A Productivity Approach to Disparate Impact and the Civil Rights Act of 1991

Steven Greenberger, DePaul University
A Productivity Approach to Disparate Impact and the Civil Rights Act of 1991

FROM the time when the first African survivors of the dread Middle Passage began their forced transformation into African-Americans as they emerged from the holds of slave ships upon the shores of a new world, the fundamental social, political and, therefore, legal dilemma of the American experience has been race. An ugly compromise that labeled African-Americans as three-fifths human was necessary to constitute the nation. We have been wrestling with the implications of that Faustian bargain ever since.

In the middle of the nineteenth century the original constitutional compromise unraveled and we went to war with each other over the question of race, the only time we have ever done so. In the era of Reconstruction, which followed the Civil War, slavery was abolished, and the ideal of equality for all people articulated in the Declaration of Independence was incorporated into the Constitution, but the race question did not disappear. Instead, the rights of the newly freed slaves were gradually but systematically eviscerated
under the doctrine of "separate but equal" and under the southern black codes to the point where they all but vanished.6

In the latter half of this century the United States once again confronted the issue of racial equality. Largely in response to the moral imperative of the civil rights movement, we reconstructed ourselves a second time. Remarkably, this "Second Reconstruction,"7 embodied in and then to a considerable degree engendered by federal civil rights law, undeniably succeeded beyond anything which might reasonably have been expected in light of our history. There emerged an unshakable societal consensus that overt racial discrimination is wrong and, in many spheres of life, should be illegal.8 Indeed, even the public expression of racially insensitive comments will now likely subject the speaker to censure, or worse.9

This fundamental change in prevailing attitudes concerning the unacceptability of discrimination is no small triumph. Yet, despite this newfound consensus, we have not as yet arrived at "the end of history" insofar as our racial dilemma is concerned.10 On the con-

---

6 The leading Supreme Court decision upholding the constitutionality of the separate but equal doctrine is, of course, Plessy v. Ferguson, 163 U.S. 537 (1896). Interestingly, while the Supreme Court at the turn of the century was willing to uphold segregation in streetcars in Plessy, it is less well known that the Court also struck down a variety of racist laws in other settings. See ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992).


8 But see RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1991) (arguing that antidiscrimination laws are economically inefficient and should be abolished).

9 Perhaps the two most publicized incidents of adverse consequences befalling those who have made racially insensitive remarks in public in recent years have occurred in major league baseball. In 1987, the Los Angeles Dodgers fired a long-time executive, Al Campanis, over comments he made questioning the managerial ability of African-Americans. See, e.g., Dodgers Fire Campanis Over Racial Furor, CHICAGO TRIB., APR. 9, 1987, at C1; Charles Farell, Study: Little Progress for Blacks in Baseball, WASH. POST, OCT. 8, 1988, at D4. More recently, the owner of the Cincinnati Reds, Marge Schott, was suspended from running the team for a year because of racial slurs that she made. See, e.g., Reds' Fans Looking Beyond Controversy, N.Y. TIMES, DEC. 10, 1993, at B16; Schott Says There's No Racism, N.Y. TIMES, FEB. 12, 1993, at B13.

10 See FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992). Fukuyama uses the phrase "the end of history" to refer to the collapse of communism in the former Soviet Union and the consequent end of the Cold War. Recent events in the Persian Gulf, the former Yugoslavia and elsewhere suggest, however, that although the contest between the United States and the Soviet Union which predominantly
Disparate Impact and the Civil Rights Act of 1991

trary, the widespread elimination of facially discriminatory practices, significant though it has been, has served also to highlight the profound disagreement over the meaning and manner of achieving equality which still divides us. We are now in something of a "postmodern" period in race relations. Jim Crow is a memory, but we are profoundly at odds over what more, if anything, must or should be done.

In no arena has the debate over equality been engaged more contentiously than in the workplace. This is hardly surprising. Most of us work in order to live, and our standard of living and sense of self-worth are determined by the work we are able to do. Anything which limits employment options, whether by restricting our opportunities or expanding someone else's at our expense, is a matter of deep concern. In addition, regulations designed to promote equality in employment, if unduly burdensome, risk rendering American enterprises less competitive in the increasingly global economy, ultimately reducing employment possibilities for Americans of all colors.

The central challenge of fair employment law has been and is to give practical content to our commitment to equality on the job. This requires articulating an understanding of what equality for African-Americans requires—and perhaps permits—in light of the sometimes antithetical interests of employers in maximizing profits and of whites in not being discriminated against themselves.

Some of that exposition is already to be found in federal positive employment discrimination law. Thus, one element of equality, which Congress explicitly endorsed when it passed Title VII of the Civil Rights Act of 1964, is unassailable: minorities may not be intentionally disfavored by employer actions undertaken against them because of their race. At the other end of the spectrum, it is shaped the course of world events since the conclusion of the Second World War is (permanently?) over, conflict as an element of human affairs is still with us.

As a philosophical matter, the guarantee of equal opportunity to sell one's labor and to choose one's work represents the final triumph over slavery which, although it restricts freedom in many ways, has as its raison d'être the exaction of forced labor.


Section 703(a)(1) of Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . ." 42 U.S.C. § 2000e-2(a)(1) (1988).
less clear, but still generally true that, except in certain limited circumstances, minorities are not to be explicitly favored by actions initiated solely to benefit them.¹⁵

Between the principle of nondiscrimination on the one hand and the unacceptability of unfettered racial preferences on the other lies the terrain of employment practices, neutral on their face, which, because of our legacy of racism, have the consequence of disfavoring minorities at a greater rate than whites, even though they are not adopted intentionally for that purpose. Because their use is so widespread, the effect of these practices upon the allocation of employment opportunities is enormous, and their status under the law is profoundly important.¹⁶

Congress did not explicitly address in Title VII the lawfulness of neutral selection devices which disproportionately exclude minorities. The Supreme Court held in 1971 in *Griggs v. Duke Power Co.*¹⁷ that so-called "disparate impact" claims are in fact cognizable. But eighteen years later, in *Wards Cove Packing Co. v. Atonio*,¹⁸ a Court driven by a different conception of workplace equality so drastically curtailed the circumstances under which disparate impact claims could be made out as to overrule *Griggs sub silentio.*¹⁹

The Civil Rights Act of 1991 (the "Act")²⁰ was enacted, in part, to clarify the status of disparate impact doctrine.²¹ The Act for the

---

¹⁵ It is true, of course, that employers may adopt affirmative action plans under Title VII which benefit minorities notwithstanding that the antidiscrimination provision of the statute protects members of all races from discriminatory treatment, including whites. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). The circumstances under which an employer may adopt an affirmative action plan and the degree of impact the plan may have upon whites are not, however, unlimited. Although the topic of affirmative action in employment is a matter of considerable complexity and beyond the scope of this article, it is clear that even the Supreme Court's decisions under Title VII upholding affirmative action are narrowly drafted and require that a plan be carefully tailored so as not to unduly limit the opportunities of whites, especially incumbent employees. See, e.g., *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

¹⁶ See *Epstein, supra* note 8, at 205.


¹⁹ The *Wards Cove* case is treated at length in part II.D, *infra*.


²¹ The Civil Rights Act of 1991 was primarily a response to a series of decisions rendered by the Supreme Court during its 1988-1989 term which substantially limited the reach of Title VII and 42 U.S.C. § 1981, a Reconstruction-era statute enacted as part of the Civil Rights Act of 1870. Aside from *Wards Cove*, those decisions included *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (limiting the reach of section
Disparate Impact and the Civil Rights Act of 1991

first time grants formal legislative recognition to the impact principle and reverses some aspects of the Supreme Court's decision in *Wards Cove*. On the most significant questions before them, however, the definition of disparate impact and the defenses available to an employer once such an impact is established, Congress and the President papered over their disagreements in an unilluminating compromise. Thus, while the Act confirms the viability of disparate impact as a method of proving a violation of Title VII, it still leaves largely unresolved what the impact principle is to mean in practice.

This statutory void will necessarily force the courts to consider the meaning and scope of impact law once again. But if the political process has proven unable wholly to harmonize the competing concerns of minorities, business, and whites, and perforce has left the adjustment of those concerns to the judiciary, where are the courts to turn for guidance? The answer, I believe, lies in the explanation of a theory of disparate impact, different in emphasis from those which have been advanced previously.

Disparate impact has been understood most often as a measure of redistributive justice designed to correct for past racism. The goal has been seen as the elimination of practices which perpetuate the effects of historic discrimination in order that the concentration of minorities on the job will approximate their representation in the relevant population of available workers. Viewed only as a means to redress racial injustice via the reallocation of more desirable jobs to minorities, however, disparate impact starts to sound suspi-

1981 to discrimination in the formation of an employment contract but not its performance, contrary to the unanimous view of the four courts of appeals which had previously passed on the issue); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that proof of an employer's discriminatory motive is not enough to prove intentional discrimination under Title VII if the employer proves it would have made the same decision even in the absence of the discriminatory motive); Lorance v. AT&T Technologies, 490 U.S. 900 (1989) (holding that the period for filing a Title VII charge begins when an employment policy is adopted rather than when it is applied); Martin v. Wilks, 490 U.S. 755 (1989) (permitting challenges to Title VII consent decrees by disgruntled whites after the decrees have already been approved by a court). The Civil Rights Act of 1991 reverses the result in all of the above decisions, and a number of older decisions as well. It also, *inter alia*, provides for jury trials and expands the remedies available under Title VII to include compensatory and punitive damages. The provisions and history of the Act are discussed in detail in Reginald C. Govan, *Framing Issues and Acquiring Codes: An Overview of the Legislative Sojourn of the Civil Rights Act of 1991*, 41 DePaul L. Rev. 1057 (1992).

22 See infra notes 176-226 and accompanying text.
23 Id.
ciously like a naked racial preference. And whatever the soundness of the arguments in their favor, such preferences are, and are likely to remain, unacceptable to many.

The thrust of this article is that disparate impact may be justified on a different, less controversial premise. I argue that 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 ensure that business accurately evaluates its applicants and employees. The key question in a disparate impact case on this account is not whether a selection device tends to exclude minorities, although scrutiny of the efficacy of a selection device is triggered by a showing that it has some racially exclusionary effect. Rather, the central inquiry should be whether the device demonstrably assesses labor productivity. So long as it does, its use should be permissible, even if it excludes minorities in significant numbers. If it does not, then it should be banned, even if its effect upon minority employment opportunities is inconsequential.

I develop this thesis in four parts. I begin in Part I with a discussion of the history of disparate impact doctrine. I then discuss its treatment in the Civil Rights Act of 1991 in Part II, identifying the significant open issues which still remain. Part III lays out what I call a "productivity approach" to disparate impact in detail. I contend, in brief, that disparate impact law may be usefully understood as a requirement that business adopt efficient personnel practices. Understood in this way, I argue that the law will serve simultaneously to spur competitiveness in American enterprises and to foster workplace equality in a manner broadly acceptable to the nation as a whole. I end in Part IV by describing how the approach should be applied to resolve a variety of the issues left open under the new civil rights statute.


26 Surveys of popular attitudes in recent years consistently indicate that whites remain overwhelmingly opposed to racial preferences for minorities. The results of several of those surveys are discussed in Peter A. Brown, Ms. Quota: White Women and the Civil Rights Act, NEW REPUBLIC, Apr. 15, 1991, at 18. See also Richard Morin & Lynne Duke, Prejudice is in the Eye of the Beholder, Poll Indicates, WASH. POST, Mar. 8, 1992, at A24.
I

THE LAW OF DISPARATE IMPACT


1. Griggs as Statutory Interpretation

Disparate impact law is almost entirely the handiwork of the Supreme Court.\(^2^7\) The Court created the doctrine in its first and most important decision construing Title VII, *Griggs v. Duke Power Co.*\(^2^8\)

The Supreme Court held unanimously in *Griggs* that Title VII bars the use of neutral selection devices which disproportionately exclude minorities unless the devices can be justified as "related to job performance" or their use is a "business necessity."\(^2^9\) The Court opined that the statute prescribes "not only overt discrimination but also practices that are fair in form, but discriminatory in operation."\(^3^0\) The Court's decisions in *Griggs* and its progeny, especially as they describe the defenses to an impact claim, are explicitly codified in the purposes section of the new Act.\(^3^1\) They are thus now not only precedent, but statutory law. They accordingly warrant a considered review.

The facts in *Griggs* are straightforward. The Duke Power Co. operated a power plant in North Carolina where it openly discriminated against African-Americans. They were restricted to the so-called "labor" department, consisting of the least desirable jobs with the lowest wages, a typical pattern in the pre-Title VII era. On the day it became subject to the command of Title VII, Duke Power theoretically opened all of its jobs to everyone. Simultaneously, however, it imposed a high school graduation requirement upon employees seeking to transfer from labor to another department. It also required new employees desiring jobs in all but the labor de-

\(^{2^7}\) It is remarkable, if explicable, that the body of impact law was articulated by the courts over a period of two decades without formal congressional approval. Congress was apparently content to defer to the judiciary rather than engage in a divisive debate over race relations of the type which ultimately occurred when it finally addressed the concept of disparate impact in the Civil Rights Act of 1991. Even if one perceives the development of the law during that time as satisfactory, it might still be asked whether the abdication of responsibility by the legislative branch over an area of such fundamental importance in the life of the body politic is a good thing.

\(^{2^8}\) 401 U.S. 424 (1971).

\(^{2^9}\) Id. at 431.

\(^{3^0}\) Id.

partment to post a score near the national median for high school graduates on two general intelligence tests.\textsuperscript{32}

The consequence of these requirements was predictable given the social reality at the time. African-Americans graduated from high school far less often than whites.\textsuperscript{33} Suffering from the lingering effects of an inferior segregated educational system, their performance on the tests was comparatively even worse.\textsuperscript{34} Duke Power’s use of the educational and testing criteria thus served to continue to confine African-Americans to the same dead-end jobs to which the company had always relegated them.

A group of African-Americans who did not possess the newly mandated credentials sued. The district court, affirmed by the court of appeals, found that, despite its history of segregation, Duke Power did not adopt the criteria with the intent to discriminate.\textsuperscript{35} In light of the company’s implementation of the criteria the very day it first faced Title VII liability, that finding was, to say the least, suspect. Whether persuaded by other record evidence of the company’s good faith,\textsuperscript{36} viewing itself bound not to reverse a factual finding entered by a trial court,\textsuperscript{37} or anxious not to moot the momentous issue before it, the Supreme Court nevertheless accepted the district court’s finding as true. The Court was thus squarely faced with a Title VII challenge to the lawfulness of Duke Power’s selection criteria premised solely upon their exclusionary effect.

The task before the Court was at least nominally one of statutory interpretation. As such, the Court’s relative lack of attention to the language of Title VII is noteworthy. The Court asserted that:

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face and even neutral in terms of intent, cannot be maintained if they operate to “freeze” the status quo of prior discriminatory employment practices.\textsuperscript{38}

\textsuperscript{32} Griggs, 401 U.S. at 426-28.
\textsuperscript{33} Id. at 430 n.6.
\textsuperscript{34} Id.
\textsuperscript{35} Id. at 428.
\textsuperscript{36} The Supreme Court observed that Duke Power had adopted “special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training.” Id. at 432.
\textsuperscript{38} Griggs, 401 U.S. at 429-30.
The language of the statute, however, is anything but "plain" on the issue of disparate impact. It is, rather, silent. The operative prohibitory language, contained in section 703(a), provides:

It shall be an unlawful employment practice for an employer -

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

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.\footnote{39} 39 U.S.C. § 2000e-2(a) (1988).

The term "discriminate" as it appears in section 703 is not defined there or anywhere else in the statute.

On its face, the first prohibition, contained in section 703(a)(1), seems to bar only those employer actions animated by an illicit motivation: employers are prohibited from acting against individuals because of their membership in one or more of the enumerated protected categories. Adverse decisions made for any other reason, such as a desire to improve the general quality of the work force, do not trigger liability under the provision. Section 703(a)(1) has, in fact, been interpreted in precisely this manner.\footnote{40} It thus serves as the statutory source of the "disparate treatment," or intent-based branch of Title VII jurisprudence, but lends no support to the argument that the effects of a decision alone may render it unlawful.\footnote{41} 41 Id. Disparate treatment cases, which are predicated upon allegations of intentional discrimination, may be either individual or systematic. The Supreme Court sanctioned the bringing of systematic disparate treatment actions, sometimes referred to as "pattern and practice" cases, in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

What, then, of section 703(a)(2)? The Supreme Court quoted the section, without elaboration, in a footnote at the end of the first paragraph of the opinion in which it described the question presented by the writ of certiorari. But nowhere in the opinion did the Court attempt to parse the provision's text. Nor, aside from its cryptic footnote, did the Court even assert that it was the second section of 703(a) upon which it was relying.

As a matter of semantics, there are arguments both for and
against the conclusion that section 703(a)(2) embodies the disparate impact theory. On the pro side, once the first part of section 703(a) is read as a prohibition of intentional discrimination, interpreting the second part as reaching the same conduct renders that latter part redundant. And one of the many things Karl Llewellyn taught us decades ago about reading statutes is that the law abhors a redundancy.42

Second, section 703(a)(2) speaks in terms of an employer's attempts to "limit, segregate, or classify" its employees in such a way as to "adversely affect" them because of their protected characteristics. This doesn't sound like intentional discrimination; it sounds like disparate impact.

Finally, there are a number of other provisions in the statute which make no sense unless Title VII is read to recognize impact theory. The statute creates a safe harbor for employers who discriminate on a variety of facially neutral grounds, including rewarding seniority and merit,43 preferring veterans,44 excluding Communists45 and, most importantly in Griggs, relying upon professionally developed ability tests.46 If Title VII reaches only intentional discrimination, these provisions, too, are superfluous.47

On the other side of the equation, section 703(a)(2) contains the same "because of" language as section 703(a)(1). While it is possible to understand those words to mean causation in the sense of an act which has the result of bringing about an effect irrespective of purpose, an implication of motivational causation seems more natural. There is also something to be said for reading the identical

43 Section 703(h) of Title VII provides in part that "[i]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system ... ." 42 U.S.C. § 2000e-2(h) (1988).
44 Section 712 of Title VII provides that "[n]othing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans." 42 U.S.C. § 2000e-11 (1988).
45 Section 703(f) of Title VII provides that an employment practice is not unlawful if taken "with respect to an individual who is a member of the Communist Party of the United States [or other Communist organization]." 42 U.S.C. § 2000e-2(f) (1988).
46 Section 703(h) of Title VII provides that it is not unlawful for an employer "to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(h) (1988).
Disparate Impact and the Civil Rights Act of 1991

phrase in the two sections consistently, or at least for thinking that Congress would not likely have used the same words as the key to describing two entirely different approaches to liability.\(^{48}\)

Moreover, the "limit, segregate, or classify" conduct outlined in section 703(a)(2) can be seen as merely illustrative of the basic prohibition on discrimination contained in section 703(a)(1). On this view, Congress simply wanted to make it doubly clear that intentional discrimination should stop. Similarly, the safe harbor provisions to protect the use of the particular neutral devices described above were arguably included in the statute because Congress feared that the Supreme Court might "misread" the statute in precisely the manner it did in Griggs.

On the whole, then, the text of the statute is ambiguous. The next source a court would usually turn to as aid in statutory construction is legislative history.\(^{49}\) But the Supreme Court paid only slightly more attention to the views members of Congress expressed as they debated Title VII than it did to the text. This is probably because, on balance, the legislative history suggests that Congress did not intend Title VII to reach employer actions that are not discriminatorily motivated.

There was no explicit discussion of disparate impact as a distinct form of discrimination in the debate over Title VII. Congress was principally occupied with stopping employers from mistreating minorities out of racial animus, problem enough to solve in 1964. There was little recognition that eradicating discrimination might require something more than a simple cessation of purposeful disadvantaging.

The one place where there was an implicit discussion of something like disparate impact theory was in the context of testing. Congress included a provision in Title VII authorizing the use of "professionally developed" employment tests. Section 703(h) provides in part:

nor shall it be an unlawful employment practice for an employer to give and act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.\(^{50}\)

\(^{48}\) See Llewellyn, supra note 42, at 404.

\(^{49}\) The role of legislative history as a tool in interpreting statutes has become very controversial in recent years. See infra note 64 and accompanying text.

Duke Power argued to the Supreme Court in *Griggs* that its administration of general intelligence tests was sanctioned by section 703(h). The Supreme Court disagreed. In the Court's view, neutral tests which disproportionately exclude minorities are used to discriminate within the meaning of the provision unless the tests assess applicants' fitness for the job. Determining the correctness of the Court's conclusion requires a retracing of how section 703(h) found its way into the statute.

As it considered Title VII, Congress was abuzz over a decision just rendered by a hearing examiner in Illinois under the state fair employment law in a case entitled *Myart v. Motorola Co.* Motorola required satisfactory performance by prospective employees on a standard ability test much like those at issue in *Griggs*. The hearing officer found the test ran afoul of Illinois law because it did "not lend itself to equal opportunity to qualify for hitherto culturally deprived and disadvantaged groups." In other words, the test was unlawful because it disproportionately excluded minorities even though there was no showing that it was adopted for that purpose.

The *Myart* decision was uniformly condemned by legislators on both sides of the aisle as an unwarranted interference with employer prerogatives. Indeed, some of the bill's staunchest proponents went to considerable lengths to assure their colleagues that Title VII would not permit such a result. Wary of those assurances, Senator John Tower of Texas, who originally expressed concern about the *Myart* decision in the Senate debate, went further. He introduced an amendment to the bill to make sure Title VII would not be interpreted like the Illinois statute in *Myart*.

As Senator Tower originally submitted his amendment it read as follows:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to give any professionally developed ability test to any individual seeking employment or being considered for promotion or transfer, or to

---

51 *Griggs*, 401 U.S. at 433.
52 *Id.* at 436.
54 110 CONG. REC. 5664 (1964).
56 See Epstein, supra note 8, at 189-90.
act in reliance upon the results of any such test given to such individual, if —

(1) in the case of any individual who is seeking employment with such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise involved, and such test is given to all individuals seeking similar employment with such employer without regard to the individual's race, color, religion, sex, or national origin, or

(2) in the case of any individual who is an employee of such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his promotion or transfer within such business or enterprise, and such test is given to all such employees being considered for similar promotion or transfer by such employer without regard to the employee's race, color, religion, sex, or national origin. 57

In the form Senator Tower originally submitted it, his amendment was defeated. Two arguments led to the defeat. First, supporters of Title VII attacked the amendment as overbroad. They contended that, as worded, it sanctioned the administration of any test so long as it was "professionally developed" and given to everyone, even if the employer adopted the test in order to discriminate. As Senator Case remarked:

If this amendment were enacted, it could be an absolute bar and would give an absolute right to an employer to state as a fact that he had given a test to all applicants, whether it was a good test or not, so long as it was professionally designed. Discrimination could actually exist under the guise of compliance with the statute. 58

Indeed, if Senator Case's reference to a "good" test is taken to mean one which accurately assesses or predicts job performance, then his concern went beyond purposeful discrimination, for the assertion that non-job-related tests should not be protected under the statute is at least an inferential endorsement of impact theory. That is, in fact, how the Supreme Court construed Senator Case's remarks in Griggs. 59

The problem is that the Supreme Court's interpretation of Senator Case's remarks as an endorsement of impact theory is almost certainly incorrect. For the second objection to the Tower amend-

57 110 CONG. REC. 13492 (1964).
59 Griggs, 401 U.S. at 435-36.
ment, also advanced by Senator Case, was that the amendment was unnecessary because Title VII did not prohibit the Motorola type of test. Senator Humphrey stated the point most forcefully: "Every concern of which this amendment seeks to take cognizance has already been taken care of in title VII . . . . These tests are legal. They do not need to be legalized a second time. They are legal unless used for the purpose of discrimination. The amendment is unnecessary."60

Although his initial attempt to amend the bill was unsuccessful, Senator Tower was still not satisfied with the representations of the bill's proponents. He submitted a revised version of his amendment two days later.61 This time he succeeded in capturing congressional intent to the satisfaction of all the major players, and his second amendment, codified as the second clause of section 703(h), was enacted virtually verbatim without significant debate.62

Based on this legislative history, the Supreme Court's conclusion in Griggs that Duke Power's tests were not protected by section 703(h) because they had been used to discriminate because of race is wrong. The second clause of section 703(h) was added to the statute specifically to confirm the lawfulness of such tests especially when they disadvantaged minorities. That was what Congress's concern with the Myart decision was all about.63

Was Griggs, therefore, wrongly decided? The answer depends upon the manner in which a court should go about reading a statute, a matter of considerable recent controversy both on the bench and in the legal academy.64 The text of Title VII is ambiguous as to

---

60 110 CONG. REC. 13504 (1964) (statement of Sen. Humphrey).
61 Amendment No. 952, 110 CONG. REC. 13724 (1964).
62 The only changes made to the second Tower amendment by section 703(h) were the deletion of the word "to" before the word "act" and the substitution of the word "use" for the word "administration." Obviously, neither change was material. Of the second Tower amendment Senator Humphrey remarked: "Senators on both sides of the aisle who were deeply interested in title VII have examined the text of this amendment and have found it to be in accord with the intent and purpose of that title." 110 CONG. REC. 13724 (1964). The legislative history of section 703(h) is discussed in detail in Hebert, supra note 55, at 15-23.
63 The Supreme Court also cited guidelines issued by the Equal Employment Opportunity Commission (EEOC) in support of its conclusion that section 703(h) protected the use only of job-related tests. Griggs, 401 U.S. at 433. Congress purposely declined to give the EEOC rulemaking authority, however, and the author of the Griggs opinion, Chief Justice Burger, later made it clear that in some instances the EEOC's views were better ignored. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 451-53 (1975) (Burger, C.J., concurring in part and dissenting in part).
64 There has been an explosion of interest in the topic of statutory interpretation in recent years. Much of that interest has been sparked by the "textualist" theory of inter-
whether the use of a non-job-related selection device which disproportionately excludes minorities is illegal. If, as Justice Scalia believes, the text is all that a court should consider in interpreting a statute, then it is hard to know how the case should have been decided. Alternatively, if, as is traditional, the legislative history of the statutory language is considered as well, then the available evidence suggests that Title VII should not have been read at the time to incorporate impact doctrine. That conclusion, too, however, is not wholly certain because the doctrine was never directly debated by Congress. Finally, if the statute is read so as to further the congressional purpose in enacting it, then there is a strong argument that Griggs was correctly decided. Congress was concerned with more than the immorality of explicit racial exclusion, abominable and pervasive though it was. Congress was concerned as well with what it termed the “economic waste” of high African-American unemployment, because it devastated the lives of African-Americans and dampened the economic productivity of the nation.

When it enacted Title VII, Congress thought that banning intentional discrimination directed at individuals would be enough to integrate African-Americans into the economic mainstream. But by the time the Supreme Court decided Griggs seven years later, it was clear that Congress’s initial optimism had been misplaced. Congress itself recognized that it had failed to comprehend the complex nature of discrimination. A year after Griggs was decided Congress spoke of the decision approvingly as it discussed amendments to

---

65 See cases cited supra note 64.


67 See Hebert, supra note 55, at 44-45.
The Senate Report observed:

In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to the ill-will on the part of some identifiable individual or organization. It was thought that a scheme which stressed conciliation rather than compulsory process would be most appropriate for the resolution of this essentially “human” problem, and that litigation would be necessary only on an occasional basis. Experience has shown this view to be false.

Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of “systems” and “effects” rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements.\footnote{S. REP. No. 415, 92d Cong., 1st Sess. 5 (1971), reprinted in 2 COMMITTEE ON LABOR AND PUBLIC WELFARE, UNITED STATES SENATE, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 410, 414 (1972).}

Thus, even if the Supreme Court went beyond the literal language of Title VII and Congress’s implicit intention in 1964, the Court’s decision in \textit{Griggs} accurately reflected the evolution in congressional views which had taken place by the time the decision was handed down. Furthermore, \textit{Griggs} is probably an accurate reflection of what Congress would have explicitly done originally had it appreciated the complexity of the problem it was seeking to cure.\footnote{But see Epstein, supra note 8, at 197 (asserting that “[i]f in 1964 any sponsor of the Civil Rights Act had admitted Title VII on the ground that it adopted the disparate impact test read into it by the Supreme Court in \textit{Griggs}, Title VII would have gone down to thundering defeat”).}

I have argued in detail elsewhere that a court ought to read a statute so as to facilitate the attainment of the legislature’s purpose, updating the statute as necessary to reflect the current legislature’s views.\footnote{See Greenberger, supra note 64, at 73-77.} Admittedly, mine is not a universal conviction.\footnote{\textit{Cf.}, e.g., Lawrence C. Marshall, “\textit{Let Congress Do It}”: The Case for an Absolute Rule of Statutory Stare Decisis, 88 MICH. L. REV. 177 (1989) (asserting the contrary view).} It is,
however, apparently a conviction which Congress shares. This is suggested not only by Congress’s subsequent expressions of approval of Griggs, but by Congress’s repeated overruling of numerous Supreme Court interpretations of civil right statutes over the last decade-and-a-half (of which the Civil Rights Act of 1991 is only the most recent example) on the grounds that the Court had not faithfully interpreted congressional purpose. One lesson to be derived from Griggs and its subsequent treatment by Congress, then, is that Congress expects and approves of the Supreme Court liberally interpreting civil rights statutes in order to effectuate the purpose underlying the legislation.

2. The Doctrine of Griggs

Griggs was a paradigm-shifting decision. The landscape of discrimination law looked different after Griggs was rendered than it had before, oriented more toward the group and less toward the individual. It is probably in the nature of paradigm-shifting decisions that they sweep broadly, hinting at some of the more particular questions which will require resolution in their wake without necessarily answering them in detail. Griggs certainly fits this description.

Once the Supreme Court decided in Griggs that the absence of discriminatory intent in the adoption of job selection devices does not insulate them from scrutiny under Title VII, the Court had two principal issues left to resolve: When does an unlawful impact exist? And when may a device be used notwithstanding its impact? To neither question did the Griggs Court supply more than the beginnings of an answer.

The Court’s entire discussion of the first question is contained in a single sentence and a footnote. Quoting from the court of appeals’s opinion, the Supreme Court stated that “on the record in the present case, ‘whites register far better on the Company’s alternative requirements’ than Negroes.” The evidence for that conclusion was supplied in a footnote:

In North Carolina, 1960 census statistics show that, while

73 See Greenberger, supra note 64, at 38-51.
74 See Terry S. Kogan, A Neo-Federalist Tale of Personal Jurisdiction, 63 S. Cal. L. Rev. 257 (1990) (discussing the concept of “paradigm-seeking” cases).
75 Griggs, 401 U.S. at 430 (quoting Griggs v. Duke Power Co., 420 F.2d 1225, 1239 n.6 (4th Cir. 1970)).
34% of white males had completed high school, only 12% of Negro males had done so.

Similarly, with respect to standardized tests, the EEOC in one case found that use of a battery of tests, including the Wonderlic and Bennett tests used by the Company in the instant case, resulted in 58% of whites passing the tests, as compared with only 6% of the blacks.\footnote{\textit{Id.} at 430 n.6.}

The Court’s treatment of the existence of a disparate impact is noteworthy in two respects. First, the implicit formula the Court offers—that a device is impermissible if whites do “far better” on it than African-Americans—is quite imprecise and remains uncertain to this day.\footnote{See \textit{infra} notes 248-50 and accompanying text.} While the Court observes that African-Americans graduated from high school a little more than one-third as frequently as whites and passed a battery of tests only one-tenth as often, it does not indicate whether these differentials, wide between themselves, are to serve as future percentage benchmarks. Second, the statistics the Court cites to impose liability on the Company compare graduation rates and test performances between racial groups in the general population rather than within the Company’s pool of potential applicants, its actual applicants, or its current employees (in the case of promotion or transfer). The Court is thus willing to assume, without requiring an evidentiary showing, that the more general statistics reflect a distribution of educational levels by race similar to that seen by the Company (at least unless the Company is able to demonstrate that the assumption is unwarranted).

The Supreme Court’s treatment of the circumstances under which the use of an impactful test can be justified is more expansive, if no more definitive, than its inquiry into what constitutes an unlawful impact. The Court addresses the topic of justification several different times in the opinion. Unfortunately, the standard the Court articulates varies, sometimes within the space of a single paragraph, sowing the seeds of a confusion which remains unresolved even under the new Act. The Court states at different times that an otherwise unlawful test will pass muster if, in descending order of difficulty for a defendant to show, its use is demonstrably a “business necessity,”\footnote{\textit{Griggs}, 401 U.S. at 431.} has a “manifest relationship to the employment in
question,"'80 is "a reasonable measure of job performance,"'81 or, finally, is merely "related to measuring job capability."'82

Though the burden on the employer may be unclear, the Court's conclusion that Duke Power failed to meet it provides some clue as to its nature. A company executive testified that the requirements were implemented in order to "improve the overall quality of the work force."'83 The Supreme Court found this desire for generally better employees did not pass muster. Even the most lenient formulation of the employers' burden thus requires that there be a demonstrable nexus between the test and the job being tested for.

Griggs, then, introduced the impact principle into fair employment law, but also left its definition largely to the future. The Supreme Court spent the better part of the next decade intermittently endeavoring to work it out, with mixed results.

B. Impact Doctrine in the 1970's: Albemarle, Dothard and Beazer

The next impact case the Supreme Court decided after Griggs was Albemarle Paper Co. v. Moody.'84 Albemarle established the order of proof in disparate impact litigation and spoke to the nature of an employer's burden in defending an impact claim.

In essential facts, Albemarle is a case of Griggs redux. A North Carolina employer with a history of deliberate segregation required applicants to have a high school diploma and to pass two tests of general intelligence, one of which was also used in Griggs.'85 The social conditions in North Carolina presumably had not changed, and African-Americans, therefore, still significantly underperformed whites on the tests.'86 With the benefit of the decision in Griggs, however, this time the employer retained an industrial psychologist to evaluate the "job relatedness" of its testing program.'87 The expert concluded that the tests correlated with job performance in some instances.'88 The Supreme Court had to decide whether that was enough to permit their use.

80 Id. at 432.
81 Id. at 436.
82 Id. at 432.
83 Id. at 431.
84 422 U.S. 405 (1975).
85 Id. at 408-11.
86 Id. at 425.
87 Id. at 411.
88 Id.
The Court began by introducing a tripartite series of shifting evidentiary burdens to guide the decision of an impact lawsuit. The Court held that a plaintiff must first establish a prima facie case by “[showing] that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants.” Because the presence of unlawful impact was undisputed in Albemarle, the Court did not elaborate upon how a prima facie case is to be made out. It is thus impossible to know, for example, whether the Court’s reference to the “pool of applicants” as the appropriate comparison group against which to assess the disparity of impact was intended as a limitation on the type of general population comparison the Court sanctioned in Griggs.

The Court then held, following Griggs, that once a plaintiff makes a prima facie showing the burden at the second stage of the case shifts to the employer. The Court stated that the employer must “meet the burden of proving that its tests are ‘job related’” and must show that “any given requirement [has] a manifest relationship to the employment in question.” The Court’s choice of language is significant in two respects. First, the Court characterizes the employer’s burden as one of proof rather than production. It is, accordingly, not enough for the employer simply to assert a nexus between its test and a job; it must prove the nexus, by a preponderance of the evidence, upon pain of losing the lawsuit.

Second, of the various formulations of the employer’s burden mentioned in Griggs, the Court in Albemarle opts for the “job related” standard. That is, at least nominally, a lesser burden than the employer would have had to satisfy if the Court had chosen the more exacting “business necessity” test. On the other hand, both times it invokes the term “job related” the Court places it in quotation marks, as if to indicate that the term is serving as a shorthand for a range of possible alternatives, rather than constituting a definitively higher than in a treatment case, where the employer need only “articulate” a reason for its action rather than establishing the reason by a preponderance of the evidence. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (stating that it is enough in a treatment case for an employer “to articulate some legitimate, nondiscriminatory reason” for the allegedly discriminatory act to rebut the plaintiff’s prima facie case).

89 Id. at 425.
90 Id. (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)). The Court used both of these statements of the defendant’s burden interchangeably in the same paragraph, suggesting that they have the same meaning.
91 See id. The employer’s burden in an impact case is thus higher than in a treatment case, where the employer need only “articulate” a reason for its action rather than establishing the reason by a preponderance of the evidence. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (stating that it is enough in a treatment case for an employer “to articulate some legitimate, nondiscriminatory reason” for the allegedly discriminatory act to rebut the plaintiff’s prima facie case).
92 Albemarle, 422 U.S. at 408, 425.
Disparate Impact and the Civil Rights Act of 1991

tive choice among them.93

The Court is also quite critical of the employer's actual effort to validate its tests. The company's expert testified that there was a statistically significant correlation between test scores and supervisory ratings for a number of different jobs.94 While the expert's findings are somewhat suspect in that he performed his study on the eve of trial and relied in part upon the evaluations of supervisors who knew the company was being sued, the company's attempted validation still went well beyond the testimony of a single executive in Griggs that such tests generally improve the quality of the workforce.95 The Supreme Court nevertheless took exception to the company's study on technical grounds. The Court criticized the study because it failed to validate the tests for all jobs for which they were administered, used vague criteria to assess employee performance, focused on the performance of employees at the top of a line of progression without a showing that entry level employees typically ascended to high-level jobs, and dealt only with experienced white workers when the tests were often given to young, minority applicants.96

Taken together, the Court's description of the defendant's burden as one of proving that its tests are job related, rather than a business necessity, while simultaneously imposing a rather exacting validation requirement on their use, suggests that the Court was requiring a relatively high level of justification from the employer. The Court seems to be saying that the employer must demonstrate that a racially exclusionary test is more than moderately correlated with successful performance on some of the jobs it is used to test for, but its use need not be a literal necessity. This view is confirmed by the Court's description of the third and final stage of an impact case.

Assuming that an employer discharges its second stage burden—which the employer in Albemarle did not—the Supreme Court held that the burden then shifts back to the plaintiff "to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' Such a showing would be evidence that the employer was using its tests merely as a 'pretext' for

93 Id.
94 Id. at 411.
95 See supra note 83 and accompanying text.
96 Albemarle, 422 U.S. at 431-35.
This third stage of proof in an impact case is new, added by the Court in *Albemarle*. While the Court might have required that an employer demonstrate the absence of any alternatives with a lesser discriminatory effect as part of its burden at the second stage of the case, the Court chose not to. Because the employer is more likely than the plaintiff to have information about other selection devices and their racial effect, placing the burden on the employer would have made a certain amount of sense. To require the employer to prove the absence of a lesser discriminatory alternative, however, is essentially to demand a showing that the device in question is a business necessity. The Court's determination to place the burden on the plaintiff thus confirms its rejection of the business necessity test.

The Court's characterization of the significance of a plaintiff's demonstration of available alternatives as suggestive of a possibly discriminatory motivation on the part of the defendant is also interesting. Some commentators have argued that the Court may have been attempting thereby to refocus the inquiry in impact cases on the defendant's motive for selecting a test and away from the test's exclusionary effect. They noted that the Supreme Court first adopted a three-stage approach to discrimination litigation in *McDonnell Douglas Corp. v. Green*, the seminal disparate treatment case. The Court's description of the plaintiff's rebuttal burden as tending to establish pretext is borrowed from *McDonnell Douglas* as well. Whatever the precedential lineage of the third-stage requirement, however, its articulation was not a collapsing of the impact model back into disparate treatment, at least in *Albemarle*. The third stage does not even arise until the defendant proves job relatedness, as to which its motivation, good or bad, is irrelevant. Moreover, while the Court said that a plaintiff's demonstration of possible alternatives would be evidence of "pretext," it again set off the term in quotation marks, suggesting it was not to be taken liter-

---

97 *Id.* at 425 (citation omitted) (quoting McDonnell Douglas v. Green, 411 U.S. 792, 801, 804 (1973)).


100 Hebert, *supra* note 55, at 54-56.

ally. The Court also did not say that the plaintiff’s rebuttal was confined to the presentation of alternative devices, or that evidence of possible alternatives is only relevant insofar as it bears on the defendant’s motivation. Rather than casting doubt upon impact doctrine, Albemarle was a clear reaffirmation of its growing significance.

The Court further addressed the elements of an impact claim two terms later in Dothard v. Rawlinson. Diane Rawlinson challenged the refusal of the Alabama Board of Corrections to hire her as a prison guard because she failed to meet minimum height and weight requirements established for correctional officers by Alabama law. She alleged, on behalf of herself and the class of similarly situated women, that the physical standards had the effect of disproportionately excluding women from jobs as guards. There was no assertion that the State had adopted its requirements for a purposefully discriminatory reason.

The Supreme Court struck the requirements down, finding that their application would operate to exclude only a tiny percentage of men of employable age in the United States, but over 40% of women. The Court noted that this degree of impact exceeded the disparity found unlawful in Griggs and was sufficient to make out a prima facie case.

In dissent, Justice White took issue with the majority’s willingness to rely upon nationwide population statistics in lieu of focusing upon the group of women who actually applied for jobs as guards. In his view, it was quite likely that the actual group of women applicants, or even the pool of women seriously interested in correctional officer positions, consisted disproportionately of larger than average

102 See supra note 93 and accompanying text.

103 Of course, to the extent that the evidence does not bear on motivation it most logically bears upon the need for that particular test. For the reasons cited in the text, this does not, however, mean that the Court was adopting the business necessity standard. For a slightly different treatment of this point see Mack A. Player, Is Griggs Dead? Reflecting (Fearfully) on Wards Cove Packing Co. v. Atonio, 17 FLA. ST. U. L. REV. 1, 19-20 (1989).


105 Id. at 323-29. Also at issue in the case was the purposeful refusal of the Alabama Board of Corrections to hire women who had the necessary physical stature to serve in “contact positions” in male prisons. Id. at 325-28. The Supreme Court ruled that barring women from those positions was a bona fide occupational qualification for the job. Id. at 336-37.

106 Id. at 329-31.

107 Id. at 330 n.12.
women. If that were true, of course, then the height and weight standards would not operate to exclude (interested) women at a significantly greater rate than men.

The majority responded by noting that statistics derived from the application process would likely themselves be distorted by potential applicants' recognition that they failed to meet the standards, which would dissuade them from applying in the first place. More importantly, even if the flow of actual or potential applicants might have told a different story, the majority thought it was up to the defendant to tell it. The Court held:

[R]eliance on general population demographic data was not misplaced where there was no reason to suppose that physical height and weight characteristics of Alabama men and women differ markedly from those of the national population.

... [W]e cannot say that the District Court was wrong in holding that the statutory height and weight standards had a discriminatory impact on women applicants. The plaintiffs in a case such as this are not required to exhaust every possible source of evidence, if the evidence actually presented on its face conspicuously demonstrates a job requirement's grossly discriminatory impact. If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own. In this case no such effort was made.

As articulated in *Dothard*, then, the plaintiff's initial prima facie burden is not severe. The plaintiff may, in appropriate circumstances, rely upon general population statistics as proof of impact. She need not necessarily "fine-tune" her statistical showing to the particular work setting so as to exclude all possible innocent explanations of a demonstrable disparity. Instead, the defendant is entitled to dispute the plaintiff's statistical showing at the second stage of the case if it desires. By the same token, however, the Court's rather tepid endorsement of the district court's finding of discrimination suggests that greater statistical refinement might be required of plaintiffs in future cases, especially where a defendant mounts


109 *Dothard*, 433 U.S. at 330.

110 Id. at 330-31.
some type of attack on the plaintiff’s statistics.\textsuperscript{111}

Once it affirmed the district court’s finding that Ms. Rawlinson had made out a prima facie case, the Court turned to the state’s justification for its physical requirements. In the body of its opinion, the Court described the burden on the defendant precisely as it had in \textit{Albemarle}: the defendant must prove that the requirements were “job related” in that they bore a “manifest relationship to the employment in question.”\textsuperscript{112} In a later footnote, however, addressing an argument of only marginal relevance to the case, the Court quoted the “business necessity” language of \textit{Griggs} and stated that a “discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge.”\textsuperscript{113} These two statements are obviously markedly different in emphasis, and it is impossible to know how, if at all, the Court intended them to be reconciled. Was it enough that there was some nexus between a job and a requirement, or did the requirement have to be indispensible?

The State defended its physical requirements on the grounds that they were related to strength, assertedly a necessary attribute for a prison guard.\textsuperscript{114} But it offered no proof either of the amount of strength needed to do the job (assuming some strength was necessary) or of a correlation between the needed strength and its particular height and weight requirements. The Supreme Court noted, as well, that if strength were, in fact, a bona fide occupational qualification, tests could be administered to measure strength directly.\textsuperscript{115} In any event, because the State offered no evidence whatsoever in attempting to discharge its burden, the Court’s rejection of the State’s argument does not provide any insight into precisely what the Court thought the level of the burden was.

In addition, as was also true in \textit{Griggs} and \textit{Albemarle}, the deficiency of the employer’s proof meant that the case never got to the third stage. The Court’s statements as to the plaintiff’s rebuttal burden (in all three cases) are thus technically dicta. The Court in

\begin{flushright}
\textsuperscript{111}Then-Justice Rehnquist makes a similar point in his concurring opinion, remarking that the district court’s finding of discrimination was “by no means \textit{required}.” \textit{Id.} at 339 (Rehnquist, J., concurring). Although his opinion is somewhat unclear, he seems to be saying that a future defendant might be able to attack the plaintiff’s statistics, or to better justify the height and weight standards as job-related, and not that a statistical showing analogous to \textit{Dothard} should not constitute a prima facie case.
\textsuperscript{112} \textit{Id.} at 329.
\textsuperscript{113} \textit{Id.} at 332.
\textsuperscript{114} \textit{Id.} at 331.
\textsuperscript{115} \textit{Id.} at 332.
\end{flushright}
Dothard described the rebuttal burden by repeating its statement from Albemarle that the plaintiff had the opportunity to prove the availability of alternatives with a lesser discriminatory impact.\textsuperscript{116} There was still no indication, though, of what such a showing might look like.

The final disparate impact case the Supreme Court decided in the 1970s was \textit{New York City Transit Authority v. Beazer}.\textsuperscript{117} \textit{Beazer} involved a challenge to the Transit Authority's ban on the employment of narcotics users, which included individuals taking methadone to cure their heroin addiction. A group of methadone users asserted that the Authority's ban as applied to them violated, \textit{inter alia}, Title VII because it served to exclude substantially more African-Americans and Hispanics than whites.\textsuperscript{118} The Supreme Court not only rejected the claim, it held that the plaintiffs had failed even to establish a prima facie case.\textsuperscript{119}

The plaintiffs cited two sets of statistics as proof of an unlawful impact. First, over 80% of the employees referred to the Authority's medical staff on suspicion of having violated the drug ban were Hispanic or African-American.\textsuperscript{120} Second, 63% of the persons in publicly-administered methadone maintenance programs were Hispanic or African-American.\textsuperscript{121}

The Court dismissed the first statistic as overbroad because it was not limited to methadone users, the only group who were challenging the rule. The Court went so far as to suggest in a footnote that it was unlikely that \textit{any} of the referred employees were on methadone because methadone does not produce visible physical symptoms characteristic of narcotics use.\textsuperscript{122} But while the 80% statistic may not be directly probative of the racial impact of the narcotics ban on the group of methadone users, it is not irrelevant either. If the class of narcotics users is overwhelmingly minority (as might be

\textsuperscript{116} \textit{Id.} at 329.
\textsuperscript{117} 440 U.S. 568 (1979).
\textsuperscript{118} \textit{Id.} at 582-83. The ban was also challenged as a violation of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. \textsection 794 (1988), and the Equal Protection Clause of the Fourteenth Amendment.
\textsuperscript{119} \textit{Beazer}, 440 U.S. at 582-87. The Supreme Court was willing to assume \textit{arguendo} that the plaintiffs had made out a prima facie case because it thought the narcotics ban was so clearly job related. \textit{See infra} note 127 and accompanying text. It is clear from the opinion, however, that the Court would not have found the plaintiffs' showing sufficient to establish a prima facie case if it had been necessary to resolve that issue in order to decide the case.
\textsuperscript{120} \textit{Id.} at 584.
\textsuperscript{121} \textit{Id.} at 585.
\textsuperscript{122} \textit{Id.} at 585 n.26.
suggested by the pattern of referrals), then it would seem to follow that the class of those receiving methadone treatment to cure their former addiction would likely be disproportionately minority as well.\footnote{Another explanation for the disproportionate percentage of minorities among the group of suspected drug abusers referred for medical evaluation, of course, is purposeful discrimination.} Indeed, plaintiffs' second statistic—that almost two-thirds of those enrolled in public methadone treatment programs are minority—points to the same conclusion.

The Supreme Court, however, was dissatisfied with that statistic as well. The Court found it too general because it "reveal[ed] little if anything about the racial composition of the class of [Transit Authority] job applicants and employees receiving methadone treatment."\footnote{\textit{Beazer}, 440 U.S. at 585.} The Court also faulted the plaintiffs for failing to adduce evidence of the percentage of minorities in \textit{private} treatment programs,\footnote{\textit{Id.} at 585 n.27.} which might have suggested that the class of methadone users was not disproportionately minority.

The \textit{Beazer} Court's strict scrutiny of the plaintiffs' statistical showing is remarkable, especially in light of the relaxed standard the Court had previously established for the articulation of a prima facie case in \textit{Griggs, Albemarle} and \textit{Dothard}. While the Court had hinted in \textit{Dothard} that in some cases applicant flow data might be preferable to general population statistics, the Court had never before rejected a purported prima facie showing for lack of statistical specificity. On the contrary, the \textit{Dothard} Court was unwilling to assume that women interested in guard jobs were disproportionately taller and heavier than the average woman, despite that proposition's intuitive appeal, without specific proof. The thrust of the holding in \textit{Dothard} was that it was the defendant's burden to take issue with a plaintiff's statistics, not for a court, especially the Supreme Court, to do so \textit{sua sponte}.

\textit{Beazer}, then, might be read to establish a new and more demanding standard for the plaintiff's prima facie case. One hesitates to embrace that conclusion too hastily, however, because of \textit{Beazer}'s atypical facts. The case involves drugs and a potential threat to public safety, a combustible combination likely to make a court unusually wary about striking down an employer's work rules. Indeed, the Civil Rights Act of 1991 contains a provision specifically confirming the lawfulness of bans on the employment of narcotics
users unless adopted or applied with the intent to discriminate.\textsuperscript{126} Nevertheless, the Court's departure from its previous approach to evaluating a plaintiff's prima facie showing is marked.

If the Beazer Court's approach to the first stage of an impact case thus intimated the possibility for doctrinal change, its discussion of the second stage portended potential revolution. The Court began by stating, innocently enough, that the Transit Authority was required to demonstrate that its refusal to hire narcotics users was "job related."\textsuperscript{127} The Court's definition of job relatedness, though, was extraordinarily loose. The Court found that the Transit Authority discharged its burden merely by showing that its "legitimate employment goals of safety and efficiency" were "significantly served by—\textit{even if they [did] not require}—[the anti-drug] rule as it applies to all methadone users including those who are seeking employment in non-safety-sensitive positions."\textsuperscript{128}

Moreover, the Court's conclusion that the employer discharged its burden is open to question as well. Because the Authority's interest in safety obviously could not serve to justify its exclusionary rule for non-safety-sensitive jobs, the ban on methadone users in those jobs had to be supported by the employer's alternative interest in efficiency. The evidence in the record, however, was that "the strong majority" of those enrolled in methadone maintenance programs for at least a year were drug-free.\textsuperscript{129} The record contained no evidence that drug use (which would concededly impair efficiency) was any higher among the class of enrollees than among the general population.\textsuperscript{130} Given this record, as the dissent observed: "No one could reasonably argue that the petitioners made the kind of show-

\textsuperscript{126} Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, 1075. The statute provides:

Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. § 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex or national origin.

\textsuperscript{127} Beazer, 440 U.S. at 587.

\textsuperscript{128} Id. at 587 n.31 (emphasis added).

\textsuperscript{129} Id. at 575.

\textsuperscript{130} Id. at 575-76, 586.
ing demanded by *Griggs* or *Albemarle* . . . .”131

What the Court correctly noted was that there would always be
some uncertainty whether those receiving treatment might suffer a
relapse. The employer's ban of all methadone users was, to that
extent (in the Court's word) "rational," if overinclusive.132 But to
define the employer's burden as one of mere rationality is to say that
the employer really has no burden at all. None of the practices the
Court struck down in earlier cases were irrational; requiring em-
ployees to have a high school diploma or to pass a test is not a crazy
thing to do. But at least up until *Beazer*, a racially exclusionary
selection device could not be adopted simply because it made some
sense to use it.

For the same reason that caution is in order with respect to con-
cluding that *Beazer* fundamentally altered the first stage of an im-
pact claim, however, so, too, should we proceed warily before
concluding that it reworked the second. The new standard is ar-
ticulated in a rather offhand manner in an otherwise dispensable
footnote, and the Court certainly does not say that it is overruling
any prior decisions. On the other hand, there is no gainsaying that
*Beazer* was substantially more solicitous of employers than any-
thing that preceded it.133

The *Beazer* Court, finally, had something to say by implication
about a plaintiff's rebuttal burden. The plaintiffs in the case argued,
and the district court found, that the Transit Authority could have
made specific inquiries as to the success of individual applicants in
their treatment programs without the need completely to bar all
methadone users.134 The district court held that making such in-
quiries would be no more burdensome than checking the references
of other applicants.135 The Supreme Court rejected this alternative
because the Court thought it would be more costly than a blanket
prohibition.136 Whether the Supreme Court was right about the
cost or not,137 the Court was clearly suggesting that, in order for it

---

131 Id. at 602 (White, J., dissenting).
132 Id. at 592.
133 Professor Player characterizes the response of the lower courts to *Beazer* as "a
frenzy of disharmony." Player, supra note 103, at 22.
134 *Beazer*, 440 U.S. at 608 n.14 (White, J., dissenting).
135 Id.
136 Id. at 590.
137 If, as the dissent suggests, screening methadone users is truly no more compi-
cated than the usual checking of references, it would not seem to be an excessively
costly practice. Id. at 608 n.14 (White, J., dissenting). The majority, however, thought
that screening for methadone use was considerably more involved. Id. at 590 n.33.
to find that discrimination exists, the plaintiff in rebuttal must offer an alternative selection device which accomplishes the employer's purpose without being more expensive.

At the close of its first decade, impact law was thus in a state of confusion. The impact principle, articulated in *Griggs* and implicitly affirmed by Congress the following year in the debates over the Equal Employment Opportunity Act of 1972, was firmly entrenched in the legal landscape. The formal framework of shifting evidentiary burdens governing proof in impact cases established by *Albemarle* was reasonably fixed as well. But the nature of the showing necessary to discharge those burdens was largely unresolved. It was another decade before the Supreme Court, with three new Reagan appointees added in the interim, seriously engaged the problem again.

**C. The Hints of Change: Watson**

The Supreme Court returned to the subject of disparate impact in *Watson v. Fort Worth Bank & Trust.* Clara Watson was an African-American bank teller repeatedly passed over for promotions in favor of whites. The Bank had no formal criteria for awarding promotions and relied instead upon the subjective evaluations of its supervisors. All of the supervisors who rejected Ms. Watson for promotion were white. Ms. Watson argued both that she was a victim of purposeful discrimination and that the Bank's subjective promotion system had a disparate impact upon minorities. The lower courts rejected her disparate treatment claim because the Bank presented legitimate and nondiscriminatory reasons for its decisions not to promote her. They rejected her disparate impact claim on the grounds that subjective criteria were not subject to impact analysis.

The Supreme Court granted certiorari to decide whether impact law should apply to the use of subjective employment criteria. The Court held unanimously that it should. To hold otherwise, the Court reasoned, would enable employers to evade the mandate of *Griggs* by substituting subjective practices for objective ones. The lower courts had previously been in conflict on the issue, and the Supreme Court's decision represented a substantial victory for minorities.

---

139 *Id.* at 982-84.
140 *Id.* at 985-91.
But a plurality of the Court also determined to go beyond the certified question to undertake "a fresh and somewhat closer examination" of impact doctrine because the Bank argued that subjective selection practices "would be so impossibly difficult to defend under disparate impact analysis that employers would be forced to adopt numerical quotas in order to avoid liability." Concerned by the prospect of quota hiring and promotion, the plurality decided to elaborate upon "the constraints that operate to keep [impact] analysis within its proper bounds."

In the eyes of the plurality, those constraints were several. The first was the specificity with which a plaintiff was required to prove a prima facie case. The plurality said that a plaintiff must identify the particular practice responsible for the statistical imbalance complained about, and then prove a causal link between the practice and the disparity. Although there was no "rigid mathematical formula" to be satisfied, the magnitude of the disparity had to be substantial enough to sustain an inference of causation.

The plurality observed in passing that some of the lower courts had looked to the EEOC's Uniform Guidelines on Employee Selection Procedures for direction in assessing whether the magnitude of a disparity was causally sufficient. The guidelines indicate that an impact will be presumed where the selection rate of minorities is less than four-fifths of the rate at which the highest rated group is selected. The plurality explicitly declined, however, to endorse the four-fifths standard or any other measure as an appropriate rule for all cases.

If an employer has adopted an objective, neutral selection practice, such as possession of a high school diploma or achieving a passing score on a test, the plaintiff can readily satisfy the plurality's identification requirement. The plaintiff's task will be considerably harder, however, where the employer has implemented a multifactor selection process with one or more subjective components. He likely will not know, especially in a hiring case, what the various components are and, even if he knows, will lack the data to prove their impact.

141 Id. at 994.
142 Id. at 989.
143 Id. at 994.
144 Id. at 995.
146 Id. § 1607.4D.
147 Watson, 487 U.S. at 995-96 n.3.
This is not to say that raising the plaintiff's burden in these circumstances to some degree is necessarily bad. If there is no requirement of identification and causation, then the plaintiff may essentially attack the statistical imbalance of an employer's work force. Congress took pains to indicate that racial imbalances are not per se unlawful under Title VII,148 and all of the Court's impact decisions prior to *Watson* involved challenges to the effects of particular practices on employment opportunities rather than an examination of an employer's "bottom line" racial mix. On the other hand, care must be taken lest employers jumble their practices together in a manner which cannot be segregated so as to evade the possibility of impact scrutiny entirely.

The plurality also emphasized the importance of statistical precision in the plaintiff's case. In contrast to the relatively deferential posture the Court had adopted toward unchallenged statistical showings in *Dothard*, the *Watson* plurality offered a laundry list of possible deficiencies in a plaintiff's proof which it instructed lower courts to raise and explore on their own.149 The tone of the opinion is in fact very reminiscent of the Court's skeptical approach to the plaintiffs' statistical presentation in *Beazer*.

The plurality's approach to the plaintiff's prima facie case in *Watson* is thus stringent, although not necessarily a departure from the Court's prior decisions. None of the earlier cases involved a challenge to a subjective practice, and the plurality's identification and causation requirements do not suggest that the mode of proceeding in a case where an objective practice is at issue will be very much different than before. Although the plurality stressed the

---

148 Section 703(j) of Title VII provides:

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area ....


149 *Watson*, 487 U.S. at 996-97. The shortcomings noted by the Court as examples of typical weaknesses included small or incomplete data sets and inadequate statistical techniques.
need for reliability in the plaintiff’s statistical proof of impact, the Court had sounded that theme at least occasionally (if not always consistently) in the past. Where the plurality began to alter impact law dramatically, however, was in its treatment of the employer’s defense.

The second constraint the plurality identified as serving to rein in the impact principle is the nature of the employer’s burden in response to a plaintiff’s proof that a disparate impact was present. The plurality stated that the defendant has the burden only “of producing evidence that its employment practices are based on legitimate business reasons . . . .”150 This wan statement of the business necessity defense reduces the employer’s burden to no more than it faces in a disparate treatment case.151 In all its previous impact decisions the Court used language which implied that the defendant was required to prove that its practice was job related or a business necessity, not merely “produce evidence” to that effect. The plurality itself quoted an excerpt from Griggs that “an employer has ‘the burden of showing that any given requirement must have a manifest relationship to the employment in question . . . .’”152 Recasting the employer’s burden as one of production rather than persuasion was a stark reversal of accepted doctrine, which the plurality accomplished without the benefit of any supporting authority.

Moreover, the plurality completely eviscerated the previously required nexus between the selection device and the requirements of the particular job. Even the most flaccid of the various formulations of the business necessity defense in Griggs stressed that an impactful device was only justified if “related to measuring job capacity.”153 Yet, the Watson plurality now asserted that an employer need only present “legitimate business reasons” to explain its exclusionary practices. In essence, the plurality was adopting the mere rationality standard of Beazer which, as indicated above, is not really a standard at all.

The plurality also eased the manner in which a defendant could satisfy its new and diminished burden. Demanding validation stud-

150 Id. at 998.
151 In a disparate treatment case, after the plaintiff completes his prima facie proof the burden that shifts to the employer is merely to articulate a legitimate, nondiscriminatory reason for its decision. The employer does not bear the burden of proving the reason for its decision by a preponderance of the evidence. Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248 (1981).
152 Watson, 487 U.S. at 997 (quoting Griggs, 401 U.S. at 432) (emphasis added).
153 Griggs, 401 U.S. at 432.
ies of the type the Court had required in *Albemarle* was now a thing of the past. Even as to objective tests, the plurality thought it would sometimes be “obvious” that legitimate employment goals were being served through their use.\(^{154}\) The plurality then went out of its way to emphasize that it was businessmen, not judges, who best knew how to structure employment practices.\(^{155}\)

The plurality finally spoke briefly to the plaintiff’s rebuttal burden. Although the defendant’s burden had been relaxed, the plurality did not adjust the plaintiff’s required showing on rebuttal. On the contrary, although the Court’s prior treatment of the plaintiff’s rebuttal burden had been sketchy, the plurality seemed to raise the standard for plaintiffs even higher than before. It stressed that any proposed alternatives needed to be “equally as effective as the challenged practice in serving the employer’s legitimate business goals.”\(^{156}\) As in *Beazer*, effectiveness as defined by the plurality meant that possible alternatives could not be any more costly than the employer's chosen device.\(^{157}\)

*Watson* thus heralded the possibility of substantial changes in impact law. Aside from extending the impact principle to subjective practices, however, for the time being those changes were acquiesced in by only a plurality of the Court. It was not until the following term that the *Watson* plurality commanded a majority.

**D. The Doctrine Overturned: Wards Cove**

Perhaps no decision construing Title VII has ever had more opprobrium heaped upon it than *Wards Cove Packing Co. v. Atonio*.\(^{158}\) To the extent the Supreme Court in *Wards Cove* consolidated its emasculation of the business necessity defense begun in *Watson*, without any indication that Congress approved of the changes, the criticism is deserved. On the other hand, *Wards Cove* presented a unique problem concerning the plaintiff’s prima facie case as to which the Court’s solution was not unjustifiable.

Wards Cove Packing Company and another company ran seasonal salmon canning operations in remote locations in Alaska. A group of minority employees filed a class action alleging that various of the companies’ hiring and promotion practices had resulted

---

\(^{154}\) *Watson*, 487 U.S. at 998.

\(^{155}\) *Id.* at 999.

\(^{156}\) *Id.* at 998.

\(^{157}\) *Id.*

\(^{158}\) 490 U.S. 642 (1989).
in a racially stratified work force. The class members claimed that the companies’ personnel policies served to confine them to so-called “cannery” work, consisting predominantly of unskilled jobs processing fish, whereas the higher-paying and mostly skilled “non-cannery” positions were filled largely by whites. The class complained as well about racial segregation in living quarters and dining facilities.\(^{159}\)

The plaintiffs challenged the companies’ practices on both disparate treatment and disparate impact grounds. The case had a tortuous history through the lower courts, but eventually all of the disparate treatment claims were rejected. The plaintiffs did not appeal the rejection of those claims to the Supreme Court. As to the disparate impact claims, the Ninth Circuit ruled that the plaintiffs had made a prima facie showing and remanded the case to the district court to afford the companies an opportunity to prove that their practices were a “business necessity.”\(^{160}\) The companies instead challenged the Ninth Circuit’s finding of impact and its definition of business necessity in the Supreme Court. The Court granted certiorari to consider again the issues it had been evenly divided upon the term before in *Watson*.  

The Court began by addressing the plaintiffs’ statistical showing of a prima facie case. The plaintiffs argued, without pointing to the effect of any employment practices in particular, that the gross disproportion between the large number of minorities in cannery positions and the meager number of minorities in noncannery positions was enough by itself to shift the burden of proof to the employer. The Supreme Court rejected this internal work force comparison. While, as the Court acknowledged, there were instances in which it had previously ruled that a sufficiently gross statistical disparity could constitute prima facie proof of discrimination even if not demonstrably tied to a specific employment practice,\(^{161}\) it had never held that the necessary disparity could be proved by comparing the racial composition of one portion of an employer’s work force to another. On the contrary, the Court had always stressed that the proper comparison was between the racial composition of the segment of an employer’s labor force performing a particular job or

---

\(^{159}\) *Id.* at 647-48. The Supreme Court described the challenged practices as including “nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, [and] a practice of not promoting from within . . . .” *Id.* at 647.

\(^{160}\) *Id.* at 649.

jobs and the racial composition of a larger group of applicants or members of the relevant labor market qualified to perform those jobs.\textsuperscript{162} Absent this limitation, an employer would have to ensure that the racial mix of each segment of his work force approximated the mix of every other segment, an impossible task which would create an almost irresistible incentive for employers to resort to quotas.

The problem in \textit{Wards Cove}, however, was that the remoteness of the canneries and the seasonal nature of their operations made the identification of the relevant labor market against which to compare the companies' work force devilishly difficult. While the companies recruited most noncannery employees from a broad geographic area extending to Alaska, California and the Pacific Northwest, most of the available workers in that labor market would have no desire to sign on for seasonal work in the Alaska hinterlands.\textsuperscript{163} Drawing a comparison between the racial composition of the companies' noncannery workers and the available pool of skilled workers in Los Angeles or Seattle, for example, would be silly. The plaintiffs, accordingly, argued that by virtue of their employment they were at least geographically available for noncannery work. They were not, however, qualified for most of those positions.\textsuperscript{164} And even as to the few unskilled noncannery jobs for which they might have been qualified, they did not exhaust the relevant labor pool.\textsuperscript{165}

The Supreme Court thus had to decide whether the practical difficulty of identifying the appropriate labor pool in these unusual circumstances justified the plaintiffs' reliance upon an internal workforce comparison. By a vote of five to four, the Court thought not. That decision has been criticized, most vociferously by the dissenting justices.\textsuperscript{166} It seems, though, that the dissenters were reacting as much to the companies' overtly segregated eating and sleeping arrangements, which they likened to a "plantation,"\textsuperscript{167} as they were to the logic of the majority's analysis. But though the stench of racism at the canneries was certainly in the air, the lower courts, as in \textit{Griggs}, had rejected the plaintiffs' claims of disparate treatment.

Might the Supreme Court, on these facts, have nevertheless

\textsuperscript{162} \textit{Wards Cove}, 490 U.S. at 650.
\textsuperscript{163} Id. at 676 n.23 (Stevens, J., dissenting).
\textsuperscript{164} Id. at 651.
\textsuperscript{165} Id. at 654.
\textsuperscript{166} Id. at 661 (Blackmun, J., dissenting); \textit{id.} at 662 (Stevens, J., dissenting).
\textsuperscript{167} Id. at 663-64 n.3 (Stevens, J., dissenting).
carved out an exception permitting the use of an internal work force comparison where the identification of an appropriate labor pool was otherwise difficult or impossible? Yes. But the specification of the circumstances under which any such exception could be invoked in the future might have proved even more difficult than identifying an appropriate labor market for seasonal work in the wilderness. The Court's decision to adhere to prior doctrine, for fear of creating an exception that might serve to require that all segments of an employer's labor force be equally racially balanced with each other, if not exactly compelled, was not indefensible either.

Moreover, there was another shortcoming in the plaintiffs' prima facie proof. The plaintiffs were unable to isolate any particular employment practices as causing the racial imbalance even between the cannery and noncannery workers. And although the Supreme Court did not make this point as clearly as it might have, the cases in which proof of racial imbalance alone had been deemed adequate to constitute a prima facie showing were systematic disparate treatment cases, where a gross imbalance was deemed to be probative of unlawful intent. There were no cases in which racial imbalance not caused by a particular employment practice had ever been held sufficient to prove a disparate impact. The Supreme Court accordingly found that the plaintiffs had not met the identification and causation requirements of Watson, which a majority of the Court now affirmed to be the governing rules of impact litigation.

The Wards Cove majority next confirmed that the Watson plurality had correctly stated the employer's burden at the second stage of an impact case. That holding, as measured by congressional intent and the Court's own precedents, was not defensible. The majority asserted that the employer needed only to "produc[e] evidence of a business justification for his employment practice," even though requiring that the employer bear anything less than a full burden of persuasion on the issue of business justification was flatly inconsistent with all of the prior decisions of a majority of the Court. Untroubled by that inconsistency, the majority also confirmed the plurality view in Watson that any type of business justification,

---

168 See id. at 653 & n.8.
170 Wards Cove, 490 U.S. at 656.
171 Id. at 659.
172 Id. at 659-60.
whether related to measuring job capacity or not, would do. The Court remarked:

The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices. At the same time, though, there is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils . . . .\textsuperscript{173}

The primary evil to which the Court implicitly refers, of course, always lurking in the shadows, is quotas. But in response to the great quota fear, the Court teetered on the precipice of eliminating disparate impact as a distinct mode of Title VII analysis. Thus, the Court's reason for not accepting an "insubstantial" justification from an employer is not that a disparate impact, even where causally connected to a specific employment practice, constitutes discrimination per se. Rather, the Court is concerned that a weak justification might mask the employer's discriminatory intention. Indeed, the Court took pains later in the opinion to trumpet the fact that it was conforming the employer's burden in impact litigation to what was previously required in disparate treatment cases.\textsuperscript{174}

But it was when the Court addressed the plaintiffs' rebuttal burden that it jumped over the edge, taking impact analysis along with it. The Court said:

If respondents [plaintiffs], having established a prima facie case, come forward with alternatives to petitioners' [defendants'] hiring practices that reduce the racially disparate impact of practices currently being used, and petitioners refuse to adopt these alternatives, such a refusal would belie a claim by petitioners that their incumbent practices are being employed for nondiscriminatory reasons.\textsuperscript{175}

In this passage, the Court reduces disparate impact to a subcategory of disparate treatment. The Court says clearly that the ultimate issue in an impact case is not the racially exclusionary effect of a selection device, but the employer's state of mind.

More so than any other, it was this aspect of \textit{Wards Cove} which enraged critics. Because the defendant's burden was now so easily

\textsuperscript{173} Id. at 659.
\textsuperscript{174} Id. at 660-61.
\textsuperscript{175} Id.
satisfied—an employer would always be able to offer some business reason for adopting a challenged practice—contested impact cases would henceforth inevitably be decided at the third and final stage. But, even if the plaintiff were able to prove that less discriminatory (and no more expensive) alternatives were available, that would still not be enough necessarily to win the case, because, according to the Court, the plaintiff’s proof of alternatives would serve only to raise an inference of improper motivation on the part of the defendant. Indeed, most incredibly of all, that inference might still be rebutted if the defendant were to adopt the plaintiff’s alternatives after being made aware of them even, if the Court’s language is taken literally, as late as during the actual trial on the merits.

Wards Cove thus portended, if it did not actually represent, the dismemberment of disparate impact as an independent theory of liability under Title VII. In response, Congress immediately set about attempting to insure the theory’s continued viability.

II

THE CIVIL RIGHTS ACT OF 1991

The Civil Rights Act of 1991 was enacted primarily in response to five employment discrimination decisions, including Wards Cove, rendered by the Supreme Court during its 1988 Term. In those decisions, the Court significantly curtailed the protections afforded discrimination victims under a variety of federal civil rights statutes. The Act either reverses or modifies the results in those cases to restore the law to its pre-existing state. The Act also extends the law in some additional areas, affording victims new protections and remedies, especially in the area of damages.

As has been well chronicled in the academic literature and the popular press, the Act was the subject of extended political wrangling. While there were numerous points of disagreement at different times in the two years between the Act’s initial introduction in Congress and its eventual signing into law by President Bush, the principal bone of contention was the way in which the law ought to

---

176 See supra note 21.
177 Id.
178 Id.
treat the mode of proof in disparate impact cases. President Bush, supported by the Republican members of Congress, consistently echoed the concern of the Supreme Court majority in *Wards Cove* that the plaintiff’s burden not be eased nor the defendant’s burden be raised to the point where employers would resort to quotas.\(^{180}\) Congressional Democrats stressed in opposition the importance of reinvigorating impact law in the wake of *Wards Cove* and dismissed the concern with quotas as an obstructionist canard.\(^{181}\)

The political compromise eventually written into the Act resurrects impact doctrine as a viable theory and flatly overrules the portion of the holding in *Wards Cove* that lessened the defendant’s burden from one of persuasion to one of production. The Act also at least touches upon issues relating to each of the three stages of an impact case. The Act does not, however, resolve all of the issues it addresses, and leaves other important issues entirely unaddressed. On the whole, it is fair to say that, to a significant degree, the Act leaves impact law in the state of confusion in which it has existed since its inception.

Among the stated purposes of the Act is “to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII . . . .”\(^{182}\) We thus now officially know, some twenty years after the fact, that Congress accepts the *Griggs* Court’s construction of Title VII to encompass the impact principle. But, just as Congress did not define the term “discrimination” when it enacted Title VII, Congress declined to define what it meant by the phrase “disparate impact” in the new Act. The Act thus says nothing about such concerns as the magnitude of the disparity a plaintiff must establish to prove an unlawful impact or the type of comparison which might be relied upon.

One central aspect of the plaintiff’s case that the Act addresses relates to the isolation/causation requirement of *Watson* and *Wards Cove*. Section 105(a) of the Act requires that a plaintiff demonstrate that “a particular employment practice . . . causes a disparate impact.”\(^{183}\) There is, however, an exception. “[I]f the complaining party can demonstrate to the court that the elements of a respon-

---

\(^{180}\) *See* Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 990 PUB. PAPERS 1937, 1438.


\(^{183}\) *Id.* § 105(a), 105 Stat. at 1074.
dent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice."¹¹⁸⁴ Thus, a plaintiff must usually single out an offending practice with particularity. On the other hand, at least some of the time, she will not have to.

When may a plaintiff challenge an employer's process in its entirety? The statutory answer, that the employer's selection process must be analytically incapable of separation, is less than clear. This "cumulation" problem, as it came to be called in the congressional debates, is discussed in the legislative history. But whether we are allowed to consult the most relevant part of that history, even to understand what the precise nature of the dispute was, is uncertain. In an unusual, if not unprecedented bit of draftsmanship, Congress added a second subpart to section 105 (subsection b) which states:

No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove — Business necessity/cumulation/alternative business practice."¹¹⁸⁵

Section 105(b) was inserted into the Act because the compromise relating to disparate impact was threatening to unravel in the face of efforts by various members of Congress to create legislative history supportive of their own view of what the statute should mean.¹¹⁸⁶ The provision thus bars consideration of any "statements" made by senators and representatives bearing on the specified topics.

Whether the section prohibits reference to previous versions of the Act as it wound its way through Congress is uncertain as well. The interpretive memorandum to which we are exclusively directed in section 105(b) provides:

The final compromise on S. 1745 agreed to by several Senate sponsors, including Senators DANFORTH, KENNEDY, and DOLE, and the Administration states that with respect to Wards Cove — Business necessity/cumulation/alternative business practice — the exclusive legislative history is as follows:

The terms "business necessity" and "job related" are intended to reflect the concepts enunciated by the Supreme

¹¹⁸⁴ Id.
¹¹⁸⁵ Id. § 105(b), 105 Stat. at 1075.

When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, such as the height and weight requirements designed to measure strength in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the particular, functionally-integrated practices may be analyzed as one employment practice.\(^8\)

The memorandum, perhaps not surprisingly in light of the frantic efforts to manufacture opposing bits of legislative history at the time,\(^18^8\) is not overly helpful. It states that the constituent elements of a single, “functionally-integrated” practice need not be isolated and analyzed distinctly, but it does not say that an employer’s selection process is incapable of separation for analysis in only that situation. Nor does it say anything about what the term “cause” means as used in section 105(a).

If the Act’s legislative history is off limits as a guide toward resolving the cumulation problem, it nevertheless suggests what the nature of the problem is, and is worth reviewing briefly if only for that limited purpose. Both of the original versions of the Act introduced in Congress in 1990 would have overturned *Wards Cove* on the cumulation issue.\(^18^9\) They provided that “if a complaining party demonstrates that a group of employment practices [defined as ‘a combination of employment practices or an overall employment process’]\(^19^0\) results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact . . . .”\(^19^1\) From the beginning, congressional Republicans argued that permitting a plaintiff to proceed without isolating a particular practice that caused the disparate impact, for the reasons cited by the Supreme Court in *Watson* and *Wards Cove*, would lead employers fearful of litigation to engage in quota hiring. By the time the Civil Rights

---


\(^18^8\) Representative Hyde, for example, saying that he “would like to add some legislative history at the end of [his] remarks,” inserted a 9,000 word statement, not explicitly approved of by any other member of Congress, into the Congressional Record. 137 CONG. REC. H9543 (daily ed. Nov. 7, 1991).


\(^19^0\) H.R. 4000, supra note 189, § 3; S. 2104, supra note 189, § 3.

\(^19^1\) H.R. 4000, supra note 189, § 4; S. 2104, supra note 189, § 4.
Act of 1990 was passed and sent to President Bush, however, the Democrats thought they had addressed that concern. They added a provision to the 1990 Act that it was not to "be construed to require or encourage an employer to adopt hiring or promotion quotas . . . ." More importantly, as presented to the President, the 1990 Act also stated that:

the complaining party shall be required to demonstrate which specific practice or practices are responsible for the disparate impact in all cases unless the court finds after discovery (I) that the respondent has destroyed, concealed or refused to produce existing records that are necessary to make this showing, or (II) that the respondent failed to keep such records . . . .

This provision, however, later characterized by Senator Dole as a "gigantic exception" to the isolation requirement, was unacceptable. President Bush vetoed the 1990 Act largely for that reason, and Congress was unable to override the veto.

The initial version of the Civil Rights Act of 1991 introduced in the House of Representatives contained language similar to the 1990 Act. Gradually, however, the Democrats began to move away from their position that plaintiffs be permitted to cumulate an employer's practices for impact analysis, until the compromise language included in section 105 was settled upon. To the extent that section 105 affirms *Wards Cove*'s isolation requirement rather than overruling it as the Democrats had originally sought, the compromise represents a substantial victory for the Republicans. As a result, plaintiffs will have more difficulty attacking an employer's cumulative practices than they would have under the Democrats' original version of the Act. But how much more difficulty?

That depends upon how the phrase "not capable of separation for analysis" is to be interpreted. Any process, no matter how functionally integrated, is at least theoretically capable of separation with a sophisticated enough multiple regression analysis. If the phrase is taken to refer to what is theoretically possible, then the only exception likely to be recognized is for the type of case explic-
ily mentioned in the interpretive memorandum, where the employer has chosen to fuse its standards into a single criterion as in *Dothard*. On the other hand, the capability of separation for analysis might be understood in a practical, rather than a theoretical sense, to refer to the existence or availability of the necessary data upon which a regression analysis might be performed. According to this view, if the employer did not keep or destroy records containing the necessary information, then the elements of his decision-making process would be "practically incapable" of separation for analysis and could, therefore, be attacked cumulatively.

In a colloquy in the legislative history, to which reference by the terms of section 105(b) is verboten, Senator Dole, speaking for himself and the Administration, and Senator Kennedy, speaking for the Democratic majority, disagree as to precisely this point. Senator Dole says that "not capable of separation for analysis" means what it says, and "does not apply in situations where records were not kept or have been destroyed." 198 He asserts that "[i]n such circumstances, the elements are obviously separable," although he does not say how the separation is to be accomplished. 199 Senator Kennedy asserts, by contrast, that

if a defendant has destroyed or failed to keep records showing which practices it relies upon, and the plaintiff, after diligent effort, is unable to locate other evidence permitting the separation of the decisionmaking process into its component parts, the court should permit the plaintiff to challenge the decisionmaking process as a single practice, and should allow the employer to defend it as such. 200

The omission from the 1991 Act of the reference to employer nonfeasance or malfeasance in recordkeeping contained in the vetoed 1990 version tends to support Senator Dole's view on the cumulation issue. As a matter of policy, however, telling employers that they can escape impact liability by not keeping records or by lumping their employment practices together into an indistinguishable "black box mush" subverts the reaffirmation of impact law which stands as one of the principal purposes of the Act. Because Congress did not resolve these arguments the courts will ultimately have to decide what this part of section 105 should mean.

The Act also addresses the causation element of a prima facie case. Earlier versions of the Act used language other than the spe-

199 Id.
specific word "cause" to describe the necessary relationship between a contested practice and an impermissible impact. The vetoed bill, for example, spoke of a practice which "results in" a disparate impact and of practices which "are responsible" for an impact.\footnote{H.R. 4000, 101st Cong., 2d Sess. § 4 (1990) (enrolled version as vetoed by President Bush).} The Republicans, however, were successfully adamant that the statute use only the word "cause."

What the Republicans never made clear, though, is why they thought this particular wording made any difference when contrasted with the alternatives. The most significant issue of causation is the extent to which a plaintiff must negate other possible explanations for an exclusionary impact. For example, if a plaintiff were to challenge a written examination because minorities perform significantly more poorly than whites, must the plaintiff show that the minority performance is not attributable to lower levels of educational attainment, insufficient studying, or some other possible explanation?\footnote{See, e.g., Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981) (raising the question of the effect of failing to study on examination performance), cert. denied, 455 U.S. 1021 (1982).} Generally, no; because if an employer does not have to prove alternative explanations as affirmative defenses, then minorities will often be unable to meet their burden precisely because of the lingering effects of past racism, which render the use of the tests objectionable in the first place. The employer would thus never have to justify the business need for its tests, which is the central issue on which the case ought to turn.\footnote{Plaintiffs might, of course, for tactical reasons want to establish as part of their initial proof that there is not an obvious explanation for the disparate impact other than the test itself. They should not, however, be required to do so.} But, requiring that a practice be shown to "cause" rather than "result in" a disparate impact does not appear to demand more of a plaintiff by way of disproving the existence of other reasons for the disparity.

Insofar as the prima facie case is concerned, then, the Act confirms that a plaintiff will usually have to isolate and prove the differential effect of each specific employment practice challenged. On all the other unsettled issues bearing on the plaintiff's burden, however, the Act has very little to say.

Turning to the defendant's case, the principal bone of contention in Congress, and the issue which, more than any other, prevented the Act from becoming law for two years, was the definition of the employer's burden of proving a business necessity. Both political
parties and the President were able to agree quickly that the Supreme Court was wrong to have lowered the level of the burden from persuasion to mere production because the employer is the party who knows why it structured its operations in a particular manner. Logically, therefore, the employer should be required to justify his choice. Sections 104 and 105 of the Act thus reverse *Wards Cove* on that issue by returning the burden of persuasion to the employer. 204 There was anything but agreement, however, as to the type and degree of relationship between a job and a selection device that an employer should have to prove.

The final compromise wording in section 105 requires that, in response to proof of a disparate impact, an employer must "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 205 Neither of those two terms—job related or business necessity—is defined in the Act. The purposes section says that Congress's intention is "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs* and in the other Supreme Court decisions prior to *Wards Cove*." 206 But, in *Griggs* itself, let alone all of the cases which followed, those concepts were vaguely defined and used inconsistently. 207 Thus, rather than resolving its disagreement as to the stringence of the business necessity defense, Congress simply codified it.

Nevertheless, we know that the definition of business necessity is not as strict as the Democrats originally sought. As introduced, the bill demanded that an employer prove that a practice was "essential to effective job performance," 208 but that requirement was deleted ultimately as too difficult for an employer to satisfy. The Act now states that a requirement must be "related to the position in question" rather than to "effective job performance." This change might suggest greater flexibility about matters not directly tied to actually doing the work, such as attitude, punctuality or even promotability, although the difference in wording is terribly small.

---

204 Section 105 provides that once a plaintiff establishes that an employment practice causes a disparate impact the employer must "demonstrate" that the practice is job related and consistent with business necessity. Civil Rights Act of 1991, *supra* note 181, § 105, 105 Stat. at 1074. Section 104 defines the term demonstrate to mean "meets the burdens of production and persuasion." *Id.* § 104.

205 *Id.* § 105.

206 *Id.* § 3(2), 105 Stat. at 1071.

207 *See supra* notes 78-82 and accompanying text.

Disparate Impact and the Civil Rights Act of 1991

299

to draw any conclusions. 209

Because Congress, for the most part, simply agreed to disagree on the meaning of business necessity, there is little reason to tarry over the legislative history, which, aside from the interpretive memorandum's verbatim repetition of the statement from the purposes section quoted above, is still off limits by virtue of section 105(b). Predictably, different members of Congress expressed competing views of how the statutory compromise should be read. Senator Dole, for example, again speaking for the administration as well as himself, argued that because the purposes section was changed from an intent "to overrule the proof burdens and meaning of business necessity in Wards Cove" to the final version quoted above, the Supreme Court's discussion of the business necessity defense in Wards Cove is still good law. 210 Not surprisingly, Senator Dole also thinks that Beazer, especially in its suggestion that any legitimate business purpose may justify the use of an employment practice, is the decision between Griggs and Wards Cove to which the courts should look most closely for guidance in the future. 211

Senator Dole's contentions are terribly strained. The purposes section explicitly states that the Act codifies only the Court's decisions prior to Wards Cove. 212 And, as discussed above, Congress and the President agreed that the Act overrules Wards Cove on the burden of proof issue, even though the statement to that effect formerly in the purposes section of the Act does not appear in the statute as enacted. Moreover, the findings section of the Act states that Wards Cove "weakened the scope and effectiveness of federal civil rights protections." 213 Such a statement is hardly a ringing endorsement of the decision.

By contrast, in Senator Kennedy's opinion, one of the fundamental purposes of the Act was to overrule Wards Cove. 214 He asserts that the statute "makes clear" that the employer must prove the business necessity of a selection device. 215 Despite these differing opinions, the Act became law only by leaving business necessity undefined. Notwithstanding the senators' jockeying, there simply is

210 See id.
211 See id.
212 § 3(2), 105 Stat. at 1071.
213 Id. § 2(2).
215 Id.
no correct definition of the employer's burden. Leaving business necessity undefined was the only way that it was possible for the Act to become law.

The Act is just as ambiguous regarding the third stage of impact litigation. Section 105 provides that a plaintiff may prevail either by proving that a device causes a disparate impact, the use of which the employer fails to show is job related and consistent with business necessity, or by making "the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice." Subparagraph (C), however, does not describe a demonstration. It circularly provides only that "[t]he demonstration referred to [in the statutory text quoted above] shall be in accordance with the law as it existed on June 4, 1989 [the day before Wards Cove was decided], with respect to the concept of 'alternative employment practice.'"

On its face, because the Act disjunctively sets forth two different ways in which a plaintiff may proceed, it appears that a plaintiff can now establish liability without directly challenging the job relatedness of an employer's practice. A plaintiff may instead prevail and force the employer to adopt an alternative having a lesser disparity of impact simply by proving that the alternative meets the employer's needs even, it seems, where the employer's chosen practice is itself closely related to job performance.

But what sort of "demonstration" concerning an alternative is a plaintiff required to make? All we know for certain is that the demonstration need not comport with Wards Cove. Thus, exploring the reasons why Congress might have found the Supreme Court's treatment of the plaintiff's rebuttal in Wards Cove objectionable may, at the very least, shed some light on what a plaintiff does not have to prove. As indicated above, one major criticism of Wards Cove is that the Supreme Court seemed to collapse impact analysis back into disparate treatment. Congress clearly emphasized elsewhere in the Act that the two modes of analysis are to remain distinct, although this is not directly relevant to the issue of alternative practices. Congress also perhaps thought that Wards Cove raised the plaintiff's rebuttal burden too high. The Supreme Court indicated

---

216 § 105, 105 Stat. at 1074.
217 Id.
218 Section 102 of the Act, for example, limits certain remedies to cases alleging intentional discrimination rather than disparate impact. § 102, 105 Stat. at 1072-74.
that a plaintiff's specified alternative had to be "equally effective" as the employer's practice.\textsuperscript{219} The Court also repeated the plurality's observation in \textit{Watson} that "cost or other burdens of proposed alternative selection devices are relevant" in assessing effectiveness.\textsuperscript{220}

The reality, however, is that there was no definitive extant standard governing a plaintiff's rebuttal case prior to \textit{Wards Cove} for Congress to have adopted. The most extensive discussion of the plaintiff's burden took place in \textit{Albemarle}, where the Court stated that an alternative device "must also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'"\textsuperscript{221} This formula does not indicate that an identified alternative must be "equally effective" and no more costly than the employer's choice, but it does not deem those considerations irrelevant either. Obviously, an alternative would have to be at least somewhat as effective and not inordinately more expensive than the employer's practice in order to be viable. Similarly, the Supreme Court referred in passing to the need to show the precision and cost of a possible alternative in \textit{Beazer}, but the discussion was nothing more than offhand dicta.\textsuperscript{222}

The one pre-\textit{Wards Cove} case which did treat the plaintiff's burden in some detail is \textit{Watson}. The \textit{Watson} plurality stressed that a plaintiff must clearly demonstrate the effectiveness and inexpensiveness of possible alternatives. But if those were the very grounds upon which Congress thought \textit{Wards Cove} went too far, Congress cannot have meant to include \textit{Watson}, which did not even express the views of a majority of the Court, as one of the cases descriptive of the law prior to June 5, 1989.\textsuperscript{223} The Act thus once again incorporates a standard of proof based upon decisonal law which offers no clear guidance on the issue for which it is referenced.

There is one final ambiguity concerning the plaintiff's rebuttal which also deserves mention. The Act states that a plaintiff may prevail by demonstrating the availability of a suitable alternative practice which the employer then "refuses to adopt."\textsuperscript{224} As indi-

\textsuperscript{219} \textit{Wards Cove}, 490 U.S. at 661.
\textsuperscript{220} \textit{Id.} (quoting \textit{Watson}, 487 U.S. at 998).
\textsuperscript{221} \textit{Albemarle}, 422 U.S. at 430 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)).
\textsuperscript{222} \textit{See Beazer}, 440 U.S. at 590.
\textsuperscript{223} The interpretive memorandum offered on the floor of the House states that \textit{Watson} is not authority because it was only a plurality decision. 137 \textit{CONG. REC.} H9527 (daily ed. Nov. 7, 1991). However, the statement is not to be considered under the terms of section 105(b).
\textsuperscript{224} § 105, 105 Stat. at 1074.
cated above, Wards Cove implied that the employer could defeat the plaintiff's case if it adopted his alternative as late as the trial on the merits.\textsuperscript{225} The language of the Act does not suggest that Wards Cove was in error on this point. Permitting the employer to moot the case via a last-minute adoption of a plaintiff's alternative, however, would gut the Act. The incentive to bring impact suits would disappear if a plaintiff knew that after years of litigation he could be deprived of any recovery, including attorneys' fees, the moment before judgment was to be entered.

Thus, notwithstanding the statutory language, it seems more likely that Congress was thinking of instances where the employer was aware of and refused to adopt a possible alternative before a case was filed. The statute might also be interpreted to permit an employer to moot a claim for injunctive relief by adopting a proposed alternative, but not to escape liability for damages and attorneys' fees for its conduct up until that point.\textsuperscript{226} But as on so many other issues, the Act is not clear and we will have to wait and see what the courts ultimately have to say.

The Civil Rights Act of 1991 thus leaves open as many issues as it resolves. I turn next to the articulation of an analytical approach against which some of the issues raised in the Act might be better understood.

III

A PRODUCTIVITY APPROACH TO IMPACT ANALYSIS

With remarkable prescience, Professor Owen Fiss, in his seminal article articulating a theory of fair employment laws, anticipated and offered a justification for impact theory prior to the Supreme Court's decision in Griggs.\textsuperscript{227} His account proved enormously influential and remains the orthodoxy to this day. His central insight, commonplace now but not so widely appreciated at the time, is that there are two different understandings of what racial equality on the job might entail. He illustrated those understandings by analogizing the workplace to a footrace.

\textsuperscript{225} See supra note 175 and accompanying text.
\textsuperscript{226} Senator Kennedy expressed the view that the employer cannot escape liability by adopting the plaintiff's alternative during trial but, again, his remarks are not to be considered by virtue of section 105(b). See 137 CONG. REC. S15234 (daily ed. Oct. 25, 1991) (statement of Sen. Kennedy).
Professor Fiss labeled the first understanding "equal treatment" or, as it is sometimes known, equal opportunity.\(^\text{228}\) The underlying norm is that of color blindness, traceable to the first Justice Harlan's famous dissent in *Plessy v. Ferguson*.\(^\text{229}\) Equal treatment means that skin color is something to be ignored; an employer should proceed as if its applicants and employees were all of one hue. In the context of the footrace, the focus is on the starting point. No one is to be denied entry into the race or required to begin several yards behind the starting line on account of color.

The second understanding of equality, which Professor Fiss called "equal achievement," looks to the outcome of the race in lieu of the starting position: the focus is on the racial makeup of the winners.\(^\text{230}\) The goal is to insure that minorities actually receive jobs and benefits in proportion to their concentration in the relevant labor market. To achieve that end, the equal achievement paradigm sometimes requires that an employer be color conscious rather than color blind.

The two understandings of equality thus rest upon different and to some extent incongruous objectives. The equal treatment paradigm is concerned exclusively with eliminating race from the employer's decisionmaking process. To be sure, over time, the cumulative effect of individual decisions made free of race will serve to increase the number and quality of jobs held by minorities. But, with the equal treatment model, that effect is merely incidental. By contrast, the aim with the equal achievement conception of equality is explicitly to redistribute jobs to minorities, irrespective of the formal neutrality of the allocation process.\(^\text{231}\)

The equal treatment paradigm is the basic animating principle of all fair employment law. It corresponds to the disparate treatment branch of Title VII jurisprudence. The theoretical rationale for the law's insistence upon equality of treatment is clear. As Professor Fiss observes, the use of race as a selection criterion is unfair because it is an inaccurate predictor of individual productivity and is unalterably fixed at birth.\(^\text{232}\) Denying persons the opportunity to succeed on the basis of their race is antithetical to the American cultural ethos of individualism and unacceptable in an economic

\(^\text{228}\) Id. at 237.
\(^\text{229}\) 163 U.S. 537, 559 (Harlan, J., dissenting).
\(^\text{231}\) See Belton, *supra* note 7, at 229.
\(^\text{232}\) Fiss, *supra* note 227, at 240-44.
system where differential rewards are at least nominally tied to access to opportunity.

Although the theoretical justification for prohibiting intentional discrimination in employment has been questioned by a few iconoclastic scholars in recent years on both economic and philosophical grounds, advocating the repeal of Title VII's ban on disparate treatment in the larger world beyond the academy would be outside the bounds of realistic political debate, and thankfully so. After a long and arduous struggle, the formal guarantee of equal treatment, if not yet always the reality, has become a fundamental axiom of American public law. Challenging the rationale for that axiom may be a high profile sideline for a few contrarian academics, but the reality of the ban against disparate treatment is not about to change any time soon.

The place of disparate impact doctrine in employment law is not as sacrosanct, although Title VII formally recognizes the disparate impact model. The lingering controversy over the model's application and the definition of its contours stems largely from its identification with the equal achievement paradigm. The concept of equality of achievement is controversial because it explicitly departs from the color-blind norm. Color-blind decisionmaking is widely popular, even though the original impetus behind it was to end discrimination against minorities, because it safeguards whites against discrimination equally as well as minorities. Conversely, the equal achievement paradigm envisions as its very purpose the skewing of outcomes in favor of minorities and to the inevitable disadvantage of whites.

The theoretical justification for requiring equality of achievement is nevertheless clear, if debatable. The justification may be usefully appreciated with reference to the footrace analogy. Advocates of equal achievement contend that letting all runners of every color into the race and lining them up at the same starting point does not insure that the opportunity of minorities actually to win is in any meaningful sense equal to that of whites. The lingering effects of centuries of discrimination operate as weights around the ankles of the minority runners, slowing them down. The overall result of the race is in fact quite predictable. Even if a few minorities, who are

---

234 See supra note 182 and accompanying text.
either exceptionally fast or relatively unencumbered by history, are able to win some heats, most will never emerge victorious, and many may not even finish the race. Indeed, as the results of repeated races become increasingly clear, there will be less and less incentive for minorities even to prepare themselves to try to run.\textsuperscript{235} A race under these circumstances is said to be inherently unfair, and its results, consequently, in need of adjustment.

The difficulty, of course, is that changing the outcome of a color-blind race to favor minorities entails certain economic and social costs. The most obvious of these stem from the bestowal of opportunity upon those not best situated to take advantage of it. This has adverse consequences not only for those who would have otherwise won the race and for employers now saddled with slower runners, but for society at large. To push the footrace analogy one step further, the contemporary competition, largely unlike twenty years ago when Professor Fiss wrote, is in effect a trial for the U.S. Olympic team. The members of our team must then race against the fleetest runners from the rest of the world. The Olympic final, however, is a race predicated exclusively on speed; there is no equalization of the results to reflect comparative disadvantage. If our fastest runners do not run in the final, we will simply lose the race more often.

To the extent that disparate impact rests upon the equal achievement paradigm, as is commonly thought, it is necessarily a form of preferential treatment. As such, like all racial preferences, it operates to improve the lot of at least some minorities, but at a significant if incalculable cost. I offer no special insight into whether or not the benefits of racial preferences exceed their costs. There are many informed arguments made by many people of good will in favor of such preferences,\textsuperscript{236} and just as many reasoned arguments made by just as many equally well-meaning people against them.\textsuperscript{237} The appropriate balance between the demands of social justice and the discipline of economic competition is not easily struck, nor is it

\textsuperscript{235} This outcome is referred to in the literature more technically as the problem of under-investment in human capital. The argument is made that victims of discrimination in a labor market will respond to the discrimination by making less of an effort to acquire the education and training necessary to compete successfully. See, e.g., David A. Strauss, The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards, 79 GEO. L.J. 1619, 1626-27 (1991); Cass R. Sunstein, Three Civil Rights Fallacies, 79 CAL. L. REV. 751, 758-59 (1991).

\textsuperscript{236} See authorities collected supra note 25.

a matter as to which we are likely to arrive at a political consensus in the foreseeable future.

In my view, however, the understanding that impact doctrine rests upon the equal achievement paradigm is misleading, if not mistaken, especially as the doctrine operates today. There is no question that, as originally articulated in \textit{Griggs}, one rationale for the doctrine was to open up more and better jobs to minorities. Merely requiring an end to disparate treatment had not been enough materially to improve the relative economic position of minorities in the first several years after Title VII passed; the legacy of segregation was too powerful.\textsuperscript{238} Nevertheless, despite the immediacy of the continuing effects of Jim Crow laws, the Supreme Court in \textit{Griggs} declined to construe Title VII as an affirmative action statute intended to guarantee a job to African-Americans solely by virtue of their color. The Court remarked that "[d]iscriminatory preference[s] for any group, minority or majority, is precisely and only what Congress has proscribed."\textsuperscript{239}

In answer to the problem of integrating minorities into the workplace, the Supreme Court required that employers adopt personnel practices which actually measure productivity. Thus, Duke Power's use of a test of general intelligence was unacceptable not because African-Americans scored lower on it than whites, but because the test was not predictive of performance on the jobs for which it was administered. In the Court's view, if a test were predictive, then its use would not be a problem, irrespective of its racial effect.

In reality, then, impact doctrine is predicated on the equal treatment conception of equality, rather than equal achievement. As embodied in Title VII, impact doctrine serves primarily as an injunction to employers to assess the abilities of their personnel accurately. Although minorities have tended to benefit disproportionately from the elimination of nonpredictive selection devices because, as victims of historic discrimination, they tend to lack the particular, but often irrelevant knowledge and skills those devices measure, the benefit to them, as with the disparate treatment model, is in the final analysis incidental.

Still, impact doctrine is arguably a form of preferential treatment insofar as it requires employers to change their selection procedures from those they presently employ where the number of minorities

\textsuperscript{238} See \textit{supra} notes 66-69 and accompanying text.

selected by one of the procedures is small. Evaluating current and prospective employees is a cost of doing business. From the standpoint of profitability, increases in that cost are justified only to the extent that they are offset by corresponding improvements in labor productivity. Thus, substituting an expensive series of personal interviews for a cheap test of general intelligence only makes sense where the employees chosen via interviews will add more to the bottom line than the additional cost of interviewing them. Moreover, the discipline of the competitive marketplace might be thought enough ordinarily to insure that profit-maximizing employers will adopt only those personnel practices where cost and productivity are in efficient equilibrium.

The reality, however, is often quite different. The personnel department has long been the backwater of corporate America, its procedures seldom subjected to the rigorous scrutiny of operating divisions. Starting out as a manager of human resources has never been a ticket to the boardroom, and cost accountants spend far more time looking over the assembly line than they do visiting the interview room. My view that personnel decisions are often removed from marketplace pressures is undoubtedly to some extent informed by my personal experience of having represented many employers, some of them quite large, with poor and in some instances wholly unstructured selection practices. The failure of the market to root out unproductive practices is illustrated as well, however, by the substantial changes in personnel management which resulted in the aftermath of Griggs. As noted in the House Report on the Civil Rights Act of 1991, "among experts who develop and assess employment tests today, there is a consensus that Griggs triggered a dramatic improvement in the quality and reliability of employee selection criteria," an improvement which obviously the pressures of competition alone had not been sufficient to engender previously. 240 The salutary effect of Griggs and its progeny was attested to by several witnesses called to testify during the hearings on the Act. 241 As William H. Brown, Jr., a management attorney and former Chair of the EEOC during the Nixon Administration, summarized:

Adherence to equal opportunity laws has had a positive impact on most employers. Major corporations have had to rethink their personnel policies, not just in terms of how they affect

241 Id. at 25.
Blacks, other minorities and women. In doing so, many found that they have improved the working conditions of all employees . . . there have been improvements in their procedures and standards for hiring, the use of discipline and employee performance reviews. 242

Thus, the assumption that existing selection practices are ipso facto efficient, or that employers will jettison inefficient practices on their own without governmental intervention, is unwarranted. And the fact that impact law requires that current practices be abandoned, if inefficient, does not render the law racially preferential. Efficient practices need never be abandoned, even if they exclude minorities completely.

The best evidence that disparate impact is properly understood as a regulation intended to spur productivity rather than solely as a racial preference is the significant support the impact principle has come to enjoy among white Americans, for many of whom racial preferences are an anathema. White Americans understand that there is no real cause for them to feel victimized by a rule that requires selection devices to correlate with productivity. As a group, they will comparatively outperform minorities on good tests as well as bad, if perhaps not by quite as substantial a margin. Moreover, a high score on a bad test should not create a sense of entitlement to a job or a promotion.

Indeed, in light of white acceptance of the impact principle, the Supreme Court’s decision in Wards Cove effectively to overrule Griggs was unexpected. Until Wards Cove, there had been no agitation against the disparate impact doctrine established eighteen years earlier in Griggs. Even the Republicans in Congress accepted the basic impact principle during the debates over the Civil Rights Act of 1991; they disagreed only with some of its applications.

To think of a doctrine which permits challenges to employment practices based upon their disparate statistical effect upon minorities as a guarantee of equal treatment is paradoxical. It is no less paradoxical to understand a civil rights statute as a prompt toward productivity. But paradoxical or not, these views seem to me fundamentally correct. In the section which follows, I discuss what resolutions these views suggest for some of the open issues in the Civil Rights Act of 1991.

242 Id. (citation omitted).
IV
APPLICATIONS

As indicated in Part I, in the wake of the Act there are unresolved issues bearing on all three stages of an impact case. Continuing the pattern of the discussion in previous sections, I shall analyze what the understanding of disparate impact as a prompt toward productivity might mean at each stage, in the order they would arise during a lawsuit.

The principal problem associated with the plaintiff's prima facie case is how to determine when a disparate impact exists. This determination poses several theoretical and practical problems. From a theoretical perspective, as Professor Epstein observes, it may be wrong to assume that a test is free from impact where the pass rates for whites and African-Americans are about the same. Professor Epstein argues that, owing to their comparatively higher level of education, we should expect whites in most instances to perform better. Setting the proper "baseline" for assessing the presence of a disparate impact at equal performance, which is what the law generally assumes, thus confers an implicit benefit on African-Americans.243

The baseline issue, however, is, at once, more varied and less problematic than Professor Epstein realizes. He assumes that the group of white applicants for most jobs likely has more schooling than their African-American counterparts. But there is no particular reason to think that is so, or that it should necessarily make any difference even if it is. Better-educated people tend to apply for better jobs, so that, as whites move disproportionately up the employment ladder, the educational level of the applicant pool for many remaining lesser jobs—the jobs most often filled by the use of employment tests—may not vary all that much by race. Indeed, it might be that because of their discriminatory exclusion from more prestigious jobs the pool of African-American applicants for some lesser jobs might actually be better educated on average than competing whites. Moreover, Professor Epstein assumes that a good test ought to favor those with higher levels of education. But while that may be true for some jobs, it is not so clear, as the Supreme Court held in Griggs, that that is necessarily the case for many others. A file clerk with a Ph.D. may prove so bored with the job that a high school graduate would perform better.

243 Epstein, supra note 8, at 206.
For any particular job and any particular employer it is thus impossible to know, a priori, where to set an appropriate baseline for test performance. Professor Epstein concludes that, as a theoretical matter, a plaintiff, therefore, should be required to normalize test results against relevant background factors before claiming that an unlawful impact exists. He notes that such a requirement would prove so onerous an undertaking, however, that a plaintiff’s incentive to bring impact cases would all but disappear. Accordingly, in his view, "the law makes the false but convenient simplifying assumption that an unbiased test yields an equal percentage of passing grades across all racial groups." 244

But that is not exactly what the law assumes. Plaintiffs always have been required to show that a test causes a disparate impact on the group of minorities qualified for the position in question. Thus, in a case involving alleged discrimination in the hiring of schoolteachers, it was not enough for the plaintiffs to show that the defendant school district had a lower percentage of minority teachers than there were minorities in the relevant metropolitan area. Rather, the necessary comparison was with those minorities who possessed the required teaching credentials. 245 The only time that the assumption Professor Epstein describes is made without reference to qualifications is where the job is of a type, like driving a truck, which anyone old enough to drive can perform. 246

Thus, impact plaintiffs have to go a considerable distance toward normalizing selection results, by proving qualifications. And the assumption that some degree of bias inheres in a test which disproportionately excludes members of the pool of qualified minorities, who by definition have the education and training necessary to do the job, is not "false"; or, at least, no more false than other assumptions the law regularly makes in employment law. 247

If we nevertheless acknowledge that there are other possible explanations besides bias for the racial impact of a test, even upon a

244 Id. at 207.
247 In disparate treatment cases, for example, the law assumes that a plaintiff is a victim of discrimination if he proves that he is a qualified minority who applied and was rejected for a job for which the employer continued to seek applicants after his rejection. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). This assumption is not true in any literal sense; many minorities who are able to make out the foregoing proof are not victims of discrimination. The assumption is nevertheless warranted because it forces the employer to come forward with some other explanation for the plaintiff's rejection.
group of qualified minorities, the real question is which party should have the initial responsibility to prove or defeat those explanations. The law's answer, which I believe correct, is that the burden should belong to the employer because the employer is more likely to have information about the explanations than is the plaintiff. Indeed, beyond demonstrating qualifications, it would be unlikely that a plaintiff would know what it was he was supposed to disprove. Thus, the law assumes that an unbiased test affects racial groups of qualified applicants or employees equally not so much because it would be difficult for plaintiffs to prove that the effects of a test are not caused by some other explanation of which they are aware, although it would be harder. Rather, the law makes that assumption because the plaintiff is not in a position to negate other possible explanations until the employer articulates them. It is worth bearing in mind here that the assumed relationship between racially skewed results on a test and bias is only that—an assumption. All that is at issue is the allocation of the initial burden of proof as to possible competing explanations; placing that burden on the defendant in no way suggests that the explanations will not be fully aired at trial or that, if the employer proves that other factors are at work, the employer will not win the case.

The productivity approach to impact analysis suggests that the plaintiff's prima facie burden should not be too difficult to satisfy in this regard. Professor Epstein is correct that requiring a plaintiff to negate the universe of possible competing explanations for an impact will lead to a sharp reduction in impact litigation. Indeed, pushed to its extreme, such a requirement would foreclose impact suits entirely; completely negating all possible explanations for the disparate effect of a test other than bias is conceptually impossible. With impact litigation practically foreclosed, Title VII would return to its pre-Griggs status as a prohibition against only intentional discrimination, and the legal incentive for employers to improve their personnel practices would disappear accordingly.

A second issue in proving the existence of an impact is to decide how great a departure from the equal performance baseline a device must cause to be deemed unlawful. As indicated in part I section C, the most common yardstick for assessing impact is the four-fifths rule. Although endorsed by the EEOC, the rule has never been formally adopted by the Supreme Court and, as indicated above, the

Court actually seemed to back away from it in *Watson*. There is no mention of this issue in the Civil Rights Act of 1991.

With a large enough sample, the four-fifths rule functions fairly well to eliminate chance as a possible explanation for the under-selection of minorities, although it says nothing about the effect of other possible explanatory factors. The rule also is less than ideal in a situation where there are more than two possible outcomes of an employment decision or more than two racial groups are being compared. Nevertheless, to the extent that the rule requires a plaintiff to eliminate chance as a possible explanation for an exclusionary effect it serves a useful purpose. Again, if there are other possible explanatory factors present in particular situations, it should be up to the defendant to demonstrate them.

A third problem in proving impact involves the choice of the relevant qualified labor pool against which to compare an employer's work force. Although the Supreme Court has acknowledged the problem at various times, it has offered little guidance. The general concern is clear enough: if the pool of actual or potential applicants for a job is largely bereft of minorities, then we would expect the job to be filled mostly with whites, and no negative consequences should flow to the employer for its lack of minority employees. Setting upon the appropriate labor pool for purposes of comparison, however, is sometimes enormously complex.

Ordinarily, the most probative comparison is between the group of persons who actually applied for a position and those who were in fact selected. But there are a number of reasons why a comparison based on the flow of actual applicants might not help a plaintiff in a particular case. One reason, as the Supreme Court discussed in *Dothard*, is that an employer may adopt an accessible selection standard against which potential applicants may readily measure themselves, so that those who fail to meet it will simply not ap-

---

249 The four-fifths rule correlates with accepted tests for statistical significance. Thus, with a universe of 100 or more selections, if members of one group are selected at a rate less than 80% of the selection rate of another group, there is a less than 5% chance that the differential results from chance. When the probability that an event is due to chance sinks to that level, statisticians (and most courts) infer that the deviation is attributable to some cause other than mere chance. See David C. Baldus & James W.L. Cole, *Statistical Proof of Discrimination* 191-93 (1980). While the rule does not explain what the cause of the disparity is, it serves to raise an inference of possible discrimination which needs to be explained or rebutted. The strength of the inference diminishes, however, as the number of selections decreases. See also Epstein, supra note 8, at 207-11.

250 Epstein, supra note 8, at 207-11.
Such a standard would exclude large numbers of otherwise interested minorities without its exclusionary impact being reflected in the employer's choice among actual applicants. Similarly, but less innocently, an employer's discriminatory reputation might discourage potential qualified minorities from applying. Focusing solely on applicant flow data in that situation would unacceptably reward employers who intentionally discriminate and who would justify their lack of minority employees by the absence of minority applicants caused by their own actions. In other instances, the means by which an employer chooses to communicate its openings may skew the composition of the group who actually apply. An employer who posts notices solely on company premises or relies on word-of-mouth hiring may exclude large numbers of minorities who might be interested in a job but never hear about it. Finally, an employer might innocently, negligently or deliberately fail to compile or retain data needed to make a comparison between its applicants and those it hired.

In view of the potential problems with applicant flow data, it is sometimes necessary instead for plaintiffs to attempt to identify a pool of qualified potential applicants against which to measure the racial composition of an employer's hires. But delineating such a pool is not easy. As one commentator observes, it requires undertaking an integrated demographic and economic analysis of the local labor market in order to generate a map of the geographic boundaries within which an employer might be expected to search for workers. Moreover, once a pool is identified, there is no good way to gauge the competitive attractiveness of any particular employer to potential employees within that pool. Any description of the relevant labor market for a particular employer, and the percentage of minorities within it, is thus always in reality nothing more than a "guesstimate." If, as is often the case, the employer argues for a different pool (with fewer minorities in it), the court

251 See supra note 109 and accompanying text.
252 There is no general requirement under Title VII that records be made or retained. 29 C.F.R. § 1602.12 (1992). The EEOC does require that large employers annually fill out a standard form indicating, inter alia, the racial composition of the labor force, the so-called "EEO-1 Report," but the data contained therein is of little use to a plaintiff litigating a case. Id. § 1602.7. The EEOC also advises employers to keep records of the racial impact of employment tests, but there is no formal requirement that they do so. Id. § 1607.4.
must choose between two constructs which only hypothetically approximate the labor market in which the employer was actually hiring.\textsuperscript{254}

In the face of these difficulties, the question arises, how refined should a plaintiff’s proof of the racial composition of the relevant labor market be? The Supreme Court’s decisions, as suggested from the descriptions in part I, vary considerably. \textit{Griggs} and \textit{Dothard} suggest that general population statistics drawn from the state or even the nation as a whole may be adequate in some instances. In those cases the Court was willing to infer that the effect of a selection device on the general population was the same as it was on the employer’s actual or potential applicants. In \textit{Hazelwood School District v. United States},\textsuperscript{255} a systematic disparate treatment case, the Supreme Court identified the metropolitan area as the relevant market and further required that the distorting impact of the affirmative action policies of other employers in the area be taken into account in calculating an expected percentage of minority hires.\textsuperscript{256} \textit{Beazer, Watson,} and \textit{Wards Cove} suggested that a court should strictly scrutinize a plaintiff’s identification of the relevant labor market. The Civil Rights Act of 1991, once again, does not address the issue.

Applying the productivity approach, a prima facie case should be held to be established whenever the plaintiff shows an impact upon either the group of actual applicants or any pool of potential applicants the plaintiff is able to identify, with the exception of another segment of the employer’s work force. The first method is the best; proof of impact upon the group of actual applicants should always be sufficient. Indeed, any impact on minority applicants is likely to understate the impact of the employer’s practice on minorities as a whole because of the factors described above which tend to discourage minorities from applying in the first place.\textsuperscript{257}

A plaintiff should also be deemed to have established a prima facie case where he can show an impact on any pool of potential applicants he is able to identify. The court’s scrutiny of the plain-

\textsuperscript{254} \textit{Id.} at 474-75.


\textsuperscript{256} \textit{Id.} at 308-13.

\textsuperscript{257} It might be argued in response that putting in an application for a job is not conclusive evidence of actual interest, especially where a prospective employee has submitted applications to multiple employers. Even if that argument is correct, however, there is no reason to think that the level of interest of a prospective employee would vary by race.
tiff's description of the relevant labor market should be minimal. It is impossible to identify a hypothetical market with precision, and placing a demanding burden on the plaintiff will limit the cases in which an employer is required ultimately to prove the productivity of its selection procedures. Thus, if the plaintiff can show that a requirement operates to exclude a significant percentage of minorities nationally, courts should assume that the national effect is replicated at the local level, and shift the burden in the case to the employer. Obviously, if the plaintiff wants to identify the relevant labor market with more specificity, that would be better, but it should not be required.

The hard case, exemplified by *Wards Cove*, is where a plaintiff seeks to establish unlawful impact by comparing the racial make-up of one segment of an employer's work force to another. Absent significant geographic isolation in an employer's operations, however, such a comparison generally should not be necessary. More importantly, there is a not insubstantial risk that permitting proof of impact by internal workforce comparison will cause employers to insure that their labor force is uniformly racially balanced in order to escape liability. Although, as I discuss below, fear of losing an impact lawsuit inherently exerts a limited degree of pressure on employers to hire by the (racial) numbers, that pressure would likely prove overwhelming if liability were to attach whenever a company's internal percentages were out of whack. Hiring solely by race is inconsistent with the productivity principle, and, therefore, any interpretation of Title VII likely to foster racial hiring should be rejected.

The final issue on the plaintiff's prima facie case is the isolation/causation requirement discussed above in the context of the new Act. Specifically, the courts will have to decide when an employer's decisionmaking process is "not capable of separation for analysis" so that it may be analyzed in its entirety. This problem will arise in two situations: where an employer has not kept records, and where it combines its practices in such a way that the records it has kept do not reflect the impact of any particular practice individually. In both of these situations, a concern with productivity suggests that a global attack on the outcome of the employer's decisionmaking process as a whole should be allowed. The reason is straightforward. Permitting comprehensive chal-

258 See *supra* notes 183-201 and accompanying text.
259 § 105, 105 Stat. at 1074.
lenges will spur employers to start keeping records and to evaluate with specificity whether each of the selection practices they use fosters productivity or retards it.

On the whole, then, the plaintiff's prima facie burden should be very relaxed, approximating that of a disparate treatment case. If employers know that they will be forced to prove in court that their personnel practices correlate with productivity, then they will start giving more thought to the best means to select the best applicants and employees before they are sued.

At this juncture, some might argue that, rather than prompting employers to improve their personnel practices, relaxing the plaintiff's burden unduly will simply encourage employers to resort to productivity-impairing quotas to insulate themselves from impact liability. Because the issue of quotas is so laden with emotion, its discussion was severely distorted by both sides in the debates over the Civil Rights Act of 1991. On balance, it seems very unlikely for several reasons that employers will institute quotas in response to the strengthening of impact law. But, candor compels acknowledging that the matter is not entirely free from doubt.

The Democrats insisted that nothing in the new Act could be read to require employers to adopt quotas.260 This observation, although true, is beside the point. The Republicans' argument was never that the Act compelled employers to implement quotas directly. Rather, they maintained that, if an impact were too easily made out, or a selection practice too difficult to justify, then employers would act to minimize the risk of costly litigation and the attendant possibility of large adverse judgments by keeping their numbers in line. The Democrats' denial that impact law creates some incentive to engage in racial hiring was disingenuous. So long as an employer may be called upon to defend its actions when they disparately impact upon minorities, common sense counsels that the employer will have at least some reason to see to it that no such impact is present.

But, if the Democrats, for political reasons, were unwilling to acknowledge the incentive toward racial hiring that impact law inevitably creates, the Republicans vastly exaggerated its magnitude. The reality is that there are other factors, legal and economic, which cut in the opposite direction. The first of those factors is the Supreme Court's decision in Connecticut v. Teal.261 The issue in

260 See supra note 181.
Disparate Impact and the Civil Rights Act of 1991

_Teal_ was whether an employer could protect itself from liability by pointing to the “bottom line” racial balance of its work force where a test it administered had a disparate impact on minorities. The Supreme Court said no. The Court held that the use of any device which disproportionately excludes minorities is unlawful, irrespective of whether the employer offsets its exclusionary effect later in the decisionmaking process.262 Given the Court’s decision in _Teal_, an employer thus does not buy much formal legal protection, simply by increasing the number of minorities it employs if it continues to use bad tests. And while an employer might be thought to be purchasing some good will in the minority community which would theoretically render it a less likely target for suit, we know from _Teal_ that having more African-American faces on the premises will not deter plaintiffs from challenging selection devices which exclude them personally, regardless of the bottom line.263

Even without the Court’s decision in _Teal_, hiring minorities in order to forestall an impact suit might not make much economic sense. Every minority hired simultaneously constitutes a potential lawsuit if later discharged. Indeed, the vast majority of Title VII actions brought today challenge discharges rather than refusals to hire.264 This phenomenon is not surprising; discharged workers generally are far more aggrieved and have considerably more at stake than applicants who simply are not hired. They also know more about the reasons for the employer’s actions. Moreover, in discharge cases, which are likely to involve conduct for which punitive damages are recoverable under the new Act, the employer may face substantially greater exposure.265 Employers thus may well conclude that the projected costs of discharge actions brought by minorities who might have to be let go will exceed the costs of impact lawsuits brought by minorities who are not hired in the first place. There would certainly be no reason to implement a quota if that were true.266

262 _Id._ at 453-56.

263 It is possible, however, that having a racially balanced bottom line will make the employer less likely to be subject to scrutiny by the EEOC. _See_ 29 C.F.R. § 1607.4E (1992). The vast majority of Title VII actions, however, are initiated by individuals rather than the EEOC.


265 Section 102 of the Act provides for the recovery of compensatory and punitive damages for intentional discrimination up to certain limitations which vary according to the size of the employer. § 102, 105 Stat. at 1072-74.

266 Any actual comparison of the potential exposure to an employer from failure to
Finally, even if employers still conclude that resorting to quotas would be cost-effective, the question remains whether the type of racial hiring they would engage in to avoid impact liability is all that troubling. Employers will only hire by race where the potential exposure from impact liability exceeds the drag on productivity that would result from hiring workers who would not otherwise be chosen. That is likely to be true solely where the minorities being hired are in fact qualified to do the job or the job in question is so unimportant that not having it performed well is of no real consequence. In either case, it is hard to see why there should be any serious objection to increased minority hiring. In the former instance, the jobs would not be awarded to minorities who were not qualified, and in the latter case it is unlikely that whites would want the kind of jobs at stake. There is thus little to be feared and much to be gained from easing the burden of the plaintiff's prima facie case.

The same considerations which justify a relaxed standard for the plaintiff, however, suggest an increased burden for the employer. The principal open issue concerning the defendant's case under the new Act is the level of business justification an employer must demonstrate in order to use a practice which causes a disparate impact. Put simply, how much necessity should the business necessity defense require an employer to prove? The general answer is: "quite a bit." If the business necessity defense has no real bite to it, then the incentive impact law otherwise creates for employers to implement efficient personnel practices would be substantially undercut. As with the plaintiff's prima facie case, some will argue that employers will be driven to hire by the numbers if their burden is raised too high. Most of the arguments made in response to the quota issue as it bears on the plaintiff's prima facie case, however, are equally applicable here. The one difference is that the additional cost of demonstrating that a selection device is a "necessity" must be factored into the employer's incentive structure.

That cost may not be inconsiderable. Although the Supreme Court has not spoken extensively about the nature of the validation an employer must undertake before an impactful test may be used,
the EEOC has.\textsuperscript{267} The Commission’s guidelines are very exacting, requiring employers to show high correlations between test performance and job performance.\textsuperscript{268} In addition, as Professor Epstein notes, an employer's ability to rely upon validity studies undertaken by the authors of the test or other users is somewhat limited.\textsuperscript{269} The tenor of the guidelines is that an individual employer generally must commission extensive studies to establish the validity of a test for its own particular situation.\textsuperscript{270}

From the perspective of aggregate national productivity, requiring particularized validation studies from every employer who wants to use a test is counterproductive. Many employers, especially smaller ones, will simply forego the use of a test (and the information it might provide) because of the cost of validation. Other employers will continue to use and individually validate tests, but much of the cost of that individual validation will be a deadweight social loss. There is simply no reason to insist, for example, that every fire department in the country promulgate and validate its own employment examination; the job of firefighter does not vary that much from one locale to another. Moreover, an undue burden of validation dampens the incentive to create better tests once an employer has settled upon a test which is valid and in use.

There is, accordingly, a need to balance the prompt toward productivity which a requirement of business necessity creates against the diminution in productivity which will result from the discarding of useful selection devices if the proof of their necessity is made too difficult to meet. In striking that balance under the new Act, there are two approaches the courts ought to adopt. First, the courts ought to eschew reliance upon the EEOC guidelines and admit proof of validation studies whether or not a particular defendant employer commissioned them. If there is some reason why the situation of a specific employer makes reliance upon general validation studies problematic, then the plaintiff should be free to point that

\textsuperscript{267} The EEOC’s requirements for validation are contained in the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1992). The Supreme Court did address the topic of validation in \textit{Albemarle}, but the Court limited itself to questioning the defendant’s attempt at validation without really setting forth what it thought a successful validation should include.


\textsuperscript{269} \textit{Epstein}, \textit{supra} note 8, at 215.

\textsuperscript{270} Thus, the guidelines explicitly caution users that they alone are responsible for compliance. 29 C.F.R. § 1607.7A.
Indeed, the preferred course of events would be for the EEOC to endorse specific tests or practices for particular categories of jobs in lieu of issuing complex validation requirements which serve to drive employers toward subjective decisionmaking. If the courts then lent their imprimatur to the EEOC-endorsed tests, much of the cost of validation could be eliminated entirely. While there might be some danger that stamping certain practices with a seal of formal governmental approval would stifle innovation in testing as employers tended to congregate around the safe harbor of what they knew to be acceptable, it is not clear that the promulgation of nationally sanctioned examinations would have an effect any more dampening on advances in testing than the law creates presently.

Second, the courts ought to demand that employers demonstrate that they have conducted a survey of possible alternative practices as part of a showing that the practice they have chosen is a business necessity. To some extent this requirement can be viewed as semantically mandated; the term “necessity” by its nature suggests an exploration of options. Stated differently, a practice is not really necessary if the purpose for which it is used could be accomplished in some other manner with less impact. Beyond semantics, the requirement will lead employers to weigh possible alternatives they might not otherwise contemplate.271

Placing this burden on the employer might, at first blush, seem inconsistent with the new Act, which states that a plaintiff may prevail by demonstrating the availability of an alternative employment practice with a lesser disparity of impact which the employer refuses to adopt.272 But the inconsistency is more apparent than real. While the new Act provides an additional means for a plaintiff to win an impact case,273 it does not suggest that the presence of alternatives is consequently irrelevant to establishing a business necessity. On the contrary, requiring that the employer identify the practices it considered, but rejected, will permit the plaintiff to make a case for an alternative it might not otherwise have known to exist.

271 The EEOC guidelines also suggest that employers should review possible alternatives in choosing a selection device, but for the purpose of eliminating impact rather than enhancing productivity. See 29 C.F.R. § 1607.3B.
272 § 105(a), 105 Stat. at 1074.
273 See supra notes 216-19 and accompanying text.
Turning finally to the third stage of an impact case, the principal open issue, as indicated in part II above, is the level of comparability a plaintiff must demonstrate between his alternative and the employer's practice with respect to both effectiveness and cost. Perhaps more than any other, this is the place where approaching impact analysis from the standpoint of productivity rather than as a form of racial preference leads to a different legal standard. If the purpose of impact law is seen principally as the aiding of minorities, then the plaintiff should be given fairly wide latitude to demonstrate the suitability of alternative practices. Thus, if the employer's chosen selection device is significantly racially exclusionary, the plaintiff should win the case if he proffers an alternative with a lesser impact, even if it costs more and does not work quite as well. By contrast, if the emphasis is on productivity, then the plaintiff should be required to show that his device is equally as effective as the employer's and no more expensive.

To some extent, of course, the difference between these two standards is a matter of degree. An alternative which is inordinately expensive and functions badly would simply not be viable, regardless of its higher yield of minorities. By the same token, an alternative which meets the employer's needs without a disparate impact would be acceptable, even if slightly more costly.

Nevertheless, in my view, to succeed at the third stage of the case the plaintiff should have to prove that its alternative will satisfy all of the employer's principal requirements with an additional cost that is not much more than *de minimus*. Once an employer has met the demanding burden of demonstrating that its preferred practice is a business necessity, a plaintiff should not be able to force the employer to adopt a different practice without a very strong showing. Indeed, it will probably be an unusual case in which a plaintiff would even attempt such a showing.\(^{274}\)

**Conclusion**

It is perhaps naive to assume that our national dilemma over race as reflected in the workplace will be resolved any time soon. Nevertheless, the importance of enhancing the productivity of American

\(^{274}\) Where a plaintiff does meet its burden, however, for the reasons indicated in part II, the employer should not be able to evade liability by adopting the plaintiff's proffered alternative in the middle of trial.
business and labor is something upon which we can largely agree. Disparate impact law has a role to play in that regard, and the courts should read the Civil Rights Act of 1991 to further it.