DISPARATE IMPACT UNDER TITLE VII:
AN OBJECTIVE THEORY OF DISCRIMINATION

George Rutherglen*

The theory of disparate impact is the single most important
judicial contribution to title VII of the Civil Rights Act of
1964. In enacting title VII, Congress extended the constitutional
prohibition against discrimination in two directions: to private em-
ployers, and to discrimination on the basis of sex, the latter sev-
eral years before constitutional law was to develop a similar prohi-
Court extended title VII in yet another direction: to facially neu-
tral employment practices with an adverse impact on persons of a
particular race, national origin, sex, or religion.

Under Griggs, the plaintiff need only prove adverse impact. If
the plaintiff carries this burden, the defendant must prove that the
disputed employment practice is justified by job relationship or
business necessity. Compared to a theory of intentional discrimi-

* Professor of Law, University of Virginia. I would like to thank William Eskridge, John
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(codified as amended at 42 U.S.C. § 2000e(a)-(b) (1982)). The act also extended the prohibition
to employment agencies, unions, and joint labor-management committees. See id. §§ 701(c)-(d),
2000e-2(d) (1982)). As originally enacted, title VII covered only private employers. See id. §
701(a)-(b), 78 Stat. 241, 253-54 (codified as amended at 42 U.S.C. § 2000e(a)-(b) (1982)). In
1972, it was amended to cover state and local governments and the federal government. See
4 The Supreme Court first held sexual discrimination to be unconstitutional in Reed v.
Reed, 404 U.S. 71 (1971).
6 See id. at 429-33.
7 See id. at 431-32. In theory, if the defendant carries its burden, the burden shifts back
to the plaintiff to prove pretext. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 425
(1975). But in practice, plaintiffs have almost never carried this burden. See infra note 124

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nation, the theory of disparate impact puts a lighter burden of proof on the plaintiff—to prove adverse effects instead of discriminatory intent—and it puts some burden of proof on the defendant—to justify practices with adverse effects. It is also an objective theory of discrimination, in the technical sense that it requires proof of facts independent of the defendant’s state of mind. The plaintiff must prove that the disputed employment practice has discriminatory effects, and the defendant must justify it by reference to the jobs for which it is used. By contrast, the theory of intentional discrimination, or as it is called under title VII, disparate treatment, requires a finding about the defendant’s state of mind: that the defendant or its agents considered race, national origin, sex, or religion in the decisionmaking process.

Despite its importance, controversy and ambiguity have marked the theory of disparate impact since its origins in Griggs. The controversy has concerned the basis for the theory in title VII. The principal prohibitions of title VII, against discrimination and classifications on the basis of race, national origin, sex, and religion, do not refer to the theory at all. Only under an extremely strained interpretation can they be forced to yield an explicit prohibition against neutral practices with adverse impact. Ironically, the only provision that even alludes to the theory does not contain a prohibition against, but rather a defense for, professionally developed ability tests that are not used as a pretext for discrimination. Because the theory has such a weak basis in the literal terms of the statute, its supporters have naturally turned to the statute’s legislative history. But that, too, is principally concerned with the defense for professionally developed ability tests, insofar as it addresses the theory of disparate impact at all.

The difficulty in finding a statutory source has created, or aggravated, most of the ambiguities surrounding the theory of disparate impact. This difficulty has obscured the differences between disparate impact and disparate treatment. It has also led to varying and confused formulations of the defendant’s rebuttal case and, to a

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9 See id.
11 See, e.g., Griggs, 401 U.S. at 434-36.
12 See infra notes 34-40 and accompanying text.
lesser extent, the plaintiff's prima facie case. These problems, in turn, have spawned persistent efforts to limit the scope of the theory of disparate impact, and thus reduce the problems that it has created. The relationship between the problems in justifying the theory and in applying it, however, is not wholly negative. If the source of the theory can be clarified, then some light may be shed upon the practical problems in applying the theory.

The source of the theory of disparate impact has been obscured by the theory of disparate treatment, which has its source in the same statutory provisions and the same statutory purpose. Both theories attempt to prevent pretextual discrimination. I argue that the common purpose of the two theories, far from making the theory of disparate impact redundant, provides the only sound statutory basis for it. Because of the difficulty of proving the defendant's intent directly and because Congress attempted to prevent pretextual discrimination in several central provisions of title VII,\(^{13}\) the theory of disparate impact constitutes a justifiable extension of the statute's prohibitions against discrimination. It is an instance of federal common law based on, but also restricted by, a comprehensive federal statute.

Part I of this Article examines the foundation for the theory of disparate impact. Subsequent parts then develop the implications of this analysis for several concrete problems that have arisen in applying the theory. Part II considers the definition of the defendant's burden of justification and the interpretation of the Uniform Guidelines on Employee Selection Procedures.\(^{14}\) Part III considers the plaintiff's burden of proving adverse impact and recently proposed restrictions on the overall scope of the theory of disparate impact.

I. FOUNDATIONS

The statutory language of title VII immediately raises the fundamental question about the theory of disparate impact: How can a prohibition against neutral practices with discriminatory effects be derived from provisions that only prohibit intentional discrimination? The principal prohibitions in title VII come in two parts, and

\(^{13}\) See infra text accompanying notes 31-41.

each part, in turn, can be broken down into three clauses. The first, section 703(a)(1), literally prohibits discrimination. It makes it unlawful for a defendant:

1 to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual
2 with respect to his compensation, terms, conditions or privileges of employment,
3 because of such individual’s race, color, religion, sex, or national origin.15

The second, section 703(a)(2), does not mention discrimination, and, for that reason, it has sometimes been identified as the source of the theory of disparate impact in that section.16 Section 703(a)(2) makes it unlawful for a defendant:

1 to limit, segregate, or classify his employees or applicants for employment
2 in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee,
3 because of such individual’s race, color, religion, sex, or national origin.17

Despite the division of these prohibitions into separate subsections, the two provisions have the same structure. Both appear to prohibit, first, discrimination or classification, second, in employment, third, on a prohibited basis. When they are reduced to their essentials, both prohibitions appear to be directed against intentional discrimination, in the sense of taking into account a person’s race, national origin, sex, or religion in making an adverse employment decision.

Nevertheless, it is important not to reduce these prohibitions to their essentials. Both prohibitions, in their full statutory language, are highly redundant. “[T]o discriminate,” in the first provision, expands to “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate.” And “classify,” in the second, is really “to limit, segregate, or classify.” The range of covered aspects of employment is also specified very broadly in each prohibi-

16 See infra note 20 and accompanying text.
tion. In the first, it extends to "compensation, terms, conditions, or privileges of employment," and in the second, to practices "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee." The prohibited bases of discrimination also include "color," which adds nothing to "race" and "national origin." Moreover, the prohibitions themselves are repeated for different defendants. The first applies to employers, employment agencies, unions, and joint labor-management committees, with an additional prohibition against unions causing employers to discriminate, whereas the second applies only to employers, employment agencies, and unions. Finally, and most fundamentally, the two prohibitions repeat one another. Why are two broad prohibitions against discrimination necessary in the same statute?

The answer occasionally suggested by the Supreme Court is that the prohibition against classifications in section 703(a)(2) enacts the theory of disparate impact. This answer requires a special, not to say artificial, reading of this prohibition. It takes "classify" in the first clause to be modified by the second clause, but not the third clause, so that the prohibition is against classifications that adversely affect a group defined according to a prohibited basis. The third clause, however, is more naturally taken to modify the first clause, so that together they refer to classifications on a prohibited basis. This last reading is also the most natural reading of the prohibition against discrimination, which has exactly the same structure as the prohibition against classifications. It is a prohibition, first, against discrimination, second, in employment, third, on a prohibited basis. This alternative reading of the prohibition against classifications becomes still more compelling when the other words in the first clause—"limit" and "segregate"—are read with "classify." On this reading, the prohibition as a whole is addressed to one form of intentional discrimination, namely, segrega-

\[18\] See id. § 703(a)(1), (b), (c)(1), (c)(3), (d), 42 U.S.C. § 2000e-2(a)(1), (b), (c)(1), (c)(3), (d) (1982).


tion practiced under the doctrine of "separate but equal."

Other difficulties confound the attempt to base the theory of disparate impact on the prohibition against classifications in section 703(a)(2). Because this prohibition applies only to employers and unions, the theory of disparate impact would not be available against employment agencies and joint labor-management committees. It might further limit the theory to claims that can be characterized as claims that classifications are illegal, as the Supreme Court suggested in two opinions,\(^2\) later overruled by an amendment to title VII.\(^2\) Other sections of title VII that seemingly require proof of intentional discrimination also undermine this interpretation of section 703(a)(2). Remedies can be ordered only against a defendant who "has intentionally engaged in or is intentionally engaging in an unlawful employment practice."\(^3\) Likewise, the exception for professionally developed ability tests is qualified only by a general proviso that preserves the prohibition against tests "designed, intended or used to discriminate."\(^4\) The exception for seniority and merit systems and for piecework and locational differentials in pay is subject to a nearly identical proviso.\(^5\) These general provisions are inexplicable if Congress meant to distinguish sharply between the prohibition against discrimination in section 703(a)(1) and the prohibition against classifications in section 703(a)(2).

What did Congress mean to do? In a recent exhaustive analysis of title VII and its legislative history, Michael Evan Gold has argued that it meant only to prohibit intentional discrimination, on the model of the contemporary constitutional prohibition against discrimination.\(^6\) He argues that title VII, like other titles of the


\(^2\) See Civil Rights Act of 1964 § 706(g), 42 U.S.C. § 2000e-5(g) (1982). This provision has been broadly, and somewhat artificially, construed to refer to the defendant's intent to adopt the disputed practice as an employment practice. See, e.g., Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1006 (9th Cir. 1972).


\(^5\) The statute reads "provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin." Id.

Civil Rights Act of 1964, only extended the scope of the constitutional prohibition without changing its character. Thus, titles II and VI extended the prohibition against racial discrimination to public accommodations and recipients of federal funds. Gold has also discovered that the prohibition against classifications in section 703(a)(2) originated in the bills that preceded title VII in earlier sessions of Congress as a prohibition against discriminatory practices by trade unions, which was later extended to employers when they were found to be equally responsible for such practices. 28

Although this argument also finds strong support in the repeated references to intentional discrimination in title VII, it fails to account for the redundancy of the statutory prohibitions. Instead, as Gold makes clear, title VII was discussed almost entirely in terms of the prohibition against discrimination. The prohibition against classifications was hardly mentioned. From the legislative history, Gold correctly concludes that section 703(a)(2) has the same meaning as section 703(a)(1), but he unnecessarily, and incorrectly, argues that it acquired a technical meaning that limited it to the forms of discrimination commonly practiced by unions. 30 Undoubtedly Congress took up the original drafts of title VII where previously defeated bills had left off. But it does not follow that Congress tacitly adopted this history as a technical gloss on the statutory language, or that the enactment of the prohibition has no important consequences. The legislative history only confirms the redundancy of the two central prohibitions in title VII; it does not explain why Congress enacted both of them into law.

The answer lies in the function of redundant statutory prohibitions in preventing avoidance, evasion, and pretextual discrimination. The success of title VII, particularly in eliminating overt and systematic forms of discrimination, is now taken for granted. Its success, partial though it might be, could not have been taken for granted when it was enacted. The experience under state fair en-
mployment practice statutes might well have given the supporters of title VII pause. None of the state statutes enacted before title VII applied to segregated employment in the South and few were effective in eliminating patterns of discrimination in the North. Supporters of title VII would rightly have suspected any attempt to delete either of its redundant prohibitions. In fact, amendments were offered by opponents of title VII that would have neutralized these prohibitions. All but one were defeated. The exception for professionally developed ability tests is the one that was not, but it was heavily qualified. It is also the exception in which Congress most clearly addressed the problem of pretextual discrimination.

This exception, also known as the Tower amendment, was added to title VII in the Senate, but only after it was itself amended. The legislative history of the amendment is accurately recounted in Griggs, although the Court makes too much of the particular wording of the amendment and of selected passages in the legislative history and not enough of its overall direction. The Tower amendment resulted from concern—first expressed in the Senate after title VII had already been passed by the House—over a decision by a state hearing examiner. In Myart v. Motorola Co., a

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31 With the exception of a few actions against unions in the construction industry, no such actions were brought under state fair employment practice statutes. Instead, formal enforcement actions were almost entirely confined to individual actions. See Girard & Jaffe, Some General Observations on Administration of State Fair Employment Practice Laws, 14 Buffalo L. Rev. 114, 114-15 (1964); Hill, Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations, 14 Buffalo L. Rev. 22, 24, 47-59 (1964); Sutin, The Experience of State Fair Employment Commissions: A Comparative Study, 18 Vand. L. Rev. 565, 1019-21, 1045-46 (1965). The principal empirical study of state fair employment laws before the enactment of title VII concluded that they were effective in reducing racial discrimination in pay by 11 to 15%, but not in changing occupational distribution by race. See Landes, The Economics of Fair Employment Laws, 76 J. Pol. Econ. 507, 544-45 (1968).

32 Senator McClellan offered two amendments, one that would have created an exception for hiring employees believed, on the basis of substantial evidence, to be beneficial to a business, and another that would have prohibited discrimination only if it was "solely" on the basis of race, color, religion, sex, or national origin. Both were defeated. See 110 Cong. Rec. 13,825-26, 13,837-38 (1964).


34 See Griggs, 401 U.S. at 434-36.

35 Illinois Fair Employment Practices Comm'n Charge No. 63C-127 (1964). For a full report of the decision, see 110 Cong. Rec. 5662-64 (1964). The Commission itself decided that the black applicant had passed the test but had been given a failing score because he was...
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hearing examiner of the Illinois Fair Employment Practices Commission decided that a black applicant for employment could not be denied a job because he had failed an intelligence test that was culturally biased against blacks. Opponents of the Civil Rights Act argued that title VII would be interpreted like the Illinois statute in *Myart*. Supporters argued that it would not, and in particular, that an employer could still "set his qualifications as high as he likes," and that employees would still be required to meet "the applicable job qualifications."³⁸

Dissatisfied with these disclaimers, Senator Tower offered the original version of his amendment. It allowed the use of professionally developed ability tests,³⁷ but it did not contain the present
proviso "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." It was defeated out of fear that it would have allowed employers to use professionally developed ability tests as a pretext for discrimination. As Senator Case said:

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

Supporters of title VII also argued that the amendment was unnecessary because the principal prohibitions of title VII did not reach nondiscriminatory tests. This reason alone, however, does not account for their opposition to the amendment: if the amendment really did not add to or subtract from the statute, it could have been accepted as simply another redundant provision in title VII. A revised version of the amendment, with the proviso, was passed two days after the original version was defeated. Although it is generally favorable to testing, the Tower amendment reveals the same suspicion of pretextual discrimination as the principal prohibitions of title VII.

From these provisions as a whole, we can conclude that Congress identified pretextual discrimination as a problem, but not that Congress found a solution for it. Instead, the solution was left to be developed by the federal courts. In the procedural provisions of title VII, themselves the subject of extensive debate and compro-

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40 See id. at 13,724.
mised, Congress settled on a scheme of administrative investigation and conciliation followed by public and private actions in federal court. Because Congress relied upon judicial enforcement of the statute when administrative conciliation failed, it left application and interpretation of the statute largely in the hands of the federal courts. In doing so, Congress followed a broader trend, towards development of areas of special federal common law. Like other doctrines of federal common law, the theory of disparate impact merges questions of judicial authority with questions of implementation. In this, title VII resembles the statutory source of the federal common law of collective bargaining or the federal common law that has developed under the Reconstruction civil rights acts. As in these areas of law, the federal courts are bound by the principles enacted by Congress, but they are free within these limits to devise effective means of enforcement.

Some commentators, like Gold, have found these limits in the constitutional prohibition against intentional discrimination that, they claim, Congress adopted and applied to private employers in title VII, and that the Supreme Court exceeded in Griggs. These writers rely on the contemporary understanding of constitutional law as a prohibition only against intentional discrimination, and on an analogy to other titles of the Civil Rights Act of 1964, particularly title VI, which prohibits racial discrimination by recipients of federal funds. These arguments, however, depend on a piecemeal interpretation of the constitutional principle against discrimination, accepting only its contemporary results but not its potential for future development. Even if members of Congress discussed title VII in terms of the familiar constitutional prohibi-

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41 For a detailed account of the legislative history, see Rutherglen, Title VII Actions, 47 U. Chi. L. Rev. 688, 690-96, 713-20 (1980).
44 For a discussion of the decisions addressing the constitutional aspects of the discrimination prohibition, see Brest, The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 22-53 (1976).
tion against de jure segregation, it does not follow that they enacted a static and undeveloped version of constitutional law in title VII. When title VII was enacted, the constitutional prohibition had seldom been applied to the distinctive problems of employment discrimination. Instead, Congress enacted title VII against the background of developing constitutional law. It could not have anticipated the course that this development would take: only later did decisions confirm that the constitutional prohibition barred intentional discrimination alone. Congress was far more likely to have recognized that the desegregation decisions were then, as they are now, the paramount example of judicial activism in our time, and that the constitutional prohibition against discrimination was not a static legal rule but a developing body of judge-made law.

The analogy between title VI and title VII fails for a similar reason. It assumes an exact equivalence between developing bodies of law. In fact, title VI was more closely modeled on the constitutional prohibition than title VII: it was designed to expand the state action doctrine under the fifth and fourteenth amendments, by bringing recipients of federal funds within its scope. Just as the constitutional prohibition does not apply to purely private action but extends to all forms of government action, so title VI was both confined to and made applicable over the entire range of federally funded activities. By contrast, title VII reaches private employment, but it does not extend to government action outside of employment.

The statutory foundation on which Griggs rests, the principle against discrimination in employment, has only been strengthened by subsequent legislation. The Equal Employment Opportunity Act of 1972, which made extensive amendments to title VII, greatly expanded its coverage and improved its enforcement provisions. Although Congress stopped short of enacting the theory of

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49 Even so, title VI has been interpreted to authorize regulations adopting the theory of disparate impact. See Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 584 (1983); Larry P. v. Riles, 793 F.2d 969, 981-83 (9th Cir. 1984).
disparate impact into statutory law,\textsuperscript{51} it enhanced both the scope and the effectiveness of the statute as a whole.\textsuperscript{52} It also confirmed the prominent role of the federal courts in applying and interpreting the statute.\textsuperscript{53} The enactment of the Age Discrimination in Employment Act of 1967,\textsuperscript{54} modeled partly on title VII, has resulted in the extension of the theory of disparate impact by judicial decision.\textsuperscript{55} The theory has also been extended by amendment to the Voting Rights Act of 1965.\textsuperscript{56}

Both title VII and its legislative history reveal that Congress was aware of the problem of pretextual discrimination, but that it left this problem to be resolved by the federal courts. It was in \textit{Griggs} that the Supreme Court—far from engaging in folly—devised a solution to the problem of pretextual discrimination. Only rarely will plaintiffs find direct evidence of discriminatory intent. Instead, they must usually prove discrimination, at least in general employment practices, by submitting evidence of the discriminatory effects of those practices and by attacking the justification offered

\textsuperscript{51} Attempts to enact the theory into the statute were passed by a committee in the House, but rejected on the floor, and passed by the Senate, but rejected by the conference committee. See H.R. 1746, 92d Cong., 1st Sess. § 8(c) (1971); S. 2515, 92d Cong., 1st Sess. § 4(a) (1971). For a full discussion of the legislative history, see Thomson, The Disparate Impact Theory: Congressional Intent in 1972—A Response to Gold, 8 Indus. Rel. L.J. 105 (1986); Gold, Reply to Thomson, 8 Indus. Rel. L.J. 117 (1986).


\textsuperscript{53} Attempts to grant authority to the Equal Employment Opportunity Commission (EEOC) to issue cease-and-desist orders were defeated on the floor of both the House and the Senate. See H.R. 1746, 92d Cong., 1st Sess. §§ 4-5; S. 2515, 92d Cong., 1st Sess. § 4(a) (1971); Sape & Hart, supra note 52, at 835-45. The principal authority to interpret the statute remained in the federal courts. In a well-known passage in the legislative history, one of the chairmen of the conference committee recognized the importance of judicial interpretation of title VII: "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." 118 Cong. Rec. 7166 (1972) (statement of Sen. Williams); see also id. at 7564 (similar remarks by Rep. Perkins).


for them. A direct inquiry into the elusive intent of the defendant is usually fruitless, even when the plaintiff relies on the theory of disparate treatment. Class-wide claims of discrimination, including claims of a "pattern or practice" of discrimination,\(^5\) invariably are brought against institutional defendants, such as corporate employers, government entities, or unions. The intent of these institutions must be constructed from the intent of their individual agents. There is no simple way to do this, even in the abstract. The intent of different individuals may conflict, their authority may overlap, and actual practices may deviate from formulated institutional policy. These conceptual problems in defining the relevant institutional intent become all the more difficult when litigation requires evidence of intent. Officials responsible for setting institutional policy are not likely to leave behind direct evidence of discrimination.

The prevailing economic theories of discrimination confirm the need for objective evidence of discrimination, because objective economic incentives, as much as an employer's state of mind, motivate employers to engage in discrimination. According to Gary Becker, employers engage in discrimination in order to satisfy tastes for discrimination: their own desire or the desires of their employees, customers, or suppliers not to associate with members of a disfavored group.\(^6\) If employers cannot engage in explicit discrimination because it is obviously illegal, they will use other means to minimize contact between the group with discriminatory tastes and the disfavored group: for example, neutral selection procedures that disproportionately screen out members of the disfavored group. Moreover, employers could adopt these procedures without any taste for discrimination themselves or any intent to discriminate on their part. They might seek only to obtain the benefits of satisfying others' tastes for discrimination, and they might even be unaware that these benefits derive from tastes for discrimination.

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Likewise, according to the theory of statistical discrimination, employers screen out members of a disfavored group because of the difficulty of accurately assessing their productivity. Employers can minimize the cost of assessing productivity and of making mistakes in doing so by minimizing the number of employees that they hire from the disfavored group. They can do so by adopting neutral employment practices with adverse impact on the disfavored group. For example, by setting artificially high minimum standards with an adverse impact upon the entire disfavored group, the employer can be assured of hiring only those members of the group most likely to be productive. It can screen out other members of the group whose productivity is more uncertain. Again, the employer may take these steps without any explicit intent to discriminate but simply to improve the predicted productivity of its work force as evaluated according to neutral standards.

For these reasons, even in cases alleging disparate treatment, the Supreme Court has endorsed the use of statistical evidence to prove intentional discrimination. Disparate treatment cases also refer to a burden of proof that shifts to the defendant after the plaintiff has made out a prima facie case. Griggs goes further than these cases in reducing the plaintiff's burden of proof and in placing a burden on the defendant to justify employment practices with adverse impact. Far from showing that the theory of disparate impact is redundant, these cases show how a theory of disparate treatment comes to approximate one of disparate impact when it is applied to general employment practices. The theory of disparate impact only addresses the difficulty of proving pretextual discrimination and of using objective evidence more clearly and systematically. The pressing questions about the theory of disparate impact are not whether it should be abandoned, but how its scope and content should be defined in practice.

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II. THE DEFENDANT’S BURDEN OF JUSTIFICATION

The principal problems in applying the theory of disparate impact arise from the defense of business justification. By itself, clarifying the defense would reduce the disarray that has resulted in the federal courts from uncertainty over what the defense requires the defendant to prove. More fundamentally, defining a defense that imposes a significant but manageable burden upon the defendant would allow the theory to serve its primary purpose of preventing pretextual discrimination.

A. Business Necessity or Job Relationship?

The degree to which statutory authority can be claimed for the theory of disparate impact depends upon the magnitude of the burden that the defense imposes on the defendant, or more accurately, upon the strength of the justification needed for an employment practice with adverse impact. Almost all of the cases agree that the defendant bears the burden of persuasion on the issue of business justification and all assume that it is the standard burden of proof by a preponderance of the evidence. The cases disagree instead on what the defendant must prove. If, by analogy to individual claims of disparate treatment under *McDonnell Douglas Corp. v. Green*, the theory would not be controversial. It would also, like *McDonnell Douglas*, not do much to prevent pretextual discrimination.

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63 The Supreme Court seems to have required as much in its leading decisions on the theory of disparate impact. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Most circuits also take this view. See, e.g., *Bunch v. Bullard*, 795 F.2d 384, 393-94 (5th Cir. 1986); *Nash v. Consolidated City of Jacksonville*, 763 F.2d 1393, 1397 (11th Cir. 1985); *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 815 (8th Cir. 1983). The United States Court of Appeals for the Third Circuit, however, has reached the opposite conclusion by relying on decisions of the Supreme Court concerned with individual claims of disparate treatment. See *Croker v. Boeing Co.*, 662 F.2d 975, 991 (3d Cir. 1981) (en banc) (“As with claims of discriminatory intent, the burden of persuasion remains at all times with the plaintiff.”).

64 411 U.S. 792 (1973).

65 Id. at 802-03.

66 See *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 254-60 (1981); *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 (1982);
Conversely, if defendants were required to meet scientific standards of validity, so that they could rarely succeed in carrying their burden, the theory would effectively require them to adopt preferences in order to avoid a finding of adverse impact. The theory would then run afoul of the anti-quota provision of title VII, section 703(j), which provides that "[n]othing contained in this subchapter shall be interpreted to require" preferences on the basis of race, color, national origin, sex, or religion.67

The Supreme Court has never settled on a single formulation of the defense of business justification. Griggs itself uses several different phrases: "business necessity," "related to job performance," "meaningful study of their relationship to job-performance ability," "manifest relationship to the employment in question."68 On the facts of the case itself, the Court was not required to choose among these formulations because the employer had defended the disputed requirements—a high school diploma and passing scores on two general intelligence tests—only through the testimony of a vice-president that these requirements were intended to improve the overall quality of its work force.69 In its subsequent decisions, the Supreme Court has alternated among the various formulations contained in Griggs, first emphasizing business necessity70 and then job relationship.71 In only one case, however, has it held that a professional, but seriously defective, attempt at validation failed,72 and in several it has upheld marginally successful attempts at validation.73

The different formulations of the defendant's burden correspond exactly to the different purposes attributable to the theory of disparate impact: preventing pretextual discrimination or discourag-

68 Griggs, 401 U.S. at 431-32.
69 See id. at 427-31.
72 See Alhambra Paper Co. v. Moody, 422 U.S. 405, 431-36 (1975). In Dothard v. Rawlinson, 433 U.S. 321, 331 (1977), the Court emphasized job relationship as the showing required of the defendant, but it found that the defendant, who had offered no specific evidence, had not met even this lenient standard.
ing employment practices with adverse impact. These purposes are to some degree consistent, because eliminating discrimination is one way of achieving greater representation of disadvantaged groups in the work force. But the purposes diverge when adverse impact can be further reduced only through preferences that require employment decisions to be made explicitly on a prohibited basis. Both goals have coexisted uneasily since the decision in Griggs, which relied interchangeably on each of them. Often it relied on both within the space of a few sentences: “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.”\(^7\) The opinion in Griggs did not foresee that these two goals would come into conflict if employment practices were difficult to justify and if the defendant’s burden of justification was correspondingly difficult to carry.

Indeed, soon after Griggs, it became apparent that most employment tests currently in use could not be scientifically validated. This fact was unknown to Congress when it enacted title VII, just as it was unknown to the Supreme Court when it decided Griggs. The Tower amendment was limited to “professionally developed ability tests,”\(^7\) apparently on the assumption that most such tests were valid. The congressional debate over Myart did not consider the validity of the test because the decision itself was based only on the “cultural bias” of the test.\(^7\) “Cultural bias” is not a precise term, but it more closely resembles adverse impact than invalidity because it concerns the effect of a test on individuals from different groups rather than the relationship between a test and the job for which it is used. A prohibition against tests that were culturally biased, based on the upbringing, education, and work experience of different groups, would extend to valid as well as invalid tests. In rejecting Myart, Congress did not reject the requirement of test validity so much as it rejected any interpretation of title VII that

\(^7\) Griggs, 401 U.S. at 431.


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required racial balance, a step that it made explicit in section 703(j).\footnote{See Civil Rights Act of 1964 § 703(j), 42 U.S.C. § 2000e-2(j) (1982).}

The fact that most employment tests were not scientifically valid became widely known only after the Equal Employment Opportunity Commission (EEOC) promulgated its second set of guidelines\footnote{Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12,333 (1970). See infra notes 84-90 and accompanying text (discussing 1970 guidelines). The first set of EEOC Guidelines was never formally published. It is quoted, however, in Griggs. See infra note 82 and accompanying text.} on this subject, which followed the consensus among psychological experts that the scientific validity of most employment tests was difficult, if not impossible, to establish.\footnote{See Lerner, Washington v. Davis: Quantity, Quality and Equality in Employment Testing, 1976 Sup. Ct. Rev. 263, 297-304; Wilson, supra note 76, at 857-54.} These guidelines created a conflict with section 703(j) by transplanting strict standards of validity from the theoretical context of scientific inquiry to the practical context of employment decisions. In effect, they used strict standards of scientific validity as a lever to increase the defendant's burden of proof and virtually to require preferences as the easiest means of eliminating adverse impact. The Uniform Guidelines on Employee Selection Procedures later moderated these standards somewhat,\footnote{See Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.5-.9, .14 (1987); see also 43 Fed. Reg. 38,290 (1978) (discussing problems in application of earlier guidelines as reason for changes).} but not before the earlier guidelines had exercised a profound influence over the theory of disparate impact. These developments have created a dilemma for the federal courts: they cannot return to the naive assumption that employment tests can be easily validated, yet they cannot require defendants to meet scientific standards of validity without forcing them to engage in affirmative action, contrary to section 703(j).

Serious as this dilemma is, it does not force the courts to choose between the extremes of presumed validity and strict scientific proof. The most compelling purpose of the theory of disparate impact—to prevent pretextual discrimination—is better served by placing a moderate burden upon defendants, rather than a heavy burden that would, in effect, prevent hidden discrimination only by requiring reverse discrimination. A heavy burden serves the more controversial purpose of promoting equal opportunity directly by discouraging employment practices with adverse impact,
but only at the risk of contradicting the prohibition against re-
quired preferences in section 703(j). The goal of racial and sexual
balance need not be entirely disavowed, but it must be qualified.
The ultimate goal of title VII was to achieve greater economic
equality, even if it was not expected to result in equal representa-
tion of all groups in all segments of the work force. The theory of
disparate impact represents an uneasy compromise between the
abstract and ambiguous ideal of economic equality and the means
that Congress thought sufficient to achieve it. The theory resists
neat formulation because it embodies sometimes contradictory
purposes, particularly on the issue of business justification. This
tension between the different purposes of the theory of disparate
impact can be alleviated, if not eliminated entirely, by subordinat-
ing the goal of racial and sexual balance to the dominant purpose
of preventing pretextual discrimination. The only effective means
of doing so is by moderating the burden of business justification
placed upon defendants, particularly by the Uniform Guidelines on
Employee Selection Procedures.

B. Interpreting the Uniform Guidelines on Employee Selection
Procedures

The standards for business justification adopted by the EEOC
and interpreted by the federal courts have followed a zigzag course,
from little more than commonsense reasoning about business justi-
fication, to strict scientific standards of validity, to an uncertain
mixture of the two. The original guidelines on testing procedures,

81 Compare the following statements, one by Senator Humphrey, a leading supporter of
the Civil Rights Act, and the other by the Supreme Court:
  What good does it do a Negro to be able to eat in a fine restaurant if he cannot afford
to pay the bill? What good does it do him to be accepted in a hotel that is too expen-
sive for his modest income? How can a Negro child be motivated to take full advan-
tage of integrated educational facilities if he has no hope of getting a job where he
can use that education?
110 Cong. Rec. 6547 (1964) (statement of Sen. Humphrey). "[A]bsent explanation, it is ordi-
narily to be expected that nondiscriminatory hiring practices will in time result in a work
force more or less representative of the racial and ethnic composition of the population in
the community from which employees are hired." International Bhd. of Teamsters v. United
States, 431 U.S. 324, 340 n.20 (1977). For other statements from the legislative history of
Friedman, Redefining Equality, Discrimination, and Affirmative Action Under Title VII:
The Access Principle, 68 Tex. L. Rev. 41, 60-61 (1986) (discussing competing policy objec-
tives behind title VII).
issued by the EEOC in 1966, simply defined "professionally developed ability test" in the following terms: "[A] test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs." The first cases endorsing the theory of disparate impact, coming before Griggs, adopted similar standards.

The standards for validation changed dramatically when the EEOC adopted greatly expanded and much stricter guidelines in 1970. These Guidelines on Employee Selection Procedures generally incorporated scientific standards for validation devised by psychological experts on testing. They favored criterion validation, presenting it as the principal means of showing business justification. Criterion validation requires the defendant to establish a statistically significant correlation between good performance on a test and good performance on the job according to some accepted criterion, such as speed or error rates for simple jobs and supervisors' evaluations for complex jobs. As litigation subsequently revealed, few tests could be validated using this technique. Moreover, the cost of validation was prohibitively expensive, at least $100,000 and often much more, and had to be incurred each time a

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85 Validation standards published by the American Psychological Association (APA) in 1966 had assumed that validation studies were usually performed by the maker of the test, published in a manual along with instructions on how to use the test, and then considered by the test user in deciding whether the test was appropriate for its purposes. See American Psychological Association, Standards for Educational and Psychological Tests and Manuals 2-3, 7, 10-11 (1966). Although the standards themselves were quite detailed, the level of completeness and accuracy they set out was thought to be "already reached by many of the better tests." Id. at 3.


test was used for a different job. Although the Supreme Court initially endorsed these guidelines as entitled to "great deference" in Albemarle Paper Co. v. Moody, it later went out of its way to apply a much weaker standard of validation, based more on common sense than on technical standards, in Washington v. Davis. In both cases, the employer had commissioned a validation study that obviously failed to meet the technical requirements of the guidelines, but in Washington v. Davis, the Supreme Court accepted the plausible argument that good performance as a metropolitan police officer required a passing score on a general verbal ability test.

Against this background, the EEOC and several other federal agencies formulated the present set of guidelines, the Uniform Guidelines on Employee Selection Procedures. These guidelines preserved the technical approach of the guidelines of 1970, but the federal agencies made the Uniform Guidelines somewhat more lenient. In particular, they relaxed the requirements for content validation, in which a test is validated by showing that it directly incorporates the most significant and concrete parts of the job for which it is used. (The standard example of a content valid test is a typing test for the position of typist.) The Uniform Guidelines relaxed the requirements for validation partly at the urging of professional psychologists, but even so, the Uniform Guidelines have been the subject of repeated calls for further reform and they are

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87 See Lerner, Employment Discrimination: Adverse Impact, Validity, and Equality, 1979 Sup. Ct. Rev. 17, 18 n.6; Novick, supra note 85, at 80. Although the evidence of the high cost of criterion validation is only anecdotal, it has not been contradicted.
90 See id. at 249-52.
91 29 C.F.R. §§ 1607.1-18 (1987). At the time the Uniform Guidelines were promulgated, these agencies were the Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department of Justice. Id. at § 1607.1(A). The EEOC has subsequently taken over the enforcement authority of the Civil Service Commission. See Reorganization Plan No. 1 of 1978 § 3(a), 92 Stat. 3781, reprinted in 5 U.S.C. app. at 1155 (1982).
93 See Division of Industrial-Organizational Psychology, American Psychological Ass'n, Principles for the Validation and Use of Personnel Selection Procedures 1-3 (1975) [hereinafter Principles].
94 A revised set of professional principles was published in 1980 with this aim. See Division of Industrial-Organizational Psychology, American Psychological Ass'n, Principles for
Disparate Impact

The Supreme Court has not yet interpreted the Uniform Guidelines, but the circuit courts have accorded them a limited degree of deference. The circuit courts have generally accepted the guidelines as expert advice on technical issues, but not as binding authority on questions of statutory interpretation. They have applied the guidelines strictly only to some of the basic elements of validation, such as an analysis of the job for which a test is used and participation by experts in the process of devising and validating tests. They have been particularly lenient in validating tests for complex jobs, following the lead of the Supreme Court in Washington v. Davis. Nevertheless, the accommodation between the Uniform Guidelines and the commonsense approach of Washington v. Davis has inevitably resembled an ad hoc compromise that varies from circuit to circuit and case to case. The resulting confusion has been further aggravated by the uncertainty over the foundations of the theory of disparate impact and the varying formulations of the employer’s defense in Griggs. Some decisions have required proof of “business necessity,” whereas others, often in the same circuit, have required only proof of “manifest relation-
ship" between the test and the job.\textsuperscript{99}

A systematic approach to the defendant's burden of justification must reconcile the divergent standards for validation, not just with one another, but with the purposes of the theory of disparate impact. Even scientific standards of validation depend on the context in which they are applied. Because the defense of business justification arises only after the plaintiff has proved adverse impact, it should be defined, at least initially, by reference to the plaintiff's prima facie case. The content of the defense should vary directly with the degree of adverse impact proved by the plaintiff: the greater the adverse impact, the greater the business justification that must be proved by the defendant. This relative standard does not, however, establish a minimum threshold of business justification. Such a threshold must take account of the risk of pretextual discrimination, but without requiring a difficult inquiry into the defendant's intent. Taken together, the plaintiff's evidence of adverse impact and the defendant's evidence of business justification must reveal a significant risk that the disputed employment practice could be used as a pretext for discrimination.

This objective evidence of pretextual discrimination should be evaluated largely without regard to the defendant's good faith in using the disputed employment practice, since the very purpose of the theory is to avoid the need for evaluating evidence on this issue. Evidence of intentional discrimination figured prominently in many of the major decisions under the theory of disparate impact because the defendant substituted neutral tests for explicitly discriminatory practices. It figures more commonly today in cases in which claims of disparate impact are joined with claims of disparate treatment, whether individual claims or class-wide claims. Nevertheless, its use in deciding claims of disparate impact must be limited to assessing the legitimacy and good faith of the business purposes asserted by the defendant. For example, in \textit{Griggs}, the fact that the employer substituted an intelligence test for outright segregation of its employees suggests that it was not genu-

in the test, but in *Washington v. Davis*, the employer’s use of an affirmative action program in recruiting suggests that it did really seek to measure verbal ability with the test that it gave to applicants, although it did not establish the connection between the test and the job. Such evidence, however, has no bearing at all on the effectiveness with which the asserted business purposes are served by the practice. The defense of business justification concerns the objective reasons that employers or unions in general can reasonably have for using the disputed employment practice, not the subjective reasons peculiar to the defendant.

Many decisions are consistent with a “sliding scale” approach to evaluating evidence of business justification and some have explicitly adopted it, at least in determining the sufficiency of criterion validation. Among the decisions in favor of the defendant, the most important is *New York City Transit Authority v. Beazer*, which upheld the exclusion of methadone users from jobs in a transit system. Although the Supreme Court also relied on the need for safety in operating a transit system, it found the defendant’s casual evidence of validation sufficient, and presented this finding in a single sentence immediately following several paragraphs on the inadequacy of the plaintiff’s evidence of adverse impact. This pattern has repeated itself in numerous decisions of the lower federal courts: weak evidence of adverse impact leads the court to impose a weak requirement of business justification.

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100 See *Griggs*, 401 U.S. at 427-32.
102 See, e.g., Clady v. County of Los Angeles, 770 F.2d 1421, 1431-32 (9th Cir. 1985), cert. denied, 106 S. Ct. 1516 (1986); Guardians Ass’n v. Civil Serv. Comm’n, 630 F.2d 79, 103-06 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981).
104 See id. at 584-87 & n.31.
And, of course, many decisions have found the plaintiff's evidence of adverse impact to be so weak that it fails to make out a prima facie case at all, relieving the defendant of any need to establish a business justification.\footnote{630 F.2d 79 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981).}

A case near the opposite extreme is Guardians Association v. Civil Service Commission,\footnote{587 F. Supp. 572, 576-78, 604-05 (E.D.N.Y. 1983), aff'd, 739 F.2d 746 (2d Cir. 1984).} in which the plaintiffs presented evidence that an entry-level test for police officers resulted in a pass rate of 45.9% for whites, but only 17% for blacks and 20.5% for Hispanics.\footnote{See id. at 85. The disparate impact of the test in ranking applicants for further steps in the hiring process was even more severe. For the first 795 applicants selected from among those who passed the test, the rate of those selected over all those who applied was 3.6% for whites, but only 0.5% for blacks and 1.0% for Hispanics. See id. at 86.} Despite the defendant's elaborate precautions in preparing the test to assure its validity,\footnote{See id. at 95-97.} the United States Court of Appeals for the Second Circuit held that it was not content valid because the defendant had justified neither its use in ranking applicants nor its cutoff for a passing score.\footnote{See id. at 100-06. As the Second Circuit said: Thus the exam is adequately related to the content of the police officer's job, and adequately representative. The combined effect of the assessment might support a conclusion that the exam as a whole has content validity, though it would be a close question whether a test with the disparate racial impact of this one can be validated when its development departs in some significant respects even from reasonably attainable requirements of the Guidelines. However, even if the construction of the exam passes muster, the way in which it was used to distinguish among candidates seriously departs from the third requirement for content validity and defeats any claim of validity for a testing process that produces disparate racial results. Id. at 99-100.} When the plaintiff has
presented compelling evidence of adverse impact, the defendant has usually been held to a higher standard of business justification. And even under the theory of disparate treatment, such evidence has caused the court to examine closely the defendant's justification for the disputed practice, or virtually to equate disparate treatment with disparate impact. The frequent correspondence of findings of adverse impact and lack of business justification reveals the fundamental connection between these issues in proving, or disproving, pretextual discrimination.

As it is usually formulated, the theory of disparate impact conceals this connection. The burden of proof is supposed to shift in an all-or-nothing fashion, so that the defendant must prove business justification only after the plaintiff proves adverse impact. But the theory cannot operate so mechanically in practice. As the Supreme Court has recognized, the plaintiff must establish substantial adverse impact, not just any difference in treatment, however slight. Proof of substantial adverse impact requires more than statistically significant evidence because such evidence means only that an apparent difference—for instance, in pass rates of blacks and whites—was not the result of chance. The difference may still be so small that it is not practically significant from an economic, 

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111 See EEOC v. Rath Packing Co., 787 F.2d 318, 328, 332-33 (8th Cir.) (95% of defendant's employees were men), cert. denied, 107 S. Ct. 307 (1986); Lewis v. Bloomsburg Mills, Inc., 773 F.2d 561, 568-72 (4th Cir. 1985) (hiring rate of black women far below their representation in labor market); Caviale v. Wisconsin Dep't of Health & Social Servs., 744 F.2d 1289, 1291, 1293-95 (7th Cir. 1984) (less than 2% of executives with disputed qualification were women); EEOC v. St. Louis-S.F. Ry., 743 F.2d 739, 742-43 (10th Cir. 1984) (height requirement excluded a majority of women but only a small percentage of men); Carpenter v. Stephen F. Austin State Univ., 706 F.2d 608, 622 (5th Cir. 1983) (47% of whites, but only 25% of blacks, satisfied high school diploma requirement and 80% of positions requiring a high school diploma were held by whites); Liberles v. County of Cook, 709 F.2d 1122, 1127-33 (7th Cir. 1983) (83% of lower paid Case Aides were black and 81% of higher paid Caseworker I's were white); Jackson v. Seaboard Coast Line R.R., 678 F.2d 992, 997-98, 1015-17 (11th Cir. 1982) (all carman helpers were black; carmen generally were white).


managerial, or legal point of view. Although the Uniform Guidelines do not require statistical significance, they do require proof that the pass rate of the least successful group is less than four-fifths of the pass rate of the most successful group. But even proof of practically significant adverse impact should not always shift the same burden to the defendant. Tests, qualifications, and selection procedures with little adverse impact are likely neither to serve as pretexts for discrimination nor to deny equality of opportunity. Employment practices with great adverse impact are likely to do both.

A sliding scale of business justification also allows defendants greater leeway in validating tests with little adverse impact. In particular, defendants should be allowed to rely on content validation to justify such tests, following the trend set by the Uniform Guidelines and the decisions interpreting them. The Uniform Guidelines limit content validation to evaluations of concrete behavior actually performed on the job, in order to distinguish it from construct validation, in which a test is validated by showing first that it measures some abstract ability (intelligence is the notorious example) and then by establishing that this abstract ability is correlated with good performance on the job (ideally by statistical evidence). The guidelines are rightly suspicious of construct validation, or more precisely, of the constructs that have been proposed for validation. The misuse of intelligence tests figured prominently in Griggs and other landmark cases using the theory of disparate impact. This suspicion, however, does not justify a completely behaviorist approach to content validation. Most jobs of any complexity at all, whether lower level or upper level, cannot be broken down into a series of physical movements. The Uniform Guide-


116 See id. § 1607.14(D).


118 See Lerner, supra note 79, at 282-91. The distinction between content and construct validation has been pointedly criticized on similar grounds by a testing expert. See Landy, Stamp Collecting Versus Science: Validation as Hypothesis Testing, 41 Am. Psychologist 1183, 1189 (1986).
lines recognize this fact by allowing content validation of "knowledges, skills, or abilities," but only if they can be operationally defined as "that body of learned information which is used in and is a necessary prerequisite for observable aspects of work behavior of the job."119

Instead of narrowing the range of content validation, it would be better to recognize that it is essentially a judgmental rather than a quantifiable method of validation120 and to establish safeguards against its abuse. In particular, the method should still require a thorough analysis of the jobs for which a test is used and the participation of experts in constructing and validating the test.121 The Uniform Guidelines should not be interpreted to require strict conformity to an ideal, but to require, to the extent possible, a representative sample of behavior on the job and of the knowledge, skill, and ability necessary to perform it. To avoid the pitfalls of construct validation, these aspects of the job must be defined as specifically as possible and their connection to good performance of the job must be established by specific evidence, not just the conclusory opinions of the defendant's managers and experts. So, for instance, in Washington v. Davis, if the defendants had submitted

119 See Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.14(C)(1), (4) (1987). For definitions of "ability," "observable," and "skill," see id. § 1607.16(A), (O), (T). The Division of Industrial-Organizational Psychology of the American Psychological Association has taken a slightly more lenient position, allowing content validation of a job content domain "defined principally in terms of activities or consequences of activities which can either be observed or be reported by the job incumbent." Principles, supra note 93, at 10.

120 See Principles, supra note 93, at 9.


evidence of the need for police officers to possess the forms of verbal ability which the test measured in that case, such evidence would have furnished good grounds for finding the test to be content valid. As it was, the Court relied on a questionable mixture of criterion validation attempted by the defendants and its own commonsense version of validation. A partial relaxation of the requirements of content validation makes more sense than interpreting the Uniform Guidelines to impose impossibly strict standards of validation and then abandoning them on an ad hoc basis, a process that often seems to have resulted in the approval of casual and deeply flawed attempts at validation.

Just as a sliding scale makes employment practices with little adverse impact easier to justify, it should also make those with large adverse impact harder to justify. A nearly complete exclusion of blacks or women should result in a very heavy burden of justification. If the defendant cannot validate a test according to the Uniform Guidelines, it should be required to show that there are no available alternatives that can be validated or that have less adverse impact, short of some form of preferential treatment.

Instead of following this approach, the Supreme Court and the Uniform Guidelines have taken positions at opposite extremes on the issue of alternative selection procedures. The Supreme Court has suggested that the plaintiff has the burden of proof on that issue. If the defendant carries its burden of justifying an employment practice with adverse impact, the burden shifts back to the plaintiff to prove pretext. In practice, however, the plaintiff almost never carries this burden. The Uniform Guidelines put the burden of proving the existence of alternatives on the defendant as an addition to its burden of business justification. This addition to the defendant’s burden of proof makes sense only on the assumption that the theory of disparate impact is designed principally to discourage employment practices with adverse impact. Although this assumption is elsewhere endorsed by the Uni-

122 See Washington, 426 U.S. at 249-52 & n.17; id. at 263-70 (Brennan, J., dissenting).
125 See Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.3(B) (1987). Only the Eighth Circuit appears to follow the Uniform Guidelines on this point. See supra note 96.
form Guidelines,\textsuperscript{126} it is inconsistent with the anti-quota provisions of section 703(j).\textsuperscript{127}

The issue of alternatives, however, can be used to moderate the defendant's burden of justification by framing it as one way to satisfy the burden instead of as an addition to it.\textsuperscript{128} If the defendant really has no alternative with less adverse impact, or with a better justification, then it has established that the disputed employment practice is practically necessary, even if it is not theoretically ideal. Conversely, if the defendant has not considered an alternative selection procedure with obviously greater validity, then it has undermined the procedure that it did choose. For instance, in Dothard \textit{v. Rawlinson},\textsuperscript{129} the Supreme Court rejected an attempt to validate height and weight requirements for prison guards on the ground that they were correlated with strength. It did so partly because strength could be tested directly.\textsuperscript{130}

The need to consider feasible alternatives becomes all the more urgent in the typical case in which the plaintiff proves adverse impact but that impact is neither clearly overwhelming nor clearly insignificant. In these cases, the risk of pretextual discrimination must be defined more precisely than in cases at the extremes. The risk is that the employer seeks to satisfy tastes for discrimination, either its own or those of its employees, customers, or suppliers, or to exclude groups whose qualifications it cannot accurately evaluate.\textsuperscript{131} Evaluation of this risk must take into account the defendant who seeks to exploit the adverse impact of the disputed employment practice. This shift, to suspicion of the defendant's motives, corresponds exactly to the shift in the burden of persuasion after the plaintiff has proved adverse impact. This suspicion can be dispelled only by objective evidence of business justification, including the availability of alternative procedures. If the defendant could have, but did not, use such alternatives, then it is more likely

\textsuperscript{126} See id. §§ 1607.4(E), .13, .17. The EEOC has also promulgated Guidelines on Affirmative Action. See id. §§ 1608.1-.12.
\textsuperscript{127} See supra text accompanying note 67.
\textsuperscript{128} See Lamber, Alternatives to Challenged Employee Selection Criteria: The Significance of Nonstatistical Evidence in Disparate Impact Cases Under Title VII, 1985 Wis. L. Rev. 1, 34-59 (discussing possible uses of evidence of alternatives).
\textsuperscript{129} 433 U.S. 321 (1977).
\textsuperscript{130} See id. at 331-32.
\textsuperscript{131} See supra text accompanying notes 58-59.
to have exploited the benefits of adverse impact. Conversely, if there are no alternatives that are more justifiable or that have less adverse impact, the defendant's actions are not suspect at all, but necessary for the operation of its business. This explains the deference accorded to selection procedures for positions affecting public safety, as in New York City Transit Authority v. Beazer, and for academic positions in colleges and universities. No alternatives to the procedures in dispute appear to be available. It would be better, however, to address this question directly, rather than to defer to the self-interested judgment of the defendant and its officials.

Civil service requirements stand especially in need of objective evaluation in terms of feasible alternatives. Civil service tests are the employment practices most frequently attacked under the theory of disparate impact, in part because of the success of the theory in causing private employers to abandon objective tests and qualifications. The existence, but not the content, of civil service requirements is generally outside the immediate control of the public employers who are subject to them. Historically, civil service laws were enacted to limit political patronage, although they might well be maintained to preserve the special opportunities of present employees or of applicants acceptable to the currently employed group. For instance, height and weight requirements and tests of physical ability have excluded women from male domi-

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nated occupations, such as police work or firefighting. Consequently, these requirements and tests are subject to stricter standards of business justification than other civil service standards. These other standards must be evaluated primarily by reference to the available alternatives, especially modification or reformulation of a test or the weight that is given to it. As the Second Circuit has emphasized in adopting a sliding scale of its own, the degree of business justification should vary inversely with the care that went into preparing the test. The primary alternative to invalid civil service tests is better prepared tests, although not necessarily tests that conform to every requirement of the Uniform Guidelines.

On this issue, as on others, the Uniform Guidelines must be interpreted in light of the dominant purpose of the theory of disparate impact: to prevent pretextual discrimination. This purpose does not require defendants to meet scientific standards of validation. It is better fulfilled by requiring them to meet a moderate and flexible burden of justification that depends upon the degree of adverse impact established by the plaintiff. Under this interpretation, the theory of disparate impact still stands as a safeguard against pretextual discrimination because it requires defendants to submit objective evidence of business justification. It gives effect to the Uniform Guidelines insofar as they authorize content validation. It remains, however, a legitimate instance of federal common law because it respects the prohibition in section 703(j) against required preferences.

III. Applications

Clarifying the defendant's burden of justification would have advantages beyond simplifying and moderating this element of the defendant's case. Defendants now try to avoid the burden of justification by discrediting the plaintiff's statistical evidence of ad-

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verse impact, a tactic that has spread from claims of disparate impact to claims of disparate treatment. Instead of exaggerating the natural tendency of the adversary system to generate ever more sophisticated forms of evidence, it would be better to establish a modest threshold for the plaintiff's prima facie case that emphasizes the practical significance of the evidence of adverse impact. A simplified burden of justification would also partially explain the troublesome holding in Connecticut v. Teal rejecting the "bottom line" defense to claims of adverse impact. In addition, it would reduce the trend—already apparent in some circuits—toward limiting the scope of the theory only to objective employment practices. If defendants had some realistic prospect of justifying subjective selection procedures with adverse impact, there would be no need to force plaintiffs to prove intentional discrimination.

A. Proof of Adverse Impact

Proof of adverse impact began as a simple matter of finding any statistics that tended to show disproportionate exclusion of a group by the employment practice in dispute. In Griggs, for instance, the Supreme Court relied on statistical evidence that only 12% of black males, but 34% of white males, throughout North Carolina held high school diplomas and on a finding by the EEOC in an unrelated case that only 6% of blacks, but 58% of whites, had passed the disputed tests. The Court did not determine whether the statewide labor market was similar to the labor market for the single power plant whose hiring practices were challenged; it did not require evidence of the proportion of black and white applicants who had a high school diploma or who passed the disputed tests; it did not inquire into the statistical or practical significance of any of the findings that it relied upon. The Court relied so uncritically on the available statistical evidence because other evidence in the record established that the employer had almost completely excluded blacks from all but the lowest positions in its plant. It was not until five months after the charge was filed in Griggs that the employer promoted even a single black em-

137 See id. at 456.
ployee out of its lowest department. As the Court remarked in a later case, quoting the United States Court of Appeals for the Fifth Circuit, "the inexorable zero" of minority representation constitutes compelling evidence of discrimination. In hindsight, Griggs appears to be a case of obvious pretextual discrimination, which could equally well have been the subject of a claim of disparate treatment.

When employers and unions abandoned such obvious pretexts for discrimination, plaintiffs faced greater difficulty in finding compelling evidence of adverse impact. The theory of disparate impact became, in part, a victim of its own success. Defendants also came to appreciate the subtlety and importance of statistical evidence. They recognized that different definitions of the relevant labor market, like different definitions of the product market in antitrust law, resulted in different conclusions about the effect of disputed employment practices. Should the labor market be defined, for instance, to include only skilled workers, or also unskilled workers? How far should it extend geographically from the employer's immediate locale—to the state, the region, or the nation? Superimposed on these questions about the abstract definition of the labor market were practical questions about the best evidence of the composition of the labor market: general population figures for the surrounding metropolitan area, census data on occupations, or applicant-flow data from the employer's own files. Because the burden of justifying employment practices with adverse impact was so heavy, defendants soon realized that the whole case was likely to turn on the issue of adverse impact. They consequently argued, with some success, that plaintiffs should carry a heavier burden of proving adverse impact. As the issue of adverse impact became crucial, it became just as technical as the defense of business justification.

The decision that marked the culmination of this trend was Hazelwood School District v. United States, a case brought by the Attorney General alleging a pattern or practice of discrimination in

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139 See id. at 427 & n.2.
hiring by a school district in the suburbs of St. Louis. Although it concerned a claim of disparate treatment, Hazelwood also bears directly upon claims of disparate impact because proof of adverse impact differs from proof of intentional discrimination only in requiring less evidence of a statistical disparity. Hazelwood also contains the Supreme Court's most extensive discussion of statistical evidence of employment discrimination. The Court addressed almost all of the questions raised by such evidence, although it left most of them to be resolved on the facts of each case: whether the labor market should be limited to persons with special qualifications for the job, whether applicant-flow statistics were superior to census figures, what time period should be covered by statistical evidence, what measures of statistical significance were appropriate. In its only clear holding in the case, the Court held that the labor market was confined to teachers who possessed state teaching certificates, an issue not really contested by the parties. It also generally held that in the absence of gross disparities in the hiring of blacks and whites, the court should use some measure of statistical significance to evaluate numerical data. The Court left the remaining issues to be resolved on remand. In general, the Court followed the approach articulated in another of its decisions,

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142 At the time, there were constitutional doubts about the application of the theory of disparate impact to state and local governments. See id. at 306 n.12. These doubts arose from National League of Cities v. Usery, 426 U.S. 833 (1976), which was read narrowly in EEOC v. Wyoming, 460 U.S. 226 (1983), and overruled in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).


144 See Hazelwood, 433 U.S. at 308.

145 See id. at 308-12 & nn.13-20.

146 See id. at 313.
that statistics "come in infinite variety and, like any other kind of evidence, they may be rebutted."\textsuperscript{147}

Some lower federal courts have neglected this cautionary statement and formulated relatively rigid rules for the use of statistical evidence. The most notorious of these is the test for statistical significance that was used in \textit{Hazelwood} but not endorsed as an absolute rule binding on the lower courts.\textsuperscript{148} This test—technically, a two-tailed test for the probability of Type I errors within two or three standard deviations according to the binomial distribution—may well have been inappropriate on the facts of \textit{Hazelwood} itself.\textsuperscript{149} It certainly does not justify the general rule that the probability of such errors must remain below some specific threshold, as some decisions on claims of disparate treatment have said.\textsuperscript{150} Any general rule must be qualified to take account of situations in which it does not apply. For instance, the rule of the Uniform Guidelines that the pass rate of any group must be four-fifths of the pass rate of the most successful group does not apply if applicant-flow statistics are not representative of the labor market or if the number of applicants is too small to provide statistically significant results.\textsuperscript{151} Other attempts to formulate fixed rules have also met with limited success: for instance, rules about the circumstances in which the plaintiff must produce evidence of a labor market limited to skilled workers.\textsuperscript{152} Either such rules are so broad that they are open to criticism by economic and statistical experts, or they are so narrow that they apply only to the few cases in which there is a genuine dispute over the appropriate form of statistical proof.

The absence of fixed legal rules for proof of adverse impact allows a wide range of sophisticated and expensive expert testimony

\textsuperscript{147} International Bhd. of Teamsters v. United States, 431 U.S. 324, 340 (1977).

\textsuperscript{148} See \textit{Hazelwood}, 433 U.S. at 311 n.17.


\textsuperscript{151} See Uniform Guidelines for Employee Selection Procedures, 29 C.F.R. § 1607.4(D) (1987); see also Meier, Sacks & Zabell, supra note 114, at 143 & n.25, 166-69 (defending the 80% rule).

\textsuperscript{152} See Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 483-84 (9th Cir. 1983); EEOC v. Radiator Specialty Co., 610 F.2d 178, 184-86 (4th Cir. 1979).
on this issue. Experts retained by both plaintiffs and defendants have now become virtually indispensable in the litigation of class actions and pattern-or-practice actions that present substantial claims of employment discrimination. Plaintiffs need experts to meet the requirements of Hazelwood and, unless the plaintiff's statistical evidence is plainly inadequate, defendants need experts to rebut the testimony of the plaintiff's experts.

As with proof of validity, it is impossible to return to a naive approach, exemplified by the use of statistical evidence in Griggs. Instead, expert analysis of statistical evidence must be harnessed to the fundamental purpose of the theory of disparate impact. The theory more effectively prevents pretextual discrimination if it does not require the plaintiff to produce sophisticated evidence of adverse impact in the absence of contrary evidence submitted by the defendant. Statistical evidence of adverse impact should not be held insufficient just because it contains theoretical defects, as the Supreme Court has recently held. Instead, if the plaintiff's evidence yields some reasonable evidence of adverse impact, the defendant should be required to submit an alternative statistical model showing no adverse impact. Such a standard, focused on the practically available means of proving adverse impact, follows Michael Finkelstein's longstanding proposal that statistical evidence generally should be the subject of competing models rather than purely theoretical objections.

Linking the plaintiff's case to the defendant's case would have the added advantage of reemphasizing the practical significance of evidence of adverse impact, an issue that has been eclipsed by technical analysis of statistical significance. Practical significance differs from statistical significance because it does not concern the question of whether an apparent numerical difference really resulted only from chance. Instead, it concerns the question of whether a genuine numerical difference is large enough to make a practical difference in employment decisions. It cannot be analyzed in the abstract, as a matter of simple numerical differences. It must instead be analyzed by reference to the risk of pretextual discrimination, so that a large disparity with a strong justification

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153 See Bazemore v. Friday, 106 S. Ct. 3000, 3009 (1986).
Disparate Impact does not constitute a violation of title VII, whereas a moderate disparity with no justification at all does. The testimony of competing experts could then be put in proper perspective, not as an arcane dispute about facts of which the employer or union was probably unaware, but as the best way to assess the actual risk of pretextual discrimination.

For example, in Hazelwood, the appropriate definition of the labor market for teachers probably never entered the minds of school officials responsible for hiring, let alone the principals who actually made the hiring decisions after interviewing the candidates. Nevertheless, the low percentage of black teachers hired by the school district might be explained away as the product of since-abandoned past practices, or conversely, condemned as the result of failing to recruit black teachers from nearby inner city schools. In a disparate impact claim based on the facts of Hazelwood, the emphasis would properly be placed on the objective disparities in hiring blacks and whites and on the justification for the school district's hiring practices. These issues should not be analyzed in isolation or as evidence of intentional discrimination, but together as evidence of the risk of pretextual discrimination.

B. The "Bottom Line" Rule

The plaintiff's ability to prove adverse impact depends not only on how the labor market is defined but on how the disputed employment practice is analyzed: according to selection rates for each of several components of the selection process, or according to the overall "bottom line" selection rates of different groups for a particular job. In Connecticut v. Teal, the Supreme Court rejected the "bottom line" rule adopted by the Uniform Guidelines. As it is formulated in the Uniform Guidelines, this rule is subject to exceptions, and it is explicitly endorsed only as a guide to administrative and prosecutorial discretion. The Supreme Court seized on these qualifications in refusing to apply the rule to judicial determinations of adverse impact. In the case before it, the Court held

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155 Both arguments were made in Hazelwood. See Hazelwood, 433 U.S. at 309-12.
158 See Teal, 457 U.S. at 453 n.12.
that a pass-fail test had an adverse impact upon minorities, even though its adverse impact was more than offset by an affirmative action plan that resulted in a higher overall selection rates for minorities than for whites.\textsuperscript{159} The decision was widely regarded as a repudiation of the bottom line rule and, by implication, as a deterrent to adoption of affirmative action plans to offset employment practices with adverse impact.\textsuperscript{160} The Court reasoned that title VII primarily protected the rights of individuals, instead of groups, and consequently that the rights of minority individuals who failed the test were independent of the rights of those who passed the test and benefited from the affirmative action plan.\textsuperscript{161}

The difficulty with this reasoning, as the dissent immediately pointed out,\textsuperscript{162} is that it ignores the group character of claims of disparate impact. An individual plaintiff can recover under the theory of disparate impact only by proving adverse impact upon a group. In \textit{Teal}, the defendants argued only that the plaintiffs had failed to prove adverse impact and hence a violation of title VII, not that the plaintiffs should be denied individual relief if a violation were established. Although the theory of disparate impact appears most commonly in class actions and government pattern-or-practice actions, it can also be used by individual plaintiffs, as it was in \textit{Teal}.

If individual plaintiffs prove that they are the victims of discriminatory employment practices, then they are entitled to relief, regardless of the preferential treatment of other members of the same group. The question in \textit{Teal} was whether

\textsuperscript{159} See id. at 456.


\textsuperscript{161} See \textit{Teal}, 457 U.S. at 453-56.

\textsuperscript{162} See id. at 456-60 (Powell, J., dissenting).

\textsuperscript{163} There were only four plaintiffs who asserted claims under title VII in \textit{Teal}. See id. at 442 & n.2. Other cases have allowed individual plaintiffs to use the theory of disparate impact. See, e.g., Walker v. Jefferson County Home, 726 F.2d 1554, 1557 (11th Cir. 1984); Lasso v. Woodmen of the World Life Ins. Co., 741 F.2d 1241, 1245 (10th Cir. 1984), cert. denied, 471 U.S. 1099 (1985); see also Welch, Superficially Neutral Classifications: Extending Disparate Impact Theory to Individuals, 63 N.C.L. Rev. 849 (1985) (suggesting a new framework for applying the disparate impact theory to individuals).
this prior condition of proving adverse impact, and therefore liability, had been met. This question cannot be answered simply by referring to the individual character of the rights created by the theory of disparate impact. Instead, it concerns the nature of that individual right: whether it is an individual right to be free of selection procedures with components with adverse impact or only a right to be free of selection procedures as a whole with adverse impact. This question can only be answered by reference to the purposes of the theory.

Neither of these purposes supports the decision in *Teal*, at least in any straightforward way. An employer or union engaged in pretextual discrimination would not use both a test with adverse impact and an affirmative action program that entirely compensated for the adverse impact. Employers and unions encouraged by the bottom line rule to adopt affirmative action plans would also provide actual economic equality to members of all groups. The only argument that can be mustered for the decision in *Teal* is that it prevents discrimination against certain subgroups who perform poorly on objective tests or who lack commonly required qualifications. This argument encounters an immediate difficulty, however, in defining the subgroup that suffers adverse impact. It does not define the disadvantaged subgroup according to some criterion independent of the challenged employment practice, such as low income, but by reference to the employment practice itself, such as poor performance on a test. But, of course, according to this definition of the relevant subgroup, every selection device has an adverse impact on all the subgroups—white as well as minority, male as well as female—who fail to meet its standards. Any selection device, by definition, will exclude someone.

Instead of searching for a direct connection between the decision in *Teal* and the purpose of the theory of disparate impact, it might be better to justify it as a constraint on the theory. As a limiting principle, *Teal* serves the salutary purpose of focusing the theory upon preventing pretextual discrimination, instead of encouraging preferential treatment. This rationale for the decision explains the Court’s repeated emphasis upon the individual character of the plaintiffs’ rights because section 703(j) explicitly disavows any concept of group equality as a requirement imposed by title VII.

Ironically, *Teal* reaffirms the prohibition against pretextual discrimination by imposing liability upon employers who have not en-
gaged in any discrimination at all. Even under the decision that most directly interprets section 703(j), *United Steelworkers v. Weber,*\(^{164}\) employers and unions are free to implement affirmative action plans voluntarily, subject only to the fairly loose constraints of remedying traditional forms of segregation and avoiding unnecessary infringement on the interests of white employees. The Court's approval of voluntary affirmative action plans in *Weber* is undercut by its rejection of the bottom line rule in *Teal.* Moreover, as we have seen, the function of focusing the theory upon pretextual discrimination could be better served by reducing the defendant's burden of justification. For that reason, *Teal* might be limited to its facts. The Court may well have regarded the employer's affirmative action plan skeptically because it was put in place over a year after the action was filed and only a month before it was tried.\(^{165}\)

On the other hand, the disruptive effect of the decision should not be exaggerated. As the recent decision in *EEOC v. Sears*\(^{166}\) illustrates, even the best financed plaintiffs are not likely to have much success pursuing claims of disparate impact against employers with vigorous affirmative action plans.\(^{167}\) Either they will decide not to sue because the initially available statistics favor the employer or, if they sue, they probably will lose because their claim must be decided against the background of an affirmative action plan, which also favors the employer. The limited success that plaintiffs have had with claims under *Teal* confirms this conclusion. Generally, there must be some reason to be suspicious of the test or qualification in dispute, either because it has been held illegal in other cases or because it perpetuates the effects of past discrimination.\(^{168}\) These are just the exceptions identified by the Uniform Guidelines.\(^{169}\) The lower federal courts have also interpreted *Teal* narrowly, limiting it to tests and qualifications that screen


\(^{165}\) See *Teal*, 457 U.S. at 444. I am indebted to Julian Cook for this point.

\(^{166}\) 628 F. Supp. 1264 (N.D. Ill. 1986).

\(^{167}\) See id. at 1292-94.

\(^{168}\) See, e.g., Giles v. Ireland, 742 F.2d 1366, 1378-81 (11th Cir. 1984); Wilmore v. City of Wilmington, 669 F.2d 667, 671-72 (3d Cir. 1983).

out applicants entirely, instead of separate factors that enter into a multi-faceted subjective decision.\textsuperscript{170}

\textit{C. Scope of the Theory of Disparate Impact}

The current controversy over the scope of the theory of disparate impact originated in \textit{Pouncy v. Prudential Insurance Co.}\textsuperscript{171} In \textit{Pouncy}, the Fifth Circuit refused to apply the theory of disparate impact, for two different reasons, to subjective employment decisions. The plaintiff in \textit{Pouncy} claimed that his employer discriminated against blacks, relying on evidence that they were concentrated in lower level positions. He alleged that several different employment practices had led to this result, among them, the employer's reliance on subjective performance evaluations and promotion decisions by a predominantly white group of supervisors. The Fifth Circuit first held that the theory of disparate impact was not "the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices."\textsuperscript{172} Or, as the court later said, the plaintiff had failed to show that "the Prudential employment practices that he has identified have caused the racial imbalance in Prudential's work force."\textsuperscript{173} In the course of giving this first reason, the court also introduced a second, controversial reason: that the employment practices identified by the plaintiff were not "facially neutral practices," such as educational requirements and aptitude tests, for which the theory was designed.\textsuperscript{174}

The first, and less controversial, holding in \textit{Pouncy} required the plaintiff to focus on the specific procedures that caused the adverse impact, so that the defendant would not be forced to justify a broad range of employment practices.\textsuperscript{175} This requirement amounts

\textsuperscript{170} See Sengupta v. Morrison-Knudsen Co., 804 F.2d 1072, 1077 (9th Cir. 1986); Carroll v. Sears, Roebuck & Co., 708 F.2d 183, 189 (5th Cir. 1983). Other, more questionable, decisions have refused to apply \textit{Teal} to claims by white males, see, e.g., Livingston v. Roadway Express, Inc., 802 F.2d 1250, 1252-53 (10th Cir. 1986), or to class actions, see, e.g., Coser v. Moore, 587 F. Supp. 572, 588 (E.D.N.Y. 1983), aff'd, 739 F.2d 746 (2d Cir. 1984). For criticism of these limits on \textit{Teal}, see Chamallas, supra note 160, at 357-61.

\textsuperscript{171} 668 F.2d 795 (5th Cir. 1982).

\textsuperscript{172} Id. at 800.

\textsuperscript{173} Id. at 801.

\textsuperscript{174} See id.

\textsuperscript{176} See id. at 800-01. All of the circuits apparently agree with this holding. See, e.g., Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1485 (9th Cir. 1987) (en banc); Rossini v. Ogilvy & Mather, Inc., 798 F.2d 590, 605 (2d Cir. 1986); Griffin v. Board of Regents, 795
to more than the formality of notifying the defendant of the selection procedures in dispute. Most plaintiffs could do this simply as a matter of liberal pleading under the Federal Rules of Civil Procedure,\(^7\) as indeed, the plaintiff in *Pouncy* did.\(^7\) Framing the requirement in terms of causation transforms it from a formality of pleading to a substantive requirement of proof. Unfortunately, doing so also raises some unwelcome analogies to the difficult issue of proximate cause in tort law, which has already confused the case law on individual claims of disparate treatment.\(^7\)

These confusions can be avoided by interpreting causation consistently with the purpose of giving the defendant notice of the employment practices that must be justified. So interpreted, proof of causation would usually require the plaintiff to establish some proof of connection between different practices with an aggregate effect: for instance, distinct qualifications jointly required of all applicants. As applied to such composite selection procedures, this approach would require the plaintiff to demonstrate the adverse impact of each component. Of course, in such cases, the defendant would not be bound by the plaintiff's evidence of causation, but could introduce its own evidence exonerating some employment practices from any role in causing adverse impact.

A few circuits have followed the second holding in *Pouncy* and refused to apply the theory of disparate impact to subjective employment decisions.\(^7\) However, there are conflicting decisions.

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\(^7\) See Fed. R. Civ. P. 8. The plaintiff's attorney must certify that "to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact." Fed. R. Civ. P. 11. The plaintiff's evidence of adverse impact should be sufficient to satisfy this requirement as to any plausibly related selection procedure.

\(^7\) See *Pouncy*, 668 F.2d at 799.


\(^7\) In addition to the Fifth Circuit, the Fourth and Eighth Circuits have also taken this position. See Pope v. City of Hickory, 679 F.2d 20, 22 (4th Cir. 1982); Talley v. United States Postal Serv., 720 F.2d 505, 506-07 (8th Cir. 1983), cert. denied, 466 U.S. 952 (1984). For a defense of these decisions, see Note, Evaluation of Subjective Selection Systems in Title VII Employment Discrimination Cases: A Misuse of Disparate Impact Analysis, 7 Cardozo L. Rev. 549 (1986).
within most of these circuits, including the Fifth Circuit itself. At least seven circuits, on the other hand, have continued to apply the theory to subjective employment decisions. This is also the position of the Uniform Guidelines, which broadly define "selection procedure" as "[a]ny measure, combination of measures, or procedure used as a basis for any employment decisions," including "informal or casual interviews and unscored application forms." The Supreme Court has also stated—although only in a footnote—that the theory of disparate impact and the theory of disparate treatment apply equally well to any employment practice. Elsewhere it has stated, somewhat inconsistently, that claims of disparate impact should be brought under section 703(a)(2).

The majority of circuits refuse to limit the scope of the theory of disparate impact. They do so because of the risk that subjective decisions might conceal pretextual discrimination, a risk first recognized, ironically, by the Fifth Circuit. Evaluation of workers and applicants without specific standards provides a ready means for discriminatory employment decisions, particularly if they are made by a staff composed predominantly of white males. A subjective decision, ostensibly based on all the relevant factors, can easily conceal silent, unacknowledged, or even unrecognized reliance

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181 These are the United States Courts of Appeals for the Second, Sixth, Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits. See Zahorik v. Cornell Univ., 729 F.2d 85, 95-96 (2d Cir. 1984); Rowe v. Cleveland Pneumatic Co., 690 F.2d 88, 93 n.10 (6th Cir. 1982); Regner v. City of Chicago, 789 F.2d 534, 539 (7th Cir. 1986); Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1480-86 (9th Cir. 1987) (en banc); Hawkins v. Bounds, 752 F.2d 500, 503 (10th Cir. 1985); Griffin v. Carlin, 755 F.2d 1516, 1523-25 (11th Cir. 1985); Segar v. Smith, 738 F.2d 1249, 1288 n.34 (D.C. Cir. 1984), cert. denied sub nom. Meese v. Segar, 471 U.S. 1115 (1985). The Third Circuit may also agree with them. See Wilmore v. City of Wilmington, 699 F.2d 667, 671-72 (3d Cir. 1983).


183 See supra note 20 and accompanying text.

upon a prohibited factor such as race or sex. This is not to say that subjective employment decisions are necessarily suspect, but only that they should be examined under the same theories of liability as other employment decisions. To immunize subjective employment practices from claims of disparate impact has the perverse effect of increasing the risk of pretextual discrimination by encouraging employers to replace objective tests and qualifications, which must be validated after proof of adverse impact, with subjective procedures, which need not.

The countervailing reluctance to apply the theory of disparate impact to subjective selection procedures arises, as do many of the problems with the theory of disparate impact, from the defendant's difficulty in carrying its burden of justification. If defendants were forced to rely upon criterion validation, as an earlier version of the Uniform Guidelines strongly implied, they would frequently confront a nearly inescapable circularity. The only available criteria for good performance on these jobs are usually themselves subjective evaluations, normally provided by supervisors. Consequently, criterion validation would only establish a correlation between two sets of subjective evaluations: those constituting the selection procedure in dispute and those constituting the criteria according to which it is validated. The defendant would still have to establish that the subjective criteria used in the validation study were a better means of evaluating employees than the subjective selection procedure in dispute. Otherwise, he would have succeeded only in justifying one questionable form of subjective evaluation by appealing to another. Content validation appears to be a more promising alternative, but only if the restrictions imposed by the Uniform Guidelines are relaxed. This form of validation is restricted to observable aspects of the job and to knowledge, skill, and ability readily reflected in observable behavior. Taken literally, the Uniform Guidelines allow content validation of a complex job only through procedures that allow the applicant a probationary period on the job. Many subjective selection procedures—for


187 See supra notes 116-19 and accompanying text.
instance, interviews—do not fit this restrictive pattern, and many complex jobs involve costs and risks that do not permit probationary evaluation of every applicant for employment.

Instead of forcing subjective selection procedures to conform to a scientific model of validation, it would be better to recognize the judgmental nature of content validation and to address directly the defects of subjective procedures that create a risk of pretextual discrimination. A strict insistence on highly technical standards of validation only perpetuates the tendency of courts to avoid placing such a heavy burden of justification upon defendants in the first place, a tendency exemplified by the holding in Pouncy narrowing the scope of the theory of disparate impact. As the courts have recognized, subjective decisions create a substantial risk of pretextual discrimination only in the absence of standards to guide the discretion of those who make the evaluation. These standards, in turn, must be based on an analysis of the jobs to which they apply. They will, of course, be more or less specific depending on the nature of the job. As with other selection procedures, the defendant’s burden of justification depends upon the alternative selection procedures available, as well as the degree of adverse impact proved by the plaintiff. The focus should not be on the kind of selection procedure used by the defendant—whether it is subjective or objective or whether it is susceptible to scientific validation—but on the risk that it creates of pretextual discrimination.

Recognizing the limits on validation of subjective selection procedures also clarifies the question, recently debated, over the differential application of title VII to higher level and lower level jobs. Higher level jobs, of course, are usually complex jobs, but as the cases concerning policemen illustrate, all but the most routine jobs are likely to be complex. Complexity, not status, should

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188 The cases that have found subjective procedures to be legal have emphasized the presence of guidelines to prevent pretextual discrimination. See cases cited supra note 186. Cases that have found such procedures suspect or even illegal have likewise emphasized the absence of guidelines and ordered them as a remedy. See, e.g., Williams v. Colorado Springs, Colo. School Dist. No. 11, 641 F.2d 835, 842 (10th Cir. 1981); James v. Stockham Valves & Fittings Co., 559 F.2d 310, 345, 355 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978).


190 See Lerner, supra note 79, at 282-85.
determine the appropriate standards for validation. Jobs consisting of a variety of duties, with few simple measures of successful performance, generally require selection procedures that cannot be scientifically validated, such as subjective evaluations and objective qualifications of education and experience. Title VII does not put employers to the choice of adopting scientifically valid selection procedures or eliminating adverse impact through affirmative action. It does not follow, however, that selection procedures for complex jobs should be simply excluded from the scope of the theory of disparate impact or that judges should defer to the self-interested judgment of the defendant or its officials in deciding whether such procedures are justified. The risk of pretextual discrimination should not be ignored, but confronted. The defendant should be required to present objective evidence, independent of its officials' state of mind, that the selection device is among the best available and that objective guidelines for subjective decisions reduce the risk of pretextual discrimination.

Restrictions on the scope of the theory of disparate impact, if they are justifiable at all, should have a firm basis in the statutory language of title VII. For instance, the seniority clause of section 703(h) has received exactly this interpretation from the Supreme Court. In *International Brotherhood of Teamsters v. United States,* the Court held that this clause excludes seniority systems from the scope of the theory of disparate impact. Only statutory exceptions for specific employment practices justify general restrictions on the scope of the theory. The problems with the theory, particularly with the defendant's burden of justification, cannot be evaded by limiting its scope.

IV. CONCLUSION

The theory of disparate impact, I have argued, is an example of federal common law. Its basis is not to be found in any provision

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193 See id. at 349-54. The equal pay clause of § 703(h) has also been suggested as a provision that excludes from the theory's scope claims of sexual discrimination in compensation. See County of Washington v. Gunther, 452 U.S. 161, 168-71 (1981); American Fed'n of State, County & Mun. Employees v. Washington, 770 F.2d 1401, 1405-07 (9th Cir. 1985); Spaulding v. University of Wash., 740 F.2d 686, 708 (9th Cir.), cert. denied, 469 U.S. 1036 (1984).
explicitly enacting it into law or in any passage in the legislative history. Instead, it rests on the practical need, recognized by Congress in the central provisions of title VII and implemented by the Supreme Court in *Griggs*, to prevent pretextual discrimination by institutional defendants. It has the same goal as the theory of disparate treatment, but it dispenses with the need for direct evidence on the difficult conceptual and practical issue of intentional discrimination: whether the defendant took account of race, national origin, sex, or religion in making a disputed employment decision. Although the theory of disparate impact is a creation of the federal courts, it remains subject to the restrictions imposed by Congress, chiefly the provision in section 703(j) that nothing in title VII shall be interpreted to require affirmative action. This prohibition imposes significant restraints on the justification required of the defendant after the plaintiff has proved adverse impact. As defined by the Uniform Guidelines on Employee Selection Procedures, this burden is often too heavy. It has consequently received a more lenient interpretation by many, but hardly all, of the judicial decisions applying the theory of disparate impact. I have argued that a lenient interpretation makes more sense of the statute and the cases than a strict interpretation and that a lenient interpretation also contributes to the resolution of several other problems that have plagued the theory. I do not pretend to have solved these problems in all their detail. This would require a treatise, not an article, and one that would soon go out of date. I have argued only that the theory of disparate impact should develop on a firmer, or at least clearer, foundation.

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