenon
of this century—and in its extensive use a very recent phenomenon.” Wisconsin
clearly has the right to exercise its constitutional role and enact legislation to reverse the judiciary's decision.\textsuperscript{224}

\textit{Use of Legislative History Is Necessary When the Legislature Fails, or Refuses, to Act}

In the event of a legislative vacuum, that is, when the legislature either consciously refuses to act or fails to act in a clear manner, the judiciary may need to step in and take some action. In some instances, the efficient running of society demands that courts play a stronger role in defining the nation's laws.\textsuperscript{225} In doing so, courts should act as consistently as possible with legislative intent.\textsuperscript{226} To do so, a court must rely on legislative history to provide the necessary guidance. If a court, in attempting to interpret ambiguous statutory language, did not look to some collective legislative will, it would be unable to justify any conclusions it reached. The only logical place for the court to look is to the intent of the legislative body; otherwise, the court's decision would be grounded in its own intent.\textsuperscript{227} Clearly, however, separation of powers dictates that an unelected judiciary should not make new law on its own whim.\textsuperscript{228} When a legislative

\textsuperscript{224} Such legislation would also more likely be very specific in its language. This is not always true, however, as the passage of the Civil Rights Act of 1991 illustrates. \textit{See infra} notes 310-52 and accompanying text.

\textsuperscript{225} The role of the courts in defining and enforcing civil rights in the 1950's is such an example.

\textsuperscript{226} In such instances, as Sunstein notes, the court sees its role as that of an agent of the legislature. He specifically describes judicial inquiry into the legislative purpose as "an effort to maintain the role of the courts as agents of the legislature." Sunstein, \textit{supra} note 56, at 426.

\textsuperscript{227} \textit{See} Sunstein, \textit{supra} note 56, at 428. Professor Sunstein states that "in hard cases, the meaning of the statute should be derived by ascertaining the intent of those who enacted it." \textit{Id.} He further states the pro-legislative intent argument that "it is not clear where judges are to look if they refuse to consider the legislative history." \textit{Id.} at 430.

\textsuperscript{228} \textit{See} Wald, \textit{supra} note 184, at 281. Judge Wald finds that "personal experience has revealed that the nearly universal view among federal judges is that when we are called upon to interpret statutes, it is our primary responsibility, within constitutional limits, to subordinate our wishes to the will of Congress because the legislators' collective intention, however discerned, trumps the will of the court." \textit{Id.}, accord Sunstein, \textit{supra} note 56, at 415 (noting that supporters of the traditional approach believe "judges are agents or servants of the legislature").
vacuum occurs, the courts should act, but only to the extent that the elected, lawmaking body would act.\textsuperscript{229}

The legislative intent model seeks to provide courts with a practical framework for interpreting ambiguous legislation.\textsuperscript{230} For whatever reason a court reviews legislation, once the legislation is before a court, the court should attempt to settle the issue rather than ignore it or wait for the legislature to act in a more explicit manner.

Through the use of legislative history, a court may arrive at an interpretation that, for the moment, most adequately reflects the legislative body’s intentions to date.\textsuperscript{231} A court’s interpretation ultimately may be found not to reflect the current legislature’s intent.\textsuperscript{232} In that case, the legislature can make use of its constitutional powers and enact new, more specific legislation that reflects the current intent of the legislature and clearly states that intent in unambiguous terms.\textsuperscript{233}

The legislative intent approach does have its problems and the textualist’s critique of using legislative history presents many valid arguments for the courts to consider.\textsuperscript{234} Nevertheless, the use of legislative history, as compared to the textualist approach, provides the best method of interpreting ambiguous statutes for a number of theoretical reasons as noted above. Additionally, the use of legislative history makes sense from a policy perspective because Congress assumes, when writing new

\textsuperscript{229} See Wald, supra note 184.

\textsuperscript{230} See generally Eskridge, supra note 180, at 626-40 (discussing the Court’s traditional use of legislative history); Wald, supra note 191, at 301-08 (comparing the legislative intent model with the textualist model).

\textsuperscript{231} Id.

\textsuperscript{232} See Sunstein, supra note 56, at 428-34.

\textsuperscript{233} Id.

\textsuperscript{234} See infra notes 250-85 and accompanying text.
legislation, that the courts will pay attention to legislative history. The same cannot be said of textualism.

The Textualist Approach to Statutory Interpretation

The textualist approach to statutory interpretation is, theoretically, much more restrictive in the amount of judicial creation allowed. Although both textualists and supporters of the legislative intent model agree that the first step in statutory interpretation is reading the statute for its clear intent, the textualists basically stop after this step. Simply put, textualism argues that statutes "are what their literal text commands and nothing else." Thus, when the clear meaning of a statute is not evident from the literal text, textualism stands directly opposed to the legislative intent model.

Textualism currently does not enjoy a widespread following among the federal judiciary. Nevertheless, a small but growing and influential group of textualists have made their presence known, particularly at the highest levels of the judiciary. Most notable among these adherents to textualism on the Supreme Court is Justice Antonin Scalia. The remainder of this discussion of textualism focuses on Justice Scalia's version of the textualist method and his view of how courts should treat ambiguous statutes.

235. See supra notes 184, 189 and accompanying text.
236. Neuborne, supra note 185, at 722.
237. Judge Wald argues that "the textualist view logically points to a full-scale attack on the use of legislative history." Wald, supra note 184, at 285. She acknowledges, however, that textualists, including Justice Scalia, "have not yet taken it that far." Id.
238. See supra notes 198-200 and accompanying text.
239. See, e.g., Neuborne, supra note 185, at 722 n.5 (stating that Seventh Circuit Court of Appeals Judge Frank Easterbrook is "the leading modern exponent of textualism"); Wald, supra note 184, at 300 (stating that Justices Scalia and Kennedy are "true believers" in textualism and Justices Rehnquist and O'Connor occasionally have supported textualism).
240. See Wald, supra note 184, at 281.
Attack on the Legislative Intent Model

Justice Scalia’s brand of textualism conflicts directly with the traditional legislative intent model. He places no faith in legislative history and does not believe it possible for a legislative body to have a collective intent or collective will. In Scalia’s view, “judges owe deference only to language that a majority of Congress has approved and the president [sic], by his signature, has endorsed.” Justice Scalia takes dead aim at the use of common sources of legislative history for any purpose. Justice White, commenting on Scalia’s view, said “[h]e has often said that courts should not refer to legislative history at all where the statutory text is clear enough.” To Justice Scalia, legislative history is not a legitimate measure of congressional will. For example, Scalia argues that obscure congressional staff members have too great an effect on committee reports.

241. Professor Eskridge labels Scalia’s view “the new textualism.” Eskridge, supra note 180, at 623. Eskridge summarizes Scalia’s views as follows:

The new textualism posits that once the Court has ascertained a statute’s plain meaning, consideration of legislative history becomes irrelevant. Legislative history should not even be consulted to confirm the apparent meaning of a statutory text. Such confirmation comes, if any is needed, from examination of the structure of the statute, interpretations given similar statutory provisions, and canons of statutory construction.

Id. at 623-24.

242. See Blanchard v. Bergeron, 489 U.S. 87, 97-100 (1989) (Scalia, J., concurring in part and concurring in the judgment); Hirschey v. F.E.R.C., 777 F.2d 1, 7 (D.C. Cir. 1985) (Scalia, J., concurring) (“I frankly doubt that it is ever reasonable to assume that the details set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee’s bill.”).


244. Id.

245. Id. at 917 (quoting Justice White’s remarks at the ABA Annual Meeting in August 1989).

246. “Justice Scalia suggests that legislative history is frequently written by well-organized private groups, and much of it, especially the floor debates, reflects little, if any, general congressional will.” Sunstein, supra note 56, at 429. However, Sunstein disagrees with Scalia’s conclusion, and, instead, argues that “[t]he legislative history will sometimes reveal what some or many members of the Congress thought about the meaning of an ambiguous term, and that understanding is relevant. It is unlikely that the history will only reflect the views of self-interested private groups.” Id. at 430.

247. “As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff
The staff members, in fact, actually research and write the reports.\footnote{248} In addition, very few legislators actually read and comprehend the reports generated by their staff.\footnote{249} Thus, Scalia would argue, to make use of congressional reports that most legislators understand in only a very general way, at best, is extremely dangerous. How can words barely read by someone reflect their intent on particular legislation?

Further, legislators who\textit{do} understand the contents of committee reports often use the reports as a method of inserting personal views that in no way represent the sentiment of the entire Congress, or even a majority\footnote{250} Committee members often have a special interest in the committee topic and, arguably, their interest and views do not reflect the view of Congress as a whole.\footnote{251} In addition, Congress often substantially amends legislation after the filing of committee reports.\footnote{252} To consider these reports as indicative of the intent of a majority of legislators, therefore, is highly questionable.\footnote{253} Much of the same argument against the use of committee reports can be made against judicial use of floor debates\footnote{254} and the \textit{Congressional}
The latter often includes statements that members insert after Congress has voted on the legislation. Such legislative "speeches" provide a perfect opportunity to inject self-serving statements into the record that courts should not view as legislative intent.

Although textualist attacks on the use of legislative history are numerous and well documented, textualists are often vague on how courts should interpret ambiguous statutes without making use of legislative history. Justice Scalia, however, has a very clear idea of how textualism should resolve the judicial review of ambiguous statutes.

Aside from his dislike of the traditional sources of legislative history, Scalia finds fault with the whole notion of the determination of a legislative intent through the judicial process. Simply put, Scalia argues that courts should interpret ambiguous statutes only by looking at the actual statutory language, because it is only this statutory language that all members of the legislature actually voted on with the intent that it become law.

According to Judge Wald, Justice Scalia views "[t]he words of a statute [as] the only definitive source of congressional intent." To accomplish this," Judge Wald continues, "judges are to depend exclusively on their own knowledge, perhaps with the aid of a dictionary, to determine the meaning of words in statutes, supplementing 'ordinary usage' only by reference to the context in which the words are found within the statutes themselves."

The new textualist argument, then, is that the use of legislative history is constitutionally suspect. As Professor Sunstein notes, the Scalia-textualists give credence to statutory language

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255. Id. at 528-30.
256. See OFFICE OF LEGAL POLICY, supra note 215, at 54-55.
258. Green, 490 U.S. at 528 (Scalia, J., concurring in the judgment).
259. Wald, supra note 184, at 282.
260. Id.
261. Greenberger, supra note 250, at 64.
over legislative history because only "[s]tatutory terms—not legislative history, not legislative purpose, not legislative 'intent'—have gone through the constitutionally specified procedures for the enactment of law." 262

Justice Scalia is emphatic on this point. In Blanchard v. Bergeron, 263 the majority opinion, in part, based its interpretation of a federal statute264 on a Fifth Circuit opinion, Johnson v. Georgia Highway Express, Inc.,265 which the statute's House and Senate reports cited approvingly.266 The Court, therefore, reasoned that Johnson "provided guidance to Congress' intent" on the statutory issue before the Court.267

Scalia, however, criticized the majority's reasoning and stated that he "decline[d] to participate in this process." 268 Although concurring in the judgment, Scalia argued that whether Congress embraced Johnson or not was unclear.269 "Congress," he wrote, "is elected to enact statutes rather than point to cases." 267

In a later case before the Court, 270 Scalia clearly defined how he believes courts should interpret ambiguous statutes:

The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind.272

Justice Scalia's approach, however, is flawed. As Professor Sunstein argues, the "central problem [with the textualist view]
is that the meaning of words (whether 'plain' or not) depends on both culture and context. Statutory terms are not self-defining, and words have no meaning before or without interpretation. Justice Scalia argues that statutory language can be determined through the words "ordinary usage." The result of this approach seems to be that the words are interpreted as he interprets their ordinary usage. In effect, Scalia merely substitutes his own interpretation for that of the legislative body. Scalia's ultimate reliance on his own interpretive powers is not the only possible criticism of his textualist approach.

**Critique of the Textualist Approach**

Justice Scalia's textualist approach is subject to attack on several fronts. Judge Patricia Wald of the D.C. Circuit Court of Appeals is a strong opponent of textualism and is credited with being one of the first judges to publicly take notice of the rise of textualism within the federal judiciary. Judge Wald argues that strict use of textualism presents a serious separation of powers problem:

To disregard committee reports as indicators of congressional understanding because we are suspicious that nefarious staff- ers have planted certain information for some undisclosed reason, is to second-guess Congress' chosen form of organization and delegation of authority, and to doubt its ability to oversee its own constitutional functions effectively. It comes

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273. Sunstein, supra note 56, at 416.
274. Green, 490 U.S. at 528 (Scalia, J., concurring in the judgment).
275. Sunstein, supra note 56, at 416-17.
276. Sunstein notes that Scalia's goal might not be so obvious. Id. at 457. Rather "[t]he 'plain meaning' principle might be an effort not to discover what Congress meant in the particular case, but instead to tell Congress to be careful with statutory language. The hope—probably a false one—is that the principle will lead Congress to express itself clearly in the future." Id. Professor Eskridge, who supports Sunstein's point, observes that textualists, in general, argue that the legislative history model takes legislative power away from the legislative branch and that textualism is necessary to fight the judicial encroachment into the legislative realm. Eskridge, supra note 180, at 648.
277. See Wald, supra note 184 (noting and criticizing the rise of textualism on the Supreme Court); see also Biskupic, supra note 187 (describing the rise of textualism on the Supreme Court and the disfavorable reaction by Congress).
278. Wald, supra note 184, at 306-08.
perilously close, in my view, to impugning the way a coordinate branch conducts its operations and, in that sense, runs the risk of violating the spirit if not the letter of the separation of powers principle.\textsuperscript{272}

Textualism suffers generally in its attempt to interpret ambiguous statutes and thereby demonstrates the difference between textualism and the traditional legislative intent model. Both methods advocate adherence to the plain language of the statute if discernible.\textsuperscript{280} The two diverge with the next step. While Judge Wald would look to extrinsic sources of legislative history, analyze them, and arrive at an interpretation that she finds consistent with the intent of the entire bill making process, Justice Scalia and his fellow textualists look primarily at the exact language of the bill itself and somehow ascertain the statute's meaning, even when admitting the ambiguousness of the language.\textsuperscript{281} The question even Justice Scalia seems to have trouble answering is how a textualist can ascertain the interpretation upon which they eventually decide.

Judge Wald notes two primary alternative sources to legislative history that textualists may use in interpreting ambiguous statutes.\textsuperscript{282} First, they could use a "hyper-literal" reading of the statute, which Wald attacks as ineffective and sure to "gut" many statutes of their "intended" meaning.\textsuperscript{283} Textualists also may supply their own assumptions about how to interpret the statutory language.\textsuperscript{284} Of course, no judge will admit to such a method, but for a jurist, textualist or otherwise, not to bring their own "assumptions, speculation, preferences, and notions of 'sound public policy'" into their decision would be nearly impossible.\textsuperscript{285} With no extrinsic sources to fall back on and the

\textsuperscript{279} Id. at 306-07.
\textsuperscript{280} See supra notes 203, 226-28 and accompanying text.
\textsuperscript{281} Sunstein states that "[w]hen the language of a statute does not specify its implementing rules, textualism is incomplete: courts must look elsewhere." Sunstein, supra note 56, at 422.
\textsuperscript{282} Wald, supra note 184, at 303-06.
\textsuperscript{283} Id. at 303.
\textsuperscript{284} Id. at 304.
\textsuperscript{285} Id.
The statute itself being ambiguous, the danger of such judicial subjectivity increases. 286

Finally, and most importantly for this discussion, textualism, by virtue of its rejection of extrinsic legislative sources, runs the very real possibility of favoring the executive branch and/or independent agencies over the legislative branch on issues affecting a federal agency 287 This problem would arise because the Court, with no extrinsic evidence of legislative intent in front of it, would look either to one of the two possibilities just mentioned or to the existing interpretation used by the administrative agency in enforcing the statute. If the agency's interpretation is at issue, the Court is not necessarily presented with a question of what the legislation intended, but rather with a question of whether the agency's interpretation is permissible given a literal reading of the ambiguous statute. In fact, Justice Scalia has contended that the Equal Employment Opportunity Commission's interpretation of an ambiguous statute should receive deference stating, "the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference." 288 Absent such a conflict, one would have difficulty imagining a situation in which a textualist Court would not give deference to an agency interpretation because, again, the textualist would not consider countervailing legislative history that might weigh against that interpretation.

As Judge Wald notes, "if the clarity of Congress' will must be discerned solely from the text, without access to legislative history, there will be fewer cases where judges can confidently determine that will. As a result, the executive will decide more

286. See id.
287. See id. at 308.
288. EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227, 1236-37 (1991) (Scalia, J., concurring in the judgment) (quoting EEOC v. Commercial Office Prods. Co., 487 U.S. 107, 115 (1988)). The majority opinion stated that the amount of deference the EEOC interpretation should receive was dependent on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade" and held that the EEOC's interpretation was incorrect. Id. at 1235 (quoting General Electric Co. v. Gilbert, 429 U.S. 125, 142 (1976) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).
cases under the *Chevron* principle." The *Chevron* principle that Judge Wald alludes to, although not a textualist doctrine, adds tremendous fuel to a textualist court wishing to give such deference to an agency interpretation. This coupling of textualism and *Chevron* has tremendous implication for judicial review of the Civil Rights Act of 1991.

**The Importance of Chevron**

The Supreme Court addressed the issue of an agency’s interpretation of ambiguous statutes in *Chevron v. Natural Resources Defense Council*. *Chevron* declared that courts, when unable to discern a statute’s literal meaning, should defer to a federal agency’s interpretation of a statute unless clear evidence suggested a contrary congressional intent:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

*Chevron* does not say that courts should defer automatically to the agency interpretation. To be judicially acceptable, such an interpretation must be a permissible construction of the statute. Specifically, a court must reject an agency interpretation if it is “contrary to clear congressional intent.” The Court in

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289. Wald, supra note 184, at 308.
290. Id.
292. Id. at 842-43 (footnotes omitted).
293. Id. at 843.
294. Id. at 843 n.9 (“The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”).
Chevron further noted that courts should give deference to a permissible agency interpretation only when Congress is silent on the matter and that courts must first determine legislative intent and then defer to the agency interpretation, only if the legislative intent is not discernible. The Chevron procedure may be summarized as follows: (1) examine the statute to apply the clear and unambiguous language; failing that, (2) determine Congress’ intent with respect to the precise issue at hand and apply the statute accordingly; and failing that, (3) examine the agency interpretation and determine if it is permissible.

The doctrine set forth in Chevron seems a reasonable extension of the legislative intent model. A court first must look

295. Id. at 842-43.
296. Id. at 843 n.9 (“If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”) (emphasis added).
297. See, e.g., id. at 859-63 (outlining the application of this procedure). The Court was quick to point out that a permissible interpretation does not necessarily mean the one Congress would have wanted. “The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.” Id. at 843 n.11.

The Court in Chevron also quoted an earlier Supreme Court case as follows:

We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations

has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.

If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

Id. at 844-45 (quoting United States v. Shimer, 367 U.S. 374, 382, 383 (1961)) (emphasis added) (citations and footnote omitted).

298. But see Sunstein, supra note 56, at 445. “A rule of deference in the face of ambiguity would be inconsistent with understandings, endorsed by Congress, of the considerable risks posed by administrative discretion.” Id. Sunstein further argues that “[a]n ambiguity is simply not a delegation of law-interpreting power. Chevron
to legislative history for the legislative intent. If none is available or discernible, then the court defers to the agency. After all, the court must look somewhere for assistance in interpretation.

The *Chevron* doctrine in the hands of a textualist such as Justice Scalia, however, drastically alters the formulation. For Scalia and the new textualists, a search for congressional intent is useless because legislative history is not an authoritative source of what the law means.\(^9\) Thus, when confronted with an ambiguous statute, a textualist court could always bypass the second step of searching for that legislative intent and defer to the appropriate federal agency's statutory interpretation, assuming the agency's interpretation is permissible. A move towards textualism makes the Court's decision in *Chevron* all the more troubling in instances when agency interpretation and legislative intent collide.

The use of agency interpretation as a whole, particularly in the hands of textualist jurists, presents a distinct problem because agencies typically do not engage in a "slavish search for what Congress wanted."\(^9\)Without such a search, the agency conceivably could make new law on its own, with no consideration of the legislative branch.\(^301\)

Significantly, the Court's textualists and non-textualists alike employ the *Chevron* doctrine.\(^302\) One should not infer as such that the *Chevron* doctrine is a subset of textualism.\(^303\) Application of the *Chevron* doctrine by a textualist court, however, presents serious concerns, particularly with respect to the separation

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301. Consider, for example, the possibilities involved when an executive agency interprets ambiguous legislation enacted by Congress over a presidential veto.
302. The *Chevron* decision, authored by Justice Stevens, was unanimous, although Justices Marshall, Rehnquist, and O'Connor did not participate in the decision. *Chevron* v. National Resources Defense Council, 467 U.S. 837, 866 (1984). The Justices who joined in Justice Stevens' opinion included Chief Justice Burger and Justices Brennan, White, Powell, and Blackmun. See *id.* at 839. Although Judge Wald lists Rehnquist, White, and O'Connor as leaning towards textualism, see *supra* note 239, Blackmun and Stevens are not part of the textualist camp.
303. See generally Sunsten, *supra* note 56 (reviewing different methods of statutory interpretation, and discussing textualism and the *Chevron* doctrine as two separate methods).
of powers principle.\textsuperscript{304} As Professor Sunstein states, "[t]he combination of textualism, disregard of legislative history, and the \textit{Chevron} principle 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 textualism].\textsuperscript{305} Most likely, when Justice Stevens crafted his \textit{Chevron} opinion a year before Justice Scalia ascended to the Court, he did not consider the potential effects of \textit{Chevron} in the hands of a textualist powerhouse like Scalia.\textsuperscript{306}

The above discussion does not delve deeply into the debate over textualism and the legislative intent model,\textsuperscript{307} nor is it an in-depth review of the methods of statutory interpretation.\textsuperscript{308} For purposes of this Note, only an understanding that these two competing methods exist and that they can lead quite obviously to distinctly different results is important. Thus, courts can interpret the same piece of legislation in two completely different ways, depending on which method the court employs. Such an observation has significant implications with respect to the business necessity standard of the Civil Rights Act of 1991, which Congress purposely rendered ambiguous to present a quick political fix and allow for a permanent judicial resolution of its interpretation.\textsuperscript{309} With this in mind, the following section discusses the actual application of these methods to the business necessity standard of the Civil Rights Act of 1991.

\textsuperscript{304} See id. at 446 ("[T]he notion that administrators may interpret statutes that they administer is inconsistent with separation of powers principles.")

\textsuperscript{305} Id. at 430 n.91.

\textsuperscript{306} Sunstein notes that the \textit{Chevron} doctrine, in part, contemplates judicial review of agency interpretations to ensure adherence to the legislative intent behind the statute. Id. at 446 (citing Crowell v. Benson, 285 U.S. 22, 42-46 (1932)).

\textsuperscript{307} For a more in-depth discussion, see generally Eskridge, \textit{supra} note 180; Wald, \textit{supra} note 184.

\textsuperscript{308} See generally Sunstein, \textit{supra} note 56.

\textsuperscript{309} See Marcus, \textit{supra} note 4.
The First Step: The Plain Language of Section 105 of the Civil Rights Act of 1991

For the purposes of discussing the Act’s standard of business necessity, the most relevant provision of the statute is section 105, entitled “Burden of Proof in Disparate Impact Cases.” More specifically, only sections 105(a)(k)(1)(A)(i) and 105(b) discuss business necessity and are relevant to this discussion. Section 105(a)(k)(1)(A)(i) reads as follows:

[An unlawful employment practice based on disparate impact is established if] a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.

Under both the legislative intent model and the textualist approach, the first step in interpreting the phrase “consistent with business necessity” is to examine the statute to see if its plain language provides the literal meaning of what “consistent with business necessity” means. The statute does not offer an explanation of what “consistent with business necessity” means other than in section 105(b), which reads:

No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity.

311. Id. at 1074 (emphasis added).
312. See supra notes 203, 236 and accompanying text.
Looking at the plain language of the statute to derive its meaning, section 105(b) clearly says that only Senator Danforth's interpretive memorandum\(^1\) shall serve as legislative history when determining the Act's business necessity standard. Thus, the statute requires a review of that memorandum only if one relies upon legislative history to determine the legislative intent. Notice, however, that the statute does not provide that one must use the Danforth memorandum to determine what the business necessity standard is, only that if one relies upon legislative history, then only the Danforth memorandum constitutes legislative history.

But what if a court places little, or no, value in the legislative intent model and is not interested in the legislative history? A Scalia-type textualist would recognize that the language of the statute is unclear as to how to interpret "consistent with business necessity," yet would reject the legislative intent model. What steps would a textualist court take in defining business necessity under the Civil Rights Act of 1991?

The remainder of this Note first applies the legislative intent model, and then the textualist approach, to determine how a court employing each method would interpret the Act's business necessity standard. The importance of this analysis is clear. If congressional leaders agreed to the compromise language of the Act under the assumption that the Supreme Court would use the traditional legislative intent model, their efforts would definitely backfire if Justice Scalia influenced the Court to use a textualist approach to decide the Act's business necessity standard. If the Court does, in fact, use the textualist approach, it very well may reiterate its holding in \textit{Wards Cove}, the holding that prompted Congress to draft a new civil rights act in the first place.

This Note also will examine the possible effect of the \textit{Chevron} doctrine on the interpretation of the Civil Rights Act of 1991. In this analysis, the dispositive question is what interpretation the EEOC will adopt in administering the Act. The combination of the \textit{Chevron} doctrine, a textualist dominated Court, and EEOC

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adherence to the Bush Administration's pro-Wards Cove interpretation, would ensure a return to the Wards Cove business necessity standard and just as certainly would implicate a separation of powers crisis.

Interpreting Business Necessity: The Legislative Intent Model

Under the legislative intent model, a court, after a hopeless attempt to deduce the meaning of business necessity from the statutory language, would look at the Danforth interpretive memorandum as the first step in understanding the legislative intent. Relevant sections of the memorandum read as follows:

The final compromise on S. 1745 agreed to by several Senate sponsors, including Senators Danforth, Kennedy, and Dole, and the Administration states that with respect to Wards Cove—business necessity—the exclusive legislative history is as follows:

The terms “business necessity” and “job related” are intended to reflect the concepts enunciated by the Supreme Court in Griggs v. Duke Power Co., and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atwood.315

This language strongly suggests that Congress disagreed with the Wards Cove decision and did not want to return to its language or its business necessity standard. Under a traditional legislative intent scenario, a court also would look to committee hearings and reports, floor statements and, to a lesser extent, executive administration statements made during the completion of the bill's enactment. Several typical sources of legislative history do exist, although the language of the memorandum suggests that these sources do not reflect the legislative intent, as the “exclusive legislative history” is the second paragraph of the memorandum only

Even excluding such typical sources of legislative history, other valid and “intellectually honest” sources exist to guide a court. The Civil Rights Act of 1991 itself contains further language that, although not related directly to the definition of

315. Id. (citations omitted).
business necessity, clearly reveals the intent of the legislature.\footnote{316}

The "Findings" of the Act state that "the decision of the Supreme Court in Wards Cove Packing Co. v Atomo has weakened the scope and effectiveness of Federal civil rights protections\footnote{317} and that "legislation is necessary to provide additional protections against unlawful discrimination in employment."\footnote{318} The "Purposes" of the Act state that the Act seeks "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in Griggs v Duke Power Co., and in other Supreme Court decisions prior to Wards Cove Packing Co. v Atomo\footnote{319} and 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.\footnote{320}

These sections, part of the statutory language that Congress enacted and the President signed, coupled with the interpretive memorandum, leave no doubt that the Act intends to overrule \textit{Wards Cove} and that the interpretation of business necessity \textit{returns} to some position before the \textit{Wards Cove} ruling. Just what that position is remains a question of interpreting \textit{Griggs}, the difficulties of which this Note discussed previously.\footnote{321}

The problem, of course, is that interpreting \textit{Griggs} is precisely what the Supreme Court implied it was doing in \textit{Wards Cove}.\footnote{322} Couldn't the Court merely interpret the 1991 Act along the lines of \textit{Wards Cove}? Clearly not, as the legislative intent

\footnotetext{316}{Even the textualists agree that looking at the structure of the statute as a whole is a necessary step in interpreting the statutory language. See Biskupic, \textit{supra} note 187, at 917 (discussing comments of Justice White).}
\footnotetext{317}{Civil Rights Act of 1991, Pub. L. No. 102-166, \$ 2(2), 105 Stat. 1071, 1071 (citation omitted).}
\footnotetext{318}{\textit{Id.} \$ 2(3).}
\footnotetext{319}{\textit{Id.} \$ 3(2) (citations omitted).}
\footnotetext{320}{\textit{Id.} \$ 3(4).}
\footnotetext{321}{See \textit{supra} notes 23-44 and accompanying text.}
\footnotetext{322}{Although the Court never explicitly states agreement or disagreement with \textit{Griggs}, the Court cites affirmatively to \textit{Griggs} in stating that "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." Wards Cove Packing Co. v. Atomo, 490 U.S. 642, 659 (1989). Despite the Court's near indifference to \textit{Griggs}, the Court's statement above is not the holding of \textit{Griggs}. See \textit{supra} notes 30-38 and accompanying text.}
discussion above illustrates. The Court should view Wards Cove as a bottom, and most restrictive, limit of interpreting business necessity. The Act expresses Congress' intent to expand protection from employment discrimination beyond Wards Cove and, therefore, by using the legislative intent model of interpreting the Act, a court should interpret business necessity in a manner more favorable to minority plaintiffs than did Wards Cove.

Interpreting Business Necessity: The Textualist Approach

As with the legislative history approach, the textualist approach looks first at the general provisions of the Act that pertain specifically to the business necessity standard. These provisions are, of course, the text of section 105 and the interpretive memorandum of Senator Danforth. Use of the latter source by textualists may appear inconsistent, as textualists disdain the use of legislative sources. Section 105, however, directs readers to the memorandum and even a textualist would have difficulty ignoring it completely.

From a practical standpoint, the textualists' review of the interpretive memorandum is attractive because the document's ambiguity provides a convenient excuse, under the textualist approach, not to rely on it for guidance. From the textualist perspective, the memorandum may provide a general idea of what the legislature's intent is, but textualism would require the memorandum to say specifically what the Act's business necessity standard is before a court legitimately may rely on it.

A textualist might find the memorandum clear enough to use in interpreting the business necessity standard. A number of observers join the Court in its belief that Wards Cove reflected the "true" standard set forth in Griggs. If this is the case, the interpretive memorandum's guidance that "[t]he terms 'business necessity' and 'job related' are intended to reflect the con-
cepts enunciated by the Supreme Court in Griggs and in the other Supreme Court decisions prior to Wards Cove points towards a business necessity standard that Wards Cove merely reiterated. Such reasoning, however, seems counterintuitive if one notes the memorandum's language of "prior to Wards Cove." Even a textualist would recognize the inconsistency in continuing the Wards Cove standard of business necessity by pointing directly to language that instructs the reader not to consider Wards Cove in interpreting the Act's intent.

More than likely, textualists would arrive at the correct conclusion: that the text itself is not clear. But where a court employing the more traditional method would look to legislative history for guidance, textualists would bypass legislative history and look to the "structure and purpose of the law rather than become involved in the legislative history." In looking to the structure and purpose of the Act, textualists still should look to other general provisions of the Act. Textualists consider the statutory language itself the best source for interpreting the statute. These provisions, discussed above in the section on the Act's Purposes and Findings would not receive much attention from strict textualists, such as Justice Scalia. Although textualists look to the overall structure of the statute to interpret its meaning, they generally are reluctant to place much weight on contradictory or ambiguous language in the statute.

If the textualists determined that they could not interpret the Act in their first level of analysis, they most likely would bypass any inquiry into legislative history and proceed to a Chevron-type examination. Non-textualists could also arrive at the Chevron stage of inquiry, but such a result is not probable. Use of the legislative intent model should resolve the interpretive issue in favor of a more Griggs-like standard of business necessity. Nevertheless, examining the interpretation of the Act's

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327. Id.
328. See supra note 245.
329. See supra notes 260-86 and accompanying text.
330. See supra notes 297-98 and accompanying text.
331. See supra notes 315-24 and accompanying text.
business necessity standard in the shadow of *Chevron* is necessary in the event that the textualist view takes hold of the Court. In examining the standard as applied under *Chevron*, we must look at the agency whose interpretation would be the subject of the Supreme Court’s scrutiny: the EEOC.332

**EEOC Interpretation of the Business Necessity Standard**

Prior to the advent of the Clinton Administration, the EEOC derived its interpretation of the Act’s business necessity standard from President Bush’s statement at the signing of the Civil Rights Act of 1991. In his official signing statement of the 1991 Act, President Bush directed that a statement by Senator Dole in the *Congressional Record* was to serve as “authoritative interpretive guidance by all officials in the executive branch with respect to the law of disparate impact.”333 Senator Dole’s exhaustive interpretation stated that “the bill is no longer designed to overrule the meaning of business necessity in Wards Cove.”334

Senator Dole’s statement is legislative history in the most classic form and should receive no attention from textualists. Because President Bush ordered executive branch officials to follow this memorandum, however, Senator Dole’s interpretation rises from the disdain of legislative history to the exalted role of agency interpretation in the eyes of textualists.

The ability of Senator Dole’s interpretation to receive the textualists’ blessing, even indirectly, is particularly troubling and would be intellectually dishonest of the textualists. Textualists spare no amount of vitriol in criticizing the legislative intent model’s use of legislative history Textualists often specifically point to congressional debate as useless in understanding congressional intent and emphasize the fact that this debate usually occurs after the legislation has been drafted, and

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332. See supra notes 315-24 and accompanying text.
sometimes after Congress has enacted it. Senator Danforth drafted his interpretive memorandum prior to completion of section 105 and section 105 specifically refers to the Danforth memorandum as indicative of the Act's intent. Furthermore, Congress voted on and the President approved section 105's reference to the interpretive memorandum (as part of the entire Act). If President Bush disagreed with Senator Danforth's interpretation, he could have vetoed the 1991 Act. Yet to a textualist, such debate statements are worth little attention. Senator Dole made his statement, however, after the drafting of section 105 was complete and was never referred to in the Act at all. In addition, Congress never voted on Senator Dole's statement nor did Congress present it to the President for his approval. Yet, because President Bush directed executive agencies to follow the Dole interpretation, such truly spurious legislative history served as agency interpretation during the remainder of the Bush Administration.

The EEOC followed President Bush's order, a decision not surprising in light of the fact that EEOC Chairman Evan Kemp

335. See Office of Legal Policy, supra note 215, at 54-55.
337. See supra note 161.
338. See supra note 174 and accompanying text.
339. The final language of the Act, in the final form of Senate Bill 1745, was released October 25, 1991, and Senator Dole did not make those comments until October 30, 1991.
340. Id.
341. See supra note 333; see also Lawyers' Committee Urges Changed Strategy in Enforcing Federal Civil Rights Statutes, Daily Lab. Rep. (BNA) No. 6, at A-6 (Jan. 11, 1993) [hereinafter Lawyers' Committee].

Neither the Department of Justice nor the EEOC has issued a definitive statement of how the Court will interpret business necessity under the new Act. In light of President Clinton's election to the White House, the Department of Justice probably will not follow the Danforth interpretation and will advocate a business necessity standard closer to the pre-Wards Cove view. The Court, however, would probably look to the EEOC as the lead agency in defining policy in this matter. The Court would be correct to look to the EEOC first, for the EEOC's mission is to advocate for civil rights in the workplace. The EEOC's interpretation, however, may very well be at odds with both the Clinton Administration and the Danforth memorandum.
342. See id. (following Bush's order although no official EEOC statement was made to that effect).
served as one of President Bush's point men in attacking House Bill 1 and the subsequent congressional proposals. In fact, Kemp's interpretation of the business necessity standard was consistent with the Bush Administration throughout 1991.

On June 24, 1991, Kemp sent a letter to White House Chief of Staff John Sununu concerning an early proposal by Senator John Danforth. Kemp stated that any definition of business necessity tied to job performance would "make it extremely difficult, if not impossible for employers to show that use of educational credentials and objective measures of academic achievement are legally defensible." Kemp's letter also said that employers "will have little choice but to revert to hiring by the numbers," if business necessity were tied to job performance.

Kemp's position during the debate over the Civil Rights Act was clearly on the side of the Bush Administration and in favor of adopting the Wards Cove approach to business necessity.

After passage of the Act, Kemp and the EEOC drew criticism from civil rights advocates for using a restrictive interpretation of the Act, primarily with respect to the agency's refusal to seek retroactive enforcement of the Act. In oversight hearings before the Senate, Senator Kennedy attacked Kemp's position on the Act. "You're charged as an independent agency to root out discrimination and you've chosen to adopt the narrower interpretation. That sends a powerful negative message."

With Bill Clinton's victory over George Bush, Kemp is no longer the chairman of the EEOC—nor do Republican appointees dominate the EEOC. Their actions in the wake of the
passage of the 1991 Civil Rights Act, however, illustrate the powerful influence of the EEOC in interpreting the Act's business necessity standard. It seems commonsensical that judicial interpretation of such an important law should not turn on which political party controls the EEOC when this issue inevitably reaches the Court. Nevertheless, such a result is not out of the question.\textsuperscript{350} As such, civil rights advocates should take heed and not view the ascension of the Clinton Administration—and any possible shift in the EEOC's interpretation\textsuperscript{351}—as bringing finality to the question of how to interpret the 1991 Civil Rights Act's business necessity standard. The ultimate interpretation of this standard lies in the future, with the federal courts.\textsuperscript{352}

**INTERPRETING THE CIVIL RIGHTS ACT OF 1991. THE CORRECT INTERPRETATION MAY NOT BE THE ACTUAL INTERPRETATION**

The general concerns of textualists with respect to statutory interpretation are valid and deserve considerable attention by all members of the judiciary. Concern that judges are too quick to play a legislative role unnecessarily is well founded, but the answer to these concerns is not an indiscriminate ban on examining legislative intent.

\textsuperscript{350} See supra notes 287-306 and accompanying text.

\textsuperscript{351} See Lawyers' Committee, supra note 341 (calling for the Clinton Administration to withdraw President Bush's directive regarding the interpretation of the 1991 Act's business necessity standard). No formal policy change has been announced, as of this writing, nor has President Bush's directive been formally withdrawn by President Clinton. It seems likely, however, that the Clinton EEOC will opt for the Danforth, rather than the Dole, interpretation when confronted with this issue. For example, the EEOC has already reversed the Bush EEOC on the question of whether the 1991 Act applies retroactively. EEOC Reiterates Vote to Change Policy on Retroactivity of 1991 Civil Rights Act, Daily Lab. Rep. (BNA) No. 71, at A-1 (Apr. 15, 1993); cf. New Direction at EEOC, supra note 349 (outgoing EEOC General Counsel, Donald Livingston, predicting that the Clinton EEOC will make "very few policy changes").

\textsuperscript{352} See supra note 11.
Just as the Civil Rights Act of 1991’s provision for business necessity is a classic example of irresponsible legislating, so too is the Act an excellent example of a case in which deriving a general intent of the legislature is fairly simple. Congress’ intent was to overturn Wards Cove and provide greater civil rights protections in the work place than were previously available. Notwithstanding Senator Dole’s statement of October 30, 1991—and even not considering, for the moment, the Danforth interpretive memorandum—the statutory language itself explicitly reveals the legislature’s intent, as shown in the Act’s Findings and Purposes.

Because the Act gives a clear understanding of its general intent, not to search further for more specific intent would be unreasonable; thus, the mission of the legislative intent model. The textualist approach would lead to an interpretation that runs completely counter to the Act’s stated purpose. Further, the textualist approach could arrive at its interpretation through a method more convoluted and suspect than the legislative intent model at its worst.

The ambiguity of the Act’s business necessity standard leaves its ultimate definition to the Federal Courts—courts currently dominated by Reagan and Bush appointees. Quite possibly, therefore, the courts will interpret “consistent with business necessity” more in line with the Wards Cove standard than the Griggs standard. If this is the case, did the Bush Administration really compromise? Did it really “lose”? Or did the Administration make the best of a bad political environment and outsmart its congressional opponents? We may not know the answer to these questions until the Supreme Court addresses the issue of disparate impact discrimination again. The Civil Rights Act of 1991 may not overrule Wards Cove with respect to business necessity. Despite the Act’s other substantive accomplishments, it very well may be a civil rights failure on its most important, and most contentious, issue.

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