

Disparate Impact, Discrimination, and the
Essentially Contested Concept of Equality

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“The line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court’s opinion might assume.”¹

In this single sentence, Justice Stevens suggests all the problems with the uneasy distinction between disparate impact and discriminatory purpose under the Constitution and the civil rights laws. Both theories of liability rely upon the same evidence. Yet each theory purports to establish unique standards of liability, disparate impact more favorably for plaintiffs and discriminatory purpose more favorably for defendants. This observation, offered almost in passing by Justice Stevens, in fact raises profound issues about the goals and methods of civil rights law: what it seeks to achieve and how it goes about achieving it. The uncertain fault line between disparate impact and discriminatory purpose cuts through almost all the major issues in this field, with implications for subjects as different as affirmative action, racist and sexist stereotyping, and the distinctive features of age discrimination, an issue most recently addressed by Justice Stevens in *Smith v. City of Jackson*.²

The distinction between disparate impact and discriminatory intent raises so many issues because it marks the boundary between consensus and controversy over the concept of equality in civil rights law. This is the point at which litigation, argument, and judicial decisions depart from widely shared understandings about what laws against discrimination prohibit and turn to intensely fought disputes over what those laws seek to achieve. Adapting terminology from the philosophical literature,³ at this point the overlapping consensus on discrimination gives way to the essentially contested concept of equality. The theory of disparate impact thus plays two very different roles in civil rights law. At the concrete level of administering the law, it allocates the burden of proof between plaintiffs and defendants. At the abstract level of defining the ultimate aims of the law, it structures debates over equality.

This article discusses these different dimensions of the theory of disparate impact, beginning in Part

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¹ *Washington v. Davis*, 426 U.S. 229, 254 (1976) (Stevens, J., concurring).

² *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005).

³ John Rawls, *The Idea of an Overlapping Consensus*, in *Collected Papers* 421 (Samuel Freeman ed., 1999); W.B. Gallie, *Essentially Contested Concepts*, 56 *Proceedings of the Aristotelian Society* 167 (1956).

I with a survey of the areas in which claims of disparate impact appear and the efforts to distinguish such claims from those of intentional discrimination. Part II traces the vicissitudes in the theory of disparate impact back to the breakdown in consensus over what constitutes prohibited discrimination and to arguments over the inherently contested concept of equality. Part III returns to an examination of legal doctrine and the most recent decision under the theory of disparate impact, Justice Stevens' opinion in *Smith v. City of Jackson*, recognizing a version of the theory under the Age Discrimination in Employment Act.

I. Variety and Ambiguity in the Theory of Disparate Impact

The theory of disparate impact acquired its first firm foothold in civil rights law in *Griggs v. Duke Power Co.*,⁴ the leading case recognizing the theory as a basis for liability under Title VII of the Civil Rights Act of 1964.⁵ From there, the theory fitfully spread to other statutory claims, sometimes through judicial decisions, at other times by statute. As *Washington v. Davis* famously (or for some, infamously) held,⁶ the theory does not apply to claims of discrimination under the Fifth or Fourteenth Amendments which, instead, require proof of discriminatory intent. A strictly chronological account of these developments would reveal a very checkered history, with decisions to adopt or reject liability for disparate impact soon followed by qualifications and limitations. The unifying theme in all these developments is that the theory of disparate raises not one issue, but two: first, whether to recognize liability on this basis, effectively shifting part of the plaintiff's burden of proving discrimination onto the defendant to prove absence of discrimination; and second, how much of this burden is shifted to the defendant and in what terms. Both inquiries depend heavily on context so that, for instance, the labor market analysis appropriate for cases under Title VII has no relevance whatsoever to the analysis of voting patterns for cases under the Voting Rights Act. The recent decision in *Smith v. City of Jackson*, recognizing a limited form of liability for disparate impact under the Age Discrimination in Employment Act, perfectly illustrates these points. To appreciate the significance of this decision, it is first necessary to survey the overall development of the doctrine governing claims of disparate impact.

Griggs, as mentioned earlier, is the starting point for this development. It was a purely statutory case, concerned with a private employer and claims only under Title VII. Constitutional issues figured, at most, only tangentially in the case, which concerned testing and education requirements for higher level jobs at a utility plant in North Carolina.⁷ The landmark holding in the case was that "practices, procedures, or

⁴ 401 U.S. 424 (1971).

⁵ Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964), codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (2005).

⁶ 426 U.S. 229 (1976).

⁷ *Griggs*, 401 U.S. at 425-26.

tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.’⁸ If the opinion clearly relieved the plaintiff of the burden of proving intentional discrimination, it left open exactly what the plaintiff had to prove to establish disparate impact or what the defendant had to prove to justify a practice with such impact. The plaintiff’s burden was met by only the most cursory statistical evidence and the defendant’s burden was alternatively framed in a variety of different ways: as a showing of “business necessity,” or that the disputed practice was “related to job performance,” or that it had “a demonstrable relationship to successful performance,” or that it had “a manifest relationship to the employment in question.”⁹ These ambiguities have determined the course of subsequent interpretations of the theory of disparate impact under Title VII, even if they have not been fully resolved to this day.

Griggs was soon followed by decisions that expanded liability for disparate impact, mainly by emphasizing phrases such as “business necessity” or “manifest relationship to the employment in question,” which apparently placed a heavier burden of proof upon the defendant. This stage in the development of Title VII quickly reached its high-water mark in *Albemarle Paper Co. v. Moody*,¹⁰ a decision followed by the issuance of the Uniform Guidelines on Employee Selection Procedures.¹¹ These guidelines consisted of regulations issued by the Equal Employment Opportunity Commission (EEOC) and the other federal agencies charged with enforcing Title VII. Although the guidelines explicitly governed only the exercise of enforcement discretion, they were given “great deference” by the courts, following similar deference given to earlier versions of these regulations by the EEOC in *Griggs* and *Albemarle Paper*.¹² Like those decisions, the guidelines concentrated on the what the defendant had to show to justify a practice with disparate impact, rather than what the plaintiff had to show in order to prove disparate impact in the first place. The latter issue was left mainly as proof of something less than intentional discrimination. Thus the early trend under the theory of disparate impact was to enhance the defendant’s burden of proof and minimize the plaintiff’s, resulting in decisions that expanded the scope and significance of the theory.

This expansion was halted by the decision in *Washington v. Davis*, which, in addition to its holding that the Constitution prohibited only intentional discrimination, imposed further restrictions on claims for

⁸ *Id.* at 430.

⁹ *Id.* at 431-32.

¹⁰ 422 U.S. 405 (1975).

¹¹ Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. pt. 1607 (2005).

¹² *Griggs*, 401 U.S. at 433-34; *Albemarle Paper*, 422 U.S. at 425-36. Later decisions, however, took a much less deferential approach to the guidelines. *Washington v. Davis*, 426 U.S. 229, 250-52 (1976); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 & n.31 (1979); *Connecticut v. Teal*, 457 U.S. 440 (1982).

disparate impact under a statute, applicable only to the District of Columbia, that was assumed to incorporate the same standards for liability as Title VII.¹³ Other decisions also imposed indirect restraints on claims of disparate impact under Title VII, by tightening the limits on the use of statistical evidence to prove discrimination¹⁴ and by strictly interpreting the requirements for certification of class actions, which served as the procedural vehicle for bringing most claims of disparate impact.¹⁵ One decision, concerned with discrimination against methadone users, also commented on the insufficiency of any claim of disparate impact.¹⁶ In other respects, however, the theory of disparate impact was modestly expanded, to claims of sex discrimination¹⁷ and by giving the plaintiff the option of attacking a defendant's employment practices one by one, rather than in their overall effect.¹⁸ A further expansion, or clarification of the theory, occurred in a decision that recognized that it applied to subjective hiring and promotion decisions as well as objective tests and educational requirements, such as those at issue in *Griggs*.¹⁹

This last decision, however, signaled a much more restrictive turn in interpretation of Title VII. In that case, the Court divided evenly over a significant retrenchment in the theory, so that no binding precedent was created, but the view adopted by a plurality of four became the opinion of the Court in *Wards Cove Packing v. Atonio*.²⁰ That decision increased the plaintiff's burden of proof, by requiring identification of a specific employment practice with disparate impact and placing the burden of persuasion only upon the plaintiff. By contrast, the defendant's burden of proof was greatly reduced, only to a burden of production and only to a justification that survived "a reasoned review" by the court.²¹

The twists and turns of the case law under Title VII could be explored in further detail, but Congress so far has had the last word on the theory of disparate impact. The Civil Rights Act of 1991

¹³ *Washington v. Davis* also involved a claim under section 1981. Such claims were later held, however, to require proof of intentional discrimination. See text accompanying notes ____-____ infra.

¹⁴ *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977).

¹⁵ *General Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982); *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405-06 (1977).

¹⁶ *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 593-94 (1979).

¹⁷ *Dothard v. Rawlinson*, 433 U.S. 321, 332 (1977).

¹⁸ *Connecticut v. Teal*, 457 U.S. 440, 453-54 (1982).

¹⁹ *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988).

²⁰ 490 U.S. 642 (1989).

²¹ *Id.* at 659.

superseded, and to a large extent, overruled *Wards Cove*. The holdings on the defendant's burden of proof were specifically rejected and only the requirement that the plaintiff identify a specific employment practice, when it was possible to do so, was endorsed by Congress.²² Title VII now provides that the defendant has both the burden of production and persuasion to establish that an employment practice with disparate impact is "job related for the position in question and consistent with business necessity."²³ Exactly what the phrase means is open to dispute since it embraces both poles of interpretation of the defendant's burden: business necessity and job relationship. The direction of Congress to look to the law that developed before *Wards Cove*²⁴ does not resolve this uncertainty, since the earlier case law, as we have just seen, also is ambiguous.

Regardless of what the Civil Rights Act of 1991 actually accomplished, it transformed the theory of disparate impact from a matter of judicial interpretation to legislative action. The same process also marks the development of the effects test for violations of the Voting Rights Act, the analogue to claims of disparate impact under Title VII. In *City of Mobile v. Bolden*,²⁵ the Court held that section 2 of the Voting Rights Act²⁶ prohibited only intentional discrimination,²⁷ but this decision, like *Wards Cove*, was soon overruled by Congress in the 1982 amendments to the Act. These added a new subsection 2(b) that established an effects test to determine whether voting rights had been denied on the basis of race.²⁸ Like the amendments to Title VII, this amendment was justified as a return to pre-existing law, mainly in

²² Title VII of the Civil Rights Act of 1991 § 703(k), 42 U.S.C. §2000e-2(k) (2005).§ 703(k). The Act also sought to revise the burden of proof on the issue of pretext, but it was not clear precisely how it changed pre-existing law. Compare § 703(k)(1)(C), 42 U.S.C. §2000e-2(k)(1)(C) (2005) with *Albemarle Paper*, 422 U.S. at 436.

²³ § 703(k)(1)(A), 42 U.S.C. § 2000e-2(k)(1)(A) (2005).

²⁴ Civil Rights Act of 1991 § 3(2), Pub. L. No. 102-166, 105 Stat. 1071 (1991).

²⁵ 446 U.S. 55 (1980).

²⁶ 42 U.S.C. § 1973 (2000). The then-current version of this section was enacted in 79 Stat. 437 (1965).

²⁷ 446 U.S. at 60-61 (plurality opinion of Stewart, J.). Justice White would also have required proof of intent, but he dissented on the ground that such intent had been established in this case. *Id.* at 103 (White, J., dissenting).

²⁸ 96 Stat. 134 (1982). *Mobile v. Bolden* was specifically disapproved in the legislative history. S. Rep. No. 97-417, at 2 (1982).

decisions under the Fifteenth Amendment,²⁹ and the end result was that Congress was clearer about what it rejected than what it accepted. It rejected any requirement that the plaintiff prove intent, but it adopted an open-ended test “based on the totality of the circumstances” which was further elaborated by a variety of factors identified in the legislative history.³⁰

The source of these ambiguities all derive from the same concern that Justice Stevens expressed in *Washington v. Davis*: the problematic distinction between discriminatory intent and discriminatory effects. Justice Stevens expressed exactly the same concern in his separate opinion in *Mobile v. Bolden*. Although he concurred in the judgment in that case, agreeing with the majority that the plaintiffs had no claim, he believed that “a proper test should focus on the objective effects of the political decision rather than the subjective motivation of the decisionmaker.”³¹ Nevertheless, a simple finding of disparate impact on some racial group was, in his view, insufficient to establish a violation of section 2.³² The 1982 amendments take a similar position by requiring an examination of a variety of different factors, of which disparate impact on a particular racial group is only one. As refined in *Thornburg v. Gingles*,³³ for application to claims of vote dilution through the use of multi-member districts, these factors require a showing that “a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group.”³⁴ This showing involves more than the loss of single election or even a pattern of elections by candidates from a minority group; it also requires elements of racially selective bloc voting.³⁵

This trend, away from rigid insistence on proof of intentional discrimination toward some form of liability for discriminatory effects, is evident under other civil rights statutes. More so than under Title VII and the Voting Rights Act, claims of disparate impact under these statutes have been of limited significance.

²⁹ *White v. Regester*, 412 U.S. 755 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973).

³⁰ S. Rep. No. 97-417, *supra* note ___, at 27-30; see *Thornburgh v. Gingles*, 478 U.S. 30, 44-46 (1986).

³¹ *City of Mobile*, 446 U.S. 55, 90 (Stevens, J., concurring in the judgment).

³² *Id.*

³³ 478 U.S. 30 (1986).

³⁴ *Id.* at 49 (emphasis in original).

³⁵ *Id.*

Under Title VI of the Civil Rights Act of 1964,³⁶ a companion provision to Title VII that prohibits racial discrimination by recipients of federal funds, the Supreme Court has recognized a limited form of liability for disparate impact. Such claims can be brought, not under the statute itself, but only under regulations issued under the statute,³⁷ and these claims can be brought only by the government, not by private individuals.³⁸ Claims of disparate impact can also be brought under the Rehabilitation Act of 1973,³⁹ another statute which prohibits discrimination by recipients of federal funds, in this case on the basis of disability. When this prohibition was extended generally to employers by the Americans with Disabilities Act of 1990 (the ADA),⁴⁰ the theory of disparate impact was also codified, in terms that closely resemble those that now appear in Title VII.⁴¹ Nevertheless, few class actions are brought under the employment provisions of the ADA because of the predominance of individual issues, such as the nature and extent of a plaintiff's disability and the cost of any accommodation that can be made for it.⁴² Individual claims under the ADA have eclipsed the significance of the theory of disparate impact.

Claims for discrimination related to real estate are governed by two statutes, originally enacted during Reconstruction, sections 1981 and 1982.⁴³ Section 1981 prohibits racial discrimination in all forms

³⁶ Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964), codified as amended at 42 U.S.C. §§ 2000d-2000d-4 (2005).

³⁷ *Guardians Ass'n*, 463 U.S. at 584 n.2, 591-592 (opinion of White, J.); *id.* at 623, n. 15, (Marshall, J., dissenting); *id.* at 643-645, (Stevens J., joined by Brennan and Blackmun, JJ., dissenting); see *Alexander v. Sandoval*, 532 U.S. 275, 281-82 (2001).

³⁸ *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

³⁹ Rehabilitation Act of 1973, 29 U.S.C. § 794 (2000); *Alexander v. Choate*, 469 U.S. 287, 298 (1985).

⁴⁰ 42 U.S.C. § 12101-17 (2000).

⁴¹ *Id.* § 12112(b)(6) (2000).

⁴² The few disparate impact claims under the ADA that are likely to be successful for claims concern denial of access to government services or public accommodations under title II and III, rather than claims for employment discrimination under title I. See *Sunrise Development, Inc. v. Town of Huntington, New York*, 62 F.Supp.2d 762 (E.D.N.Y. 1999) (zoning restrictions on assisted living facilities likely to have a disparate impact on disabled individuals).

⁴³ 42 U.S.C. §§ 1981, 1982 (2000). These statutes were originally part of the Civil Rights Act of 1866. 14 Stat. 27.

of contracting, but it has been interpreted by the Supreme Court to prohibit only intentional discrimination.⁴⁴ Section 1982 is more narrowly focused on discrimination with respect to property transactions, but because its history is so closely linked with section 1981, it, too, has been limited to intentional discrimination.⁴⁵ Modern fair housing legislation has received more equivocal interpretations, with the circuits split on the availability of claims for disparate impact under the Fair Housing Act of 1968.⁴⁶ So, too, the decisions under the Equal Credit Opportunity Act of 1974⁴⁷ have left the standards for proving discrimination in lending uncertain, with courts seeking various analogies to cases under both Title VII and the Constitution.⁴⁸

All of these statutory developments recently culminated in *Smith v. City of Jackson*, in which the Supreme Court recognized a qualified form of the theory of disparate impact under the Age Discrimination in Employment Act of 1967 (the ADEA). This decision, to be discussed more fully in Part III, requires a prior understanding of the place of age discrimination in the entire spectrum of discrimination claims, including those under the Constitution. It is therefore useful to return to *Washington v. Davis* and its requirement that the plaintiff prove intentional discrimination in order to establish a violation of the Constitution. Some scholars found this decision to be a significant retreat from the promise of equal racial justice in *Brown v. Board of Education*.⁴⁹ Others, like my colleague, Dan Ortiz, found it to be an invitation to exploit the ambiguities in the concept of intent and to tailor the standards for proof of intentional discrimination to different contexts.⁵⁰ These views are not mutually exclusive and elements of both of them must surely be true: ambiguities in the concept of intentional discrimination tend to be systematically resolved in favor of a narrow interpretation of the constitutional prohibition. The same general conclusion can be approached through two related, but distinct, issues: first, the evidence necessary to prove intentional discrimination; and second, the relationship between intentional discrimination and affirmative action.

⁴⁴ General Bldg. Contractors Ass'n, 458 U.S. 375, 389-90 (1982).

⁴⁵ See *id.* at 388 (interpreting both § 1981 and § 1982 to require proof of intentional discrimination).

⁴⁶ 42 U.S.C. §§ 3601-31 (2000). See Peter E. Mahoney, The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle, 47 Emory L.J. 409, 425 n.54 (1998).

⁴⁷ 15 U.S.C. § 1691 (2000).

⁴⁸ Mahoney, *supra* note ___, at 411, 447-50.

⁴⁹ E.g., David Strauss, Discriminatory Intent and the Taming of *Brown*, 56 U. Chi. L. Rev. 935 (1989).

⁵⁰ Daniel R. Ortiz, The Myth of Intent in Equal Protection, 41 Stan. L. Rev. 1105 (1989).

Concrete issues of proof, more than any abstract theory, reveal the fundamental similarity between claims of intentional discrimination and those of disparate impact. The evidence submitted to prove one kind of claim invariably can be used to support the other. Three decisions within a year of *Washington v. Davis* illustrate this point. In *Village of Arlington Heights v. Metropolitan Housing Authority*,⁵¹ the disparate impact of a zoning decision on African-Americans was held to be insufficient to establish discriminatory intent in the absence of further evidence showing that race entered into the decisionmaking process. The Court acknowledged, however, that evidence of adverse impact “may provide an important starting point” and may be entirely sufficient if “a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action.”⁵² The history of decisionmaking on the issue in question—zoning for single-family dwellings—also was relevant and was found to be a sufficiently neutral justification for the city’s refusal to rezone to permit low-income housing. These two elements in the Court’s analysis figure in virtually all claims of discrimination: the plaintiff’s initial showing of discriminatory intent or effects and the defendant’s offered justification for the disputed decision.

Although *Arlington Heights* was a constitutional case, two cases under Title VII followed essentially the same pattern. In *International Brotherhood of Teamsters v. United States*,⁵³ the Court upheld a finding of intentional discrimination in hiring and promoting truck drivers to better-paid positions as “over the road” drivers. The plaintiff’s evidence was overwhelming based on the “inexorable zero” of almost no representation at all of minority drivers in “over the road” jobs.⁵⁴ This overwhelming statistical disparity was augmented by anecdotal evidence of discrimination that, in the Court’s words, “brought the cold numbers convincingly to life.”⁵⁵ These extreme cases are as easy as they are rare. More representative of the typical case today is *Hazelwood School District v. United States*,⁵⁶ which involved the complex analysis of statistical evidence in the hiring practices of a public school district in suburban St. Louis. This case was brought under Title VII, but since it involved a claim of intentional discrimination by a government employer, it could equally well have been brought for violation of the Fourteenth Amendment.⁵⁷ What is surprising about the Court’s analysis of the statistical evidence applies equally to claims of disparate impact. The same examination of the labor market, in this case for positions as teachers, and of the employer’s hiring decisions over the relevant period time, and the same determination of the

⁵¹ 429 U.S. 252 (1977).

⁵² *Id.* at 266.

⁵³ *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 375-76 (1977).

⁵⁴ *Id.* at 342 n.23.

⁵⁵ *Id.* at 339.

⁵⁶ 433 U.S. 299 (1977).

⁵⁷ *Id.* at 307, n.12.

significance of any discrepancy in those numbers, applies equally to the plaintiff's burden to show disparate impact as to show intentional discrimination. Indeed, in the decades since *Hazelwood* was decided, the only reliable difference between the use of statistical evidence in the one case and in the other, is that a greater discrepancy, supported by additional evidence, is needed to show intentional discrimination.⁵⁸

The similarity between the two kinds of claims goes further. As Justice Stevens pointed out in his dissent, if the plaintiff succeeded in making out a *prima facie* case of discrimination, the burden then shifted to the defendant to rebut that case.⁵⁹ The majority did not disagree with this analysis,⁶⁰ although neither opinion identified discrete issues on which the burden of proof was allocated between the parties. Instead, the dispute in *Hazelwood* was entirely over the adequacy of the plaintiff's statistical evidence, an issue on which it would bear the entire burden of proof, even on a claim of disparate impact. Supposing, however, that the defendant had submitted evidence to justify its hiring practices—for instance, conducting interviews in order to assure that teachers had the necessary personal skills to work effectively with students and other faculty—that evidence could have been used in rebuttal. In terms of the theory of disparate impact, evidence of job relationship or business necessity can also be used to defeat a claim of intentional discrimination. The difference between the two theories of liability is not in the evidence used to support or defeat a claim of discrimination, but in the way in which the burden of proof is explicitly allocated between the parties under the theory of disparate impact. In a claim of intentional discrimination, the burden of proof rests entirely with the plaintiff to establish, in the words used in Title VII, that “race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”⁶¹

All of this bears out Justice Stevens' observation, with which this article began, that the difference between claims of disparate impact and claims of intentional discrimination often is exaggerated. It leaves open the puzzle, however, about why the difference between these two kinds of claims has been so frequently litigated. If only a subtle shift in the burden of proof is at stake, why do the parties care so much about this issue? Why, for that matter, has the Court devoted so much attention to it and Congress, as well, in specifically defining the difference between claims of disparate impact and claims of intentional discrimination under Title VII? The next part of this article addresses these questions.

II. Discrimination and the Inherently Contested Concept of Equality

⁵⁸ George Rutherglen, Disparate Impact under Title VII: An Objective Theory of Discrimination, 73 Va. L. Rev. 1297, 1332 (1987).

⁵⁹ *Hazelwood*, 433 U.S. at 314.

⁶⁰ *Id.* at 310-11.

⁶¹ § 703(m), 42 U.S.C. § 2000e-2(m) (2005).

For lawyers, disputes over the theory of disparate impact are disputes over the burden of proof. As an initial matter, disputes over whether the theory is available at all reduce to the question whether the plaintiff has to carry the entire burden of proving intentional discrimination or only the lesser burden of proving disparate impact. And if the theory is recognized, most disputes over its implementation turn on how much of the burden of proof is shifted onto the defendant—whether the defendant has a lighter or heavier burden of justifying a practice with disparate impact. Lawyers care about the burden of proof because in close cases, it determines who wins or loses, with doubts resolved against the party who bears the burden of proof. The party who does not have the burden of proof can blame all the gaps in the evidence and in the resulting inferences on the party who does. Placing the burden of proof on the opposing party often gives lawyers a decisive edge in litigation.

Yet the obsession of lawyers with the burden of proof, understandable though it may be, does not explain its pervasive presence in the law of discrimination, particularly as applied to claims of disparate impact. It is attributable, or so I will argue, to deeper issues, values, and concerns. My thesis is that disputes over the theory of disparate impact mark the point where the consensus over discrimination runs out and the inherently contested concept of equality takes over. As with several other related issues, notably affirmative action, controversies break out where prohibitions against discrimination no longer provide a reliable and accepted guide about how to achieve equality. Disputes about equality then feed back into disputes over what constitutes prohibited discrimination, narrowing the prohibition in some respects and extending it in others, but giving rise to controversy precisely because of these distortions of the concept of discrimination itself.

Borrowing from the philosopher, John Rawls, we might say that we have an “overlapping consensus” on the concept of discrimination.⁶² For Rawls, the overlapping consensus is a condition that assures the stability of principles of justice in a well-ordered society.⁶³ It assures that these principles, derived by arguments that appeal to rational individuals in a hypothetical situation, would prove to be minimally acceptable to people with diverse moral and religious beliefs in the realistic conditions of a modern democratic society. The overlapping consensus, in his view, is not a compromise that somehow represents the weighted average of otherwise inconsistent beliefs. It represents a commitment that adherents of those beliefs, to the extent they are reasonable, would have to principles of justice. Rawls derives these principles by entirely different means, dependent upon elaborate arguments made within what

⁶² John Rawls, *The Idea of an Overlapping Consensus*, in *Collected Papers* 421, 421 (Samuel Freeman ed., 1999). For a similar adaptation of Rawls’ views, but one more focused on abstract normative issues rather than a descriptive account of concrete disagreements, see Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 *Harv. L. Rev.* 1733 (1995).

⁶³ *Id.* at 422-23.

he calls “the original position.”⁶⁴ The overlapping consensus only assures that, if the principles of justice derived in the original position were actually adopted in any modern society, reasonable people with fundamentally different moral and religious views would find them acceptable as a basis for social cooperation. The overlapping consensus neither provides the arguments for his principles of justice nor guarantees that those principles would be adopted. It only explains how, once adopted, they would form the basis for a stable political order.⁶⁵

To pursue the subtleties of Rawls’ theory of justice would take a separate article, far removed from the intricacies of the theory of disparate impact. But that, in a way, is the point. No theory of justice explains the law as we have it. No comprehensive theory of equality uniquely determines the legal prohibitions against discrimination. Instead, altogether too many theories of what equality truly requires can be invoked to support the minimal concept of discrimination as colorblindness. And altogether too many disputes among those theories reflect disagreements about how that concept should be extended, modified, or limited. The overlapping consensus, as Rawls uses the term, only provides a means for describing the problematic relationship between comprehensive moral and religious views and the more limited concept of political liberalism that he endorses. It insulates his theory of justice from more fundamental disputes between adherents of different religions and secular philosophies of life. It describes the relationship between comprehensive moral and religious views and the more limited concept of political liberalism that Rawls endorses.

The same basic idea, however, can be invoked at a lower level of abstraction and generality: to describe the relationship between theories of justice and equality and actual legal rules. In the realm of civil rights, it describes the point at which the concept of discrimination gives way to arguments over equality; where arguments about the best means of preventing improperly motivated actions, whether by government or by employers, gives way to arguments about the kinds of equality the law is seeking to achieve, in terms of equal opportunity throughout society. Such disputes break out most dramatically in the law of affirmative action, but they can be found throughout the law of discrimination. In the debates over affirmative action, the fault line between discrimination and equality occurs just at the point that race-conscious programs can no longer be justified as remedies for identifiable instances of past discrimination. Broad agreement across the political spectrum supports the concept of discrimination as colorblindness. It gives way to fundamental controversy when that principle must be violated in order to attain some broader concept of equality, defined in terms independent of discrimination itself.

The support for the concept of discrimination as deviations from colorblindness is so broad partly because the concept itself is defined in redundant, yet ambiguous, terms as “intentional discrimination.” The widespread use of this phrase, without much sense that it is redundant, reveals what the problem is.

⁶⁴ Id. at 428. For Rawls’ account of the original position, see John Rawls, *A Theory of Justice* 102-30 (rev. ed. 1999).

⁶⁵ Rawls, *supra* note ___, at 444.

Discrimination, in the usual meaning of the term, outside of civil rights law, requires some form of intent with respect to the grounds of discrimination. A manager cannot discriminate between skilled and unskilled, or qualified and unqualified, workers without taking these characteristics into account. So, too, he or she cannot discriminate on the basis of race or sex without taking these factors into account. Concepts such as “unconscious discrimination” and “discriminatory effects” are extensions of the concept of discrimination in the ordinary sense and have elicited controversy for just this reason. Some critics, of course, have questioned these extensions, but it is more important to contrast them with the accepted sense of discrimination. Across the political spectrum, from right to left, there is agreement about the need to prohibit discrimination in its most narrowly defined and widely accepted sense: as adverse action taken against members of minority groups and against women simply because of their status as members of these groups.

Thus, Richard Epstein, who is usually a reliable indicator of the extreme right wing of acceptable political opinion, endorses a prohibition against discrimination by government, and to the extent necessary to dismantle the effects of government discrimination, discrimination by private employers as well.⁶⁶ To be sure, from his book, *Forbidden Grounds*, it is sometimes difficult to tell whether he objects to discrimination by the government more because it is by the government than because it is discrimination. Nevertheless, he does oppose it, sometimes based on libertarian arguments for restricting the role of government and sometimes based on utilitarian arguments for promoting overall efficiency.⁶⁷

Representative of a more moderate conservatism is Alexander Bickel, who clearly stated his position in his well-known denunciation of affirmative action. As he said before the first affirmative action cases were decided: “The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored.”⁶⁸ This famous passage promotes the principle against discrimination into a constraint on any form of legitimate government action—a surprisingly absolutist position for Bickel to take given his otherwise general allegiance to the pragmatic, conservative approach he adopted from Edmund Burke, with his sensitivity to the history and circumstances in which government must act.⁶⁹

Another constitutional scholar, John Hart Ely, offered an equally famous defense of affirmative action, confronting Bickel directly with the argument that it did, indeed, make all the difference whose ox

⁶⁶ Richard Epstein, *Forbidden Grounds* 103-15 (1992).

⁶⁷ *Id.* at 118-25.

⁶⁸ Alexander M. Bickel, *The Morality of Consent* 133 (1975).

⁶⁹ *Id.* at 3, 16-17.

was gored: the minority's or the majority's. He saw no constitutional objection to the majority discriminating against itself through programs of affirmative action.⁷⁰ The majority could protect itself through the political process by means that were not available to minority groups. His position was based explicitly on rights of democratic participation: not simply to have each individual's vote counted equally with every other but to have each individual's interest considered equally in the entire process of government.

Still further along the spectrum of liberal views, many scholars have defended prohibitions against discrimination as a means, but only one means, of "breaking down patterns of racial segregation and hierarchy," to use the phrase from *United Steelworkers v. Weber*,⁷¹ the major decision upholding affirmative action under Title VII. This defense of affirmative action as a remedy for the persistent consequences of past discrimination has been widely embraced, by figures otherwise so diverse in their philosophical commitments as Lawrence Tribe, Cass Sunstein, Ronald Dworkin, Owen Fiss, and David Strauss.⁷² It attaches priority to the end of achieving effective equality over the means chosen to achieve that end. Prohibitions against discrimination are only one such means to this end.

At the left-wing extreme, partisans of Critical Legal Studies, Critical Race Theory, and Critical Feminists denounce any attempt to make prohibitions against discrimination the exclusive means of remedying inequality, not on the ground simply that they are ineffective, but on the ground that they legitimate the status quo of caste, oppression, and disadvantage. Alan Freeman, Charles Lawrence, Richard Delgado, Lani Guinier, and Catharine MacKinnon have criticized prohibitions against discrimination as the embodiment of a purely formal principle of equality that fails to take account of the reality of race- and sex-based subordination.⁷³ This deficiency in existing law can be cured only by recognizing the rights

⁷⁰ See John H. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 727 (1974).

⁷¹ 443 U.S. 193, 208 (1979).

⁷² See Laurence H. Tribe, *American Constitutional Law* 1514-21 (2d ed. 1988); Cass R. Sunstein, *Lochner's Legacy*, 87 Col. L. Rev. 873, 896-97 (1987); Ronald Dworkin, *Taking Rights Seriously* 226-27 (1978); Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. Chi. L. Rev. 235, 310-13 (1971); David A. Strauss, *The Myth of Colorblindness*, 1986 Sup. Ct. Rev. 99, 100, 126-27.

⁷³ See Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law*, 62 Minn. L. Rev. 1049, 1050 (1978); Charles Lawrence, *The Id, the Ego & Equal Protection*, 39 Stan. L. Rev. 317, 387-88 (1987); Richard Delgado & Jean Stefancic, *The Racial Double Helix: Watson, Crick, and Brown v. Board of Education* (Our No-Bell Prize Award Speech), 47 How. L. J. 473, 484 (2004); Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. Pa. L. Rev. 561, 568-77 (1984); Lani Guinier, *The Tyranny of the Majority* 3-5 (1994); Catherine MacKinnon, *Towards a Feminist Theory of the State* 161-66 (1989).

of groups to achieve equal status and recognition. As I read these authors, however, they have stopped far short of advocating repeal of the laws against discrimination, like Title VII. Their criticism essentially is that existing law does not go far enough, not that it goes too far.

This commitment, however qualified and nuanced, to prohibitions against discrimination represents the common ground among legal theorists across the political spectrum. It constitutes the overlapping consensus, reached by theoretical arguments from very different, if not utterly incompatible, premises and proceeding by equally varied and divergent methods of reasoning. This consensus is not only a matter of theory, but expresses the widespread support for prohibitions against discrimination, as revealed by polling data on affirmative action. These data show that approval rates for affirmative action depend very heavily on how programs of affirmative action are described. The term itself elicits widespread disapproval, as do decisions based on preferences rather than ability, while programs to improve the position of minorities or to compensate for past discrimination receive broader support.⁷⁴ The common thread in all the data is that discrimination is the base line from which both approval and disapproval is derived: approval if affirmative action is seen to be necessary to remedy past discrimination; disapproval if it is thought to be only an instance of continued discrimination. Prohibitions against discrimination are the common ground on which disputes over affirmative action are fought out.

Allegiance to the concept of discrimination as an abstract ideal is nearly universal. Disputes break out only when it is necessary to formulate concrete rules for actually achieving equality. As my colleague, Dan Ortiz, has pointed out, these disputes arise even over the terms in which prohibitions against intentional discrimination are applied, varying across a range of different claims from employment discrimination to voting rights.⁷⁵ The variation is all the more striking, and the disagreements more intense, over claims of disparate impact. On the hopeful side, the absence of hard-and-fast rules of liability allow claims of disparate impact to be molded to different forms of discrimination and the different contexts in which they arise. This is, I believe, one of the central insights of Justice Stevens' opinion in *Smith v. City of Jackson*, to be discussed more fully in the next part of this article. On the doubtful side, the same variability creates the risk that the commitment to equality embodied in laws against discrimination will not be fully implemented, that technicalities and qualifications in applying the theory of disparate impact will defeat the efforts of most plaintiffs to establish liability. The overlapping consensus on prohibiting intentional discrimination results, on this view, from the effectiveness of such prohibitions in remedying a problem that is now long past: the explicit segregation and exclusion that characterized the regime of Jim Crow and that was largely dismantled by in the first wave of civil rights litigation in the decades after *Brown v. Board of*

⁷⁴ Charlotte Steeh & Maria Krysan, *The Polls Trends: Affirmative Action and the Public, 1970-1995*, 60 *Pub. Opinion Q.* 128, 130-131 (1996).

⁷⁵ Ortiz, *supra* note __.

Education.⁷⁶ No matter how effective in eliminating such obvious forms of discrimination, prohibitions against intentional discrimination could not address the more subtle forms of discrimination that grew up in their place. The theory of disparate impact initially played an important role in “smoking out” these hidden forms of discrimination, but its effectiveness was compromised, on this pessimistic view, by procedural and substantive restrictions imposed on plaintiffs who brought claims under this theory.

Much can be said for this conclusion and much has been said for the optimistic view as well. For present purposes, it is less important to choose between these views than to recognize the way in which they define and structure debate over the theory of disparate impact. It plainly extends liability beyond claims for intentional discrimination but does so subject to the same concerns and restrictions. These views attempt to strike a balance between pragmatic effectiveness in eliminating discrimination and preserving quintessentially American values of individual rights, universal coverage, and limited government. Prohibitions against intentional discrimination preserve these values, first, by protecting individuals from discrimination on the basis of features that they, by and large, are powerless to change. Second, they are universal in the sense that they protect everyone, as we say, regardless of race, color, creed, or sex. Whites are protected as well as blacks, men as well as women. And third, these prohibitions require only limited government intervention, telling employers, government, and other institutional actors only what they may not consider in making decisions, not what they must consider.

This compromise does not work so easily for claims of disparate impact. To the extent that such claims uncover subtle or hidden forms of discrimination, no one denies their desirability. Eliminating discrimination is the core commitment of the overlapping consensus on civil rights. But the countervailing values of individualism, universality, and limited government qualify and restrict efforts to make good on this commitment. The theory of disparate impact threatens to compromise these values for many of the same reasons as programs of affirmative action. Like affirmative action, the theory of disparate impact emphasizes results over intent, focusing on group statistics instead of individualized evidence of discrimination. Likewise, this theory of liability works almost exclusively to the benefit of minority groups and women.⁷⁷ Claims of disparate impact are virtually never brought on behalf of whites or on behalf of men. And lastly, such claims require defendants to justify practices with disparate impact, injecting courts into a reassessment of the defendant’s reasons for adopting the practice in the first place.⁷⁸ Courts end up telling defendants what they should do, not just what they shouldn’t do.

The connection between disparate impact and affirmative action also operates at the practical in

⁷⁶ See, e.g., David Lyons, *Corrective Justice, Equal Opportunity, and the Legacy of Slavery and Jim Crow*, 84 B.U. L. Rev. 1375, 1389-91 (2004).

⁷⁷ Charles A. Sullivan, *The World Turned Upside Down? Disparate Impact Claims by White Males*, 98 Nw. U. L. Rev. 1505, 1508-09 (2004).

⁷⁸ Rutherglen, *supra* note ___, at 1298.

addition to the theoretical level. Defendants faced with liability for disparate impact have powerful incentives to adopt affirmative action plans to alleviate the adverse effects of practices that they would otherwise have to justify with more or less extensive empirical evidence. As Judge Wisdom first articulated the problem under Title VII, employers faced with liability for disparate impact, without the possibility of engaging in permissible forms of affirmative action, would be placed on a “high tightrope without a net beneath them.”⁷⁹ They would be subject to suit either for disparate impact or for reverse discrimination. Allowing them to adopt affirmative action programs for hiring, training, or promotions, even if they do so in the shadow of the law, allows them to reduce their exposure to liability.

But here, too, countervailing values have limited the force of legal doctrine. The threat of liability for disparate impact, at least under Title VII, has never required employers to eliminate all forms of imbalance in their work force. Liability has actually been imposed usually only when there is some reason to believe that the employer has engaged in intentional discrimination: where there is a complete absence or only minimal presence of members of a minority group, “the inexorable zero” as it has been famously characterized; or where the practice in dispute is inherently suspect, either because it has been previously found to be illegal or because it was framed in terms that obviously exclude members of the plaintiff’s class, such as ostensibly neutral height and weight requirements that nevertheless exclude a large proportion of women. Liability for disparate impact under Title VII, whatever the hopes of its advocates, has never strayed very far from liability for intentional discrimination. Claims of disparate impact, although doctrinally distinct from claims of intentional discrimination, remain bound by the same limiting principles embedded in the overlapping consensus.

These theoretical considerations do not resolve the tensions inherent in the theory of disparate impact. They instead explain why the tensions exist in the first place. To return to the quotation with which this paper began, they confirm Justice Stevens’ observation that “the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court’s opinion[s] might assume.” What he said then, nearly thirty years ago, is equally true now, and its enduring significance can be seen in its implications for the current development of the theory of disparate impact. Justice Stevens’ own opinion applying the theory to claims of age discrimination is the best place to begin this task.

III. Implications for Age Discrimination

In his opinion in *Smith v. City of Jackson*, handed down just last term, Justice Stevens recognized claims of disparate impact under the Age Discrimination in Employment Act (ADEA), but narrowly interpreted the reach of such claims in light of past and now superseded decisions under Title VII. The judgment he announced for the Court, and effectively the opinion that he wrote for a majority, might appear

⁷⁹ *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting), rev’d, 449 U.S. 193 (1979).

to be a compromise between the competing arguments for and against interpreting the ADEA in exactly the same terms as Title VII. The two statutes have some provisions in common and some, directly relevant to the theory of disparate impact, that diverge. To view the decision from such a strictly doctrinal perspective, however, is greatly to underestimate its importance. It demonstrates the Court's continuing commitment to imposing liability for discriminatory effects as a means of preventing hidden and otherwise elusive forms of discrimination.

The plaintiffs in *City of Jackson* were police officers who claimed that a pay raise for all city employees was systematically less favorable to officers over the age of 40 than to younger employees.⁸⁰ They did not claim that they received lower raises in absolute terms, but only that they received lower raises as a proportion of their pre-existing salary.⁸¹ The limited form of adverse impact that they alleged no doubt reduced the ultimate persuasiveness of their claim that they were victims of discrimination, as did the justification offered by the city for the way in which the raises were structured. Employees with less than five years experience, who were predominantly under 40, received proportionally greater raises based on pre-existing salary because the city was trying to bring starting salaries up to the regional average.⁸² These background facts did not support a strong inference that the city acted generally contrary to the interest of older workers, but instead that it adopted a policy for entirely legitimate reasons that inevitably was less favorable to some employees than others. There was little evidence in the record that the city was engaged in some form of subtle discrimination against older workers.

It therefore comes as no surprise that the plaintiffs ultimately lost this case.⁸³ What is surprising is that the Court went out of its way to allow them to state a claim under the theory of disparate impact. Justice Stevens, for a plurality of four justices, held that the ADEA itself supported claims of disparate impact,⁸⁴ and he was joined in this conclusion by Justice Scalia, who reached the same conclusion by deferring to EEOC regulations recognizing the theory of disparate impact.⁸⁵ Unlike Justice Stevens, who

⁸⁰ 125 S. Ct. at 1539.

⁸¹ *Id.* at 1545.

⁸² *Id.* at 1546.

⁸³ And, indeed, all the justices concurred in this conclusion (except Chief Justice Rehnquist who did not participate), differing only on the grounds on which the plaintiffs lost. See *id.*; *id.* at 1549 (opinion of Scalia, J., concurring and concurring in the judgment); *id.* at 1560 (O'Connor, J., concurring in the judgment).

⁸⁴ *Id.* at 1544 (opinion of Stevens, J.).

⁸⁵ *Id.* at 1546-49 (Scalia, J., concurring in part and concurring in the judgment).

also cited these regulations in his opinion,⁸⁶ Justice Scalia would have deferred to them as a reasonable interpretation of the statute under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*⁸⁷ Justice Scalia's reliance on EEOC regulations raises significant issues of its own, given the Commission's consistently more expansive view of the theory of disparate impact than the one adopted by the Court,⁸⁸ but the common ground between his opinion and Justice Stevens' is more important than the differences. Both would make claims of disparate impact generally available to plaintiffs under the ADEA, without any restriction like those which apply to similar claims under Title VI.⁸⁹

The doctrinal reasons for this conclusion derive directly from the incorporation in the ADEA of language from the original provisions in Title VII that supported the seminal decision in *Griggs v. Duke Power Co.*⁹⁰ The main prohibitions in each statute are identical, with only the substitution of age in the ADEA for the grounds of discrimination prohibited by Title VII. As Justice Stevens emphasized in his opinion: "*Griggs*, which interpreted the identical text at issue here, thus strongly suggests that a disparate impact theory should be cognizable under the ADEA."⁹¹ In her opinion concurring in the judgment, Justice O'Connor rejected this reasoning and refused to recognize any claims for disparate impact under the ADEA, relying on two respects in which the text of the ADEA departed from Title VII: first, the adoption of a defense based on "reasonable factors other than age" (RFOA) that has no counterpart in Title VII; and second, the absence in the ADEA of any explicit prohibition upon practices with disparate impact.⁹² This latter objection implicitly appeals to the comparative history of Title VII and the ADEA. The Civil Rights Act of 1991, although it amended both statutes, codified the theory of disparate only under Title VII. Justice Stevens deflected these textual objections by reconceiving them as arguments addressed to the

⁸⁶ Id. at 1544 (opinion of Stevens, J.).

⁸⁷ 467 U.S. 837 (1984).

⁸⁸ See Uniform Guidelines *supra* note __; on Employee Selection Procedures, 29 C.F.R. pt. 1607 (2005); *Dothard v. Rawlinson*, 433 U.S. 321, 328-33 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425-36 (1975); *Rutherglen*, *supra* note __ at 1316.

⁸⁹ See note __ *supra* and accompanying text.

⁹⁰ Compare § 703(a)-(c), codified at 42 U.S.C. § 2000e-2(a)-(c) (2005) with 29 U.S.C. § 623 (a)-(c) (2005); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

⁹¹ 125 S. Ct. at 1542 (opinion of Stevens, J.).

⁹² Id. at 1551-55 (O'Connor, J., concurring in the judgment). Justice O'Connor had earlier raised doubts about the availability of the theory disparate impact under the ADEA in her opinion for the court in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

scope, rather than the existence, of liability for disparate impact under the ADEA.⁹³

Both objections had been raised in the lower courts and in the secondary literature, but the implications of the Civil Rights Act of 1991 had received by far the most attention.⁹⁴ The RFOA has always been something of a puzzle since it was plainly designed to benefit employers by giving them a defense to attacks on reasonably justified business decisions, but its relationship to the law as it developed under Title VII dissipated much of this advantage. Under *McDonnell Douglas Corp. v. Green*,⁹⁵ employers could defend most Title VII cases by articulating a “legitimate nondiscriminatory reason” for a disputed decision. This defense, as the Supreme Court emphasized in a number of cases, placed on them only the light burden of producing evidence that supported a plausible justification for their decision.⁹⁶ The RFOA provision in the ADEA, by contrast, seemed to force on employers a full-fledged defense, in which they bore the full burden of proof, including the burden of persuasion, a burden they conspicuously did not bear under Title VII.⁹⁷ Hence the RFOA was largely neglected in cases under the ADEA for two

⁹³ *Id.* at 1544-45. (opinion of Stevens, J.).

⁹⁴ See Kenneth R. Davis, Age Discrimination and Disparate Impact, 70 Brooklyn L. Rev. 361, 383 (2004); Howard Eglit, The Age Discrimination in Employment Act, Title VII and the Civil Rights Act of 1991: Three Acts and a Dog that Didn’t Bark, 39 Wayne L. Rev. 1093, 1102-05 (1993); Mack A. Player, Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is a Transplant Appropriate?, 14 U. Tol. L. Rev. 1261 (1983); Nathan E. Holmes, Comment, The Age Discrimination in Employment Act of 1967: Are Disparate Impact Claims Available?, 69 U. Cin. L. Rev. 299, 327 (2000); Jennifer J. Clemons & Richard A. Bale, ADEA Disparate Impact in the Sixth Circuit, 27 Ohio N.U. L. Rev. 1, 22 (2000); Jonas Saunders, Note, Age Discrimination: Disparate Impact Under the ADEA After *Hazen Paper Co. v. Biggins*: Arguments in Favor, 73 U. Det. Mercy L. Rev. 591, 604 (1996); Toni J. Querry, Note, A Rose by any Other Name No Longer Smells as Sweet: Disparate Treatment Discrimination and the Age Proxy Doctrine after *Hazen Paper Co. v. Biggins*, 81 Cornell L. Rev. 530 (1996).

To the extent that these articles discuss the RFOA, they do so only incidentally as part of a larger argument against recognizing the theory of disparate impact under the ADEA. The only article devoted to the RFOA itself is Howard Eglit, The Age Discrimination in Employment Act’s Forgotten Affirmative Defense: The Reasonable Factors Other Than Age Exception, 66 B.U. L. Rev. 155 (1986).

⁹⁵ 411 U.S. 792, 802 (1993).

⁹⁶ See *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-55 (1981); *Board of Trustees v. Sweeney*, 439 U.S. 24, 25 (1978); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577-80 (1978).

⁹⁷ Howard Eglit, The Age Discrimination in Employment Act’s Forgotten Affirmative Defense: The Reasonable Factors Other Than Age Exception, 66 B.U. L. Rev. 155, 158-60 (1986).

incompatible but widely accepted reasons: either because it was redundant with or because it was inconsistent with the allocation of the burden of proof under *McDonnell Douglas*, which quickly came to dominate the litigation of most claims of intentional discrimination, regardless of the statute under which they were brought.⁹⁸

The codification of the theory of disparate impact in the Civil Rights Act of 1991, by contrast, had direct and negative implications for the ADEA. The Act codified the theory only under Title VII, superseding the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*, which had significantly restricted liability for disparate impact.⁹⁹ In the absence of any corresponding amendment to the ADEA, the implication was that the theory of disparate impact lacked the same secure footing in the literal terms of the statute that it now had under Title VII. Moreover, the Act amended the ADEA in other respects so that Congress could not have meant simply to neglect the ADEA entirely.¹⁰⁰

Justice Stevens finessed both of these objections to recognizing the theory of disparate impact under the ADEA by adapting them to the unique features of age discrimination. In his view, the RFOA constituted recognition by Congress that older workers eventually suffer a decline in their ability to perform most jobs.¹⁰¹ Employers could rely upon the RFOA to insist upon neutral requirements despite their adverse effect on older workers. Employers bore a correspondingly lower burden of proof to justify practices with adverse impact under the ADEA than under Title VII. This interpretation of the statute dovetailed with the negative implications of the Civil Rights Act of 1991, which superseded *Wards Cove* but only for claims under Title VII, leaving it applicable to claims under the ADEA.¹⁰² Justice Stevens accordingly concluded that the best view of the entire statute, going back to the central prohibitions adopted from the original version of Title VII, supported the theory of disparate impact, but in limited form.

⁹⁸ The Supreme Court has only assumed that the structure of proof from *McDonnell Douglas* applies to claims under the ADEA. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141-42 (2000); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 309-11 (1996). Yet the lower courts have unanimously concluded that *McDonnell Douglas* also applies to claims of intentional discrimination under the ADEA. See, e.g., *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1216-17 (5th Cir., 1995); Mack A. Player, Proof of Disparate Treatment Under the Age Discrimination in Employment Act: Variations on a Title VII Theme, 17 Ga. L. Rev. 621 (1983).

⁹⁹ See notes ___-___ supra and accompanying text.

¹⁰⁰ Howard Eglit, The Age Discrimination in Employment Act, Title VII and the Civil Rights Act of 1991 Three Acts and a Dog that Didn't Bark, 39 Wayne L. Rev. 1093, 1102-05 (1993).

¹⁰¹ 125 S. Ct. at 1545.

¹⁰² *Id.*

Beneath these purely textual issues was a fundamental question of policy: the extent to which age discrimination should be treated like discrimination on other grounds. The genesis of the ADEA in a report ordered by Congress when it enacted Title VII supports the conclusion that age elicits discrimination comparable in its severity to discrimination on the basis of race or sex.¹⁰³ Opposed to this inference is the recognition in provisions like the RFOA that age eventually takes its toll on most people's ability to hold a job. In its decisions on the constitutionality of age discrimination, the Supreme Court has emphasized the same basic point, that advancing age does not identify a discrete and insular minority, but "a stage that each of us will reach if we live out our normal span."¹⁰⁴ Those decisions do not undermine the congressional judgment about the severity of age discrimination in employment, a matter which rests well within its power to regulate commerce. It does, however, implicate the way in which this problem must be addressed. As Congress itself acknowledged in provisions like the RFOA, age cannot be treated exactly on the model of race or sex. In his opinion in *City of Jackson*, Justice Stevens succeeds in giving definite form to this ambiguous congressional judgment: that age discrimination must be effectively prohibited, but not necessarily on the same terms as discrimination on other grounds.

Reliance exclusively on regulations of the EEOC does not resolve this problem, partly because the existing regulations do not strike the balance demanded by the statute. As Justice O'Connor pointed out, Justice Scalia's deference to the regulations is only partial.¹⁰⁵ While they recognize the theory of disparate impact, they also construe it to allow employers only a defense of "business necessity," which is a far more demanding standard than that imposed by *Wards Cove*.¹⁰⁶ Under the latter decision, as applied to the ADEA by Justice Stevens (and inferentially by Justice Scalia, who joined in this part of his opinion),¹⁰⁷ the employer's burden is only to produce evidence that "a challenged practice serves, in a significant way, [its] legitimate employment goals."¹⁰⁸ Justice O'Connor found the regulations to be limited to the EEOC's exercise of enforcement authority rather than its interpretation of the law,¹⁰⁹ but this objection is undermined

¹⁰³ Report of the Secretary of Labor, *The Older American Worker Age Discrimination in Employment* 22 (June 1965), reprinted in U. S. Equal Employment Opportunity Commission, *Legislative History of the Age Discrimination in Employment Act* (1981).

¹⁰⁴ *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-314 (1976) (per curiam).

¹⁰⁵ 125 S. Ct. at 1560 (O'Connor, J., concurring in the judgment).

¹⁰⁶ Compare 29 C.F.R. § 1625.7(d) (2005) with *Wards Cove*, 490 U.S. at 659.

¹⁰⁷ 125 S. Ct. at 1544-46; *id.* at 1546 (Scalia, J., concurring and concurring in the judgment).

¹⁰⁸ *Wards Cove*, 490 U.S. at 659.

¹⁰⁹ 125 S. Ct. at 1558-59 (O'Connor, J., concurring in the judgment).

by the agency’s unequivocal recognition of liability for disparate impact.¹¹⁰ The real obstacle to giving the regulations *Chevron* deference has to do with the origins of the theory of disparate impact under Title VII, which was through judicial interpretation of the statute.¹¹¹ To be sure, the EEOC’s rulemaking authority is far more limited under Title VII than it is under the ADEA,¹¹² but recognizing liability for discriminatory effects does not easily fall within the ADEA’s grant of authority to issue “such rules and regulations as it may consider necessary or appropriate for carrying out this chapter.”¹¹³ The same provision continues, in far more explicit terms, to authorize “reasonable exemptions” to the other provisions of the ADEA.¹¹⁴ If the ADEA itself prohibited only intentional discrimination, as Justice Scalia supposes, it is difficult to believe that a new cause of action of disparate impact would be “necessary or appropriate for carrying out” this prohibition. Instead, it would be a completely new prohibition inconsistent with the limited liability imposed by the statute. Indeed, to the extent that the regulations allow only a defense of “business necessity,” they are inconsistent with the statute as presently construed by the Supreme Court and therefore entitled to no deference at all.¹¹⁵

The significance of the theory of disparate impact lies in exactly its uneasy relationship to prohibitions against intentional discrimination. On the one hand, it is different from them in expanding the scope of defendants’ liability, but on the other, it serves the same basic goal of eliminating inequalities in employment. Working out the tensions in this relationship cannot easily be left to an administrative agency, especially one like the EEOC which generally has taken positions favorable to plaintiffs.¹¹⁶ The history of its regulations under Title VII reveal a willingness to elaborate upon and to increase the defendant’s burden of justifying practices with disparate impact and a corresponding reluctance of the Supreme Court to consistently defer to them. This is not to say that the EEOC’s regulations should or do receive no deference under Title VII, but it is the variable deference under *Skidmore v. Swift & Co.*¹¹⁷ The

¹¹⁰ The regulation states that practices with a disparate impact “can only be justified as a business necessity.” 29 C.F.R. § 1625.7(d) (2005).

¹¹¹ See notes ___ - ___ supra and accompanying text.

¹¹² Compare § 713(a), codified at 42 U.S.C. § 2000e-12(a) (2000) (limiting the EEOC to “procedural regulations” under Title VII) and 29 U.S.C. § 628 (2000) (authorizing the EEOC to create “reasonable exemptions” to the ADEA).

¹¹³ 29 U.S.C. § 628 (2000).

¹¹⁴ *Id.*

¹¹⁵ See *Chevron*, 467 U.S. at 842-43.

¹¹⁶ See note ___ supra.

¹¹⁷ 323 U.S. 134, 140 (1944).

institutional dynamics established under that statute can be displaced by an uncertain delegation of rulemaking authority in the ADEA.¹¹⁸ The degree of deference given by Justice Stevens to these regulations more closely follows the pattern established under Title VII.

It also more accurately conveys what is at stake with the theory of disparate impact: how far our country is willing to go to assure the effectiveness of prohibitions against discrimination, while at the same time preserving the competing values that make those prohibitions attractive. The critics of *Washington v. Davis* have pointed out the inadequacy of relying exclusively on a prohibition only against intentional discrimination.¹¹⁹ Limiting the Constitution to claims of intentional discrimination invites exactly the kind of evasion and underenforcement that permits many forms of discrimination to go undiscovered and unpunished.¹²⁰ As a corollary, it also makes the concept of intent so central to civil rights litigation that it is distorted beyond all recognition.¹²¹ By contrast, the theory of disparate impact gives greater prominence to objective evidence of discrimination, based on the actual effects of employment practices rather than the employer's elusive state of mind, and it makes the balance between effective enforcement and government intervention explicit.¹²²

These objections to relying exclusively on prohibitions against intentional discrimination are all the stronger with respect to statutory prohibitions, like the ADEA, which pose no risk of judicial supremacy

¹¹⁸ *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 *Harv. L. Rev.* 467, 576-92 (2002).

¹¹⁹ See Reva B. Siegel, *Equality Talk Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 *Harv. L. Rev.* 1470, 1473 (2004) (arguing that equal protection jurisprudence reflects a commitment to anticlassification, rather than antisubordination); Kenneth Karst, *The Costs of Motive-Centered Inquiry*, 15 *San Diego L. Rev.* 1163, 1165 (1978) (arguing that intent requirements place a near-impossible burden on the plaintiff because improper motives are easy to hide and result from a combination of several different motives and actors). See generally Symposium, *Issues in Legal Scholarship, The Origins and Fate of Antisubordination Theory: A Symposium on Owen Fiss's Groups and the Equal Protection Clause* (2003), at <http://www.bepress.com/ils/iss2/> (2002).

¹²⁰ Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 *Harv. L. Rev.* 1470 (2004); Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 *Harv. L. Rev.* 1212, 1218-20 (1978).

¹²¹ Strauss, *supra* note ___, at 971-75; Sheila Foster, *Intent and Incoherence*, 72 *Tul. L. Rev.* 1065, 1069-73 (1998); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 *Geo. L.J.* 279 (1997).

¹²² See Strauss, *supra* note ___, at 960-62, 1012-14.

over the legislature. As the development of the theory of disparate impact under Title VII and the Voting Rights Act reveals, both the courts and the legislature can adapt and refine the theory as it applies to different forms of discrimination. In the stronger version of the theory, applicable to race, sex, and national origin under Title VII, it encourages various forms of affirmative action on these grounds. In the weaker version under the ADEA it does not play this role, but it is not one that is even thought to be necessary. Affirmative action for older workers is neither prevalent nor where it occurs, controversial. Discrimination in favor of older workers is not even prohibited by the ADEA,¹²³ but explicit programs to favor them in hiring or promotions remain rare.

Advocates of a stronger version of the theory of disparate impact, applicable to all forms of discrimination, need to take account of the widely varying context in which the theory has been invoked. It is difficult to conclude, for instance, that racial or sexual stereotypes have such a strong resemblance to stereotypes on the basis of age that all these forms of discrimination need to be addressed by exactly the same legal doctrine.

Adapting the theory of disparate impact to discrimination on different grounds and in different situations constitutes a more promising strategy for effective enforcement than insisting that all claims under this theory must be treated alike. Respect for civil rights depends upon a recognition by the majority that discrimination against a shifting constellation of minorities works to the disadvantage of all. Just as in other areas of law, voluntary compliance instead of litigation must be the ultimate aim in framing and enforcing legal rules. Theories of liability that extend too broadly, without an appreciation by those who must comply of how and why they should do so, threatens enforcement of the law as much as liability that is too narrowly constricted. The correct balance between over- and under-enforcement cannot be struck in the abstract but depends upon a pragmatic assessment of what can be expected to work in different circumstances. Justice Stevens' opinion in *City of Jackson*, whether or not one ultimately agrees with his finding of no liability, represents an attempt to strike such a balance.

Conclusion

Another of Justice Stevens' former law clerks, Professor James Liebman, observed some time ago that he was surprised to learn that over the course of the justice's career, he moved from the center to the liberal wing of the court without changing position at all. Perhaps this is a sign of the times, but it is also a sign of Justice Stevens' consistency and integrity. He has not formulated artificially precise rules in one case only to depart from them in the next, when they had undesirable consequences. Instead, he has adhered to principles that were capable of developing with the times and the changing nature of discrimination. Nowhere is this more evident than in his opinions on the theory of disparate impact, where he has sought to frame standards that actually work to prevent discrimination and to encourage compliance with the law. The methods of a judicial moderate, emphasizing pragmatic respect for pluralistic values, inevitably disappoints those who argue for clearer solutions to more simply framed problems. To his great credit, Justice Stevens has recognized that the enduring dilemmas of discrimination in our country do not fit this

¹²³ *General Dynamics Land Systems, Inc. v. Cline*, 540 US 581, 601 (2004).

mold. His opinions on disparate impact are just one of many instances in which he has molded legal principles to be an effective expression of our deepest values.