DePaul Law Review

Volume 41
Issue 4 *Summer 1992: Symposium - Employment Discrimination, Affirmative Action, and Multiculturalism*

Article 8

Racial Preferences, Quotas, and the Civil Rights Act of 1991

Lino A. Graglia

RACIAL PREFERENCES, QUOTAS, AND THE CIVIL RIGHTS ACT OF 1991

*Lino A. Graglia**

INTRODUCTION

Jean-Francois Revel begins his recent book with the sentence, "The foremost of all the forces that drive the world is falsehood."[1] This is nowhere more true than in regard to the subject of civil rights and racial discrimination in the United States today. Measures that will have the intended effect of requiring race discrimination are put forth in the name of civil rights; requirements of discrimination are justified as measures to end discrimination.

In 1954, in *Brown v. Board of Education*[2] and *Bolling v. Sharpe*,[3] a companion case, the United States Supreme Court established the principle that all racial discrimination by government, state or federal, is prohibited by the Constitution. At least this is what everyone believed the Court established, as it quickly extended the nondiscrimination principle to all publicly owned facilities without further explanation.[4] Once established, the principle was immediately seen as so appealing, so obviously just and necessary in the American context, as to be irresistible. In the Civil Rights Act of 1964 ("1964 Act"),[5] the most important civil rights legislation in our history, Congress ratified, endorsed, and extended the nondiscrimination principle. Title IV of the Act, providing for enforcement of *Brown* by the Attorney General,[6] and Title VI, prohibiting racial discrimi-

---

* A. Dalton Cross Professor of Law, The University of Texas at Austin. My thanks to Kay Graglia for her helpful comments on an earlier draft.

1. JEAN-FRANCOIS REVEL, THE FLIGHT FROM TRUTH: THE REIGN OF DECEIT IN THE AGE OF INFORMATION 3 (1992).

2. 347 U.S. 483 (1954).

3. 347 U.S. 497 (1954).

4. *E.g.*, Gayle v. Browder, 352 U.S. 903 (per curiam) (buses), *petition for clarification and reh'g denied*, 352 U.S. 950 (1956); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (per curiam) (public beaches and bath houses); Holmes v. Atlanta, 350 U.S. 879 (1955) (per curiam) (municipal golf courses).

5. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at scattered sections of U.S.C.).

6. Title IV states:

> Whenever the Attorney General receives a complaint in writing . . . and the Attor-

nation by institutions receiving federal funds,[7] made *Brown* effective and enforceable for the first time, quickly bringing state-imposed school segregation to an end. Going much further than *Brown,* the Act prohibited even private discrimination in public accommodations (Title II)[8] and employment (Title VII).[9] The history of the law of racial discrimination in the United States since the passage of the Act, however, is a history of the turning of the 1964 Act against itself. The ending of official and public discrimination against blacks, the triumph of *Brown,* had come to seem to the victors too limited an achievement. The time had come, they decided, to seek a still greater victory, a return to racial discrimination, this time against whites.

In what surely is one of the most extraordinary stories in the history of law, *Brown*'s and the 1964 Act's prohibitions of discrimination were converted into permissions for or even requirements of discrimination. The Civil Rights Act of 1991[10] is another step in this direction. Because racial discrimination could not and still cannot be defended before the American people, however, it has had to be imposed by administrative agencies and courts, and now by Congress, by stealth, not by openly rejecting *Brown*'s and the 1964 Act's prohibitions of discrimination, but in the name of *enforcing* those prohibitions. Falsehood has been and continues to be the indispensable driving force. Its use has been unusually effective in this area because the goals of increased racial integration and black advancement are obviously so highly moral as to reduce to a quibble any objection to the use of immoral means.

---

ney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized . . . to institute . . . a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate . . . .

42 U.S.C. § 2000b(a) (1988).

7. Title VI states:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d (1988).

8. 42 U.S.C. §§ 2000a to 2000a-6 (1988).

9. 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. III 1991).

10. Pub. L. No. 102-166, 105 Stat. 1071 (codified at scattered sections of U.S.C.).

I. THE BEGINNING OF THE COUNTERREVOLUTION: FROM PROHIBITING TO REQUIRING RACIAL DISCRIMINATION IN EDUCATION

If *Brown* began the revolution in the law of racial discrimination, *Green v. County School Board*,[11] decided in 1968, began the counterrevolution. In *Green*, the NAACP stipulated that the New Kent County, Virginia, school system was being operated free of racial discrimination, but challenged its constitutionality, nonetheless, on the ground that one of its two schools remained all black. The lower courts held that since the school system admittedly was free of racial discrimination, it was obviously in compliance with *Brown*.[12] The only two options for the Supreme Court, it seemed, were either to affirm this conclusion or to hold that compliance with *Brown* was no longer the constitutional requirement and that the new requirement was, not the elimination, but the practice of racial discrimination, now not to prevent but in order to increase school racial integration. The Court did not want to take the first option—compliance with *Brown*, a dream a short time before, had suddenly become for the truly committed to "civil rights" much too limited a goal. But the Court could hardly take the second option and openly announce that the Constitution did not prohibit all racial discrimination by government after all, as everyone thought was held by *Brown*, and that the Constitution actually sometimes required racial discrimination.

In the practiced hands of Justice Brennan, the Court found a third, albeit totally dishonest, option. The requirement remained, Justice Brennan insisted, the requirement of *Brown*—the total elimination of racial discrimination. But the New Kent County school

---

11. 391 U.S. 430 (1968).

12. The United States Court of Appeals for the Fourth Circuit, in a per curiam opinion, affirmed the district court's holding that the school board was operating in compliance with *Brown*. 382 F.2d 338, 339 (1967). The Fourth Circuit's decision in *Green* was governed by Bowman v. County School Board, 382 F.2d 326 (1967), which the Fourth Circuit had decided that same day. In *Bowman* a group of black pupils attacked the same "freedom of choice" school selection plan that was attacked in *Green*. Under this plan each pupil was given the unrestricted right to attend any public school in the system. Thus, a black child could voluntarily choose to leave an all-black public school in favor of an all-white or predominantly white public school. The court rejected the plaintiffs' argument that the school board had a constitutional obligation to compel racial integration or "balance" in the public schools. The court held that the Fourteenth Amendment did not require that an individual black pupil be deprived of his choice to attend any school, unless his choice was not free: "Since the plaintiffs here concede that their annual choice is unrestricted and unencumbered, we find in its existence no denial of any constitutional right not to be subjected to racial discrimination." *Id.* at 328.

system was not in compliance with *Brown*, despite the elimination of racial discrimination, because its schools were not racially balanced.[13] The Court thus performed the amazing feat of changing *Brown*'s and the 1964 Act's prohibition of segregation and all official racial discrimination into a requirement of integration and official racial discrimination and did it with no explanation other than that it was only continuing to enforce the prohibition—a feat possible only by a decision maker subject to no review. To this day, the Court continues to insist that there is no requirement of integration as such and that the only requirement is "desegregation"— that although it is requiring the assignment of students to school by race, it is actually enforcing *Brown*'s prohibition of racial assignment.[14]

In *Swann v. Charlotte-Mecklenburg Board of Education*,[15] decided in 1971, the Court brought *Green* to full fruition holding that "desegregation" meant that students were to be excluded from their neighborhood schools because of their race—precisely what *Brown* had prohibited—and transported to more distant schools when necessary to produce greater school racial mixing. This was still only a requirement of "desegregation," however, not of integration for its own sake, the Court asserted, because it applied only to schools that had been segregated in violation of *Brown*—not to all school racial separation—and its only purpose was to "remedy" the continuing effects of that unconstitutional segregation.[16]

Thus was born the "remedy" rationale for requiring or permitting racial discrimination, not only in the face of prohibitions of such discrimination, but on the basis of a claim to be enforcing those prohibitions. Racial discrimination used only to cancel or negate earlier racial discrimination, the theory apparently is, may actually result in a net reduction of racial discrimination. There are, however, two vitiating difficulties with this rationale in the school context. First, the claim to be merely counteracting or undoing the effects of past segregation is patently untrue: In practice, the

13. *Green*, 391 U.S. at 441-42.

14. *E.g.*, Freeman v. Pitts, 112 S. Ct. 1430 (1992).

15. 402 U.S. 1 (1971).

16. *Id.* at 15. The district court had imposed, as a "norm," a racial balance requirement of 71% white/29% black on individual public schools. The Supreme Court stated that, if the district court had imposed such a requirement as a "matter of constitutional right," the Supreme Court would have been "obliged to reverse" the district court's decision. The Supreme Court, however, purported to read the 71%-29% requirement as merely a "starting point" in fashioning a "remedy" for segregation prohibited by *Brown*. *Id.* at 23-26.

requirement was not limited to undoing the effects of past unconstitutional segregation. In *Swann,* for example, the Court ordered a near-perfect racial balance in the schools of Mecklenburg County, North Carolina, although such racial balance did not and does not exist even in school systems that had never practiced racial segregation.[17] Second, the theory does not, in any event, make sense: The merits of compulsory integration, if any, would not seem to depend on the cause of the racial separation being "remedied"; if compulsory integration is sound social policy in formerly segregated school districts, it should be sound social policy everywhere. The only function of the "desegregation-remedy" rationale for compulsory integration is to conceal the fact that compulsory integration cannot be justified.

Whatever doubt there might be about the true meaning of *Brown* or the Constitution regarding compulsory school racial integration, there can be no doubt about the meaning of the Civil Rights Act of 1964. Title IV of the Act states as clearly as language permits that " '[d]esegregation' means the assignment of students to public schools . . . without regard to their race" and, redundantly, that " 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."[18] Unfortunately, Congress neglected to specify that its explicit and repeated preclusion of racial assignment to overcome racial imbalance was meant to apply in the South as well as the North, that is, even when practiced only to "remedy" unconstitutional segregation. Chief Justice Burger's opinion for a unanimous Court in *Swann* disposed of these statutory provisions as follows:

> The legislative history of Title IV indicates that Congress was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of so-called "de facto segregation," where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action by state authorities.[19]

Unfortunately, Chief Justice Burger neglected, however, to cite the legislative history he was referring to, which can be explained by

---

17. *Id.* at 22-31. As Justice Powell pointed out in his concurring opinion in Keyes v. School District No. 1, 413 U.S. 189, 222 (1971): "In imposing on metropolitan southern school districts an affirmative duty, entailing large-scale transportation of pupils, to eliminate segregation in the schools, the Court required these districts to alleviate conditions which in large part did *not* result from historic, state-imposed *de jure* segregation."

18. 42 U.S.C. § 2000c-6 (1988).

19. *Swann,* 402 U.S. at 17-18.

the fact that no such legislative history exists.[20] This remarkable performance established that there were no effective limits on the ability of the Court to defy the 1964 Act's prohibitions of discrimination where the effect would be to increase integration; it set the precedent for the Court's undoing of the Act's other titles.

II. FROM PROHIBITING TO REQUIRING RACIAL DISCRIMINATION IN EMPLOYMENT

What *Green* and *Swann* did to Title IV of the Civil Rights Act of 1964, *Griggs v. Duke Power Co.*[21] and *United Steelworkers of America v. Weber*[22] did to Title VII. It was also what the Court did to Title VI in *Regents of the University of California v. Bakke*,[23] holding that Title VI's prohibition of racial discrimination against any "person" by institutions receiving federal funds was perfectly consistent with discrimination against whites.[24] The Court in *Griggs*, by disallowing the use of ordinary employment criteria that disproportionately disqualified blacks, converted Title VII's requirement that employment decisions be race-neutral into a requirement that no employment decision be made without taking race into account.[25] As with the schools, the need became to avoid not racial discrimination but racial imbalance, that is, to *practice* racial discrimination. *Weber* took *Griggs* to its logical conclusion by making explicit the Court's view, implicit in *Griggs*, that Title VII's prohibition of racial discrimination in employment does not preclude the use of quotas and discrimination against whites.[26]

---

20. For a full discussion, see LINO A. GRAGLIA, DISASTER BY DEGREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS (1976).

21. 401 U.S. 424 (1971).

22. 443 U.S. 193 (1979).

23. 438 U.S. 265 (1978).

24. *Id.* at 287. Title VI states, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1988).

25. *Griggs*, 401 U.S. at 429-33. Title VII prohibits an employer from discriminating against any individual with respect to his employment because of that individual's race. 42 U.S.C. § 2000e-2(a)(1) (1988). Title VII further specifically prohibits an employer from limiting, segregating, or classifying an employee or applicant on the basis of race in a way that would tend to deprive him of employment opportunities. *Id.* § 2000e-2(a)(2).

26. *Weber*, 443 U.S. at 201-08. In *Weber*, an employer adopted an "affirmative action" program that reserved for black employees 50% of the available openings in a job-training program until the percentage of black employees became commensurate with the percentage of blacks in the relevant labor market. The plaintiff, a white employee, was denied admission to the program because blacks with less seniority were given preference. *Id.* at 197-200.

In *Griggs*, the defendant employer made high school graduation and a passing score on certain standardized general intelligence or aptitude tests conditions of eligibility for employment in positions that involved more skills than simple manual labor. The Court held that the use of these criteria constituted racial discrimination prohibited by Title VII because they had the effect of making a larger proportion of blacks than of whites ineligible for the positions to which the criteria applied.[27] As in *Swann*, Chief Justice Burger wrote the opinion for a unanimous Court, and as in *Swann*, Burger supported his supposed interpretation of the 1964 Act with assertions as to Congress's true intent, which he supposedly found in the Act's legislative history. This history, however, he again unfortunately neglected to cite—for the reason that it does not exist.[28]

The problem posed by Title VII, and other titles of the 1964 Act, for those who seek to make a civil rights "advance" from individual to group rights is not that the Act is unclear but that it all too clearly prohibits the racial discrimination they seek to impose. To the Court of the late 1960s and the 1970s, swollen with pride at the success of *Brown*, basking in its recognition as the "conscience of the nation," and determined to remain at the forefront of the cause of racial progress, the 1964 Act quickly went from being the nation's greatest civil rights achievement to an impediment to further progress. In the Court's view, the Act, committed to the protection of individual rights, was not to be administered but overcome.

The question, the Court said in *Griggs*, is whether Title VII prohibits an employer from making minimum requirements of education and intelligence conditions for employment without offering justification when those requirements disqualify a greater proportion of blacks than of whites.[29] But how could that be the question? How can a preference for educated and intelligent employees over employees who are less so violate a prohibition of racial discrimination? To say that it can is simply a devious way of saying that an employer must permit racial considerations to prevail over ordinary and legitimate business considerations. It is to conceal an indefensible requirement of racial discrimination—a requirement that less-qualified employees be preferred to better-qualified employees for racial reasons—behind the facade of a prohibition of racial

27. *Griggs*, 401 U.S. at 431.
28. *Id.* at 436.
29. *Id.* at 425-26.

discrimination.

The Court's opinion in *Griggs* consists largely of a series of assertions about congressional intent that are not only without basis in, but directly contradicted by, the 1964 Act's plain terms and legislative history. "The Act," the Court said, "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[30] "Congress," the Court reiterated, "has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question,"[31] and so on. The Court offered no citation for these remarkable assertions, all the more remarkable because the issue of the employer's freedom to set employment qualifications, including even unnecessarily high qualifications, was extensively debated in Congress and clearly decided contrary to the Court's conclusion.[32]

The specific issue of the use of intelligence tests arose when a hearing examiner in *Motorola,* a state employment discrimination case, ruled that an employer could not use an intelligence test that a disproportionate number of blacks failed to pass.[33] That such a result might follow from Title VII was the strongest argument its opponents could make against it. Indeed, if that argument were ac-

---

30. *Id.* at 431.

31. *Id.* at 432.

32. "The Court cited not a line in a committee report, not a colloquy on the floor of either house of Congress, not the testimony of a witness before a committee, not even the report of a journalist in a newspaper. The reason is that no such evidence exists." Michael E. Gold, Griggs' *Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform,* 7 INDUS. REL. L.J. 429, 480-81 (1985). This article is the definitive refutation of *Griggs'* purported reading of the 1964 Act's legislative history.

33. The decision and order of the hearing officer are reprinted at 110 CONG. REC. 9030-33 (1964). In *Motorola,* Leon Myart, a black, claimed that Motorola had failed to hire him because of his race. Myart based his claim on the Illinois Fair Employment Practice law. Myart had studied electronics at a vocational high school and had received his high school diploma from an adult school where he had completed a course for electrical technicians. He also had some practical experience repairing television sets. Myart applied for the position of analyzer and phaser, which required troubleshooting radio, television, and stereophonic sets as they came off the assembly line. As part of the employee-selection process, Motorola gave Myart the company's "Test No. 10," a twenty-eight-question written examination that Motorola routinely gave to all applicants. The examination was basically an intelligence test. Myart failed the examination. The hearing examiner for the Illinois Fair Employment Practices Commission concluded that the examination was illegal because black applicants, due to their culturally deprived and disadvantaged background, achieved lower scores than white applicants. *See id.* at 9032.

cepted, it would have been sufficient to defeat the 1964 Act, and the Act's proponents did all they could to make clear that Title VII did not mean what the Court nonetheless found it to mean in *Griggs*. Provisions were added to the Act explicitly stating that only "intentional" discrimination was prohibited[34] and that ability tests not used to discriminate racially were not prohibited.[35]

An authoritative Interpretive Memorandum prepared by the bipartisan co-managers of Title VII in the Senate stated:

> There is no requirement in title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.[36]

Senator Case, one of the comanagers, assured the Senate that "no court could read title VII as requiring an employer to lower or change the occupational qualifications he sets for his employees simply because proportionately fewer Negroes than whites are able to meet them."[37]

The Court in *Griggs* held, nonetheless, that Congress meant to prohibit employers from using ordinary employment criteria that disproportionately disqualified blacks unless the employers were willing to assume a burden of justification.[38] A statute that could not have been passed but for assurances that it merely prohibited racial and certain other discrimination was thus effectively converted into a statute requiring racial discrimination, such as the rejection of whites meeting ordinary employment qualifications in or-

---

34. 42 U.S.C. § 2000e-5(g) (1988) (a court may take corrective action where it finds that "respondent has intentionally engaged or is intentionally engaging in an unlawful employment practice"), *amended by* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075. Senator Humphrey, the principal proponent and Senate Floor Manager of the bill that became the Act, stated that "Section [2000e-5(g)] is amended to require a showing of intentional violation of the title in order to obtain relief." 110 CONG. REC. 12,723 (1964). This was only a "clarifying change," he pointed out, since the title's prohibition of discrimination on grounds of race "would seem already to require intent." *Id.*; *see also* Charles J. Cooper, Wards Cove Packing Co. v. Atonio: *A Step Toward Eliminating Quotas in the American Workplace*, 14 HARV. J.L. & PUB. POL'Y 84 (1991) (Title VII, as enacted, prohibited only intentional discrimination).

35. 42 U.S.C. § 2000e-5(h) (1988); *see also* Gold, *supra* note 32, at 533-49. The 1991 Act added a new provision to Title VII that prohibits the "race norming" of test scores. Civil Rights Act of 1991, Pub. L. No. 102-166, § 106, 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(l) (1988 & Supp. III 1991)).

36. 110 CONG. REC. 7213 (1964).

37. *Id.* at 7246-47 (punctuation omitted).

38. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

der to hire blacks who do not. The opponents of racial preferences and quotas, even when employed against whites, prevailed in Congress only to have their victory taken away by the Supreme Court.

III. How Much Must Employers Discriminate?—The Meaning of "Business Necessity" Prior to the Civil Rights Act of 1991

The result of *Griggs* was to change the central question in employment discrimination law from whether an employer had discriminated on the basis of race to what showing he would be required to make before being allowed to use employment criteria that blacks disproportionately cannot meet. Employers clearly had to lower employment standards in order to increase employment opportunities for blacks, but by how much? In *Griggs,* the Court stated the requirement of justification in varying language, as if heedless of the need for a definitive formulation. It stated at one point, for example, that "[t]he touchstone is business necessity,"[39] at another that a challenged requirement must be "shown to be related to job performance,"[40] and at still another that it must have "a manifest relationship to the employment in question."[41] It was not enough, the Court said, that an employer believed—reasonably enough one would think—that minimum education and standardized test score requirements "generally would improve the overall quality of the work force."[42] Such requirements could not be used unless the employer could show that he had made a "meaningful study of their relationship to job-performance ability."[43]

How will an employer be able to show, however, that an applicant who completed high school would likely make a better employee than one who completed only three years or two years or did not attend at all, or that an applicant with an IQ test score of 95 or 100 would be better than one with a score of 85 or 80? Unfortunately, "meaningful" studies making such showings are not often available or can be obtained only at substantial cost.[44] The one certainty is that the employer's Title VII problems are almost always about

---

39. *Id.*
40. *Id.*
41. *Id.* at 432.
42. *Id.* at 431.
43. *Id.*
44. *See* Gold, *supra* note 32, at 454-57 (noting that there exist no satisfactory guidelines to assist an employer in proving that its employment criteria are job-related).

whether his work force has the proper "balance" in terms of race or sex; that is, in the typical race case, whether he has hired enough blacks.[45] The Court's insistence in *Griggs* that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed"[46] was, therefore, inconsistent with what the Court required of employers in fact. The actual requirement is the hiring of employees who are less educated or intelligent or otherwise less competent or trustworthy than others who are available, in order to provide additional employment for blacks.

Later Supreme Court cases applying what became known as the *Griggs* "disparate impact" theory of racial discrimination stated the employer's burden of justification for challenged job requirements in varying ways. In *Albemarle Paper Co. v. Moody,*[47] the Court, quoting EEOC guidelines, stated that "discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.' "[48] In *Dothard v. Rawlinson,*[49] an alleged sex discrimination case, the Court held that the defendant had failed to show that its height and weight requirements for the position of prison guard were correlated with "the req-

---

45. However, even an employer having a work force comprised of "enough blacks" may not satisfy Title VII. In Connecticut v. Teal, 457 U.S. 440 (1982), a majority of the Supreme Court, led by Justice Brennan, rejected the so-called "bottom line" defense. There, the employer, a Connecticut state agency, had promoted to supervisory positions 22.9% of the black candidates, and only 13.5% of the white candidates. *Id.* at 444. Although this system of promotion obviously favored blacks over whites, and had in fact resulted in more blacks than whites being promoted to supervisory positions, the Court held that it was no defense to the disparate impact claim made against the agency. *Id.* at 442.

"In considering claims of disparate impact under § [2000e-2(a)]," said Justice Brennan, "this Court has never read § [2000e-2(a)] as requiring the focus to be placed instead on the overall number of minority or female applicants actually hired or promoted." *Id.* at 450. Instead, he continued, in disparate impact cases, "Title VII guarantees . . . these individual[s] . . . the *opportunity* to compete equally with white workers on the basis of job-related criteria." *Id.* at 451. The agency's bottom line showing that it had favored blacks over whites for promotions failed because this practice only favored the plaintiffs' minority group as a whole and not the individual plaintiffs themselves. *Id.* at 453-54. The rejection of individual in favor of group rights is, however, the essence of *Griggs* and *Weber.*

The result of *Teal* is to force employers either to abandon tests altogether or to rely on expensive job-related testing procedures, which may be found invalid if challenged. *Id.* at 463 (Powell, J., dissenting).

46. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

47. 422 U.S. 405 (1975).

48. *Id.* at 431 (quoting 29 C.F.R. § 1607.4(c) (1974)).

49. 433 U.S. 321 (1977).

uisite amount of strength thought essential to good job performance."[50] Who could have imagined in 1964 that a civil rights statute would preclude prison authorities from assuming that physically imposing prison guards would be particularly useful?

New York City Transit Authority v. Beazer[51] illustrates perhaps even more clearly than *Dothard* the potential of the disparate impact theory of discrimination to produce results most people would regard as ludicrous. The New York Transit Authority ("TA") had a rule—for which subway passengers presumably were grateful—prohibiting employee use of narcotic drugs. Methadone is a narcotic drug that when injected into the bloodstream with a needle has essentially the same effects as heroin. Because a disproportionate number of blacks and Hispanics are methadone users, the Transit Authority's requirement was attacked by disqualified black and Hispanic applicants under the disparate impact theory as constituting racial discrimination in violation of both the Constitution and Title VII. A federal district judge in New York upheld the claim.[52] Perhaps it is important that subway conductors—the actual drivers of trains—not be on methadone, he reasoned, but surely there are many transit authority jobs—indeed, seventy-five percent of the jobs, he found—that drug users can be expected adequately to perform.[53] The United States Court of Appeals for the Second Circuit affirmed without reaching the Title VII claim.[54]

A divided Supreme Court reversed, holding on the Title VII claim that the plaintiff's prima facie case of racial discrimination was "assuredly rebutted by TA's demonstration that its narcotics rule (and the rule's application to methadone users) is 'job-related.' "[55] It is enough, the Court said, that the TA's "legitimate employment goals of safety and efficiency" are "significantly served by—even if they

50. *Id.* at 331.

51. 440 U.S. 568 (1979).

52. Beazer v. New York City Transit Auth., 414 F. Supp. 277, 279 (S.D.N.Y. 1976), *modified in part and rev'd in part*, 558 F.2d 97 (2d Cir. 1977), *rev'd*, 440 U.S. 568 (1979). The same plaintiffs had earlier successfully argued, before the same district judge, that this Transit Authority rule violated their rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Beazer v. New York City Transit Auth., 399 F. Supp. 1032, 1058 (S.D.N.Y. 1975), *modified in part and rev'd in part*, 558 F.2d 97 (2d Cir. 1977), *rev'd*, 440 U.S. 568 (1979). The plaintiffs then sued under Title VII in order to obtain an award of attorney's fees, 42 U.S.C. § 2000e-5(k) (1988). *Beazer*, 414 F. Supp. at 278.

53. *Beazer*, 399 F. Supp. at 1052.

54. Beazer v. New York City Transit Auth., 558 F.2d 97, 99-100 (2d Cir. 1977), *rev'd*, 440 U.S. 568 (1979).

55. *Beazer*, 440 U.S. at 587.

do not require—TA's rule as it applies to all methadone users including those who are seeking employment in non-safety-sensitive positions."[56]

In *Watson v. Fort Worth Bank & Trust*,[57] a unanimous Court held that the disparate impact theory of discrimination is applicable even to the use of subjective or discretionary employment criteria. A four-Justice plurality mitigated this expansion of Title VII's coverage, however, by stating the elements of a disparate impact case in an apparently restrictive manner. The plurality opinion by Justice O'Connor made clear for the first time, for example, that although the employer has the burden of producing evidence of "business necessity" in response to a plaintiff's prima facie case of "discrimination" on the basis of disparate impact, the burden of proof of a Title VII violation remains with plaintiff.[58]

On the crucial issue of the meaning of "business necessity," the plurality indicated in passing that an employer met its burden by "producing evidence that its employment practices are based on legitimate business reasons."[59] Citing lower court opinions, the plurality indicated that deference should be given to employer judgment and that the use of "plainly relevant criteria" should not be disallowed just because they lead to "decisions which are difficult for a court to review,"[60] which amounts to saying that they need not be specifically shown to be job-related. The plurality relied on *Beazer* for the proposition that employment criteria are sufficiently justified

---

56. *Id.* at 587 n.31. Justice White dissented in an opinion joined by Justice Marshall and partly by Justice Brennan, arguing that the TA had not even come close to showing that the rule is "'demonstrably a reasonable measure of job-performance,'" *id.* at 602 (White, J., dissenting) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971)), because the TA had adopted the rule with no "meaningful study of [its] relationship to job-performance ability," *id.* (White, J., dissenting) (quoting *Griggs*, 401 U.S. at 431). The TA failed to show, Justice White argued, that "the rule results in a higher quality labor force, that such a labor force is necessary, or that the cost of making individual decisions about those on methadone was prohibitive." *Id.* (White, J., dissenting). This incredible position—how can an employer show, for example, that a higher quality labor force is "necessary"?—no doubt accounts for a provision in the 1991 Act that explicitly exempts an employer from having to show that a requirement that excludes current users of illegal drugs is a "business necessity." Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(k)(3) (1988 & Supp. III 1991)). The provision at the same time may effectively overrule *Beazer*, however, by providing that the exemption does not apply to rules that exclude persons, like the plaintiffs in *Beazer*, who use narcotics pursuant to supervised programs. *Id.*

57. 487 U.S. 977 (1988).

58. *Id.* at 997.

59. *Id.* at 998.

60. *Id.* at 999 (quoting Zahorik v. Cornell Univ., 729 F.2d 85, 96 (2d Cir. 1984)).

if they are shown to "significantly serve[] . . . legitimate employment goals."[61] Standards of proof should be set, the plurality said, so as "to avoid giving employers incentives to modify any normal and legitimate practices by introducing quotas or preferential treatment,"[62] which the 1964 Act explicitly prohibits.[63]

The Court's next disparate impact case, *Wards Cove Packing Co. v. Atonio*,[64] was the precipitating cause of the Civil Rights Act of 1991 ("1991 Act"). Reversing a Ninth Circuit decision, the Court held that the plaintiffs had failed to establish a prima facie disparate impact case because they failed to compare the racial makeup of the work force in the jobs in question with the racial makeup of a relevant labor pool.[65] In order to provide guidance to the court of appeals on remand, the Court went on to discuss other aspects of a disparate impact case. In essence, the Court affirmed and raised to the status of a majority opinion the views expressed in Justice O'Connor's plurality opinion in *Watson*.

First, the Court affirmed that a plaintiff must identify "the specific employment practice that is challenged" and show that it "has created the disparate impact under attack."[66] Second, the Court reiterated that an employer could rebut a prima facie case by showing that "a challenged practice serves, in a significant way, the legitimate employment goals of the employer."[67] "The touchstone of this inquiry," the Court said, "is a reasoned review of the employer's justification for his use of the challenged practice."[68] While a "mere insubstantial justification . . . will not suffice," neither must the practice be shown to be " 'essential' or 'indispensable' to the em-

---

61. *Id.* at 998 (quoting Beazer v. New York City Transit Auth., 440 U.S. 568, 587 n.31 (1979)).

62. *Id.* at 999.

63. Title VII provides that it shall not be "interpreted to require any employer . . . to grant preferential treatment to any individual or to any group" on the basis of race. 42 U.S.C. § 2000e-2(j) (1988).

Justice Blackmun, in a concurring opinion joined by Justices Brennan and Marshall, agreed that the disparate impact theory should apply even to subjective employment criteria, but did not share the plurality's concern about avoiding racially preferential hiring, and protested its apparent tightening of the requirements for recovery. *Watson*, 487 U.S. at 1000 (Blackmun, J., concurring in part and concurring in the judgment).

64. 490 U.S. 642 (1989).

65. *Id.* at 650-51.

66. *Id.* at 656-57.

67. *Id.* at 659.

68. *Id.*

ployer's business."[69] Finally, the Court reiterated that while the employer has the burden of providing evidence of business justification for challenged practices if the plaintiff has made a prima facie case, the ultimate burden of proof on the issue of discrimination still remains, despite contrary indications in pre-*Watson* cases, on the plaintiff.[70]

An outraged dissenting opinion by Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, disputed the majority on all three points. Justice Stevens charged the majority with a "sojourn into judicial activism,"[71] which had become the favorite accusation of the four judicial activists—they apparently considered it effective strategy to attack as "activism" any attempt to limit the results of their own genuine activism. The dissent insisted, first, that business justification for employment practices with a disparate impact is an affirmative defense to a Title VII action and, therefore, that the burden of proof on liability shifts to the defendant after the plaintiff has made a prima facie case by showing that the practice has caused a racial imbalance.[72]

The position of the dissenting Justices, however, requires a rewriting of Title VII. The offense under Title VII is racial discrimination, not racial imbalance. *Griggs* holds that prohibited discrimination may be found on the basis of a showing of unjustified use of employment practices with a disproportionate racial effect, but discrimination must remain the ultimate issue if it is Title VII that is being enforced. The burden must be on the plaintiff, therefore, to show that the challenged practices are unjustified and therefore, under *Griggs*, discriminatory. If the statute prohibits discrimination, plaintiff must show discrimination; if discrimination can be demonstrated by showing unjustified disparate impact, plaintiff must show that. A defendant's failure to produce evidence of business justification does not remove a plaintiff's burden of showing lack of justification; it merely makes it easier for a factfinder to hold that the burden has been met. The difference between a law that prohibits racial discrimination, which can be found on the basis of practices with unjustified disparate impact, and a law that prohibits racial imbalance unless the practices that cause it can be justified may be a

69. *Id.*

70. *Id.*

71. *Id.* at 663 (Stevens, J., dissenting).

72. *Id.* at 668-79 & n.14 (Stevens, J., dissenting).

subtle one, but it is the difference between placing the burden of showing justification on the plaintiff and placing it on the defendant. It is the difference between Title VII as written and the statute the dissenters would prefer.

Making racial imbalance instead of racial discrimination the basic offense—the result of making justification of disparate impact employment criteria an affirmative defense—inevitably leads to the conclusion that justification should be difficult. If racial imbalance is the offense, it should be tolerated only if unavoidable; if racial discrimination is the offense, it should be found on the basis of nonracial employment criteria only if they serve no significant business need. Justice Stevens therefore concluded, predictably, that the employer's burden of proof on the issue of justification is "weighty."[73] He declared himself "astonished" at the Court's statement that there should be a "reasoned review of the employer's justification" and that the challenged practice need not be shown to be "essential."[74] In *Dothard v. Rawlinson*,[75] he stated, the Court held that the challenged height and weight requirements had to be shown to be "essential to good job performance."[76] The Court's actual holding in *Dothard*, however, was only that the requirements had to be shown to be correlated with "the requisite amount of strength thought essential to good job performance."[77] More serious, Justice Stevens simply ignored his own statement for the Court in *Beazer*, primarily relied on by the majority, that it is enough that "legitimate employment goals" are "significantly served" by the challenged practices.

Finally, Justice Stevens denounced as excessively onerous the Court's requirement that plaintiffs in disparate impact cases specify the employment practice that allegedly caused the disparate impact. "[P]roof of numerous questionable employment practices," he argued, "ought to fortify an employee's assertion that the practices caused racial disparities."[78] This seems to mean that if a plaintiff complains of enough practices, it will not be necessary for him to specify the nature of his complaint, in terms of effect, as to any. Justice Stevens did not appear eager to state his position with clar-

73. *Id.* at 671 (Stevens, J., dissenting).
74. *Id.* (Stevens, J., dissenting).
75. 433 U.S. 321 (1977).
76. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 671 (1989) (Stevens, J., dissenting).
77. *Dothard*, 433 U.S. at 331.
78. *Wards Cove*, 490 U.S. at 673 (Stevens, J., dissenting).

ity, but he apparently would permit Title VII litigation to begin with a showing of little more than the existence of "racial disparities" in an employer's work force. The majority's approach, he charged, violates "principles of fairness" by "tipping the scales in favor of employers."[79] His approach, however, converts Title VII from a prohibition of racial discrimination into a prohibition of racial work-force imbalance unless the employer can show it to be virtually unavoidable.

IV. THE ELUSIVE MEANING OF "BUSINESS NECESSITY" IN THE 1991 ACT

In the Civil Rights Act of 1991, Congress found that the Supreme Court's decision in *Wards Cove* "weakened the scope and effectiveness of Federal civil rights protections."[80] The 1991 Act explicitly adopts, for the first time, the disparate impact theory of a Title VII violation[81] and, explicitly overruling *Wards Cove* on the issue, places on defendant employers the burden of justifying challenged practices shown to have a disparate impact.[82] On the other hand, it affirms *Wards Cove*, and rejects the dissent's position, by providing that the plaintiff ordinarily must identify the particular practice alleged to have a disparate impact.[83] On the crucial issue of the weight of the burden of justification, however, the Act is much less clear.

The Act states that the employer's burden is "to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity."[84] It further states that one of its purposes is "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power*

---

79. *Id.* (Stevens, J., dissenting).

80. Civil Rights Act of 1991, Pub. L. No. 102-166, § 2(2), 105 Stat. 1071, 1071.

81. *Id.* § 105(a), 105 Stat. 1071, 1074 (codified at 42 U.S.C. § 2000e-2(k)(1)(A) (1988 & Supp. III 1991)).

82. *Id.* (codified at 42 U.S.C. § 2000e-2(k)(1)(A) to (C) (1988 & Supp. III 1991)).

83. *Id.* The 1991 Act provides:

> An unlawful employment practice based on disparate impact is established under this title only if—
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race . . . and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . . ."

Id. (codified at 42 U.S.C. 2000e-2(k)(1)(A)(i) (1988 & Supp. III 1991)).

84. *Id.*

Co. . . . and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio.*"[85] The Act does not, however, define the codified concepts other than by this reference to Supreme Court decisions. Indeed, it provides, probably uniquely, that the crucial term "business necessity" is to be understood as if it had no legislative history, despite the fact that its meaning was intensely debated by Congress over a period of two years. Only an "interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991)," the Act states, "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."[86] The uniquely authoritative interpretative memorandum referred to, unfortunately, merely repeats, almost verbatim, what is stated in the 1991 Act itself, that the "terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.* . . . and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio.*"[87]

The crucial question, therefore, is: What is the "concept" of "business necessity" enunciated in *Griggs* and the other Supreme Court decisions prior to *Wards Cove?* How, if at all, was the concept changed in *Wards Cove?* In *Griggs,* after stating that "[t]he touchstone is business necessity,"[88] the Court stated, more specifically, that the employer's burden is to show that the challenged employment standard has "a manifest relationship to the employment in question."[89] This phrase was repeated and apparently treated as the definitive statement of the relevant test in every later case, including Justice O'Connor's plurality opinion in *Watson* and both the majority and dissenting opinions in *Wards Cove* itself. This makes it extremely difficult, to say the least, to state what precisely is the difference, if any, in the meaning of "business necessity" between *Wards Cove* and prior cases.

---

85. *Id.* § 3(2), 105 Stat. 1071, 1071 (citations omitted) (codified at 42 U.S.C. § 1981 (1988 & Supp. III 1991)).

86. *Id.* § 105(b), 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 1981 (1988 & Supp. III 1991)).

87. 137 CONG. REC. S12,276 (daily ed. Oct. 25, 1991) (sponsors' interpretive memorandum) (citations omitted).

88. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

89. *Id.* at 432.

On the business necessity issue, *Wards Cove,* as already noted, is essentially a reaffirmation of *Watson.* Is *Watson* not to be considered a Supreme Court decision prior to *Wards Cove,* on the ground that it is only a plurality opinion? We are, of course, explicitly precluded from seeking light from legislative history. Unless *Watson* is excluded from consideration, however, *Wards Cove* clearly made no significant change in the prior law. The result would be that the 1991 Act's codification of "business necessity" is entirely without effect in regard to *Wards Cove.*

It is arguable that *Wards Cove* made no change in the concept of "business necessity" even if *Watson* is not considered. Indeed, that is precisely what the Bush Administration's congressional supporters claim is the compromise they agreed to and on the basis of which they withdrew their opposition to the 1991 Act.[90] On the issue of "business necessity," *Watson* relied primarily on *Beazer,* the most recent prior case, and *Wards Cove* also relied on *Beazer* as well as on *Watson.* The crucial *Wards Cove* statements are that the "business necessity" or "job related" issue is "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer," and that the challenged practice need not be "essential" or "indispensable" to the employer's business.[91] These statements, however, simply paraphrase the *Beazer* statement that it is enough for an employer to show that its "legitimate employment goals" are "significantly served by—even if they do not require"—the challenged practice.[92] The claim of the Bush Administration and its supporters that the 1991 Act as finally agreed to was not intended to make any change in the "business necessity" concept is further supported by the fact that an earlier version explicitly spoke of overruling *Wards Cove,* while the Act that escaped the President's veto speaks only of codifying the law prior to *Wards Cove.*[93]

In sum, the meaning of "business necessity" in the 1991 Act can-

---

90. *See* 137 CONG. REC. S15,472-78 (daily ed. Oct. 30, 1991) (Section-by-Section Analysis Representing the Views of the Administration and Senator Burns, Cochran, Dole, Garn, Gorton, Grassley, Hatch, Mack, McCain, McConnell, Murkowski, Simpson, Seymour and Thurmond). The Administration's analysis notes that "the present bill has codified the 'business necessity' test employed in *Beazer* and reiterated in *Wards Cove.* The language in the bill is thus plainly not intended to make that test more onerous for employers to satisfy than it had been under current law." *Id.* at S15,476.

91. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989).

92. New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979).

93. *See supra* note 90.

not be determined by looking at the Act, and the Act tells us we may look nowhere else except to the Supreme Court decisions prior to *Wards Cove*. The majority in *Wards Cove*, however, claimed that their decision in that case made no change in the prior law as they understood it. It seems entirely possible, therefore, that the majority may continue to develop and apply the "business necessity" language of *Griggs* as if the 1991 Act had not intervened.

That, at least, is what one would argue as an advocate for an employer—that the long struggle to change the definition of "business necessity" ended in a stalemate. Countering this is the fact that the 1991 Act was a victory for the liberals in Congress in several respects, including its stated purpose to correct the "weakened" civil rights enforcement that supposedly resulted from *Ward's Cove*. Courts should interpret legislation neither narrowly, if that means to cut it back, nor broadly, if that means to expand it, but simply in the utmost good faith to effectuate legislative intent to the extent it can be ascertained. The history of "civil rights" law over the past four decades is a history of liberals winning in the courts victories they could not win in the political process, which is a perversion of our constitutional system of government. This time the liberals appear to have won in the political process, and it would be no less a perversion of our system of government—even though only statutory interpretation is involved, and limiting the 1991 Act would surely serve the public interest—for conservatives to attempt to take that victory away from them in the courts.

The question, however, is the extent of the liberals' victory; it would be just as improper for courts to give them more than they won than to give them less. Indeed, in a country based on individual liberty—or a country that would pursue prosperity—there should be a presumption against the expansion of law, coercion, and liability. If, therefore, a court acting in total good faith can make no reasonable determination that a law expands liability beyond a certain point, it should assume that it does not.

The liberals won many victories in the 1991 Act. They won official recognition of the disparate impact theory of discrimination, which effectively converts Title VII of the 1964 Act from a prohibition of racial discrimination into a requirement of racial preferences. They had the burden of proof of business necessity placed on the employer, which greatly strengthens the requirement of racial preferences by making the basic offense not discrimination but a

lack of work-force racial "balance." They achieved many other litigation-encouraging gains that make the 1991 Act a bonanza for plaintiffs and their lawyers.[94] For at least three reasons, however, the scope of their victory, if any, on the business necessity issue is difficult or impossible to determine.

First, although it is clear that the liberals wanted to undo *Wards Cove,* which was seen as weakening the "business necessity" requirement, the concessions they were forced to make in order to avoid a presidential veto may well have amounted, as noted above, to their achieving nothing on this crucial issue.[95]

Second, the Act presents courts with the difficult, but unfortunately not unprecedented, question of how to deal with legislation that is largely hypocritical or simply dishonest because it cannot openly state, but must conceal, the actual objective of its sponsors.[96] The liberals' dilemma is and was that although they favor, or at least have no serious objection to, racial preferences and quotas—believing that the time has come to move beyond equality of opportunity to equality of results, and from individual rights to group rights—they are politically unable to state this openly. Indeed, they are compelled to declare their opposition to racial preferences. Courts should of course implement legislation according towhat it actually (and knowingly) says, even though it is known that sponsoring legislators hoped to achieve the opposite of what they were politically required to say. Courts, that is, should not cooperate in the perpetuation of a ruse.

The result is that the 1991 Act is a statute at war with itself. On the one hand, by placing the burden of proof of business necessity

---

94. For example, potential liability under 42 U.S.C. § 1981 is greatly expanded, *see* Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071 (codified at 42 U.S.C. § 1981(b), (c) (1988 & Supp. III 1991)); damages are no longer limited to discrimination on the basis of race, *see id.* § 102 (codified at 42 U.S.C. § 1981a (1988 & Supp. III 1991)); and provision is made for the payment of fees to experts, *see id.* § 113 (codified at 42 U.S.C. §§ 1988(c), 2000e-5(k) (1988 & Supp. III 1991)).

95. *See* 137 CONG. REC. S15,474-76 (daily ed. Oct. 30, 1991) (listing the many restrictive definitions of "business necessity"—for example, "essential to effective job performance"—suggested by proponents of the Act but not accepted).

96. The Robinson-Patman Act, 15 U.S.C. §§ 13 to 13b, 21a (1988), is another example. It was a Depression-era measure enacted to protect small businessmen from competition (primarily small retail and wholesale grocers from the A & P chain) at the expense of consumers, but it was necessarily drafted as an antitrust measure, as if meant to foster competition and protect consumers. Since it could only be passed as an antitrust statute, the courts should certainly interpret it as such, even though the result is clearly the opposite of what its sponsors intended. *See* MARTIN J. ADELMAN, A & P—A STUDY IN PRICE-COST BEHAVIOR AND PUBLIC-POLICY (1959).

on employers and making the burden heavier—to the extent that it does—the Act requires employers to discriminate racially in making employment decisions. On the other hand, the Civil Rights Act of 1964, which the 1991 Act does not repeal but merely amends, still purports to prohibit racial discrimination and still contains a provision (redundant in light of the prohibition) explicitly rejecting racial preferences. Most important, the 1991 Act adds a provision—which the Act's proponents could not oppose without exposing their attachment to quotas—prohibiting "race norming," that is, the manipulation of test scores in order to make blacks appear more competitive with whites.[97] This is the only provision of the Act that can properly be described as a "civil rights" measure, a measure that, if enforced, will actually make a contribution to preventing discrimination against individuals on the basis of race. Indeed, if properly implemented, the prohibition of race norming could mean the end of "affirmative action"—discrimination in favor of blacks and against whites—in a vast array of employment contexts.

If hypocrisy is the tribute vice pays to virtue, it is right to insist that payment be made. If vice—in this case, the favoring of racial preferences—cannot be suppressed, it should at least be made to hide its face. The 1964 Act's continuing condemnation of racial discrimination and the 1991 Act's (therefore redundant) condemnation of race norming should therefore be taken seriously, as if prohibiting, not requiring, racial discrimination continues to be the congressional objective in fact as well as in name. If the liberals in Congress want something as politically unpalatable as racial preferences, they should be required to say so openly and clearly so that the public may understand what is happening; they should not be allowed to have the racial preferences they want while claiming to abjure

---

97. Section 106, "Prohibition Against Discriminatory Use of Test Scores," provides:

> It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

Civil Rights Act of 1991, Pub. L. No. 102-166, § 106, 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(l) (1988 & Supp. III 1991)).

The Sponsors' Interpretive Memorandum, *supra* note 87, 137 CONG. REC. at S12,276, states that the purpose of the section is "to bar the practice of 'race norming' and other practices used to alter or adjust the scores of job applicants on employment-related tests." Under race norming, blacks compete only with blacks and whites only with whites, with the result that a black can achieve a test score much lower than that of a white and yet be reported to an employer as being in the same or a higher percentile of test takers than the higher scoring white.

them.

There is no escaping, nonetheless, that the purpose and effect of the 1991 Act is to require employers to discriminate racially to the extent that it is easier for them to do so than to undertake to establish the business necessity of challenged employment criteria. The 1991 Act is, therefore, inconsistent with the 1964 Act it amends, but so was *Griggs*. Perhaps the real significance of the 1991 Act is that the *Griggs* disparate impact theory is no longer the illegitimate product of Supreme Court misbehavior but a part of statutory law. That theory means that employers are required to incur additional costs and some individuals must be advantaged and others disadvantaged because of race—less-qualified black employees must be preferred to more-qualified whites—in order to achieve a more racially integrated workforce.

The third reason that the scope of the liberals' victory on the business necessity issue is limited or at least uncertain is that Congress did not state how loss in efficiency and gain in racial integration are to be balanced. It probably is not possible to formulate an administrable rule indicating how much cost, in absolute or relative terms, must be incurred for a given gain, in absolute or relative terms, in racial integration. In any event, Congress is unwilling (politically unable) openly to admit that a cost must be incurred, that is, that racial preferences are required. The result, as with any illogical command, is to leave virtually unlimited discretion—the real lawmaking power—in the hands of courts and administrative agencies.

V. CONCLUSION

Perhaps the best that conscientious judges can do in this situation is to continue to impose efficiency losses on employers in the interest of increased work force racial balance more or less as they have done ever since the Supreme Court's wrongful and misguided decision in *Griggs*. Unlike the Supreme Court in *Griggs*, however, they should state openly that this is exactly what they are doing and feel required to do under the 1991 Act. Honesty is almost always a virtue in the administration of the law. Here, it might have the effect of requiring Congress to take a consistent and comprehensible position on the issue of racial preferences in employment. In any event, it should serve to enlighten the public as to exactly what is going on.

For many years the Court, led by Justice Brennan, was far to the left of Congress, consistently handing down socially destructive deci-

sions such as *Swann, Griggs, Weber,* and *Bakke* in defiance of statutory law as well as the public will. Justice Brennan (after a third of a century) and Justice Marshall (after a quarter of a century) are finally gone, and the Court is attempting to limit, as in *Wards Cove,* the reach of some of its worst mistakes. The saddest lesson of the misnamed Civil Rights Act of 1991 is that Congress, now to the left of the Court, will not permit that to happen.