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L Camille Hebert

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# REDEFINING THE BURDENS OF PROOF IN TITLE VII LITIGATION: WILL THE DISPARATE IMPACT THEORY SURVIVE *WARDS COVE* AND THE CIVIL RIGHTS ACT OF 1990?†

L. CAMILLE HÉBERT*





* Assistant Professor of Law, The Ohio State University College of Law. B.A., Kansas State University, 1979; J.D., University of Kansas, 1982. I want to thank my colleagues, Lawrence Herman, Rhonda R. Rivera, Louis A. Jacobs, Arthur F. Greenbaum, Daniel C. K. Chow, and Mary Beth Beazley for their comments and suggestions. I also would like to thank Monte G. Smith, The Ohio State University College of Law Class of 1990, and Eugene N. Lindenbaum, Class of 1991, for their research assistance in connection with this article.

## INTRODUCTION

Two primary theories of employment discrimination have developed under Title VII of the Civil Rights Act of 1964.[1] The more traditional theory is the disparate treatment theory, which prohibits intentional discrimination on the basis of a protected characteristic. The disparate treatment theory essentially prohibits members of certain groups from being treated differently from other persons.[2] This theory reflects an "equal treatment" notion of equality, which suggests that equality is achieved if persons of different groups are treated in the same manner.[3]

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[1] 42 U.S.C. §§ 2000e to 2000e - 15 (1988).

[2] The United States Supreme Court described the disparate treatment theory in *Teamsters v. United States*:

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. Undoubtedly disparate treatment was the most obvious evil that Congress had in mind when it enacted Title VII.

431 U.S. 324, 335–36 n.15 (1977) (citations omitted); *see also* C. SULLIVAN, M. ZIMMER, & R. RICHARDS, I EMPLOYMENT DISCRIMINATION § 2.2 (1988).

[3] *See* Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 237–38 (1971). Professor Fiss described the concept of equal treatment in the following manner:

> Individual Negroes should be treated "equally" by employers in the sense that their race should be "ignored," that is, not held against them. This sense of

The less traditional and much more controversial theory of employment discrimination under Title VII is the disparate impact theory, which generally makes unlawful facially-neutral employer practices that disproportionately disadvantage members of protected groups unless those effects can be justified.[4] Proof of discriminatory intent is generally not considered to be a requirement for liability under the disparate impact theory.[5] The disparate impact theory is based on an "equal opportunity" notion of equality, which suggests that mere equality of treatment is not sufficient to achieve true equality because of the effects of past societal or employer discrimination. This notion of equal opportunity holds that the imposition of uniform standards or requirements on persons who are unable to meet those requirements because of past discrimination or because of some other characteristic tied to their membership in a protected group does not represent equality.[6] The equal opportunity concept of equality requires that the actual opportunities provided to different groups be equal.

Although the disparate treatment theory has obtained general acceptance, the disparate impact theory has had a checkered history

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equality focuses on the starting positions in a race: If color is not a criterion for employment, blacks will be on equal footing with whites.

*Id.* at 237.

[4] The Supreme Court has defined the disparate impact theory as follows:

> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate impact theory.

*Teamsters*, 431 U.S. at 335–36 n.15 (citations omitted).

[5] *See* C. SULLIVAN, M. ZIMMER, & R. RICHARDS, *supra* note 2, § 2.2.

[6] In *The Zero Sum Society*, Professor Thurow used Professor Fiss's metaphor of a race to demonstrate the problems with the equal treatment concept of equality:

> Imagine a race with two groups of equal ability. Individuals differ in their running ability, but the average speed of the two groups is identical. Imagine that a handicapper gives each individual in one of the groups a heavy weight to carry. Some of those with weights would still run faster than some of those without weights, but on average, the handicapped group would fall farther and farther behind the group without the handicap . . . . Now suppose that someone waves a magic wand and all the weights vanish . . . . If the two groups are equal in their running ability, the gap between those who never carried weights and those who used to carry weights will cease to expand, but those who suffered the earlier discrimination will never catch up . . . . If a fair race is one where everyone has an equal chance to win, the race is not fair even though it is now run with fair rules.

L. THUROW, THE ZERO SUM SOCIETY 188–89 (1980).

since its recognition and articulation in the 1971 United States Supreme Court decision of *Griggs v. Duke Power Co.*[7] In that case, the Court took an expansive view of the theory, finding the footings of the doctrine firmly rooted in congressional intent and in the purposes for which Title VII was enacted.[8] Since *Griggs* was decided, however, the disparate impact theory has been the subject of a good deal of commentary and dispute. Some commentators have praised the doctrine as essential to the effectuation of the purposes of the antidiscrimination laws;[9] others have argued that the theory is inconsistent with the intent and purposes of Congress[10] and flawed in practice, if not in theory.[11] Still others have struggled considerably

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[7] 401 U.S. 424 (1971).

[8] Then Chief Justice Burger, writing for a unanimous Court, explained the justification of the disparate impact theory as follows:

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

*Id.* at 429–30.

[9] *E.g.*, Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 62 (1972) (stating that the Court's adoption of the disparate impact theory in *Griggs* was "in the tradition of great cases . . . which announce and apply fundamental legal principles to the resolution of basic and difficult problems of human relationships" and makes possible "a prompt and effective nationwide assault . . . on patterns of discrimination").

[10] Gold, Griggs' *Folly: An Essay on the Theory, Problems, and Origins of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429, 516 (1985) (after an exhaustive review of the legislative history of Title VII, the author concludes that Congress did not intend and in fact rejected the disparate impact theory). *But see* Thomson, *The Disparate Impact Theory: Congressional Intent in 1972—A Response to Gold*, 8 INDUS. REL. L.J. 105, 116 (1986) (regardless of intent of 1964 Congress in enacting Title VII, Congress clearly approved of disparate impact model when it amended the statute in 1972); Blumrosen, Griggs *Was Correctly Decided—A Response to Gold*, 8 INDUS. REL. L.J. 443, 447–50 (1986) (even if Congress did not expressly contemplate the disparate impact theory in enacting the statute, that theory is consistent with the purpose of Congress in enacting the statute).

[11] Much of the criticism of the application of the disparate impact theory has focused on the allocation and definition of the burdens of proof placed on the respective parties. *See* Laycock, *Statistical Proof and Theories of Discrimination*, 49 LAW & CONTEMP. PROBS. 97, 101–02 & n.17 (1986) (arguing that requirements for validation of selection criteria with a disparate impact to satisfy "business necessity" defense are so onerous that it is practically impossible to meet those requirements); Maltz, *The Expansion of the Role of the Effects Test in Antidiscrimination Law: A Critical Analysis*, 59 NEB. L. REV. 345, 353–54 (1980) (widespread use of the disparate impact theory will result in employment of a marginally less productive workforce and will cause employers to abandon criteria that would satisfy the requirements of *Griggs*).

to articulate a justification for the doctrine that is consistent with both the language of Title VII and the intent of Congress in enacting that statute.[12]

This scrutiny of the doctrinal foundations of the disparate impact theory has not been confined to the pages of law reviews. Ever since *Griggs* was decided, the courts, including the United States Supreme Court, have seemed to struggle with the purpose and therefore with the application of the theory.[13] The struggle of the Supreme Court with the underpinnings of the disparate impact theory has intensified in recent terms, particularly in the cases of *Watson v. Fort Worth Bank & Trust*,[14] decided in 1988, and *Wards Cove Packing Co. v. Atonio*,[15] decided in 1989. In those cases, the Court made changes to the burden of production and burden of persuasion previously thought applicable to the disparate impact theory.

The disparate impact theory has also recently captured the attention of Congress. The Civil Rights Act of 1990, introduced in

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[12] Caldwell, *Reaffirming the Disproportionate Effects Standard of Liability in Title VII Litigation*, 46 U. PITT. L. REV. 555, 579–86 (1985) (arguing that the foundation for the theory of disparate impact is the theory of "productive efficiency," which recognizes that employer actions with a disparate impact have the effect of depriving the economy of the efficient use of manpower); Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1299–1311 (1987) (although concluding that there is no direct textual support for the disparate impact model in Title VII, Rutherglen argues that the existence of the model is justified as a method for challenging pretextual discrimination that would otherwise be difficult, if not impossible, to prove); Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 AM. U.L. REV. 799, 804–22 (1985). Willborn argues that the disparate impact theory exists in a theoretical vacuum. After addressing a range of possible theories for the model—intent theory, past discrimination theory, functional equivalence theory, and statistical discrimination theory—Willborn concludes that the disparate impact model is based on the statistical discrimination theory, which assumes that employers take certain actions because they lack sufficient information to make low cost decisions about the productivity of particular employees and therefore rely on prohibited proxies. Willborn, *supra*, at 804–22.

[13] Only a few years after the Court in *Griggs* indicated that intent was irrelevant to disparate impact analysis, the Court in *Albemarle Paper Co. v. Moody* seemed to read intent back into the analysis by relying on the concept of "pretextual discrimination." 422 U.S. 405, 425 (1975). The Court indicated that after the employer has met its burden of showing that a selection criteria with a disparate impact on protected groups is "job related," the plaintiff has the opportunity to demonstrate that other selection criteria would meet the goals of the employer without the undesirable effects on protected groups. *Id.* The Court said that this showing "would be evidence that the employer was using its tests merely as a 'pretext' for discrimination." *Id.* The Court's use of the term "pretext" seems to suggest an element of intent as part of the plaintiff's rebuttal burden. See *infra* notes 165–71 and accompanying text for a more complete discussion of the *Albemarle* case.

[14] 487 U.S. 977 (1988).

[15] 109 S. Ct. 2115 (1989).

part in response to the Supreme Court's decision in *Wards Cove*,[16] would overrule the Court's reallocations of the burdens of proof for the disparate impact theory. Although the current dispute between the Court and Congress concerning the disparate impact theory has focused on the definition and the allocation of the burdens of proof applicable to cases brought under that theory, the issue is much more fundamental than simply determining how difficult it will be for the respective parties to prove their cases.

The Court's reallocation of the burdens of proof seems to reflect the Court's changing perception of the foundation and purpose of the disparate impact theory. These changes suggest that the Court is moving away from the equal opportunity notion of equality that has traditionally been the basis of the disparate impact theory and instead is embracing the equal treatment notion of equality as the exclusive concept of equality under Title VII. The Court's changes to the burdens of proof may indeed foretell the ultimate demise of the disparate impact theory as an independent and sufficient basis for liability under Title VII.[17]

The Civil Rights Act of 1990, which passed both the House and the Senate before being vetoed by President Bush,[18] if ulti-

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[16] S. 2104, 136 CONG. REC. S1020 (daily ed. Feb. 7, 1990); H.R. 4000, 136 CONG. REC. H364 (daily ed. Feb. 7, 1990). The Civil Rights Act of 1990 deals with many more issues than just the allocation of the burdens of proof for disparate impact claims. *See infra* note 296. The other issues raised by that legislation are beyond the scope of this article.

[17] This is not the first, and may not be the last, article speculating on the demise of the disparate impact theory. Professor Furnish suggested that then recent cases indicated that the Court was moving towards a merger of the disparate impact theory into the disparate treatment theory of employment discrimination. Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After* Beazer *and* Burdine, 23 B.C.L. REV. 419, 440–45 (1982). Professor Cox also suggests that a merger of the different theories is likely, but indicates that it would be the disparate treatment theory, rather than the disparate impact theory, that would be the loser in the merger. Cox, *The Future of the Disparate Impact Theory of Employment Discrimination After* Watson v. Fort Worth Bank, 1988 B.Y.U. L. REV. 753, 797–98 (1988). Finally, other authors, although apparently troubled by some of the challenges to the disparate impact theory, seem to conclude that the theory of disparate impact is alive and well. Helfand and Pemberton, *The Continuing Vitality of Title VII Disparate Impact Analysis*, 36 MERCER L. REV. 939, 963–68 (1985). Perhaps we can hope, to paraphrase Mark Twain, that reports of the death of the disparate impact theory have been "greatly exaggerated." RESPECTFULLY QUOTED 76 (S. Platt 1989). Although some of these articles have argued that the two theories are being merged into one theory, none of the articles has focused, as does this article, on the allocation of the burdens of proof in the respective theories as central to the continued validity of the two separate theories.

[18] S. 2104, 136 CONG. REC. S9966 (daily ed. July 18, 1990) (bill passed by vote of 65 to 34); H.R. 4000, 136 CONG. REC. H6769 (daily ed. Aug. 3, 1990) (bill passed by vote of 272 to 154); 136 CONG. REC. S15,407 (daily ed. Oct. 16, 1990) (conference report adopted by Senate by vote of 62 to 34); 136 CONG. REC. H9994–96 (daily ed. Oct. 17, 1990) (conference report adopted by House by vote of 273 to 154).

mately allowed to become law, has the potential to resurrect the disparate impact theory as a viable theory of employment discrimination. Whether that legislation has this effect depends on Congress's recognition of the significance of the Court's reallocation of the burdens of proof and the clarity of Congress's articulation of the purpose of the disparate impact theory.

This article will focus on the meaning of the Court's reallocation of the burdens of proof for disparate impact cases under Title VII and the effects of Congress's re-reallocation of those burdens. Although commentators have viewed the actions of Congress regarding this reallocation as purely a political measure aimed at more stringent enforcement of the civil rights laws, I will argue that, analytically, it is Congress, and not the Supreme Court, that has correctly chosen the allocation of burdens that is consistent with the purposes of the disparate impact theory.

In Part I of this article, I will explore the origins of the disparate impact theory by looking at the language and legislative history of Title VII and at the early administrative and judicial applications of that theory.[19] I will conclude that, although both the language and the legislative history of Title VII are ambiguous on the question of whether Congress intended the disparate impact theory to be part of Title VII, the disparate impact theory is consistent with the general purposes of Congress in enacting the statute and is necessary for the achievement of the aims of the antidiscrimination laws. This study of the origins of the disparate impact theory is important to determine the correctness of the decisions now being made by the Court and Congress concerning the future of the disparate impact theory.

In Part II of the article, I will describe the different purposes of the disparate impact theory suggested by the cases applying that theory.[20] Certain of those cases are consistent with the "pure" form of the disparate impact theory, in which the theory is used as a method to attack the effects of employer practices without regard to the intent behind those practices; other cases suggest that the disparate impact theory is being used merely as a method for attacking pretextual intentional discrimination.

In Part III of the article, I will examine the role of burdens of production and burdens of persuasion in meeting the purposes of

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[19] *See infra* notes 23–147 and accompanying text.

[20] *See infra* notes 148–177 and accompanying text.

the disparate impact theory.[21] I will compare the allocations of those burdens of proof in disparate treatment cases and disparate impact cases and explore the relationship between the allocation of those burdens and the purposes of the respective theories. I will then address the use of these burdens of proof by the Supreme Court in *Watson* and *Wards Cove* and examine the implication of such use for the Court's current view of the purposes of the disparate impact theory. I will argue that the Court's allocation of the burdens of proof reflects the Court's choice between the different possible purposes of the disparate impact theory by sanctioning the "pretext" model of that theory; that is, the view of the disparate impact theory as a method of challenging pretextual intentional discrimination.

Finally, in Part IV of the article, I will demonstrate the continuing need for the disparate impact theory in its pure form, as initially expressed by the Supreme Court in *Griggs*.[22] I will suggest that the Court has taken a definitive step towards merging the disparate impact theory into the disparate treatment theory. I will also examine whether the Civil Rights Act of 1990 can preserve the disparate impact theory as a viable method of establishing violations of Title VII.

## I. Origins of the Disparate Impact Theory

### A. *The Statutory Basis for the Disparate Impact Theory*

The concept of discrimination that is the basis of the disparate impact theory is quite different from the concept of discrimination that underlies the disparate treatment theory. Based on an equal opportunity concept of equality, the "pure" form of the disparate impact theory, in which employers will be held liable solely because of the effects of their employment practices, will find discrimination in circumstances in which employers do not intend to disadvantage minority group members and in fact treat minority group members precisely the same as they treat others. In some ways, finding discrimination in such actions is somewhat counterintuitive to the common understanding of the term "discrimination," which normally includes some notion of differences in treatment.[23]

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[21] *See infra* notes 178–273 and accompanying text.

[22] *See infra* notes 274–305 and accompanying text.

[23] The term "discrimination" is defined as "the according of differential treatment to persons of an alien race or religion"; a synonym is "differentiation." "Discriminate" is defined as "to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit." Webster's Third New International Dictionary 648 (unabr. ed. 1986).

Determining whether the disparate impact theory was intended to be part of Title VII is made more difficult because the term "discrimination" is not defined in the statute. Section 703(a) of Title VII, however, sets forth the employer actions that are prohibited by the statute:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[24]

The meaning of the prohibition set forth in section 703(a)(1) seems straightforward: employers are prohibited from taking adverse employment actions against individuals "because of" certain protected characteristics. Although there is no express requirement of intent to discriminate set forth in section 703(a)(1), the requirement of an intent to discriminate seems implicit in the language used, particularly the phrase "because of." The most natural reading of this phrase and the subsection as a whole is that employers are prohibited from taking adverse employment action against individuals when such actions are motivated by the race, sex, religion, or national origin of those individuals. Under this reading of the statute, section 703 (a)(1) forms the statutory basis of the disparate treatment theory.

If this is the proper interpretation to be given section 703(a)(1), there is some question as to the purpose served by section 703(a)(2). One answer is that section 703(a)(1) provides the statutory basis for the disparate treatment theory; section 703(a)(2) provides the statutory basis for the disparate impact theory. This explanation has obtained a good deal of popular acceptance. Section 703(a)(2) of Title VII is most often cited as the statutory basis for the disparate impact theory.[25]

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[24] 42 U.S.C. § 2000e–2(a) (1988).

[25] The United States Supreme Court in *Griggs* cited § 703(a)(2) without elaboration in

The presence of the words "adversely affect" in section 703(a)(2) makes reliance on this section as the statutory basis for the disparate impact theory almost irresistible. After all, the premise of the disparate impact model is that certain facially neutral employment practices, including tests and other selection criteria, operate to "classify" employees and job applicants in certain ways that "deprive" them of "employment opportunities" and "adversely affect" their status as employees "because of" their race or other protected classification.[26] The language of section 703(a)(2), at least on its face, is consistent with the disparate impact theory.

It has been suggested, however, that section 703(a)(2) was also intended to incorporate the requirement of an intent to discriminate that courts have found in section 703(a)(1). The textual support for this position reads the words "because of" in both subsections to mean "motivated by"; that is, the type of causation contemplated by Congress was motivational causation.[27] Under this interpretation of the statute, adverse employer actions are unlawful under Title VII only when those actions were motivated by unlawful discriminatory intent or motive on the part of the employer.

This interpretation does not, however, seem compelled by the statutory language. Although the phrase "because of" in section

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addressing the issue of whether the effects of the employer's practices violated Title VII. 401 U.S. 424, 426 n.1 (1971). The Court in *General Electric Co. v. Gilbert* suggested that challenges to the effects of employer practices were to be brought under § 703(a)(2) and challenges to the intent behind such practices were appropriately brought under § 703(a)(1). 429 U.S. 125, 137 & n.13 (1976). In *Connecticut v. Teal*, the Court clearly indicated that § 703(a)(2) was the source of the disparate impact model. 457 U.S. 440, 445–49 (1982).

[26] The Supreme Court said precisely this in *Teal* :

> A disparate-impact claim reflects the language of § 703(a)(2) and Congress' basic objectives in enacting that statute: "to achieve equality of employment *opportunities* and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." When an employer uses a non-job-related barrier in order to deny a minority or woman applicant employment or promotion, and that barrier has a significant adverse effect on minorities or women, then the applicant has been deprived of an employment *opportunity* "because of . . . race, color, religion, sex, or national origin." In other words, § 703(a)(2) prohibits "discriminatory . . . barriers to employment" that "limit . . . or classify . . . applicants for employment . . . in any way which would deprive or tend to deprive any individual of employment *opportunities*."

457 U.S. at 448 (footnote and citations omitted).

[27] This appears to be the position taken by Professor Gold in support of his argument that Congress did not contemplate the disparate impact theory when it enacted Title VII. Gold, *supra* note 10, at 511–13. Professor Rutherglen also concludes, based on his reading of the structure of § 703(a)(2), that only intentional discrimination is prohibited by the statutory language. Rutherglen, *supra* note 12, at 1299–1302. He also apparently reads the term "because of" to mean "motivated by."

703(a)(2) could be read to incorporate a requirement of motivational causation, there are other meanings that can be given to those words. The ordinary dictionary definitions of "because" and "cause" include types of causation other than motivational causation: those terms include both "a reason or motive for an action or condition" and "a person, thing, fact, or condition that brings about an effect."[28] This second definition indicates that a result can be "caused" by the race or other protected characteristic of an individual even if the result is not motivated by that characteristic.

Nor is it clear that the phrase "because of" has to have precisely the same meaning in both subsections of section 703(a). Although both uses of the phrase "because of" necessarily impose some requirement of causation, different uses of that phrase might impose different standards of causation. Without doing any violence to the statutory language, it is possible, therefore, to interpret section 703(a)(1) to require motivational causation, that is, that the employer take the prohibited action based on discriminatory motive, while interpreting section 703(a)(2) to be satisfied if race or some other protected classification is a factor that produces the loss of employment opportunities or other adverse effect.[29]

Even if this reading of the statute is somewhat strained, this interpretation is consistent with general rules of statutory construction. One canon of statutory construction is that legislation not be construed in such a way as to render portions of it superfluous.[30] If section 703(a)(2) is read to prohibit only intentionally discriminatory employer action, it would simply prohibit the same acts already prohibited by section 703(a)(1) and would serve no purpose. On the other hand, construing section 703(a)(1) to prohibit employer action because of the intent behind such practices while construing section 703(a)(2) to prohibit employer action because of the effects of those practices has the virtue of giving substantive meaning to both subsections of section 703(a).

The language of Title VII is not inconsistent with the disparate impact theory and, in fact, provides some textual support for the

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[28] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 356 (unabr. ed. 1986).

[29] *See* Chamallas, *Evolving Conceptions of Equality Under Title VII: The Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 U.C.L.A. L. REV. 305, 324–25 (1983).

[30] *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979); *In re* Bellanca Aircraft Corp., 850 F.2d 1275, 1280 (8th Cir. 1988); Nieto v. Ecker, 845 F.2d 868, 873 (9th Cir. 1988); United States v. Union Gas Co., 792 F.2d 372, 379–80 (3d Cir. 1986); *see also* 2A SUTHERLAND STATUTORY CONSTRUCTION § 46.06 (Sands 4th ed. 1984).

existence of that theory. Neither, however, is the statutory language a ringing endorsement of the disparate impact theory. The ambiguity in the language of Title VII as to whether Congress intended the disparate impact theory to apply to claims under the statute counsels resort to the legislative history of the statute. The legislative history itself, however, is not unambiguous.[31]

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[31] Resort to legislative history to explain the meaning of unclear statutory provisions is always somewhat troublesome, because legislative history often contains much to support either side of an interpretational dispute. This problem is made worse by certain quirks in the legislative history of Title VII. For example, the part of the bill that became Title VII was added to the original bill as the result of executive sessions of a subcommittee of the House Committee on the Judiciary, which recommended the amended bill to the full Committee, which in turn adopted an amendment in the nature of the substitute. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 435 (1966). Some members of the Committee took exception to the manner in which the substitute bill was prepared and presented to the Committee:

> This legislation is being reported to the House without the benefit of any consideration, debate, or study of the bill by any subcommittee or committee of the House and without any member of any committee or subcommittee being granted an opportunity to offer amendments to the bill . . . . It was drawn in secret meetings held between certain members of this committee, the Attorney General and members of his staff and certain select persons, to the exclusion of other committee members.

H.R. REP. No. 914, 88th Cong., 2d Sess., pt. 1, at 62–63 (Minority Report Upon Proposed Civil Rights Act of 1963, Committee on Judiciary Substitute For H.R. 7152), *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2431, 2431; *see also* H.R. REP. No. 914, 88th Cong., 2d Sess. pt. 1, at 62 (additional views of Hon. Arch A. Moore, Jr.), *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2430, 2430 ("[A] 'compromise' bill was sprung upon the committee from out of the night. Where it came from or who were its benefactors remains to this day a deep, dark secret. The bill reported was conceived in segregation, born in intolerance, and nurtured in discrimination.").

An additional fact complicating the legislative history of Title VII is that the bill as passed by the House was not referred to committee, although both proponents and opponents of the bill moved to do so. Vaas, *supra* at 443–44. Finally, an amendment in the nature of a substitute, the Mansfield-Dirksen substitute, was prepared outside of the floor of the Senate by a bipartisan group with the purpose of reaching agreement on amendments to the bill to ensure its passage. *Id.* at 445–46.

One commentator has said the following about Title VII and its legislative history:

> The emergent Title VII is an obtuse hodgepodge of legislative compromise. The statutory provisions are complex, confusing, contradictory, and incomplete. The legislative history is virtually useless. As Judge Goldberg has stated [in Sanchez v. Standard Brands, Inc., 431 F.2d 455, 460 (5th Cir. 1970)], "The legislative history of Title VII is in such a confused state that it is of minimal value in its explication."

Modjeska, *The Supreme Court and the Ideal of Equal Employment Opportunity*, 36 MERCER L. REV. 795, 798 (1985).

In spite of the troubling aspects of legislative history in general and Title VII's legislative history in particular, a search of Title VII's legislative history does provide clues as to the purpose of Congress in enacting the statute.

## B. *The Legislative History of Title VII of the Civil Rights Act of 1964*

### 1. The Meaning of "Discrimination"

Relatively little direct support for the disparate impact theory of employment discrimination exists in the legislative history of Title VII. The primary focus of Congress at the time the statute was enacted appears to have been formal policies of segregation and individual acts of discrimination based on racial animus.[32] This type of discrimination—involving an intent to treat persons of a particular race differently from persons of another race—is the essence of the intentional discrimination that comprises the disparate treatment theory of employment discrimination.

It is less clear that Congress focused on whether employer action that was not discriminatorily motivated, but which adversely affected members of racial minorities, would violate the new law. Portions of the legislative history support the argument made by a number of commentators[33] that only intentional discrimination was contemplated by Congress in enacting the statute. In explaining one of the charges made to the proposed statute, Senator Humphrey, one of the Senate leaders involved in a substitute compromise bill aimed at ensuring the passage of Title VII, described the reach of Title VII:

> Section 706(g) is amended to require a showing of intentional violation of the title in order to obtain relief. This is a clarifying change. Since the title bars only discrimination because of race, color, religion, sex, or national origin it would seem already to require intent, and, thus, the proposed change does not involve any substantive change in the title. The express requirement of intent is designed to make it wholly clear that inadvertent or accidental discrimination will not violate the title or result in entry of court orders. It means simply that the respondent must have intended to discriminate.[34]

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[32] The legislative history of Title VII is filled with expressions of concern about the intentionally discriminatory practices of employers against blacks and other minorities. *See, e.g.*, 110 CONG. REC. 6547 (Mar. 30, 1964) (statement of Sen. Humphrey); 110 CONG. REC. 13088 (June 9, 1964) (statement of Sen. Humphrey); 110 CONG. REC. 13089 (June 9, 1964) (statement of Sen. Morse).

[33] *See, e.g.*, Gold, *supra* note 10, at 516; Rutherglen, *supra* note 12, at 1299.

[34] 110 CONG. REC. 12724 (June 4, 1964).

The presence of the word "intentional" in section 706(g) has not proved fatal to the disparate impact theory because the courts have construed that term to mean "not accidental," finding the requirement to be met as long as the employer meant to take the action claimed to be discriminatory.[35] This is certainly a permissible interpretation to give to the term "intentional,"[36] and this interpretation has some support in Senator Humphrey's reference to "inadvertent or accidental discrimination." On the other hand, Senator Humphrey's statement that the statute already requires "intent" and that the insertion of the word "intentional" means that "the respondent must have intended to discriminate" suggests that the term "intentional" might have been intended to convey more than just "not accidental," but rather some discriminatory motive on the part of the employer.

There is, in fact, some evidence that Congress may have considered and rejected the disparate impact theory as a type of discrimination actionable under the statute. The Interpretative Memorandum on Title VII introduced into the Congressional Record by Senators Case and Clark, the bipartisan co-captains responsible for Title VII, gave the following interpretation of the meaning of discrimination under the statute:

> It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 703 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title.

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[35] *See, e.g.*, Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1006 (9th Cir. 1972); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1201 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 250 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 986 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). Although the United States Supreme Court has not directly addressed the meaning of the term "intentionally" in § 706(g), its willingness to allow relief in disparate impact cases indicates that it gives a similar interpretation to that word.

[36] One of the dictionary definitions of the term "intentional" is "done deliberately or on purpose;" the antonym given is "accidental." THE RANDOM HOUSE COLLEGE DICTIONARY 693 (1975). On the other hand, the legal definition given to the term "intentional" usually connotes more purposeful action: "determination to act in a certain way or to do a certain thing;" "meaning, will, purpose, design." BLACK'S LAW DICTIONARY 948 (4th ed. 1968).

. . . .

> There is no requirement in title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.[37]

The concept of differential treatment contained in the first paragraph quoted above seems to refer to the type of discrimination that is the essence of the disparate treatment theory. The concept described in the second paragraph—that employer qualifications might adversely affect employees of certain racial groups—describes the disparate impact theory. Senators Case and Clark appear to be saying that only the first type of discrimination, which we know as disparate treatment, is included within the meaning of the term "discrimination."

2. Congressional Concern About Employment Tests

The legislative history regarding the use of employment tests is perhaps most relevant to the issue of whether the disparate impact theory was meant to be included as a basis for liability under Title VII. In spite of the apparent approval of the use of employment

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[37] 110 CONG. REC. 7212, 7213 (Apr. 8, 1964). The United States Supreme Court has recognized the authoritativeness of this Interpretative Memorandum. Firefighters v. Stotts, 467 U.S. 561, 581 n.14 (1984); *see also* Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1787 n.8 (1989). The Supreme Court addressed this piece of legislative history in *Griggs v. Duke Power Co.*, concluding that the term "qualifications" could be read to mean criteria ensuring that "applicants be fit for the job," that is, job-related criteria. 401 U.S. 424, 435 n.11 (1971). Giving that language this meaning suggests that only job-related criteria with an adverse impact are protected by Title VII and that criteria that are not so related are actionable. This interpretation transforms the legislative history from a rejection of the disparate impact model into an endorsement of that theory. It is somewhat troubling for so much to depend on the interpretation to be given to an ambiguous term.

On the other hand, there is some support elsewhere in the Case-Clark Interpretative Memorandum that they may indeed have given the term "qualifications" this meaning. In a section of the memorandum dealing with the bona fide occupational qualification defense, the senators noted the following: "This exception must not be confused with the right which all employers would have to hire and fire on the basis of general qualifications for the job, such as skill or intelligence." 110 CONG. REC. 7212, 7213 (Apr. 8, 1964). In this passage, the senators do appear to be using the term "qualifications" to mean criteria required for the job.

tests and other selection criteria in the Case-Clark Interpretative Memorandum quoted above, a number of congressional members continued to express concern that Title VII would prevent employers from judging employees on the merits. Congressional debate on this issue centered around a then-recent decision by a hearing examiner for the Illinois Fair Employment Commission in *Myart v. Motorola Co.*[38]

The *Motorola* case arose out of a claim made by a black job applicant, Leon Myart, that he had been denied employment with Motorola because of his race. Motorola claimed that one reason for the denial of employment was Myart's failure to obtain a satisfactory score on a written test required as a condition of employment.[39] The test required of the applicant was described by the test's author as "the shortest test of intelligence that has been developed," measuring verbal understanding and understanding of instructions.[40] The hearing examiner found the test to be discriminatory because it did "not lend itself to equal opportunity to qualify for hitherto culturally deprived and the disadvantaged groups": use of the test placed members of minority groups at a "competitive disadvantage." The hearing examiner went on to note that, to effectuate the goals of the state antidiscrimination laws, employers needed to "eradicate unfair employment practices" . . . [by] "adapting procedures" to fit the needs of previously deprived classes of employees and that "[s]election techniques may have to be modified at the outset in the light of experience, education, or attitudes of the group."[41]

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[38] Charge No. 63C–127, Decision and Order of Hearing Examiner (Ill. Fair Emp. Prac. Comm. Feb. 26, 1964), *reprinted at* 110 CONG. REC. 5662 (Mar. 19, 1964).

[39] *Id.* at 5663. Motorola also alleged that the plaintiff had not been hired because he had failed to inform the company through his job application and interview of relevant educational and job experience and because of his arrest record, apparently for sodomy. *Id.* at 5663–64; *see also* 110 CONG. REC. 9025 (Apr. 24, 1964). The hearing examiner discounted these other grounds for the employment decision made by Motorola, making a credibility determination that those factors were not determinative in the decision in any event. 110 CONG. REC. at 5663, 5664 (Mar. 19, 1964).

[40] 110 CONG. REC. 5663 (Mar. 19, 1964). The questions in test No. 10 are reprinted at 110 CONG. REC. 9033 (Apr. 24, 1964).

[41] 110 CONG. REC. 5664 (Mar. 19, 1964). Rather ironically, in light of the backlash in Congress concerning the *Motorola* decision, the examiner's comments about the intelligence test given to Myart were not even necessary to the resolution of the claim. The examiner did not find that the company excluded Myart because of an unsatisfactory score on a discriminatory test; he found that Myart had actually passed the test because Motorola had failed to introduce any evidence concerning Myart's score on the test. The examiner indicated that if the respondent had produced the test administrator to testify, "the showing would have been adverse to the respondent." *Id.* at 5663–64.

The type of discrimination that the hearing examiner described is the essence of the disparate impact theory of discrimination. He did not find that the employer had any discriminatory intent in requiring the test as a condition of employment; he found the test to be objectionable because of its effect on disadvantaged groups as compared to its effect on advantaged groups. He indicated that employers have a responsibility not to employ certain tests that have such an effect. He did not even address whether the test actually measured the requirements of the job. His opinion can therefore be read to invalidate all tests with an adverse impact on minorities.[42]

Congressional reaction to the *Motorola* case was uniformly negative.[43] Senator Tower relied on the *Motorola* case to justify an amendment to Title VII dealing with the issue of professionally developed ability tests. In introducing his initial amendment on the subject of professionally developed ability tests, he indicated that the hearing examiner in the *Motorola* case invalidated a test because it was found to be discriminatory as to culturally deprived groups and that the Equal Employment Opportunity Commission might attempt to regulate tests in a similar fashion. Senator Tower went on to defend the test at issue in the *Motorola* case:

> Since the case arose, it has been repeatedly stated by psychologists and testing experts that the test was not designed to "select-out" any cultural group. It is obvious that tests can and are being written which are both fair

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[42] An explanation of the hearing examiner's decision appeared in a newspaper article printed in the Wall Street Journal on April 21, 1964: "Mr. Bryant contends, 'There's absolutely nothing in my ruling which would preclude an employer from testing applicants in a way pertinent to the job they're seeking. Use of intelligence tests of this sort is a tool serving to discriminate between whites and Negroes, whether done deliberately or not.'" *Id.* These remarks indicate that the examiner condemned the test because it was not "pertinent to the job," that is, it was not job-related.

[43] Even the proponents of Title VII went to great lengths to indicate their disapproval of the hearing examiner's decision. Senator Case, in response to Senator Tower's first proposed amendment on professionally developed ability tests, stated: "I feel certain that no member of the Senate disagrees with the views of the Senator from Texas concerning the Motorola case finding by the referee or examiner." 110 CONG. REC. 13503 (June 11, 1964). Senator Case went on to explain his position on the amendment:

> I want it to be clearly understood, so far as I am concerned—and I believe that I speak for all members of the committee, the captains, and the leadership—that our position against this amendment . . . do[es] not mean approval of the Motorola case or that the bill embodies anything like the action taken by the examiner in that case.

110 CONG. REC. 13504 (June 11, 1964).

> and extremely useful. There is no professional evidence to the contrary.[44]

Senator Tower indicated that his proposed amendment would allow an employer to give any professionally developed ability test to an employee or job applicant and act on the test results, as long as the employer gave the test to all concerned individuals without regard to race, color, sex, religion, or national origin. Senator Tower added that this would ensure that "everybody will get the same fair test; everybody will get the same fair chance."[45]

Senator Tower's initial amendment would have allowed employers to give and rely on the results of any professionally developed ability test as long as the "test is designed to determine or predict whether such individual is suitable or trainable" for the "particular business or enterprise involved" and if the test were given to all persons being considered for the position.[46]

Senator Case raised two objections to Senator Tower's initial amendment. The first objection appears to have been that the amendment would protect professionally developed ability tests even if they were used for the purpose of discriminating:

> If this amendment were enacted, it could be an absolute bar and would give an absolute right to an employer to state as a fact that he had given a test to all applicants, whether it was a good test or not, so long as it was professionally developed. Discrimination could actually exist under the guise of compliance with the statute.[47]

It is possible to read Senator Case's remarks concerning "good tests" to mean tests that accurately predict job performance, that is, job-related tests. If his words are given that meaning, his objection to the proposed amendment could be that it would have protected non-job-related tests.[48]

Senator Case's second objection to the first proposed Tower amendment was that the amendment was unnecessary.[49] The Senator's view that the amendment was unnecessary is explained by an

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[44] 110 CONG. REC. 11251 (May 19, 1964).

[45] *Id.*

[46] Amendment No. 605, 110 CONG. REC. 11251 (May 19, 1964).

[47] 110 CONG. REC. 13504 (June 11, 1964).

[48] This appears to be the manner in which the Supreme Court in *Griggs* interpreted the comments of Senator Case. *See* 401 U.S. 424, 435–36 (1971).

[49] 110 CONG. REC. 13503 (June 11, 1964).

earlier memorandum prepared by Senator Case indicating why the *Motorola* case could not occur under Title VII:

> Whatever merit as a socially desirable objective, title VII would not require, and no court could read title VII as requiring, an employer to lower or change the occupational qualifications he sets for his employees simply because proportionally fewer Negroes than whites are able to meet them . . . .
>
> Title VII says merely that a covered employer cannot refuse to hire someone simply because of his color, that is, because he is a Negro. But it expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. Indeed, the very purpose of title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color. Title VII would in no way interfere with the right of an employer to fix job qualifications and any citation of the Motorola case to the contrary as precedent for title VII is wholly wrong and misleading.[50]

What Senator Case seems to have been saying is that an employer could not be held to have violated Title VII just because of the adverse effects of its job criteria: the *Motorola* case could not occur under Title VII because there is no cause of action based on such adverse effects.

There is, however, another interpretation that one can give to the remarks of Senator Case. The Supreme Court in *Griggs* relied on Senator Case's reference to "applicable job qualifications" to mean qualifications required by the job, rather than criteria set by the employer, thereby concluding that Senator Case was suggesting that only job-related tests or other selection criteria were protected by Title VII.[51] Under this interpretation, employer use of non-job-

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[50] 110 CONG. REC. 6416 (Mar. 24, 1964).

[51] *Griggs*, 401 U.S. at 434–36. There are other indications in the legislative history that members of Congress objected to the *Motorola* case because of its potential effect on job-related tests. Senator Tower indicated that the *Motorola* decision "put a premium on ignorance":

> It said, in effect, that a test is discriminatory if it discriminates against those who are by virtue of intellectual and educational background incompetent to do a particular job . . . . It is certainly right and proper for a private company to require that a man possess certain skills necessary to perform the work required by that company, or that he possess a sufficient intellect to be trainable to do a specific job.

110 CONG. REC. 9025 (Apr. 24, 1964).

related tests with an adverse impact would still be actionable under the statute.

Senator Humphrey also argued against the first Tower amendment on the ground that it was unnecessary, using language even more damaging to the disparate impact theory:

> Every concern of which this amendment seeks to take cognizance has already been taken care of in title VII, as amended, and presented in the substitute. These tests are legal. They do not need to be legalized a second time. They are legal unless used for the purpose of discrimination. The amendment is unnecessary. It would only complicate the package amendment, which has been carefully drawn and represents the considered views on the part of those concerned about title VII.[52]

Senator Humphrey's position is not subject to the ambiguity present in the comments of Senator Case. His position is that tests and other selection criteria are legal unless used with a discriminatory intent: tests are not made unlawful solely because of their effects.

This congressional debate over the first Tower amendment resulted in its defeat.[53] Two days later, Senator Tower submitted a second amendment on the subject of professionally developed ability tests, which had been cleared through the "Attorney General, the leadership, and the proponents of the bill."[54] That amendment, which was ultimately incorporated into Title VII as section 703(h), provided:

> [N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin.[55]

Virtually no debate occurred over this second amendment. Senator Humphrey noted that "[s]enators on both sides of the aisle who were deeply interested in title VII have examined the text of this amendment and have found it to be in accord with the intent

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[52] 110 CONG. REC. 13504 (June 11, 1964).
[53] 110 CONG. REC. 13505 (June 11, 1964).
[54] Amendment No. 952, 110 CONG. REC. 13724 (June 13, 1964).
[55] *Id.* Section 703(h) of Title VII is codified at 42 U.S.C. § 2000e-2(h) (1988).

and purpose of that title."[56] Because of this lack of explanation, the meaning of section 703(h) must be gleaned from its language. The terms "designed" and "intended . . . to discriminate" indicate that the use of such tests would only be unlawful if the employer had engaged in intentional discrimination with respect to those tests. The term "used" is more ambiguous. The term could be interpreted to incorporate a requirement of intent; that is, the term could be read to mean "purposefully used" to discriminate. There is, however, no express requirement that the use of the test to discriminate be purposeful. Therefore, it is possible to read the requirement that the challenged test be "used" to discriminate to include situations in which the use of the test has a discriminatory effect, even if that effect was not intended.

The Supreme Court in *Griggs* apparently relied on the term "used" in section 703(h) as statutory support for its holding that tests imposed or administered without any discriminatory intent could still violate Title VII.[57] The Court also relied on the legislative history of the Tower amendments to support the position taken by the Equal Employment Opportunity Commission ("EEOC")[58] that Congress intended section 703(h) to protect only job-related tests. Reading the congressional debate as a concern that Title VII would invalidate job-related tests and interpreting the first Tower amendment to protect only job-related tests, the Court concluded that the second amendment had the same purpose:

> Senator Tower's original amendment provided in part that a test would be permissible "if . . . in the case of any individual who is seeking employment with such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise involved . . . ." This language indicates that Senator Tower's aim was simply to make certain that job related tests would be permitted. The opposition to the amendment was based on its loose wording which the proponents of Title VII feared would be susceptible of misinterpretation. The final amendment, which was ac-

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[56] 110 CONG. REC. 13724 (June 13, 1964).

[57] *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971) (emphasis on term "used" added by Court).

[58] The Court cited to the EEOC Guidelines on Employment Testing, which were issued in pamphlet form on Aug. 24, 1966, but never formally published, and the Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12,333 (Aug. 1, 1970).

> ceptable to all sides, could hardly have required less of a job relation than the first.[59]

The validity of the Court's interpretation of section 703(h) depends on the accuracy of its interpretation of the initial Tower amendment. It is certainly possible to read the initial amendment to protect only job-related tests. The amendment sought to protect tests designed to "determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise involved"; this appears to be describing a job-related test. Perhaps Senator Tower was using the term "professionally developed" to mean a job-related test. After all, the amendment by its terms did not protect all tests, only those that were professionally developed. Additionally, neither Senator Tower nor other members of Congress seemed to contemplate that this amendment would insulate tests that were completely arbitrary or unrelated to the requirements of the job for which they were imposed.

On the other hand, the use of the term "designed" in the proposed amendment may suggest that a challenged test would be valid as long as it was "designed" to measure the requirements of a job; that is, it was not intentionally discriminatory. This second interpretation finds more support in the remarks of Senator Tower introducing the amendment.[60] Senator Tower stressed that the test in the *Motorola* case was not "designed" to discriminate and that employers would be protected under his amendment if the employer gave the same test to everybody, without regard to race or other protected characteristics.[61]

The proper interpretation of this legislative history concerning employment tests is critical to the existence of the disparate impact theory under Title VII. If the initial Tower amendment is interpreted to protect all tests, whether or not they are job-related, the legislative history seems to reflect a congressional judgment that such tests should not be subject to challenge unless employers used them to discriminate. If, however, the initial Tower amendment sought to protect only job-related tests, then the legislative history seems to reflect a congressional judgment that job-related tests needed to be protected by amendment because they might otherwise be invalidated by Title VII simply because of the effects of such tests. The legislative history contains a good deal of support

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[59] *Griggs*, 401 U.S. at 435, 436 & n.12.

[60] *See supra* note 45 and accompanying text.

[61] 110 CONG. REC. 11251 (May 19, 1964).

for both positions; it is difficult to say which is the correct interpretation.

3. Congressional Concerns About Seniority Provisions

One other portion of Title VII's legislative history may be read as a rejection of the disparate impact theory. Opponents of Title VII expressed concern that the legislation would destroy seniority rights.[62] In response to this concern, Senator Clark introduced a memorandum prepared by the Department of Justice concerning the effect of Title VII on the rights of organized labor, including seniority rights.

That memorandum took the position that Title VII would have no effect on seniority rights existing at the time it took effect. The memorandum noted that Title VII only prohibited discrimination based on race, religion, sex, and national origin and that an employee laid off under a last hired, first fired scheme would not be discriminated against based on such a protected characteristic, "even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes."[63] The memorandum contrasted this situation with one in which the seniority system itself was discriminatory, such as a rule stating that all employees of one race would be laid off before all employees of another race, which would be unlawful under Title VII.[64] The memorandum concluded: "Employers and labor organizations would simply be under a duty not to discriminate against Negroes based on their race. Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title."[65] The implication of this memorandum is that only provisions of seniority systems that are intentionally discriminatory would violate Title VII, and that Title VII would not be violated by the adverse effects that such provisions would have on minorities.

Senator Humphrey provided the same message in his explanation of a provision on seniority systems in the Mansfield-Dirksen substitute amendment, ultimately incorporated in section 703(h) of Title VII. That section provides that it is not unlawful for an employer to provide different terms and conditions of employment in

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[62] *See* 110 CONG. REC. 486–89 (Jan. 15, 1964) (remarks of Sen. Hill).

[63] 110 CONG. REC. 7205–07 (Apr. 8, 1964).

[64] *Id.*

[65] *Id.*

reliance on a bona fide seniority system, "provided that such differences are not the result of an intention to discriminate."[66] The Senator explained the change as follows: "[T]his provision makes clear that it is only discrimination on account of race, color, religion, sex, or national origin, that is forbidden by the title. The change does not narrow application of the title, but merely clarifies its present intent and effect."[67] What Senator Humphrey appears to be saying is that, even prior to this amendment, reliance on seniority systems would have been unlawful only if accompanied by an intent to discriminate and that the effects of such systems were not actionable under Title VII.

4. Congressional Concern About Quotas

Commentators have also argued that the disparate impact theory is inconsistent with Congress's concern that employers not be held liable based solely on racial imbalance in their workforces and that employers not be required to adopt quotas to escape liability under Title VII. Persons taking this position argue that because claims of disparate impact are based partially on proof of imbalances in the workforce between minority and majority groups, the use of that theory will cause employers to use quota hiring to eliminate the imbalance and thereby prevent successful claims of disparate impact.[68]

There is no dispute that a number of members of Congress expressed concerns that the enactment of Title VII would lead to quota hiring.[69] Although proponents of Title VII insisted that Title VII did not require racial balance and that quota hiring would not be required—or allowed—by the bill,[70] an amendment was proposed

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[66] 42 U.S.C. § 2000e–2(h) (1988).

[67] 110 CONG. REC. 12723 (June 4, 1964).

[68] *See* Gold, *supra* note 10, at 503–11 (Congress's clear rejection of quotas is inconsistent with the disparate impact model because that model allows a finding of a violation of the act from the existence of a racial imbalance in the workforce); Rutherglen, *supra* note 12, at 1313, 1345 (heavy burden of business justification placed on the defendant would run afoul of anti-quota provisions of § 703(j) by requiring employers to adopt preferences to avoid a finding of adverse impact).

[69] *See, e.g.*, 110 CONG. REC. 1645 (Feb. 1, 1964) (statement of Rep. Alger) (act will "force employers to hire workers on the bases of color rather than ability"); 110 CONG. REC. 2557–58 (Feb. 8, 1964) (statements of Reps. Dowdy and Ashmore) (bill would require racial balance in unions); 110 CONG. REC. 2576 (Feb. 8, 1964) (statement of Rep. Poff) (bill would require racial balance in all employer job categories); 110 CONG. REC. 7902 (Apr. 14, 1964) (statements of Sens. Long and Thurmond) (act would require racial balance).

[70] Senators Case and Clark addressed the argument that Title VII would require employers to maintain a racial balance in their Interpretative Memorandum on Title VII:

to address these concerns.[71] The essence of this amendment was ultimately included in Title VII as section 703(j), which provides that:

> (j) Nothing contained in this subchapter shall be interpreted to require an employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.[72]

Senator Humphrey indicated that this amendment did not effect a substantive change in the statute, but that it was included in

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> There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual. While the presence or absence of other members of the same minority group in the work force may be a relevant factor in determining whether in a given case a decision to hire or to refuse to hire was based on race, color, etc., it is only one factor, and the question in each case would be whether that individual was discriminated against.

110 CONG. REC. 7215 (April 8, 1964); *accord* 110 CONG. REC. 7218 (April 8, 1964) (Sen. Clark's response to questions on Title VII raised by Sen. Dirksen); 110 CONG. REC. 8921 (April 23, 1964) (statement by Sen. Williams); 110 CONG. REC. 9881–82 (May 4, 1964) (statement by Sen. Allott).

[71] In proposing amendment 568, Senator Allott indicated that he did not believe that Title VII would result in quota hiring, but that he was proposing the amendment to allay the fears of employers that quota hiring would be required by Title VII. That amendment provided that:

> The court shall not find, in any civil action brought under this title, that the respondent has engaged in or is engaging in an unlawful employment practice charged in the complaint solely on the basis of evidence that an imbalance exists with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, without supporting evidence of another nature that the respondent has engaged in or is engaging in such practice.

110 CONG. REC. 9881–82 (May 4, 1964).

[72] 42 U.S.C. § 2000e–2(j) (1988).

order to expressly state that "title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group."[73]

This legislative history and the presence of section 703(j) in the statute is in no way inconsistent with the disparate impact theory. Section 703(j) indicates that employers will not be required to engage in "preferential treatment" to avoid racial imbalance. The duty imposed on the employer not to use non-job-related selection devices that disproportionately affect members of protected groups does not require preferential treatment, but merely requires that the employer provide equal opportunity to minorities and nonminorities by not unjustifiably excluding minorities from consideration. Neither does the disparate impact theory hold employers liable for violations of the statute merely because of an imbalance in the work force: it is not the imbalance itself that creates liability on the part of the employer but the discriminatory acts of the employer, whether intentional or unintentional, that cause that imbalance.

The argument that the disparate impact theory should not be used because it might prompt employers to adopt quotas to avoid liability is similarly unpersuasive. The precise argument could be made, and was made, about the disparate treatment theory. In arguing against Title VII, Senator Smathers said:

> [T]here is no question in my mind that when a man has to submit his records, and he has always hired a certain group of citizens, or a certain type of citizens, to work for him, and the Government goes through his records and says, "You have employed all of one kind; you must have in your heart a feeling of discrimination against persons of another type," that persons will have to protect himself against such a situation . . . . So he will protect himself by hiring a certain number of colored people in order to keep the majesty and might of the Federal law and its large bureaucracy off his neck.[74]

Senator Smathers was arguing that prohibiting intentional discrimination would result in use of quotas by employers trying to escape liability under the act, but no one would argue that Congress meant

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[73] 110 CONG. REC. 12723 (June 4, 1964) (explanation of Sen. Humphrey of proposed amendments to Title VII).

[74] 110 CONG. REC. 7800 (1964) (statement of Sen. Smathers); *see also* 110 CONG. REC. 13076 (1964) (statement of Sen. Sparkman) (racial imbalance could be used as evidence of discrimination).

to disavow the disparate treatment theory by enacting section 703(j). That some employers might resort to quotas to escape litigation or liability under the act does not mean that use of the disparate impact theory—or the disparate treatment theory—requires quotas or racial balance in the workforce.[75]

### 5. The General Purpose of Congress in Enacting Title VII

The legislative history of Title VII does not conclusively establish whether the disparate impact theory was intended to be a theory of discrimination under Title VII. Although portions of the legislative history support the theory, the overall tenor of the debates suggests that at least some of Title VII's supporters contemplated that only intentional discrimination would violate the statute.

On the other hand, some of Title VII's opponents seemed very concerned about the absence of a definition of discrimination in the statute,[76] perhaps indicating that they believed that more than the traditional concept of discrimination was encompassed in the language of the proposed legislation. The concerns expressed about the potential effects of Title VII on employer selection criteria and seniority systems also support this view because those amendments would have been entirely unnecessary if only intentional discrimi-

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[75] Even the United States Supreme Court has bought into the quota argument to justify its imposition of heavier evidentiary burdens on the plaintiff and lighter burdens on the defendant for disparate impact claims. In *Watson v. Fort Worth Bank and Trust*, the plurality gave the following justification for the evidentiary standards that it was imposing on disparate impact claims:

> If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent, and should not be the effect of our decision today.

487 U.S. 977, 993 (1988); *see also* Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2122 (1989).

Additionally, concern about quotas has been one of the major objections expressed by opponents of the Civil Rights Act of 1990, which would legislatively overrule the *Wards Cove* case. *See, e.g.*, 136 CONG. REC. S3144 (daily ed. Mar. 26, 1990) (statement of Sen. Hatch); 136 CONG. REC. S9339–40 (daily ed. July 10, 1990) (statement of Sen. Thurmond); 136 CONG. REC. S9817 (daily ed. July 17, 1990) (statement of Sen. Coats); 136 CONG. REC. H6798 (daily ed. Aug. 2, 1990) (statement of Rep. Bartlett).

[76] *See, e.g.*, 110 CONG. REC. 7218 (Apr. 8, 1964) (response of Sen. Clark to questions raised about Title VII by Sen. Dirksen); 110 CONG. REC. 11251 (May 19, 1964) (letter from Robert C. Nichols, Program Director of the National Merit Scholarship Corporation, to John G. Tower, May 6, 1964).

nation were forbidden by the statute. By their very nature, those type of employer practices are subject to challenge precisely because of their effects; they are neutral practices that would generally be objectionable, if at all, because of their effects. Additionally, those amendments, which protected employer use of "bona fide" seniority systems and "professionally developed ability test[s],"[77] suggest that not all such systems and tests are protected by the statute, but only those that meet the qualifying terms of those provisions. This certainly leaves open the possibility that employers may be found liable under Title VII because of the effects of tests that are not "professionally developed" and seniority systems that are not "bona fide." The presence of those provisions in Title VII, therefore, provides additional statutory support for the disparate impact theory.

Even if one were to read the legislative history as an implicit rejection of the disparate impact theory, one would not be lead inevitably to the conclusion that the disparate impact theory has no place in Title VII jurisprudence. On the contrary, the concerns in Congress and elsewhere that culminated in the enactment of Title VII went beyond blatantly racially restrictive hiring and other employment practices. There is no doubt that some members of Congress supported the proposed legislation because of their views concerning the morality of intentional discrimination based on racial classifications.[78] It also appears, however, that the legislation was motivated in part by the belief that racial discrimination in employment had to be eradicated because of its economic effects on blacks

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[77] *See* 42 U.S.C. § 2000e–2(h) (1988).

[78] Senator Clark emphasized the moral issue of race discrimination in response to an amendment to delete Title VII from the proposed statute:

> The moral question raised by the bill is particularly applicable to the fair employment practices title. The moral issue is clear, indeed. It is merely a question of right and wrong. We cannot duck it. There is no way we can avoid searching out our own consciences. The bill clearly raises this important moral question.
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> We had before us, in hearings held by the committee, eloquent and articulate representatives of the churches of the United States . . . . [T]he representatives of the National Catholic Welfare Conference, the Synagogue Council of America, and the National Council of Churches of Christ in America said:
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> > The religious conscience of America condemns racism as blasphemy against God. It recognizes that the racial segregation and discrimination that flow from it are a denial of the worth which God has given to all persons. We hold that God is the father if all men. Consequently in every person there is an innate dignity which is the basis of human rights. There rights constitute a moral claim which must be honored both by all persons and by the state. Denial of such rights is immoral.

110 CONG. REC. 13080 (June 9, 1964).

and society as a whole. President John F. Kennedy, in a message to Congress urging the enactment of a civil rights bill, offered the following justifications for putting an end to racial discrimination:

> Race discrimination hampers our economic growth by preventing the maximum development of our manpower, by contradicting at home the message we preach abroad. It mars the atmosphere of a united and classless society in which this Nation rose to greatness. It increases the costs of public welfare, crime, delinquency, and disorder. Above all, it is wrong.[79]

This concern with the economic consequences of racial discrimination in employment was echoed by members of the House Judiciary Committee in their additional comments explaining the report of the Committee on Title VII. They indicated that the "failure of our society to extend job opportunities to the Negro is an economic waste" because of effects on the gross national product, welfare, crime, and shortages of skilled employees and that "[n]ational prosperity will be increased through the proper training of Negroes for more skilled employment together with the removal of barriers for obtaining such employment."[80]

Congress's concern and its purpose in enacting Title VII were not just to eliminate blatant racial discrimination, but to create equality of employment opportunity.[81] Equalization of employment opportunity requires not only that minority group members not be excluded from consideration for employment, but that they be allowed to compete on an equitable basis with nonminority group

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[79] Special Message to the Congress on Civil Rights (February 28, 1963), JOHN F. KENNEDY PUB. PAPERS 221, 222 (1963). President Kennedy in his statement to Congress made reference to both lack of equal treatment and lack of equal opportunity for blacks. *Id.*

[80] H.R. REP. NO. 914, 88th Cong., 2d Sess., pt. 2, at 28 (additional views on H.R. 7152 of Hon. William M. McCullough, Hon. John V. Lindsay, Hon. William T. Cahill, Hon. Garner E. Shriver, Hon. Clark MacGregor, Hon. Charles McMathias, Hon. James E. Bromwell), *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2487, 2513–16, *and* LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964 at 2122, 2149.

[81] The legislative history of Title VII is filled with references to the need for equal employment opportunity and the removal of barriers to minority employment. *See, e.g.*, H.R. REP. NO. 914, 88th Cong., 2d Sess., pt. 2, at 28 (additional views on H.R. 7152 of Hon. William M. McCullough, Hon. John V. Lindsay, Hon. William T. Cahill, Hon. Garner E. Shriver, Hon. Clark MacGregor, Hon. Charles McMathias, Hon. James E. Bromwell), *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2487, 2513–16, *and* LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964 at 2122, 2149, 2151; 110 CONG. REC. 1635, 1636 (Feb. 1, 1964) (statement of Sen. Reid); 110 CONG. REC. 6552, 6553 (Mar. 30, 1964) (statement of Sen. Humphrey); 110 CONG. REC. 12598 (June 3, 1964) (statement of Sen. Clark); 110 CONG. REC. 13079 (June 9, 1964) (statement of Sen. Clark).

members. The mere prohibition of intentional discrimination would not meet this goal. President Lyndon B. Johnson spoke of the need to go beyond intentional discrimination in the following terms: "Freedom from discrimination is not enough. There must be freedom from the disadvantage that 200 years of discrimination helped create. There must be freedom of opportunity, freedom to work."[82]

Employer actions taken without a discriminatory intent, but which have an adverse impact on certain protected groups, have as devastating—if not more devastating—consequences for the job opportunities of racial minorities.[83] Blatant discrimination was not the only cause of the widespread unemployment and underemployment of blacks and other minorities cited in the legislative history of Title VII as justification for enacting the statute.[84]

The proponents of Title VII were committed to eliminating the disadvantages suffered by racial minorities and guaranteeing equal employment opportunity. This commitment required not only that intentional discrimination be prohibited, but also that unintentional actions of employers in adopting unjustified employment criteria that excluded disproportionate numbers of minorities be

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[82] Special Message to the Congress Proposing Further Legislation To Strengthen Civil Rights (Apr. 28, 1966), LYNDON B. JOHNSON PUB. PAPERS 461, 466 (1966).

[83] The EEOC recognized the pervasiveness of unintentional discrimination in the early years of its existence:

> The starting point for an effective program must, of course, be the fact of discrimination in the American economy. Some of it is deliberate, even willful; much of it is institutionalized, an almost unconscious acceptance of habitual ways of recruiting and promoting.
>
> . . . .
>
> Even though they are not consciously intended to discriminate, traditional attitudes and patterns of conduct in business, employment agencies and labor organizations may have the effect of barring minorities from employment opportunities as surely as overt discrimination itself.

1 EEOC Ann. Rep. 7, 8 (1967).

It is clear from later reports of the EEOC that the "unconscious" discrimination of which the agency spoke is what became known as disparate impact:

> Nationwide, discriminatory behavior—some overt, much of it more subtle and more sweeping—occurs daily. Employers and unions require each new candidate to secure a recommendation from a current employee or union member, while the current workforce is all white; verbal aptitude tests are given for jobs requiring few verbal skills so that jobs are unreasonably denied to Spanish-surnamed Americans achieving low test scores; women are barred from jobs because of unrealistic limitations on weightlifting.

2 EEOC Ann. Rep. 1 (1968).

[84] *See, e.g.*, 110 CONG. REC. 6547–48 (Mar. 30, 1964) (statement of Sen. Humphrey); 110 CONG. REC. 7204–7403 (Apr. 8, 1964) (statement of Sen. Clark); 110 CONG. REC. 12598 (June 3, 1964) (statement of Sen. Clark).

eliminated. The disparate impact theory of discrimination therefore was essential to the purposes of Congress and, in this broad sense, is consistent with congressional intent.

It is true, to a large extent, that addressing the question of legislative intent in this manner requires one to ask not so much what Congress did as what it would have done if it had directly focused on the fact that prohibiting intentional discrimination alone would not result in equal employment opportunity.[85] There is in fact evidence that Congress did not fully understand the nature of racial discrimination in employment at the time that it enacted Title VII;[86] members of Congress later admitted this lack of understand-

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[85] *See* Teamsters v. United States, 431 U.S. 324, 386–87 (1977) (Marshall, J., concurring in part and dissenting in part) (quoting Burnet v. Guggenheim, 288 U.S. 280, 285 (1933)). In *Teamsters*, Justice Marshall addressed the issue of Congress's intent with respect to the protection of seniority systems under Title VII that perpetuated the effects of pre-Act discrimination. In concluding that Congress did not directly address the issue and could not have intended such a result, Justice Marshall said:

> Prior to 1965 blacks and Spanish-surnamed Americans who were able to find employment were assigned the lowest paid, most menial jobs in many industries throughout the Nation but especially in the South . . . . The Court holds, in essence, that while after 1965 these incumbent employees are entitled to an equal opportunity to advance to more desirable jobs, to take advantage of that opportunity they must pay a price: they must surrender the seniority they have accumulated in their old jobs. For many, the price will be too high, and they will be locked into their previous positions. Even those willing to pay the price will have to reconcile themselves to being forever behind subsequently hired whites who were not discriminatorily assigned. Thus equal opportunity will remain a distant dream for all incumbent employees.
>
> I am aware of nothing in the legislative history of the 1964 Civil Rights Act to suggest that if Congress had focused on this fact it nonetheless would have decided to write off an entire generation of minority group employees. Nor can I believe that the Congress that enacted Title VII would have agreed to postpone for one generation the achievement of economic equality. The backers of that Title viewed economic equality as both a practical necessity and a moral imperative. They were well aware of the corrosive impact employment discrimination has on its victims, and on society generally. They sought, therefore, to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens and to make persons whole for injuries suffered on account of unlawful employment discrimination. In short, Congress wanted to enable black workers to assume their rightful place in society.

431 U.S. at 387–88 (Marshall, J., concurring in part and dissenting in part) (citations and footnotes omitted). Obviously, much of what Justice Marshall says about congressional intent in this context is also relevant to the issue of whether Congress would have approved the disparate impact model if it correctly perceived the need for such a theory to accomplish the goal of equal employment opportunity.

[86] Professor Belton indicated in a slightly different context—the permissibility of voluntary affirmative action under Title VII—that "Congress failed to bridge the gap between equality as a theoretical concept and equality as a reality for blacks." Belton, *Discrimination*

ing in connection with amendments to the statute.[87] Therefore, even if Congress did not directly authorize the disparate impact theory of employment discrimination, one can argue that if Congress had recognized the need for such a theory to meet its purposes of ensuring equal employment opportunity, it would have approved that theory.

This method of construction of legislative intent is not unknown to the judiciary, particularly with respect to issues of civil rights. The Supreme Court took essentially this approach in *United Steelworkers v. Weber*, in trying to determine whether Congress intended voluntary affirmative action to be lawful under Title VII.[88] Although the Court did not argue that Congress had specifically contemplated the issue of affirmative action, that is, discrimination against whites, the Court concluded that affirmative action must be permissible under the statute, holding that Congress could not have intended to prevent employers from "taking effective steps to accomplish the goal that Congress designed Title VII to achieve."[89] Interpreting statutes liberally in such a way as to be consistent with the purpose or objective of the statute is an established method of statutory construction.[90]

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*and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C.L. REV. 531, 591 (1981). He went on to note, with express reference to the disparate impact model:

> [A]s courts, enforcement agencies, and others gained experience under Title VII, it became overwhelmingly clear that confining the application of the statute to a neutral nondiscriminatory standard would fail to achieve meaningful employment opportunities for blacks. As Chief Justice Burger noted in *Griggs*, a broader reading was required in order that Title VII "not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and fox . . . ."
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> These concerns lay behind the line of cases beginning with, and perhaps more clearly exemplified by *Griggs*. These cases imported into Title VII law a number of mechanisms that nudged open the judicial door so that the statute might achieve its primary purpose. These mechanisms included, among others, the disparate impact analysis and related statistical presumptions, rather than proof of intent. Devices such as the disparate impact analysis did not relieve black plaintiffs from having to establish that the defendant had unlawfully discriminated. They did, however, substantially broaden the meaning of "unlawful employment discrimination" in order that Title VII might at least begin to reduce the racial disparaties[sic] that so concerned Congress.

*Id.* at 596–97.

[87] *See* S. REP. No. 415, 92d Cong., 1st Sess. 5 (1971); H.R. REP. No. 238, 92d Cong., 1st Sess. 8, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2143–44.

[88] 443 U.S. 193 (1979).

[89] *Id.* at 204.

[90] *See* 2A SUTHERLAND STATUTORY CONSTRUCTION § 58.06 (Sands 4th ed. 1984).

This interpretation of Title VII is consistent with the position taken by the EEOC, the agency created by Title VII to enforce the statute.[91] The EEOC indicated that it believed one of its "primary responsibilities . . . inherent in Title VII is the duty to contribute to the legal definition of employment discrimination."[92] In fulfilling this duty, the Commission took the position that proof of intent to discriminate was not necessary to prove a violation of Title VII:

> If a company, for example, imposes a qualification for employment or promotion that bears no valid relationship to performance in the respective job and has the effect of excluding black people from that job, then such a requirement violated Title VII regardless of whether the employer had the specific goal of excluding Negroes. By establishing through the Commission decision process, with growing support in the courts, the concept that certain employment practices may be in violation of Title VII not because they constitute disparate *treatment* but because they produce unjustifiably disparate *effect*, EEOC has brought equal job opportunity a large step closer to reality.[93]

What the EEOC was articulating, two years prior to the decision of the Supreme Court in *Griggs*, was the disparate impact theory; namely, that the effects, rather than the intent, of employer action could violate Title VII's ban on racial discrimination. The EEOC considered its interpretation of the statute to be fully consistent with both the purpose of Congress to ensure equal job opportunity and its charge to bring about meaningful results with respect to em-

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[91] Civil Rights Act of 1964, Title VII, §§ 705, 706, 42 U.S.C. § 2000e–3 (1988).

[92] 3 EEOC Ann. Rep. 12 (1969). Professor Blumrosen argues that the EEOC's efforts to give substance to the meaning of discrimination in Title VII was appropriate, given Congress's failure to seriously address that legal concept:

> Congressmen can react to social needs. Their administrative staffs and interest groups can prepare studies, data, and arguments. The Justice Department lawyers can prepare scholarly memoranda for use in the heat of the political debate, and legal and other academicians can review these proposals and recommend changes. Out of these ingredients the legislative product emerges. But the legislation itself is far from the last word. The application of the legislation to specific situations remains. The administrative and judicial processes work between the cup of legislation and the lip of life. The jurisprudential conceptions applied at this point determine the operative effect of the statute.

Blumrosen, *supra* note 9, at 99.

[93] 3 EEOC Ann. Rep. 12 (1969) (emphasis in original).

ployment discrimination.[94] The United States Supreme Court confirmed the EEOC's interpretation of Title VII in *Griggs v. Duke Power Co.*[95]

### C. Griggs v. Duke Power Company

The *Griggs* case did not start out as a disparate impact case. The case was brought as a class action by thirteen of the fourteen black employees of Duke Power Company.[96] The plaintiffs' claim was that certain selection criteria imposed by the defendant prevented black employees from transferring out of the lower-paid all black department, to which they had been discriminatorily assigned because of their race prior to the effective date of Title VII, and that these practices were therefore unlawful because they gave present effect to past discrimination.[97]

The defendant's work force was divided into five different departments, in order of descending hierarchy: Operations, Maintenance, Laboratory and Test, Coal Handling, and Labor.[98] In 1955, the defendant had initiated a requirement of a high school diploma or its equivalent for employment in all departments other than the Labor Department. The requirement applied both to new hires into the higher-paid, non-Labor departments and to transfers between departments, but did not affect the continued employment of cur-

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[94] *See* 1 EEOC Ann. Rep. 36 (1967).

[95] 401 U.S. 424 (1971).

[96] Griggs v. Duke Power Co., 292 F. Supp. 243, 244, 245 (M.D.N.C. 1968).

[97] *Id.* at 247. The plaintiff's authority for the proposition that the present effects of past discrimination were actionable under Title VII was Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968), a case in which the district court invalidated provisions of a seniority system that served to perpetuate the effects of the employer's prior practices of racially segregating its departments by restricting transfers between departments without loss of departmental seniority. The district court stated:

> The act does not condone present differences that are the result of intention to discriminate before the effective date of the act, although such a provision could have been included in the act had Congress so intended. The court holds that the present differences in departmental seniority of Negroes and whites that result from the company's intentional, racially discriminatory hiring policy before January 1, 1966 are not validated by the proviso of § 703(h).

*Id.* at 518 (emphasis omitted).

The *Quarles* court's reliance on the present effects of past discrimination theory with respect to seniority systems was disapproved by the United States Supreme Court in Teamsters v. United States, 431 U.S. 324, 346 n.28, 348–355 (1977). Although apparently approving the "present effects of past discrimination" theory generally, the Court held that § 703(h) prevented the application of that theory to invalidate bona fide seniority systems. *Id.* at 352–53.

[98] *Griggs*, 292 F. Supp. at 245.

rent employees in these departments.[99] The Labor Department, for which the high school diploma requirement did not apply, was essentially all black; the other departments were all white. The district court found that the defendant had, prior to the effective date of Title VII, discriminatorily restricted blacks to the Labor Department.[100]

On July 2, 1965, the effective date of Title VII, the defendant added a new requirement for employment in any department other than the Labor Department. New employees hired into the other departments were required to obtain satisfactory scores on two tests, the E.F. Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test, Form AA. Current employees were not required to pass these tests to transfer between departments and remained eligible to transfer if they had a high school diploma.[101] In September 1965, the policy on transfers between departments was amended, at the instigation of employees in the Coal Handling Department, to allow persons hired before September 1, 1965 who did not have a high school diploma to become eligible for transfer by obtaining satisfactory scores on the two professionally developed ability tests.[102]

The basis of the plaintiff's claim was that because they had been discriminatorily restricted to the lower-paid Labor Department because of their race, the application of the high school diploma or testing requirement to them prevented their employment in the higher-paid departments, while white employees originally hired into those departments without a high school diploma were eligible for positions in those higher-paid departments.[103] The plaintiffs argued that, because the present practices of the defendant were "tainted by prior discriminatory practices," they were unlawful.[104]

The district court held that the plaintiffs had not stated a claim for a violation of Title VII because the statute was prospective only.[105] The district court also noted that the challenged require-

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[99] *Id.*; Griggs v. Duke Power Co., 420 F.2d 1225, 1228–29 (4th Cir. 1970).

[100] *Griggs*, 292 F. Supp. at 247.

[101] *Id.* at 245–46; Griggs v. Duke Power Co., 401 U.S. 424, 427–28 (1971). Effective July 2, 1965, new employees hired into the Labor Department were required to obtain a satisfactory score on the Revised Beta Test. That requirement was not challenged by the plaintiffs. *Griggs*, 292 F. Supp. at 245.

[102] *Griggs*, 292 F. Supp. at 246.

[103] *Id.* at 247.

[104] *Id.*

[105] *Id.* at 248. The district court stated:

> In providing for prospective application only, Congress faced the cold hard fact of past discrimination and the resulting inequities. Congress also realized

ments had been imposed "without any intention or design to discriminate against Negro employees" and therefore were lawful.[106] The district court dismissed the action, concluding that the plaintiffs "have failed to carry the burden of proving that the defendant has intentionally discriminated against them on the basis of race or color."[107] The district court in *Griggs* clearly rejected any suggestion that the effects of employer practices, as opposed to the intent behind such practices, could constitute a violation of Title VII.

Although the United States Court of Appeals for the Fourth Circuit reversed the district court in part, the majority of the court also did not endorse the disparate impact theory. Instead, its decision was an endorsement of the plaintiffs' "present effects of past discrimination" theory. The appellate court noted that, as to the plaintiffs without a high school diploma who had been hired prior to the implementation of that requirement, both of the challenged selection criteria locked them into the lower-paid positions in which prior discrimination had placed them and were therefore unlawful.[108]

That the court of appeals was not applying the disparate impact theory is made clear by its treatment of the remaining plaintiffs, those employees without high school diplomas who were hired subsequent to the implementation of that requirement. The court said that, to determine if the educational and testing requirements were valid, it had to determine "whether Duke had a valid business purpose in adopting such requirements or whether the company merely used the requirements to discriminate."[109] The majority discounted the notion that those requirements could be invalidated "merely because of Negroes' cultural and educational disadvantages

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> the practical impossibility of eradicating all the consequences of past discrimination. The 1964 Act has as its purpose the absolution of the policies of discrimination which produced the inequities.

*Id.*

[106] *Id.* at 248, 250. The plaintiffs also argued that the defendant's use of the Wonderlic and the Bennett Mechanical Comprehension tests was unlawful because they were not job-related. The district court agreed, stating that "[t]he two tests used by the defendant were never intended to accurately measure the ability of an employee to perform the particular job available." *Id.* at 250. The district court nevertheless held that § 703(h) of Title VII protected all professionally developed ability tests, not just job-related tests, unless used for the purpose of discrimination. *Id.*

[107] *Id.* at 251–52.

[108] *Griggs*, 420 F.2d 1255, 1230–31 (4th Cir. 1970).

[109] *Id.* at 1232.

due to past discrimination," indicating that the plaintiffs had conceded as much in their brief.[110]

The court concluded that the challenged criteria had been adopted with a "legitimate business need" and without any intention to discriminate. The court noted that the requirement of a high school diploma was adopted nine years prior to the passage of Title VII and that the requirement had disadvantaged white employees as well as black employees. The court also noted that the company had generally acted in good faith with respect to employment since the effective date of the statute and that the company had a policy of paying a major portion of the expenses incurred by an employee in securing a high school diploma or its equivalent.[111] The court indicated that the high school diploma requirement was supported by an "obvious" business need because it allowed the employer to hire only employees who had a reasonable chance of being promoted to higher positions.[112] Finally, the court concluded that the testing requirement did not violate Title VII because the tests were professionally developed, there was no discrimination in the admin-

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[110] *Id.* The portion of the plaintiffs' brief quoted by the majority does not support the contention that the plaintiffs admitted that only intentional discrimination was unlawful under Title VII. The plaintiffs argued that:

> An employer is, of course, permitted to set educational or test requirements that fulfill genuine business needs. For example, an employer may require a fair typing test of applicants for secretarial positions. It may well be that, because of long-standing inequality in educational and cultural opportunities available to Negroes, proportionately fewer Negro applicants than white can pass such a test. But where business need can be shown, as it can where typing ability is necessary for performance as a secretary, the fact that the test tends to exclude more Negroes than whites does not make it discriminatory. We do not even wish to suggest that employers are required by law to compensate for centuries of discrimination by hiring Negro applicants who are incapable of doing the job. But when a test or educational requirement is not shown to be based on business need, as in the instant case, it measures not ability to do a job but rather the extent to which persons have acquired educational and cultural background which had been denied to Negroes.

*Id.* (quoting Brief of Appellants) (emphasis omitted). The import of the plaintiffs' argument was that job-related tests—those based on business need and that measure skills necessary for a particular position—are lawful under Title VII even when they do have adverse effects on blacks, but that such adverse effects are unlawful under Title VII if the test is not job-related.

[111] *Id.* at 1232–33 & nn.3, 4, 5 & 6.

[112] *Id.* at 1232 n.2. It is possible to read the court's language concerning the "legitimate business need" supporting the policy as finding the "business necessity" and "job-relatedness" that has traditionally been required under the disparate impact theory. The court seemed, however, to rely on the existence of a business need for the requirements as evidence that the requirements were adopted for that purpose and not for a discriminatory purpose. *Id.* at 1232–33.

istration or scoring of the tests, and the testing requirement was applied both to white and black employees.[113]

Judge Sobeloff, in his concurring opinion to the decision of the court of appeals, relied on the disparate impact theory.[114] He indicated that the issue presented by the case was "the use of allegedly objective employment criteria resulting in the denial to Negroes of jobs for which they are potentially qualified."[115] Although he suggested the possibility that the objective employment criteria used by Duke Power Company might have been adopted precisely because of their effect on blacks, he did not rely on that possibility to support his position that those criteria were unlawful. Instead, he indicated that the motive of the employer was entirely irrelevant to the question of whether the criteria violated Title VII.[116]

Judge Sobeloff argued that Title VII prohibited not only overt discrimination but also neutral practices that disadvantaged blacks and were not supported by business necessity.[117] He indicated that, although Title VII does not require that minorities be given preferential treatment to make up for centuries of discrimination, it did prohibit the use of tests or other criteria that measured educational and cultural differences caused by that past discrimination when they were irrelevant to the ability to perform the job in question.[118]

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[113] *Id.* at 1233, 1235–36. The court rejected the plaintiffs' assertion (and the position of the EEOC) that only job-related tests were protected under Title VII, finding that claim not supported by the legislative history. *Id.* at 1234–35.

[114] *See generally id.* at 1237–38 (Sobeloff, J., concurring in part and dissenting in part). In addition to relying on what came to be known as the disparate impact model, Judge Sobeloff also indicated that Duke Power had violated Title VII under the "present effects of past discrimination" theory. *Id.* at 1247–48. Those two conclusions that Title VII had been violated appear to be independent of each other. *Id.* at 1248.

[115] *Id.* at 1237.

[116] *Id.* at 1238 & n.4.

[117] *Id.* at 1238–41. Although he cited other cases in support of his position, such as Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968), and Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969), neither of those cases was truly a disparate impact case. Instead, those cases were "present effects of past discrimination" cases, in which the effects of prior intentionally discriminatory employer action were challenged. Neither of those cases suggested that the intent of the employer was wholly irrelevant to the issue of whether Title VII was violated.

[118] *See generally id.* at 1240–44 (Sobeloff, J., concurring in part and dissenting in part). He did not find § 703(h) regarding professionally developed ability tests to be to the contrary, based on his view that that section was only intended to protect job-related tests. In reaching this conclusion, Judge Sobeloff relied both on the EEOC guidelines to this effect, which he viewed as entitled to great deference and as making "eminent common sense," and on the legislative history of Title VII. *Id.* Finally, he concluded that the selection criteria used by Duke Power Company were not job-related or supported by business need. *Id.* at 1244–46.

He gave a particularly compelling justification as to why Title VII must reach both intended and unintended discrimination:

> A man who is turned down for a job does not care whether it was because the employer did not like his skin color or because, although the employer professed impartiality, procedures were used which had the effect of discriminating against the applicant's race. Likewise irrelevant to Title VII is the state of mind of an employer whose policy, in practice, effects discrimination. The law will not tolerate unnecessarily harsh treatment of Negroes even though an employer does not plan this result. The use of criteria that are not backed by valid and corroborated business needs cannot be allowed, regardless of subjective intent.[119]

Judge Sobeloff recognized the significance of the disparate impact theory to the purposes of Title VII: "On this issue hangs the vitality of the employment provision (Title VII) of the 1964 Civil Rights Act: whether the Act shall remain a potent tool for equalization of employment opportunity or shall be reduced to mellifluous but hollow rhetoric."[120]

The separate opinion of Judge Sobeloff proved instrumental to the United States Supreme Court's recognition of the disparate impact model in *Griggs*, and much of his analysis appears in that decision. The Supreme Court focused from the outset of its decision on the issue that is the core of Judge Sobeloff's opinion and of the disparate impact model—whether Title VII can be violated in the absence of discriminatory intent or purpose.[121]

The Court had no trouble concluding that discriminatory intent was not a requirement for violation of Title VII. Focusing on Con-

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[119] *Id.* at 1246.

[120] *Id.* at 1237–38.

[121] The Supreme Court described the issues before the Court as follows:

> The Court of Appeals noted, however, that the District Court was correct in its conclusion that there was no showing of a racial purpose or invidious intent in the adoption of the high school diploma requirement or general intelligence test and that these standards had been applied fairly to whites and Negroes alike. It held that, in the absence of a discriminatory purpose, use of such requirements was permitted by the Act. In so doing, the Court of Appeals rejected the claim that because these two requirements operated to render ineligible a markedly disproportionate number of Negroes, they were unlawful under Title VII unless shown to be job related. We granted the writ on these claims.

Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971) (footnotes omitted).

gress's objective in enacting the statute, that of achieving equal employment opportunity and removing barriers to employment of minorities, the Court held that employment practices that denied such equal opportunity were unlawful even in the absence of any discriminatory intent.[122] Although the Court initially seemed to be focusing on the "present effects of past discrimination" theory,[123] the Court went beyond that theory by indicating that the employer's actions were unlawful not because they carried forward the effects of prior discrimination by the employer, but because they perpetuated the effects of prior societal discrimination.[124]

The Court made clear, however, that the theory that it was adopting did not require preferential treatment of minorities, only that "artificial, arbitrary, and unnecessary barriers" to equal opportunity for minorities be eliminated.[125] The Court drew the line between permissible and impermissible barriers at the connection between the challenged requirement and the needs of the job or the employer's business: "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[126]

The Court also addressed the issue of who had the burden of establishing business necessity: "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."[127] The

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[122] *Id.* at 429–30.

[123] *See id.* at 426, 430. In describing the question on which certiorari was granted, the Court suggested the relevance of past intentional discrimination by listing as a subpart of the question that "the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites." *Id.* at 426. In describing the scope of Title VII, the Court indicated that neutral practices "cannot be maintained if they operated to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430. Both of these passages suggested that the existence of prior discrimination might be necessary to finding the "effects" of discrimination actionable.

[124] *Id.* at 430.

[125] *Id.* at 430–31.

[126] *Id.* at 431. The Court concluded that the practices at issue here had not been shown to be job-related, because neither had been "shown to bear a demonstrable relationship to successful performance of the jobs for which it is used." *Id.* at 431–32. The Court also addressed and rejected the assertion of the employer that its use of the intelligence tests was specifically protected by § 703(h), adopting the position of the EEOC that only job-related tests were protected by that section. *Id.* at 433–36. See *supra* notes 57–61 and accompanying text for discussion of the Court's analysis on this issue.

[127] *Griggs*, 401 U.S. at 432. In practice, the Court also appears to have imposed the

Court made clear that this burden could not be met simply by showing that the practice was not discriminatorily motivated, indicating that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[128]

The unanimous decision of the Supreme Court contains powerful policy support for the disparate impact theory, eloquently describing the need for the theory in order to achieve the purposes of Title VII. The troublesome aspect of the decision is that virtually no support is cited for the assertion of the Court that this was what Congress intended when it enacted Title VII. Given the earlier discussion in this article of the legislative history of Title VII,[129] this omission is not surprising.

This lack of express support for the disparate impact theory does not mean, however, that the decision of the Court is in error. Indeed, as previously discussed, the Court's analysis of whether intent must be established to prove a violation of Title VII is in complete accord with the purposes of Congress in enacting the statute, if not with its express intent.[130]

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burden of proof on the employer, referring to the insufficiency of the justification given by the employer for imposing the requirements and its failure of proof of job-relatedness. *Id.* at 431–32.

[128] *Id.* at 432. The Court not only indicated the irrelevance of discriminatory intent, but suggested that the employer had had no such discriminatory intent, indicating that the employer had made special efforts to help undereducated employees by financing a portion of their tuition for high school training. *Id.* The Court, however, did not rely on other evidence that might have indicated present discriminatory intent on the part of the employer. For example, one of the challenged policies of the employer, the implementation of the intelligence test requirement for new hires, became effective on the very day that Title VII became effective, *id.* at 427, perhaps suggesting that there was some connection between the adoption of the requirement and the fact that the employer could no longer arbitrarily exclude blacks from the favored departments. *See* Blumrosen, *supra* note 9, at 64 (employers took advantage of one-year delay in effective date of Title VII to adopt seemingly neutral practices that perpetuated the subordinate position of black employees). Perhaps the fact that this requirement was not applied to persons like the plaintiffs who were seeking to be transferred to rather than hired in those departments kept the Court from addressing that coincidence. Additionally, the Court mentioned in passing but did not rely on the fact that, even though there were some blacks who met the high school diploma requirement, not a single black was promoted into one of the higher departments until five months after a charge had been filed with the EEOC, more than a year after the effective date of Title VII. *Griggs*, 401 U.S. at 427 n.2.

[129] *See supra* notes 32–75 and accompanying text.

[130] *See supra* notes 76–95 and accompanying text.

### D. *The Legislative History of the Equal Employment Opportunity Act of 1972*

The concept of disparate impact came before Congress again during the consideration of what became the Equal Employment Opportunity Act of 1972,[131] which amended Title VII. There had been long-standing efforts to amend Title VII,[132] and hearings on yet another bill to amend the statute, House Bill 1746, had just begun when the Supreme Court handed down the decision in *Griggs*.[133] Although the focus of that bill was on expanding the coverage of Title VII and providing enforcement powers to the EEOC, members of Congress discussed the *Griggs* decision and the disparate impact model that it had adopted in their consideration of the proposed amendments to Title VII. In its report on House Bill 1746, the House Committee on Education and Labor discussed the current understanding of the nature of employment discrimination:

> During the preparation and presentation of Title VII of the Civil Rights Act of 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, due, for the most part, to ill-will on the part of some identifiable individual or organization. It was thought that a scheme which stressed conciliation rather than compulsory processes would be more appropriate for the resolution of this essentially "human" problem. Litigation, it was thought, would be necessary only on an occasional basis in the event of determined recalcitrance. Experience, however, has shown this to be an oversimplified expectation, incorrect in its conclusions.
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> Employment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem

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[131] 42 U.S.C. §§ 2000e to 2000e - 17 (1988).

[132] Almost as soon as Title VII became effective, congressional efforts to amend the statute began. In July 1965, barely more than two weeks after the effective date of Title VII, the House Committee on Education and Labor held hearings on bills aimed at expanding the coverage of Title VII and strengthening the ability of the EEOC to enforce the provisions of the statute. *Bills to More Effectively Prohibit Discrimination in Employment Because of Race, Color, Religion, Sex, or National Origin, and for Other Purposes: Hearings on H.R. 8998 and H.R. 8999 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 89th Cong., 1st Sess. 1 (1965); *see also* H.R. REP. No. 238, 92d Cong., 2d Sess. 2, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2138.

[133] H.R. REP. No. 238, 92d Cong., 1st Sess. 2, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS at 2138.

> in terms of "systems" and "effects" rather than simply intentional wrongs. The literature on the subject is replete with discussions of the mechanics of seniority and lines of progression, perpetuation of the present effects of prior discriminatory practices through various institutional devices, and testing and validation requirements.[134]

The Committee report cited the Supreme Court's decision in *Griggs* as an example of an unlawful practice that required the expert assistance of the EEOC not only to resolve the problem but also to identify that the practice was indeed unlawful.[135]

The original version of House Bill 1746 contained a provision to incorporate the portion of the holding of *Griggs* concerning the requirement that professionally developed ability tests be job-related in order to be lawful under Title VII. The bill proposed an amendment to section 703(h) providing that it would not be unlawful:

> to give and to act upon the results of any professionally developed ability test which is directly related to the determination of bona fide occupational qualifications reasonably necessary to perform the normal duties of the particular position concerned, *Provided*, That such test, its administration, or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin.[136]

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[134] H.R. REP. No. 238, 92d Cong., 1st Sess. 8, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2143–44.

[135] *Id.* There is no question that the Committee was citing *Griggs* with approval. The Committee report does not suggest that the holding of *Griggs* went beyond the prohibition of discrimination contained in Title VII. In discussing the need to extend the prohibitions on discrimination contained in Title VII both to state and local employers and to the federal government, the report noted the presence of both overt and "institutional" discrimination in those areas, and criticized the Civil Service Commission for assuming that "employment discrimination is primarily a problem of malicious intent on the part of individuals." *Id.* at 17, 24, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS at 2152, 2159. None of the minority views in the report expressed any disapproval of the *Griggs* decision. *See* H.R. REP. No. 238, 92d Cong., 1st Sess. 118 (minority views on H.R. 1746), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS at 2167; H.R. REP. No. 238, 92d Cong., 1st Sess. 128 (separate views of Rep. Green of Oregon), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS at 2176; H.R. REP. No. 238, 92d Cong., 1st Sess. 129 (individual views of Rep. Mazzoli), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS at 2177; H.R. REP. No. 238, 92d Cong., 1st Sess. 130 (supplemental views of Reps. John M. Ashbrook and Earl F. Landgrebe), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS at 2178.

[136] H.R. 1746, 92d Cong., 1st Sess. 117 CONG. REC. 212 (Jan. 22, 1971). The Committee report explained the justification for this amendment:

> Section 8 of the bill amends subsection 703(h) of the Act and perfects the Title VII provisions dealing with testing and apprenticeship training. Tests,

Although this amendment ultimately was not adopted, there is no suggestion in the hearings on the bill that the House's failure to adopt this amendment indicated any disapproval of the holding of the Court in *Griggs*. The provision on job-related tests was dropped from the bill in the House when an amendment in the nature of a substitute, House Bill 9247, was offered and adopted. The debate in the House on the relative merits of the two bills focused on whether Title VII could be most fairly and effectively enforced through administrative or judicial processes. No mention was made during this debate of the portion of House Bill 1746 relating to job-related tests.[137] In fact, with only limited exception, the little discussion of *Griggs* that occurred in the House debate was favorable.[138]

The debate in the Senate paralleled that in the House, focusing on whether there should be administrative or judicial enforcement

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> while they are a useful and necessary selection device for management purposes, often operate unreasonably and unnecessarily to the disadvantage of minority individuals. General intelligence tests commonly used by employers as selection devices for hiring and promotion deprive minority group members of equal employment opportunities. Culturally disadvantaged groups—groups which because of low incomes, substandard housing, poor education, and other "atypical" environmental experiences—perform less well on these types of tests on the average than do applicants from middle class environments. The net result is that members from culturally disadvantaged groups are screened out of employment and training programs merely because of their failure to score well on such tests. Such tests are often irrelevant to the job to be performed by the individual being tested and uncritical reliance on test results may not aid management decisions and selection of personnel, but will screen out the disadvantaged minority individual.

H.R. REP. No. 238, 92d Cong., 1st Sess. 20–21, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS at 2155. The report indicates the view of the Committee that the proposed amendment of § 703(h) was fully consistent with the decision of the Court in *Griggs* and with the guidelines established by the EEOC. *Id.* at 22, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS at 2157.

[137] *See* 117 CONG. REC. 31,958–85 (Sept. 15, 1971); 117 CONG. REC. 32,088–110 (Sept. 16, 1971). The debate over the relative merits of judicial or administrative enforcement of Title VII continued in the Senate. The Senate Committee on Labor and Public Welfare reported out two bills, Senate Bill 2515, calling for administrative enforcement, with the recommendation that it pass, S. REP. No. 415, 92d Cong., 1st Sess. 1 (1971), and House Bill 1746, the bill passed by the House providing for judicial enforcement, with no recommendation, S. REP. No. 416, 92d Cong., 1st Sess. 1 (1971). After extensive debate and two unsuccessful cloture motions, 118 CONG. REC. 1972 (Feb. 1, 1972); 118 CONG. REC. 2492 (Feb. 3, 1972), the Senate ultimately decided upon judicial enforcement of Title VII, 118 CONG. REC. 4944–45 (Feb. 22, 1972).

[138] Only two representatives offered comments during the House debate that could be construed as disapproval of the disparate impact model. Both of those representatives spoke in opposition to the approval of either version of the bill and cannot be considered to have articulated the views of the majority. *See* 117 CONG. REC. 32,101 (Sept. 16, 1971) (statement of Rep. Ashbrook); 117 CONG. REC. 32,108 (Sept. 16, 1971) (statement of Rep. Rarick).

of Title VII. The senators divided into three camps on the issue: those preferring administrative enforcement of the statute, those preferring judicial enforcement of the statute, and those who preferred no enforcement of the statute at all. Senators in both of the first two groups made reference to the *Griggs* decision and the theory of discrimination that it adopted in support of their respective positions;[139] only members of the third group made disparaging

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[139] In supporting the grant of cease-and-desist powers to the EEOC, Senator Humphrey stressed the need for the expertise of the EEOC in eliminating employment discrimination:

> Our original view that employment discrimination consisted of a series of isolated incidents has been shattered by evidence which shows that employment discrimination is, in most instances, the result of deeply ingrained practices and policies which frequently do not even herald their discriminatory effects on the surface. The EEOC has stressed many times that much of what we previously accepted as sound employment policy does, in effect, promote and perpetuate discriminatory patterns that can be traced back to the Civil War and earlier.

118 CONG. REC. 590 (Jan. 20, 1972) (statement of Sen. Humphrey). Senator Javits stated:

> There is a great need for expertise in interpreting and applying the provisions of title 7 which only a specialized agency can insure. For example, one of the most critical areas under title 7 is testing of applicants for employment. Whether or not a given test is appropriate in a given case presents difficult psychological and sociological issues, as well as difficult problems in the analysis of job content and personnel policy.

118 CONG. REC. 580–81 (Jan. 20, 1972) (statement of Sen. Javits); *see also* 118 CONG. REC. 3371 (Feb. 9, 1972) (statement of Sen. Williams) (citing *Griggs* with approval as evidence of the "multifaceted approach to employment discrimination" of the federal courts).

Several senators who argued against cease-and-desist powers for the EEOC and in favor of enforcement in the courts also cited *Griggs* and the disparate impact model in support of their position. Senator Dominick, the chief spokesman for judicial enforcement, introduced a newspaper article that made reference to *Griggs* to explain why judicial enforcement was preferable to administrative enforcement. That article provided in part:

> Pennsylvania's Mr. Anderson contends that the most discriminatory treatment is institutional: subtle practices that leave minorities at a disadvantage because of cultural and educational differences. He doubts whether such forms of bias could be rooted out by cease and desist orders. "At the labor board, individual cases are decided on individual merits," he observes. Thus cease and desist orders fail to create broad legal principles, and "that's not good enough for race questions." Mr. Anderson questions, for instance, whether any such order could ever have had the impact of the Griggs v. Duke Power Co. decision, in which the Supreme Court recently held that employment tests, even if fairly applied, are invalid if they have a discriminatory effect and can't be justified on the basis of business necessity.

Carlson, "How Best to Toughen the EEOC?," Wall St. J., Sept. 15, 1971, *reprinted in* 117 CONG. REC. 41,411–12 (Nov. 16, 1971) (statement of Sen. Dominick).

Senator Spong also argued that the nature of discrimination actionable under the disparate impact model was particularly appropriate for judicial rather than administrative enforcement:

> There can be no question that willful or knowing discrimination in employment is wrong and I believe that it should be dealt with in the most expeditious way. But the fact is a significant part of the problem today is not

remarks about that theory or, in one case, seemed to deny that the theory even existed.[140]

One other part of the legislative history of the Equal Employment Opportunity Act of 1972 could conceivably be construed as congressional disapproval of the disparate impact theory. Senate Bill 2515, as adopted by the Senate, would have amended section

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> the simple, willful act of some employer but rather the effect of long-established practices or systems in which there may be no intent to discriminate or even knowledge that such is the effect.
>
> . . . .
>
> I am not suggesting that because it may have been unintentional or unknowing, an act of job discrimination should be tolerated. I am saying such cases ought to be treated differently than other acts of discrimination.
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> The problem here is not one of simply assigning blame and requiring remedy but of defining what constitutes a violation of law in the first place and of constructing a solution which takes account of all the circumstances. I believe that kind of question should be submitted to the full processes of a court of law.

118 CONG. REC. 944–45 (Jan. 24, 1972) (statement of Sen. Spong).

[140] Senator Allen, a vocal opponent of the bill, twice made reference to the disparate impact model in urging the defeat of the bill. In connection with the portion of the bill that would extend Title VII to state and local governments, he made implicit reference to *Griggs*:

> It is true that many State and local job requirements are in part unrelated to the job. But it is wholly in keeping with our political traditions to give our State and local leaders, and our national leaders for that matter, the discretion to give reasonable weight to factors other than job fitness in filling jobs.

117 CONG. REC. 38402 (Nov. 1, 1972) (statement of Sen. Allen). On the very last day of debate in the Senate, Senator Allen made another reference to the disparate impact model in describing the alleged abuses of the EEOC. 118 CONG. REC. 4924–27 (Feb. 22, 1972). Senator Ervin, in describing his views of the prohibition against discrimination contained in Title VII and the proposed amendments, seemed to deny that the disparate impact theory even existed:

> I say the entire foundation underlying this bill is unsound. The bill does not make illegal the hiring of any person by any employer as such. Under the terms of this bill and under the terms of every other principle of law, the hiring of one man by another to perform services for an employer is a perfectly legal external act. Under the law a man can hire anybody he pleases and under this bill he can hire anybody he pleases, as long as he does not have some intent down in the innermost recesses of his mind that accompanies that act. I have a right, if I am an employer, even under the Senate bill, to hire anybody I please as long as I am not moved to hire him because of his race or his religion or because of his national origin or because of his sex. It is only the intent or the motive which accompanies the hiring which makes the hiring illegal under this bill and under the original title VII of the Civil Rights Act of 1964.

118 CONG. REC. 1519 (Jan. 27, 1971) (statement of Sen. Ervin). Senator Ervin went on to express his views that discrimination on the basis of race, religion, national origin, or sex was "entirely natural" and should not be illegal. *Id.* Senators Allen and Ervin expressed their disapproval of any version of the bill and eventually voted against the bill. 118 CONG. REC. 4606 (Feb. 18, 1972); 118 CONG. REC. 4907–08, 4944, 4948 (Feb. 22, 1972). They cannot be considered to have articulated the views of the majority.

706(g) of Title VII by deleting the requirement for the award of remedies under the statute that the defendant "intentionally" engage in an unlawful employment practice.[141] House Bill 1746 as adopted by the House made no change to this portion of section 706(g).[142] In conference, the House version of the bill prevailed and the term "intentionally" was left in the statute. No explanation was given as to the resolution of this difference between the bills either in the explanation of the conference report or in the limited debate that occurred before adoption of that report.[143] In light of the generally favorable comments made about the disparate impact model and the *Griggs* decision, it seems unlikely that Congress would have dealt with such an important issue in such an offhanded way.

A review of this legislative history suggests that the members of Congress in 1972 were aware of the disparate impact theory and approved of its incorporation into Title VII. The section-by-section analysis of the Equal Employment Opportunity Act of 1972 indi-

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[141] S. 2515, 92d Cong., 2d Sess., 118 CONG. REC. 4946 (Feb. 22, 1972). Section 706(g) as enacted by Title VII provided in relevant part that:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . . .

The Civil Rights Act of 1964, Pub. L. No. 88–352, § 706(g), 78 Stat. 241, 261. Senate Bill 2515 would have deleted the word "intentionally" from this portion of § 706(g).

[142] Joint Explanatory Statement of Managers at the Conference on H.R. 1746 to Further Promote Equal Employment Opportunities for American Workers, 118 CONG. REC. 6646, 6647 (Mar. 2, 1972), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2179, 2183.

[143] *Id.*; 118 CONG. REC. 7166–70 (Mar. 6, 1972) (adoption of conference report by Senate); 118 CONG. REC. 7563–73 (Mar. 8, 1972) (adoption of conference report by House). The wording used in the section-by-section analysis of the final bill suggests that this provision was of little importance to the members of the conference committee. Even though the word "intentionally" was left in the bill, the analysis of the bill explains this section as follows:

> *Section 706(g)*—This subsection is similar to the present section 706(g) of the Act. It authorizes the court, upon a finding that the respondent has engaged in or is engaging in an unlawful employment practice; to enjoin the respondent from such unlawful conduct and order such affirmative relief as may be appropriate including, but not limited to, reinstatement or hiring, with or without back pay, as will effectuate the policies of the Act . . . .

Section-by-Section Analysis of H.R. 1746, The Equal Employment Opportunity Act of 1972, 118 CONG. REC. 7563, 7565 (Mar. 8, 1972). It appears that the conference committee attached no significance to the presence of the word "intentionally" in § 706(g).

One of the points mentioned in the House debate on the adoption of the conference report was that the House had given in to the Senate 18 times, whereas the Senate had given in to the House only three times. 118 CONG. REC. 7567 (Mar. 8, 1972). The Senate may have capitulated on that issue because it was judged to be unimportant.

cated that: "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII."[144] *Griggs* obviously was an important part of the then-present case law that Congress intended to govern the interpretation of Title VII.[145]

This implicit ratification of *Griggs* and the disparate impact theory is further supported by the fact that Congress, being aware of the decision in *Griggs*, did not act to amend Title VII to disapprove the disparate impact theory of discrimination. In a number of other instances, Congress has not hesitated to correct the interpretation given by the Court to civil rights statutes.[146] This failure to amend Title VII provides at least some evidence that the Supreme Court had correctly judged Congress's intent in enacting Title VII.[147]

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[144] Section-by-Section Analysis of H.R. 1746, The Equal Employment Opportunity Act of 1972, 118 CONG. REC. 7563, 7564 (Mar. 8, 1972).

[145] The Supreme Court reached precisely this conclusion in Connecticut v. Teal, 457 U.S. 440, 447 n.6 (1982).

[146] For example, Congress enacted the Pregnancy Discrimination Act of 1978, Pub. L. No. 95–555, 92 Stat. 2076 (1978), to overrule legislatively the decision of the Supreme Court in General Electric Co. v. Gilbert, 429 U.S. 125 (1976), that discrimination on the basis of pregnancy did not constitute discrimination on the basis of sex. Similarly, in 1988, Congress enacted the Civil Rights Restoration Act of 1987, Pub. L. No. 100–259, 102 Stat. 29 (1988), to overrule legislatively a number of Supreme Court decisions, including Grove City College v. Bell, 465 U.S. 624 (1984), which had restricted the scope of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988).

[147] The Supreme Court has previously noted the significance of congressional failure to act to change the interpretation given by the Court to particular legislation. In Johnson v. Transportation Agency of Santa Clara County, 480 U.S. 616 (1987), the Court noted the failure of Congress to act after the Court construed Title VII to allow voluntary affirmative action in United Steelworkers v. Weber, 443 U.S. 193 (1979):

> Congress has not amended the statute to reject our construction, nor have any such amendments even been proposed, and we therefore may assume that our interpretation was correct . . . . Any belief in the notion of a dialogue between the judiciary and the legislature must acknowledge that on occasion an invitation declined is as significant as one accepted.

*Johnson*, 480 U.S. at 629–30 n.7.

Justice Scalia argued in dissent in *Johnson* that congressional inaction should not be read as congressional approval:

> This assumption, which frequently haunts our opinions, should be put to rest. It is based, to begin with, on the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than what the law as enacted meant . . . . But even accepting the flawed premise that the intent of the current Congress . . . is determinative, one must ignore rudimentary principles of political science to draw any conclusions regarding that intent from the *failure* to enact legislation. The "complicated check

A review of the legislative histories of Title VII of the Civil Rights Act of 1964 and of the Equal Employment Opportunity Act of 1972 confirms the place of the disparate impact theory in Title VII jurisprudence. Even if the 1964 Congress did not expressly contemplate or approve the theory, the 1972 Congress recognized the need for the disparate impact theory and approved of its inclusion in Title VII. Accepting the legitimacy of the disparate impact theory, however, still leaves unresolved some issues concerning the proper role of the theory under Title VII and the meaning and purpose of the theory. An understanding of the purposes of the disparate impact theory is critical to understanding both the proper application of that theory and the implications of the recent changes to the theory by the United States Supreme Court and the proposed changes by Congress.

## II. Purposes of the Disparate Impact Theory

### A. *The "Pure" Disparate Impact Theory: A Challenge to the Effects of Discriminatory Practices*

The "pure" form of the disparate impact theory represents a method for challenging employer practices that adversely affect members of minority groups without regard to the intention or motivation of the employer with respect to those practices. Under the pure version of the theory, an employer may be held liable for its actions when it has no intent to disadvantage minorities or even when its intent with respect to minorities is favorable.

The concept of disparate impact found in *Griggs v. Duke Power Co.* may not represent the theory in its purest form. Although the

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on legislation" erected by our Constitution creates a degree of inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.

*Id.* at 671–72 (Scalia, J., dissenting) (citations omitted).

Although Justice Scalia is obviously correct in his conclusion that congressional inaction does not always mean congressional approval, the circumstances in this situation make it more likely that Congress's failure to overrule *Griggs* represented approval of that decision. The express references to *Griggs* during the debates on the Equal Employment Opportunity Act of 1972 rule out the possibility that Congress was unaware of the decision in *Griggs*. The lack of any suggestion during the debates that *Griggs* should be overruled discounts the possibility of inability to agree on how to change the decision. Given the heat of the debate over the issue of enforcement, and most other issues concerning Title VII, indifference seems an unlikely alternative. Finally, it would be hard to characterize the efforts of Congress to obtain effective civil rights legislation as political cowardice.

Supreme Court in that case upheld the finding of the district court that the employer had no present discriminatory intent, the challenged employment policies had a disparate impact on minorities in part because of the company's history of past intentional discrimination. If the employer had not previously restricted black employees to the lowest ranking department, the later restrictions on transfer between departments would not have had as disproportionate an impact on black employees.[148] Therefore, the liability of the employer in that case, although primarily based on the effects rather than the intent of the employment practice, was not completely divorced from the presence of discriminatory intent on the part of the employer.

The *Griggs* Court stated, however, that the employer's absence of discriminatory intent, or even the presence of "good intent," would not save the employer from liability if the disproportionate impact of the challenged employment practice could not be justified.[149] Instead, the Court indicated that the employer could escape liability for the discriminatory effects of its employment practices only if the employer could establish that the challenged requirement measured criteria that were related to job performance.[150] The language of the Court, and the indication that the employer could be held liable even if it had no discriminatory intent at all, suggested that discriminatory intent was entirely irrelevant to the issue of liability under the disparate impact theory; the only relevant issues were the impact of the challenged selection criteria on protected groups and the relationship between the selection criteria and the job for which the criteria were required.

The 1977 case of *Dothard v. Rawlinson*, decided by the Supreme Court several years after *Griggs*, also suggests the irrelevance of discriminatory intent to the disparate impact theory, in spite of the presence of evidence of discriminatory intent in that case.[151] In *Dothard*, the Court considered a challenge under the disparate impact theory to minimum height and weight restrictions that disproportionately excluded women from the position of prison guard.[152]

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[148] *See supra* notes 96–104 and accompanying text.

[149] Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

[150] *Id.* at 431, 432, 436.

[151] 433 U.S. 321 (1977).

[152] *Id.* at 323–24. The defendant in the *Dothard* case disqualified from consideration for the position of prison guard persons less than five feet two inches tall or more than six feet ten inches tall and persons weighing less than 120 pounds or more than 300 pounds. *Id.* at 324 n.2.

Nowhere in its discussion of the plaintiff's disparate impact claim did the Court mention the issue of discriminatory motive or intent or suggest that there had been any improper purpose in imposing those restrictions, except to say that the claim did not involve an issue of purposeful discrimination.[153] Instead, the Court simply focused on the employer's failure to justify its reliance on height and weight as necessary for the requirements of the job.[154]

The employer in the *Dothard* case, however, did intentionally discriminate against women, at least with respect to other employment criteria imposed for prison guards. While the plaintiff's disparate impact claim was pending, the employer adopted a regulation establishing same-sex rules for prison guards holding contact positions in maximum security institutions.[155] Although the Court ultimately found this discrimination to be permitted as a bona fide occupational qualification,[156] the employer clearly intended to discriminate against women in the assignment of positions within its institutions.[157] Although the Court did not rely on this evidence of discriminatory intent, the facts of the case do not eliminate the possibility that the Court was influenced by the presence of discriminatory intent in its analysis of the plaintiff's disparate impact claims.

If there is a Supreme Court case that represents an application of the disparate impact theory in its pure form, that case is *Connecticut v. Teal*,[158] decided in 1982. In *Teal*, the plaintiffs challenged an employer's reliance on a written test as a selection criterion for promotion, alleging that the test had a disparate impact on blacks.[159] The employer defended on the ground that, although the test may

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[153] *Id.* at 328. Although the district court did not suggest the existence of any improper motive in setting the height and weight limits, the court did note that the defendant had conducted no studies nor consulted any expert on the relevance of these restrictions to the job of prison guard. Mieth v. Dothard, 418 F. Supp. 1169, 1178 (M.D. Ala. 1976). Although the employer might have intentionally adopted the minimum height and weight restrictions in order to disproportionately exclude women, it is not possible to explain the employer's maximum height and weight restrictions on that ground, because those restrictions presumably would disqualify men predominately. *See id.* at 1175. Additionally, if the employer intended to use the minimum height and weight restrictions as a method to exclude women, the restrictions presumably would have been set much higher to exclude a greater percentage of women. For example, the employer's minimum height and weight restrictions for the position of state trooper was five feet nine inches and 160 pounds, which effectively excluded virtually all women. *Id.* at 1173, 1178.

[154] *Dothard*, 433 U.S. at 331–32.

[155] *Id.* at 325 & n.6.

[156] *Id.* at 333, 334.

[157] *See id.* at 344 n.2 (Marshall, J., dissenting); *Mieth*, 418 F. Supp. at 1184.

[158] 457 U.S. 440 (1982).

[159] *Id.* at 443–44.

have excluded blacks disproportionately from consideration for promotion, the ultimate selection of employees for promotion, based on a number of other factors, including the operation of an affirmative action plan, actually resulted in a greater percentage of black than white employees being selected for promotion.[160]

The Court concluded that the plaintiffs stated a claim under the disparate impact theory because the test deprived a disproportionate number of black employees of the equal opportunity to be considered for promotion, regardless of the percentage of black employees ultimately selected for promotion.[161] The Court concluded that the employer's lack of discriminatory intent, as evidenced by its use of an affirmative action plan to benefit black employees, was not a defense to liability under the disparate impact theory.[162] The majority opinion suggested the complete irrelevance of the presence or absence of discriminatory intent to claims under the disparate impact theory:

> In suggesting that the "bottom line" may be a defense to a claim of discrimination against an individual employee, petitioners and *amici* appear to confuse unlawful discrimination with discriminatory intent. The Court has stated that a nondiscriminatory "bottom line" and an employer's good-faith efforts to achieve a nondiscriminatory work force, might in some cases assist an employer in rebutting the inference that particular action had been intentionally discriminatory . . . . But resolution of the factual question of intent is not what is at issue in this case.[163]

The position of the majority seems to be that lack of discriminatory intent on the part of the employer is completely irrelevant to the liability of the employer under the disparate impact theory. If the majority viewed the disparate impact theory as just a method to challenge pretextual discrimination, the Court presumably would have found no liability on the part of the employer in this case, because there was no evidence of discriminatory intent and, in fact, the employer had implemented an affirmative action policy to increase the promotion opportunities of minorities. It is therefore

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[160] *Id.* at 444.
[161] *Id.* at 445–51.
[162] *Id.* at 454.
[163] *Id.*

very unlikely that the employer could have been using the challenged employment test as a pretext for discrimination.[164]

### B. *The Disparate Impact Theory as a Method to Challenge Pretextual Discrimination*

There is some support in the Supreme Court's disparate impact cases for the position that discriminatory intent is not entirely irrelevant to the disparate impact theory. The first indication that intent might play some role in disparate impact theory was contained in the Court's 1975 decision in *Albemarle Paper Co. v. Moody*,[165] decided some four years after *Griggs*. Although the Court in *Moody* disclaimed reliance on the presence of discriminatory intent for recovery under Title VII,[166] the language used by the Court in describing the allocation of proof in a disparate impact case suggested the possible relevance of discriminatory intent. Citing to *Griggs* and *McDonnell Douglas Corp. v. Green*,[167] a disparate treatment case decided by the Court two years earlier, the Court indicated that:

> Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, *i.e.*, has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. If an employer does then meet the burden of proving that its tests are "job related," it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also

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[164] A cynic might note that the application of the affirmative action criteria to increase the percentage of blacks promoted did not occur until a year after the action was brought and one month before the case was tried. *See id.* at 444 (noting when employer implemented affirmative action program).

[165] 422 U.S. 405 (1975). The *Albemarle* case, like *Griggs*, involved a challenge by black employees to a testing program implemented by the employer. *Id.* at 408.

[166] *Id.* at 422. In holding that good faith on the part of the employer was not a sufficient reason for denying back pay, the Court noted: "Title VII is not concerned with the employer's 'good intent or absence of discriminatory intent' for 'Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.'" *Id.* (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)) (emphasis in original).

[167] 411 U.S. 792 (1973).

> serve the employer's legitimate interest in "efficient and trustworthy workmanship." Such a showing would be evidence that the employer was using its tests merely as a "pretext" for discrimination.[168]

Two aspects of this passage are troubling to proponents of the pure form of disparate impact theory. First, the very fact that the Court cited to the *McDonnell Douglas* case is troublesome because that case was a disparate treatment case, in which the liability of the employer was premised on the motivation behind the challenged employment practices, not the effects of those practices.[169] Because the focus in *McDonnell Douglas* was clearly on discriminatory intent or motivation, reliance on that case in a disparate impact context might imply that discriminatory intent was also somehow relevant to a disparate impact case. Indeed, the Court's reliance on that case could be taken to mean that the two types of cases were equivalent.

The *Albemarle* Court's reference to the plaintiff's right to attempt to show "pretext" in order to rebut the employer's proof of job-relatedness is even more troubling. The *McDonnell Douglas* Court's discussion of pretext to which the *Albemarle* decision refers

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[168] Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (citations and footnotes omitted).

[169] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973). The *McDonnell Douglas* case involved a claim by an employee that the employer had refused to rehire him because of his race and in retaliation for his civil rights activity. The *McDonnell Douglas* Court expressly noted the differences between disparate impact claims like that involved in *Griggs* and claims of disparate treatment like that involved in *McDonnell Douglas*:

> But *Griggs* differs from the instant case in important respects. It dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. *Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives. Respondent, however, appears in different clothing. He had engaged in a seriously disruptive act against the very one from whom he now seeks employment. And petitioner does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to applicant's personal qualifications as an employee. Petitioner assertedly rejected respondent for unlawful conduct against it and, in the absence of proof of pretext or discriminatory application of such a reason, this cannot be thought the kind of "artificial, arbitrary, and unnecessary barriers to employment" which the Court found to be the intention of Congress to remove.

*Id.* at 806 (citations and footnote omitted).

is clearly tied up with the concept of intentional discrimination.[170] Additionally, the notion of purpose or intent is inherent in the concept of "pretext"; the dictionary definition of "pretext" is "a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs."[171]

The use of the term "pretext" is troublesome because it suggests that the disparate impact theory, as perceived by the Supreme Court, may really be about discriminatory intent. The burden imposed on the employer to establish the job-relatedness of the challenged selection criteria may represent a requirement that the employer establish that it had a nondiscriminatory reason for adopting the requirement. Such a nondiscriminatory reason would rebut the inference of discriminatory intent raised by the plaintiff's prima facie showing of the employer's use of a selection device resulting in a disparate impact. Similarly, under this view of the theory, the plaintiff can overcome the employer's justification by showing that the legitimate reason was not the real reason, but only a "pretext" for discrimination. This analysis transforms the disparate impact theory from a method of attacking the effects of discriminatory practices, without regard to the intent or motivation behind such

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[170] The Court in *McDonnell Douglas* described the concept of pretext in this way:

> Title VII does not . . . permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by § 703(a)(1). On remand, respondent must . . . be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the "stall-in" were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.
>
> Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment . . . . In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.

411 U.S. at 804–05 (citations and footnotes omitted). The evidence that the Court indicates is relevant to the existence of pretext and the Court's use of the term "coverup" makes it unmistakably clear that the Court is describing the existence of intentional discrimination.

[171] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1797 (unabr. ed. 1986); *see also* RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1141 (unabr. ed. 1967) ("that which is put forward to conceal a true purpose or object; an ostensible reason").

practices, into a method for challenging pretextual intentional discrimination.

On the other hand, it is possible that the *Albemarle* Court's use of the term "pretext" in quotation marks indicates that the Court was not giving that term its ordinary meaning, and instead was using it as a shorthand term to describe the plaintiff's rebuttal burden of demonstrating that less discriminatory means were available to the employer. This explanation would suggest that, in spite of the words used by the Court and the ordinary meaning usually given to those words, the focus of the plaintiff's rebuttal burden is not to establish that there was in fact a discriminatory motivation for the employer's selection criteria, but that the criteria were not really "necessary" because of the availability of alternative means for accomplishing the legitimate goals of the employer. Therefore, it is possible to read the Court's decision in the *Albemarle* case as an endorsement of the "pure" theory of disparate impact.

The Supreme Court's decision in *New York City Transit Authority v. Beazer*, however, also suggests that the focus of the disparate impact theory and the plaintiff's rebuttal burden is the existence of pretextual discrimination.[172] That case involved a challenge to the employer's policy of refusing to employ individuals who used methadone on the grounds that the policy had a disparate impact on blacks and other minority groups.[173] Although the Court recognized that the plaintiffs' claims under Title VII were based on the effect rather than the purpose of the policy,[174] in holding that the plaintiffs had not established a case of disparate impact, the Court noted that the plaintiffs could not overcome the employer's showing of "business necessity," indicating that "[t]he District Court's express finding that the rule was not motivated by racial animus forecloses any claim in rebuttal that it was merely a pretext for discrimination."[175]

The Court did not even mention the possibility that the plaintiff might be able to rebut the employer's showing of job-relatedness by demonstrating the existence of a less discriminatory alternative. This failure, particularly in light of the Court's reference to the lack of discriminatory intent on the part of the employer, suggests that the plaintiff's rebuttal burden of establishing a less discriminatory alternative is really about discriminatory intent.

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[172] 440 U.S. 568 (1979).

[173] *Id.* at 570, 579. That case also involved a challenge to the constitutionality of the employer's policy. *Id.* at 570.

[174] *Id.* at 584 n.25.

[175] *Id.* at 587.

Under this interpretation of the plaintiff's rebuttal burden, the existence of a less discriminatory alternative would not be relevant to show what it is presumably intended to show—the presence of discriminatory intent. This seems to be the only explanation for why the Court would consider the presence of a less discriminatory alternative irrelevant in light of an express finding of lack of discriminatory intent.[176]

The Supreme Court's disparate impact cases do not clearly indicate its perception of the purposes of the disparate impact theory. Some of those cases suggest that the theory is only concerned with the discriminatory effects of employer practices, and not the intent or motivation behind such practices. Other cases suggest that the disparate impact theory is merely a mechanism for challenging pretextual discrimination and that the effects of employer practices are relevant only because of the inferential evidence that they provide of the employer's intent in adopting such practices.

Although the Court had given inconsistent signals as to what it believed the purpose of the disparate impact theory to be, the Court, prior to *Watson v. Fort Worth Bank & Trust* and *Wards Cove Packing Co. v. Atonio*, had been consistent with regard to other critical aspects of the disparate impact theory, such as the allocation of the burdens of proof with respect to the elements of the theory.[177] Both the Court's allocation of the burdens of proof with respect to these elements, and recent changes to the burdens of proof, may say as much about the Court's perceptions of the purposes of the disparate impact theory as the language used by the Court to describe that theory.

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[176] The majority's reliance on the lack of discriminatory intent and its failure to address the plaintiff's ability to rebut the showing of job-relatedness by establishing the existence of a less discriminatory alternative is even more troubling because of the dissent in that case. Justice White's dissent, joined by Justice Marshall and assented to by Justice Brennan, disputes the majority's conclusions concerning the plaintiff's prima facie case and the employer's showing of job-relatedness, and does not even mention the majority's conclusion concerning the plaintiff's rebuttal burden, suggesting that those members of the Court also approved of the majority's analysis of this issue. *See id.* at 601–02 (White, J., dissenting).

The Court's failure to mention the possibility that the plaintiff could rebut the employer's showing of job-relatedness by establishing a less discriminatory alternative is even more curious in light of the Court's discussion of alternatives to the exclusion of all methadone users in the context of the plaintiffs' equal protection claim. *See id.* at 589–93. Consistent with this portion of the opinion, the Court in its Title VII analysis could have recognized the plaintiff's ability to rebut the showing of job-relatedness by establishing a less discriminatory alternative and still concluded that no such less discriminatory alternative existed.

[177] *See infra* notes 212–21 and accompanying text.

## III. The Role of Burdens of Proof in Meeting the Purposes of the Disparate Impact Theory

### A. *Burdens of Production and Burdens of Persuasion*

The definition and allocation of the burdens of proof in Title VII litigation, as in other litigation, is important not only because of the effect on the outcome of the litigation, but because the definition and allocation of such burdens give indications as to the courts' perceptions about particular types of claims. As a result, it is useful to review the methods by which courts traditionally allocate such burdens in order to determine the implications of the Supreme Court's allocation of those burdens under the disparate impact theory. Additionally, a comparison of the Court's allocation of the burdens of proof in disparate treatment cases and in disparate impact cases reveals the Court's perceptions of the relationship between those two theories.

The term "burden of proof" does not describe a single concept; two different aspects of the burden of proof are traditionally encompassed within that term. The first such concept, usually referred to as the "burden of production" or the "burden of producing evidence," requires that the party on whom the burden is placed come forward with sufficient evidence to avoid an adverse ruling against that party at the particular stage of the litigation.[178] The second concept encompassed within the term "burden of proof" is the "burden of persuasion," which is the burden placed on a party to convince the trier of fact of the truth of the facts or claim asserted; it may properly be thought of as an allocation of the risk of nonpersuasion.[179]

One commonly speaks of a party as having the burden of proof on a certain issue without articulating the precise nature of the particular burden imposed on that party, and it is not uncommon for a party to have both the burdens of production and persuasion on a particular issue. These two burdens, however, do operate independently of one another. Although the burden of production may be imposed initially on one party and shift to another party

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[178] *See* McCormick on Evidence § 336, at 947 (3d ed. 1984) [hereinafter McCormick]; *see also* F. James & G. Hazard, Civil Procedure § 7.7 (3d ed. 1985); 9 J. Wigmore, Evidence in Trials at Common Law § 2487 (Chadbourne rev. 1981); J. Thayer, A Preliminary Treatise on Evidence at the Common Law 355 (1898).

[179] McCormick, *supra* note 178, § 336; F. James & G. Hazard, *supra* note 178, § 7.6; J. Thayer, *supra* note 178, at 355; J. Wigmore, *supra* note 178, § 2485.

when that burden is met, the burden of persuasion does not "shift" in this manner. Rather, the burden of persuasion with respect to a particular issue generally is held to remain on the same party throughout the litigation.[180]

As a general rule, the burden of persuasion with respect to the essential components of the plaintiff's claim is imposed on the plaintiff, because the plaintiff is the party seeking relief from the court. The plaintiff, therefore, should bear the risk of nonpersuasion. The burden of production is also initially imposed on the plaintiff with respect to the elements of the plaintiff's claim for the same reason. If the court is to invoke its processes to grant relief to the plaintiff, the plaintiff should have the initial duty to present proof as to why such relief is appropriate.[181] Once the plaintiff has produced sufficient evidence to satisfy this burden, referred to as establishing a "prima facie" case, the burden of production may then shift to the defendant to meet the evidence of the plaintiff.[182]

One way in which the burden of production on a particular issue may be shifted to the defendant is by the operation of a presumption.[183] A rebuttable presumption operates to create inferences about the existence of a disputed fact from presented evi-

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[180] MCCORMICK, *supra* note 178, §§ 336, 337

[181] MCCORMICK, *supra* note 178, § 337.

[182] *Id.*; J. THAYER, *supra* note 178, at 376–77.

[183] Although there are a number of different legal mechanisms that are called "presumptions," I mean by the term "presumption" that which is sometimes referred to as a "rebuttable presumption" of law or fact. *See* W. WILLS, THE THEORY AND PRACTICE OF THE LAW OF EVIDENCE 43 (2d ed. 1907). Wills describes the term presumption as follows:

> The term Presumption denotes an inference of the existence of some fact which is in question drawn, without evidence, merely from some other fact already proved or assumed to exist. In our law, following the civil, presumptions are divided into three kinds: presumptions of fact or natural presumptions, rebuttable presumptions of law, and conclusive presumptions of law. Presumptions of law consist of those inferences which have never hardened into rules of law, and as to which therefore the judge is not entitled to direct the jury that they are bound as a matter of law to draw them; in other words, they are common probabilities of fact which the jury may draw or not, as in their judgment the circumstances of the case may appear to warrant. Rebuttable presumptions of law, on the other hand, consist of inferences which, either from their frequent probability or on some ground of policy, have been adopted by the law, so that the judge is entitled and bound to direct the jury to draw them, subject to their being rebutted either by some evidence or by some more powerful presumption to the contrary. Conclusive presumptions of law are inferences which the law will not allow to be contradicted by any evidence whatever.

*Id.*; *see also* F. JAMES & G. HAZARD, *supra* note 178, § 7.9 (indicating that only "rebuttable presumptions of fact," which serve to allocate the burden of production, are properly called "presumptions").

dence, such that if contrary evidence to the disputed fact is not presented, the decisionmaker is required to find in favor of the party in whose favor the presumption operates. The operation of a rebuttable presumption therefore results in the imposition of the burden of production with respect to the disputed issue on the opposing party.[184] The most widely accepted theory concerning the effect of presumption on the burden of persuasion is that there is no effect: a presumption operates to allocate the burden of production but has no effect on the allocation of the burden of persuasion.[185]

Although the burden of persuasion does not shift during the litigation, for some issues, the burden of persuasion is properly imposed on the defendant from the outset of the litigation. As indicated above, the plaintiff ordinarily bears the burden of persuasion with respect to the essential elements of his or her case. Although the operation of a presumption may shift the burden of production to the defendant with respect to an element of the plaintiff's case, the defendant will not be forced to bear the burden of persuasion with respect to those elements. Therefore, a defendant may be required to introduce evidence to negate an element of the plaintiff's prima facie case in order to avoid an adverse ruling, but the defendant will not be required to persuade the trier of fact of the nonexistence of the element. On the other hand, if the defendant introduces evidence designed not to contradict an element of the plaintiff's prima facie case but to present additional facts to avoid the effect of the plaintiff's prima facie case, the defendant is normally considered to have raised an affirmative defense for which the defendant bears both the burdens of production and persuasion.[186]

In order to apply these general rules concerning the allocation of the burdens of production and persuasion, one still must determine what properly should be considered an element of the plaintiff's case and what should be considered an affirmative defense to the plaintiff's prima facie case.[187] A number of different standards

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[184] W. WILLS, *supra* note 183, at 43–45; F. JAMES & G. HAZARD, *supra* note 178, § 7.9.

[185] MCCORMICK, *supra* note 178, § 344; J. THAYER, *supra* note 178, at 380–84; *see also* FED. R. EVID. 301.

[186] J. THAYER, *supra* note 178, at 368–70, 379; W. WILLS, *supra* note 183, at 28–29; *see also* F. JAMES & G. HAZARD, *supra* note 178, §§ 3.9, 4.5, 7.8.

[187] Some commentators suggest that the issue of to whose case a particular element is essential is the same issue as who should bear the burden of proof; if the burden of proof is imposed on a particular party with respect to a particular element, then that element is

have been proposed as a method for allocating the different issues in a case between the plaintiff's prima facie case and the defendant's affirmative defenses. Professor Edward Cleary, addressing the traditional allocation of the burdens of proof, indicated that this allocation can generally be explained by reference to the concepts of "policy," "fairness," and "probability."[188] He uses the term "policy" to refer to determinations made by the courts as to which side of the litigation to favor with respect to particular issues, recognizing that the allocation of the burdens of proof with respect to particular issues may work to handicap certain disfavored claims or defenses.[189] He uses the term "fairness" to suggest that the burdens of proof with respect to a particular issue are properly placed on the party who has superior access to the evidence needed to establish that issue.[190] The term "probability" suggests that the burdens of

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essential to the case of that party. *See* MCCORMICK, *supra* note 178, at 949–50; F. JAMES & G. HAZARD, *supra* note 178, § 7.8; Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 11 (1959). Although that contention is true in a technical sense, I believe it fairly can be said that some elements of a case are logically a component of the claim that is being made by the plaintiff and other elements logically belong to the defense that is being made by the defendant.

[188] Cleary, *supra* note 187, at 11.

[189] *Id.* at 11–12; *see also* MCCORMICK, *supra* note 178, § 337. An example of the Supreme Court's application of the "policy" standard can be found in NLRB v. Transp. Management Corp., 462 U.S. 393 (1983). In that case, the Court upheld the decision of the Board to treat the defendant's argument that it should not be liable for discharging an employee for his union activities because the employee would have been discharged for lawful reasons as an affirmative defense for which the employer should have the ultimate burden of persuasion. *Id.* at 401–04. The Court noted:

> The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.

*Id.* at 403. The Court gave a similar justification in Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1790 (1989), for its placement of a burden of persuasion on the employer in a mixed-motive disparate treatment case to demonstrate that the same employment action would have been taken in the absence of discriminatory motive. *See id.* at 1797–99 (O'Connor, J., concurring).

[190] Cleary, *supra* note 187, at 12; *see also* MCCORMICK, *supra* note 178, at § 337; F. JAMES & G. HAZARD, *supra* note 178, § 7.8.

An example of the Supreme Court's reliance on the "fairness" standard can be found in *Gomez v. Toledo*, in which the Supreme Court held that the defendant in an action under 42 U.S.C. § 1983 had the burden of pleading with respect to whether the alleged deprivation of civil rights was protected by qualified immunity because action taken was in good faith. The Court held that the existence of bad faith was not an element of the plaintiff's claim, but the existence of good faith was an affirmative defense. 446 U.S. 635, 639–40 (1980). The Court relied both on the language of the statute and the fact that the evidence relevant to the determination of the issue was within the control of the defendant. *Id.* at 639–41.

proof are often placed on the party who stands to benefit from the version of the facts less likely to be true, because this allocation will result in fewer unjust results.[191]

The standards traditionally used for allocating burdens of production and burdens of persuasion are relevant to the allocation of those burdens in Title VII cases. By first studying the implication of the allocation of these burdens in disparate treatment cases, it is possible to determine the meaning to be given to the Court's allocation of such burdens in disparate impact cases.

### B. *Allocation of the Burdens of Proof in a Disparate Treatment Case*

The Supreme Court has focused a good deal of attention on the proper allocation of the burden of production and burden of persuasion with respect to the different elements of a claim under the disparate treatment theory. The Court's allocation of those burdens of proof, and the implications of such allocation for the meaning of the disparate treatment theory, help to clarify the Court's current understanding of the nature and meaning of the disparate impact theory.

The Court first addressed the allocation of the burdens of proof in a claim of disparate treatment in *McDonnell Douglas Corp. v. Green*.[192] In that case, the Court discussed the burdens imposed on each party with respect to the proof required to establish intentional

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Although this case expressly dealt with the burden of pleading rather than the burden of proof, *see id.* at 642 (Rehnquist, J., concurring), the burden of proof with respect to a particular issue is normally placed on the same party as is the burden of pleading, and similar standards are used with respect to the allocation of both types of burdens. *See* F. JAMES & G. HAZARD, *supra* note 178, § 4.5.

[191] *See* Cleary, *supra* note 187, at 13–15; *see also* MCCORMICK, *supra* note 178, § 337. The Court has also used the "probability" standard in allocating the burdens of proof. In *Teamsters v. United States*, the Court recognized the role of probabilities in the allocation of the burden of proof. In holding that employers in pattern and practice cases have the burden of proving that individual members of the class were not the victims of discrimination after the plaintiffs establish a prima facie case, the Court noted:

> Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof . . . . Although the prima facie case did not conclusively demonstrate that all of the employer's decisions were part of the proved discriminatory pattern and practice, it did create a greater likelihood that any single decision was a component of the overall pattern.

431 U.S. 324, 359 n.45 (1977); *see also* Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1799 (1989) (O'Connor, J., concurring) (recognizing that the imposition of the burden of proof on the employer in the *Teamsters* case was based on "the *likelihood* that an illegitimate criterion was a factor in the individual employment decision").

[192] 411 U.S. 792 (1973).

discrimination,[193] indicating that the plaintiff is first required to establish a prima facie case of discrimination by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[194]

Once a plaintiff establishes a prima facie case, the "burden must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[195] Finally, if the employer discharges its "burden of proof" and "meet[s]" the plaintiff's prima facie case, the plaintiff must be given the opportunity to "show" that the employer's stated reason for the plaintiff's rejection was pretextual and that the "presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory reason."[196]

Although the Supreme Court set forth the allocation of the burdens of proof in a disparate treatment case in *McDonnell Douglas*, the Court did not explain fully the implications of its allocation of the burdens of proof until its decision almost eight years later in *Texas Department of Community Affairs v. Burdine*.[197] This time the

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[193] *Id.* at 802. Although the Court did not expressly say that this allocation of the burdens of proof applied only to disparate treatment claims and not claims of disparate impact, the Court did note the different character of those claims and the different type of proof involved in proving those claims. *See id.* at 802 n.14, 805–06.

[194] *Id.* at 802. The Court noted that the particular requirements of the plaintiff's prima facie case would depend on the facts of the particular case before the court. *Id.* at 802 n.13.

[195] *Id.* at 802.

[196] *Id.* at 804, 805. A comparison of the language used by the Court in *McDonnell Douglas* with that used by the Court in the disparate impact cases to describe the allocations of the burdens of proof is instructive. *See infra* note 220–21 and accompanying text. The *McDonnell Douglas* Court indicated that the plaintiff had the burden to "show" the elements of the prima facie case and to "show" or "demonstrate" pretext; the defendant had only the burden to "articulate" a legitimate, nondiscriminatory reason. *Id.* at 802; *see also id.* at 803, 804.

[197] 450 U.S. 248 (1981). The Supreme Court's two intervening cases, Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), and Board of Trustees v. Sweeney, 439 U.S. 24 (1978), did little to clear up confusion in the lower courts spawned by *McDonnell Douglas*. In *Furnco*, the Court referred to the burden imposed on the defendant to rebut the plaintiff's prima facie case as the burden "of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race," 438 U.S. at 577, and as a burden to "articulate" a legitimate, nondiscriminatory reason. *Id.* at 578. The Court also referred to the plaintiff's burden with respect to pretext as an opportunity to "introduce evidence." *Id.*

The Court's opinion in *Sweeney* also was not a model of clarity:

> While words such as "articulate," "show," and "prove," may have more or less similar meanings depending upon the context in which they are used, we think that there is a significant distinction between merely "articulat[ing] some

Court expressly noted that its allocation of the burdens of proof applied only to disparate treatment, not disparate impact, cases.[198]

In addressing the burden imposed on the plaintiff to establish a prima facie case of discrimination, the Court confirmed that this burden was a burden of persuasion and that the purpose of the prima facie case was to create an inference of intentional discrimination by eliminating the most common nondiscriminatory reasons for the plaintiff's rejection. The Court made clear that the prima facie case created a "legally, mandatory rebuttable presumption," requiring the court to enter judgment for the plaintiff if the employer did not rebut the presumption.[199]

The Court next addressed the nature of the burden imposed on the defendant to rebut the plaintiff's prima facie case of discrimination. The Court noted that the burden placed on the defendant to articulate a legitimate, nondiscriminatory reason for its action with respect to the plaintiff was not a burden of persuasion, noting that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[200] Instead, the Court held that the burden placed on the defendant was merely to produce evidence to rebut the plaintiff's prima facie case and therefore "allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus."[201]

Once the defendant satisfies its burden of production, the plaintiff has the opportunity to show pretext, "to show that the

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> legitimate, nondiscriminatory reason" and "prov[ing] absence of discriminatory motive." By reaffirming and emphasizing the *McDonnell Douglas* analysis in *Furnco Construction Co. v. Waters*, we made it clear that the former will suffice to meet the employee's prima facie case of discrimination.

439 U.S. at 25. To further confuse the issue, four members of the Court dissented in part on the grounds that there was no difference between the requirement of "articulating" and "proving" a legitimate motivation for the challenged employment decision. The dissenters suggested that the Court's prior decisions made "perfectly clear" that the defendant's burden to rebut the prima facie case was only a burden of production, not a burden of persuasion. *Id.* at 28, 29 (Stevens, J., dissenting).

[198] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252, 255 n.8 (1981).

[199] *Id.* at 253–54 & n.7. The Court's characterization of the plaintiff's burden of establishing the prima facie case as a burden of persuasion is somewhat curious, in light of the fact that the intermediate burden of establishing a prima facie case usually is considered to be only a burden of production, with the burden of persuasion not imposed until the end of the case. *See* McCormick, *supra* note 178, § 336. In any event, even if the prima facie case does impose a burden of persuasion at that point of the litigation, the burden is only to establish the facts that create the inference of intentional discrimination, not to prove the ultimate fact of intentional discrimination.

[200] *Burdine*, 450 U.S. at 253.

[201] *Id.* at 254–55, 257.

proffered reason was not the true reason for the employment decision."[202] The Court noted that the plaintiff could show pretext either directly by convincing the trier of fact that a discriminatory reason motivated the employer or indirectly by showing that the reason given by the employer was not credible. The Court indicated that the plaintiff's burden to show pretext was a burden of persuasion, and that the burden of showing pretext merged with the plaintiff's "ultimate burden of persuading the court that she has been the victim of intentional discrimination."[203]

Although some commentators have criticized the Court's allocation of the burdens of proof in claims of disparate treatment on the ground that it imposes too light a burden on the defendant to rebut the inference of discrimination created by the prima facie case,[204] the Court's allocation of these burdens of proof is consistent with the general rules concerning burdens of proof and the purposes of the disparate treatment theory. The disparate treatment theory is wholly concerned with the existence of intentional discrimination, and each of the steps in the allocation of the burdens of proof with respect to that theory is aimed at determining the existence of intentional discrimination.[205] Accordingly, the ultimate issue in a case of disparate treatment is whether the defendant intentionally discriminated against the plaintiff. As the party seeking relief, the plaintiff should have the burden of persuasion on this ultimate issue.

Although Title VII is silent on burdens of proof, one reference in Title VII's legislative history supports placing the ultimate burden of persuasion on the plaintiff with respect to the existence of intentional discrimination. The Case-Clark Interpretative Memorandum, in discussing the enforcement procedures under the statute, indicates that:

> The suit against the respondent, whether brought by the Commission or by the complaining party, would proceed in the usual manner for litigation in the Federal courts . . . . The respondent, not the defendant, would have a full opportunity to make his defense, and the plain-

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[202] *Id.* at 256.

[203] *Id.* at 253, 256.

[204] *See* Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1267–71 (1981).

[205] *Burdine*, 450 U.S. at 253, 255 n.8.

> tiff, as in any civil case, would have the burden of proving that discrimination had occurred.[206]

In order to prove that discrimination has occurred under the disparate treatment theory, the plaintiff must establish the existence of intentional discrimination, either directly or inferentially.

The general standards relied upon for allocating the different issues in an action between the plaintiff's case and the defendant's defense also support placing the ultimate burden of persuasion on the plaintiff to establish the existence of intentional discrimination.[207] As a matter of "probability," it would presumably be improper to assume that the fact of presence of intentional discrimination is more likely to be true than the fact of no discrimination. As a matter of "policy," whether or not discrimination claims are considered to be disfavored claims,[208] it would be difficult to justify requiring an employer to prove that it did not engage in intentional discrimination, in spite of the employer's greater access to evidence of its own intent. Because intentional discrimination is the issue central to liability under the disparate treatment theory, placing the ultimate burden on the defendant with respect to the existence of intentional discrimination would relieve the plaintiff of the burden of proving its right to recover and would be inconsistent with the traditional principles under which burdens of proof are allocated.

The plaintiff's prima facie case creates an inference or presumption of intentional discrimination sufficient to shift the burden of production to the defendant. The evidence presented by the defendant concerning the legitimate, nondiscriminatory reasons for its action serves to negate this inference of discrimination by suggesting that the defendant took the challenged action for legitimate, not discriminatory, reasons. The plaintiff's evidence of pretext indicates that, in spite of the legitimate reason offered by the defendant, the employer's action was in fact based on an intent to discriminate, either because of a showing of the true reasons for the employment action or the lack of credibility of the proffered reason.

Because the defendant in a disparate treatment case who asserts that there are legitimate, nondiscriminatory reasons for its employment action simply is trying to negate an essential element of the plaintiff's prima facie case, rather than raising a new issue in an

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[206] 110 CONG. REC. 7214 (Apr. 8, 1964).

[207] *See supra* notes 188–91 and accompanying text.

[208] *See* Rotolo v. Borough of Charleroi, 532 F.2d 920, 925–27 (3d Cir. 1976) (Gibson, J., dissenting) (discussing the courts' attitude toward and treatment of civil rights).

attempt to avoid the operation of the finding of intentional discrimination, the defendant has not raised an affirmative defense for which it should bear the burden of persuasion.[209] In contrast, when the defendant does raise a claim in the nature of an affirmative defense to a claim of disparate treatment, such as a bona fide occupational qualification under section 703(e),[210] the burden of persuasion is properly imposed on the defendant.[211] When the defendant seeks to rely on a bona fide occupational qualification, the defendant is not denying that it engaged in intentional discrimination; it is not articulating a "nondiscriminatory" reason to explain why its actions, which appear discriminatory, are in fact not discriminatory. Instead, the defendant is conceding that its actions do constitute discrimination—different treatment of protected groups based on a prohibited characteristic—but that its discrimination against a protected group is justified by the demands of its business. Therefore, the defendant is not seeking to negate an element of the plaintiff's claim, that of intentional discrimination, but is raising additional facts in an effort to avoid the effects of that showing of intentional discrimination.

### C. *Allocation of the Burdens of Proof in a Disparate Impact Case*

Until recently, the Supreme Court had not been as explicit in explaining its allocation of the burdens of proof for a disparate impact claim as it has been for disparate treatment claims. Although the Court discussed the allocation of the burdens of proof for disparate impact claims in a number of opinions, it did not articulate clearly whether it was imposing a burden of production or a burden of persuasion with respect to particular elements of claims and defenses under that theory.

The Court in *Griggs* gave relatively little attention to the allocation of the burdens of proof with respect to the theory of discrimination that it was articulating. The Court did not focus at all on

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[209] *See supra* note 186 and accompanying text.

[210] 42 U.S.C. § 2000e–2(e) (1988).

[211] The Court's language in *Dothard v. Rawlinson*, characterizing the bona fide occupational qualification (bfoq) defense as "the narrowest of exceptions to the general rule requiring equality of employment opportunities," suggests that it is an affirmative defense that the employer has to "prove." 433 U.S. 321, 333–34 (1977); *see also* Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1789 (1989) (indicating the Court's assumption that the employer must "show" the existence of the bfoq defense and that the employer has the "burden of justifying its ultimate decision"); *id.* at 1811 (Kennedy, J., dissenting) (also recognizing appropriateness of imposing burden on employer to justify existence of bfoq).

the showing the plaintiff had to make to establish a violation of Title VII, simply indicating that "on the record in the present case, 'whites register far better on the Company's alternative requirements than Negroes.'"[212] The Court was somewhat more specific concerning the burden that it was placing on the defendant with respect to the business necessity or job-relatedness of the challenged practice or criteria: the Court said that the employer has the "burden of showing that any given requirement [has] a manifest relationship to the employment in question."[213]

Although the Court in *Albemarle* dealt with the allocation of the burdens of proof in a disparate impact case only in passing,[214] it built upon *Griggs* by adding a third step to the process. The Court indicated that, first, the plaintiff establishes a prima facie case of discrimination by showing that the challenged practice has a significantly disproportionate impact on minorities. Next, the employer has the burden of "proving" job-relatedness. Finally, the plaintiff must be given the opportunity to "show" that other tests or devices would serve the purposes of the employer without an adverse impact on minorities.[215]

The Court confirmed this allocation of burdens of proof in *Dothard v. Rawlinson*,[216] *New York Transit Authority v. Beazer*,[217] and *Connecticut v. Teal*.[218] Although the Court used several different terms to describe the nature of the burden being imposed, such as "show," "prove," "demonstrate," and "establish," the Court seemed to use those terms interchangeably. There was no suggestion in these opinions that those terms did not all have equivalent meanings.[219]

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[212] Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (quoting Griggs v. Duke Power Co., 420 F.2d 1225, 1239 n.6 (4th Cir. 1970) (Sobeloff, J., concurring in part and dissenting in part)).

[213] *Id.* at 431, 432.

[214] *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

[215] *Id.*

[216] 433 U.S. 321, 329 (1977).

[217] 440 U.S. 568, 584–87 (1979).

[218] 457 U.S. 440, 446–47 (1982).

[219] In *Griggs*, the Court indicated that the employer had the burden of "showing" business necessity. 401 U.S. 424, 432 (1971). The *Albemarle* Court said that the plaintiff has to "show[]" disproportionate impact, that the employer has to "prov[e]" job relatedness, and that the plaintiff can then "show" less discriminatory alternatives. 422 U.S. at 425. The *Dothard* Court said that the plaintiff must "show" a prima facie case of discrimination, the employer must "prove[]" job-relatedness, and the plaintiff must "show" the existence of other selection devices. 433 U.S. at 329. The Court in *Beazer* required the plaintiff to "establish" a prima facie case and referred to the employer's "demonstration" of job-relatedness. 440 U.S.

This language should be contrasted with the language used by the Court in *McDonnell Douglas Corp. v. Green* to describe the burden of production imposed on the employer in a disparate treatment case to rebut the plaintiff's inference of discrimination created by the prima facie case: "The burden then must shift to the employer to *articulate* some legitimate, nondiscriminatory reason for the employee's rejection."[220] It would seem that the burden to "articulate" a reason is much less onerous than the burden to "show," "demonstrate," or "prove" an element of the case. Therefore, a natural reading of these cases would be that the burden of proof imposed on the parties by the Court in the disparate impact cases is the more rigorous burden of persuasion regarding those respective elements.[221]

This is precisely the way that the Court's language was interpreted by the majority of the lower courts in the almost two decades between the Court's decision in *Griggs* and its decisions in *Watson v. Fort Worth Bank & Trust* and *Wards Cove Packing Co. v. Atonio*. In contrast to the confusion that had reigned before the Court's decision in *Burdine* with respect to the proper allocation of the burdens of proof in disparate treatment cases,[222] there seemed to be little

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at 584, 587. The Court in *Teal* required the plaintiff to "show" a significantly discriminatory impact to "establish" a prima facie case, indicated that the employer must "demonstrate" job-relatedness, and imposed the burden on the plaintiff to "show" pretext in rebuttal. 457 U.S. at 446–47.

[220] 411 U.S. 792, 802 (1973) (emphasis added).

[221] The Court seems to have taken the position that there is a difference between the terms "articulate" and "prove" with respect to the burden of proof imposed by those terms. The Court in *Board of Trustees v. Sweeney* vacated and remanded a case for reconsideration because of the lower court's apparent equating of the terms "articulate" and "prove," indicating that there was a significant distinction between those terms. 439 U.S. 24, 25 (1978); *see supra* note 197. On the other hand, the Court has, in another context, indicated that the terms "show" and "prove" may not be equivalent terms. In *Celotex Corp. v. Catrett*, the Court suggested that the burden described by the word "show" might be even lighter than the burden described by the word "articulate." 477 U.S. 317, 325 (1986). In that case, the Court indicated that the burden imposed on a party moving for summary judgment to "show" an absence of a genuine issue of material fact did not even impose a burden of producing evidence on that party; all the party was required to do was to "point[] out to the district court" the absence of evidence on the part of the opposing party. *Id.* Conversely, the dissent in that case suggested that the burden imposed on the party moving for summary judgment was both an initial burden of production and an ultimate burden of persuasion. *Id.* at 330 (Brennan, J., dissenting).

The language used by the concurring opinion in *Dothard* does suggest the possibility of a lighter burden imposed on the employer in a disparate impact case with respect to business necessity. Justice Rehnquist, citing to *McDonnell Douglas*, indicated that the burden imposed on the defendant was to "articulate the asserted job-related reasons" for the challenged practice. *Dothard*, 433 U.S. at 340 (Rehnquist, J., concurring).

[222] *Compare* Vaughn v. Westinghouse Elec. Corp., 620 F.2d 655, 657–59 (8th Cir. 1980)

dispute among the lower courts, at least in recent years, concerning the proper allocation of the burdens of proof in disparate impact cases.[223] The Court, however, went out of its way in *Watson* and *Wards Cove* to redefine the allocation of the burdens of proof in disparate impact cases. In neither *Watson* nor *Wards Cove* was the discussion of the allocation of the burdens of proof strictly necessary to the Court's decision of the issues before it.

The issue in *Watson* was whether subjective employment practices could be challenged under the disparate impact theory. The lower courts had held that the disparate impact theory was inapplicable to the plaintiff's challenge to the employer's practice of relying on the subjective judgments of its supervisors in making promotion decisions.[224] After a majority of the Court concluded that the disparate impact theory could be used to challenge both subjective and objective employment practices, four Justices went on to discuss the proper allocation of the burdens of proof in cases challenging subjective employment practices under the disparate impact theory.[225]

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(although the plaintiff bears ultimate burden of persuasion, the defendant has a burden of producing evidence of a legitimate, nondiscriminatory reason and the burden of "showing by a preponderance of the evidence that the legitimate reason exists factually") *with* Loeb v. Textron, 600 F.2d 1003, 1011–12 (1st Cir. 1979) (burden imposed on the defendant to articulate a legitimate, nondiscriminatory reason is only a burden of production, not a burden of persuasion) *with* Burdine v. Texas Dep't of Community Affairs, 608 F.2d 563, 567 (5th Cir. 1979) (defendant required to prove nondiscriminatory reasons for decision by a preponderance of the evidence).

[223] *See, e.g.*, Bunch v. Bullard, 795 F.2d 384, 393 (5th Cir. 1986) (defendant has burden of persuasion on issue of business necessity in disparate impact case); Lewis v. Bloomsburg Mills, Inc., 773 F.2d 561, 572 (4th Cir. 1985) (same); Lujan v. Franklin County Bd. of Educ., 766 F.2d 917, 928 (6th Cir. 1985), and No. 84–5949 (6th Cir. 1985) (unpublished opinion) (same); Nash v. Consolidated City of Jacksonville, 763 F.2d 1393, 1397–98 (11th Cir. 1985) (same); Segar v. Smith, 738 F.2d 1249, 1267 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985) (same); Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 815 (8th Cir. 1983) (same). The court reached a contrary result in *Croker v. Boeing Co.*, in which the court of appeals concluded that the defendant had only a burden of production to rebut the "inference of discrimination" created by the plaintiff's prima facie case of disparate impact. 662 F.2d 975, 991 (3d Cir. 1981). In other cases, the courts did not clearly articulate whether the "burden of proof" imposed on the defendant to show business necessity was a burden of production or a burden of persuasion, but the courts seem to be imposing a heavy burden on the defendant to justify its practices. *See* Green v. USX Corp., 843 F.2d 1511, 1524 (3d Cir. 1988) (difficult burden imposed on employer to defend its hiring practices justified by employer's better access to information); Thomas v. Metroflight, Inc., 814 F.2d 1506, 1509 (10th Cir. 1987) (heavier burden of proof imposed on defendant in a disparate impact case than a disparate treatment case).

[224] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 984 (1988).

[225] *Id.* at 989–99; *id.* at 999–1011, 1001 n.1 (Blackmun, J., concurring in the judgment); *id.* at 1011 (Stevens, J., concurring in the judgment). It is not entirely clear from a reading

Although the plurality never explicitly recognized that they were revising the existing allocations of the burdens of proof in disparate impact cases,[226] the definition and allocations of the burdens of proof by the plurality differed substantially from the standards set forth in *Griggs* and its progeny. In describing the plaintiff's burden of establishing a prima facie case, the plurality indicated that the plaintiff not only had to identify the specific employment practice being challenged, but had to prove by reliable statistical evidence that the particular practice caused the exclusion of minority group members because of their membership in a protected group.[227] Although this is a much more stringent standard than that previously applied in the Court's disparate impact cases, the plurality's allocation of the burdens of proof with respect to "business necessity" was an even greater deviation from the Court's previous cases.

Although recognizing the language of *Griggs* that placed the burden on the employer to "show" the job-relatedness of the challenged criteria, the plurality argued that this language should not be interpreted to impose a burden of persuasion on the employer with respect to this defense.[228] Instead, the plurality indicated that the only burden imposed on the employer was a "burden of producing evidence that its employment practices are based on legitimate business reasons: the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times."[229]

Finally, the plurality addressed the plaintiff's rebuttal burden of showing the availability of other selection devices without a dis-

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of the opinion whether the plurality intended the articulated evidentiary standards to apply only to disparate impact cases involving subjective practices or to all disparate impact cases. *See id.* at 994 & n.2.

[226] Justice O'Connor dismissed the prior disparate impact cases with the following explanation for what she referred to as "a fresh and somewhat closer examination of the constraints that operate to keep [the disparate impact] analysis within its proper bounds":

> Both concurrences agree that we should, for the first time, approve the use of disparate impact analysis in evaluating subjective selection practices. Unlike Justice Stevens, we believe that this step requires us to provide the lower courts with appropriate evidentiary guidelines, as we have previously done for disparate treatment cases. Moreover, we do not believe that each verbal formulation used in prior opinions to describe the evidentiary standards in disparate impact cases is automatically applicable in light of today's decision.

*Id.* at 994 & n.2.

[227] *Id.* at 994–96.

[228] *Id.* at 998.

[229] *Id.* at 997–98.

parate impact. The plurality suggested that the plaintiff must establish not only the availability of other selection devices but that the alternatives were equally effective as the challenged practice, in terms of costs and other burdens imposed on the employer. The plurality indicated that these factors would be relevant to the issue of whether the "challenged practice has operated as the functional equivalent of a pretext for discrimination."[230]

The plurality's changes to the evidentiary standards for disparate impact cases were not lost on the concurrence, who indicated that the plurality's allocation of the burdens of proof was "flatly contradicted" by the Court's previous cases.[231] The concurrence was particularly concerned with the plurality's characterization of the employer's burden with respect to business necessity as a burden of production, rather than as a burden of persuasion. The concurrence noted that the plurality's allocation of the burdens of proof more closely resembled the Court's disparate treatment cases than its disparate impact cases.[232]

The concurrence was concerned that the plurality had failed to recognize the critical differences between the two theories of discrimination.[233] The concurrence argued that it was appropriate to impose only a burden of production on an employer with respect to a legitimate, nondiscriminatory reason in a disparate treatment case because the plaintiff's prima facie case raises only an inference of intentional discrimination, not proof of a Title VII violation.[234] In contrast, the concurrence noted that the plaintiff's prima facie case in a disparate impact case does not establish only an inference of discrimination, but proves a violation of Title VII: the disproportionate impact of an employment practice on members of a minority group constitutes a violation of Title VII unless the employer can prove that the effect of that practice is justified.[235] Accordingly, the concurrence argued that it is appropriate to impose

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[230] *Id.*

[231] *Id.* at 1000–01 (Blackmun, J., concurring in the judgment).

[232] *Id.* at 1000–04 (Blackmun, J., concurring in the judgment). The plurality's blurring of the methods of proof for disparate treatment and disparate impact claims is particularly ironic in light of the concern expressed by some of the same members of the Court dissenting in *Connecticut v. Teal* that it was the majority in *that* case that was confusing the two theories of discrimination. *See* 457 U.S. 440, 456–64 (1982) (Powell, J., dissenting).

[233] *Watson*, 487 U.S. at 1002 (Blackmun, J., concurring in the judgment).

[234] *Id.* at 1003–04 (Blackmun, J., concurring in the judgment).

[235] *Id.* at 1004 (Blackmun, J., concurring in the judgment).

a burden of persuasion on the employer with respect to its justification for a practice that would otherwise violate the statute.[236]

The *Watson* plurality's allocation of the burdens of proof for disparate impact cases became the position of the majority of the Court in *Wards Cove Packing Co. v. Atonio*.[237] As was the case in *Watson*, the Court's discussion of the allocation of the burdens of proof was not strictly necessary to the issue before the Court. Instead, the Court reached out to make the position of the plurality in *Watson* a majority decision.[238] This seems to indicate some eagerness on the part of the majority to reformulate, and thereby weaken, the disparate impact theory.

The plaintiffs in *Wards Cove* challenged a number of employment practices of the defendant under the disparate impact theory, alleging that those practices had resulted in a racially stratified workforce, in which white employees filled the higher paid "noncannery" jobs and nonwhite employees filled the lower paid "cannery" jobs.[239] The principal issue before the Court was whether the statistical evidence presented by the plaintiffs concerning the relative percentages of white and nonwhite employees in the two classifications of jobs established a prima facie case of disparate impact.[240] After concluding that the plaintiffs had not established a prima facie case, the Court then discussed the evidentiary standards that would apply if the plaintiff did establish a prima facie case.[241]

The majority in *Wards Cove* wholly adopted the evidentiary standards set forth by the *Watson* plurality with respect to the standards for the plaintiff's prima facie case, the employer's burden with respect to the issue of business necessity, and the plaintiff's burden to demonstrate the existence of less discriminatory alternatives to the challenged practice.[242] In discussing the issue of

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[236] *Id.* at 1006–07 (Blackmun, J., concurring in the judgment). The concurrence was also concerned that the plurality's acceptance of evidence by the employer that the challenged employment practices were based on "legitimate business reasons" would allow practices that were not related to the requirements of the particular job or necessary to the needs of the business, as required by prior cases. *Id.* at 1005–06 (Blackmun, J., concurring in the judgment).

[237] 109 S. Ct. 2115 (1989).

[238] *See id.* at 2124; *id.* at 2127 n.3 (Stevens, J., dissenting); *id.* at 2136 (Blackmun, J., dissenting).

[239] *Id.* at 2119–20.

[240] *Id.* at 2121.

[241] *Id.* at 2121–25.

[242] *Id.* at 2124–27.

whether the disproportionate impact shown by the plaintiff's prima facie case could be justified, the Court defined the inquiry as follows:

> Though we have phrased the query differently in different cases, it is generally well-established that at the justification stage of such a disparate impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices. At the same time, though, there is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster . . . .[243]

The Court made clear that the ultimate burden of persuasion for the issue of "business necessity" was on the plaintiff, while the defendant carried only a burden of production to justify its employment practice.[244] The Court claimed that this allocation of the burdens of proof was consistent with the "usual method for allocating persuasion and production burdens in the federal court" and indicated that this allocation was consistent with its allocation of the burdens of proof in disparate treatment cases.[245]

The dissent in *Wards Cove* viewed the majority opinion as a retreat from the goal of Title VII to eliminate barriers to equal employment opportunity and a retreat from the disparate impact theory.[246] The dissent argued that the majority was incorrect in imposing only a burden of production on the defendant with respect to "business necessity," indicating that this justification was in the nature of an affirmative defense for which the burden of persuasion should be imposed on the employer.[247]

If the disparate impact theory is really a means for challenging the effects of employment practices without regard to the intent or

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[243] *Id.* at 2125–26.

[244] *Id.* at 2126.

[245] *Id.* The Court noted, somewhat understating the case, that this allocation might not be consistent with its prior cases: "We acknowledge that some of our earlier decisions can be read as suggesting otherwise." *Id.*

[246] *Id.* at 2127–28, 2129 (Stevens, J., dissenting).

[247] *Id.* at 2130–31 (Stevens, J., dissenting).

absence of intent behind the challenged practice, the dissent in *Wards Cove* is correct in characterizing the justification of business necessity as an affirmative defense for which both the burden of production and the burden of persuasion are properly imposed on the defendant.[248] Under this "pure" view of the disparate impact theory, the essence of the plaintiff's case is the disproportionate effect of the employer's practice on members of protected groups.

It is appropriate, of course, to impose the initial burden of production and the ultimate burden of persuasion on the plaintiff to establish that the challenged policy in fact does have the prohibited discriminatory effect: a plaintiff should not be able to recover without proving this basic element of his or her case.[249] Because the central issue in a "pure" disparate impact claim is the discriminatory impact of the challenged employment practice, considerations of "policy" require the plaintiff to bear the burden of establishing the discriminatory impact of the employment practice that it is challenging.[250] The employer should not be required to bear the burden of disproving the assertion of the plaintiff that its employment policies have a discriminatory effect on certain protected groups. Additionally, the legislative history of Title VII, which suggests that the plaintiff should have the burden of proving discrimination,[251] supports the placement of the ultimate burden of persuasion on the plaintiff with respect to the issue of whether the policy has a disproportionate impact on minority group members because, under this view of the disparate impact theory, it is that impact that constitutes the prohibited discrimination.

Under the pure view of the disparate impact theory, when a defendant presents evidence seeking to establish that there is in fact no disproportionate impact on members of protected groups or that the challenged practice is not the cause of any such disproportionate impact, the defendant is merely seeking to negate an element of the plaintiff's prima facie case of disparate impact. In this situation, it is entirely appropriate to impose only a burden of production on the defendant with respect to that issue, because the plaintiff should bear the ultimate burden of persuasion with respect to whether the challenged policy has a disproportionate impact.[252]

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[248] *See supra* note 186 and accompanying text.
[249] *See supra* note 181 and accompanying text.
[250] *See supra* note 189 and accompanying text.
[251] *See supra* note 206 and accompanying text.
[252] *See supra* note 181 and accompanying text.

On the other hand, when the defendant raises the defense of "business necessity," or, as described by the Court in *Wards Cove*, the defense of a "legitimate business justification,"[253] the defendant is not attempting to negate the plaintiff's claim that the challenged practice has a discriminatory effect. Instead, the defendant is raising new facts in an effort to avoid the effect of the plaintiff's prima facie showing of disparate impact. The defendant is arguing that, in spite of the discriminatory effect of the challenged practice, the practice is still justified because the practice is related to the needs and goals of the employer's business. This is the essence of an affirmative defense because it seeks to avoid, rather than deny, an element of the plaintiff's prima facie case.[254]

The defense of "business necessity" or "legitimate business justification" most closely resembles the bona fide occupational qualification (bfoq) defense to a claim of disparate treatment. Under the bfoq defense, an employer can rely on the sex, religion, or national origin of an employee if "reasonably necessary to the normal operation of [the] particular business or enterprise."[255] In both situations, the defendant is not trying to negate the plaintiff's showing of discrimination, but rather is attempting to avoid the effect of what would ordinarily constitute a violation of Title VII by arguing that its discriminatory activity is "necessary" in some sense. In both situations, the defendant is employing a defense that is in the nature of a traditional affirmative defense. The employer bears the burden of persuasion with respect to the bfoq defense to a disparate treatment claim;[256] the defendant should also bear the burden of persuasion with respect to the issue of "business necessity" under the disparate impact theory.

Professor Cleary's considerations also support imposing on the defendant the burden of persuasion regarding the element of business necessity. Notions of "fairness" support placing the burden of persuasion for this element on the defendant, who obviously has better access to the evidence necessary to establish the needs of its business than does the plaintiff.[257] As a matter of "policy," if the underlying basis for the disparate impact theory is the "equal opportunity" concept of equality,[258] the harm to that notion of equality

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[253] 109 S. Ct. 2115, 2126 (1989).

[254] *See supra* note 186 and accompanying text.

[255] 42 U.S.C. § 2000e–2(e) (1988).

[256] *See supra* notes 210–11 and accompanying text.

[257] *See supra* note 190 and accompanying text.

[258] *See supra* note 191 and accompanying text.

would be caused by the disproportionate impact of a challenged practice itself, without regard to its justification; the justification for a practice would only be relevant to determining if the impact would be allowed because of the needs of the employer's business.

Therefore, if the disparate impact theory is being applied in its pure form, in which employer practices are unlawful solely because of their effects and the intent behind the employer practice is irrelevant, the Supreme Court is incorrect in imposing only a burden of production on the defendant with respect to this defense. The Court is also incorrect when it asserts that its rule "conforms with the usual method of allocating persuasion and production burdens in the federal courts."[259]

There are, however, two possible explanations for the Court's allocation of the burdens of proof in the manner that it did in *Watson* and *Wards Cove*, other than an assumption that the Court has misconceived the fundamental principles concerning burdens of proof. The first possibility is that the Court considers the essence of the plaintiff's showing of disparate impact to be not only the existence of an employment practice with a disproportionate impact on protected groups, but the existence of such a practice with an *unjustified* effect; that is, one not supported by "business necessity." If the plaintiff were required at the outset of his or her case to

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[259] Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989). The Court's citation to Rule 301 of the Federal Rules of Evidence in support of its assertion about the proper allocation of the burden of persuasion is not persuasive. Rule 301 provides as follows:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

FED. R. EVID. 301. Rule 301 deals only with the effect of presumptions on the shifting of burdens of production and persuasion; it does not speak to the allocation of the burden of persuasion as to certain issues from the outset of the litigation. *See supra* notes 183–86 and accompanying text.

A unanimous Supreme Court earlier rejected precisely the contention made by the *Wards Cove* Court concerning the effect of Rule 301 on the allocation of the burden of persuasion. In *NLRB v. Transportation Management Corp.*, the Court rejected the argument that Rule 301 prevented the imposition of a burden of persuasion on the defendant with respect to an affirmative defense:

> Respondent contends that Federal Rule of Evidence 301 requires that the burden of persuasion rest on the General Counsel . . . . The Rule merely defines the term "presumption." It in no way restricts the authority of a court or an agency to change the customary burden of persuasion in a manner that otherwise would be permissible.

462 U.S. 393, 403–04 n.7 (1983).

establish both that the challenged practice has a disproportionate impact and that the impact is not justified, then the defendant's defense of "business necessity" or "legitimate business justification" would not be an affirmative defense, but would only constitute a negation of an element of the plaintiff's prima facie showing of unjustified impact. Under this interpretation of the disparate impact theory, the defendant would properly bear only a burden of production, not of persuasion.[260] If this is the Court's view of the plaintiff's burden in a disparate impact case, its allocation of the burdens of proof would be correct.

This explanation for the Court's allocation of the burden of proof finds some support in the Court's recent treatment of the seniority system exception in section 703(h).[261] In *Lorance v. AT&T Technologies, Inc.*, the Court rejected the argument that section 703(h) constituted an affirmative defense to a claim of disparate impact; rather, the Court stated that this section made intentional discrimination an element of any Title VII challenge to a seniority system.[262] It is entirely possible that the Court would read the provision on professionally developed ability tests in section 703(h) in the same manner; that is, as a requirement that a plaintiff establish the non-job-relatedness of the challenged tests as part of the prima facie case, rather than requiring the defendant, as an affirmative defense, to show the job-relatedness of the challenged test. By analogy, the Court might also have chosen to treat the issue of "business necessity" as an element of the plaintiff's prima facie case, rather than as an affirmative defense to a claim of disparate impact not specifically covered by section 703(h).

Although this version of the Court's view of the disparate impact theory is a plausible one, it is not supported by the language used by the Court in describing that theory. Nowhere in its description of the plaintiff's prima facie showing in a disparate impact case does the Court suggest that the plaintiff has to show initially that the impact of the challenged practice is not justified by business

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[260] *See supra* note 186 and accompanying text.

[261] That section provides in part:

> It shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e–2(h) (1988).

[262] 109 S. Ct. 2261, 2267 (1989).

necessity. In describing the plaintiff's prima facie case in *Watson* and *Wards Cove*, the Court noted that the plaintiff had to identify the particular employment practice being challenged and had to establish that the practice was causing the disparity in the employer's workforce.[263] The plaintiff's required showing for its prima facie case raises no inference that the disparity is not justified, sufficient to shift the burden of production to the defendant to justify the employer's challenged practice. It is difficult to see how the Court can consider this lack of justification for the employment practice to be an essential element of the plaintiff's case if the plaintiff can prevail without showing that element, which would occur in the situation in which the defendant did not meet its burden of production regarding "business necessity."[264] If this explanation is the justification for the Court's reallocation of the burdens of proof, the Court's language in *Watson* and *Wards Cove* does not suggest that this is what the Court was doing.

The second explanation for the Court's reallocation of the burdens of proof is that the Court's view of the purposes of the disparate impact theory has undergone a transformation. If the disparate impact theory recognized by the Supreme Court is not the pure form of the theory—if it is in fact a method by which to challenge instances of pretextual intentional discrimination—then the Court's allocation of the burdens of proof is not incorrect. Under this "pretext" view of the disparate impact theory, the plaintiff's prima facie case showing that the challenged employment practice has a disproportionate impact on members of minority groups does not establish a violation of the statute, but only creates an inference of discriminatory intent. That is, because the policy or practice chosen by the employer has a discriminatory impact, an inference is created that the employer intended the discriminatory effect and chose the policy because of that effect.[265]

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[263] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 993–95 (1988); *Wards Cove*, 109 S. Ct. at 2124–25.

[264] This situation should be contrasted with the inference of intentional discrimination created by the plaintiff's prima facie showing in a disparate treatment case. In *Texas Department of Community Affairs v. Burdine*, the Court noted that the plaintiff's prima facie showing that she applied and was rejected for an available position for which she was qualified created an inference of intentional discrimination because it "eliminate[d] the most common nondiscriminatory reasons for the plaintiff's rejection." 450 U.S. 248, 253–54 (1981). This inference of intentional discrimination created by the plaintiff's prima facie case justifies shifting the burden of production to the defendant to articulate a justification for its actions and allows the court to enter judgment for the plaintiff if the defendant does not meet its burden of production. *Id.* at 254.

[265] *See supra* text following note 171.

If this is the meaning of the plaintiff's prima facie case, when the defendant rebuts that prima facie case by arguing that its practice or policy was based on legitimate business reasons, the defendant is not raising an affirmative defense, but merely is seeking to negate an element of the plaintiff's prima facie case, namely, the inference of intentional discrimination. When the defendant indicates a legitimate reason for its action, this reason rebuts the plaintiff's inference that the defendant adopted the policy for a discriminatory reason by raising a genuine issue of fact about the defendant's motivation. Because in this situation the defendant is merely seeking to negate an element of the plaintiff's prima facie case, the defendant should bear only a burden of production, not a burden of persuasion, with respect to this issue.[266] The ultimate burden of persuasion remains with the plaintiff, who must meet that burden by proving the existence of less discriminatory alternatives to the challenged employment practice. Under this view of the theory, when the plaintiff establishes the existence of such alternatives, this showing rebuts the defendant's claim that it adopted the practice for a legitimate reason and suggests that the asserted reason is "pretextual." Therefore, the plaintiff who makes this showing has proven that the employment decision was really motivated by discriminatory intent.

This second explanation of the Court's allocation of the burdens of proof for disparate impact cases in *Watson* and *Wards Cove* has much more support in the language used by the Court in those cases. Both *Watson* and *Wards Cove* suggest that the Court believes that the disparate impact theory is really about intentional discrimination. In spite of the Court's surface denials,[267] there is a good deal of evidence in those decisions that this second explanation describes the Court's view of the disparate impact theory.

Although much of the language in the Court's decision in *Watson* suggests that *proof* of intent is not necessary in a disparate impact case, the Court appears to view the *existence* of intent as

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[266] *See supra* note 186 and accompanying text.

[267] The Court in *Wards Cove* described the disparate impact model as follows:

> *Griggs v. Duke Power Co.* construed Title VII to proscribe not only overt discrimination but also practices that are fair in form but discriminatory in practice. Under this basis for liability, which is known as the disparate impact theory and which is involved in this case, a facially neutral employment practice may be deemed violative of Title VII without evidence of the employer's subjective intent to discriminate that is required in a disparate treatment case.

109 S. Ct. at 2118–19; *see also Watson*, 487 U.S. at 986–87.

relevant to the ultimate issue of liability. The Court repeatedly stated that the plaintiff need not "prove" intentional discrimination for a claim of disparate impact, but that this "do[es] not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used."[268] Because the ultimate issue in a disparate treatment case is the existence of intentional discrimination, this language suggests that the Court believes that intentional discrimination also forms the basis of the disparate impact theory.

The Court's citation to the concurring opinion of Justice Stevens in *Washington v. Davis* as support for its claim that the ultimate legal issue is the same in both types of cases supports this interpretation of the Court's language. The portion of the *Washington v. Davis* opinion cited by the *Watson* Court provides:

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. . . .
>
> My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume.[269]

This language, apparently cited with approval by the *Watson* Court, suggests that evidence of impact may be relevant because it is evidence of the existence of intent. The Court's reliance on this language suggests that the Court is equating discriminatory impact and discriminatory intent.

The *Watson* Court also seemed to subordinate the disparate impact theory to the disparate treatment theory when it indicated

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[268] *Watson*, 487 U.S. at 986–87. The Court's reference to the "ultimate legal issue" is troublesome. The existence of intentional discrimination in a disparate treatment case is normally considered to be a factual, not a legal, issue. The authority cited in support of this statement, however, suggests that the existence of intent is sometimes a legal, and sometimes a factual, issue. *See* Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring).

What the Court may have meant, when it said that the ultimate legal issue is the same in both types of cases, is that both types of cases involve the ultimate legal issue of the existence of a Title VII violation. This interpretation of the language turns the Court's statement into a tautology and does not seem to be supported by the citation of authority immediately following it, authority that is introduced with a "*see, e.g.*" signal. *See* A UNIFORM SYSTEM OF CITATION § 2.2 (14th ed. 1986) ("*see*" signal means that "cited authority directly supports the proposition").

[269] 426 U.S. at 253–54 (Stevens, J., concurring).

that the practices made unlawful by the disparate impact theory are prohibited because they are "functionally equivalent to intentional discrimination."[270] This language suggests that disparate impact analysis is justified, not because of its own merit, but because it reaches the same results as does disparate treatment analysis.[271]

The Court's opinion in *Wards Cove* also contains language suggesting that the disparate impact theory is a method of establishing the existence of intentional discrimination. In describing the showing that the employer must make to rebut the plaintiff's prima facie case, the Court indicated that the determination of whether the employer has met its burden centers on "a reasoned review of the employer's justification for his use of the challenged practice," because "a mere insubstantial justification in this regard . . . would permit discrimination to be practiced through use of spurious, seemingly neutral employment practices."[272] The Court seems to be indicating that the actual necessity for a challenged practice is not what warrants the imposition of a practice with a disproportionate impact, but rather whether the "justification" given by the employer is substantial enough to suggest that the employer had a nondiscriminatory reason or motive in adopting the practice.

The suggestion that intentional discrimination is an element of a disparate impact challenge is even more pronounced in the Court's discussion of the plaintiff's rebuttal burden:

> [R]espondents will have to persuade the factfinder that "other tests or selection devices without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interest[s];" by so demonstrating, respondents would prove that "[petitioners were] using [their] tests merely as 'pretext' for discrimination." If respondents, having established a prima facie case, come forward

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[270] *Watson*, 487 U.S. at 987.

[271] *Id.* at 987–88. A similar suggestion occurs in Justice O'Connor's concurrence in another case decided last term, *Price Waterhouse v. Hopkins*: "While the prima facie case under *McDonnell Douglas* and the statistical showing of imbalance involved in an impact case may both be indicators of discrimination or its 'functional equivalent,' they are not, in and of themselves, the evils Congress sought to eradicate from the employment setting." 109 S. Ct. 1775, 1803–04 (1989).

This language may suggest that the disparate impact model, like the *McDonnell Douglas* prima facie case, is simply an "indicator" of the type of discrimination that Title VII is "really" aimed at—intentional discrimination. Under this view, the disparate impact analysis would simply be another method by which a plaintiff could raise an inference of intentional discrimination.

[272] Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989).

> with alternatives to petitioners' hiring practices that reduce the racially-disparate impact of practices currently being used, and petitioners refuse to adopt these alternatives, such a refusal would belie a claim by petitioners that their incumbent practices are being employed for nondiscriminatory reasons.[273]

The Court here seems to be using "pretext" in the normal sense of the word, that is, to mean a coverup for intentionally discriminatory activity. The Court's language suggests that the only way the plaintiff can counter the defendant's evidence of a legitimate business reason is by offering alternative devices to the employer that are unjustifiably rejected. This rejection would show "pretext" because it would refute the showing of the employer that the challenged practice was adopted for a nondiscriminatory reason.

## IV. Future of the Disparate Impact Theory

### A. *The Court's Merging of the Disparate Impact Theory into the Disparate Treatment Theory*

The Supreme Court's recent allocation of the burdens of proof for disparate impact claims in *Watson* and *Wards Cove* is more consistent with the view of the theory as a method of challenging pretextual discrimination than as a method for challenging the discriminatory effects of employer practices adopted with no intent to discriminate. If the pretext model is indeed the correct interpretation of the disparate impact theory, then the evidentiary standards imposed by the Court are entirely appropriate to the goals of that theory of discrimination. Conversely, if the disparate impact theory is in fact aimed at what the courts have previously indicated—the effects, and not the intent, of employer practices—the Court's evidentiary standards are entirely inappropriate and will frustrate the goals of Title VII by allowing employers to continue unlawful practices simply because the Court has imposed an impossible standard of proof.[274]

Support exists for both versions of the disparate impact theory. The ambiguity in the legislative history of Title VII makes it difficult to state conclusively that one or the other version of the theory is the one intended by Congress. On one hand, Congress's original

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[273] *Id.* at 2126–27.

[274] *See id.* at 2133 (Stevens, J., dissenting); *id.* at 2136 (Blackmun, J., dissenting).

primary concern with intentional discrimination suggests that the purpose of the disparate impact theory may be to challenge pretextual intentional discrimination, which would be more difficult to establish if the plaintiff had to prove directly the discriminatory intent or motivation of the employer. If the theory is viewed in this way, the disparate impact theory becomes another method of indirectly establishing evidence of intent to discriminate by inference, similar to the inference of discrimination created by the *McDonnell Douglas* prima facie case.[275]

On the other hand, Congress's concern with equal employment opportunity supports the pure version of the disparate impact theory, which is based on an equal opportunity notion of equality. The existence of a method to challenge the effects of employment practices that deny equal opportunity is necessary to the purposes for which Title VII was originally adopted. Additionally, when the Supreme Court originally articulated the disparate impact theory in *Griggs*, it did not seem to be concerned with intentional discrimination but with the effects of even unintentional discrimination. Congress in its consideration of the Equal Employment Opportunity Act of 1972 also indicated its concerns with the effects of discriminatory practices, whether intended or not. Additionally, Congress has enacted legislation to overrule the Court's decision in *Wards Cove* by returning the evidentiary standards of the disparate impact theory to what they were before that decision.[276] Whether that legislation ultimately will become law is unclear, but there is substantial support in Congress and elsewhere for the disparate impact theory as articulated in *Griggs*.[277]

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[275] See *supra* note 194 and accompanying text for elements of *McDonnell Douglas* prima facie case. Justice O'Connor seemed to equate the disparate impact theory and the *McDonnell Douglas* prima facie case requirements in her concurrence in Price Waterhouse v. Hopkins, 109 S. Ct. at 1803–04. *See supra* note 271.

[276] *See* Civil Rights Act of 1990, S. 2104, 136 CONG. REC. S9966 (daily ed. July 18, 1990), H.R. 4000, 136 CONG. REC. H6769 (daily ed. Aug. 3, 1990). For a detailed discussion of the Civil Rights Act of 1990, see *infra* notes 293–97 and accompanying text.

[277] A great deal of support for the Supreme Court's decision in *Griggs v. Duke Power Co.* was expressed during consideration of the Civil Rights Act of 1990, both by members who supported that legislation and by members who were in opposition. The Senate Committee on Labor and Human Resources, in its favorable report on the Civil Rights Act of 1990, called *Griggs* "[t]he single most important Title VII decision, both for the development of the law and its impact on the daily lives of American workers." S. REP. No. 315, 101 Cong., 2d Sess. 14 (1990). Senator Hatch, who led the opposition to the Civil Rights Act of 1990 in the Senate, also expressed support for the Court's decision in *Griggs*. *See* 136 CONG. REC. S9330 (daily ed. July 10, 1990) (statement of Sen. Hatch). In fact, a primary source of contention in both the House and the Senate was the appropriate manner in which to codify

A troublesome aspect of viewing the disparate impact theory as a method of challenging pretextual intentional discrimination is that such an interpretation of the theory robs it of force as an independent basis for liability under Title VII. If the disparate impact theory is simply another method of establishing pretextual discrimination, the theory would appear to serve no purpose. Given that the allocation of the burdens of proof for disparate impact claims is now identical to that for disparate treatment claims, it is difficult to see how a plaintiff could ever establish a violation of Title VII under the disparate impact theory when it could not do so under the disparate treatment theory.[278] This is particularly true given the rigorous standards of proof imposed by the Court in *Wards Cove*.[279] Thus, if application of the two theories would always result in the same conclusion, it makes little sense to have two different theories.

If the disparate impact theory is merely a method for establishing pretextual intentional discrimination inferentially rather than directly, there is no reason that discrimination claims traditionally brought under the disparate impact theory could not instead be brought under the disparate treatment theory. Consider, for example, a plaintiff's challenge to the employer's adoption of a high school diploma requirement on the grounds that such a requirement disproportionately impacts on minority group members.[280] The plaintiff's showing of disproportionate impact caused by that requirement could simply be considered another method of establishing a prima facie case under the *McDonnell Douglas* standard under which plaintiffs create inferences of intentional discrimination based on actions taken by employers. The Court has already recognized that the precise elements needed to establish such a

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*Griggs*; no one directly indicated that *Griggs* should not be codified in Title VII. *See, e.g.*, 136 CONG. REC. S9322 (daily ed. July 10, 1990) (statement of Sen. Kennedy) (bill will restore prior law from *Griggs* case); 136 CONG. REC. S9328 (daily ed. July 10, 1990) (statement of Sen. Hatch) (Kennedy substitute fails to codify *Griggs*).

[278] Indeed, the plurality indicated that this should not be the case: "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." Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988).

[279] The plurality in *Watson* recognized that the rigorousness of the evidentiary standards that it was articulating, which were ultimately adopted by the majority in *Wards Cove*, would have a detrimental effect on the ability of plaintiffs to maintain claims of disparate impact. *Id.*

[280] The similarity between the facts of this example and the facts of *Griggs* is not accidental.

prima facie case depend on the facts of the particular case.[281] There would appear to be no barrier to simply recognizing facts showing the disparate impact of an employment policy as an alternative formulation of the *McDonnell Douglas* prima facie case.

Once a plaintiff established an inference of discrimination by its prima facie case, the defendant would then be required to articulate a "legitimate business justification" for its practice in order to rebut the inference of intentional discrimination. In this example, the defendant could present evidence that it adopted the requirement of a high school diploma in order to improve the composition of its workforce. If held to be sufficient, this justification would rebut the plaintiff's prima facie case by indicating that the challenged practice was adopted because of the needs of the business, not for the purpose of discriminating.[282] This "legitimate business justification" would simply be a type of "legitimate, nondiscriminatory reason," which is the standard required for the burden of production imposed on defendants in disparate treatment cases.[283]

Finally, once the defendant articulated the business justification for the challenged practice, the plaintiff would be able to prevail if it could establish that there was a less discriminatory alternative to the practice adopted by the defendant. Using the same example discussed above, the plaintiff would be required to demonstrate that other practices available to the employer would as efficiently and economically serve the employer's business interests.[284] The plaintiff might seek to establish that the employer could instead rely on the results of written employment tests to improve the quality of its workforce, assuming that those tests did not have as disproportionate an impact on minority groups. Alternatively, the plaintiff might argue that the employer could simply rely on references from other employers to ensure the quality of its workforce. If sufficient, this rebuttal would allow the plaintiff to prevail because it would demonstrate that the defendant's practice was not really necessary. This showing would suggest that the employment practice was in fact

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[281] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 & n.13 (1973).

[282] Under the new standards for "business necessity" articulated by the Court in *Wards Cove*, such a justification would be sufficient even if not essential to the needs of the business, as long as the requirement "significantly served" the legitimate employment goals of the employer. 109 S. Ct. 2115, 2125–26 (1989). Although this is a much looser standard of job relatedness than that applied by the Court in *Griggs* in judging a similar justification for a high school diploma requirement, I do not necessarily mean to imply that such a justification would meet the employer's rebuttal burden under the new standards.

[283] *See supra* note 195 and accompanying text.

[284] *See supra* note 230 and accompanying text.

chosen for a discriminatory reason, rather than the reason asserted by the defendant; that is, that the justification asserted by the defendant was pretextual. Viewed in this manner, the plaintiff's rebuttal burden of showing a less discriminatory alternative would be identical to the plaintiff's rebuttal burden of showing pretext traditionally imposed in disparate treatment cases.

The disparate impact theory interpreted as a method of challenging pretextual intentional discrimination would continue to serve even less purpose with respect to challenges to subjective employment practices, which the Court in *Watson* indicated were appropriately challenged under the disparate impact theory.[285] If subjective employment practices have a disproportionate impact on minority group members, it is presumably because of the existence of discriminatory motivation, either conscious or unconscious, on the part of the persons making those subjective determinations. Both conscious intentional discrimination and unconscious reliance on stereotypes and prejudices are challengeable under the disparate treatment theory; the altered disparate impact theory provides no special advantages for attacking such employer practices.[286]

The recent Supreme Court decisions appear to have turned the disparate impact theory into simply another method of attacking pretextual intentional discrimination. Viewed in this manner, the disparate impact theory is principally an evidentiary device for establishing indirectly or inferentially a disparate treatment claim. The Supreme Court seems to be intent on blending the two theories of employment discrimination under Title VII into a single unified

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[285] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 989 (1988).

[286] The suggestion of the Court in *Watson* that the disparate impact theory might be a necessary device for challenging reliance on stereotypes, *id.* at 990, is unpersuasive in light of the Court's recognition in Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989), that an employee could state a claim based on sex stereotyping under the disparate treatment theory. Although the trial court in that case had found that the employer had "consciously giv[en] credence and effect to partners' comments that resulted from sex stereotyping," *id.* at 1783, the Court more broadly indicated, in the context of the plaintiff's disparate treatment claim, that Title VII means that "gender must be irrelevant to employment decisions." *Id.* at 1785. The Court went on to note that:

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."

*Id.* at 1791. Nowhere did the Court suggest that this reliance on stereotypes had to be conscious in order to state a claim under the disparate treatment theory.

theory of discrimination, a theory focusing on the motivation of the employer in taking actions against employees and turning a blind eye to the effects of employer practices.

### B. *The Continuing Need for the Disparate Impact Theory*

The Supreme Court's efforts to merge the disparate impact theory into the disparate treatment theory and thereby create a single theory of liability under Title VII aimed at the motivation behind employer action may very well reflect the belief of the majority of the Court that disparate impact analysis is a concept whose time has come and gone. Justice Blackmun suggested this possibility in the closing lines of his dissent in the *Wards Cove* case: "Sadly, [the decision of the majority] comes as no surprise. One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against non-whites—is a problem in our society, or even remembers that it ever was."[287]

Indeed, a recurring theme of the recent disparate impact decisions of the Supreme Court has been a concern that employers will be found liable unjustifiably for "innocent" practices, rather than a concern that the increasingly rigorous standards of proof imposed on plaintiffs will allow defendants to escape liability for discriminatory practices.[288] The present majority of the Supreme Court may simply not believe that the type of discrimination that is the target of the "pure" disparate impact theory continues to be a sufficient problem to justify the continued existence of the theory.

The apparent beliefs of the majority of the Court notwithstanding, a vital need for disparate impact analysis continues to exist in Title VII jurisprudence. As long as minority group members continue to suffer the disadvantages imposed on them by centuries of societal discrimination, the equal treatment notion of equality underlying the disparate treatment theory of employment discrimination will continue to fall short of the promise of true equality for minority group members. Courts will allow employment decisions to be made on the basis of arbitrary employment criteria that are unrelated or unnecessary to the requirements of the job for which they are imposed. The promise of equality through precisely equal treatment of all individuals by the imposition of uniform criteria is an empty promise for those who cannot meet those criteria because

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[287] Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2136 (1989) (Blackmun, J., dissenting).

[288] *Watson*, 487 U.S. at 992–93; *Wards Cove*, 109 S. Ct. at 2122–27.

of past discrimination or biological characteristics. As then Chief Justice Burger wrote for the unanimous Court in *Griggs*:

> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use.[289]

The intent or absence of intent of the employer in imposing requirements for employment, although obviously relevant, should not be controlling; individuals should not be deprived of equal opportunity by either the improper motive or the arbitrary actions of employers, however well-intended.

This debate is far from just an academic one. Not all employer practices that have adversely affected the employment opportunities of minorities were the result of discriminatory motive. Those practices would not be unlawful if the disparate treatment theory was effectively the only avenue available to challenge employer practices. The absence of the disparate impact theory would have meant that the employer in *Griggs*, who in 1965 imposed a requirement of a high school diploma or passing scores on intelligence tests as a condition for promotion, could have lawfully continued to exclude disproportionately blacks from employment in skilled positions by use of arbitrary and non-job-related criteria, because the courts expressly held that the employer had no discriminatory intent.[290] Similarly, the employer in *Connecticut v. Teal*, who in 1978 imposed a requirement of a written test for promotion to supervisory positions, could have lawfully continued to disqualify disproportionate numbers of blacks from advancement to such positions based on a test that may have been unrelated to the positions' requirements, because the evidence before the Court suggested no discriminatory intent on the part of the employer.[291]

The merger of the disparate impact theory into the disparate treatment theory would effectively insulate from challenge a number of employer practices adopted without discriminatory intent but that nevertheless impose real disadvantages on members of minority groups. This result is justified only if the primary focus of Title VII

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[289] 401 U.S. 424, 431 (1971).

[290] *See id.* at 427–28, 432.

[291] 457 U.S. 440, 443, 452 (1982).

is to impose liability on employers because of their wrongful motive and actions based on such motive. If, instead, the primary purpose behind Title VII's prohibition of discrimination is to improve the employment opportunities of minorities by prohibiting unjustified employer practices that disadvantage minorities, then discriminatory motive should not be a requirement of liability. A study of the legislative history of Title VII indicates that Congress was concerned with improving the economic condition of minorities, as well as with addressing the moral problem of discrimination.[292] To the extent that employer "fault" is required to justify liability under Title VII, that fault can be found in the arbitrary employment actions of employers as much as in the discriminatory motives of such employers.

### C. *The Disparate Impact Theory's Chances for Survival*

The Court's decisions in *Watson* and *Wards Cove* pose a fundamental threat to the future of the disparate impact theory as an independent theory of employment discrimination. The prospects of the Court reversing itself with respect to the theory are dim. If the disparate impact theory is to survive, it will be because of Congress's intervention. Both the House and the Senate recently passed legislation to overrule the Court's decision in *Wards Cove* in which the Court altered the burdens of proof in disparate impact cases. The legislation, however, was vetoed by President Bush.[293] Although Congress was unsuccessful in overriding the veto, it is unlikely that we have seen the last of the Civil Rights Act of 1990. In light of the support that exists in Congress for overturning *Wards Cove*,[294] similar legislation is likely to be introduced next session.[295]

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[292] *See supra* notes 78–82 and accompanying text.

[293] *See* 136 CONG. REC. S16,562 (daily ed. Oct. 24, 1990) (veto message). The Senate failed to override the Presidential veto by one vote. 136 CONG. REC. S16,589 (daily ed. Oct. 24, 1990) (veto sustained by vote of 66 to 34).

[294] *See* 136 CONG. REC. S9830 (daily ed. July 17, 1990) (statement of Sen. Jeffords) (suggesting that both sides agree on the shifting of the burden of proof on the issue of business necessity to the employer); 136 CONG. REC. H6748 (daily ed. Aug. 3, 1990) (statement of Rep. Goodling) (Michel substitute for H. R. 4000 would reverse *Wards Cove* by placing burden of proof on employer). Even the Bush administration apparently supports placing the burden of persuasion with respect to "business necessity" on the employer, as provided by the alternative bill sent to Congress on October 20, 1990, immediately before the Presidential veto. 136 CONG. REC. S16,562 (daily ed. Oct. 24, 1990) (description of alternative bill).

[295] One opponent to the Civil Rights Act of 1990 suggested this possibility immediately after the Senate passed the legislation. *See* 136 CONG. REC. S10025 (daily ed. July 18, 1990) (statement of Sen. Murkowski) (expressing hope that the President will veto the bill so that Congress can get serious next year about passing meaningful civil rights legislation).

If enacted, the Civil Rights Act of 1990[296] would legislatively overrule the Court's allocation of the burdens of proof in disparate impact cases by amending Title VII to provide that plaintiffs would establish a prima facie case of disparate impact by showing that the defendant's employment practices, either singly or in combination, disproportionately affect a protected group. The plaintiff would have both the burden of producing evidence of such an impact and the ultimate burden of persuading the trier of fact as to the existence of that impact. Once the plaintiff met that burden, the defendant would then be required to both produce evidence and ultimately persuade the trier of fact that the challenged practice or practices were justified by its business needs.[297]

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[296] S. 2104, 136 CONG. REC. S9966 (daily ed. July 18, 1990); H.R. 4000, 136 CONG. REC. H6827 (daily ed. Aug. 3, 1990). The Civil Rights Act of 1990 would also legislatively overrule the following Supreme Court decisions: Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989); Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989); Lorance v. AT & T Technologies, Inc., 109 S. Ct. 2261 (1989); Martin v. Wilks, 109 S. Ct. 2180 (1989); Independent Fed'n of Flight Attendants v. Zipes, 109 S. Ct. 2732 (1989).

[297] The Civil Rights Act of 1990, as passed by the Senate, would overrule the Court's decision in *Wards Cove* by adding the following language to § 703 of Title VII:

> (k) PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE IMPACT CASES —
>
> (1) An unlawful employment practice based on disparate impact is established under this section when —
>
> (A) a complaining party demonstrates that an employment practice results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice is required by business necessity; or
>
> (B) a complaining party demonstrates that a group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such group of employment practices are required by business necessity, except that —
>
> (i) except as provided in clause (iii), if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact;
>
> (ii) if the respondent demonstrates that a specific employment practice within such group of employment practices does not contribute to the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity; and
>
> (iii) if the court finds that the complaining party can identify, from records or other information of the respondent reasonably available (through discovery or otherwise), which specific practice or practices contributed to the disparate impact —
>
> (I) the complaining party shall be required to demonstrate which specific practice or practices contributed to the disparate impact, and
>
> (II) the respondent shall be required to demonstrate business necessity only as to the specific practice or practices demonstrated by the complaining party to have contributed to the disparate impact.
>
> (2) A demonstration that an employment practice is required by business necessity may be used as a defense only against a claim under this subsection.

Enactment into law of the portion of the Civil Rights Act of 1990 addressing the *Wards Cove* decision would be a positive step in reversing the damage done to the disparate impact theory by the Supreme Court's recent decisions. Amending Title VII in this manner for the first time would expressly codify the disparate impact theory in the statute. There would no longer be any issue as to whether Congress intended the disparate impact theory, in some form, to have a place in Title VII jurisprudence.

This amendment to Title VII would also provide some clues as to Congress's choice between the different versions of the disparate impact theory. Reallocating the burden of persuasion to the defendant with respect to the defense of "business necessity" would be consistent with the pure version of the disparate impact theory and would strengthen the argument that business necessity should properly be considered an affirmative defense to a claim of disparate impact. In fact, during the consideration of the Civil Rights Act of 1990, some members of Congress who supported the bill expressly indicated their belief that business necessity should be considered to be an affirmative defense for which the defendant should properly have the burden of persuasion.[298]

Additionally, the reallocation of the burdens of production and persuasion under the disparate impact theory would once again create evidentiary differences between the disparate treatment theory and the disparate impact theory. This reallocation would suggest the existence of differences between the theories, both in process and in purpose. Finally, and perhaps most importantly, this change

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The Civil Rights Act of 1990 would also define the term "demonstrates" to mean "meets the burdens of production and persuasion" and define the phrase "required by business necessity" to mean that challenged selection practices "bear a significant relationship to successful performance of the job" and that other practices "bear a significant relationship to business objective of the employer." S. 2104, 136 CONG. REC. S9966–67 (daily ed. July 18, 1990).

[298] *See* 136 CONG. REC. S9351 (daily ed. July 10, 1990) (statement of Sen. Simon) (introducing testimony of former Secretary of Transportation William T. Coleman, who indicated that business necessity is a defense to justify a disparate impact caused by an employer practice, and the burden for such a justification defense is properly imposed on the employer); 136 CONG. REC. S9827 (daily ed. July 17, 1990) (statement of Sen. Spector) (employer should bear burden of proof on affirmative defense of business necessity of challenged practice). Some opponents of the bill took the position that business necessity was not an affirmative defense, but that lack of business necessity was an element of the plaintiff's claim of discrimination. *See* 136 CONG. REC. S9935–36 (daily ed. July 18, 1990) (statement of Sen. Hatch) (disparate impact theory makes illegal neutral devices that cause a disproportionate impact and are not job-related; "the burden of persuasion is on the plaintiff to prove the existence of each of these elements of wrongdoing").

would make it more likely that plaintiffs could actually prove liability and recover under the disparate impact theory, thereby reestablishing some of the theory's independent validity.

It is unclear, however, that even the enactment of the Civil Rights Act of 1990 would save the disparate impact theory. The focus of Congress in its consideration of this legislation so far has been on the difficulties of proof imposed on plaintiffs seeking to prove disparate impact[299] and on defendants seeking to defend themselves against disparate impact claims.[300] Although the placement of those burdens is of course important in and of itself, the Supreme Court's allocation of the burdens is also important because of the information that it provides regarding the Court's perceptions of the purpose of the disparate impact theory. The legislative reallocation of those burdens will not necessarily alter the Court's perception and therefore its application of the disparate impact theory. The Court had signaled that it viewed the disparate impact theory as a method of challenging pretextual intentional discrimination long before the Court's reallocation of the burdens of proof in *Watson* and *Wards Cove*.[301]

In order for the Civil Rights Act of 1990 to preserve the disparate impact theory, Congress must recognize that the *Watson* and *Wards Cove* cases have called into question the essence of the disparate impact theory, not only its enforcement. Congress must clarify to the Court its understanding of the disparate impact theory. Congress must specifically address its understanding of the theory as a method to challenge the effects of employer action without regard to the intent or motive behind those actions.

There are indications that Congress may do exactly that. In his remarks supporting the Civil Rights Act of 1990, Senator Simon

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[299] *See* S. REP. NO. 315, 101st Cong., 2d Sess. 18–19 (1990); 136 CONG. REC. S9321 (daily ed. July 10, 1990) (statement of Sen. Kennedy) (*Wards Cove* makes it "far more difficult and expensive for victims of discrimination to challenge the barriers they face"); 136 CONG. REC. S9914 (daily ed. July 18, 1990) (statement of Sen. Dodd) (shift of burden of proof to plaintiff has "made a difficult task an almost impossible one for the working men and women of this country who are the plaintiffs in these cases"); 136 CONG. REC. S9943 (daily ed. July 18, 1990) (statement of Sen. Spector) (stressing difficulties of proof imposed on plaintiffs with meritorious disparate impact cases); 136 CONG. REC. H6778 (daily ed. Aug. 2, 1990) (statement of Rep. Hawkins) (unreasonable to impose burden on employees to disprove business justification because within special knowledge of employer).

[300] *See, e.g.*, 136 CONG. REC. S9339–40 (daily ed. July 10, 1990) (statement of Sen. Thurmond) (bill would force employers to resort to quotas to avoid litigation because of difficulties of proof).

[301] *See supra* notes 165–76 and accompanying text.

indicated that "[i]t is now up to Congress to correct the mistakes made by the Court last year and to signal our clear intent that discrimination against women and minorities—no matter how unintentional or subtle—has no place in the workplace or in our society."[302]

Other members of Congress, both those supporting and those opposing the Civil Rights Act of 1990, expressed their belief that the disparate impact theory reached instances of unintentional discrimination.[303] Other portions of the legislative history, however, contain disturbing suggestions, even by supporters of the Civil Rights Act of 1990, that the purpose of the disparate impact theory is to allow a plaintiff to indirectly prove intent to discrminate that would be difficult to prove directly[304] and that disparate impact is relevant because it creates an "inference . . . that there has not been fairness for a minority."[305] Although these comments might be dismissed as simply the views of a few members of Congress, their presence in the legislative history provides some ambiguity as to Congress's views of the essence of the disparate impact theory.

The future of the disparate impact theory is in the hands of Congress. It must make clear its view of the basis and purposes of the disparate impact theory. Only if Congress does so, and only if the Supreme Court heeds the directive of Congress, will the future of the disparate impact theory be secured.

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[302] 135 CONG. REC. S1024 (Feb. 7, 1990).

[303] *See* S. REP. No. 101st Cong., 2d Sess. 46 (1990); S. REP. No. 315, 101st Cong., 2d Sess. 46 (1990) (minority views of Sens. Hatch, Thurmond, and Coats); 136 CONG. REC. S9606 (daily ed. July 12, 1990) (statement of Sen. Dodd) (disparate impact theory does not require that business practice be based on discriminatory intent); 136 CONG. REC. H6776 (daily ed. Aug. 2, 1990) (statement of Rep. Edwards) (recognizing holding of *Griggs* that practices do not have to be motivated by discriminatory intent to be unlawful).

[304] *See* 136 CONG. REC. S9828 (July 17, 1990) (statement by Sen. Spector) ("If intent can be proved, there is no doubt about the claim being established. But intent in the law is a very difficult thing to prove. That is why the courts and the Supreme Court in the *Griggs* case established what is called 'disparate impact.'").

[305] *See* 136 CONG. REC. S9941 (daily ed. July 18, 1990) (statement of Sen. Spector).