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DISAMBIGUATING THE DISPARATE IMPACT CLAIM

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In Ricci v. DeStefano, Justice Scalia contended in a concurring opinion that the disparate impact claim may be unconstitutional. Justice Scalia’s assertions sound an alarm because commentators herald the opinion establishing the disparate impact doctrine – Griggs v. Duke Power Co. – as the most important civil rights decision behind Brown v. Board of Education. To date, the prevailing approach to responding to Justice Scalia’s contentions rests upon the same, implicit baselines underlying his assertions. Although not contained in the disparate impact claims’ elements, those baselines provide that the disparate impact doctrine exists to either ‘smoke out’ hidden discrimination or rectify the structural inequality resulting from centuries of de jure and de facto discrimination.

I argue that the origins of the disparate impact doctrine reveal another baseline proposition for the doctrine. Principally, the adoption of the business necessity prong of the doctrine reveals a concern with employment practices that contravene an established workplace governance process. This same concern exists in the present, as evidenced by the widespread efforts of employers to avow the values of fair and equitable processes in workplaces. Therefore, this article will demonstrate that a workplace governance baseline according fair and just procedures for workers exists in the modern employment context. Selection practices that distort fair procedures in the workplace contradict this normative baseline, and the disparate impact doctrine serves as a measure to remedy such procedural distortions. With this conceptualization of the reasons underlying the disparate impact doctrine, I provide an alternative basis for assessing the constitutionality of the doctrine and addressing Justice Scalia’s contentions.

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INTRODUCTION

Civil rights activists and legal scholars share the sentiment that Griggs v. Duke Power Co. is the most important case in employment discrimination law, and possibly in discrimination and equality law in general. Griggs is the seminal Supreme Court opinion that recognized the
disparate impact claim as a viable cause of action in civil rights law. This high acclaim for Griggs and the disparate impact doctrine stems from the theory’s effect in inducing employers to eradicate arbitrary barriers to equal employment opportunity.

Given the importance of the disparate impact doctrine, the Supreme Court’s decision in Ricci v. DeStefano, which examined the interface of the disparate treatment and disparate impact provisions of Title VII of the Civil Rights Act, proves critical to the continued viability of the doctrine. In particular, Justice Scalia’s challenge in his concurring opinion – in which he stated that the disparate impact claim may violate the Equal Protection Clause of the Constitution – portends an ominous reception for the doctrine on the horizon. Although the Court’s opinion in Ricci declined to review the constitutional issue raised by the parties, Justice Scalia tackled it robustly in his concurrence: “[w]hether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection?” As contended by Justice Scalia, Title VII requires an employer to effect race-based actions when it violates the disparate impact provisions of the statute. That is, “Title VII’s disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial reasons.” Justice Scalia deems this statutory compulsion unconstitutional; if the Equal Protection Clause prohibits the federal government from discriminating on the basis of race, then it would prohibit the government, via Title VII, from compelling employers to discriminate on the basis of race.

Justice Scalia’s concurrence does not explicitly reveal the background assumption upon which he bases his charge against the disparate impact doctrine. Traditionally, two rationales have been offered as alternate

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5 Ricci, 129 S. Ct. at 2682.
6 Id.
7 Id.
8 Id.
justifications for the disparate impact doctrine: first, it serves to “smoke out” hidden, intentional discrimination; or second, it serves to dismantle structural inequality in the workplace stemming from years of systemic discrimination against protected minorities. Justice Scalia rejected the first proposed justification because the disparate impact framework offers no good faith harbor for employers to assert that intentional discrimination was not the reason they adopted selection practices that have a disproportionate impact upon a protected group.\(^9\) Therefore, Justice Scalia’s attack focuses upon a conception of the disparate impact claim as resting upon the second rationale. Based upon that rationale, he assails the claim as a race-conscious measure that should be subject to the strictures of strict scrutiny because it purportedly doles out employment rewards on the basis of race.

Although I do not recommend an abandonment of the traditional rationales for the disparate impact doctrine, I propose an alternative rationale for the doctrine that views the disparate impact claim as a remedy for an employer’s violation of workplace procedural norms. Critically, this viewpoint of the workplace is reflected in the origins of the disparate impact doctrine, particularly in the origins of the business necessity defense. A review of these origins will demonstrate that the disparate impact claim rests upon the attempts by aggrieved employees to rectify an employer’s transgressions against a workplace governance regime. More critically, this article will portray that established workplace governance regimes pervade the modern employment context, and the disparate impact doctrine serves to remedy violations of this regime.

In effect, the modern workplace is viewed as an environment where particular values supposedly govern. After years of development, the predominant values instilled in the workplace include equality, fair treatment by managers, equitable allocation of rewards and promotions, and safe, healthy conditions. Although these workplace values may have been installed in workplaces as a bulwark against unionization or to comply with employment laws, many employers now embrace these values, and even go beyond them, as a form of self-regulation and to promote the goals of corporate citizenship.

The widespread adoption of these values by employers – as well as the commonly held belief that these values should be among the principles controlling the job environment – demonstrate that these values and principles evolved into background conditions by which employer activity

\(^9\) Id. at 2682-83.
is adjudged compliant by stakeholders. In this manner, these background conditions form baseline propositions that underlie the suppositions made by stakeholders and observers as to the propriety of employer action in the workplace. The baseline propositions essentially buttress a belief that the predominant form of workplace governance – although largely based on employer self-regulation of workplaces – communicates that employment decisions should adhere to a certain corpus of values largely embraced by the public, and any abridgment of these propositions subjects employers to particular sanctions for workplace violations.

These propositions forming the baseline of workplace governance in today’s workplaces all flow from well-established social science applications. Notably, these social science propositions reflect the recognition that employers should adhere to certain procedures in the workplace when dispensing rewards and benefits to their employees. Commentators and scholars have recognized this concern with proper procedural norms since the inception of the disparate impact claim and within social science literature concerned with discriminatory and unequal practices in workplaces. The disparate impact claim endeavors to hold employers accountable for procedural distortions that violate the baseline workplace governance regime. This article categorizes those procedural violations into four distinct faults: contravention of organizational and procedural justice imperatives; arbitrary selection practices; selection practices that facilitate stigma and status processes; and maintenance of ‘sticky floors,’ that is, conditions that delay the career advancement of women and minorities.

Therefore, I argue that the traditional rationales for the disparate impact doctrine do not reflect the only justifications underlying it. This conception of the disparate impact doctrine establishes a different background for the claim, and this background justification is amply supported by the original judicial history of the doctrine as well as social science literature regarding workplace hierarchies. I will demonstrate that the disparate impact claim remedies procedural violations committed in the workplace that violate established workplace governance principles. These procedural faults constitute violations of principles that reject imprecise measures of work productivity that engender stigma, inferior status, and delayed career advancement for members of protected groups disproportionately impacted by selection measures.\(^{10}\) With this proper conception of the doctrine, I endeavor to change the discussion about the justifications underlying the

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\(^{10}\) See, infra part IV.
disparate impact doctrine so as to contribute to the ensuing debate about the constitutionality of the measure.

In Part I of this article, I describe the origins of the disparate impact doctrine and the constitutional challenge presented by Justice Scalia’s concurrence in Ricci. In Part II, I analyze the origins of the business necessity defense to establish the contours of an alternative justification for the disparate impact doctrine. In Part III, I review the scholarship regarding baseline analysis so as to provide a theoretical framework for the thesis of this article. After establishing this framework, I identify a baseline set of workplace governance principles that underlie the origins of the disparate impact doctrine and still operate in the modern employment context. In Part IV, I analyze several, established social science insights that portray how the disparate impact claim remedies procedural distortions that violate the prevailing workplace governance norms in the modern context. Finally, in Part V, I rely upon the arguments presented in this article to directly critique Justice Scalia’s conceptualization of the disparate impact claim and provide an alternative conception that more accurately captures the objectives of the disparate impact remedy.

I. THE THREAT TO THE DISPARATE IMPACT DOCTRINE

A. Origins and Elements of the Disparate Impact Claim

Title VII’s disparate impact prohibition – which addresses employment practices that render a disproportionate, adverse effect on members of a protected group – emanated from the Supreme Court’s interpretation of the Civil Rights Act of 1964 in Griggs v. Duke Power Co.11 Congress codified the disparate impact provisions in the Civil Rights Act of 1991, which defines a prima facie, adverse impact violation as a showing that an employer uses “a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.”12 If a plaintiff establishes a prima facie violation, an employer may prove an affirmative defense by demonstrating that the challenged practice is “job related for the position in question and consistent with business necessity.”13 If the employer discharges its burden, a plaintiff may still prevail by demonstrating that the employer declined to adopt an alternative practice that occasioned less disparate impact and met the employer’s

13 Id.
needs.\textsuperscript{14}

Although the elements of the disparate impact claim are fairly established, commentators vacillate between two primary rationales for the existence of the claim. One conceptualization envisions the claim as a proof scheme designed to reveal hidden discrimination.\textsuperscript{15} Thus, this formulation is a subspecies of intentional discrimination: the elements of the claim serve as a mode of proof whereby use of a disproportionately harmful selection practice is evidence of discriminatory intent unless an employer demonstrates that the practice is job-related and consistent with business necessity.

The other primary rationale for the disparate impact doctrine depicts it as an effort to eradicate the structural inequality stemming from past discrimination and barriers in the workplace, including unequal educational opportunities.\textsuperscript{16} In this portrayal, the law tasks employers with shouldering some of the burden of societal discrimination. Employers must provide equal opportunity to their workers and avoid using selection practices that harm disadvantaged groups for fear of exacerbating the inequalities that resulted from societal discrimination.\textsuperscript{17} Increasingly, this rationale has tended to gain favor as the principal rationale underlying the disparate impact claim.\textsuperscript{18}

The perceived problem with the broad justification for the disparate impact claim – that it serves to address structural inequalities in the workplace – is that it incites the spectre of race-conscious relief considered anathema by some commentators. In essence, the argument ensues that efforts aimed at ameliorating structural inequalities in workplaces equate to measures calling for allocation of benefits or rewards on the basis of race, sex, etc.\textsuperscript{19} Of course, this concern that the disparate impact claim represents nothing more than a species of affirmative action accounts for its mixed reception during its history; many people harbor negative feelings about

\textsuperscript{14} 42 U.S.C. § 2000e-2(k)(1)(A)(ii) and (C).
\textsuperscript{16} See \textit{id}.
\textsuperscript{17} See Primus, \textit{supra} note 15, at 524.
\textsuperscript{18} See, e.g., Sullivan, \textit{supra} note 15, at 1524.
\textsuperscript{19} See Primus, \textit{supra} note 15, at 536-37.
race-conscious relief. Indeed, several Supreme Court justices over the years have sought to limit the reach of the disparate impact doctrine so as to avoid the imposition of “quota” systems in workplaces, and this interpretation of the doctrine led to its restricted construction in notable decisions.

B. The Ricci Concurrence and Its Challenge

The conflation of the disparate impact doctrine with affirmative action undergirds the challenged posed by Justice Scalia’s concurrence in Ricci. In Ricci, the City of New Haven, Connecticut, utilized written and oral examinations to promote firefighters into lieutenant and captain positions; the written exam accounted for 60 percent of an applicant’s score and the oral exam accounted for 40 percent. When the City endeavored to fill vacancies in its lieutenant and captain ranks, it hired a consultant, Industrial Organizational Solutions, Inc. (IOC), to create the written and oral exams and administer them to the candidates.

Of the 77 candidates who took the lieutenant examination, 34 passed, including 25 of 43 white candidates, 6 of 19 black candidates, and 3 of 15 Hispanic candidates. The City selected the top ten scorers to fill vacancies in the lieutenant position, and all ten selectees were white applicants. Of the 41 candidates who took the captain examination, 22 passed, including 16 of 25 white candidates, 3 of 8 black candidates, and 3 of 8 Hispanic

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20 A 2009 Quinnipiac poll provides that 55% of United States’ voters believe that affirmative action should be abolished, compared to 36% in favor of the measure, and even more refined, 70% of voters oppose giving racial groups a preference for government jobs and 74% oppose giving racial groups a preference for private sector jobs. QUINNIPIAC UNIVERSITY POLLING INSTITUTE, U.S. VOTERS DISAGREE 3-1 WITH SOTOMAYOR ON KEY CASE, QUINNIPIAC UNIVERSITY NATIONAL POLL FINDS; MOST SAY ABOLISH AFFIRMATIVE ACTION (2009), available at, http://www.quinnipiac.edu/institutes-and-centers/polling-institute/national/release-detail?ReleaseID=1307.

21 See, e.g., Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 993-94, 997 (1988) (“Allowing the evolution of disparate impact analysis to lead to [employer adoption of quotas] would be contrary to Congress’ clearly expressed intent, and it should not be the effect of our decision today.”); Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 652 (1989) (“[The Court of Appeals’ theory of a racially imbalanced workforce demonstrating a disparate impact] cannot be squared with our cases or with the goals behind the statute. . . . The only practicable option for many employers would be to adopt racial quotas . . .; this is a result that Congress expressly rejected in drafting Title VII.”).


23 Id.

24 Id. at 2666.

25 Id.
candidates. The City selected 9 candidates for promotion to captain, 7 white candidates and 2 Hispanic candidates.

Due to a concern that the exam disproportionately excluded black candidates from promotion to the officer positions, the Civil Service Board for the City declined to certify the results, and thus the City did not promote any candidates to the vacant lieutenant and captain positions. Citing the refusal to certify the exam results, seventeen white firefighters and one Hispanic firefighter sued the City and several individual defendants for race discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment, as enforced through 42 U.S.C. § 1983, and Title VII of the Civil Rights of 1964, as amended, 42 U.S.C. §§ 2000e-2(a). The district court granted summary judgment for the defendants, finding that their “motivation to avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent under Title VII,” and their actions did not result from racial animus in contravention of the Fourteenth Amendment’s Equal Protection Clause. The Second Circuit affirmed the district court’s ruling.

On appeal, a 5-4 majority of the Supreme Court reversed the lower courts’ ruling. Eschewing the constitutional issues, Justice Kennedy, writing for the majority, based his reversal on Title VII. Justice Kennedy ruled that absent a justification, the City intentionally discriminated because it rejected the test results due to the race of the higher scoring candidates. To justify the rejection of the test results – a desire to avoid disparate impact liability — Justice Kennedy held that the City must demonstrate by a strong basis in evidence that it will be subject to disparate impact liability.

Applying the strong-basis-in-evidence standard to the facts of the Ricci dispute, the majority ruled that the City possessed strong evidence regarding a violation of the first prong of the disparate impact standard: the challenged tests disproportionately affected black candidates pursuant to the Equal Employment Opportunity Commission’s 80 percent standard.

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26 Id.
27 Id.
28 Id. at 2666-71.
29 Id. at 2671.
30 Id. at 2671-72.
31 Id. at 2672.
32 Id. at 2673.
33 Id. at 2676, 2677.
34 Id. at 2678-79.
However, Justice Kennedy held that the City did not have strong evidence that the tests were not job related and consistent with business necessity, or that there existed alternative selection practices with less adverse impact. 35

More importantly for the purposes of this article, however, is the analysis in Justice Scalia’s concurring opinion. Although the majority opinion in Ricci avoided the constitutional issue raised by the parties, Justice Scalia tackled it robustly: “[w]hether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection?” 36 As posited by Justice Scalia, Title VII requires an employer to effect race-based actions when it violates the disparate impact provisions of the statute. 37 That is, “Title VII’s disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial reasons.” 38 Justice Scalia so characterizes the disparate impact provisions and then proceeds to deem them unconstitutional: if the Equal Protection Clause prohibits the federal government from discriminating on the basis of race, then surely it would prohibit the government, via Title VII, from compelling employers to discriminate on the basis of race. 39

Justice Scalia’s characterization rests partly upon the prevailing interpretation of the Equal Protection Clause. The Equal Protection Clause precludes public entities from taking unjustified action because of an individual’s race. 40 When such an entity uses a race conscious program to benefit a particular racial group, it essentially classifies the beneficiaries of the program by race. In 1995, the Supreme Court held “that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.” 41 Strict scrutiny demands that such classifications be “narrowly tailored measures

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35 Id. at 2678-81.
36 Id. at 2682.
37 Id.
38 Id.
39 Id.
40 The Fourteenth Amendment provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. Although the Fourteenth Amendment does not apply to the federal government, the Supreme Court has interpreted the Fifth Amendment’s due process clause—which does apply to the federal government—as incorporating the same equal protection principles embodied in the Fourteenth Amendment. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 217 (1995).
41 Id. at 227.
that further compelling governmental interests."\(^\text{42}\)

By casting the disparate impact doctrine solely as a remedial racial classification scheme, Justice Scalia leads the doctrine down a path to potential annihilation. Justice Scalia’s characterization of the doctrine subjects it to the Equal Protection Clause’s strict scrutiny framework. Some scholars have argued on that turf, based upon many of the same premises.\(^\text{43}\) Yet, that characterization is not the only approach. The predominant problem with Justice Scalia’s conceptualization is the foundation for his interpretation – he basically accepts the proposition that the justification for the disparate impact doctrine is the broad rationale described above, and yet he finds this rationale wanting with respect to its constitutional moorings. Thus, designation of the disparate impact doctrine as a means to eradicate structural inequality has led it down the path of annihilation.\(^\text{44}\)

\(^{42}\) Id.


\(^{44}\) Before launching head-on into the disparate impact challenge, I acknowledge the approach of scholar Susan Carle to examine the origins or foundational principles of the
In addition to finding ways of making the disparate impact doctrine’s broad rationale supportable, we should also examine other justifications for the claim that provide a basis for constitutionality. I propose viewing the doctrine as a means of remedying procedural violations by employers of workplace norms when those violations incur disproportionate harm upon a particular group. This conceptualization of the doctrine rests upon an alternative justification that is gleaned from the origins of the disparate impact claim.

II. THE ORIGINS OF THE DISPARATE IMPACT DOCTRINE AND THE BUSINESS NECESSITY DEFENSE

The alternative baseline rationale for the disparate impact doctrine emanates from the facts of Griggs and the cases relied upon to establish the business necessity defense in Griggs. As provided in Griggs, Duke Power established that employees seeking promotion to certain craft departments and jobs – which were expressly segregated by race in the years preceding Title VII – would need to have a high school diploma and achieve a satisfactory score on cognitive ability tests. The Supreme Court declared in its decision that Duke Power’s practices violated Title VII unless it could show that the selection requirements were job related, or rather, consistent with the company’s business necessity.

The initial formulation of the disparate impact doctrine envisioned it as a means of redressing the present effects of past discrimination, that is, the disparate impact doctrine served to address practices that were continuing the effects of intentional discrimination that existed before the passage of Title VII. As chronicled by several scholars – including Robert Belton, who was an attorney representing the plaintiffs in Griggs – Griggs reflected this approach. More importantly for our purposes, the scholars demonstrate that Quarles v. Phillip Morris, a case litigated by the NAACP

\footnotesize{disparate impact doctrine so as to aid in the determination whether it is constitutional. Carle, supra note 43, at 254-56. This step back to question some of the prevailing presumptions underlying the doctrine may reveal some insight into the claim that will alter the review of its constitutional moorings. Although I diverge from Professor Carle’s approach in this article, my analysis does not discredit her invaluable contribution to the issue of the disparate impact doctrine’s constitutionality.}

\footnotesize{45} 401 U.S. at 427-28.
\footnotesize{46}  Id. at 431.
\footnotesize{47}  See Belton, supra note 1, at 443-46; Selmi, supra note 1, at 715; Smith, supra note 1, at 173.
Legal Defense and Educational Fund that involved retroactive seniority, provided the foundation for the present-effects-of-past-discrimination theory.49

Yet, as indicated by Professor Belton, Quarles also originated the business necessity defense for disparate impact cases.50 Notably, Quarles itself relied upon another case for the business necessity defense: the Fifth Circuit’s decision in Whitfield v. United Steelworkers of America, Local No. 2708 in 1957.51 Whitfield actually involved a claim under federal labor relations law. In an effort to ameliorate segregated job lines in a workplace, the employer and the union agreed to permit black employees to obtain jobs in a craft line, yet they imposed a testing requirement on black employees to attain such positions and did not award them retroactive seniority. The employer and the union premised this requirement on the argument that incumbent Caucasian employees had to undergo extensive training to assume positions in the department. The black employees sued the employer and the union under the National Labor Relations Act and the Labor Management Relations Act for a failure of the duty to bargain fairly. The Fifth Circuit ruled that the testing requirement was mandated by the business necessity of the employer so as to ensure efficient operations.52

Whitfield reveals that this major component of the disparate impact claim – the business necessity defense – originated as a defense for an employer that failed to engage in a fair process in the workplace. The previous process for obtaining a position in the craft line did not involve a testing requirement, yet the process was altered to assess the candidacy of black employees. This altered process – which included the additional failure of the union to ensure a fair process via accomplishment of its bargaining duties – compelled a showing by the employer and the union that such alterations of the normal procedure were predicated on a business necessity.

Interestingly, the business necessity defense exists today in the NLRA context, and its origins as a specific NLRA defense arose during the same time period as the Whitfield decision.53 The NLRA’s business necessity

49 See Belton, supra note 1, at 443-46; Selmi, supra note 1, at 712-13.
50 Belton, supra note 1, at 445.
51 263 F.2d 546 (5th Cir. 1959).
52 Id. at 550.
53 See Jeffrey P. Chicoine. The Business Necessity Defense to Unilateral Changes in Working Conditions Under the Duty to Bargain in Good Faith, 8 LAB. LAW. 297 n.5 (1992) (citing an article published in 1964 that claims to have coined the phrase).
defense serves as an affirmative defense for employers who take unilateral action in contravention of a collective bargaining agreement. Therefore, the NLRA’s business necessity defense reflects the same concerns as the Whitfield decision’s invocation of the defense: the failure by an employer to adhere to a procedure.

The invocation of the business necessity defense in the NLRA context reflects an application of the notion of “industrial due process.” Scholars and commentators have described the workplace norms between an employer and a union in a unionized workplace as industrial due process, and it exhibits the notion that a collective bargaining arrangement provides certain procedural protections for employees. Although the business necessity defense serves as an affirmative defense for employers who violate such procedural protections by taking unilateral action, even if this breach is defensible a workplace governance violation occurred nonetheless.

This review of the disparate impact doctrine’s business necessity defense displays the contours of an alternative justification for the doctrine. As revealed, the justification coalesces into a focus upon employment selection practices that violate established workplace procedures. As will be portrayed in the next part, this justification represents a baseline proposition that underlies the disparate impact doctrine and buttresses its viability as a lawful remedy.

III. FORMULATING AN ALTERNATIVE BASELINE

The previous section revealed that the business necessity component of the disparate impact claim indicates an alternative justification for the disparate impact doctrine. This justification centers on the violation of workplace governance regimes and amounts to a baseline proposition for the disparate impact doctrine. This section will expound upon this alternative baseline for the disparate impact doctrine. Initially, I will review baseline analysis as explored in the context of formulating legal rules. I will then depict this alternative baseline for the disparate impact doctrine that focuses on workplace values and presage four common procedural violations of these values.

54 Id. at 298-99.
A. Baseline Analysis

At its core, baseline analysis serves to provide a background set of circumstances and assumptions upon which the propriety of legal rules are adjudged. Duncan Kennedy authored one of the early canonical works on baseline analysis with his critique of cost-benefit analysis.\(^{56}\) As argued by Kennedy, liberal economists sanction the use of cost-benefit analysis to ascertain the proper liability rules for a given set of circumstances.\(^{57}\) In this formulation, a liability standard is established by determining which rule would generate Pareto optimal efficiency, that is, conditions where the gains from a liability rule reach the greatest point of outweighing the losses from the rule.\(^{58}\)

Kennedy argues that the problem with using cost-benefit analysis resides in the valuation of externalities, those costs of an activity that are not reflected in the price of the activity because transaction costs between parties prevent the setting of such a price.\(^{59}\) The primary transaction cost in cost-benefit analysis is the offer-asking problem: the winners and losers in such bargain situations tend to value entitlements differently based upon which party enjoys the entitlement.\(^{60}\) Among the prescriptions for the offer-asking problem, Kennedy analyzes the winners-bribes-losers solution; the party that does not enjoy the entitlement should bribe the party suffering the externality to acquiesce to the offending activity.\(^{61}\)

As surmised, the analyst runs into a baseline problem because choosing which party should enjoy the entitlement corresponds to identifying the change in circumstances, which corresponds to deciding which party departed from a baseline set of conditions.\(^{62}\) One party’s argument that a change in circumstances merits state intervention via creation and enforcement of an entitlement runs counter to the opposing party’s argument that its activity is the mere state of nature, or status quo, and state intervention into those circumstances would effect a biased change.\(^{63}\) In

\(^{57}\) *Id.* at 390-91.
\(^{58}\) *Id.* at 391-92.
\(^{59}\) The transaction costs exist because the party levying the externality and the party suffering the externality face barriers to efficiently bargain a payment for the cost. *Id.* at 398.
\(^{60}\) *Id.* at 401-02.
\(^{61}\) *Id.* at 411-12.
\(^{62}\) *Id.* at 413.
\(^{63}\) *Id.* at 413-14.
this construction, picking the winners and losers – and thus establishing an entitlement -- involves a biased choice in favor of one party or the other.64

In a book review of Richard Epstein’s work regarding private property and eminent domain, Jeremy Paul critiqued Epstein’s conclusions by relying upon baseline analysis.65 As described by Paul, Epstein argues essentially that the common law protects – and therefore presupposes – property rights.66 More specifically, Epstein defines property entitlements as a pre-political, natural law-derived bundle of rights – to possession, use, and disposition of property – that are traditionally secured in the private domain by the common law.67 Epstein posits that Takings Clause jurisprudence should limit the power of eminent domain based upon this derivation of pre-political property rights.68

Paul counters that Epstein’s theory that private law derives from natural rights falters because Epstein’s supposed baseline is ephemeral.69 As an initial matter, Epstein posits a factual status quo vis-à-vis property rights that pre-exist government, and then he argues that this status quo deserves moral recognition.70 However, Paul identifies an ensuing dilemma: moral recognition of status quo conditions does not establish a set of unalterable legal rules to guide investors in their disposition of private property.71 Governments may identify utilitarian reasons why a prevailing set of property rules may override the moral recognition of status quo property rights.72 More fundamentally, “[c]hanges in the existing state of affairs either alter the legal rules or are themselves unprotected by them.”73 That is, a baseline of enforceable bundles of property rights does not exist or is open-ended because either party in a dispute may assert a moral basis for

64 Id. As an example set forth by Kennedy, in ascertaining whether a rule should be established that a landowner may burn leaves unless a neighbor objects, should the winner be the neighbor because it can secure state intervention to enjoin burning, or should the landowner argue that the baseline is a natural property right to burn leaves in which the state should not intervene. In this example, either the neighbor or the landowner would enjoy the entitlement and the losing party has to bribe the winner to acquiesce on its entitlement, yet choosing the winner results from choosing the baseline. Id. at 414.


66 Id. at 751-52.
67 Id. at 755-56.
68 Id.
69 Id. at 756.
70 Id. at 758.
71 Id.
72 Id.
73 Id. at 759.
recognition of its bundle of rights.\textsuperscript{74}

The most influential exposition of baseline analysis is Cass Sunstein’s retake on the legal landscape wrought by \textit{Lochner v. New York}.\textsuperscript{75} Although the received tradition posited that \textit{Lochner} was repudiated because it reflected the specter of judicial activism at the expense of deference to legislative bodies,\textsuperscript{76} Sunstein argues that analytic strands of \textit{Lochner}’s reasoning still pervades judicial reasoning. In particular, Sunstein describes the \textit{Lochner} majority’s conclusion that common law or status quo market ordering constituted baseline states of nature that commanded government intervention on a neutral basis; government measures to intervene into the natural conditions between actors needed to accord proper respect to the behavior of the actors and their natural entitlement.\textsuperscript{77} As explained by Sunstein, \textit{West Coast Hotel v. Parrish} rejects the \textit{Lochner} majority’s conclusion that common law ordering is a proper baseline.\textsuperscript{78} In essence, legal establishment of entitlement rules reflects a choice for one side or another, and thus is not neutral, and such non-neutral choices have been made even in the construction of the perceived ‘natural’ common law rules.\textsuperscript{79} Notwithstanding this rejection by \textit{West Coast Hotel}, Sunstein demonstrates that the \textit{Lochner} majority’s premise – that common law and status quo baselines require neutral modes of intervention by governmental forces – pervades several areas of modern constitutional doctrine.\textsuperscript{80}

Ward Farnsworth delineates the baseline approach to legal critique as indispensable for thinking about the law.\textsuperscript{81} In summarizing his insights regarding baseline analysis, Farnsworth identifies two aspects of the method. First, analysts must determine the “natural or normal state of affairs” – the status quo – so as to adjudge the propriety of intervening into such affairs.\textsuperscript{82} On a deeper level, however, the analyst must ascertain the

\textsuperscript{74} \textit{Id.} at 759-60. For example, the landowner who has labored to take advantage of an existing stream of light shining onto her property morally deserves protection of that ‘right’ as much as her neighbor who decides to build a structure on her property that would block the light. Therefore, choosing the ‘winner’ in such a dispute does not emanate from the recognition of some pre-political baseline or status quo that establishes concretely a set of enforceable rights. \textit{Id.}
\textsuperscript{76} \textit{Id.} at 874.
\textsuperscript{77} \textit{Id.} at 874, 879-81.
\textsuperscript{78} \textit{Id.} at 880-81.
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{Id.} at 883-902.
\textsuperscript{81} \textsc{ward farnsworth}, \textsc{the legal analyst: a toolkit for thinking about the law} 198-206 (2007).
\textsuperscript{82} \textit{Id.} at 198.
baseline set of conditions that renders intervention neutral. Yet Farnsworth acknowledges that this baseline problem is “more likely of the hopeless variety” because any intervention to establish legal entitlements would be non-neutral.\textsuperscript{83} Like Sunstein, Farnsworth describes several areas of constitutional and public law that raise baseline problems.\textsuperscript{84}

Baseline analysis is not solely confined to ascertaining the factual circumstances or conditions upon which the propriety of a law should be judged. More generally, baselines “define the normative starting points of legal analysis,”\textsuperscript{85} and Professors Beermann and Singer indentify four baseline categories: empirical assumptions used to evaluate regulatory regimes; social visions underlying common law property and contract principles; economic analyses and their attendant valuations; and assessments of legislative supremacy and judicial competence.\textsuperscript{86}

For example, the scholars argue that the prevailing, empirical baseline assumption for the at-will employment rule includes claims about how the social world operates, including beliefs about the motivations and competencies of social actors that render the at-will employment rule a rational and optimal provision to govern workplace relationships.\textsuperscript{87} The authors argue that these assumptions privilege the status quo and incorporate value choices, yet they may not be accurate and thus may represent constructed conceptions of a particular social order.\textsuperscript{88} If such empirical assumptions are refuted, then Beermann and Singer posit the adoption of an alternate baseline that more accurately reflects the motivations and competencies of actors within a particular social realm.\textsuperscript{89}

Indeed, the previously mentioned works on baseline analysis support such re-formulations of baselines. In rejecting obeisance to common law or status quo conditions as neutral circumstances in the social order, Sunstein nevertheless rejects approaches that follow the Holmes dissent in \textit{Lochner}, which abandons baselines altogether and resorts to majority consensus to adjudge the propriety of legal rules.\textsuperscript{90} As recognized by Sunstein, the Holmes approach leads to a failure in enforcement of constitutional

\textsuperscript{83} Id. at 198-99.
\textsuperscript{84} Id. at 199-205.
\textsuperscript{86} Id. at 916-17.
\textsuperscript{87} Id. at 919-21.
\textsuperscript{88} Id.
\textsuperscript{89} Id. at 927-28.
\textsuperscript{90} Sunstein, \textit{supra} note 75, at 903-906.
provisions that invite judicial use of baselines. Sunstein sanctions the development of new baselines based upon reasoned theories of justice, institutional roles, and interpretive principles derived from constitutional clauses. Likewise, Farnsworth argues that although some baselines may lend to preservation because they are convenient in providing the type of liberty or judicial competence desired as a society, such recognition as a matter of convenience rather than a “deeper reality” underscores the motivation to identify even more convenient baselines to replace traditional formulations.

The two traditional rationales underlying the disparate impact doctrine constitute alternate baseline propositions supporting creation and maintenance of the disparate impact claim. The hidden discrimination rationale and the eradication of structural discrimination rationale represent but two baseline propositions or assumptions. In the former, the disparate impact doctrine serves to address the proposition that employers do not adopt invalid selection practices having a disproportionate effect upon a protected group unless the employers are hiding a discriminatory motive, and in the latter, the legal doctrine functions as a policy prescription for the decades of exclusion from meaningful employment opportunities.

I approach the conception of the disparate impact doctrine with a third, alternate baseline proposition regarding the claim. This formulation of an alternate baseline actually harkens back to the traditional foundational propositions underlying the establishment of common law rules. In a well-regarded analysis set forth by legal scholar Melvin A. Eisenberg, he posits that common law legal reasoning involves the interplay of doctrinal propositions and social propositions. The interpretation of the disparate impact claim’s elements is not at issue in Justice Scalia’s assessment. Rather, Justice Scalia’s concurrence calls into play the social propositions underlying the disparate impact claim.

As explained by Eisenberg, the common law is buttressed by the invocation of social propositions. Social propositions come in various forms, yet three such propositions properly underlie common law rules:

91 Id.
92 Id. at 907-09.
93 Farnsworth, supra note 81, at 204.
95 Eisenberg (2007), supra note 94, at 83-84.
moral norms, which are moral standards rooted in aspirations for the community as a whole and have substantial support in the community; policies that are good for the community as a whole and have concomitant support; and experiential propositions, that is, those propositions supported by the weight of informed opinion within the social sciences.\textsuperscript{96} Therefore, in this approach a set of social propositions should be invoked as the \textit{reasons for} the disparate impact claim.\textsuperscript{97} In this conceptualization, identifying the baselines for the disparate impact doctrine corresponds to identifying the social propositions underlying the doctrine, and this undertaking is largely bereft of any guidance from Congress on this inquiry when it enacted the statute. Moreover, such consideration of social propositions necessarily arises when interpreting the constitutionality of a statute.

In my analysis, a set of baseline social propositions may differ as time progresses and courts interpret a statute in an evolved context. Therefore, my exposition of the baseline social propositions underlying the disparate impact doctrine should be considered as an extension to, and not a usurpation of, the prevailing two rationales for the disparate impact doctrine discussed previously. Furthermore, the first two rationales of the disparate impact doctrine discussed previously may be properly conceived as the social propositions of moral norms and policy prescriptions. That is, the rationale to address hidden discrimination may be interpreted as a moral norm proposition because it is aimed at the scourge of prejudice and bias. The rationale to eradicate the structural discrimination resulting from decades of systemic bias may be interpreted as a policy prescription reflecting society’s efforts to redress state-sanctioned exclusionary practices. As will be demonstrated in the following sections, my conceptualization of an alternate baseline largely relies upon experiential propositions.

I will impose one constraint on this endeavor to identify alternate baseline social propositions for the disparate impact claim. Even though my considerations maintain that the disparate impact doctrine does not require a showing of intentional discrimination, I impose a requirement of finding fault in the employer’s selection practice. As recognized by one scholar, Congress’s statutory codification of the disparate impact claim elements inculcates the understanding that an employer liable under its provisions is at fault -- has committed a wrong -- in such a manner as to

\textsuperscript{96} Id. at 82-83.
\textsuperscript{97} Id. at 83.
constitute discrimination against a group protected by Title VII. In fashioning baseline social propositions for maintenance of the disparate impact claim, I will adhere to Congress’s implicit guidance and hew baselines that reflect employer fault for the results of a selection practice.

B. The Primary Baseline Proposition: Violation of Workplace Governance Norms

Invoking the alternate baseline social proposition for the disparate impact claim harkens back to the review of the origins of the claim and the business necessity defense. With that review, the conditions, circumstances, and assumptions justifying an alternate baseline manifest. The review demonstrated that one of the primary baseline propositions underlying the disparate impact claim coalesces into an effort to rectify transgressions against established workplace governance values. Furthermore, the same baseline social proposition – that selection practices that violate workplace governance norms should be remedied – exists in the modern workplace in a different, but nevertheless enforceable, form.

As previously established, Whitfield reveals that a major component of the disparate impact claim – the business necessity defense – originated as a defense for an employer that failed to engage in a fair process in the workplace. The previous process for obtaining a position in the craft line did not involve a testing requirement -- as laid out in a collective bargaining agreement -- yet the process was altered to assess the candidacy of black employees. Thus, the disparate impact claim rests upon the attempts by aggrieved employees to rectify an employer’s transgressions against a normal procedure that existed within a workplace governance regime, that is, the principles and norms by which the employment relations would be handled between the employer and its employees. The same situation existed in the Griggs context: Duke Power had an established workplace governance regime for awarding positions in its craft lines, and the Supreme Court ruled that the company could only deviate from this regime – if such a deviation disproportionately harms black employees – when it could prove that it had a business necessity for doing do.

Therefore, Whitfield and Griggs demonstrate that a core component

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99 See, supra part II.
100 263 F.2d at 550.
101 Id.
102 401 U.S. at 433.
of the disparate impact doctrine – the business necessity defense – reflects a concern with an employer’s violation of workplace governance norms in a particular setting. This concern indicates a baseline social proposition for the disparate impact claim, namely that the claim serves to redress violations of workplace governance norms that engender a disproportionate impact upon a particular group. However, one major objection to the establishment of this baseline emanates from a key circumstance in the cases discussed in the previous section – the workplace governance norms arose in the context of a unionized workplace. Therefore, one may contend that this specialized context limits the application of the business necessity rationale to particularized circumstances and thus prevents invocation of a workplace governance framework as a baseline social proposition for all disparate impact disputes.

Contrary to such a conclusion, however, there exist governance regimes in non-unionized workplaces that may still be besmirched by failures to satisfy a business necessity rationale. That is, employer liability under the disparate impact doctrine may be conceptualized as a remedy for the violation of workplace governance norms in unionized and non-unionized workplaces that have a disparate effect upon a group protected by Title VII. In this manner, it is necessary to demonstrate a baseline social proposition regarding workplace governance norms that operate in the modern employment environment.

The origins of the prevailing workplace governance regime in the United States – which, as discussed later, may be phrased as internal labor administration or self-regulation – actually predate the advent of the collective bargaining regime wrought by the NLRA. As demonstrated in a seminal work by Sanford M. Jacoby, the organization of the modern workplace commences with the advent of personnel bureaucracy and management.

Prior to the development of personnel bureaucracy and management organization, in most nineteenth century factories salaried foremen made most of the decisions regarding the accomplishment of production tasks, including work methods, technical processes, and work organization. By the 1880s, the foremen’s power began to erode as more mechanized forms of production and other technological advances reduced the foremen’s authority over the production process. However, the foremen retained

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complete authority over employing and supervising labor.\textsuperscript{104}

As the manufacturing industry exploded in the early twentieth century, companies determined that they needed greater coordination and systemization in their factories rather than the decentralized system that permitted foremen and highly-skilled workers to manage production. This change resulted in the hiring of professional engineers to employ systematic management practices in workplaces. These innovations significantly reduced the autonomy of foremen and production initiatives were taken over by employees removed from the factory floor.\textsuperscript{105}

During the same period, Frederick Taylor’s scientific management principles led to the creation of planning departments that assumed foremen’s production responsibilities in factories.\textsuperscript{106} This period also produced the practice of personnel management.\textsuperscript{107} Although there existed an increase in the creation of personnel management and bureaucracy during World War I, the economic fluctuations of the 1920s dampened the desire to form powerful personnel departments. As a result, foremen largely retained their control over labor into the Depression era, especially as the pressures of economic collapse led many companies to curtail personnel management practices.\textsuperscript{108}

The passage of the National Industrial Recovery Act in 1933 spurred companies to substantially alter their personnel practices. To stem unfair competition among companies, boost purchasing power, and reduce unemployment, NIRA provided for a minimum wage, maximum hours, and collective bargaining. The mechanisms of NIRA provided for the creation of codes for each industry that encompassed the directives of NIRA. Therefore, companies increasingly saw the need for creating personnel departments and managers to face this new paradigm.\textsuperscript{109} The primary thrust of the personnel management strategy during this era focused upon restructuring employment policies and procedures, principally through centralization of such activities. However, these reforms were only instituted in a progressive minority, as most companies under the NIRA regime (which was ruled unconstitutional in 1935) continued to permit

\textsuperscript{104} Id. at 12-14.
\textsuperscript{105} Id. at 30-32.
\textsuperscript{106} Id. at 34-36.
\textsuperscript{107} Id. at 36.
\textsuperscript{108} Id. at 102, 129-34, 144-46, 164-66.
\textsuperscript{109} Id. at 166-67.
foremen to control personnel policies and practices.\textsuperscript{110}

The advent of personnel management took hold substantially after passage of the Wagner Act in 1935 and the Supreme Court’s decision upholding the constitutionality of the Act in 1937. Companies increasingly turned to personnel management as a means of addressing union activity.\textsuperscript{111} As the power of personnel departments increased, decisions regarding hiring, promotions, wage determination, and dismissal were centralized in personnel departments or subjected to stringent rules and procedures.\textsuperscript{112}

The increasing development of personnel management and bureaucracy eventually evolved into the establishment of internal labor administration – rather than competitive labor markets or collective bargaining regimes – as the predominant source of workplace governance. As described in a canonical book by Paul Weiler, internal labor administration, at first glance, represents the protection of a workforce from the competition of an external labor market.\textsuperscript{113} However, this structure involves several other characteristics. As argued by Weiler, employees prefer this form of workplace governance because their sense of personal identity, job satisfaction, and self-esteem generates a desire for the fair treatment envisioned as a core feature of internal labor administration.\textsuperscript{114} Although lifetime employment is not expected, workers do not object to the internal labor administration form of workplace governance because they want decisions regarding discharges or the awarding of promotions to reflect “the values of personal integrity, equality, and due process.”\textsuperscript{115}

As for the employer’s preference for a workplace governance regime based on internal labor administration, Weiler argues at the outset that the incentive to reduce recruitment and training costs compels adoption of an internal labor administration regime aimed at employee retention.\textsuperscript{116} Yet, the effort to motivate employees and instill workplace cooperation also induces employer maintenance of an internal labor administration regime.\textsuperscript{117}

\begin{flushleft}
\textsuperscript{110} \textit{Id.} at 172-73, 177.
\textsuperscript{111} \textit{Id.} at 179-83, 186.
\textsuperscript{112} \textit{Id.} at 191-92, 200-01.
\textsuperscript{113} \textsc{Paul C. Weiler, Governing the Workplace: The Future of Labor and Employment Law} 139-41 (1990).
\textsuperscript{114} \textit{Id.} at 143.
\textsuperscript{115} \textit{Id.} at 143-44.
\textsuperscript{116} \textit{Id.} at 144-47.
\textsuperscript{117} \textit{Id.} at 147-50.
\end{flushleft}
workforce perceptions that “individual employees are being treated arbitrarily and unfairly (treatment that is perceived as damaging even if administered to one’s fellow workers and friends, not only to oneself).”\(^\text{118}\) Furthermore, employer concern for a cooperative workplace encourages, in part, “the development of rules which limit supervisory arbitrariness [so as] to preserve morale.”\(^\text{119}\)

Although Weiler, as did Jacoby, attributes the rise of internal labor administration, personnel management, and bureaucracy to employers’ desire to avoid unionization of workplaces,\(^\text{120}\) he argues that the present-day impetus for maintenance of internal labor administration stems from circumstances where employers treat their workers humanely at the same time that employees expect more satisfying employment conditions.\(^\text{121}\) Thus, any employer that strays from this form of workplace governance places its success at peril.\(^\text{122}\) Therefore, as commonly taught in human resource management,\(^\text{123}\) employers sustain “a stable, trained, motivated, and cooperative team . . . only if it treats its work force in accordance with norms of behavior that exhibit respect for the employees as human beings.”\(^\text{124}\)

This baseline proposition of internal labor administration has not abated. As chronicled by Cynthia Estlund in her recent book on workplace governance, the still predominant mode of workplace governance is employer self-regulation.\(^\text{125}\) Partly as a response to the growth of employment regulatory laws (i.e., the Occupational Safety and Health Act) and individual employee rights (i.e., Title VII of the Civil Rights Act), employers have developed extensive, internal compliance mechanisms to avoid liability under these legal regimes.\(^\text{126}\) The by-products of these self-regulatory efforts include enhancement of “employee morale, longevity, and performance”; the impeding of unionization; and employer rationalization of discipline and monitoring of supervisory personnel.\(^\text{127}\) These results echo Weiler’s exposition of employer interest in efficient, internal labor

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\(^{118}\) Id. at 148.
\(^{119}\) Id. at 150 (emphasis in original).
\(^{120}\) Id. at 151.
\(^{121}\) Id.
\(^{122}\) Id. at 151-52.
\(^{123}\) Id. at 152.
\(^{124}\) Id.
\(^{125}\) Cynthia Estlund, Regoverning the Workplace: From Self-Regulation to Co-Regulation 15, 75, 83 (2010).
\(^{126}\) Id. at 6, 11, 17.
\(^{127}\) Id. at 84.
However, liability-avoidance is not the only objective underlying the use of self-regulation as a workplace governance model. Increasingly over the past few decades, employers’ adoption of internal compliance and labor administration structures reflects the assimilation of the public values underlying individual worker protections. Thus, self-regulation initiatives attempt to “internalize, tailor, and realize” the particular norms, of equality, fairness, safety, and other concerns in the workplace. Furthermore, some self-regulatory efforts – such as the adoption of workplace diversity and inclusion goals – serve strategic business objectives that respond to changing societal demographics. As such, these “efforts often have an organizational existence that is separate from legal compliance activities and often aspire to a more profound transformation of workplace culture.”

Finally, employer self-regulation also emanates from the desire to achieve corporate social responsibility. Firms engage in efforts to be model corporate citizens that commit to exceeding the mandate of workplace legal standards. The adoption of corporate social responsibility initiatives usually develop as a response to diverse stakeholders and constituencies (“worker and consumer advocates, community and civil rights groups, environmental and human rights activists, and their allies in the investor community”), and these initiatives may engender private enforcement procedures (i.e., “monitoring and reporting procedures”) to fulfill the commitments. As Estlund finds, employers “are ever more vocally and visibly proclaiming their commitment not only to compliance with legal demands, but also to worker rights, diversity and inclusiveness, and family friendliness, as well as human rights, community development, and environmental sustainability.”

Emerging from this foray into personnel management and bureaucracy, internal labor administration, and employer self-regulation – which all

128 Id. at 16, 76-75, 137.
129 Id. at 137.
130 Id. at 85.
131 Id.
132 Id. at 11-12, 93-97.
133 Id. at 12.
134 Id. at 93.
135 Id.
136 Id. at 96.
involve essentially the same mechanisms of employer efforts to govern a workplace – it should be clear that a predominant form of workplace governance coalesces into a largely uniform, baseline proposition for U.S. workplaces. In essence, the values and assumptions expressed in the old workplace governance model, although existent in a unionized workplace, developed increasingly to occupy its prominent position in the modern workplace. The prevailing workplace governance model reflects the commonly-held value that firms should treat employees with respect and equality, and avoid arbitrary practices that abridge norms of fair process and contribute to dispirited morale and cooperation.

This baseline social proposition – the governance regime prevalent in the modern workplace –also serves as the justification for the disparate impact doctrine. Just as the examination of Whitfield and Griggs revealed the possible baseline justification for the disparate impact claim as a measure to remedy an employer’s violation of workplace governance norms wrought by a collective bargaining regime, the values underlying the present workplace governance norms provide a basis for maintaining the disparate impact doctrine as a remedy for a particularized violation of those norms. That is, if an employer selection practice disproportionately impacts a protected group and runs afoul of the business necessity inquiry, then such practice violates the baseline social propositions underlying the workplace governance regime of self-regulation. Therefore, this baseline social proposition provides the reasons for maintaining the disparate impact doctrine.

A critical connection needs to be developed, however. There should exist an inquiry into the specific ways that a selection practice violating Title VII’s disparate impact provisions demonstrate a departure from the prevailing workplace government norms. Violation of the disparate impact elements by themselves cannot constitute the justification for maintenance of the disparate impact doctrine. Rather, some showing must be made that a selection practice that violates the job-relatedness and business necessity factor represents a disavowal of a norm within the workplace governance regime described in this section.

In the next part, I will demonstrate four different ways in which invalid selection practices violate the norm of fair procedural mechanisms embedded within the modern workplace governance regime. That is, the present-day, workplace governance principles instill the value that employment opportunities will be allocated in a fair and just manner, yet invalid selection procedures mar this objective and render employers at
fault for using such erroneous measures. Depiction of these four different procedural violations will serve as the necessary link connecting the disparate impact claim with the baseline establishment of a predominant workplace governance regime.

IV. THE DISPARATE IMPACT DOCTRINE: A MEANS TO REMEDY PROCEDURAL VIOLATIONS OF WORKPLACE VALUES

As stated in the previous section, the disparate impact doctrine serves as a means to remedy procedural violations of workplace governance norms. As will be demonstrated, these procedural violations reflect the effects that invalid selection practices have on the process of allocating rewards in the workplace. Thus, the disparate impact claim’s elements redress the different ways in which an erroneous practice departs from the workplace governance baseline of awarding job positions on the basis of merit.

The foregoing analysis will rely predominantly upon well-established studies and experiments by social scientists. As a result, the four procedural violations outlined below may themselves be viewed as baseline propositions. As portrayed previously, the social propositions underlying a legal rule – the reasons for a law, as stated by Eisenberg – may arise from experiential propositions, those propositions that are supported by the weight of informed opinion within the social sciences.\textsuperscript{137} Similarly, the exploration of baseline analysis revealed that one of the baseline categories is empirical assumptions, socially scientific facts in a certain context that merit imposition of particular legal rules.\textsuperscript{138} Therefore, although there exists an overarching workplace governance regime that acts as a baseline social proposition supporting the maintenance of the disparate impact claim, the four procedural violations outlined below reflect particular manifestations of the workplace governance baseline that represent more refined, experiential baselines themselves.

A. The First Procedural Violation: Selection Practices That Contravene Organizational and Procedural Justice Imperatives

The first procedural violation rectified by the disparate impact remedy involves the same rationale underlying the business necessity defense lodged in Whitfield. As reflected in the Whitfield decision, the business necessity defense originated as a means for employers to avoid the failure to adhere to a procedure fashioned within a collective bargaining, workplace

\textsuperscript{137} Eisenberg (2007), \textit{supra} note 94, at 82-83.
\textsuperscript{138} Beermann, \textit{supra} note 85, at 916.
governance regime.\textsuperscript{139}

In the same way, the business necessity defense for disparate impact claims reflects the same concerns: the employer’s deployment of a discriminatory selection practice violates the normal procedure in a workplace when the practice is considered to be unjust. This comparison is crystallized by the application of organizational justice theory to workplaces.\textsuperscript{140} Developed by industrial and organizational psychologists, organizational justice theories are concerned with the fairness of outcomes in organizations and recognizes justice and fairness as core values for enterprises.\textsuperscript{141} There exist two main components of the theory: distributive justice, which examines the fairness of both processes and outcomes, and procedural justice, which examines the fairness of the procedures used in generating the outcomes or how allocations decisions are made.\textsuperscript{142}

A perceived lack of organizational justice results in decreased organizational commitment, increased desires to leave, effects upon the psychological well-being of applicants, and effects upon post-hire attitudes and behavior.\textsuperscript{143} In particular, selection procedures may impact a person’s

\textsuperscript{139}263 F.2d at 550.

\textsuperscript{140}See, e.g., Stephen W. Gilliland, Effects of Procedural and Distributive Justice on Reactions to a Selection System, 79 J. APPL. PSYCH. 691 (1994). Gilliland’s conceptualization of procedural justice vis-à-vis selection procedures has generated an enormous body of scholarship and is considered the predominant foundation for studies in this area. Ann Marie Ryan & Robert E. Ployhart, Applicants’ Perceptions of Selection Procedures and Decisions: A Critical Review and Agenda for the Future, 26 J. MGMT. 565, 567-68 (2000). The other primary, foundational focus considers applicant attitudes or motivation on selection process performance, id., a topic which will be touched upon briefly in this section of the article.

\textsuperscript{141}Mary A. Konovsky, Understanding Procedural Justice and Its Impact on Business Organizations, 26 J. MGMT. 489, 490 (2000). The purveyors of this theory posit that this concept of fairness inures in organizations when the interests of management and workers coincide. Id. at 491. Nevertheless, even when the interests of managers and workers diverge, a regime of pseudo-fairness prevails. Id. Pseudo-fairness resembles fair behavior, yet its motives stem from management desire to maintain order and control, and thus outcomes under this regime may differ from that where fairness reigns.

\textsuperscript{142}Id. at 492; Gilliland, supra note 140, at 691. Although this article focuses upon the effects that selection procedures have upon applicants, the social science literature demonstrates that non-job-related procedures may adversely affect organizations as well. Setting aside the legal challenges that a company may face, unjust selection policies may deter qualified applicants from seeking employment with a company, thus harming the company’s efficiency and competitiveness. James W. Smither et al., Applicant Reactions to Selection Procedures, 46 PERSNL PSYCHOL. 49, 50, 70 (1993).

\textsuperscript{143}Gilliland, supra note 140, at 692-93. Gilliland generated these conclusions regarding post-process effects by reviewing previous studies, yet his experiment exhibited some of these effects and suggested further experiments to more concretely assess his other
self-efficacy and self-esteem to the point of negatively affecting job searches and work performance.\textsuperscript{144} and “[i]ndividuals who are treated unfairly in the selection process may act on this felt injustice by decreasing their work performance.”\textsuperscript{145} Whereas procedural fairness generates for employees increased job satisfaction, organizational commitment, and organizational citizenship values – which, of course, positively affect job performance and prospects – procedural unfairness generates the opposite results and employee retaliatory behavior against the organization.\textsuperscript{146} As reflected previously, candidate perceptions of the procedural justice underlying a selection practice are associated with organizational consequences such as applying for, accepting, and committing to, a job.\textsuperscript{147}

One of the distinct components of procedural justice is the formal characteristics – the job-relatedness – of a selection practice.\textsuperscript{148} As a result, the organizational justice literature partly focuses upon how the job-relatedness of a selection procedure affects the perceived outcome of the practice.\textsuperscript{149} Studies have demonstrated that the job-relatedness of a selection procedure engenders a sense among applicants – including rejected applicants – of procedural justice in the selection practice.\textsuperscript{150} A perceived lack of validity results in the opposite sense of procedural justice.\textsuperscript{151} In the same vein, negative outcomes in a prior selection process detrimentally influence performance on subsequent participation in the same process, such as taking a candidate test,\textsuperscript{152} and this dynamic is problematic when the test is invalid and had a disproportionate effect upon a group. Furthermore, perceptions that a process is unfair or procedurally unjust may lead to applicant withdrawal,\textsuperscript{153} and a candidate’s failure to realize an expectation of receiving a job opportunity results in a devaluing

hypotheses. \textit{Id.} at 697-700.  
\textsuperscript{144} \textit{Id.}  
\textsuperscript{145} \textit{Id.} at 693. Indeed, perceptions that a selection practice is not job-related and unfair “may lower motivation to perform well on a test.” Smither, \textit{supra} note 142, at 51.

or other procedure  
\textsuperscript{146} Konovsky, \textit{supra} note 141, at 492, 497-98.  
\textsuperscript{147} \textit{Id.} at 501.  
\textsuperscript{148} Gilliland, \textit{supra} note 140, at 692.  
\textsuperscript{149} \textit{Id.}  
\textsuperscript{150} \textit{Id.} at 692, 699  
\textsuperscript{151} \textit{Id.} at 692. Indeed, candidates who perceive that a test lacks facial validity – that is, the belief that a test “on its face” does not properly measure future job performance – tend to underperform on the test. Robert E. Ployhart et al., \textit{Understanding Racial Differences on Cognitive Ability Tests in Selection Contexts: An Integration of Stereotype Threat and Applicant Reactions Research}, \textit{16 HUM. PERFORM.} \textit{231}, 235-36 (2003).  
\textsuperscript{152} Ryan, \textit{supra} note 140, at 592, 601.  
\textsuperscript{153} \textit{Id.} at 593.
of the self and the organization when the candidate perceives the failure to be unjust.\textsuperscript{154} Such circumstances arise when a selection practice is not job related.

Therefore, the disparate impact doctrine is intimately linked with the concerns of procedural justice in the workplace. The failure by an employer to follow established procedural norms – i.e., to use a job-related selection practice that is consistent with business necessity – offends the sense of organizational justice, particularly procedural justice, and may result in deleterious consequences within the workplace.

As demonstrated in this section, a lack of procedural justice in a selection process engenders harm for those rejected by the process over and above the loss of the particular job opportunity. Rejected candidates develop lower self-esteem, and if the process is not job related – and thus is procedurally unfair -- rejected candidates experience decreased work performance; retaliatory intent against the employer; decreased organizational commitment and citizenship; and avoidance of, and withdrawal from, future opportunities that involve the same selection process.\textsuperscript{155} Of course, these harms fall disproportionately upon a protected group when the selection practice lodges an adverse impact upon the group. Hence, these consequences demonstrate that the origins of the disparate impact claim – particularly the business necessity defense -- still have resonance in the modern workplace. The claim reflects a concern with the harm that may arise from the lack of procedural justice in a workplace that disproportionately affects particular groups.

\textbf{B. The Second Procedural Violation: Arbitrary Selection Practices}

This section reviews the adequacy of a selection procedure based upon

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{154}] \textit{Id.} at 596. Although Ryan and Ployhart caution in their article that there exists a paucity of evidence demonstrating a linkage between candidate perceptions of a selection process and candidate behavior, \textit{id.} at 593, 601, 602, they cite some studies showing a causal relationship between perception and behavior, such as withdrawing from a test based on process unfairness. \textit{Id.} at 593. Most of the authors’ critique reflects that participants in studies report their intentions to take certain actions because of their perceptions regarding the fairness of a selection process, yet there exist few studies that follow up the behavior actually undertaken by participants. \textit{Id.} at 592-93. Ryan and Ployhart still find value in the studies because they “contribute to our understanding of what influences perceptions, how perceptions change over the course of the selection process, and whether justice theory propositions are applicable to the selection context.” \textit{Id.} at 593.

\item[\textsuperscript{155}] Gilliland, \textit{supra} note 140, at 692-93; Konovsky, \textit{supra} note 141, at 492, 497-98; Ryan, \textit{supra} note 140, at 592, 593, 596, 601-02.
\end{enumerate}
\end{footnotesize}
well-established inquiries in disparate impact litigation. In particular, disparate impact litigation seeks to determine whether a selection practice is an arbitrary procedure or a job-related measure that satisfies the strictures of business necessity. This review regarding the proscription against arbitrary selection practices is addressed by the Supreme Court in its decision in *Connecticut v. Teal*.156

1. Teal and the Bar to Arbitrary Selection Procedures

In *Teal*, the Court ruled that the disparate impact doctrine applies to the individual components of a selection process.157 Thus, an employer may not escape the disparate impact liability stemming from a discriminatory component by demonstrating that its selection practice did not result in a disparate impact at the bottom line, that is, in the overall demographic proportions at the end of a selection practice.158 This feature was codified in the 1991 Civil Rights Act.159

On initial analysis, *Teal* led some commentators to remark that the disparate impact claim could not rest upon the justification seeking eradication of structural barriers to equality.160 As advanced by those analysts, the holding of *Teal* would discourage the use of affirmative action programs because employers would not be able to rely upon the litigation reward of such programs, that is, the bottom line defense.161 However, this concern did not seem to sway jurists from the belief that the disparate impact claim still coerces employers to mete out race conscious relief.162

The predominant feature of *Teal*, however, is the reasoning by the Court. The Court ruled that the disparate impact claim applies to the individual components of a selection practice because it exists to eradicate arbitrary barriers to equal employment opportunity.163 The Court

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157 457 U.S. at 451-53.
158 Id.
161 Id.
envisioned arbitrary practices to encompass measures that inaccurately adduce the productivity of employees. Employers are liable under the disparate impact doctrine when they use a process that improperly assesses candidates’ productivity. “Title VII strives to achieve equality of opportunity by rooting out ‘artificial, arbitrary, and unnecessary’ employer-created barriers to professional development that have a discriminatory impact upon individuals.”

This rationale for the disparate impact doctrine has been trumpeted by scholars in the past. They argue that the disparate impact doctrine serves to ensure that rewards are distributed on the basis of actual merit, ability, and productivity rather than arbitrary distinctions. To wit, “disparate impact may be understood as a form of governmental regulation intended to enhance the nation’s labor productivity by fostering the creation and implementation of personnel practices which will insure that business accurately evaluates its applicants and employees.” In this conceptualization, the disparate impact remedy provides protection for all workers who are adversely affected by practices that do not accurately assess future performance.

2. The Arbitrariness of Invalid Selection Practices

The facets of arbitrariness addressed by the disparate impact doctrine include not only the unfairness of practices that improperly assess merit, ability, and productivity. They also envelop the propensity of such practices to predict a subgroup characteristic. In the latest industrial and organizational psychology literature regarding disparate impact theory, scholars posit that the primary factors in cognitive ability tests that disproportionately impact subgroups are irrelevant to job performance. That is, “using cognitive tests for hiring purposes will result, on average, in a substantial reduction in black hires, for reasons having nothing to do with job performance.” Indeed, even if cognitive tests validly predict job performance...

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164 Id.
166 Greenberger, supra note 165, at 258.
167 Norton, supra note 165, at 250.
performance, “test score differences are substantially larger than differences in job performance . . . and other criteria typically used to evaluate the success of selection decisions.”

As depicted, the predictive ability of cognitive tests is moderate; furthermore, scholars posit that tests that only measure particular aspects of intelligence – such as reading comprehension, vocabulary, or basic math -- are not predictive of job performance; they counsel the use of a wide array of cognitive tests for such ends. Moreover, intelligence tests may not actually measure intelligence; rather they may measure the amount of deficiency or contamination in the measures of intelligence, such as the effect that a test’s cultural or linguistic bias, or even previous experience and test-taking ability, may have on test takers. In this respect, subgroup differences on such tests may reflect variance in the measures, not variance in intelligence. Based upon these findings, scholars in the field recommend the deployment of selection practices that use multiple variables to predict future job performance, not just the singular variable of cognitive tests.

Thus, there exists plenty of room for holding that certain selection practices – especially the cognitive tests in prevalent use because of the

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169 Kevin R. Murphy, How a Broader Definition of the Criterion Domain Changes Our Thinking About Adverse Impact, in OUTTZ, supra note 168, at 137, 138. As Murphy demonstrates, “black-white differences in mean test scores are typically two to three times as large as differences in job performance,” and thus the “use of cognitive tests in selection results in a much more substantial culling of minority applicants than can be justified on the basis of differences in the performance of black, Hispanic, and white applicants.” Id. at 138.

170 Harold W. Goldstein et al., Revisiting g: Intelligence, Adverse Impact, and Personnel Selection, in OUTTZ, supra note 168, at 118.

171 Id. at 119.

172 Murphy, supra note 169, at 139-40; see also Keith Hattrup & Brandon G. Roberts, What Are the Criteria for Adverse Impact, in OUTTZ, supra note 168, at 166 (“[V]alidity in the prediction of individual job performance is maximized through multivariate symmetry . . . by which predictors are identified that best match criterion dimensions in terms of specificity/generality and predictive efficiency.”); Wayne F. Cascio et al., Validity, Utility, and Adverse Impact: Practical Implications from 30 Years of Data, in OUTTZ, supra note 168, at 273 (“[M]ore recent testing programs to identify new police officers have incorporated a variety of assessment tools, including cognitive abilities, biographical data, and personality scales. Our data indicate that by increasing the scope of abilities that the tests measure, and therefore the breadth of the relevant criterion space, there are corresponding improvements in validity and reductions in adverse impact.”).

173 EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FACT SHEET ON EMPLOYMENT TESTS AND SELECTION PROCEDURES (“There has been an increase in employment testing due in part to post 9-11 security concerns as well as concerns about workplace violence, safety, and liability. In addition, the large-scale adoption of online job applications has motivated employers to seek efficient ways to screen large numbers of online applicants in
supposed link between intelligence and job performance – are relied upon arbitrarily because their subgroup variances do not reflect the relative job performances of those subgroups. In such a situation, the disparate impact claim serves to ameliorate the harm caused by employer use of such an arbitrary process.

C. The Third Procedural Violation: Selection Practices That Facilitate Stigma and Status Creation and Enhancement

The use of invalid selection practices in the workplace also engenders another problem for protected groups – they facilitate the stigma and status inferiority of individuals in those groups.

1. Rejected Applicants Fall Prey to Stigmatizing Processes

Although the social science scholarship regarding prejudice was initiated by G.W. Allport,174 and the social science scholarship regarding stigma was initiated by Erving Goffman,175 a seminal work recently demonstrated the theoretical link between the two concepts and essentially determined that they involved similar processes.176 For purposes of this article, stigma is defined as “the situation of [an] individual who is disqualified from full social acceptance,” and thus is “reduced in our minds . . . to a tainted, discounted” person.177 Prejudice is defined as “antipathy based upon a faulty and inflexible generalization” which is “directed toward a group as a whole, or toward an individual because he is a member of that group.”178

In particular, the scholars determined that convergent cognitive, emotional, and social processes result in the creation of stigma and

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177 GOFFMAN, supra note 175, at 3.
178 ALLPORT, supra note 174, at 9.
prejudice. As posited by scholars, human beings naturally categorize and label individuals and groups, a phenomenon that serves as the foundation for stigma and prejudice, and one connective label that stigmatizes groups is the characteristic of competence, that is, the capacity of individuals to accomplish shared goals. In essence, the process of categorizing groups on the basis of race, gender, or ethnicity brings along with it the process of labeling the groups with stereotypes, which is a necessary component of stigmatization. The stereotype label ascribed to a group varies on scales of warmth or competence, and negative outcomes tend to reinforce the placement of a group in the designation as incompetent.

It should be evident how this process of stigmatization operates in the context of administering selection practices. In the workplace, the disproportionate impact of a particular selection practice threatens to label the affected group with a stereotype of incompetence. If the selection practice is invalid, this process of stigmatizing the group is unjust, and the disparate impact claim serves to temper such a stigmatizing process where the selection practice is invalid.

179 Phelan, supra note 176, at 364 (“social processes involved in enacting and maintaining stigma and prejudice are more alike than different once a human characteristic gets selected as a basis for stigma and prejudice”).
180 Id. at 359 (“categories and labels [are] the cognitive bedrock for prejudice and stigma”); Bruce G. Link & Jo C. Phelan, Conceptualizing Stigma, 27 ANN. REV. SOCIOl. 363, 367, 368 (2001).
182 Id.; Link, supra note 180, at 368-69.
183 Fiske, supra note 181, at 898-99.
184 Indeed, the condition of negative selection may engender behavioral attitudes by employers that stigmatize the rejected candidates as less qualified for any number of opportunities. Heike Solga, ‘Stigmatization by Negative Selection’: Explaining Less Educated People’s Decreasing Employment Opportunities, 18 EUR. SOC. REV. 159 (2002).
Notably, this stigmatization of incompetence by itself merits the recognition of a claim to ameliorate the offending process. The same type of stigmatization has been trumpeted as a harm in the affirmative action context and in the context of other race-conscious remedy challenges. A seminal work by a legal scholar has termed this phenomenon the return of expressive harm jurisprudence within Supreme Court doctrine, which deems actionable harmful messages perpetrated by government action that do not comport with constitutional values. In essence, the courts have returned to recognizing that governmental action that causes stigmatic harm by expressing a message of inferiority regarding a particular group may be remedied by constitutional provisions. In the same vein, the foregoing analysis posits that selection practices that engender stigmatic harm for a particular group by expressing a message of incompetence should run afoul of the disparate impact doctrine when such practices are not job related and

consistent with business necessity. For example, the selection test in Ricci — whose results did not generate any viable black candidates for the captain and lieutenant positions\textsuperscript{188} — stigmatized black firefighters in New Haven as incompetent vis-à-vis those higher positions, and this stigmatization is unlawful under the disparate impact doctrine when the test is not job related and consistent with business necessity because it would not properly measure future productivity and performance.

2. Rejected Applicants Fall Prey to Inferior Status Expectations

Expressive harm – or stigma -- is not the only injury suffered by the rejected candidates of a selection practice. An expansive and well-tested field of social psychology — expectation states theory – demonstrates that more subtle injuries result from rejection in the workplace. As a foundational observation, the theory posits that in group settings – such as workplaces or teams in workplaces – the group members form expectations about the quality of each others’ contributions to an assigned task.\textsuperscript{189} These expectations – called performance expectation states — generate the emergence of status hierarchies within group settings.\textsuperscript{190}

A formal subtheory within expectation states theory is status characteristics theory (SCT), which holds that certain status characteristics – such as gender, race, etc. – are translated by group members into performance expectations states.\textsuperscript{191} The theory demonstrates that groups imbue status characteristics with a certain status worth and level of competence,\textsuperscript{192} and of course, traditionally disadvantaged groups receive inferior assessments of their status characteristics, especially vis-à-vis their competence.\textsuperscript{193} Importantly, higher status workers receive more rewards in

\textsuperscript{188} 129 S. Ct. at 2666.


\textsuperscript{190} Id.

\textsuperscript{191} Id. at 32-34.

\textsuperscript{192} Cecilia Ridgeway, The Social Construction of Status Value: Gender and Other Nominal Characteristics, 70 SOC. FORCES 367, 368-69 (1991). Ridgeway discerns that status expectations generated in one group setting transfer to other interactions, which therefore generalizes the expectations for people possessing the same status characteristics. Id. at 375-77; see also Correll, supra note 189, at 33. This diffusion of status expectations contributes to societal, consensus-building regarding the competence attributed to particular status characteristics. Ridgeway, supra herein this note, at 375-77.

\textsuperscript{193} Correll, supra note 189, at 32-34; see also Michael J. Lovaglia & Jeffrey W. Lucas, Group Processes and Individual Scores on Standardized Tests: A Theoretical Note and Basis for Investigation, 2 CURRENT RES. SOC. PSYCH. 1, 5 (1997).
group settings, such as higher income, than lower status workers.\textsuperscript{194}

SCT maintains that in group settings the events that transpire serve to either confirm or deny the status level of subgroups with a particular status characteristic.\textsuperscript{195} Indeed, studies demonstrate that the unequal distribution of valued rewards – such as job promotions – generates performance expectations, and thus status hierarchies, for actors in group settings.\textsuperscript{196} This generation of unequal rewards combines with status characteristics to create aggregate performance expectations/status hierarchies for members of particular subgroups, with higher statuses commanding respect, deference, and influence in the group setting.\textsuperscript{197}

Thus, a selection practice lodging a disproportionate impact upon a subgroup with a status characteristic results in a lower status for those individuals who exhibit the status characteristic and fail the selection practice. In turn, inferior status within these groups results in lesser opportunities to lead, lesser rewards, less assignments, etc.\textsuperscript{198} Therefore, selection practices that have a disparate impact upon a subgroup tend to reinforce the negative expectations associated with a status characteristic, and this harm is unjust, and illegal, when it emanates from an invalid selection practice and harms a group protected by Title VII and the disparate impact claim.\textsuperscript{199}

It remains important to recognize that these circumstances resulting in the formation of status hierarchies are conceptualized as social processes, that is, status organizing processes that arise from the interaction between individuals.\textsuperscript{200} As such, this conceptualization corresponds to the theme of this article regarding actions by employers that deleteriously affect processes within the workplace. As countenanced, when these effects coalesce to constitute a violation of the disparate impact doctrine, then

\textsuperscript{194} David Melamed, Deriving Equity from Expectations: A Cross-Cultural Evaluation, 41 SOC. SCI. RES. 170, 173 (2012).
\textsuperscript{195} Joseph Berger et al., Status Organizing Processes, 6 ANN. REV. SOC. 479, 480-81 (1980).
\textsuperscript{196} Correll, supra note 189, at 38.
\textsuperscript{197} Id.
\textsuperscript{198} Id. Even stigma theory recognizes that status creation is an important feature of stigma processes. See, e.g., Link, supra note 180, at 367, 370.
\textsuperscript{199} Status characteristics theory and expectation states theory “have been subjected to rigorous empirical evaluation, which has generated considerable evidence in support of the theory,” Correll, supra note 189, at 36. Therefore, the insights generated by the theories are well-supported by numerous studies, and thus the harm resulting from the status organizing process is not a product of speculation.
\textsuperscript{200} Berger, supra note 195, at 481.
employers may be held liable for such transgressions.

D. The Fourth Procedural Violation: Maintenance of ‘Sticky Floors’

The economic theory of statistical discrimination provides another available construct to analyze the procedural failings that the disparate impact doctrine addresses. Statistical discrimination theory posits that discrimination in the workplace does not result predominantly from animus or bias; it primarily emanates from a lack of information as to how individual employees from particular groups will perform their job duties. Due to the lack of such information, the theory holds that decision makers will rely upon average assumptions about a group to assess the potential productivity of members within that group. Indeed, even if two groups are initially identically skilled, an employer’s use of race or gender as a proxy for productivity will result in higher barriers for assignment to better-paying jobs; these additional barriers lower group members’ incentives to invest in the skills needed for the better-paying opportunities, which in turn reinforces the employer’s initial inducement to use race or gender as a proxy for productivity.

As reflected above, statistical discrimination models provide that employers often use race or gender as a proxy in making decisions about the productivity of workers. A more recent statistical discrimination model extends the analysis to examine how divergent precision in skill signals affect career advancement for member of different racial or gender groups. As set forth in this model, the imprecision by certain groups in signaling possession of requisite job skills “will cause profit maximizing firms to discriminate by requiring more positive skill signals in order to hire/promote members of one group to [higher-level jobs] than members of the other group.” Therefore, instead of race or gender directly serving as the proxy in the model of statistical discrimination, the imprecise signal, which is correlated with race or gender, serves as the proxy for productivity.

202 Phelps, supra note 201, at 659.
204 David Bjerk, Glass Ceilings or Sticky Floors?: Statistical Discrimination in a Dynamic Model of Hiring and Promotion, 118 ECON. J. 961 (2008).
205 Id. at 963.
As a result of such imprecision, there will be a delay in members of the subgroup attaining higher positions of authority. This phenomenon is termed “sticky floors,” and it serves as a basis for explaining the lack of minorities and women at the higher echelons of an organization. That is, as posited by this model minorities do not bump up against a glass ceiling – i.e., face intentional or structural discrimination -- when they attempt to reach the higher positions in a company. Rather, minorities and women are stuck at the lower echelons of companies because employers have not properly assessed their productivity skills due to some imprecise method of assessing such skills. Members of such disadvantaged groups “face a ‘sticky floor’ in the sense that they face greater hurdles than [members of other groups] with respect to being promoted” into higher-level jobs, and “[s]uch delays early on may cause many [of the disadvantaged] workers not to have sufficient time to develop the success record at mid-level jobs required from promotion to the top jobs in the economy.”

This same concept of “sticky floors” concretely explains the results of imprecise measures of productivity. In the model, the author provided that imprecision in skill signaling may be reflected in the failure by decision-making employees in one group to accurately assess skills of members in other groups, such as when male superiors assess ideas from female subordinates less precisely because of gender differences in communication styles, or when white employers may find it more difficult to assess the educational achievements of black candidates because they were attained at predominantly black schools. In the same manner, an invalid, non-job related selection practice constitutes an imprecise measure of productivity, and when such a practice disproportionately harms a particular group it creates the conditions for the ‘sticky floors’ theorized in the model. Therefore, the disparate impact claim serves to prevent disproportionate, “sticky floor” conditions in workplaces.

Again, the application of statistical discrimination insights to the disparate impact claim highlights the claim’s utility in enforcing modern workplace governance goals by addressing procedural failings. Use of a non-job related selection practice that adversely impacts a protected group subjects the group to “sticky floor” conditions, and such conditions represent a procedural failing that contravenes the dictates of modern workplace governance principles.
V. DISAMBIGUATING THE DISPARATE IMPACT CLAIM: REMEDYING IMPRECISE SIGNALS OF PRODUCTIVITY THAT STIGMATIZE A GROUP

The foregoing analyses recount the procedural violations underlying employer use of discriminatory selection practices that are not job related. As revealed, the formation of these procedural violations rests upon experiential propositions gleaned from well-established social science disciplines. Because of this pedigree of experiential propositions, these putative procedural violations represent an incursion upon the delineated baseline of workplace governance principles.

As described previously, the modern workplace encapsulates certain governance principles that include respect, equality, and fair process for workers. The origins of the disparate impact doctrine -- in particular its business necessity prong -- demonstrate a concern with practices that violate a workplace governance regime of fair process and respect for established procedural norms. The procedural violations potentially wrought by selection practices in the modern employment context compel the continued use of the disparate impact claim to vindicate the prevailing workplace governance norms. A disavowal of the doctrine risks an impingement upon an established and well-accepted baseline of fair process and procedures in the workplace.

The harm that may be inflicted by such procedural transgressions of the workplace governance baseline is well-studied. Scientific evidence demonstrates that exposure to procedurally-related, psychosocial risk factors in the workplace -- such as low procedural justice, low relational justice, and a high effort-reward imbalance -- increases the risk of developing stress-related mental, emotional, and physical disorders.\(^\text{210}\) Indeed, the level of workplace fairness for employees has been positively linked to the level of satisfaction customers exhibit to the service provided by employees.\(^\text{211}\) This psychosocial literature demonstrates that the marring of procedural expectations in the employment relationship harms both employees and employers.\(^\text{212}\)

\(^{210}\) K. Nieuwenhuijsen, et al., *Psychosocial Work Environment and Stress-Related Disorders, a Systematic Review*, 60 OCCUP. MED. 277, 281, 284-85 (2010). Effort-reward imbalance refers to “an experienced imbalance between high effort spent at work and low reward received,” and relational justice refers to “whether the treatment of workers by supervisors is fair, polite and considerate.” *Id.* at 278.


\(^{212}\) See *id.*; Mika Kivimäki et al., *Effort-Reward Imbalance, Procedural Justice and...*
Thus, the disparate impact doctrine represents an effort to address the myriad injuries – to employees and, as revealed, employers – that may result from the absence of fair process in the workplace. Therefore, in the first instance one may adduce the harm resulting from an arbitrary selection practice as those injuries connected to violating the baseline of fair process. The second order of harm caused by such procedural distortions emanates from the disproportionate impact the infraction levies upon members of particular subgroups.

This disambiguation of the rationale underlying the disparate impact doctrine serves to rebut Justice Scalia’s conceptualization of the claim in *Ricci*. Contrary to Justice Scalia’s description, the proper model of the disparate impact doctrine is not a scale where the employer places a finger to tip the measure in favor of one group or another. The proper model depicts a situation where the employer uses a scale that systematically favors the members of one group over another, and, critically, the scale is faulty because it does not accurately measure the contributions of members of particular groups.

Justice Scalia’s conception of the disparate impact claim describes a process where an unfettered market operates; knowledge, skills, and abilities are distributed among people and the employer passively decides, based upon a view of the scales, the appropriate judgment in a given situation. Affixing the disparate impact compliance regime upon this market -- that is, classifying the employees by race and placing a thumb on the scales -- represents a discriminatory intervention into the market that the government may not compel pursuant to Fourteenth Amendment Equal Protection Clause jurisprudence.

Contrary to Justice Scalia, the disparate impact claim does not fashion a market distortion. Rather, the employer distorts the market by using a selection practice that is a better predictor of race than job performance.213

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213 See Outtz, supra note 168, at 55 (“[U]sing cognitive tests for hiring purposes will result, on average, in a substantial reduction in black hires, for reasons having nothing to do with job performance.”) (emphasis in original); Murphy, supra note 168, at 137, 138 (“[T]est score differences are substantially larger than differences in job performance . . . and other criteria typically used to evaluate the success of selection decisions.”).
The selection mechanism imprecisely measures job performance, yet it disproportionately excludes candidates on the basis of race. Use of such a device constitutes an unwarranted intervention into the market that justifies the use of the disparate impact claim to correct the distortion.

Use of such an arbitrary selection practice is even more invidious when it disproportionately disadvantages members of a particular group. Our nation’s commitment to equality may not require equal achievement, but it does demand an equality of opportunity for individuals to participate in one of the fundamental venues in our society. Clearly, this goal underlying the disparate impact doctrine does not incite the broad-based, structural discrimination rationale discussed earlier. Indeed, scholars and courts have determined that the disparate impact doctrine’s protections extend to arbitrary practices that disproportionately exclude Caucasian males from job opportunities. The disparate impact doctrine – oft-cited as one of the most important developments in the law of equality – serves as a mechanism to ensure equality and fair process for all workers. Such a critical piece of our society’s commitment to giving everyone a fair shot and making sure everyone plays by the same rules should not be cast aside based upon ambiguous formulations of its rationales and objectives.

CONCLUSION

I endeavored in this article to present an alternative conception of the disparate impact doctrine that differed from the traditional rationales for the doctrine. As recounted in the article, the traditional rationales for the doctrine led us to this current situation in which the continued viability of the doctrine is at issue. As we gird ourselves for the impending constitutional challenge to the disparate impact doctrine that is sure to come within the next few years, I pray that we may be able to present the rationales for the disparate impact doctrine in their proper light. We should focus upon the effects outlined in this article – the process distortions engendered by employer use of a non-job related selection practice – to support maintenance of the disparate impact doctrine as a valuable measure in the ongoing effort to ensure equal opportunity in our workplaces.

In this way, the constitutionality of the disparate impact claim under the

Equal Protection Clause should be manifest. In fact, an Equal Protection challenge is not warranted given this disambiguation of the disparate impact doctrine. As recounted earlier, Whitfield -- the case recognized as the origin of the business necessity defense -- involved a NLRA challenge to an employer’s decision to alter the method of awarding positions in a particular department. The alteration in the process disproportionately affected black employees, and thus they legally challenged this procedural violation that was agreed to by the union presiding in that workplace. The black employees suing for this violation of the collective bargaining governance regime did not ask its employer to separate them out by race and ‘place a finger’ on the scale to tip it in their favor. Thus, the unfair labor charge lodged in Whitfield cannot be challenged on the basis that it compels an employer to classify its employees by race.

The NLRA did not compel the employer in Whitfield to classify its employees by race. The Act merely directed the employer to enforce the dictates of the prevailing workplace governance regime unless it had an enforceable business necessity to deviate from the regime. As stated, the employer undertook the initial action that represented a procedural fault and resulted in a disproportionate classification and segregation of its workforce. By the same token, Title VII’s disparate impact remedy merely directs employers to follow the workplace governance principles now established as a laudable baseline for all firms, and it serves to hold those employers accountable for violations of those principles that disproportionately affect members of a particular group. In this conception, the employer erects the classification and segregation of its employees by using a selection practice; the disparate impact remedy simply holds the employer to task for the classification unless it comports with the prevailing workplace governance baseline.