Vanderbilt Journal of Transnational Law

Volume 24
Issue 4 *Issue 4 - 1991*

Article 5

1991

Building on MacNamara v. Korean Air Lines

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NOTES

Building on *MacNamara v. Korean Air Lines*: Extending Title VII Disparate Impact Liability to Foreign Employers Operating Under Treaties of Friendship, Commerce, and Navigation

ABSTRACT

This Note explores the possibility of applying Title VII's disparate impact liability theory against foreign companies operating under Treaties of Friendship, Commerce, and Navigation (FCN Treaties). The author questions the reasoning of MacNamara v. Korean Air Lines, *which applied disparate treatment, but not disparate impact, against a Korean company operating under an FCN Treaty. According to* MacNamara, *if courts permit plaintiffs in Title VII-FCN Treaty cases to utilize the disparate impact theory and cite statistical disparities in the racial composition of the work force as evidence of discrimination, employers could be held liable merely for exercising their FCN Treaty rights. This Note concludes that the* MacNamara *court ignored the complexity and costliness of presenting statistical data. More importantly, recovery under the disparate impact theory has become extremely difficult as a result of the Supreme Court's subsequent decision* Wards Cove Packing v. Atonio.

Furthermore, the author concludes that any increase in Title VII liability—because of either narrowed FCN Treaty rights or the application of disparate impact analysis—likely will not affect foreign investment in the United States. Fear of widespread divestment in the United States should not be the controlling factor in the resolution of tension between Title VII and FCN Treaties. The author advocates that victims of employment discrimination should be entitled to bring disparate impact, as well as disparate treatment, claims in cases involving foreign corporations operating under FCN Treaties.

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I. INTRODUCTION

Treaties of Friendship, Commerce, and Navigation (FCN Treaties) allow foreign corporations operating in the United States to employ executives and managers "of their choice."[1] Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employment discrimination based on race, color, religion, sex, or national origin.[2] Not surprisingly, tension exists between FCN Treaty rights and Title VII prohibitions. Considering the many foreign companies doing business in the United States and the extraordinary number of workers these companies employ,[3] examination of Title VII-FCN Treaty cases is worthwhile. Moreover, developments in the Title VII-FCN Treaty conflict could affect other aspects of transnational employment law—for example, the rights of United States corporations operating in foreign states.[4]

Several courts have addressed the friction between FCN Treaties and Title VII.[5] Similarly, numerous courts have analyzed the characteristics of disparate treatment and disparate impact, the two major theories of

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1. Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, U.S.-Korea, art. VIII, para. 1, 8 U.S.T. 2217, 2223 [hereinafter Korean FCN Treaty]. The "of their choice" clause in FCN Treaties is referred to frequently as the employer choice provision. *See* Gerald D. Silver, Note, *Friendship, Commerce and Navigation Treaties and United States Discrimination Law: The Right of Branches of Foreign Companies to Hire Executives "Of Their Choice,"* 57 FORDHAM L. REVIEW 765 (1989).

2. Civil Rights Act of 1964, tit. VII, Pub. L. No. 88-352, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1988)). The relevant portion of Title VII reads:

> It shall be an unlawful employment practice for an employer—
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> (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.

Id. 78 Stat. 255, § 2000e-2(a)(1).

3. *See* Lairold M. Street, *Application of U.S. Fair Employment Laws to Transnational Employers in the United States and Abroad*, 19 N.Y.U. J. INT'L L. & POL. 357, 358 (1987) (more than 1700 foreign-owned firms operate in the United States, employing over 2.5 million United States citizens).

4. *See, e.g.*, EEOC v. Arabian American Oil Co., 111 S. Ct. 1227 (1991) (holding Title VII not applicable to employment practices of United States corporation operating abroad, even with regard to the employment of United States citizens).

5. *See, e.g.*, Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982); MacNamara v. Korean Air Lines, 863 F.2d 1135 (3d Cir.), *cert. denied*, 110 S. Ct. 349 (1989); Wickes v. Olympic Airways, 745 F.2d 363 (6th Cir. 1984); Spiess v. C. Itoh & Co., 643 F.2d 353 (5th Cir.), *vacated on other grounds*, 457 U.S. 1128 (1982), *cert. denied*, 469 U.S. 829 (1984).

recovery in Title VII cases.[6] The United States Court of Appeals for the Third Circuit held in *MacNamara v. Korean Air Lines*[7] that a foreign corporation acting under an FCN Treaty may be held liable for Title VII violations based on the disparate treatment theory.[8] The court, however, refused to apply disparate impact.[9] Until the Supreme Court decides whether Title VII disparate impact liability can be imposed on an employer operating under the authority of an FCN Treaty, the current uncertainty will continue.[10]

This Note explores the disparate treatment-disparate impact distinction in relation to Title VII-FCN Treaty cases. Part II offers a brief history of FCN Treaties and an overview of Title VII. Part III discusses the Title VII-FCN Treaty conflict and the proper scope of the employer choice provision. Part IV addresses the disparate treatment and disparate impact theories, specifically, the Supreme Court's decisions in *Watson v. Fort Worth Bank & Trust*[11] and in *Wards Cove Packing Co. v. Atonio*.[12]

Part V analyzes the feasibility of extending disparate impact analysis to Title VII cases in which an employer operates under an FCN Treaty. Preoccupied with reconciling the employer choice provision of the Korean FCN Treaty with Title VII, the *MacNamara* court dismissed the disparate impact claim to avoid a conflict between the FCN Treaty and Title VII. In light of *Wards Cove, Watson*, and other changes in the disparate impact theory, the author concludes that courts should approach the disparate impact-disparate treatment distinction with more caution and reasoning than the *MacNamara* court.

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6. *See, e.g.*, Connecticut v. Teal, 457 U.S. 440 (1982); International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

7. 863 F.2d 1135 (3d Cir.), *cert. denied*, 110 S. Ct. 349 (1989).

8. The *MacNamara* decision is significant because it marked the first time a court distinguished between the disparate treatment and disparate impact theories of Title VII liability in a case involving an FCN Treaty. *See* John K. Weir, *Foreign Treaties Raise Questions in Disparate Treatment Cases*, NAT'L L.J., Dec. 11, 1989, at 22.

9. *MacNamara*, 863 F.2d at 1148.

10. Weir, *supra* note 8, at 22. *See also* Howard A. Simon and Frederick Brown, *International Enforcement of Title VII: A Small World After All?*, 16 EMPLOYEE RELATIONS L.J. 281, 298 (1990) (future Title VII enforcement in the international context "remains extraordinarily unclear.").

11. 487 U.S. 977 (1988).

12. 490 U.S. 642 (1989).

II. BACKGROUND

A. *Treaties of Friendship, Commerce, and Navigation*

The 1956 Friendship, Commerce, and Navigation Treaty with Korea, at issue in *MacNamara*, is one of a series of bilateral FCN Treaties that the United States signed with various states after World War II.[13] According to Herman Walker, a United States State Department adviser responsible for formulating the general structure of the post-war FCN Treaties,[14] these treaties determine the treatment each signatory state owes certain citizens of the other signatory states.[15] For example, FCN Treaties define the rights of foreign corporations operating within the boundaries of the United States.[16]

One purpose of executing FCN Treaties was to encourage transnational private investment.[17] Providing foreign corporations with favorable business conditions is a crucial element in attracting foreign investment to the United States.[18] Consequently, a significant function of FCN Treaties is to grant protections from certain liabilities to these foreign corporations.[19] More specifically, FCN Treaties grant these foreign corporations the limited freedom to hire executives of their choice,[20] despite domestic employment laws.[21] Much controversy surrounds the extent to which the employer choice provisions of FCN Treaties allow foreign corporations to circumvent Title VII.

B. *Title VII*

Title VII bars employers from discriminating against individuals on the basis of race, color, religion, sex, or national origin.[22] The 1964 ver-

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13. *MacNamara*, 863 F.2d at 1138.

14. Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 181 n.6 (1982).

15. Herman Walker, Jr., *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 806 (1958).

16. *Id.*

17. Thomas A. Coulter, Comment, *Testing the United States' Commitment to International Law: The Conflict Between Title VII and Treaties of Friendship, Commerce, and Navigation*, 25 WAKE FOREST L. REV. 287, 289 (1990).

18. Nobushia Ishizuka, Note, *Subsidiary Assertion of Foreign Parent Corporation Rights Under Commercial Treaties to Hire Employees "Of Their Choice,"* 86 COLUM. L. REV. 139, 140 (1986) (citing U.S. Dep't of State, Pub. No. 6565, Commercial Treaty Program of the United States 4 (1958)).

19. *MacNamara*, 863 F.2d at 1138.

20. Korean FCN Treaty, *supra* note 1, art. VIII, para. 1, 8 U.S.T. at 2223.

21. *MacNamara*, 863 F.2d at 1138.

22. Title VII allows discrimination based on religion, sex, or national origin to the extent any of these characteristics is a "bona fide occupational qualification [BFOQ]

sion of the Civil Rights Act was directed primarily at intentional discrimination, or what is often referred to as disparate treatment.[23]

The seminal case of *Griggs v. Duke Power Co.*[24] marked the first instance in which the Supreme Court used disparate impact analysis to find an employer in violation of Title VII. Congress expressed its approval of the *Griggs* decision during subsequent amendments to the Civil Rights Act.[25] Congress believed that in addition to intentional discrimination, subtle institutional discrimination was a major problem in the United States, urgently requiring remedial measures.[26] The legislative history of the 1972 amendments to the Civil Rights Act addressed employment practices that, although facially neutral, adversely affect certain classes of employees.[27] Furthermore, according to the Supreme Court,[28] Congress enacted Title VII to eliminate employment decisions based on a mixture of legitimate and illegitimate factors.[29] In short, Title VII was designed to combat discriminatory effects, as well as intentional

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reasonably necessary to the normal operation of that particular business or enterprise." *Id.* § 2000e-2(e). The BFOQ exception to Title VII, however, has been described as "extremely narrow." Dothard v. Rawlinson, 433 U.S. 321, 334 (1977). *See also* Matthew Orebic, Note, *Japanese Companies on United States Soil: Treaty Privileges vs. Title VII Restraints,* 9 HASTINGS INT'L & COMP. L. REV. 377, 397 (1986).

23. "Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). *See also* MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION: LAW AND LITIGATION § 2.6(3)(a) (1990).

24. 401 U.S. 424 (1971). For a discussion of *Griggs* and the disparate impact theory, *see infra* notes 135-72 and accompanying text.

25. *See* Connecticut v. Teal, 457 U.S. 440, 447 n.8 (1982) ("Congress recognized and endorsed the disparate impact analysis employed by the Court in *Griggs*. Both the House and Senate Reports cited *Griggs* with approval.").

26. S. REP. NO. 415, 92nd Cong., 1st Sess. 5 (1971). The legislative history shows the complexity and pervasiveness of employment discrimination: "Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs." *Id.*

27. Employment practices having a disparate impact can be defined as those practices, though not intentionally discriminatory, which "may in operation be functionally equivalent to intentional discrimination." Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988).

28. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

29. Legislative history shows that the words "because of" in Title VII do not mean "*solely* because of" (race, color, religion, sex, or national origin). *Id.* at 239-42 (emphasis in original). Thus, "Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations." *Id.* Congress specifically rejected an amendment that would have placed "solely" before the words "because of." *Id.* at 241 n.7 (citing 110 CONG. REC. 2728, 13837 (1964)).

discrimination,[30] and does not tolerate racial discrimination in any form or guise.[31]

Recent debate over amending the Civil Rights Act has pushed employment discrimination law into the spotlight.[32] On October 24, 1990, the United States Senate sustained President Bush's veto of omnibus civil rights legislation.[33] The defeated bill would have overturned *Wards Cove,* a decision that increased the difficulty of successfully litigating disparate impact claims.[34] The remainder of this Note addresses the effect of recent developments in disparate impact liability on the analysis of the Title VII-FCN Treaty tension.

III. CONFLICT BETWEEN TITLE VII AND TREATIES OF FRIENDSHIP, COMMERCE, AND NAVIGATION

As expected, plaintiffs who believe that they have been discriminated against by a foreign corporation operating in the United States argue that Title VII prevails; foreign corporations contend that the respective FCN Treaty is superior.[35] Courts should attempt to reconcile the poten-

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30. "If an employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply." *Watson,* 487 U.S. at 990-91.

31. "[I]t is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

32. For a discussion of the 1990 debate, see *infra* notes 33-34.

33. *Senate Sustains Bush's Veto of Civil Rights Legislation,* Daily Rep. for Executives (BNA) No. 207, at A-16 (Oct. 25, 1990). The vote was 66-34 in favor of overriding the President, one short of the two-thirds needed to override. Eleven Republicans joined all fifty-five Democrats in voting to override, yet thirty-four Republicans voted to sustain President Bush's veto. *Id.*

34. *Id.* Prior to the vote defeating the bill, Senator Arlen Specter, a Pennsylvania Republican who supported the bill, expressed his distaste for *Wards Cove:* "It's time we stopped deciding job discrimination issues by 5-4 decisions of the Supreme Court. . . . This is a bill which ought to be signed." *Id.* According to the Bush Administration, however, the standards of the congressional bill were "so harsh that they would force employers to resort to numerical hiring to avoid litigation." *Id.* Moreover, Republican Senator Orrin Hatch of Utah added that the bill was a "stark contrast to Title VII" and "would make race, color, or religion a conscious part of employer's [sic] treatment of their employees." *Id.*

35. Title VII was part of the Civil Rights Act of 1964, the "first comprehensive civil rights legislation since the Reconstruction civil rights statutes." Merrick T. Rossein, *Subjective Criteria in Title VII Disparate Impact Analysis: Burdens and Standards of Proof,* 9 MISS. C. L. REV. 29, 30 (1988). In contrast, most FCN Treaties were signed shortly after World War II. For example, the Korean FCN Treaty was signed in 1956. Korean FCN Treaty, *supra* note 1.

tial conflict between FCN Treaties and Title VII. While conflicts between treaties and statutes generally are resolved in favor of the one more recent in time,[36] the courts have been hesitant to find that Title VII supersedes FCN Treaties. Most courts presume that unless otherwise stated, when Congress enacts legislation it does not intend to contradict international treaties.[37] Title VII does not address FCN Treaties explicitly, and no evidence exists that Congress intended to undermine the employer choice provision.[38] Therefore, treaties such as the Korean FCN Treaty should be given priority over Title VII. The only remaining question is the extent of freedom that these treaties give foreign corporations operating in the United States.

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36. Whitney v. Robertson, 124 U.S. 190, 194 (1888). Treaties and congressional acts generally are given equal status in United States law and "in case of inconsistency the later in time prevails." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. a (1987).

37. According to the RESTATEMENT:

> An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear *or* if the act and the earlier rule or provision cannot be fairly reconciled.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a) (1987) (emphasis added).

Scholars argue that section 115 has been restated incorrectly. Coulter, *supra* note 17, at 307 n.175. For the past 100 years, the section apparently has been interpreted to require that, for a congressional act to prevail over an international treaty, Congress explicitly must have intended to supersede the treaty, and the two cannot be reconciled. *Id.* The comments to the RESTATEMENT seem to agree that "or" has been read as "and":

> It is generally assumed that Congress does not intend to repudiate an international obligation of the United States by nullifying a rule of international law or an international agreement as domestic law, or by making it impossible for the United States to carry out its obligations. . . . The courts do not favor a repudiation of an international obligation by implication and require clear indication that Congress, in enacting legislation, intended to supersede the earlier agreement or other international obligation. The fact that an act of Congress does not expressly exclude matters inconsistent with international law or with a United States agreement does not necessarily imply a Congressional purpose to supersede the international law or agreement as domestic law.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. a (1987).

38. *MacNamara*, 863 F.2d at 1146.

A. *Scope of FCN Treaties*

1. Trend Towards a Narrow Interpretation of the Employer Choice Provision

The United States Court of Appeals for the Fifth Circuit, in *Spiess v. C. Itoh & Co.*,[39] broadly interpreted the Japanese FCN Treaty. The *Spiess* court viewed FCN treaties as the supreme law of the land that trump inconsistent state law and federal statutes such as Title VII.[40] The court reasoned that congressional acts "ought never to be construed to violate the law of nations if any other possible construction remains."[41] Furthermore, the court stated that conflicting federal legislation will govern only when Congress explicitly intends to modify treaty obligations.[42] The *Spiess* court concluded that because Title VII does not reject explicitly the rights granted by the employer choice provision, courts have the duty to acknowledge these FCN Treaty rights.[43]

Spiess essentially gave foreign corporations unfetterred discretion in hiring executive personnel with total immunity from Title VII.[44] According to the *Spiess* court, foreign companies should have an absolute right to decide which executives will manage their operations in the host state, "without regard to host country laws."[45] Rejecting the distinction between branches of foreign corporations and United States subsidiaries of foreign corporations, the court concluded that FCN Treaties should protect both types of entities.[46] The court further reasoned that interpreting the employer choice provision in a manner favorable to foreign companies will help to stimulate foreign investment in the United States—a major goal of FCN Treaties in general, and of the Japanese Treaty in

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39. 643 F.2d 353 (5th Cir.), *vacated on other grounds*, 457 U.S. 1128 (1982), *cert. denied*, 469 U.S. 829 (1984).

40. *Spiess*, 643 F.2d at 356 (quoting U.S. CONST. art. VI, cl. 2). For an excellent discussion of the scope of the employer choice provision, see generally, Silver, *supra* note 1.

41. *Spiess*, 643 F.2d at 356 (citing *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

42. *Id.*

43. *Id.*

44. *MacNamara*, 863 F.2d at 1139.

45. *Spiess*, 643 F.2d at 361. The court held the employer choice provision "was intended, not to guarantee national treatment, but to create an absolute rule permitting foreign nationals to control their overseas investments." *Id.* at 360.

46. *Id.* at 356-57. *But see* Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 182-83 (1982) (refusing to extend protection of the Japanese FCN Treaty to United States subsidiary of Japanese corporation).

particular.[47]

More recently, the employer choice provision has been given a more limited scope—in other words, a more restricted privilege for foreign corporations doing business in the United States. In *Wickes v. Olympic Airways*,[48] the United States Court of Appeals for the Sixth Circuit limited the scope of the FCN Treaty with Greece.[49] To ensure operational success in the United States, the court recognized that foreign companies should have some freedom to favor their own citizens for executive and managerial jobs.[50] Emphasizing that FCN Treaties were aimed at percentile restrictions,[51] the *Wickes* court afforded the Greek corporation only a "narrow privilege to employ Greek *citizens* for certain high level positions."[52] In short, *Wickes* held that foreign corporations should not receive complete immunity from domestic discrimination laws, such as Title VII.[53]

The Supreme Court, in *Sumitomo Shoji America Inc. v. Avagliano*,[54] held that FCN Treaties were intended to grant foreign corporations national treatment, which means treatment no less favorable than that given to United States companies.[55] The Court emphasized that the purpose of FCN Treaties was to allow foreign companies to operate on an

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47. *Spiess*, 643 F.2d at 361.

48. 745 F.2d 363 (6th Cir. 1984).

49. The Greek Treaty employer choice provision at issue in *Wickes* differed from its Korean and Japanese Treaty counterparts. In addition to the traditional "of their choice" clause, the Greek Treaty included the following language:

> [S]uch nationals and companies shall be permitted to engage, on a temporary basis, accountants and other technical experts, *regardless of nationality* and regardless of the extent to which they may possess the qualifications required by applicable laws for the exercise of their duties within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations for the exclusive account of their employers in connection with the planning and operation of enterprises controlled by the latter or in which they have a financial interest within such territories.

Id. at 367 (emphasis in original).

50. *Id.* at 368. The court also cautioned that a Greek company "has no license to discriminate against or among non-Greek citizens it hires for positions not covered by the Treaty on the basis of race, sex, national origin, or any of the other factors prohibited by [state] law." *Id.* at 369.

51. In general, percentile restrictions require United States companies operating in another state to hire a certain percentage of its workers from the host state. *See infra* notes 75-77 and accompanying text.

52. *Wickes*, 745 F.2d at 365 (emphasis in original).

53. *Id.*

54. 457 U.S. 176 (1982).

55. *Id.* at 188 n.18.

equal basis "without suffering discrimination based on their alienage, not to grant foreign companies rights superior to those of United States companies."[56]

Additionally, the Court found that the FCN Treaty protections are available only for foreign corporations operating in the United States, not for United States subsidiaries of foreign corporations,[57] because United States subsidiaries are subject to Title VII.[58] The United States State Department agreed that the employer choice provision should not be available to United States subsidiaries of foreign corporations.[59] In finding that Sumitomo was a United States subsidiary of a foreign corporation and, thus, unable to benefit from the FCN Treaty's employer choice provision,[60] the Court avoided a more difficult question: whether a branch of a foreign corporation operating in the United States would be subject to employment discrimination laws, such as Title VII, or whether the foreign corporation could assert the employer choice provision of the respective FCN Treaty.

2. Effect on Foreign Investment

In Title VII-FCN Treaty cases, a court's role often is limited to determining the intent of the parties to the treaty.[61] According to *Spiess*, one reason that the United States entered into the Japanese FCN Treaty was to ensure optimal conditions for investment in Japan.[62] In 1988,

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56. *Id.* at 187-88.

57. An entity is a United States subsidiary if it is incorporated in the United States. Sumitomo was " 'constituted under the applicable laws and regulations' of New York; [therefore], based on Article XXII(3), it is a company of the United States, not a company of Japan." *Id.* at 182. Because the applicable FCN Treaty applies only to Japanese corporations operating in the United States and United States corporations operating in Japan, Sumitomo is not entitled to the protections of Article VIII(1). *Id.* at 183.

58. *Id.* at 184.

59. Letter from James R. Atwood, Deputy Legal Adviser, U.S. Department of State, to Lutz Alexander Prager, Assistant General Counsel, Equal Employment Opportunity Commission (Sept. 11, 1979), *reprinted in* Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L L. 158, 158 (1980).

60. *Sumitomo*, 457 U.S. at 189.

61. *Id.* at 185.

62. *Spiess*, 643 F.2d at 361. The court determined through legislative history that the Senate, in approving the treaty, was "concerned about the right of American companies to use American personnel to control their investments in Japan." *Id. See also* Walker, *supra* note 15, at 806 (FCN Treaties were seen as "responsive to the contemporary need for a code of private foreign investment; and their adaptability for use as a vehicle in the forwarding of an investment aim follows from their historical concern with establishment matters.").

United States private investment in Japan was estimated at 938 million dollars.[63] Recently, several major United States companies have opened branches in Japan.[64] Logically, the negotiators from Japan and many other states desired a reciprocal arrangement of optimal conditions favoring their businesses operating in the United States.[65] If FCN Treaty rights became too narrow, foreign corporations might decrease their United States investments because of potential liability under Title VII.[66] Even those in favor of broad FCN Treaty privileges should acknowledge merit in the narrow interpretation of FCN Treaty rights given the uncertain Title VII impact on foreign investment in the United States. Since *Sumitomo*,[67] for example, Japanese investment in the United States has increased.[68] This increase in Japanese investment suggests that a narrow interpretation of the employer choice provision does not discourage foreign investment in the United States.

Furthermore, FCN Treaty negotiator and State Department adviser Herman Walker noted that a variety of reasons contribute to whether foreign corporations invest in the United States.[69] These reasons include political, economic, social, and environmental factors beyond the reach of treaties.[70] Walker emphasized that FCN Treaties should afford foreign corporations equality by allowing the company to lay a "sound and stable foundation."[71] Foreign companies should be allowed to enter the

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63. Masayoshi Kanabayashi, *Foreign Investment in Japan is Growing, Helped by Nation's Economic Expansion*, WALL ST. J., June 14, 1988, at 31.

64. *Id.* (listing, among others, Digital Equipment Corp., E.I. Dupont, Michelin, and Phillips Petroleum Co.).

65. *Spiess*, 643 F.2d at 362.

66. *Silver, supra* note 1, at 783.

67. 457 U.S. 176 (1982).

68. Silver, *supra* note 1, at 783 n.111. In the wake of *Sumitomo*, however, some Japanese companies doing business in the United States have become so afraid of getting "caught in the crossfire of America's gender and ethnic struggles that they will not promote *any* Americans, men or women, into their executive ranks even when they know that doing so could improve their performance." Chalmers Johnson, *Japanese-Style Management in America*, 31 CAL. MGMT. REV. 34, 35 (Summer 1988) (emphasis in original).

69. Even after *Sumitomo*, a foreign company might prefer to operate as an United States subsidiary. Despite being unable to assert FCN Treaty rights, these subsidiaries would enjoy limited liability for the parent corporation. Other advantages for operating in the United States include security and profitability. Orebic, *supra* note 22, at 403.

70. *See* Herman Walker, Jr., *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229, 245 (1956).

71. *Id.* at 247.

United States and operate without being hindered by overly rigid rules.[72] In short, the role of FCN Treaties in stimulating foreign investment is to give foreign corporations the opportunity to engage in business on an equal basis with their United States counterparts.[73]

3. Intent of the Signatories

Just as the United States desired to protect its companies operating in foreign states, foreign negotiators intended to protect their companies operating in the United States.[74] The employer choice provision should not be seen as a sanction for discrimination, but as a response against discrimination, specifically, the percentile legislation in effect in many foreign states after World War II.[75] According to Herman Walker, percentile legislation caused great difficulty for United States businesses operating in foreign states.[76] Similarly, many individual states of the United States had laws limiting the employment of aliens by foreign companies operating in that state.[77] When evaluating the scope of FCN Treaties, one must remember that the treaties were not designed to encourage favoritism, but rather to serve as a "dike against discrimination."[78]

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72. *See* Walker, *supra* note 15, at 817.

73. *See* Herman Walker, Jr., *The Post-War Commercial Treaty Program of the United States*, 73 POL. SCI. Q. 57, 67 (1958).

74. *Spiess*, 643 F.2d at 362. Interestingly, while the United States insisted that the employer choice provision be included in its FCN Treaties, some foreign states (including Japan) unsuccessfully fought to delete the provision and other similar language. *Sumitomo*, 457 U.S. at 181 n.6.

75. *Wickes*, 745 F.2d at 367 n.1. In the years following World War II, when most FCN Treaties were executed, percentile restrictions "required American companies operating abroad to hire a certain percentage of citizens of the host country. These restrictions were thought to have the effect of inhibiting American companies operating abroad from hiring the people in whom they had the greatest confidence." *Id. But see* Silver, *supra* note 1, at 777 (by citing " 'percentile' restrictions *and the like*," Herman Walker, Jr. implied that "the employer choice provision was meant to address legal interference of any domestic law." (emphasis in original)).

76. Walker, *supra* note 70, at 234.

77. *Wickes*, 745 F.2d at 368 n.1 ("The legislative history of the post-war treaties suggests that both parties deemed the right to utilize the services of their own nationals in managerial, technical, and confidential capacities to be critical.").

78. Walker, *supra* note 73, at 75. Moreover, the United Nations Charter lists as a goal that member nations not discriminate based on race, sex, language, or religion. U. N. CHARTER art. 1, para. 3. Though a "good indication of member states' views on general issues," the United Nations Charter "is not a self-executing treaty and therefore not binding law." Bart I. Mellits, Note, *The Rights of a Foreign Corporation and Its Subsidiary Under Title VII of the Civil Rights Act of 1964 and Treaties of Friendship,*

B. *Current Law:* MacNamara v. Korean Air Lines

1. Interpretation of the Employer Choice Provision

MacNamara v. Korean Air Lines[79] involved a Korean company with a branch in the United States. Thomas MacNamara, then a fifty-seven year-old United States district sales manager for Korean Air Lines (KAL), was dismissed and replaced by a forty-two year-old Korean man.[80] MacNamara sued KAL, alleging discrimination based on race, national origin, and age in violation of Title VII and other domestic discrimination laws.[81] The district court dismissed the claim.[82] The United States Court of Appeals for the Third Circuit reversed by holding that MacNamara could proceed with his disparate treatment claim.[83]

The debated issue in *MacNamara,* as in most Title VII-FCN Treaty cases, was the application of Article VIII of the Korean FCN Treaty—the employer choice provision.[84] The Third Circuit interpreted the employer choice provision as granting a foreign corporation the right to choose the nationality of its executive labor pool.[85] With respect to these managerial and technical positions, the court found that KAL has

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Commerce, and Navigation, 17 GEO. WASH. J. INT'L L. & ECON. 607, 631 n.161 (1983) (citing Sei Fujii v. State, 242 P.2d 617, 620 (1952)).

79. 863 F.2d 1135 (3d Cir.), *cert. denied*, 110 S. Ct. 349 (1989).

80. Including MacNamara, KAL discharged six managers that were United States citizens and replaced them with four Korean citizens. *Id.* at 1138.

81. *Id.* In addition to a Title VII claim, MacNamara alleged a violation of the Age Discrimination in Employment Act of 1967 (codified at 29 U.S.C. §§ 621-634) and the Employment Retirement Income Security Act of 1974 (codified at 29 U.S.C. §§ 1001-1461). *Id.* National origin and citizenship are not synonyms. National origin "refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came." *MacNamara*, 863 F.2d at 1147. Citizenship is a different concept: "[a]ll persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST., amend. XIV, § 1.

82. The district court treated KAL's motion to dismiss as a motion for summary judgment. *MacNamara*, 863 F.2d at 1138.

83. *Id.* at 1137. The court rejected MacNamara's disparate impact claim and stated that disparate impact analysis could not be reconciled with Article VIII(1) of the FCN Treaty. *Id.* at 1148. *See also infra* notes 92-100 and accompanying text.

84. Article VIII(1) of the Korean Treaty, which is identical to the employer choice provision of most other FCN treaties, including the Japanese Treaty, reads in pertinent part: "Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." *MacNamara*, 863 F.2d at 1138 (quoting Korean FCN Treaty, *supra* note 1, 8 U.S.T. at 2223).

85. *Id.* at 1146.

the right to hire only Korean citizens, provided the decisions are based on citizenship.[86] Foreign employers, however, may be held liable for Title VII employment discrimination based on race, national origin, sex, or religion.[87]

The *MacNamara* court implied that its narrow interpretation of the employer choice provision might adversely impact foreign investment.[88] The court, however, emphasized that the domestic corporations competing against these foreign companies also must defend their employment practices in the face of Title VII claims.[89] Because FCN Treaties were designed to give foreign corporations operating in the United States equal, not preferential, treatment, this narrow interpretation is appropriate.[90] By limiting the employer choice provision to permit discrimination based solely on citizenship, *MacNamara* reconciles Title VII and Article VIII, at least in disparate treatment cases. Furthermore, the court found no theoretical or practical conflict between Title VII's prohibition against intentional discrimination and the limited rights conferred by Article VIII of the Korean FCN Treaty.[91]

2. Liability Imposed Under Disparate Treatment, But Not Disparate Impact

MacNamara is important not only for its interpretation of the traditional Title VII-FCN Treaty conflict, but also because it "represents the first significant judicial effort to differentiate between disparate treat-

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86. *Id.* at 1140 ("[a]rticle VIII(1) was not intended to provide foreign businesses with shelter from any law applicable to personnel decisions other than those that would logically or pragmatically conflict with the right to select one's own nationals as managers *because of their citizenship*." (emphasis in original)).

87. *Id.* at 1144. The United States, as amicus curiae, supported this narrow reading of Article VIII(1) of the Korean FCN Treaty. The State Department argued in its amicus brief that Article VIII(1) created a "limited privilege to hire non-citizens, not a broad exemption from laws that prohibit discrimination on grounds unrelated to citizenship." *Id.* at 1146. The State Department's position should carry great weight as a current treaty interpretation by one of the signatory states. *Id.* (quoting Kolovrat v. Oregon, 366 U.S. 187, 194 (1961)).

88. *Id.* at 1147.

89. *Id.*

90. *Id.* at 1146.

91. *Id.* at 1140-41. *MacNamara* acknowledged that other courts have reconciled FCN Treaties and Title VII by citing the BFOQ exception to Title VII. *Id.* at 1139. For an illustration of factors that would be considered if a BFOQ defense was asserted in a Title VII-FCN Treaty case, see Avigliano v. Sumitomo Shoji America, Inc., 638 F.2d 552, 559 (2nd Cir.), *vacated on other grounds*, 457 U.S. 176 (1982).

ment and disparate impact when FCN Treaty defenses are asserted."[92] To the extent domestic discrimination laws would impose liability under a disparate impact theory,[93] *MacNamara* held that conflict would exist,[94] and that the conflict would be resolved in favor of the FCN Treaty.[95] In ultimately deciding not to apply disparate impact liability against a foreign corporation operating under an FCN Treaty, the court acknowledged that this decision was "the most difficult aspect of this case."[96]

The court's main argument against disparate impact involved the application of statistical data frequently used in disparate impact cases.[97] Because Korea's population is relatively homogeneous, all of the executives hired by KAL would be of the same race and national origin. Based on statistical data, KAL's employment practices then would show a disparate impact on qualified, but denied, applicants. Therefore, a Korean company could be held liable under Title VII disparate impact analysis for merely exercising its FCN Treaty rights, namely hiring Korean citizens to fill executive positions.[98]

MacNamara represents the only United States decision involving a foreign corporation that has distinguished between disparate impact and disparate treatment.[99] Nevertheless, the reasoning adopted in Title VII cases involving domestic corporations also should apply to cases involving foreign corporations.[100]

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92. Weir, *supra* note 8, at 22.

93. For a discussion of disparate impact liability, see *infra* notes 135-72 and accompanying text.

94. *MacNamara*, 863 F.2d at 1148.

95. *Id.* at 1141.

96. *Id.* at 1147.

97. *Id.* at 1148.

98. *Id.*

99. Weir, *supra* note 8, at 20.

100. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Connecticut v. Teal, 457 U.S. 440 (1982); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

IV. The Two Theories of Liability in Title VII Cases: Disparate Treatment and Disparate Impact

A. *Disparate Treatment*

1. Traditional Three-Step Analysis

Disparate impact and disparate treatment are the two major theories plaintiffs utilize in Title VII discrimination claims.[101] Disparate treatment analysis addresses Title VII discrimination by focusing on an employer's motive and intent.[102] An employee must show that an employer treated some individuals less favorably than others because of race, color, religion, sex, or national origin.[103] In a disparate treatment case, the ultimate burden of proving intentional discrimination "remains at all times with the plaintiff."[104]

Initially, the plaintiff has the burden of establishing a prima facie case,[105] a burden that has been described as "not onerous"[106] and as having a "low threshold."[107] Under *McDonnell Douglas Corp. v. Green,*[108] a plaintiff in a race discrimination case must show the following: plaintiff belongs to a racial minority group; plaintiff applied and was qualified for the job in question; plaintiff was rejected despite being qualified; and the job remained open and the employer accepted applica-

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101. "Although disparate impact and disparate treatment are the most prevalent modes of proving discrimination violative of Title VII, they are by no means exclusive." Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 668 n.13 (1989) (Stevens, J., dissenting) (citing Barbara L. Schei & Paul Grossman, Employment Discrimination Law 13-289 (2d ed. 1983)).

102. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). The Court noted that proof of discriminatory motive "can in some situations be inferred from the mere fact of differences in treatment." *Id.* Discriminatory intent covers a wide variety of thoughts ranging "from animus to stereotyped assumptions and unconscious perceptions. . . . The law also reaches the more subtle and, perhaps for that reason, more pervasive and invidious forms of intent." Charles A. Sullivan, Michael J. Zimmer, Richard F. Richards, Employment Discrimination 253-54 (2d ed. 1988).

103. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983).

104. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

105. The Supreme Court has interpreted the term "prima facie case" as a "rebuttable presumption" designed to "sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.* at 254-55 nn.7-8.

106. *Id.* at 253.

107. Segar v. Smith, 738 F.2d 1249, 1269 (D.C. Cir.), *cert. denied,* 471 U.S. 1115 (1985).

108. 411 U.S. 792 (1973).

tions from individuals with qualifications similar to the employee's.[109] The *McDonnell Douglas* test is flexible[110] and also applies to Title VII cases not involving race.[111] Furthermore, a plaintiff must prove, by a preponderance of the evidence, that discrimination was an employer's "standard operating procedure—the regular rather than the unusual practice."[112] Merely citing the occurrence of "isolated or 'accidental' or sporadic discriminatory acts" will not suffice.[113] If the plaintiff succeeds in establishing a prima facie case, the employer presumably has violated Title VII.[114]

After establishing a prima facie case, the burden shifts to the employer to offer a legitimate, nondiscriminatory reason for rejecting the plaintiff.[115] An employer can rebut successfully a prima facie case by providing a specific explanation for its decision.[116] Although the employer must respond with some degree of specificity, generally evidence creating a genuine issue of fact as to whether the plaintiff was a victim of discrimination is sufficient.[117] The employer's burden is one of production, not persuasion.[118]

Assuming that the employer carries its burden, the plaintiff still may prevail by proving that the employer's criteria were merely a pretext for

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109. *Id.* at 802.

110. *Id.* at 802 n.13. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575 (1978) (the *McDonnell Douglas* test was "not intended to be an inflexible rule"); Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1235-47 (1981).

111. STEPHEN N. SCHULMAN & CHARLES F. ABERNATHY, THE LAW OF EQUAL EMPLOYMENT OPPORTUNITY ¶3.05[2][a], at 3-35 n.191 (1990).

112. International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977).

113. *Id.*

114. This inference of discrimination arises because the defendant's acts, if not explained, are "more likely than not based on the consideration of impermissible factors." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981) (quoting *Furnco*, 438 U.S. at 577).

115. *Id.*

116. *Id.* at 255.

117. *Id.* at 254-55. The Court explained that placing this burden of production on the defendant serves two functions: meeting the plaintiff's prima facie case with a "legitimate reason for the action" and framing the factual issue with "sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions." *Id.* at 255-56.

118. *Id.* at 257. The Court noted that limiting the defendant's obligation to a burden of production will not "unduly hinder the plaintiff." The employer's explanation must be "clear and reasonably specific." Moreover, the defendant has an incentive to persuade the trier of fact that the employment decision was proper. *Id.* at 258.

discriminatory conduct.[119] In other words, the plaintiff has the opportunity to show that the stated reason for the employment decision was not the true reason.[120] In essence, the plaintiff's burden of showing this pretext merges with the initial burden of proving intentional discrimination; the plaintiff uses the same evidence of discriminatory intent at both stages.[121]

2. Mixed Motive Cases: *Price Waterhouse v. Hopkins*

Generally, causation is determined by a but-for test.[122] The Supreme Court in *Price Waterhouse v. Hopkins*[123] altered the causation test for mixed motive disparate treatment cases,[124] in which employment decisions are based on a mixture of legitimate and illegitimate factors.[125] According to the Court, Title VII covers mixed motive cases.[126] In a confusing collection of four opinions, all nine Justices agreed that recovery required a showing of causation, but they disagreed on the standard and allocation of the burden of proof.

A plurality of the Court initially held that the plaintiff must prove

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119. *McDonnell Douglas*, 411 U.S. at 804.

120. *Burdine*, 450 U.S. at 256.

121. *Id.*

122. "The 'but-for' test is the most widely accepted standard for determining cause-in-fact legal theory." Robert Belton, *Causation and Burden-Shifting Doctrines in Employment Discrimination Law Revisited: Some Thoughts on* Hopkins *and* Wards Cove, 64 TUL. L. REV. 1359, 1368 (1990). Four of the Justices in Price Waterhouse v. Hopkins support the but-for test as the "general substantive standard of causation." *Id.* at 1369.

123. 490 U.S. 228 (1989). The plaintiff, Ann Hopkins, was one of the candidates proposed for partnership at the nation-wide accounting firm Price Waterhouse. The partners were invited to submit written comments about the candidates. After a review of these comments, the firm's Admissions Committee then recommends to the Policy Board that the candidate be accepted for partnership, denied, or placed on hold. The plaintiff, placed in this hold category, subsequently resigned. The District Court found that Price Waterhouse had discriminated against the plaintiff based on gender. *Id.* at 231-37. For example, one partner suggested that Ms. Hopkins should walk, talk, and dress more femininely. *Id.* at 285. The firm, however, also had some potentially valid reasons for not promoting Hopkins. One partner stated that she was "universally disliked." *Id.* In short, *Price Waterhouse* involved "decisions based on a mixture of legitimate and illegitimate considerations." *Id.* at 241.

124. CHARLES A. SULLIVAN, MICHAEL J. ZIMMER, RICHARD F. RICHARDS, EMPLOYMENT DISCRIMINATION 57 (2d ed. Supp. 1990).

125. *Price Waterhouse*, 490 U.S. at 241.

126. *Id.* at 240-41. The principles announced by the Court, including specific references to gender, "apply with equal force to discrimination based on race, religion, or national origin." *Id.* at 244 n.9.

that an improper factor, such as race, gender, or national origin, was a motivating part in the employment decision.[127] Given an employer's reliance on improper criteria, the burden then shifts to the employer to prove, by a preponderance of the evidence, that absent reliance on the impermissible criteria, it would have arrived at the same decision.[128] An employer will not avoid liability merely by citing legitimate and fully sufficient reasons; the reasons must have received actual consideration when the adverse employment decision was made.[129] Despite this apparently more onerous burden on the employer, the Court argued that the decision is consistent with *McDonnell Douglas*. The Court characterized the employer's so-called burden as an affirmative defense.[130] Under *Price-Waterhouse*, the plaintiff still has the burden of proving that the an improper ground was a motivating factor in the employer's decision.[131]

B. *Disparate Impact*

1. Disparate Impact Analysis: *Griggs v. Duke Power Co.*

Under current law, Title VII liability is not limited to employment practices involving intentional discrimination, but extends to those "fair in form, but discriminatory in operation."[132] Under disparate impact analysis, an employer can be held liable when facially neutral employment practices have a discriminatory effect on protected groups.[133] Some employment practices, though not intentionally discriminatory, may be functionally equivalent to intentional discrimination.[134]

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127. *Id.* at 250. The Court explained its new standard in terms of gender discrimination at issue in *Price Waterhouse*:

> [G]ender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.

Id.

128. *Price Waterhouse*, 490 U.S. at 252. The plurality also noted that "in most cases, the employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive." *Id.*

129. *Id.*

130. *Id.* at 245-47.

131. *Id.* at 246.

132. *MacNamara*, 863 F.2d at 1148.

133. *Id.*

134. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988). "Perhaps the most obvious examples of such functional equivalence have been found where facially

In the watershed case of *Griggs v. Duke Power*,[135] the Supreme Court introduced disparate impact analysis. The Court in *Griggs* noted that the overall purpose of Title VII was to ensure all individuals equality of employment opportunity by removing "barriers that have operated in the past to favor an identifiable group of white employees over other employees."[136] In signaling the emergence of disparate impact liability, the Court arguably disregarded the employer's motive and focused solely on impact.[137] The Court stated that a lack of discriminatory intent does not cleanse employment practices that "operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[138] The Court reasoned that Congress was concerned with "the *consequences* of employment practices, not simply the motivation."[139]

The 1972 amendments to the Civil Rights Act adopted the *Griggs* holding, which involves a three-step analysis.[140] Initially, a plaintiff must show that the practice had an adverse impact on a protected group. Once this fact has been established, the employer can assert a business necessity defense. The Court found that Congress intended the employer to bear the burden of proving that any given employment requirement has a manifest relationship to the position at issue.[141] If the defendant suc-

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neutral job requirements necessarily operated to perpetuate the effects of intentional discrimination that occurred before Title VII was enacted." *Id.*

135. 401 U.S. 424 (1971). *Griggs* involved a Title VII action based on racial discrimination. The employment practice in question required that potential employees possess a high school education or pass a standardized general intelligence test. These requirements tended to disqualify black applicants significantly more frequently than white applicants. In addition, neither of the requirements were shown to be significantly related to job performance. *Id.* at 431. For a thorough discussion of *Griggs*, *Watson*, *Wards Cove*, and disparate impact analysis in general, see Mack A. Player, *Is* Griggs *Dead? Reflecting (Fearfully) on* Wards Cove Packing Co. v. Atonio, 17 FLA. ST. U.L. REV. 1 (1989).

136. *Griggs*, 401 U.S. at 429-30.

137. Player, *supra* note 135, at 9.

138. *Griggs*, 401 U.S. at 432. In contrast, allowing foreign corporations to assert FCN Treaty rights (specifically the employer choice provision of Article VIII), despite domestic employment laws such as Title VII, seems more warranted. For example, a Japanese company operating in the United States could argue that employing Japanese citizens in executive positions is acceptable because citizenship is often related to job capability. *See* Orebic, *supra* note 22, at 399-400.

139. *Griggs*, 401 U.S. at 432 (emphasis in original).

140. Connecticut v. Teal, 457 U.S. 440, 447 n.8 (1982).

141. *Griggs*, 401 U.S. at 432. *Griggs* noted "the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability." *Id.* at 433. "What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job per-

ceeds in showing business necessity, the plaintiff still may recover if equally effective, nondiscriminatory alternatives exist.[142]

2. *Griggs'* Three-Step Analysis as Modified by *Wards Cove Packing Co. v. Atonio*

Under the *Griggs* analysis, a plaintiff needed to show that the employment practice in question had an adverse impact on a class protected by Title VII.[143] In *Connecticut v. Teal*,[144] the Court echoed the *Griggs* test and required that a plaintiff prove the employment practice had a "significantly discriminatory impact."[145] The Supreme Court in *Wards Cove Packing Co. v. Atonio*[146] followed *Teal* and also rejected the "bottom line" argument when offered by plaintiffs.[147] After *Teal* and *Wards Cove*, a plaintiff may assert a disparate impact claim of racial discrimination even though the end result of a selection process is a racially balanced work force.[148] Similarly, an employer may escape liability despite a racial imbalance in the work force.[149] The focus is not on the end result, but instead is a comparison between those holding the jobs in question and the pool of qualified applicants.[150]

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formance." *Id.* at 436.

142. *Id.*

143. *Griggs*, 401 U.S. at 429-30. Professor Player contends that *Griggs* required the plaintiff to offer only minimal evidence showing adverse impact. Player, *supra* note 135, at 10 n.35.

144. 457 U.S. 440 (1982).

145. *Teal*, 457 U.S. at 446. More than a year after the case was commenced and approximately one month before trial, the defendant promoted a significant number of minority supervisors. These promotions altered the statistical data and produced a result seemingly "more favorable to blacks than to whites." The Court rejected the defendant's argument that an appropriate racial balance at the "bottom line" served as a complete defense to the Title VII claim. *Id.* at 444.

146. 490 U.S. at 642. *Wards Cove* involved a class action suit brought by former cannery workers alleging racial discrimination in violation of Title VII. The Court held that statistical data comparing the racial composition of defendant's cannery workers with that of defendant's noncannery workers was not sufficient to establish a prima facie case of disparate impact in violation of Title VII. *Id.* at 642-44.

147. *Id.* at 656-57. "Apparently the Court thought it only fair to apply the same rule on 'bottom line' statistics to a plaintiff, as it has adopted for defendants in *[Teal].*" Robert Belton, *The Dismantling of the* Griggs *Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 YALE L. & POL'Y REV. 223, 240 n.96 (1990).

148. *Wards Cove*, 490 U.S. at 650-51.

149. *Id.* at 652-53.

150. *Id.* at 650-51. For a discussion on the appropriate statistical comparison in a disparate impact and disparate treatment cases, see *infra* notes 173-94 and accompany-

Wards Cove also increased the plaintiff's initial burden. As compared to the traditional *Griggs* analysis, *Wards Cove* requires a plaintiff to prove adverse impact with much greater precision.[151] Under *Wards Cove*, a plaintiff must show that each challenged employment practice has an adverse impact on employment opportunities.[152] The Court in *Wards Cove* even anticipated complaints that the specific causation requirement places an undue burden on plaintiffs.[153]

In addition, *Wards Cove* decreased the showing an employer must make in asserting a business necessity defense or, as the Court termed it, "business justification."[154] Although an employer must present some justification for its employment policies, the challenged practice need not be essential to the employer's business.[155] An employer needs to show only that the policies in question serve the "legitimate employment goals of the employer."[156]

More importantly, *Wards Cove* rejected the notion that the business necessity defense is an affirmative defense.[157] After an employer produces a business justification for its employment policies, the burden of persuasion shifts to the plaintiff.[158] Placing the burden of persuasion on the disparate impact plaintiff is consistent with the rule in disparate treatment cases that the employer has the burden of production and the plaintiff has the burden of persuasion.[159]

Recent commentary indicates that the burden-shifting prompted by *Wards Cove* will prove troublesome for disparate impact plaintiffs, especially those lacking financial resources and access to an employer's records.[160] Another commentator disagreed and suggested that *Wards*

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ing text.

151. Player, *supra* note 135, at 15 n.63, 45-46. As a result of *Wards Cove*, "precise proof of a high level of impact is necessary to create a prima facie showing." *Id.* at 45.

152. *Wards Cove*, 490 U.S. at 657-58.

153. *Id.* In defense, the Court argued that its rule makes sense in light of the liberal civil discovery rules. Plaintiffs have greater access to employers records, which in turn allows plaintiffs to document their claims more effectively than in the past. *Id.*

154. *Id.* at 658.

155. *Id.* at 659.

156. *Id.* Similarly, recent commentary suggests that the redefined meaning of business necessity is something less than necessity. Player, *supra* note 135, at 45-46.

157. *Wards Cove*, 490 U.S. at 659-60.

158. *Id.*

159. *Id.* Specifically, the Supreme Court stated that "the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration." *Id.* at 660.

160. Pendleton E. Hamlet, Note, *Fetal Protection Policies: A Statutory Proposal in the Wake of* International Union, UAW v. Johnson Controls, Inc., 75 CORNELL L. REV.

Cove's burden-shifting will affect only those close decisions in which the employer asserts an adequate business justification and the plaintiff has evidence challenging this justification.[161]

Even if the defendant prevails on the business justification issue, a plaintiff may challenge an employment practice by proposing a nondiscriminatory alternative. A plaintiff must show that another test or set of criteria would satisfy the employer's interests in hiring adequate employees.[162] *Wards Cove* requires that the alternative selection process be equally effective.[163] *Wards Cove*, however, imposes a presumption against second-guessing employers' hiring criteria because employers generally are more qualified than courts in analyzing and restructuring their own business practices.[164]

3. Subjective Hiring Criteria

Prior to *Watson v. Fort Worth Bank & Trust*,[165] the Supreme Court had applied disparate impact analysis only to objective employment requirements.[166] The United States Courts of Appeals, however, were in conflict on the issue.[167] *Watson* extended the application of disparate impact analysis to subjective employment criteria.[168] The Court began its

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1110, 1117 (1990) ("Limited funds and limited access to employer information and policy rationales" make the task of disproving an employer's business justification "extraordinarily difficult, if not impossible, for plaintiffs.").

161. Player, *supra* note 135, at 46. Professor Player stated:

> While this shift in the burden is dramatic in appearance, only in cases where the defendant has succeeded in carrying the considerable burden of providing the level of evidence necessary to satisfy the stringent production demands of *Griggs*, *Dothard*, and *Albemarle Paper* will there be any difference in result. Lower courts must not forget that *Wards Cove Packing* did not reverse any of these leading cases. They still stand, but as reconstructed, they stand for the proposition that in each case the defendants failed because they did not present sufficient evidence to carry their burden.

Id.

162. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

163. *Wards Cove*, 490 U.S. at 661.

164. *Id.*

165. 487 U.S. 977 (1988).

166. *Id.* at 988. In *Griggs*, for example, disparate impact liability was appropriate because the employer followed objective employment policies that had a disproportionately adverse impact on blacks. *Id.* Standardized tests and high school diploma requirements are typical objective criteria. *See Griggs*, 401 U.S. at 432.

167. *Watson*, 487 U.S. at 989.

168. *Id.* at 991. The plaintiff, Clara Watson, alleged that her employer had discriminated against blacks in all facets of the employment process. *Id.* at 983. The Court cited "hiring, compensation, initial placement, promotions, terminations and other terms and

analysis by citing Title VII and its general prohibition of employment discrimination based on race, color, religion, sex, or national origin.[169] Applying disparate impact liability to objective, but not subjective, employment practices would allow employers to circumvent Title VII. By adding a subjective component, such as an interview, to an otherwise objective selection process, a plaintiff would be forced to rely solely on the disparate treatment theory of liability.[170]

Watson's extension of disparate impact liability to cases involving subjective employment criteria is generally favorable for plaintiffs. A plurality, however, emphasized the plaintiff's heavy initial burden in establishing a prima facie case. The plaintiff must identify the specific employment policies that are being challenged, a potentially difficult task when subjective criteria are at issue.[171] In short, *Watson* reiterates that in a disparate impact case the burden of proof "remains with the plaintiff at all times."[172]

C. *Use of Statistics*

Although statistics seem more useful in disparate impact cases,[173] statistics are used in disparate treatment cases as well, most notably in "pattern and practice" cases.[174] The Court in *McDonnell Douglas* noted

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conditions of employment." *Id.* In evaluating candidates, the bank did not use "precise and formal criteria," but instead relied on the "subjective judgment of supervisors who were acquainted with the candidates and with the nature of the jobs to be filled." The Court noted that all the supervisors selected over Watson in each of the four promotions she sought were white. *Id.* at 982.

The Court feared that if employers were allowed to insulate themselves so effortlessly (by incorporating a subjective aspect into their employment criteria), disparate impact analysis could become meaningless. *Id.* at 990. One commentator has argued that disparate impact analysis is not a legitimate theory for recovery in Title VII cases. *See* 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 (1985). Nevertheless, *Watson* has been commended for extending disparate impact liability to subjective employment practices. Anita M. Alessandra, Comment, *When Doctrines Collide: Disparate Treatment, Disparate Impact, and* Watson v. Fort Worth Bank & Trust, 137 U. PA. L. REV. 1755, 1778 (1989).

169. *Watson*, 487 U.S. at 985.

170. *Id.* at 989-90. The Court noted that any selection process combining objective and subjective criteria would "generally have to be considered subjective in nature." *Id.* at 989.

171. *Id.* at 994.

172. *Id.* at 997.

173. Disparate impact plaintiffs often rely exclusively on statistical data. *MacNamara*, 863 F.2d at 1148.

174. *See, e.g, McDonnell Douglas*, 411 U.S. at 804-05. *See also* Elaine W. Shoben,

that statistics are helpful in determining whether the employer practiced a general pattern of discrimination.[175] Additionally, in *International Brotherhood of Teamsters v. United States*,[176] the Supreme Court made the general observation that statistics play an important role in disparate treatment cases whenever employment discrimination is at issue.[177] Statistics can assist the plaintiff in showing a discriminatory intent or motive; however, they are not conclusive in disparate treatment cases.[178] The usefulness of statistics depends on the particular facts of each case.[179] Furthermore, a defendant may rebut or undermine a plaintiff's data.[180] Finally, because Title VII does not require that the composition of a given work force mirror that of the general population, statistics alone cannot establish Title VII violations.[181]

Claimants in disparate impact cases rely primarily on statistical data.[182] The *Wards Cove* Court acknowledged that a plaintiff can establish a prima facie case based solely on statistics.[183] The *Watson* Court noted, however, two major constraints on a plaintiff's ability to rely on statistical data in proceeding under the disparate impact theory. First, the employer may question or undermine the statistics offered by the plaintiff.[184] Second, an employer might establish a business necessity defense.[185]

The *Wards Cove* Court cautioned against improper statistical comparisons, especially those that could lead to employers' establishing quotas.[186] For example, the Court rejected the validity of statistical compari-

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The Use of Statistics to Prove Intentional Employment Discrimination, 46 LAW & CONTEMP. PROBS. 221, 222 (Autumn 1983) (statistical relevance to claims of intentional discrimination has become increasingly important).

175. *McDonnell*, 411 U.S. at 805.

176. 431 U.S. 324 (1977).

177. *Id.* at 339.

178. Furnco Constr. Co. v. Waters, 438 U.S. 567, 579-80 (1978).

179. *Teamsters*, 431 U.S. at 340.

180. *Id.*

181. *Id.* at 339.

182. *MacNamara*, 863 F.2d at 1148.

183. *Wards Cove*, 490 U.S. at 650.

184. *Watson*, 487 U.S. at 996. "Nor are courts or defendants obliged to assume that plaintiffs' statistical evidence is reliable. 'If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own.'" *Id.* (quoting Dothard v. Rawlinson, 433 U.S. 321, 331 (1977)).

185. *Id.* at 997.

186. *Wards Cove*, 490 U.S. at 651-52. The *Watson* Court also cautioned against the adoption of quotas or preferential treatment. *Watson*, 487 U.S. at 992.

sons showing a racial imbalance within a given work force.[187] To make out a prima facie case, a plaintiff must show that a specific or particular employment practice created the statistical disparity.[188] The proper statistical comparison is "between the racial composition of [the at-issue jobs] and the racial composition of the qualified. . . population in the relevant labor market."[189] In addition to placing the burden on the disparate impact plaintiff at all stages of the case, *Wards Cove* restricts the statistical comparisons that a plaintiff can utilize.[190]

Even prior to *Wards Cove*, many employers began adopting affirmative action plans that reduced the racial or sexual disparities in a given work force. As a result of affirmative action, plaintiffs face increasing difficulty in "[using] statistical evidence to establish a prima facie case of disparate impact discrimination."[191] Proving disparate impact through the use of statistics has become much more complex since *Griggs*. Plaintiffs have "neither the means nor the capacity to assemble and analyze large amounts of complex data necessary for a 'scientific' analysis."[192]

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187. *Wards Cove*, 490 U.S. at 657. A Title VII plaintiff "does not make out a case of disparate impact simply by showing that, 'at the bottom line,' there is a racial *imbalance* in the work force." *Id.* (emphasis in original).

188. *Id.*

189. *Id.* at 650 (alteration in original) (quoting Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977)). For example, "if the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite, the employer's selection mechanism probably does not operate with a disparate impact on minorities." *Id.* at 653. The Court noted that when attaining these labor market statistics would be difficult or impossible, other statistics, such as those considering the racial composition of applicants otherwise-qualified for the jobs in question, may be sufficient. *Id.* at 651.

190. According to Professor Belton, "the *Wards Cove* analytic scheme for establishing disparate impact might be more onerous on the plaintiff than the disparate treatment scheme is." Belton, *supra* note 147, at 244.

191. *Id.* at 233.

192. Marcel C. Garaud, Comment, *Legal Standards and Statistical Proof in Title VII Litigation: In Search of a Coherent Disparate Impact Model*, 139 U. PA. L. REV. 455, 469 (1990). A plaintiff's prima facie case often depends on "the accuracy and credibility of the plaintiff's statistical analysis." *Id.* at 460. "[F]laws such as inaccurate or insufficient data, poor choice of relevant population, or inappropriate selection or use of a statistical method" can be fatal to a plaintiff's case. Thus, plaintiffs do not have much room for error. *Id.* at 466 n.54. *See also Watson*, 487 U.S. at 996-97 (typical weaknesses in plaintiffs' statistical evidence include "small or incomplete data sets and inadequate statistical techniques"); DAVID C. BALDUS & JAMES W. COLE, STATISTICAL PROOF OF DISCRIMINATION § 1.22 (1980 & Supp. 1987). As a result, plaintiffs often are required to hire experts to testify as to the validity of statistics showing disparate impact. William B. Gould, IV, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TUL. L. REV. 1485, 1497 (1990).

Defendants also have benefitted from judges who misinterpret the plaintiffs' burden of proof when statistics are used as primary evidence.[193] In addition, the prohibitive cost involved in gathering and analyzing statistics likely has deterred many potential disparate impact plaintiffs from bringing suit.[194]

V. DISPARATE IMPACT LIABILITY IN TITLE VII-FCN TREATY CASES

A. MacNamara's *Incomplete Analysis of the Use of Statistics*

Consistent with other FCN Treaties, the Korean FCN Treaty involved in *MacNamara* allows Korean companies operating in the United States to employ executives of their choice.[195] In other words, these companies may preference their own citizens.[196] According to *MacNamara*, allowing statistical data to prove the existence of a disparate impact in these cases would lead to an unintended result.[197] If all executive positions were filled by Korean citizens according to FCN Treaty rights, statistics would show an imbalance based on race and national origin that could erroneously lead to liability based on the disparate impact theory.[198] *MacNamara* oversimplifies the use of statistics in disparate impact claims. As previously stated, proving disparate impact through statistics has become very difficult because of the complexity and the cost involved.[199]

In addressing the issue of causation, the *Wards Cove* Court stated that a plaintiff must show more than a mere racial imbalance in the work force; a plaintiff must demonstrate that a particular employment practice produced the alleged disparate impact.[200] Furthermore, under *Wards Cove*, statistics could be used to compare the characteristics of executive and technical positions with those of individuals qualified for those jobs.[201] An employer always may assert a business justification analogous

193. *See* Garaud, *supra* note 192, at 469. *But see* Anthony S. Boardman & Aidan R. Vining, *The Role of Probative Statistics in Employment Discrimination Cases*, 46 LAW & CONTEMP. PROBS. 189, 211 (Autumn 1983) (courts "have moved with the times and become familiar with relatively sophisticated statistical techniques").

194. Garaud, *supra* note 192, at 476.

195. Korean FCN Treaty, *supra* note 1, art. VIII, para. 1, 8 U.S.T. at 2223.

196. *MacNamara*, 863 F.2d at 1146.

197. *Id.* at 1148.

198. *Id.*

199. *See supra* notes 189-94 and accompanying text.

200. *Wards Cove*, 490 U.S. at 656-57.

201. *Id.* at 651.

to the bona fide occupational qualification (BFOQ) defense used in disparate treatment cases.[202] Thus, when faced with statistics suggesting disparate impact, a Korean corporation could argue that Korean citizenship is a valid justification for holding a high level executive or managerial position.[203]

Assuming that the concerns in *MacNamara* about applying disparate impact liability are well-grounded, the application of disparate treatment liability would appear to produce the same result. Because statistical evidence would indicate a disparity in the race and national origin of the executives hired by KAL and because a disparate treatment plaintiff may make out a prima facie case by statistical proof alone,[204] a court could conclude that the employer intended to discriminate based on race and national origin. Therefore, in *MacNamara*, the plaintiff's claims of disparate treatment and disparate impact either both should have succeeded, or both should have failed.[205]

B. *Similarities Between Disparate Impact and Disparate Treatment After* Wards Cove

Certainly differences exist between disparate impact and disparate treatment analyses.[206] The two theories, however, share many common threads. The following section illustrates some of these similarities. Generally, both theories further Title VII's goal of eliminating employment discrimination.[207] All successful employment discrimination claims require a nexus between the plaintiff's Title VII claim and the defendant's employment policies.[208]

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202. 42 U.S.C. §§ 2000e-2(e) (1981). Technically, the BFOQ exemption to Title VII is available only in disparate treatment cases. *See* Orebic, *supra* note 22, at 397 n.106. The business necessity defense and the BFOQ defense, however, have similar tests. *Id.* An employer successfully shows a BFOQ if "the qualification is reasonably necessary for the normal operation of that particular business or enterprise." Ishizuka, *supra* note 18, at 164 (quoting 42 U.S.C. §§ 2000e-2(e)(1) (1981)).

203. Orebic, *supra* note 22, at 405 ("There is little doubt that a Japanese citizenship requirement for top executive personnel of a Japanese affiliate will meet the strict test for establishing a BFOQ exemption to Title VII.").

204. *Teamsters*, 431 U.S. at 339-40 n.20.

205. Nevertheless, on the particular facts, the *MacNamara* court may be justified in rejecting only the impact claim. The disparate impact claim depended not only on MacNamara's dismissal, but also on KAL's discharge of five other United States citizens. The treatment claim only involved KAL's handling of MacNamara. *MacNamara*, 863 F.2d at 1148.

206. *See supra* notes 100-194 and accompanying text.

207. *See Griggs*, 401 U.S. 429-30.

208. Belton, *supra* note 110, at 1223.

In attempting to differentiate between the two theories, some scholars have argued that treatment cases involve individual discrimination, while impact cases involve class-wide discrimination.[209] This observation is not completely accurate because both theories have been applied to individuals and groups. For example, the *Teamsters* Court applied disparate treatment analysis to class-wide discrimination, emphasizing a company's standard operating procedure and the regularity of discriminatory practices.[210] Similarly, in *McDonnell Douglas Corp. v. Green*,[211] the Supreme Court, in addressing a disparate treatment claim, noted the relevance of the employer's "general policy and practice with respect to minority employment."[212]

Teamsters and *Segar v. Smith*[213] are "pattern and practice" disparate treatment cases, which are very similar to typical disparate impact cases. Both disparate impact and "pattern and practice" disparate treatment cases are "attacks on the systemic results of employment practices."[214] Similarly, although proof of discriminatory intent ordinarily is required in a treatment case, improper motive may be inferred in some circumstances.[215] These "pattern and practice" cases often have the effect of placing before the court "all the elements of a traditional disparate impact case."[216] Hence, either theory—disparate impact or disparate treatment—may be applied to a given set of facts.

In *Wards Cove* and *Watson*, the Supreme Court emphasized the similarities between disparate impact and disparate treatment. Most notably, disparate impact analysis is premised on the notion that some employment practices, while facially neutral, are "functionally equivalent to in-

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209. *See* Rossein, *supra* note 35, at 64-66 (contrasting disparate impact and disparate treatment theories).

210. *Teamsters*, 431 U.S. at 336.

211. 411 U.S. 792 (1973).

212. *Id.* at 804-05.

213. 738 F.2d 1249 (D.C. Cir.), *cert. denied*, 471 U.S. 1115 (1985).

214. *Id.* at 1267.

215. *Id.* at 1265-66 ("illicit motive may be inferred from a sufficient showing of disparity between members of the plaintiff class and comparably qualified members of the majority group"). *See also Teamsters*, 431 U.S. at 335 n.15 (in disparate treatment case, "[p]roof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment").

216. *Segar*, 738 F.2d at 1270. *See also* Franks v. Bowman Transp. Co., 424 U.S. 747, 772 (1976)(existence of a discriminatory hiring pattern and practice places the burden on the employer to prove that future individual disparate treatment plaintiffs were not victims of discrimination); Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 880 (1984) (judgment for employer in "pattern and practice" disparate treatment case does not preclude future individual disparate treatment claims).

tentional discrimination."[217] The *Watson* decision emphasized that the amount of evidence required to find an employer liable on the disparate impact theory is the same amount as needed under the disparate treatment theory.[218] *Watson* held disparate impact analysis applicable to subjective hiring criteria, which previously only could be challenged under the disparate treatment theory.[219] More generally, although the factual issues involved in disparate impact and disparate treatment claims may vary, the factual differences do not imply that the ultimate legal issue is different.[220]

Wards Cove places the ultimate burden of rebutting an employer's business justification on the plaintiff in a disparate impact case.[221] The Court introduced the new rule by noting its conformity with the allocation of burdens in disparate treatment cases.[222] In addition, the *Wards Cove* Court relied on two disparate treatment cases for direction regarding the proper statistical comparisons.[223] Even the *MacNamara* court conceded that "the statistical evidence supporting a claim of disparate impact often resembles that used to establish disparate treatment."[224] Finally, the United States as amicus curiae in *Wards Cove* encouraged the Court to " 'recognize a parallelism between disparate impact and disparate treatment analysis.' "[225]

C. *Policy Implications of Allowing Disparate Impact Claims*

Applying disparate impact liability in Title VII-FCN Treaty cases conceivably could lead to more successful Title VII claims.[226] Conse-

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217. *Watson*, 487 U.S. at 987.

218. *Id.* ("Nor do we think it is appropriate to hold a defendant liable for unintentional discrimination on the basis of less evidence than is required to prove intentional discrimination.").

219. *Id.* at 988.

220. *Id.* at 987.

221. *Wards Cove*, 490 U.S. at 659. The Court reconciled its decision with *Griggs* and its progeny. In placing the burden of proof on the employer to offer a legitimate business justification, earlier cases should be interpreted as placing the burden of production, but not persuasion, on the employer. *Id.*

222. *Id.* at 659-60.

223. The Court cited *Teamsters*, 431 U.S. at 339, and Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08 (1977). *Wards Cove*, 490 U.S. at 650.

224. *MacNamara*, 863 F.2d at 1148.

225. Rossein, *supra* note 35, at 40 (quoting Brief for the United States as *Amicus Curiae* Supporting Petitioners at 28, Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (No. 87-1387)).

226. In a pre-*Wards Cove* article, Professor Belton stated that courts realize "it is much easier to prevail on a discrimination claim under disparate impact than under

quently, foreign corporations might hesitate before doing business in the United States if this analysis were applied.[227] Therefore, one purpose of FCN Treaties—promoting foreign investment—could be frustrated if signatory states were held liable for employment practices that produced a disparate impact.[228]

Given recent developments, however, the disparate impact theory likely will not produce increased liability for foreign corporations. In *Watson,* the Supreme Court equated the amount of proof required in disparate impact claims with that needed to show disparate treatment.[229] Additionally, *Wards Cove* has increased the difficulty of recovering under disparate impact analysis. A plaintiff now has a greater initial burden of showing adverse impact.[230] More significantly, *Wards Cove* redefined the employer's burden when offering a business justification as one of production; the plaintiff now has the ultimate burden of disproving this justification.[231] A foreign company can now shift the burden of proof to the plaintiff by citing a legitimate reason for preferencing Korean citizens of its own state.[232]

A plaintiff's initial burden in a disparate treatment case has been described as "not onerous"[233] and having a "low-threshold."[234] Thus, extending disparate impact liability, which now has more difficult burdens for the plaintiff to meet, to Title VII-FCN cases arguably would not impose increased liability on these corporations operating under FCN Treaties.[235]

Even assuming arguendo that applying disparate impact analysis to foreign corporations would make them more vulnerable to Title VII claims, foreign investment likely will not suffer.[236] In 1982, the Supreme Court held that a United States subsidiary of a Japanese corporation could not assert any of the Japanese FCN Treaty rights and, therefore,

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disparate treatment." Belton, *supra* note 110, at 1229 n.100.

227. *See* Silver, *supra* note 1, at 783.

228. *See generally* Coulter, *supra* note 17.

229. *Watson,* 487 U.S. at 987.

230. *Wards Cove,* 490 U.S. at 657-58.

231. *Id.* at 659.

232. *Id. See also* Orebic, *supra* note 22, at 405.

233. *Burdine,* 450 U.S. at 253.

234. *Segar,* 738 F.2d at 1269.

235. One commentator has suggested that, after *Wards Cove,* recovery based on impact analysis is virtually impossible. Hamlet, *supra* note 160, at 1117.

236. *See* James B. Treece, *What the Japanese Must Learn About Racial Tolerance,* BUS. WK., Sept. 5, 1988, at 41.

was liable for Title VII employment discrimination.[237] Nevertheless, Japanese investment in the United States greatly accelerated throughout the 1980s and shows no signs of waning.[238]

Moreover, evidence suggests that some Japanese companies discriminate against United States citizens, specifically blacks and Hispanics, who often are labeled lazy and untrustworthy.[239] Few employers, however, leave "the kind of direct evidence of an intent that can be challenged under the laws prohibiting discrimination."[240] Because even mildly clever employers can defeat disparate treatment claims with relative ease, plaintiffs frequently will be left only with claims of disparate impact. To prevent foreign companies from blatant violation of Title VII, plaintiffs in Title VII-FCN Treaty cases should be able to utilize both disparate treatment and disparate impact theories of liability.[241]

One difficulty in comparing employment discrimination by domestic employers with that of foreign corporations operating in the United States involves the variation in victims. A typical domestic Title VII suit might involve racial discrimination, such as an employer discriminating against a member of a protected class (as defined by Title VII) in favor of a white, male, or white-male employee.[242] In contrast, frequently the plaintiffs in Title VII-FCN Treaty cases are not these "discrete, and insular minorities."[243] In a way, the analysis in Title VII-FCN Treaty cases could be viewed as analogous to reverse discrimination. As noted above, however, some foreign corporations operating in the United States

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237. *See Sumitomo*, 457 U.S. at 176. *See also* Silver, *supra* note 1, at 783 n.111.

238. *See* Johnson, *supra* note 68, at 34. Department of Commerce statistics show that in 1986 Japanese investors contributed $4.1 billion in foreign direct investment, one-sixth of all foreign investment in the United States. Moreover, since 1984, Japan has made more individual investments in the United States than any other state. *Id.*

239. Silver, *supra* note 1, at 783 n.113.

240. Belton, *supra* note 110, at 1229. In addition, the causation issue presents difficult substantive and policy problems: "concepts such as 'because of,' 'based on,' 'tend to,' or 'adversely affect' may be construed as requiring any one of the following: (1) An effects test; (2) an intent test; (3) both effect and intent; or (4) either effect or intent." *Id.* at 1225.

241. *See generally* Street, *supra* note 3, at 393 ("The U.S. judicial and administrative system must not allow the public policy of promoting fair employment to be frustrated by foreign or transnational employers.").

242. *See generally* Donald R. Worley, *U.S. Supreme Court Renders Important Decision on Commercial Treaty Rights of Locally-Incorporated Subsidiary of Foreign Company*, 11 INT'L BUS. LAW. 109, 110 (1983).

243. *Id.* at 110. "Underlying the Civil Rights Act of 1964 is the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and the Supreme Court's Equal Protection Clause decisions have shown special solicitude only for 'discrete, and insular minorities', not for the majority of Caucasian-Americans." *Id.*

do discriminate against racial minorities.[244] Therefore, comparing the discrimination in Title VII-FCN Treaty cases with that involved in domestic Title VII cases does not seem unwarranted.

Prior to *Wards Cove*, some commentators resisted linking the disparate treatment and disparate impact theories, emphasizing instead the differences between the two theories.[245] Some commentators even rejected disparate impact liability altogether as contrary to the aims of Title VII because of the onerous burden placed on employers.[246] After *Watson* and *Wards Cove*, however, recovery under disparate impact arguably is as difficult as under disparate treatment. Consequently, those commentators who once thought disparate impact liability was unduly harsh on employers now have less grounds for complaint.

VI. CONCLUSION

The Supreme Court has gone far to equate the disparate impact and disparate treatment theories of recovery in Title VII cases. Generally stated, the amount of proof required to prevail under either theory is equal.[247] *Wards Cove* increases the plaintiff's initial burden of showing adverse effect in a disparate impact case.[248] *Wards Cove* also relaxes the employer's burden of asserting a business justification.[249] Perhaps most significantly, *Wards Cove* places the burden of persuasion on the plaintiff to rebut an employer's business justification for the employment practices.[250] As in disparate treatment claims, a disparate impact plaintiff now must carry the ultimate burden of persuasion at all stages of a Title VII action.[251] Moreover, the spiraling cost and complexity of establishing statistical proof of discrimination has worked to the detriment of

244. Treece, *supra* note 236, at 41; Silver, *supra* note 1, at 783 n.113.

245. *See, e.g.*, Rossein, *supra* note 35, at 64-66; *see generally* Gold, *supra* note 168 (courts should abandon disparate impact liability and focus on a theory of employment discrimination based on intent).

246. Gold, *supra* note 168, at 466-578. "Institutional discrimination is unjust and should be prohibited under Title VII, but adverse impact is the wrong tool for the job." *Id.* at 588. *Cf.* Player, *supra* note 135, at 43-44. Professor Player proposed a standard of Title VII liability whereby the amount of motive or intent that the plaintiff needs to prove decreases with the severity of the impact on the protected class. For example, when the discriminatory impact of an employment practice is especially severe, the practice is "presumed to have been improperly motivated unless the employer could carry the heavy burden of proving the true necessity for using such a system." *Id.* at 44.

247. *See Watson*, 487 U.S. at 987.

248. *Wards Cove*, 490 U.S. at 657.

249. *Id.* at 658-59.

250. *Id.* at 659

251. *Id.*

disparate impact plaintiffs.[252]

In light of the developments in *Wards Cove* and *Watson*, and the growing difficulty of proving discrimination based on statistics, foreign corporations will not face a significant increase in liability if Title VII plaintiffs are allowed to assert disparate impact claims against corporations operating under FCN Treaties. Even assuming additional liability, or the fear of this result, research indicates that foreign corporations will continue to invest in the United States. Predictions of widespread divestment appear to be unfounded.[253]

In straining to reconcile Title VII with the employer choice provision of the Korean FCN Treaty, the *MacNamara* court created an artificial distinction between disparate treatment and disparate impact based on the potential of an employer being held liable under disparate impact for merely exercising its FCN Treaty rights. Given the increased difficulty of success under the disparate impact model and the decreased likelihood foreign divestment, courts addressing Title VII-FCN Treaty conflicts should not follow *MacNamara*. Instead, courts should recognize the similarities between the treatment and impact theories and consider disparate impact claims on the merits.

In sum, much like Title VII, employer choice provisions in FCN Treaties were intended to guard against discrimination, not encourage it.[254] Discrimination by foreign corporations, especially against racial minorities, is a serious problem today.[255] Because employers have learned to disguise their discriminatory intent,[256] the disparate treatment model frequently is inadequate. Victims of employment discrimination by foreign companies operating in the United States under FCN Treaties should possess all the tools available to plaintiffs in domestic Title VII claims, including recovery based on disparate impact. These foreign

252. *See supra* notes 192-94 and accompanying text.
253. *See* Orebic, *supra* note 22, at 403
254. *See supra* notes 75-78 and accompanying text.
255. *See* Treece, *supra* note 236, at 41.
256. *See* Belton, *supra* note 110, at 1229.

corporations still may preference their own citizens, as long as the preferences are not based on race, color, religion, sex, or national origin.

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ADDENDUM

At the time of publication, passage of the Civil Rights Act of 1991 (the Act) appears virtually certain. Most significantly, the Act would modify *Wards Cove Packing Co. v. Atonio* and make it more difficult for employers to defend against disparate impact claims. After a plaintiff makes a prima facie case, employers will be required to prove that the employment practice in question is "job-related for the position in question and consistent with business necessity." *Wards Cove* had required a "business justification," with the ultimate burden of persuasion on the plaintiff to refute this justification.

The Act, however, does not simply return to the *Griggs v. Duke Power Co.* standard. Plaintiffs in disparate impact cases still must contend with the increasingly costly and complex nature of making a prima facie case of discrimination through statistics, the primary proof offered in disparate impact cases. Even before *Wards Cove,* recovery under disparate impact had become significantly more difficult than it was when *Griggs* was decided in 1971. Moreover, as this Note has shown, even assuming increased liability in Title VII-FCN Treaty cases, the primary goal of FCN Treaties—encouraging foreign investment in host states—would not be undermined. In sum, while the Civil Rights Act of 1991 could increase the likelihood of recovery under disparate impact, the passage of the Act does not change the conclusion that plaintiffs in Title VII-FCN Treaty cases should be able to recover under the disparate impact theory.

* The author extends his thanks to Professors Robert Belton and Robert Covington for their assistance in this project.