Disparate Impact: History and Consequences

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I. INTRODUCTION

The Civil Rights Act of 1991 had a highly unusual passage through the legislative process. It generated a presidential veto at the beginning and an extraordinary amendment at the end, yet denied what happened as a legal matter by designating just two paragraphs in the Congressional Record as the sole legislative history. With the dust settled and the legislation out of the daily news, now is a good time to assess what the bill actually did on the quota issue—which, along with damages, were the two provisions in the bill which generated the most controversy.

Who won the fight, the civil rights interest groups or the Bush administration lawyers? This was the "who's up, who's down" way the struggle was framed by contemporaneous press accounts, which all but totally ignored the fundamental educational policy dispute at the heart of the struggle. Interestingly, the activists of both left and right (as represented on this issue by William Coleman on behalf of the NAACP Legal Defense Fund, Inc., on the one hand, and Patrick Buchanan on the other) claimed that the Bush administration caved in to the interest groups.

As I will try to demonstrate, the Bush administration not only advanced public policy toward the goals the administration sought from the beginning, but did so far more convincingly than even its most ardent supporters claimed at the time. Indeed, it actually achieved a result that was better (at least on the quota issue) than would have been the case had there been no bill at all.

A. Background

Explaining this necessarily requires a brief review of a complicated area of employment law called disparate impact theory, and its effect on the links between education and the workplace.

The law of disparate impact stems from Griggs v. Duke Power Co., one of the two most important Supreme Court cases of the last twenty-five years

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1. See 137 Cong. Rec. 515, 362 (daily ed. Oct. 29, 1991) (referring to an interpretive memorandum containing the official legislative history, which was incorporated into Amendment 1286 to Amendment 1274 to S. 1745, 102d Cong., 1st Sess. (1991)).
(Roe v. Wade\textsuperscript{3} being the other). In Griggs, the Court held that if an employer uses a hiring qualification, such as a requirement for a high school diploma, that operates to exclude blacks disproportionately to whites (because blacks have a higher drop-out rate), then the employer can continue to use the requirement only if he can justify its use as a matter of "business necessity."\textsuperscript{4}

There are three basic components to a case premised on disparate impact. The first component relates to what the plaintiff must prove in order to force a business necessity explanation by the defendant; this issue involves how much of a causal relationship the plaintiff must prove between the questioned hiring requirement and the numerical imbalance.

The second issue relates to the burden of proof with respect to the business necessity explanation once an exclusionary practice or requirement has been adequately identified. The question is whether the plaintiff retains the ultimate burden of disproving the adequacy of the employer’s justification for using a particular requirement, or whether the employer has shifted onto himself the burden of proving the justification’s adequacy.

The third issue relates to the definition of business necessity. How much justification must be proven, or disproven, in connection with the questioned hiring requirement? For example, can an employer simply assert that a high school education is a good thing to have as a condition of employment, as the military does today in recruiting, or must he prove that high school graduates perform better in each job than drop-outs? If so, what kind of proof is necessary?

\textbf{B. Wards Cove}

As would be expected, these issues were subject to numerous refinements by the Supreme Court in the two decades that followed Griggs. Then, in 1989, the Supreme Court decided Wards Cove Packing Co. v. Atanio.\textsuperscript{5} That decision was characterized by civil rights activists as overruling Griggs, and that characterization in turn prompted the activists’ civil rights bill, which was described both as overruling Wards Cove and “restoring” Griggs. Supreme Court decisions with broad policy implications are not, however, easily and cleanly overruled or restored. In fact, the civil rights bill as initially proposed and vetoed would have done more than just overrule one case and restore another. Nevertheless, an understanding of these two cases as they relate to the three issues identified above is necessary to an understanding of the bill that emerged at the end.

Let us begin with the burden of proof, since it is the easiest to explain. Although Griggs itself did not deal explicitly with the burden of proof, lower

\begin{itemize}
\item \textsuperscript{3} 410 U.S. 113, 93 S. Ct. 705 (1973).
\item \textsuperscript{4} Griggs, 401 U.S. at 431, 91 S. Ct. at 853.
\item \textsuperscript{5} 490 U.S. 642, 109 S. Ct. 2115 (1989).
\end{itemize}
court decisions had generally placed the burden on the defendant. Thus, *Wards Cove*'s placement of the burden on the plaintiff represented a significant decision, if not an overruling of *Griggs*. Since the Bush administration early on agreed to shift the burden to the defendant, however, this component fell out as an issue in the legislative fight.

*Wards Cove*'s impact on the other two issues was less clear. *Griggs* assumed, without spelling out, the need for a causal link between a showing of numerical imbalance and a specific hiring requirement. In *Wards Cove*, the dissent thought the majority had tightened somewhat the showing of causation required. But the dissent did not explain clearly what it thought the correct causative requirement should be, nor did it claim that any court decision, let alone *Griggs*, had been overruled or changed by the majority. This issue nevertheless became one of the two major battlegrounds in the legislative war, and will be explored in more detail below.

The third issue, the definition of business necessity, was neither briefed by the parties nor spelled out with clarity by the Court in either *Griggs* or *Wards Cove*. The dissent in *Ward's Cove* argued the majority opinion had relaxed the definition, yet the dissent did not explain exactly how the majority had done so. Such a disagreement would hardly seem grounds for a two-year legislative slugfest, yet, as will be shown, the initial bill asked for far greater change in the law than the *Wards Cove* dissent.

*Wards Cove*, then, did not overrule *Griggs* in the obvious sense of abandoning disparate impact theory. At most, it refined *Griggs* and *Griggs*' progeny at the margins. The truth is that *Wards Cove* was thus seized as an occasion for revising and expanding, as opposed to restoring, disparate impact law in a comprehensive fashion. Accordingly, in the discussion that follows, I will deal with the legislative fight as just such an attempted revision and expansion, and not an effort to restore disparate impact theory, *Griggs* per se, or any other particular case that followed it.

II. THE LEGISLATIVE STRUGGLE

Since, as noted above, the administration early on agreed that the burden of proof was properly shifted to the defendant in a disparate impact case, the legislative struggle focused on the two remaining issues: business necessity and causation.

A. Business Necessity

The best place to start in describing the bill is with the Senate Committee on Labor and Human Resources report's explanation for including a business

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6. *Id.* at 671-72, 109 S. Ct. at 2132 (Stevens, J., dissenting).
7. *Id.*, 109 S. Ct. at 2132 (Stevens, J., dissenting).
necessity definition in the legislation.\textsuperscript{8} It is important to remember, however, that the explanation is relevant only to the motives and purposes underlying the bill, not to the meaning of the language ultimately adopted. The bill signed by President Bush used language very different from the bill described in the report, and also contained language precluding resort to the committee report for determining the legislative history.\textsuperscript{9}

\section{The Goal: Codify the Uniform Guidelines}

The report states simply and clearly that the business necessity definition was intended to legislate the Uniform Guidelines on Employee Selection Procedures,\textsuperscript{10} which the report says exemplify the prevailing pre-\textit{Wards Cove} law regarding the meaning and method of proving business necessity. The Uniform Guidelines were written by the federal civil rights bureaucracy after \textit{Griggs}, and purport to tell employers how that bureaucracy would determine whether employer selection practices passed Title VII muster. The guidelines, the report says, "embody the legal principles that were accepted and applied prior to \textit{Wards Cove}, and which the Committee intends [the bill] to restore."\textsuperscript{11}

But nothing in any pre-\textit{Wards Cove} case codifies the Uniform Guidelines, and, conversely, nothing in \textit{Wards Cove} expresses disapproval of the Uniform Guidelines. The dissenters in \textit{Wards Cove} pointed out only that the majority opinion contains dicta saying that an employer could keep using a challenged hiring practice only on a showing that it is important, beneficial, or relevant to its business, not that it is "essential" or "indispensable" for its business.\textsuperscript{12} But indispensability is not the touchstone of the Uniform Guidelines, and does not appear as an issue in the committee report, which does not refer to the indispensability dispute between the two \textit{Wards Cove} opinions as the reason for codifying the Uniform Guidelines.

Rather than focus on indispensability, the report cites the Uniform Guidelines as important because they require statistical, rather than anecdotal, demonstration or validation that a hiring practice produces better job performance for an entry level job than some less exclusionary practice (or nothing at all). The focus, the report says, is on seeking the lowest possible hurdle: "The fact that the best of [the] employees ... score well on a test does not necessarily mean that ... some particular cutoff score on the test, is a permissible measure of the minimal qualifications of new workers entering lower level jobs."\textsuperscript{13} The

\begin{itemize}
\item \textsuperscript{8} S. Rep. No. 315, 101st Cong., 2d Sess. 41-45 (1990) [hereinafter Committee Report].
\item \textsuperscript{10} 29 C.F.R. § 1607 (1993) [hereinafter Uniform Guidelines].
\item \textsuperscript{11} Committee Report, supra note 8, at 42.
\item \textsuperscript{12} \textit{Wards Cove Packing Co. v. Atonio}, 490 U.S. 642, 671-72, 109 S. Ct. 2115, 2132 (1989) (Stevens, J., dissenting).
\item \textsuperscript{13} Committee Reports, supra note 8, at 43 (quoting \textit{Albemarle Paper Co. v. Moody}, 422 U.S. 405, 434, 95 S. Ct. 2362, 2379-80 (1975)).
\end{itemize}
critical issue in, for instance, a case involving a strength test for firefighters is “what degree of strength is actually required for effective job performance”; in other words, the report says proof of business necessity must address “the particular cutoff score used on a test.” To give another example, if an employer cannot provide statistically valid studies demonstrating that “A” students actually make fewer defective widgets than “C” students, then an employer cannot make any hiring decisions based on grades.

The fact is the Uniform Guidelines, because they made it so difficult for employers to defend so many neutral practices that had a disparate impact, created enormous pressure on employers to avoid “bad numbers” by adopting surreptitious quotas.

2. Reasons for the Goal

Why did the legislation's proponents focus so intensely on the Uniform Guidelines generally, and on statistical correlation between hiring practices and actual job performance specifically, when Wards Cove did not deal with these issues?

First, civil rights advocates might have been justified in feeling that there was, for them, a disquieting trend or pattern developing in Supreme Court jurisprudence. While Wards Cove alone might not seem adequate justification for alarm, it was not decided in a vacuum. In addition to the Supreme Court cases overruled in whole or in part by the civil rights bill, there was one major contemporaneous ruling that was never targeted by the civil rights groups: the Richmond set-aside case, City of Richmond v. J.A. Croson Co. There is no mention of this case in the Senate committee report, and thus no public explanation of why the proposed legislation did not target it. One possible explanation is that the decision involved a constitutional ruling, making congressional alteration more difficult. But another explanation is that the case clearly involved quotas, and that the civil rights community knew that the public would never accept an explicit quota bill.

There were private indications that a desire to codify a quota regime was the principal motivation behind the legislation. William Coleman, the bill's principal author, was quite candid with me about what he wanted. “What I need is a generation of proportional hiring, and then we can relax these provisions,” he told me in my office. David Gergen confirmed to me, before the 1992 election, that Coleman had confided to him as well that quotas were the goal, but that he had never reported that fact because he felt he had to respect the confidentiality of his source. Of course, the legislative struggle could have been quite different if Gergen or others had published Coleman's objectives.

14. Committee Report, supra note 8, at 44.
16. Those who objected to Croson, however, would undoubtedly argue that Congress had power under Section 5 of the Fourteenth Amendment to limit that decision.
A second, and consistent, explanation lies in the rapid changes enveloping the work force, work-force training, and education. Big corporations, which followed the Uniform Guidelines because their government contracts exposed them to the affirmative action requirements of Executive Order 11,246, were no longer the principal sources of new jobs. To the contrary, they were downsizing and becoming increasingly edgy about competition from small business, which in the 1980s accounted for more than seventy percent of all job creation. Attaching the Uniform Guidelines to their rivals would not only put a drag on their efficiency, it would ultimately give big corporations an edge, since they were better able than their smaller competitors to absorb the costs of compliance with the guidelines, including the costs of education and training that the guidelines did not permit companies to require at the outset as a condition of employment.

At the same time, the Equal Employment Opportunity Commission (EEOC) was increasingly redirecting its enforcement resources away from disparate impact cases to cases involving intentional discrimination. This change, in turn, was posing a threat to the Uniform Guidelines. The EEOC does not have rulemaking authority under Title VII, and thus the guidelines were not rules, and had potency only as enforcement guidelines. If the EEOC was no longer pressing disparate impact cases, the guidelines had no independent force or effect. And this meant they would no longer be pushing companies to adopt quotas, to the chagrin of the civil rights groups.

It was thus in the interest of both the civil rights community and some big business to see the Uniform Guidelines codified as substantive rules of law and then applied to small companies. For this purpose, a major public, congressional push was essential.

Finally, there were major educational reform efforts mounting that might permit employers and parents to insist on more accountability from the public school system. Albert Shanker wrote persuasively of the need to allow employers to help educational accountability by rewarding school achievement in hiring, something the civil rights laws essentially prohibited. Professor Bishop of Cornell University conducted a comprehensive study of this problem and concluded that the civil rights laws were a major impediment to school reform. Emerging growth companies, which lacked the deep pocket resources to do their own training, were looking increasingly to high schools as the source for better trained employees.

Indeed, this was even true for some large companies. The Wall Street Journal recently reported, for example, that Chrysler had to spend one million hours training workers shifted from an old plant to operate a highly automated

20. See infra text accompanying notes 58-63.
new plant using self-directed work teams. The Journal noted the training costs were high in part because the workers had not completed high school. While the results were good, the Journal reported the head of Chrysler's manufacturing operations as saying, "if that's the way I'm going to handle my training, I'm going to go out of business." As a result, Chrysler has dramatically raised its hiring standards.

As for the school choice movement, the ability of parents to choose between schools assumes there is some standard of quality or achievement against which to measure different schools. But that requires, at a minimum, that parents themselves be able to make the same kinds of distinctions that colleges make when they signal that some secondary schools provide better preparation than others, something the civil rights laws all but prohibited.

The downgrading of a high school education's importance arguably began with Griggs itself, which prohibited the use of a diploma requirement for certain jobs. But the demands of global competition for a more educated work force had, twenty years after Griggs, raised the stakes on the importance of education to productivity. As the New York Times summarized the recent G-7 jobs summit in Detroit, "Government officials from the United States and other leading industrial nations agreed today that the only way to create more good jobs in the face of rapid technological change was to upgrade education, particularly for those who are the least skilled."

3. The Real Issue: Education

Indeed, it was this argument over education that constituted the core dispute between the Bush administration and the legislation's supporters (who tried— with great success—to stifle debate about quotas by denying that the bill involved them). One of the bill's principal sponsors dismissed President Bush's concerns about the bill's impact on education by characterizing the President's position as demanding diplomas from would-be fifty-year-old janitors. But the future of American's job creation does not center on the fifty-year-old janitor who is a high school dropout. Rather, it centers on finding ways to strengthen the educational system for today's children so that they will have more than a janitor's opportunity.

The Uniform Guidelines did not purport explicitly to prohibit use of educational achievement outright in making hiring decisions, but they did require employers who wished to do so to provide studies proving that "A" students perform particular entry-level jobs better than "D" students. As Professor Bishop

22. Id.
23. Id. at A1.
has demonstrated, this is prohibitively expensive to do, especially in a rapidly evolving work force where job descriptions are changing on a day-to-day basis to meet the demands of innovation, competition, and new markets. One question that apparently has no answer is whether the military, which is exempt from Title VII and thus empowered to demand a diploma (which ninety-nine percent of its recruits have), can prove statistically that high school graduates make demonstrably better soldiers than dropouts do. The performance of the military in the Persian Gulf War would seem to make obvious the benefits of a diploma requirement, but that performance would not constitute adequate validation under the guidelines.

The sensitivity of the Uniform Guidelines' role in divorcing educational achievement from the hiring process was underscored by a mini-firestorm that was ignited by an EEOC leak to the New York Times towards the end of the legislative fight. "Bush administration officials say they are considering new regulations that would allow employers more latitude in the use of aptitude tests and educational requirements in hiring, promotion and pay," the story began. It went on to describe a White House meeting that included EEOC Chairman Evan Kemp, Labor Secretary Lynn Martin, and myself, and that resolved to revise the Uniform Guidelines. The proposed changes would, the story said, send a message that doing well in school was important in getting a job and would "also provide support for Mr. Bush's idea for giving voluntary academic tests to students in the 4th, 8th and 12th grades," because under current rules "any employer who used test results in making personnel decisions and did not show that they were directly related to job performance could face a discrimination lawsuit."26

The reaction was, according to the story, quick and strong. "It's off the wall," said the research director of Women Employed, a Chicago advocacy organization.27 "As social policy, it would be a major change," said an anonymous Washington civil rights lawyer.28 "I do not think they have the legal power to do that," said Richard T. Seymour, director of the Employment Discrimination Project of the Lawyers Committee for Civil Rights.29 "They would have to have statutory language to do that, and I don't think Congress would allow it."30

The article said that the language change under consideration would permit employers "to use ability tests, provided that such tests were 'not designed, intended or used to discriminate because of race, color, religion or national

26. Id.
27. Id.
28. Id.
29. Id.
30. Id.
Although the article did not point it out, the proposed language was already the law of the land; it was virtually word for word the same as Section 703(h) of the Civil Rights Act of 1964. The civil rights activists had thus turned that act upside down by regulation, a process allowed if not encouraged by the judiciary, and were now insisting that Congress would have to reenact the 1964 Civil Rights Act in order to revive it. (It could, of course, be argued that disparate impact theory also turned upside down the anti-quota provisions of the 1964 Act, Section 703(j) of which prohibits any requirement that an employer “grant preferential treatment to any individual or to any group because of the race . . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . . employed by any employer . . . . in comparison with the total number or percentage of persons of such race . . . . in the available work force in any community . . . .”) Now, with the Supreme Court apparently having second thoughts, and the Bush administration threatening to go back to the 1964 Civil Rights Act, the legislation’s proponents might well have thought it imperative to expand and freeze the regulatory regime in legislation before further changes gathered momentum.

Did they succeed in requiring statistical proof of a link between education or other hiring requirements and actual job performance? Proponents realized that overruling Wards Cove to indicate what the law was not would do nothing to indicate what the law (i.e., the Uniform Guidelines) should be, especially since Wards Cove itself had not mentioned the Uniform Guidelines, let alone rejected them. So the proponents created a new definition ("essential to effective performance of the job") that they said was intended to codify the Uniform Guidelines and its requirement for proof of a link between educational achievement and job performance.

4. The ADA Compromise

Notwithstanding Coleman’s and Jordan’s later assertions to the contrary, however, this language never survived in either the text of the statute or the exclusive legislative history referenced in the statute. The language used in the last-minute compromise that permitted President Bush to endorse the bill was taken instead from the Americans With Disabilities Act, which no one has ever associated with proportional hiring goals. The ADA says simply that the employer must “demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.” Business necessity is not separately defined as it was in the initial bill, and the legislative history says only that “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. Atonio.*

What does this statutory language mean? It clearly does not require a linkage between a hiring practice and job *performance*. As Michael Carvin, a former official in the Reagan Civil Rights Division, has stated, "a selection device need not be related to job *performance* as such." There are, he said, many employment characteristics, such as interpersonal relationships, absentee rate, drug use, and ability to teach, "that are related to a job, even if they are not directly relevant to job performance." This question was the centerpiece of the debate, with "job performance [being] the essential constraint that the Kennedy forces wanted to place on the employer's hiring and promotion decisions." Accordingly, he wrote, the term does not encompass validation and the other "statistical studies [that] are incredibly difficult to develop" and that are required by the Uniform Guidelines, because "none of that is incorporated, codified, or referenced in the 1991 Act or its legislative history." Coleman and Jordan took virtually the opposite position in an op-ed piece in the *Washington Post* shortly after the bill was signed by President Bush. "Job selection criteria must be related solely to job performance," they wrote. Furthermore, they said there must be "a substantial relationship" between selection criteria and job performance. Finally, they wrote, the ADA, from which the civil rights bill compromise language was taken, and EEOC's final interpretive regulations issued earlier that July, "make clear that there must be a close relationship between selection criteria and actual job performance."

The Coleman-Jordan emphasis on job performance is puzzling, since there is nothing in the ADA or the EEOC's regulations that remotely suggests the use of the words "job performance." The language of the statute is, quite simply, "job related." The EEOC regulations are more revealing, but not in the direction suggested by Coleman and Jordan. The EEOC regulations interpreting this language state:

It is important to note that the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative. . . . If an

36. Id.
37. Id. at 1159-60.
38. Id. at 1160.
40. Id.
41. Id.
42. Id.
employer requires its typists to be able to accurately type 75 words per minute, it will not be called upon to explain why... a typing speed of 65 words per minute, would not be adequate. Similarly, if a hotel requires its service workers to thoroughly clean 16 rooms per day, it will not have to explain why it requires thorough cleaning, or why it chose a 16 room rather than a 10 room requirement.\footnote{1933}

The EEOC interpretation thus clearly repudiates the committee report’s command, relevant to the vetoed bill, that “proof of business necessity must address the particular cutoff score,” and that in a strength requirement for firefighters, the employer prove “what degree of strength is actually required for effective job performance.”\footnote{1944} In other words, because “it is not the intent of this part to second guess an employer’s business judgment with regard to production standards,” such standards will “generally not be subject to a challenge under this provision.”\footnote{1945}

This required deference to an employer’s business judgment is, of course, flatly inconsistent with the Uniform Guidelines and their focus on actual job performance. What, if anything, did the EEOC interpretive ADA rules say about the guidelines? The rules state that the guidelines “do not apply to the Rehabilitation Act and are similarly inapplicable to this part.”\footnote{1946}

The Uniform Guidelines, in other words, have three strikes against them under the enacted bill. They never had the force of substantive rules to begin with and they failed to attain the status of substantive rules in the legislation; the guidelines are irrelevant to the ADA language in any event, whatever their status as a matter of administrative law. Furthermore, the EEOC rejected any requirement to link particular cutoff scores to actual job performance, which was the underlying point of the proponents’ attempt to codify the guidelines.

The legislative history does not provide any comparably detailed guidance as to the meaning of the language taken from the ADA. It states, as noted above, that the language means what the Supreme Court said business necessity meant in cases prior to Wards Cove. As Carvin has pointed out, the Wards Cove majority did not see itself as breaking any new ground on the question of job performance (as distinguished from the burden of proof issue, or the causation question, discussed below). And, as noted above, even the dissent’s question about “essentiality” or “indispensability” did not evince any concern about the separate issue of job performance and the Uniform Guidelines, which was at the heart of the debate.

Concededly, the bill’s and the legislative history’s silence with respect to the Wards Cove decision does not prohibit the Court from writing a different opinion.

\footnote{1943} 29 C.F.R. § 1630 app. (1993).
\footnote{1944} Committee Report, supra note 8, at 44.
\footnote{1945} 29 C.F.R. § 1630 app. (1993).
if faced with Wards Cove's precise facts again, but the EEOC regulations would seem clearly to prohibit deference to the Uniform Guidelines, or erection of any other standard that would permit easy challenges to an employer's business judgment. This, in turn, would seem clearly to permit employers to use the kind of ability and academic achievement tests originally permitted by the Civil Rights Act of 1964, but inhibited by the Uniform Guidelines and prohibited outright by the initial bill's prohibition of the use of cutoff scores (unless statistically validated). As so interpreted, therefore, the compromise language of the final bill provided a significant relaxation, not a tightening, of the business necessity definition for purposes of disparate impact cases.

B. Causation

Although not as prominent in the public debate, the causation issue was nevertheless the occasion for hundreds of hours of negotiation. In many ways, this issue, as presented in the bill vetoed by President Bush, posed an even greater threat of quotas than codification of the Uniform Guidelines.

Section 4 of the vetoed bill provided that if a plaintiff "demonstrates that a group of employment practices results in a disparate impact," he will not be required to show which particular practice in the group caused the disparity in order to require the employer to defend every practice in the whole group. What this meant was that mere allegation of a numerical imbalance alone was enough to force an employer either to balance his numbers or to have an expensive validation study proving that each step in his hiring program produced clearly better-performing workers than any conceivable alternative—an obviously difficult, if not impossible, burden. Rather than try to conduct the study and defend the lawsuit, most employers would simply "hire by the numbers." This, of course, is what the activists' and plaintiffs' lawyers wanted.

As with the business necessity issue, it is not at all clear that the Wards Cove decision necessitated this bold quota-inducing language. In Wards Cove, the plaintiffs did try to shift the burden of defense to the employer on a mere showing of bad numbers alone, but the majority said no, the plaintiffs must provide a "demonstration that specific elements of the petitioners' hiring process have a significantly disparate impact on nonwhites." To hold otherwise, the majority said, would result in employers being potentially liable for "the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces." The dissent takes issue with this, noting first, however, that "[i]t is elementary that a plaintiff cannot recover upon proof of injury alone; rather, the

49. Id. at 657 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992, 108 S. Ct. 2777, 2787 (1988)).
plaintiff must connect the injury to an act of the defendant in order to establish *prima facie* that the defendant is liable.\(^{50}\) This observation seems wholly in accord with the majority. What then is the disagreement? “Although the causal link must have substance, the act need not constitute the sole or primary cause of the harm. Thus . . . proof of numerous questionable employment practices ought to fortify an employee’s assertion that the practices caused racial disparities.”\(^{51}\) This last statement is difficult to evaluate fully, because it assumes that the plaintiff has, first, at least alleged something questionable about one or more practices, and thus identified them as suspect, and second, made some minimal showing of a causative link to the disparity, which link would be “fortified” by proof of the questionable practices.

In other words, the dissent says nothing to suggest that they would dispense entirely with the requirement that the plaintiff identify a particular questionable practice and provide some showing of a causative link. And, in fact, there is no discussion in the committee report about how maintaining such a requirement in some form changed the law. The report, for example, cites no cases allegedly overruled by the majority opinion, and the dissent similarly cites no cases. Yet, dispensing with this causation requirement is precisely what the vetoed bill would have accomplished, even though there was nothing in *Wards Cove* calling for such a dramatic change.

The Bush administration objected strenuously and, ultimately, successfully. Thus, the enacted bill provides that a plaintiff must “demonstrate that each particular challenged employment practice causes a disparate impact”; except if the elements of an employer’s hiring process “are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.” The legislative history explains this merely by saying:

> When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, such as the height and weight requirements designed to measure strength in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the particular, functionally-integrated practices may be analyzed as one employment practice.\(^{52}\)

The provision ultimately adopted, together with its brief explanation, distills an extraordinarily contentious and drawn-out negotiation over the causation issue. The negotiation was highly hypothetical and abstract in nature, since there were no reported cases that would have been decided differently depending on one’s preference for the majority or dissenting discussion of the causation issue.

\(^{50}\) *Wards Cove Packing Co.*, 490 U.S. at 672, 109 S. Ct. at 2132 (Stevens, J., dissenting) (emphasis added).

\(^{51}\) *Id.* at 672-73, 109 S. Ct. at 2132 (Stevens, J., dissenting) (citations omitted).

There was one relevant case that surfaced early in the negotiations—*Sledge v. J.P. Stevens & Co.*⁵³—but in the end it was never cited by the legislation’s proponents, for reasons that will become clear in reviewing that case. The bill’s proponents argued that, under *Wards Cove*, plaintiffs would frequently be thrown out of court when confronted with an employer who hired by the seat-of-the-pants, that is, by purely subjective evaluation without any objective sorting out on the basis of test results, high school grades, etc. The administration argued that in such a case the subjective evaluation was itself the hiring practice, which could be challenged and defended as such. No, said the civil rights proponents, that happened recently in the *Sledge* case and the plaintiffs were thrown out of court. A quick review of that case, however, shows that the judge threw out the defendant, not the plaintiff, for being unable to explain what he had done. The evidence consisted of an affidavit from a personnel officer to the effect that the defendant’s personnel officials had “no idea” of the bases on which they made their employment decisions; the court ruled that “the identification by plaintiffs of the uncontrolled, subjective discretion of defendant’s employing officials as the source of the discrimination shown by plaintiffs’ statistics sufficed to satisfy the causation requirements of *Wards Cove*.”⁵⁴

Thus came the recognition, embodied in the exception clause of the final bill, that if one could not separate out the elements of a decision for analysis, then the whole decision could be treated as a single hiring practice. But this allowed the administration to insist that where one *could* identify the factors relied on by the defendant, causation must be proved as to each of the factors. The final bill, unlike the vetoed legislation, contained no language suggesting that a plaintiff could make out a case simply by alleging a numerical imbalance. Lest anyone try to confuse this already difficult issue by resorting to legislative history, the parties agreed to limit the entire legislative history to two paragraphs, the relevant one of which is quoted above.

As soon as agreement had been reached, however, Senator Kennedy went out on the floor to provide legislative history that was totally inconsistent with that agreement. Among other things, Senator Kennedy repeatedly said the purpose of the legislation was to overrule *Wards Cove*, when in reality hundreds of hours had been devoted to crafting a compromise bill and legislative history that quite clearly avoided saying that *Wards Cove* was overruled.⁵⁵ That was extraordinary enough in the circumstances, but his lengthy discussion of causation was even more bizarre.

In that regard, Senator Kennedy said the language of the compromise would permit a plaintiff to challenge the use of a test, an interview, and a grade-point average as a single hiring practice if the employer “subjectively reviews these

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⁵⁴. Id. at *4.
three factors without assigning any particular weight to any of the factors." But this hypothetical example did not constitute the "incapable-of-analysis" example excepted in the bill, because the three components—test, interview, and grades—were identified clearly and thus were obviously capable of separation for analysis. Requiring a plaintiff to try to pin down the employer to some rough approximation of his weighing of these factors does not render the plaintiff's burden impossible. Conversely, not requiring the plaintiff to identify the likely culprit or culprits among the selection criteria would mean that simply alleging a numerical imbalance would be enough in this situation to win the lawsuit. Concededly, under the compromise, the plaintiff may have to do some work in the discovery process. But, given that there can always be a number of factors that lead to a numerical imbalance but that have nothing to do with a defendant's hiring practices, it is still important to require the plaintiff to identify what causes an imbalance, lest the mere fact of a numerical imbalance dictate the result in every case.

Even worse, Senator Kennedy misquoted the agreed-upon legislative history to permit a plaintiff to attack an entire decisionmaking process by simply alleging a numerical imbalance whenever that process includes particular, functionally-integrated components of the same standard or test, regardless of whether other aspects of the hiring process were capable of individual analysis. The agreed-upon language by contrast stated only that the particular, functionally-integrated practices may be analyzed as one employment practice, not that the entire decisionmaking process could be treated as a single practice.

As a result of this breach of the agreement, the negotiators went back to the drawing board. For awhile, it looked as though there might not be any bill at all. Then, after the weekend, the Senate agreed to insert the original two-paragraph, exclusive legislative-history floor statement into the bill itself, thus for the first time writing a bill that by its own terms had no legislative history save what was cited in the bill.

III. CONCLUSION

In sum, the Bush administration succeeded in blocking any specific change in the law to legislate the Uniform Guidelines and to allow a plaintiff to win merely by alleging a numerical imbalance. Moreover, the administration not only gained a specific ban on race-norming, but also forced the adoption of a provision that requires deference to business judgment on hiring qualifications and that permits the use of ability and achievement tests in order to reestablish the links between education and the workplace.

On balance, this has to be judged not simply as a defeat of the legislative effort by the civil rights interest groups, but also as an unqualified victory by the

56. Id. at S15,234.
57. Id.
Bush administration in its efforts to reward educational achievement. For, as Coleman and Jordan recognized in their Washington Post article, the viability of educational requirements was at the heart of the debate. In this regard, it seems quite clear that, at the end of the day, employers should now be free to use tests and other measures of educational achievement, as clearly envisioned by the 1964 Civil Rights Act. Educational achievement is clearly job related, and no employer will be required, every time he hires a new employee, to have a validation study to establish for that particular employee the central importance of education to our nation's job future.

The need to end the divorce between the high school and the workplace continues to grow in importance. The New York Times reported on February 20, 1994, that Secretary of Education Riley and Secretary of Labor Reich had hosted a conference in California to urge stronger "programs for students not bound for college, particularly school-to-work transition programs."58 The article noted that the Clinton Administration's Goals 2000 education legislation "emphasizes job training for high school students."59 According to another Times article, published a few days later, the core of President Clinton's education policy, indeed, seems to be the "need for new links between learning and jobs."60 "We have to tie the workplace to the learning environment in high school," the President himself was quoted as saying.61 The article went on to note that one of the hurdles to stronger workplace programs was "a communications gap between educators and businessmen."62 One school official was then quoted as saying, "At one time, businesses told us they wanted people who would show up on time, treat our customers well and take coaching. Now they are demanding more, but so are we."63

The point is, thanks in part to the Civil Rights Act of 1991, employers are now legally entitled to ask for more in terms of student performance in school. There is evidence they are now doing so. The Wall Street Journal's lead story for March 11, 1994, headlined "Auto Plants, Hiring Again, Are Demanding Higher-Skilled Labor," surveys the auto industry's new and heavy reliance on ability testing and education and achievement. "Prospective workers are being tested in everything from mathematics to manual dexterity," the article said, noting that among the new Ford workers, "about a third have attended college, 4 percent have four-year degrees [and] 97 percent have high-school diplomas." The story also noted that the Canadian Auto Workers union says the "preference for high-school graduates in [Canada] is discriminatory," but identified no civil rights law barriers to the new hiring practices.

59. Id.
61. Id.
62. Id.
63. Id.
Postscript: Media Left and Right

A few words about press coverage of the legislation and its relationship to the interest groups involved might be appropriate here. Press coverage—especially by the print media—of an issue of this magnitude is important because published accounts of what the bill does are for many small businesses the only source of information about their legal obligations. It does not do much good to enact a bill that allows businesses to demand more of their high schools if they are not informed of that fact or, even worse, are told the contrary is true. And, needless to say, it does not do much good to enact a bill that says one thing if the regulators interpret it to say the opposite (as they did with the 1964 Civil Rights Act) and the press allows them to get by with it.

The media coverage of the civil rights fight was surprisingly nonsubstantive throughout the battle, especially in light of the long time the issue maintained its front-page interest and, thus, the long time for reporters to educate themselves. A few reporters did, in fact, provide insight into what might have been motivating the various players; Steven Holmes of the New York Times and syndicated columnist Ben Wattenberg come conspicuously to mind. But by and large, the reporters involved reported the usual horse-race material on "who won, who lost," and failed to address the central policy issue under debate—namely, the impact of the bill on education and education reform. Intensifying the perplexity (for this writer in any event) at why the press ignored the education issue is the fact that the two most important of all the Supreme Court decisions on race in the last half century—Brown v. Board of Education and Griggs, which was, after all, the focus of the fight—both involved education as the central issue.

The most obvious explanation is that once the interest groups committed themselves to the proposed legislation, the media went along in support, being, as it is, philosophically more sympathetic to both the interest groups and the Democratic Congress than it was to the Bush administration. Thus, the mainstream media has no real interest in taking on, for instance, the National Education Association. In addition to being a major force in the NAACP—and a powerful force in the AFL-CIO, which in turn is a major financial backer of the NAACP—the NEA is, along with the NAACP, one of the foundation blocks of the Democratic Party. And the NEA has every interest in frustrating educational reform and thus a strong interest in preventing employers from playing a greater role in disciplining the public school system.

One of the most interesting aspects of the media coverage, however, was the avoidance of the educational issues by even the conservative press. Although Patrick Buchanan tried to make an issue during the primaries of President Bush's alleged signing of a "quota bill," neither he nor any other conservative commentator spent any time during the fight discussing the civil rights bill

generally, let alone the quota and educational issues specifically. These conservative commentators were, however, just as quick as the mainstream media to claim President Bush had caved in, once the bill was signed into law. Conservative commentators still take this view in the popular press. This is not just frustrating but ultimately pernicious, because it will not matter that the bill in fact permits employers to rely on educational achievement (and thus to risk an imbalanced work force) if they read the contrary in the public press. Accordingly, it becomes important to understand why not only the left but also the right constantly get it wrong.

The only suggestion that makes sense is that those conservatives who did not like President Bush found it in their interest to look for a way to criticize him after the bill's enactment, just as they found it in their interest to avoid applauding him when he successfully sustained the veto, against all odds, of the original legislation. These commentators, in other words, wanted to have quotas as a "wedge" issue for political purposes, just as the liberal commentators wanted quotas in fact even though neither could openly admit their real desire. Hence the convergence of interests. President Bush confounded both sides, however, and thus irritated both sides equally.

Taking quotas off the table was good policy, of course, but not good short-term politics. Quotas were an effective wedge issue for Reagan Democrats, and losing that issue probably meant losing some of them. Some conservative commentators were thus arguably right to see the bill signing as a political mistake. But if that is so, then some of those same commentators ought to balance the accounts by giving President Bush credit for trading the political issue in exchange for the policy victory of deregulating the restrictions on "incentivizing" educational achievement. They should acknowledge this, not as a Bush victory per se, but as a win for education deregulation, so that the business community can be adequately informed to get about the job of helping reform the public schools through their recruiting, hiring, and training programs. Otherwise many businesses will ask the high schools for much less in terms of performance and achievement than they are in reality entitled to.

Adequately explaining the deregulatory aspects of the 1991 Civil Rights Act would also close a chapter that has remained open on the Clarence Thomas confirmation fight. Does it really make sense that Congress would confirm an anti-quota Justice to the Supreme Court, and then within just weeks enact pro-quota legislation—overturning the Supreme Court's anti-quota decision? No, the Congress and the public, which Congress is supposed to represent, are not that fickle and inconsistent. The confirmation and the compromise bill were consistent in their rejection of quotas and their embrace of education. This double congressional rejection of quotas—never popular—may explain why

Justice Thomas was no more an issue in the presidential race than the civil rights bill itself.

Moreover, if it would be helpful to recognize more precisely what the 1991 bill does and does not do, it would be equally helpful to understand more fully the victory Justice Thomas also won against the AFL-CIO and the NAACP in the name of true educational opportunity for all disadvantaged. After all, quite aside from his views on quotas, Justice Thomas represents the ultimate triumph of school choice and the importance of educational quality in breaking the grip of abject poverty and hurdling existing cultural and social barriers to success.