1-1-1993

The Civil Rights Act of 1991: A “Quota Bill,” a Codification of Griggs, a Partial Return to Wards Cove, or All of the Above?

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THE CIVIL RIGHTS ACT OF 1991: A “QUOTA BILL,” A CODIFICATION OF GRIGGS, A PARTIAL RETURN TO WARDS COVE, OR ALL OF THE ABOVE?

Kingsley R. Browne*

Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant.¹

INTRODUCTION

The tension between individual equality and group equality — between equality of treatment and equality of result — has probably never been as central to public debate as it was during the tortured history of the Civil Rights Act of 1991² and its vetoed

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predecessor, the Civil Rights Act of 1990. Proponents defended the 1991 Act declaring that it advanced individual equality. Opponents attacked the Act as an attempt to codify notions of group entitlements and quotas. Although the Act purportedly had little to say about affirmative action, whether described as "quotas" or mere "preferences," concerns about affirmative action constituted the undercurrent of the debate from the outset. An awareness of that undercurrent is critical to the proper interpretation and understanding of the Act.

The purpose of this article is to examine the effect of the


4. See Senator Metzenbaum's comments:

    I am hopeful that President Bush will focus on the purpose of this bill: To restore the dream of every American, that in this great Nation you will get a fair chance to prove yourself, regardless of your race, your creed, your gender your national origin, or your color . . . . It is a bill to provide equal opportunity for all Americans.

136 CONG. REC. S15,335 (1990) (statement of Sen. Metzenbaum). See also 136 CONG. REC. H6807 (1990) (statement of Rep. Hawkins) ("Qualifications are and should be the test, and that is all we are saying in this bill.").

5. See, e.g., comments made by Senator Hatch:

    [W]hat kind of a society do we really wish to establish? . . . Is it a society that has created a convoluted, tortured, and often contradictory legal system which, as a practical matter, requires every job in America to match perfectly the numerical mix of the surrounding, relevant labor pool; a society in which one's right depends on the group to which he or she belongs; a society in which group membership may be more important than ability and experience; a society where every employment policy is governed by numerical quotas? Is that what we are after?

Civil Rights Act of 1991 on the disparate-impact theory of discrimination and to explore the relationship between the debate over this issue and the debate (or lack thereof) over affirmative action. Part I of this article will summarize the disparate-impact theory of discrimination as it has been developed in opinions of the Supreme Court from *Griggs v. Duke Power* through *Wards Cove Packing Co. v. Atonio*. Part II will examine the extent to which *Wards Cove* altered the prior law of disparate-impact discrimination, and, in turn, how the 1991 Civil Rights Act altered the standards contained in *Wards Cove*.

The 1991 Act was, in large part, a response to a series of Supreme Court decisions handed down during the 1988 Term. The most controversial of these cases was *Wards Cove Packing Co. v. Atonio*, which many commentators considered to be a substantial cutback on, if not an overruling of, the Court's 1971 decision in *Griggs v. Duke Power Co.* In fact, *Wards Cove* was nothing of the kind. The central holding of *Griggs* was that a plaintiff may challenge facially neutral practices that are adopted without discriminatory purpose if the practices result in an adverse impact on a "protected class." The plaintiff will prevail on such a showing unless the employer can demonstrate business necessity or job relatedness. The most important aspect of *Griggs* — that a plaintiff can establish an unlawful employment practice even with-

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8. See *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (holding that 42 U.S.C. § 1981 does not prohibit harassment on the basis of race); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989) (holding the time to challenge a facially neutral seniority system adopted for discriminatory purposes begins to run at the time the system is adopted); *Martin v. Wilks*, 490 U.S. 755 (1989) (allowing plaintiffs harmed by an affirmative-action plan contained in a consent decree to bring independent lawsuits challenging the action); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (holding that plaintiffs in disparate-impact cases must prove that the challenged practice does not serve the employer's legitimate interests); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that in mixed-motive cases the employer can avoid liability by proving that it would have taken the same action in the absence of discriminatory motivation).
9. See *infra* notes 13-22 and accompanying text for examples of reactions to the *Wards Cove* decision.
10. The term "protected class" as used in this article denotes a class that is defined by race or by sex; it does not mean only minorities and women. Every person is a member of some protected class, because everyone has a race and a sex. Title VII of the Civil Rights Act of 1964 also prohibits discrimination on the basis of color, national origin, and religion, so any discussion of race and sex discrimination should be read to include discrimination on those bases as well.
out a showing of intent\textsuperscript{12} — was not challenged by a single Justice in \textit{Wards Cove}. At most, the \textit{Wards Cove} opinion made only marginal adjustments to the disparate-impact doctrine, although, as described below, it arguably did not change the doctrine at all.\textsuperscript{13}

If \textit{Wards Cove} did not challenge the central holding of \textit{Griggs}, the firestorm of protest that it engendered is difficult to explain, but a firestorm it surely unleashed. The \textit{New York Times} repeatedly referred to \textit{Wards Cove} as “overruling” the eighteen-year-old unanimous precedent of \textit{Griggs}.\textsuperscript{14} The \textit{Wards Cove} holding was called a “startling turnabout”\textsuperscript{15} and a reflection of “a sharp break with the Court’s own prior understanding.”\textsuperscript{16} One commentator suggested that in \textit{Wards Cove} the Court “revisited”

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12. \textit{Id.}

13. Even some commentators favorable to the \textit{Wards Cove} decision view it as having worked a substantial change in the law. See, e.g., \textbf{RICHARD EPSTEIN, FORBIDDEN GROUNDS} 234 (1992) (“there is no defensible construction of \textit{Griggs} that supports its wholesale reinterpretation in \textit{Wards Cove}”); Charles J. Cooper, \textit{Wards Cove Packing Co. v. Atonio: A Step Toward Eliminating Quotas in the American Workplace}, 14 \textit{Harv. J.L. & Pub. Pol'y} 84, 90 (1991) (“In \textit{Wards Cove}... the Supreme Court abandoned the ‘business necessity’ test as it has been applied since \textit{Griggs} and redefined the employee’s burden in proving disparate impact. To establish a prima facie case, an employee must now show more than ‘a racial imbalance in the work force.’”).

14. See, e.g., Linda Greenhouse, \textit{The Year the Court Turned to the Right}, \textit{N.Y. Times}, July 7, 1989, at A1 (“\textit{Griggs v. Duke Power}... was effectively overruled this term...”); \textit{Id.} (“\textit{Wards Cove v. Atonio}...overturned the \textit{Griggs} decision in all but name”); Editorial, \textit{A Red Herring in Black and White}, \textit{N.Y. Times}, July 23, 1990, at A14 (“[I]n last year in the \textit{Wards Cove} case, a 5-to-4 majority overruled \textit{Griggs} and placed new, heavy burdens on civil rights plaintiffs.”); Adam Clymer, \textit{President Rejects Senate Agreement on Rights Measure}, \textit{N.Y. Times}, Aug. 2, 1991, at A1 (“For more than a year arguments over civil rights legislation have focused on how to interpret a 1971 Supreme Court decision, \textit{Griggs v. Duke Power Company}, which was overruled by the Court in 1989 in \textit{Wards Cove v. Atonio}.”). \textit{See also} Reginald Alleyne, \textit{Smoking Guns are Hard to Find}, \textit{L.A. Times}, June 12, 1989, at Part 2, Page 5 (the Supreme Court’s “underlying dislike” for Title VII “is openly revealed by the illogic of the reasoning” of \textit{Wards Cove}); \textit{Id.} (“The \textit{Wards Cove} case illustrates how political catch phrases like ‘strict constructionist’ and ‘judges who are not activists’ are little more than code words for judges who, among other traits, simply dislike civil-rights legislation.”); Marcia Coyle & Fred Strasser, \textit{Is the High Court Hiding Reversals on Rights?}, \textit{Nat’l J.I.}, June 19, 1989, at 5 (quoting Isabelle K. Pinzler, director of the American Civil Liberties Union Women’s Rights Project: “The most fascinating aspect of the decision was its dishonesty... They have overruled \textit{Griggs} but they deny it... The doors of opportunity opened by \textit{Griggs} have been slammed shut. We’re not out of business, but ironically, Title VII will become the vehicle that prevents the remedying of systemic employment discrimination.”).


16. \textit{Id.} at 73 (Blumoff and Lewis note that the Supreme Court first broke with prior understanding in Justice O’Connor’s plurality opinion in \textit{Watson v. Fort Worth Bank & Trust}, 487 U.S. 977 (1988)).
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Griggs' holding that adverse impact can serve as a basis of liability, and "reached an opposite conclusion" by holding that only intentional discrimination is proscribed by Title VII. 17 The Court, according to this commentator, "left little doubt that it intended to dismantle Griggs." 18 Another commentator asserted that Wards Cove "may have all but eliminated the disparate impact branch of Title VII analysis." 19 References to Dred Scott v. Sandford 20 and Plessy v. Ferguson 21 abounded. 22

One can hypothesize a number of explanations for the strength of the reaction to Wards Cove. The firestorm may have been exacerbated by the fact that Wards Cove was seen as not standing in isolation, but rather as one of a whole series of closely decided cases that the Court's critics viewed as cutting back on protection against discrimination. 23 Had Wards Cove been the only civil rights case of the 1988 Term, the necessary critical mass to over-

18. Id. at 237.
20. 60 U.S. (19 How.) 393 (1856).
22. See, e.g., Robert Belton, Causation and Burden-Shifting Doctrines in Employment Discrimination Law Revisited: Some Thoughts on Hopkins and Wards Cove, 64 TUL. L. REV. 1359, 1405 (1990) ("In a real sense, the position of the conservative majority of the Justices in Hopkins and Wards Cove is behind the times: their position is as outmoded as that of the Court when it handed down its separate-but-equal decision in Plessy v. Ferguson almost one hundred years ago"). See also Belton, The Dismantling of the Griggs Disparate Impact Theory, supra note 17, at 247 ("The implicit message in Wards Cove parallels the explicit message of the justices who dismantled the civil rights legislation of the First Reconstruction."); Alan Freeman, Antidiscrimination Law: The View from 1989, 64 TUL. L. REV. 1407, 1407 (1990) (calling the 1989 decisions "the greatest setback to civil rights progress in a single Term of Court since the nineteenth century" and stating that "[t]he impact of the 1989 decisions was so dramatic as to parallel those of the post-Civil War Reconstruction Era."); Linda S. Greene, Race in the 21st Century: Equality Through Law?, 64 TUL. L. REV. 1515, 1517 (1990) ("The civil rights decisions of the 198[8] Term force us to refoce on a question presented time and time again, before and after Dred Scott: whether meaningful equality can be obtained for African-Americans through law."); Stephen Reinhardt, Civil Rights and the New Federal Judiciary: The Retreat from Fairness, 14 HARV. J.L. & PUB. POL'Y 142, 149 (1991) ("Our legal system has gone through similar times of racial insensitivity before, such as the era of Dred Scott and Plessy v. Ferguson, and we have come out of those eras resilient.").
23. See 136 CONG. REC. S1022 (1990) (statement of Sen. Metzenbaum) ("In a stunning series of 5-to-4 decisions announced last spring, the new majority on the Court reversed longstanding precedents and denied protection to the victims of employment discrimination.").
rule it may not have coalesced. Misconception played a large role in the controversy, leading to the oft-stated, but greatly exaggerated, argument that the Supreme Court is engaged in a systematic pattern of cutting back on civil rights. Although it is true that the Court has reached decisions that displease the "civil rights establishment" in a number of cases, it is a vast over-generalization to view this as part of a consistently anti-civil rights pattern. Indeed, in the last half-dozen years the Court has issued numerous employment-discrimination decisions that adopt positions urged by the civil rights establishment.

24. The following remarks of Representative Owens are typical of some of the more fulsome rhetoric surrounding the bill:

For African-Americans and other minorities, the reign of Reagan was catastrophic . . . . Years of steady progress lurch to a halt; the clock didn't just stop — it started ticking backward. Here again in America, racism has been made socially acceptable . . . . And now thanks to Ronald Reagan's appointments to the Supreme Court, here again in America, racism in the workplace has been made legally tenable . . . . Years of consensus and consistent precedent were swept aside . . . . What the Court has said to employers in Wards Cove is that while you still can't commit blatant, obvious acts of discrimination against minorities and women, if you are sophisticated and discreet about it, we will look the other way. You cannot hang a "no blacks allowed" sign on your door, but if you're clever and come up with a standardized test or some other superficially neutral ruse that achieves exactly the same result, no one will stand in your way. You can be a bigot, in other words, so long as you are a kind and gentle one.


25. The term "civil rights establishment" is probably the least confusing way to characterize the interests being referred to here. The terms "pro-plaintiff" and "pro-employer" do not fit well, because the position of civil rights organizations is not always contrary to employer interests, as seen in the affirmative action cases. The terms "pro-civil rights" and "anti-civil rights" are rejected, because they assume that a decision in favor of a reverse-discrimination plaintiff is an "anti-civil rights" decision, which is a corruption of the term.

What the constituents of the "civil rights establishment", seem to share is, first, a strong (for some an irrebuttable) presumption that, in any given case, a female or minority plaintiff alleging discrimination should prevail in litigation; second, an assumption that legal rules should impose a difficult burden on employers to justify a lack of proportional representation in the workplace; and third, a belief that affirmative action plans, whether voluntary or court-imposed, should be virtually immune from legal challenge.

The language of Title VII does not easily lend itself to the disparate-impact theory.\textsuperscript{27} Likewise, nothing in the legislative history supports the assertion that the 1964 Congress in any way intended to outlaw job qualifications that were not intended to discriminate. In fact, the relevant legislative history suggests the contrary.\textsuperscript{28} Nonetheless, the Griggs Court found Congress's intent to

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\item Section 703(a)(1) of Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1) (1988).
\item Section 703(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2) (1988) (emphasis added). In cases subsequent to Griggs the Court has identified § 703(a)(2) as the source of the disparate-impact prohibition. See, e.g., Connecticut v. Teal, 457 U.S. 440, 448-49 & n.9 (1982).
\item Section 706(g), the remedial provision of Title VII, is difficult to square with a view that Title VII prohibited unintentional discrimination, since it provides remedies only for "intentional" discrimination. 42 U.S.C.A. § 2000e-5(g) (West Supp. 1992).
\end{itemize}


\textbf{28.} For example, in their influential interpretive memorandum, Senators Clark and Case said:

There is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, mem-
prohibit facially neutral practices "plain from the language of the statute," although the Court provided no analysis of the statutory language and little analysis of the legislative history in support of its conclusion.

The weak doctrinal foundation of Griggs may have also contributed to the reaction to Wards Cove. Although the Court in Wards Cove did not question the central holding of Griggs, recognition of Griggs' shaky underpinnings may have caused some anxiety among supporters who feared that Griggs was a likely candidate for overruling.

Griggs was, without a doubt, the most significant Title VII case ever decided; indeed, it is almost trite to refer to it as a "landmark" decision in the law. There is usually little reflection, however, about why the case is entitled to landmark status. If Griggs had come out the other way and had simply enforced the most obvious meaning of the statutory language and acted in apparent harmony with the drafters' purpose to eliminate intentional discrimination, it is unlikely that Griggs would have been considered a landmark case or even an important one. Paradoxically, the landmark status of Griggs was the very factor that rendered it vul-

bers of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.

110 CONG. REC. 7213 (1964). By far the most thorough analysis of the legislative history on the disparate-impact issue is found in Gold, supra note 27.


See also Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 665 (1989) (Stevens, J., dissenting) ("Chief Justice Burger's landmark opinion in Griggs established that an employer may violate the statute even when acting in complete good faith without any invidious intent.").
The reaction to *Wards Cove* also may have been intensified by the fact that it was seen as breaking a tacit understanding between the Court and Congress under which the former would advance the cause of equality of result, through preferential treatment or otherwise, without the need for action by the latter.\textsuperscript{31} Before *Wards Cove*, the Court had repeatedly advanced equality of result in the face of apparently contrary statutory direction. For example, in *Griggs* itself, the Court took a statute that prohibited depriving *individuals* of employment opportunities because of the individual's race and read it as prohibiting deprivation of opportunities of groups.\textsuperscript{32} In *United Steelworkers v. Weber*,\textsuperscript{33} the Court interpreted a statute whose plain meaning admits of no exception to its command of nondiscrimination, and whose legislative history is unambiguous on the point,\textsuperscript{34} and held that employers could, in

\textsuperscript{31} The "betrayal" theme was rampant in the congressional debates on the Civil Rights Acts of 1990 and 1991. See, e.g., Senator Kennedy's comments:

In the past . . . the Supreme Court has issued a series of rulings that mark an abrupt and unfortunate departure from its historic vigilance in protecting civil rights. The fabric of justice has been torn. Significant gaps have been opened in the existing laws that prohibit racism and other types of bias in our society.

136 CONG. REC. S1018 (1990) (statement of Sen. Kennedy). See also id. at 1022 (statement of Sen. Jeffords) (the Supreme Court is moving backwards and "reneg[ing] on history"); 137 CONG. REC. S15,287 (1991) (statement of Sen. Metzenbaum) (the civil rights decisions of the 1988 Term symbolize the Court's abandonment of its "traditional role as protector of the powerless in our society.").

\textsuperscript{32} *Griggs*, 401 U.S. at 431.

\textsuperscript{33} 443 U.S. 193 (1979).

\textsuperscript{34} Justice Rehnquist's exhaustive review of the legislative history of the 1964 Civil Rights Act in his dissent stands in stark contrast to the almost non-existent use of legislative history by the majority in *Weber*. Indeed, the *Weber* majority could not point to a single statement in the legislative history of the 1964 Act suggesting that racial preferences were permissible. The majority acknowledged that the language of the statute seemed to contradict its position but nonetheless rested its decision on the amorphous desire of the 1964 Congress to improve "the plight of the Negro in our economy." *Id.* at 202 (citing 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey)). Yet, given that Weber's claim of discrimination was supported by the text of the statute, the burden on the question of legislative history was clearly on the majority, and the majority did not carry it. Justice Rehnquist's discussion of the legislative history went essentially unanswered. Several statements cited in Justice Rehnquist's dissent were express statements by important sponsors of the legislation suggesting that employers would not be permitted to employ racial preferences. *Id.* at 231-55 (Rehnquist, J., dissenting). For example, in a floor speech, Hubert Humphrey stated: "The 'bugaboo' [that courts could require employers to achieve a certain balance] is 'nonexistent': In fact, the very opposite is true. Title VII prohibits discrimination. In effect, it says that race, religion, and national origin are not to be used as the basis for hiring and firing." 110 CONG. REC. 6549 (1964). See also
fact, discriminate against certain individuals for the purpose of advancing affirmative-action goals. Again, in California Federal Savings & Loan Ass'n v. Guerra, the Court interpreted a provision of the Pregnancy Discrimination Act of Title VII that required pregnant women to "be treated the same . . . as other persons not so affected" as allowing pregnant women to be treated better than any other persons.

In each of these cases, the Court acted in a manner contrary to the ordinary meaning of the provisions that were being interpreted and contrary to the apparent intention of the drafters as revealed by the legislative history. It is extremely doubtful that political considerations would have permitted congressional adoption of any of these rules at the time the relevant statutes were enacted. Nonetheless, the Court adopted all of them without the need for the public debate and the concern for political consequences that accompany legislative action.

The primary concern of Wards Cove opponents may have had

id. at 6553 (statement of Sen. Humphrey) ("It is claimed that the bill would require racial quotas for all hiring, when in fact it provides that race shall not be a basis for making personnel decisions.").

Senator Humphrey also stated:
The title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. In fact, the title would prohibit preferential treatment for any particular group, and any person, whether or not a member of any minority group would be permitted to file a complaint of discriminatory employment practices.

Id. at 11,848. Similarly, Senator Celler stated: "The Bill would do no more than prevent . . . employers from discriminating against or in favor of workers because of their race . . . .", id. at 1518, and Senator Kuchel assured opponents that employers "could not discriminate in favor of or against a person because of his race . . . . In such matters . . . the bill now before us is color-blind," id. at 6564. Senator Saltonstall stated that Title VII "provides no preferential treatment for any group of citizens. In fact, it specifically prohibits such treatment." Id. at 12,691. Finally, the interpretive memorandum of Senators Clark and Case assured that:

[Title VII's] effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged — or indeed permitted — to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.

Id. at 7213.

35. Weber, 443 U.S. at 204.
38. Guerra, 479 U.S. at 287.
less to do with the law of disparate-impact discrimination itself than it did with the law of affirmative action.\textsuperscript{39} A common justification for relaxed scrutiny of affirmative-action plans is that a permissive standard is necessary to relieve employers of a dilemma: if they adopt affirmative-action plans, they face reverse-dis-\textsuperscript{9} crimination suits; if they do not adopt such plans, they face disparate-impact suits. This relationship between the disparate-impact theory and affirmative action had been noted by Supreme Court Justices\textsuperscript{40} and academic commentators.\textsuperscript{41} Indeed, prior to Wards

\textsuperscript{39} See Blumoff \& Lewis, supra note 15, at 15 ("[D]isparate impact analysis is partially incompatible with the principle of merit. The basic principle of color-blindness may obstruct the goal of equal achievement. The incompatibility creates the persistent fear that equality may demand what many see as pernicious and even illegal activity.").

\textsuperscript{40} For example, in his concurrence in United Steelworkers v. Weber, Justice Blackmun stated that although he was not convinced that the legislative history of Title VII supported affirmative action, the majority's interpretation was necessary because of "practical and equitable [considerations] only partially perceived, if perceived at all" by Congress when it enacted the statute. United Steelworkers v. Weber, 443 U.S. 193, 209 (1979) (Blackmun, J., concurring). Among these considerations is that employers would have to walk a tightrope between liability to minorities if they did not adopt affirmative action, and liability to whites if they did. Id. at 210. According to Justice Blackmun, affirmative-action plans allow an employer to reduce the likelihood that plaintiffs can successfully raise a disparate-impact claim. Id. at 211. Similarly, in Albemarle Paper Co. v. Moody, Justice Blackmun noted that if an employer's hiring practices are measured by a standard which is so high as to be impractical, it would "leave the employer little choice . . . but to engage in a subjective quota system of employment selection." Albemarle Paper Co. v. Moody, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring).

Justice Powell addressed the same issue in Connecticut v. Teal, 457 U.S. 440 (1982). Justice Powell suggested that preventing employers from defending disparate-impact suits by demonstrating an absence of "bottom-line" disparities would decrease employers' incentives to engage in affirmative action, since proportional representation would no longer insulate employers from liability. Id. at 463 (Powell, J., dissenting).

\textsuperscript{41} For example, in a recent article about the Wards Cove case, Mack A. Player observed that disparate-impact liability is "a key premise upon which affirmative action is based" and expressed the fear that a relatively relaxed standard of disparate impact would "reduce[] the pressure on employers to adopt affirmative action plans as a basis for avoiding liability premised on impact." Player, supra note 27, at 45 n.167. See also Alfred W. Blumrosen, The Legacy of Griggs: Social Progress and Subjective Judgments, 63 CHI.-KENT L. REV. 1, 6 (1987): "Griggs provides the underlying justification for race conscious affirmative action programs under Title VII. Identification of 'disparate impact' requires that employers be race conscious. Once disparate impact is identified, voluntary action to ameliorate it is necessary to avoid liability in the absence of business necessity." Robert Belton has made the same point:

The Griggs disparate impact theory provided both the practical and doctrinal foundations for race- and sex-specific affirmative action plans. . . . It was generally agreed that a validation study provided the most probative evidence of business necessity. Validation, however, was commonly known to be difficult, costly, and time-consuming. Accordingly, many employers sought alternative ways to reduce the likelihood of a disparate impact suit. Primarily, they adopt-
Cove, the fact that such a relationship existed was uncontroversial. After Wards Cove, however, in the context of attempts to "codify" Griggs, political considerations necessitated the disclaimer of any relationship between Griggs and racial preferences. As a result, that which had previously been openly acknowledged was now denied. Although Wards Cove critics repeatedly disavowed any interest in encouraging preferential hiring, they must have

ed affirmative action plans, pursuant to which they expressly took race or sex into account in hiring or promoting in order to substantially reduce racial and sexual disparities in their workforce. By reducing these disparities, it became more difficult for plaintiffs to use statistical evidence to establish a prima facie case of disparate impact discrimination.

Elizabeth Bartholet has also noted the relationship between the disparate-impact theory and affirmative action:

Employers have also been under some pressure to avoid the costs of litigation — or of validation — by adopting selection systems that have no adverse impact . . . Griggs has thus encouraged employers to develop hiring and promotion systems that select on a racially proportionate basis from among qualified candidates. The Supreme Court's approval in United Steelworkers v. Weber of a race-conscious employment scheme was the logical consequence of the Griggs doctrine. Employers — compelled by Griggs to eschew policies that had an unnecessary adverse impact on blacks — could not be penalized for adopting policies designed to ensure that blacks were employed on a proportionate basis.


42. See, e.g., 136 CONG. REC. S15,327 (1990) (statement of Sen. Kennedy) ("[I]n all the 18 years it was in effect, the Griggs rule did not force employers to resort to quotas."). See also 136 CONG. REC. H6778 (1990) (statement of Rep. Fish); Id. at H6786 (statement of Rep. Conyers); Id. at H6791 (statement of Rep. Hayes) (all disavowing any relationship between Griggs and quotas).

Supporters of affirmative action and the disparate-impact theory apparently are attempting to have it both ways. On the one hand, they say that the employer needs the safe harbor of affirmative action to protect against disparate-impact suits, and on the other hand, they deny that the disparate-impact rules cause employers to adopt preferences. See Blumoff & Lewis, supra note 15, at 31 ("Most of the new constraints rest largely on consequential reasoning. Conclusions based on the fear of detrimental consequences — here, quotas — ordinarily ought to dictate result only when the feared consequences are likely to occur, a matter for empirical inquiry."). But see Rutherglen, supra note 27, at 1315 (the EEOC Guidelines on Employee Selection Procedures "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").

43. See supra note 42. See also Senator Jeffords' discussion of this issue:

There is considerable confusion over the use of the term "quotas." I think the most obvious confusion is the reference which the Senator from Iowa alluded to in the latter part of his talk about quotas or affirmative action type programs. This has nothing to do with that. Those are contracts through the Federal Government wherein there is an affirmative action required to reduce discrimination. This has nothing to do with that.

known what was at stake.\textsuperscript{44}

I. DISPARATE-ImpACT THEORY FROM GRIGGS TO WARDS COVE

In \textit{Griggs v. Duke Power Co.}, the Court held that Title VII prohibits facially neutral practices, adopted without discriminatory intent, if those practices have an adverse impact on a protected group and the practices do not bear a "manifest relationship to the employment in question."\textsuperscript{45} \textit{Griggs} involved a challenge to Duke Power's requirements of a high-school education and satisfactory scores on two professionally prepared aptitude tests as conditions of obtaining any of a number of mostly blue-collar positions with Duke Power Company.\textsuperscript{46} The Supreme Court observed that the lesser performance of blacks in meeting these requirements was a consequence of poor education received in segregated schools and that the diploma and test requirements tended to "freeze" the status quo of prior discriminatory employment practices."\textsuperscript{47} The Court found that these requirements violated Title VII because the employer could not show a relationship between the requirements and job performance.\textsuperscript{48}

\textit{Griggs} could have been viewed as a narrow case that operated either to permit disparate-impact challenges only to practices that perpetuate the effects of discrimination in employment or education or to facilitate challenges to intentional discrimination by dispensing with a requirement of proving intent in certain cases. Subsequent cases made clear, however, that its scope was much broader. For example, in \textit{Dothard v. Rawlinson},\textsuperscript{49} the Court applied disparate-impact analysis in a challenge to a height-and-weight requirement for prison guards. The female plaintiff's challenge was successful, even though the fact that women, on average, are shorter.

\textsuperscript{44} One oft-stated objection to the quota argument was that quotas are illegal. \textit{See}, \textit{e.g.}, 136 \textit{Cong. Rec.} S15,365-66 (1990) (statement of Sen. Jeffords) ("Quotas in the term used, for instance, are illegal."); \textit{Id.} at H6799 (1990) (statement of Rep. Vento) ("This is clearly not a quota bill. Quotas are illegal."). In fact, the Court upheld a quota system in \textit{United Steelworkers v. Weber}, 443 U.S. 193, 197 (1979), where the employer set aside 50\% of the positions in a training program for blacks.
\textsuperscript{45} \textit{Griggs}, 401 U.S. at 432.
\textsuperscript{46} \textit{Id.} at 425-26.
\textsuperscript{47} \textit{Id.} at 426-28. Prior to the effective date of Title VII, Duke Power had an open policy of racial discrimination. In response to Title VII, the company modified its employment requirements into what became the challenged practices in \textit{Griggs}. \textit{Id.}
\textsuperscript{48} \textit{Id.} at 431.
and lighter than men is not a product of any kind of discrimination, at least not discrimination by humans. In Connecticut v. Teal, a test requirement was subject to a disparate-impact challenge even though the employer had in place an affirmative-action plan that resulted in an overrepresentation of blacks in the challenged positions, negating any argument that the test requirement was adopted for the purpose of discrimination. The Court found that a non-discriminatory bottom line did not prevent a plaintiff from establishing a prima facie case of disparate impact nor was it a defense to a disparate-impact challenge.

Between Griggs and Wards Cove, the level of the Court’s scrutiny of practices having a disparate impact varied greatly. In 1975, the Court in Albemarle Paper Co. v. Moody applied the Equal Employment Opportunity Commission ["EEOC"] Guidelines on testing in such a stringent fashion that it was predicted that employers would no longer be able to engage in testing at all. On the other hand, the following year in Washington v. Davis, the Court upheld a written test of verbal ability on a much lesser showing, relying in part on the intuitive ground that reading ability is important to the training program and to the job of police officer. The next year, the Court in Dothard v. Rawlinson stated that a practice with a disparate impact “must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge.” However, two years after Dothard, the Court in New York City Transit Authority v. Beazer held that the employer need show only that its “legitimate employment goals . . . are significantly served by — even if they do not require” the challenged practice. In sum, the Court had never adopted a monolithic posi-

51. Id. at 442.
52. 422 U.S. 405 (1975).
55. Id. at 254 (Stevens, J., concurring).
58. Id. at 587 n.31.
tion on the disparate-impact standards.  

Part of the reason for the Court’s failure to settle on an appropriate standard has been a lack of consensus about the underlying rationale for the disparate-impact theory.  

Griggs itself suggested that Title VII was directed at “removal of artificial, arbitrary, and unnecessary barriers to employment” and struck down requirements that it viewed as arbitrary and unrelated to job performance. In Albemarle Paper, on the other hand, the Court struck down tests that probably did bear an overall relationship to performance of at least some of the jobs for which they were used. The tests were struck down because they did not satisfy the rigorous validation standards of the EEOC Guidelines. Lack of arbitrariness was not the issue in Albemarle Paper. Rather, the Court required that practices satisfy a much higher level of justification. By the time of Beazer, the last disparate-impact case where the standard of business necessity was applied, the Court had retreated to a more Griggs-like approach that looked to whether the challenged practice furthered a legitimate employer interest. Suggestions that the Wards Cove Court abandoned a consistent line of precedent reflect blindness to the fact that since Griggs, the Court simply has not been of a single mind about the purpose of the disparate-impact

59. Prior to Wards Cove, it was widely recognized that the Court’s disparate-impact cases were inconsistent, a fact that is easy to forget in the aftermath of Wards Cove, which created an incentive for critics of the case to claim that all of those cases that they never liked, such as Davis and Beazer, were part of the “good old days” of Griggs. See Paulette M. Caldwell, Reaffirming the Disproportionate Effects Standard of Liability in Title VII Litigation, 46 U. Pitt. L. REV. 555, 561-62 (1985) (discussing the vacillation in distinguishing discriminatory motive and disparate impact in Title VII opinions since Albemarle); Barbara Lemer, Washington v. Davis: Quantity, Quality, and Equality in Employment Testing, 1976 SUP. CT. REV. 263, 268 (discussing the Court’s attempt in Davis to mitigate the disproportionate burden of proof on defendants in impact cases); Rutherglen, supra note 27, at 1319 (discussing the confusing nature of lower court standards and approaches to disparate impact cases).

60. George Rutherglen has described the Court as vacillating between two purposes: preventing pretextual discrimination and discouraging employment practices with adverse impact. Rutherglen, supra note 27, at 1313-14.


62. Albemarle Paper, 422 U.S. at 436.

63. Id. at 435-36. Validation is the process of determining whether a selection device actually measures what it is intended to measure. Barbara Lerner, Employment Discrimination: Adverse Impact, Validity, and Equality, 1979 SUP. CT. REV. 17, 18.

64. Albemarle Paper, 422 U.S. at 436.

65. Beazer, 440 U.S. at 592-93.
Although critics have been suggesting for years that the Court was retreating from Griggs, it has actually beenretreating from Albemarle Paper, which appeared to set an impossibly high level of justification for employers. It is not a coincidence that Griggs was the last unanimous disparate-impact decision of the Court. By the time Wards Cove reached the Supreme Court, the battle lines had been drawn for over a decade.

In Wards Cove, the Court considered a disparate-impact suit brought by non-white, mostly Filipino and Alaska Native, cannery workers against two salmon canneries. The plaintiffs alleged that a variety of the employers' hiring and promotion practices had created a racially stratified work force. Most of the cannery jobs were unskilled positions held by non-whites; most of the noncannery jobs were skilled positions held by whites. To demonstrate the statistical adverse impact, the plaintiffs compared the racial composition of the cannery work force with the racial composition of the noncannery work force. Based upon that comparison, the Court of Appeals for the Ninth Circuit sustained the claims of the cannery workers.

In reversing the Ninth Circuit, the Supreme Court held that comparison of these two components of the employers' work forces was inappropriate. The Court found "nonsensical" the assertion

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66. See Earl M. Maltz, Title VII and Upper Level Employment — A Response to Professor Bartholet, 77 NW. U. L. REV. 776, 778, 779 (1983) (discussing the continuing development of the effects test since Griggs and the impossibility of finding a general doctrine that the Court has applied across-the-board).


70. These practices included nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, and a practice of not promoting from within. Id. at 647-48.

71. Id. at 647.

72. Id. at 651.


that discrimination in the selection of skilled noncannery workers could be demonstrated by pointing to a high proportion of minorities in the unskilled cannery positions. "Racial imbalance in one segment of an employer's workforce," declared the Court, "does not, without more, establish a prima facie case of disparate impact with respect to the selection of workers for the employer's other positions." Instead, the "proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified population . . . in the relevant labor market." Having found the plaintiffs' statistical comparison inappropriate, the Court could have simply remanded the case for reevaluation in light of its analysis of the statistical comparison. However, because the employers' petition for certiorari had also challenged, more generally, the standards applied by the Ninth Circuit in analyzing disparate-impact claims, the Court proceeded to consider the proper order and allocation of proof in disparate-impact cases.

The rule with respect to disparate-impact challenges under Title VII as described in Wards Cove is: (1) the plaintiff must first identify a specific practice or practices causing the disparate impact; (2) the burden of production, but not the burden of persuasion, then shifts to the employer to justify the challenged practice (3) by showing that the practice "serves, in a significant way, the legitimate employment goals of the employer"; and (4) even if the practice does serve the employer's legitimate employment goals, the plaintiff may still prevail by demonstrating that the employer rejected alternative practices that would have both reduced the disparate impact and still served the employer's interests as well, because such a showing would "believe a claim by [the employers] that their incumbent practices are being employed for...

75. Id.
76. Id. at 653.
77. Id. at 650 (quoting Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977)). The 1991 Act does not alter the Wards Cove holding that a disparity between two segments of an employer's work force does not establish disparate impact. Significantly, none of the many versions of the Civil Rights Acts of 1990 or 1991 would have overturned, or affected in any way, that holding. For example, the Senate Report on the original Civil Rights Act of 1990, a more sweeping bill than that which ultimately passed, made clear that the bill did not change how disparate impact is proved. S. REP. No. 315, 101st Cong., 2d Sess. 47 (1990).
78. Wards Cove, 490 U.S. at 656-58.
79. Id. at 659-60.
80. Id. at 659.
non-discriminatory reasons."

In describing the respective burdens in *Wards Cove*, the Court gave no indication that it believed that it was breaking new ground. More significantly, not a single member of the Court questioned the basic, and most important, holding of *Griggs*: that a plaintiff can prevail by showing a substantial disparate impact even absent an intent to discriminate. Nonetheless, an outcry against the decision resulted.

II. DISPARATE-IMPACT STANDARDS UNDER THE CIVIL RIGHTS ACT OF 1991

A. The Legislation

Within two weeks of the Court’s decision in *Wards Cove*, Senator Howard Metzenbaum of Ohio introduced The Fair Employment Reinstatement Act, a bill designed to overrule the decision. Ultimately, that bill was substantially incorporated into the original version of the Civil Rights Act of 1990, which was introduced in both the House and Senate on February 7, 1990. The 1990 bill would have legislatively overruled a number of Supreme Court decisions from the 1988 Term and earlier terms, allowed compensatory and punitive damages, extended the statute of limitations,

81. *Id.* at 660-61.

82. The closest the Court came to suggesting that its position deviated from prior law was its statement with respect to whether it is a persuasion or a production burden that shifts:

We acknowledge that some of our earlier decisions can be read as suggesting otherwise. But to the extent that those cases speak of an employer's "burden of proof" with respect to a legitimate business justification defense, they should have been understood to mean an employer's production — but not persuasion — burden.

*Id.* at 660 (citations omitted).

83. See, e.g., *id.* at 642-43 (favorably citing the holding of *Griggs* in the opening paragraph) and *id.* at 662 (Stevens, J., dissenting) (citing the central holding of *Griggs*). In light of this fact, it is surprising to note that some commentators assert that after *Wards Cove* only intentionally discriminatory practices violate Title VII. See, e.g., Belton, *supra* note 22, at 1404; Blumoff & Lewis, *supra* note 15, at 6.


and effected a number of other procedural changes. After eight months of rancorous debate, a modified version of the bill was passed by the House and Senate in October 1990 but vetoed by President Bush.

The Civil Rights Act of 1991 was introduced in the House on January 3, 1991, and passed on June 5, 1991. It was in large part similar to the vetoed version of the 1990 bill, except that some compromise language that had been in the vetoed version of the bill had been removed. In the Senate, the Democratic bill was expected to be introduced in the winter, but it was held in abeyance while Senator John Danforth, Republican of Missouri, attempted to fashion a compromise that would be acceptable to both supporters and opponents of the 1990 bill. He introduced three bills in early summer, which among them covered most of the areas covered by the omnibus bill. Then, in September of 1991, Senator Danforth introduced a single comprehensive bill. For weeks, faced with veto threats by President Bush, the bill made no apparent progress, although closed-door negotiations between the White House and Senators proceeded. Even as late as October

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89. See 136 CONG. REC. S16,457 (1990).
90. H.R. 1, 102d Cong., 1st Sess. (1991), infra Appendix E.
92. No Democratic bill had been introduced in the Senate, because Senator Edward M. Kennedy was unable to obtain the support of "moderate Republicans," including Senator Danforth. Steven A. Holmes, Business and Rights Groups Fail In Effort to Draft Bill on Job Bias, N.Y. TIMES, Apr. 20, 1991, at A1 and A10.
23, 1991, the Administration had vowed to veto the Danforth bill.96 Then, on October 25, the supporters of the Danforth Bill and the White House reached a compromise agreement.97 That bill passed the Senate on October 30,98 and the House on November 7.99 President Bush signed the bill on November 21.100

The primary impasse between supporters and opponents of the bill concerned the disparate-impact standards. Opponents argued that the disparate-impact provisions went far beyond any standards ever announced by the Court and imposed such a difficult burden on employers to justify practices having a disparate impact that they would be forced to hire by the numbers so that they would not be in the position of having to defend their statistics.101 Proponents of the bill argued that all they wished to do was return the law to its pre-Wards Cove state, and they denied that the bill would have the effect of forcing employers to adopt quotas.102

The proponents' denial of any intent to encourage employers

97. White House Announces Civil Rights Compromise Ending Two-Year Long Dispute, DAILY LAB. REP. (BNA) No. 208, at A-11 (Oct. 28, 1991). Leading congressional Democrats speculated that part of the pressure on President Bush to reach a compromise came from the much-publicized Clarence Thomas confirmation hearings and the strong showing of David Duke in the Louisiana gubernatorial campaign. Id.
98. Because of the inadvertent omission of language exempting the Wards Cove Packing Company from the disparate-impact standards of the bill, the Senate had to vote on the bill again on November 5.
101. See the President's remarks on the 1990 Act:
S. 2104 creates powerful incentives for employers to adopt hiring and promotion quotas. These incentives [ . . . ] created by the bill[ . . . ] will make it difficult for employers to defend legitimate employment practices. In many cases, a defense against unfounded allegations will be impossible . . . . [U]nable to defend legitimate practices in court, employers will be driven to adopt quotas in order to avoid liability.

102. Their denials were so vehement that quota claims were labelled racist and akin to the Willie Horton advertisements from the 1988 presidential campaign. See, e.g., 137 CONG. REC. H9538 (1991) (statement of Rep. Stokes) ("Sadly, the President's problem with H.R. 1 was never quotas, the problem was politics. Those politics were the same divisive, racial politics that in 1988 gave us Willie Horton . . . . "); see also 137 CONG. REC. H3953 (1991) (statement of Rep. Costello); 136 CONG. REC. H6801 (1990) (statement of Rep. Dellums).
to adopt quotas is significant. In supporting the bill, they did not argue that it would result in race-conscious hiring or that such hiring would be a good thing; instead, they specifically disavowed any intent to require or even encourage race-conscious hiring103 and took issue with opponents' arguments that the bill would have the asserted effect. Thus, the two sides agreed that a bill having the practical effect of requiring employers to engage in quota hiring would be inappropriate.104

On one level, it might be said that the parties really never joined issue in the quota debate, because they did not clearly define their terms in such a way that the two sides could actually be said to be arguing about the same issue. Opponents of the bill seemed to define “quotas” to include race or sex preferences for the purpose of achieving proportional representation.105 On the other hand, some of the proponents of the bill possibly believed that the bill would encourage employers to adopt such preferences but that such preferences did not constitute “quotas.” They could have been basing their argument on a definition of quotas as completely inflexible requirements that do not permit an employer to take job qualifications into account.106 If that was the proponents'
definition, their failure to identify it in the course of a debate intended for public consumption inevitably misled their audience.

An artificial distinction under which any element of flexibility at all in a "disfavored" quota converts it into a "favored" goal is not a distinction that the public is likely to make. Members of the general public would be likely to identify as a quota a system under which an employer attempts to cause its work force to mirror the racial composition of the general population, and under which a supervisor’s achievement of this objective is considered in his performance reviews. In short, to the extent that the proponents’ denial that a “quota bill” was at issue rested on an undisclosed view of the nature of quotas that is counter to common understanding, the public could scarcely be faulted for misconstruing the positions of those favoring the legislation.

Many of the denials of an intent to encourage quotas cannot reasonably be viewed as based upon an asserted distinction between preferences and quotas. First, that distinction was not urged by supporters as a reason to support the bill. Proponents did not argue that, even though the Act would force employers to adopt affirmative-action plans, it would not require inflexible quotas. Second, much of the discussion focused on how the bill was intended to ensure that legitimate qualifications, not race, be the controlling factors.

Although some of the proponents of the bill may have been strong supporters of race and sex preferences, it is significant that throughout the debates on the bill, there were constant denials that this bill had anything to do with affirmative action in any of its affirmative-action cases. See Sheet Metal Workers Int’l Ass’n Local 28 v. EEOC, 478 U.S. 421, 495-96 (1986) (O’Connor J., concurring in part, dissenting in part) (referring to a quota as a “fixed number or percentage which must be attained or which cannot be exceeded”, and would do so ‘regardless of the number of potential applicants who meet necessary qualifications”) (quoting Memorandum — Permissible Goals and Timetables in State and Local Government Employment Practices (March 23, 1973), reprinted in 2 Empl. Prac. Guide (CCH) ¶ 3776 (1985)).


108. See, e.g., 137 CONG. REC. H3953 (1991) (statement of Rep. Costello) (“This legislation is about equal opportunity for all workers, and not handouts, quotas, or unfair advantages.”).
form.\textsuperscript{109} It is true, of course, that a body of opinion holds that the important thing is not whether the employer's selection devices are valid, but rather whether they increase the representation of women and minorities in the workforce. For example, Eleanor Holmes Norton, while Chairwoman of the EEOC, complained that the ability of employers to validate their selection devices allowed them to avoid having to achieve proportional representation.\textsuperscript{110} In the debates over the current Act, however, supporters of the bill did not take Norton's position by arguing that the business necessity defense should be so rigorous as to force proportional representation; instead, they argued that they simply wanted employers to use job-related qualifications and that the bill allowed them to do so.

One significant consequence of the reluctance of supporters of the Act to appear to endorse preferences is that the only substantive change in the law of affirmative action effected by the Act was to outlaw a particular form of affirmative action — race norming. Race norming is the process of adjusting test scores so that scores are reported in terms of a comparison of a particular

\textsuperscript{109} See, e.g., Senator Kennedy's remarks:

The rhetorical smoke screen that our opponents are already laying down is a blatant attempt to divert this important civil rights debate into a dead-end debate over quotas, minority set-asides and affirmative action. That is not the measure we are proposing. The bill does not address those questions, and it does not require quotas.

\textsuperscript{110} See the comments of Eleanor H. Norton at the Equal Employment Opportunity Commission Meeting of December 22, 1977:

It is clear that the employers around the country are increasingly sophisticated in the validation of tests. Because employers make money and will learn to do what the government wants them to do. And the government says what we really want you to do is validate tests, that is what they are going to spend their money doing . . . . We do not see, however, comparable evidence that validated tests have in fact gotten black and brown bodies, or for that matter, females into places as a result of the validation of those tests. In other words, we do not see the kind of causal relation that I think, when the great — and I regard it as a great — new enforcement tool was discovered some years ago, we do not see quite the causal relationship we had expected to see . . . . So if the commission, in effect, says to employers, as long as you validate your tests we're really not concerned about you anymore . . . it is saying that the presence of real people who are not in the work force, is not as important as making sure that the tests have been validated.
test taker with other test takers of the same race.\textsuperscript{111} Thus, the highest test score of a black is reported as equal to the highest test score of a white, even if the raw scores on the tests are substantially different.\textsuperscript{112} The only distinction between race norming and other forms of affirmative action is that the issue of race norming had recently been brought to the forefront of public consciousness\textsuperscript{113} and members of Congress, even those supporting affirmative action, appeared hesitant to defend it.

Despite the claims of the bill's proponents, there can be no doubt that the initial 1990 Act was, in practical operation, a quota bill. That bill allowed plaintiffs to challenge an employer's bottom-line statistics, and the employer could defend practices (or the bottom-line disparity itself) only by proving that the practices were "essential to effective job performance."\textsuperscript{114} It is axiomatic that if the burden on employers to justify statistical disparities is high enough, employers will be able to avoid liability only by avoiding those disparities in the first place. Senator John Danforth, the leading force behind the 1991 Civil Rights Act, himself acknowledged that the requirements of the original 1990 Act were too stringent and likely to lead to quotas.\textsuperscript{115}

An understanding of the quota debate is a necessary prerequisite to a proper interpretation of the Act. In resolving questions of

\begin{footnotes}
\item[111] On December 13, 1991, the Department of Labor ordered that, effective immediately, "Employment and Training Administration (ETA) contractors and grantees and programs under the National Apprenticeship Act shall terminate the use of within-group conversion scoring or other race or ethnicity-based adjustments to [General Aptitude Test Battery] scores in making selection and referral decisions." \textit{Labor Department's Policy Decision on the General Aptitude Test Battery, DAILY LAB. REP. (BNA) No. 241, at D-1} (Dec. 16, 1991).
\item[112] See infra note 388.
\item[113] See id.
\item[114] See S. 2104 \S 3, \S 4, 101st Cong., 2d Sess., 136 CONG. REC. S1019, S1019 (1990), infra Appendix A \S 3, \S 4.
\item[115] The definition of "business necessity" in the original bill was that the business practice was "essential to effective job performance." . . . My feeling was . . . that this definition, "essential to effective job performance," was really impossible from the standpoint of business and was way, way too tough. Therefore, we went about the task of reformulating the definition, to have a more balanced view of "business necessity."
\end{footnotes}
interpretation under the Act, courts should be mindful of the fact that all parties to the debate agreed that it should not be interpreted in such a way as to force employers to "hire by the numbers" and that,whether explicitly or implicitly, all parties shared an assumption that the attempt by employers to predict job performance is a legitimate enterprise. Moreover, courts should not accept the apparent assumption of many commentators that the sole importance of the law is to separate out deserving and undeserving plaintiffs in litigation. The primary goal of Title VII is voluntary employer compliance, and the statute must be interpreted with an eye toward the kind of employer behavior that it will induce.

Because the Act did not expressly overrule much of Wards Cove, the Act's effect on the law of disparate-impact discrimination cannot be understood without a clear understanding of Wards Cove's effect on prior law. The remainder of this article will examine first, how Wards Cove fit into prior law with respect to each of its controversial holdings, and second, how the 1991 Act affected the holding of Wards Cove.

B. The Effect of the Legislation and Wards Cove on Prior Law

Opponents of Wards Cove argued that it broke with prior law on four points: (1) the allocation of the burden of persuasion; (2) the plaintiff's obligation to identify a specific practice or practices causing the disparate impact; (3) the standard of "business necessity"; and (4) the treatment of alternatives. An analysis of these elements will demonstrate that they are fully consistent with prior case law of the Supreme Court, even if they depart in some

117. Unfortunately, although Title VII is primarily a regulator of employer behavior, its success is often measured primarily in terms of who wins specific litigated cases, rather than in terms of the way in which it modifies employer behavior. The focus on litigation has tended to minimize the attention paid to the more important question, which is how the statute affects the millions of employment decisions that are never subject to litigation. See Kingsley R. Browne, Title VII as Censorship: Hostile Environment Harassment and the First Amendment, 52 OHIO ST. L.J. 481 (1991) (criticizing the hostile-environment theory because of the pressure it imposes on employers to censor employee speech).
118. See, e.g., Belton, supra note 17, at 243-44; Player, supra note 27, at 14-16.
respects from the approach taken by some lower courts. Because, as we will see, the 1991 Civil Rights Act specifically overruled only the allocation of the burden of persuasion to the plaintiff, how Wards Cove fit in with prior law remains quite critical to current law.

119. Compare Powers v. Alabama Dep't of Educ., 854 F.2d 1285, 1293 (11th Cir. 1988), cert. denied, 490 U.S. 1107 (1989) (plaintiff need show only disparity; employer then must identify and justify practices that caused result) and Segar v. Smith, 738 F.2d 1249, 1267 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115 (1985) (once the disparate impact of particular practice is shown, the burden of persuasion shifts to employer to show business necessity) and Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), cert. dismissed, 404 U.S. 1006 and 1007 (1971) ("The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business.") with Pouncy v. Prudential Ins. Co., 668 F.2d 795, 800 (5th Cir. 1982) (plaintiff must identify specific practices causing the impact) and Croker v. Boeing Co., 662 F.2d 975, 991 (3d Cir. 1981) (en banc) (burden of persuasion remains with plaintiff at all times) and Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981), cert. denied, 455 U.S. 1021 (1982) (Supreme Court's disparate-impact cases approve "employment practices that significantly serve, but are neither required by nor necessary to, the employer's legitimate business interests.").

Significantly, most cases that adopted one position of the original 1990 Act rejected the other positions. Perhaps the courts recognized that a combination of all the elements would place an impossible burden on the employer. Thus, for example, while Powers allowed the plaintiff to establish a prima facie case merely by showing a disparity, it permitted the defendant to come forward with just a showing of job-relatedness. Similarly, while Segar placed the burden of persuasion on the defendant, it required the plaintiff to challenge specific practices.

Since the criticism of the Wards Cove decision was that it deviated from the Supreme Court's own prior decisions, not that it was at variance with lower court decisions, the discussion of the impact of Wards Cove will focus on how it relates to the Supreme Court's precedents rather than its effect on the rules being applied in lower courts, which, in many instances, went beyond what had been authorized by the Supreme Court, and which lacked any substantial measure of consistency.

120. The enacted version of the 1991 Act limits the use of statements in the legislative history in interpreting the disparate-impact provisions to the interpretive memorandum found at 137 CONG. REC. S15,276 (1991).

Section 105(b) of the Act provides:

No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove — Business necessity/cumulation/alternative business practice.


The interpretive memorandum states, in its entirety:

The final compromise on S. 1745 agreed to by several Senate sponsors, including Senators Danforth, Kennedy, and Dole, and the Administration states that with respect to Wards Cove — Business necessity/cumulation/alternative business practice — the exclusive legislative history is as follows:

The terms "business necessity" and "job related" are intended to reflect the concepts enunciated by the Supreme Court in Griggs v.
1. The Shifting of the Burden of Production but not Persuasion

a. Wards Cove

Although the Wards Cove ruling on the burden-of-persuasion issue was unambiguously overruled by the 1991 Act, it is worthwhile to discuss the consistency of the Wards Cove resolution of that issue with prior precedent. Much of the controversy over Wards Cove involved the assertion that the Court overruled a consistent body of prior precedent, and much of the overreaction centered on the burden-of-persuasion issue.\(^\text{121}\)

Despite widespread statements to the contrary, in addressing the question of whether the burden that shifts to the employer is one of production or persuasion, the Supreme Court in Wards Cove resolved an issue it had never previously specifically addressed.\(^\text{122}\) Although it had in previous cases used words such as “prove,” “demonstrate,” and “show” to describe what an employer must do to answer the plaintiff’s prima facie case, the Court had never expressly described what it meant by those words.\(^\text{123}\) Thus, whatever course the Court ultimately chose could not fairly be described as inconsistent with its prior precedent.\(^\text{124}\) However, the

\[^{121}\text{See supra note 14.}\]
\[^{122}\text{Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 660 (1989).}\]
\[^{124}\text{Although most lower courts that had expressly addressed the issue had held that the defendant bears a burden of persuasion, not all courts had done so. See supra note 121. See also Martha Chamallas, Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle, 31 U.C.L.A. L. Rev. 305, 319 (1983) ("Lower courts are also in conflict over whether the defendant in a disparate impact case should shoulder both the burden of production and the burden of persuasion on the issue of justification for a challenged practice that adversely affects minorities."). Compare Johnson v. Uncle Ben’s, Inc., 657 F.2d 750, 753 (5th Cir. 1981), cert. denied, 459 U.S. 968 (1982) (once plaintiff proves its prima facie case, both the burden of production and the burden of persuasion shift to defendant), and Kirby v. Colony Furniture Co., 613 F.2d 696 (8th Cir. 1980) (same), with Croker v. Boeing Co., 662 F.2d 975, 991 (3d Cir. 1981) (en banc) (plaintiff retains burden of persuasion; defendant’s\}
Court's ultimate resolution of the question was consistent with its earlier cases, as well as with the development of the same issue under the disparate-treatment theory.\textsuperscript{125}

The \textit{Wards Cove} Court acknowledged that "some of [its] earlier decisions can be read as suggesting" that the burden that shifts is one of persuasion, but the Court stated that these cases "should have been understood to mean an employer's production — but not persuasion — burden."\textsuperscript{126} The Court reasoned that shifting only the production burden, and thereby leaving the burden of proving illegal discrimination on the plaintiff at all times, is consistent with the approach of Rule 301 of the Federal Rules of Evidence\textsuperscript{127} and with the rule in disparate-treatment cases.\textsuperscript{128}

In his dissent, Justice Stevens argued that "[d]ecisions of this Court and other federal courts repeatedly have recognized that while the employer's burden in a disparate-treatment case is simply one of coming forward with evidence of legitimate business purpose, its burden in a disparate-impact case is proof of an affirma-

\textsuperscript{125} A number of commentators have noted that the Supreme Court had never explicitly held that the burden that shifts to the employer is one of persuasion. See, e.g., Rutherglen, supra note 27, at 1312 n.63 ("The Supreme Court seems to have required [the employer to meet a persuasion burden] in its leading decisions on the theory of disparate impact."); Player, supra note 27, at 2 ("Without ever precisely so holding, the Court over the years appeared to assume that the employer's burden . . . was a burden of persuasion . . . .")

Perhaps the closest the Court had come to addressing that issue was in New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979), where the Court stated: "Whether or not [plaintiffs'] weak showing was sufficient to establish a prima facie case, it clearly failed to carry [plaintiffs'] ultimate burden of proving a violation of Title VII."

125. Although most of the lower courts that had addressed the issue prior to \textit{Wards Cove} had concluded that the burden that shifted was one of persuasion, the furor surrounding \textit{Wards Cove} involved the assertion that the Supreme Court had deviated from its own precedents, not from the standards employed by lower courts. See, e.g., articles cited supra at note 14.

126. \textit{Wards Cove}, 490 U.S. at 660.

127. \textsc{FED. R. EVID.} 301. Rule 301 states that:

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

\textit{Id.}

128. See, e.g., Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (burden of persuasion remains with the plaintiff at all times).
tive defense of business necessity." In support of this assertion, Justice Stevens pointed to the Court's prior descriptions of the employer's burden as one of "demonstrating," "proving," or "showing" job-relatedness. Significantly, Justice Stevens was unable to point to a single instance in which the Court had described the employer's burden as one of persuasion. Although Justice Stevens seemed to assume that the words "demonstrate," "prove," and "show" describe a burden of persuasion, the discussion below reveals the falsity of that assumption.

The evolution of the burden-of-proof issue under Griggs parallels the evolution of the same issue under the disparate-treatment theory of McDonnell Douglas Corp. v. Green. In McDonnell Douglas, the Court held that in a disparate-treatment case, once the plaintiff has established a prima facie case, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." It held that such an articulation would rebut the employee's prima facie case and "discharge the [employer's] burden of proof." Later, in Furnco Construction Corp. v. Waters, the Court described the burden that shifts to the employer as one of "proving that he based his employment decision on a legitimate consideration and not an illegitimate one such as race."

129. Wards Cove, 490 U.S. at 668.
130. Justice Stevens provided his support in a footnote as follows:
   See McDonnell Douglas, 411 U.S., at 802, n.14. See also, e.g., Teal, 457 U.S., at 446 ("employer must . . . demonstrate that 'any given requirement [has] a manifest relationship to the employment in question'"); New York City Transit Authority v. Beazer, 440 U.S. 568, 587 (1979) (employer "rebutted" prima facie case by "demonstration that its narcotics rule . . . is job related"); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (employer has to "prove[] that the challenged requirements are job related"); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (employer has "burden of proving that its tests are 'job related'"); Griggs, 401 U.S., at 432 (employer has "burden of showing that any given requirement must have a manifest relationship to the employment").
   Id. at 668 n.14 (Stevens, J., dissenting) (emphasis added).
131. Id.
133. Id. at 802 (emphasis added).
134. Id. at 803 (emphasis added).
136. Id. at 577. In his Furnco dissent Justice Marshall, joined by Justice Brennan, compared the employer's burden of proof under McDonnell Douglas and Griggs. In a disparate-treatment case, according to Justice Marshall, "the burden shifts to the employer who must prove that he had a 'legitimate nondiscriminatory reason for the [plaintiff's] rejection.'" Id. at 582 (Marshall, J., dissenting) (quoting McDonnell Douglas, 411 U.S. at 802).
Subsequently, in *Board of Trustees of Keene State College v. Sweeney*\(^{137}\), the Supreme Court reversed a decision of the First Circuit that had held that the employer's burden was to "prove absence of discriminatory motive."\(^{138}\) The Court stated:

While words such as "articulate," "show," and "prove," may have more or less similar meanings depending upon the context in which they are used, we think that there is a significant distinction between merely "articulat[ing] some legitimate, nondiscriminatory reason" and "prov[ing] absence of discriminatory motive."\(^{139}\)

Thus, the Court acknowledged that the words "articulate," "show," and "prove" could refer to either a production burden or a persuasion burden.\(^{140}\) Even with this relatively clear description of a rule shifting only the burden of production, however, the Court was required to revisit the question in *Texas Dept. of Community Affairs v. Burdine*\(^{141}\). In *Burdine*, the Court unequivocally held that the burden of persuasion never shifts to the defendant in such cases.\(^{142}\)

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In a disparate-impact case, "the burden shifts to the employer to show that the practice has "a manifest relationship to the employment in question.""\(^{137}\) *Id.* at 583 (Marshall, J., dissenting) (quoting *Griggs*, 401 U.S. at 432). To the extent that there is a difference in these two standards, the burden of "showing" presumably is not greater than the burden of "proving." Thus, Justice Marshall must have been saying that the burden placed upon the employer in a disparate-impact case is no greater, and is perhaps less, than the burden placed on the employer in a disparate-treatment case.

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\(^{137}\) 439 U.S. 24 (1978) (per curiam).

\(^{138}\) *Id.*

\(^{139}\) *Id.* at 25.

\(^{140}\) Justice Stevens, dissenting in *Sweeney*, took issue with the majority's conclusion that "prove" and "articulate" mean something different and argued that the Court of Appeals had not shifted the burden of persuasion by requiring the employer to "prove" absence of discriminatory motivation. He asserted that "when an executive takes the witness stand to 'articulate' his reason, the litigant for whom he speaks is thereby proving those reasons."\(^{140}\) *Id.* at 28-29 (Stevens, J., dissenting). Justice Stevens stated:

Whether the issue is phrased in the affirmative or in the negative, the ultimate question involves an identification of the real reason for the employment decision. On that question — as all of these cases make perfectly clear — it is only the burden of producing evidence of legitimate nondiscriminatory reasons which shifts to the employer; the burden of persuasion, as the Court of Appeals properly recognized, remains with the plaintiff.


\(^{142}\) The Court stated:

The burden that shifts to the defendant . . . is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone
The above discussion reveals that an assertion that the Supreme Court's decisions have consistently placed the burden of persuasion on the employer in disparate-impact cases cannot rest upon the facile quotation of words such as "demonstrate," "prove," and "show." When those same words were used in the disparate-treatment context, they were held to denote the employer's burden of production, not persuasion.\textsuperscript{143}

The mere fact that the Court's precedents do not demonstrate that the employer's burden should be characterized as an affirmative defense does not necessarily mean that such a characterization would be wrong. Justice Stevens, after arguing from precedent in his dissent, went on to argue that "thoughtful reflection on common-law pleading principles"\textsuperscript{144} also demonstrates that the employer's justification in a disparate-impact action is "a classic example of an affirmative defense."\textsuperscript{145} He explained:

In the ordinary civil trial, the plaintiff bears the burden of persuading the trier of fact that the defendant has harmed her. See, \textit{e.g.}, Restatement (Second) of Torts §§ 328 A, 433 B (1965) (hereinafter Restatement). The defendant may undercut plaintiff's efforts both by confronting plaintiff's evidence during her case in chief and by submitting countervailing evidence during its own case. But if the plaintiff proves the existence of the harmful act, the defendant can escape liability only by persuading the factfinder that the act was justified or excusable. See, \textit{e.g.}, Restatement §§ 454-461, 463-467.\textsuperscript{146}

Justice Stevens then reasoned that because intent plays no role in the disparate-impact inquiry, once a disparate impact is shown, the employer's burden is to show "why it is necessary to the operation

\textsuperscript{143} See, \textit{e.g.}, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
\textsuperscript{144} \textit{Wards Cove}, 490 U.S. at 669 (Stevens, J., dissenting).
\textsuperscript{145} \textit{Id.} at 670.
\textsuperscript{146} \textit{Id.} at 669.
of the business."147

Justice Stevens was mistaken about both the plaintiff’s burden in an ordinary civil trial and the relevance of this reasoning to the disparate-impact setting. Contrary to his suggestion, in the ordinary civil trial a plaintiff’s showing that the defendant harmed her does not shift the burden to the defendant to justify the action.148 If the plaintiff asserts nothing more than harm caused by the defendant, the plaintiff’s complaint will not withstand a motion to dismiss. The plaintiff must also establish that the defendant breached a legal duty toward her. She may not just assert that the defendant was driving a car that hit her; she must also assert that the defendant was driving negligently or that the defendant intended to strike her.149

For example, once the plaintiff has shown that the defendant intended to strike her, the defendant might assert an affirmative defense in justification. The defendant might argue that the striking was justified by the doctrine of self-defense, at which point the defendant would have the burden of persuasion on the self-defense issue. Similarly, in a discrimination action, once the plaintiff has demonstrated that the employer intentionally based an adverse employment action on her sex, the employer might raise the defense that in the particular circumstances sex is a bona fide occupational qualification, or BFOQ. The employer properly bears the burden of persuasion on the BFOQ issue because it is claiming exemption from a generally applicable prohibition against discrimination on the basis of sex.150 In essence, the employer is stating that it is discriminating, but the discrimination is permissible be-

147. Id. at 670. The phrase "necessary to the operation of the business" comes from an unrelated section of Title VII, the bona fide occupational qualification provision. 42 U.S.C. § 2000e-2(e).

148. The sections of the Restatement of Torts cited by Justice Stevens are inapposite. Section 328A provides that it is the plaintiff’s obligation to prove duty, breach, causation, and damages. RESTATEMENT (SECOND) OF TORTS § 328A (1965). Section 433B provides that the plaintiff has the obligation to prove that the tortious action of the defendant harmed him. Id. § 433B. The remaining sections deal primarily with the liability of a negligent actor for unanticipated harm and the defense of contributory negligence. None of the sections cited supports a finding of liability in the absence of wrongful conduct on the part of the defendant. See Wards Cove, 490 U.S. at 669 (Stevens, J., dissenting).

149. Even strict liability cases involving defective products require more than a mere showing that the plaintiff was injured by the defendant’s product. The plaintiff must also show that the product was defective and unreasonably dangerous. RESTATEMENT (SECOND) TORTS § 402A (1965).

cause it falls within a particular statutory exception upon which the employer is entitled to rely.

Fundamentally, the question of whether the burden that shifts is one of persuasion or one of production depends upon what constitutes the wrong in a disparate-impact case. If the wrong is, as Justice Stevens seemed to suggest in Wards Cove, that an employer has a work force that is out of balance, then arguably it makes sense to say that an employer must prove the "affirmative defense" of "business necessity." The general statutory requirement of proportional representation has been violated, and now the employer must justify it. The affirmative defense is simply an act of grace by Congress, an exception to a general rule imposing a proportional-representation requirement. However, if the wrong is the placement of arbitrary barriers that are not related to the employer's legitimate business concerns in the way of minority advancement, as suggested in Griggs, then showing that the barrier is arbitrary is logically part of the plaintiff's case.

Section 703(j) of Title VII strongly suggests that a statistical imbalance in an employer's work force is not prima facie unlawful, since it provides that an employer is not obligated to grant preferential treatment to remedy a statistical imbalance in the work force. Presumably, employers are not required to remedy an imbalance in the work force because an imbalance in itself does not violate Title VII, nor, unlike a McDonnell Douglas prima facie case, does it even indicate a substantial likelihood that impermissible discrimination has occurred.

In stark contrast to the situation under the BFOQ analysis

151. Wards Cove 490 U.S. at 676-77 (Stevens, J., dissenting).
152. Justice Blackmun's view of this issue is also apparently skewed by his interpretation of what constitutes the wrong. In his opinion in Watson, he suggested that "numerical disparity" is itself "an improper effect." Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 1004 (1988) (Blackmun, J., concurring).
153. See also Connecticut v. Teal, 457 U.S. 440, 450 (1982) (describing Dothard v. Rawlinson, 433 U.S. 321 (1977), as holding that "minimum statutory height and weight requirements for correctional counselors were the sort of arbitrary barrier to equal employment opportunity for women forbidden by Title VII").
154. Section 703(j) provides:

Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group . . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any [protected class] in comparison with the total number or percentage of persons of such [protected class] in . . . the available work force . . . .

described above, when an employer resists a suit charging the employer with adopting a neutral practice that turns out to have a disparate impact, the employer does not acknowledge discrimination and claim that it falls within some exception. Rather the employer denies discrimination altogether. Treating the employer’s justification as an affirmative defense means that any employer with a work force that is out of balance is presumed to be violating the law. However, lack of proportional representation has never been \textit{prima facie} unlawful.\textsuperscript{155} Title VII has always been an anti-discrimination statute, not a proportional-representation statute.\textsuperscript{156}

Some opponents of \textit{Wards Cove} have also argued that the burden of persuasion should be shifted to the employer because the employer is better able to adduce evidence of business justification.\textsuperscript{157} The employer’s superior access to evidence is, of course, precisely the reason that the burden of production shifts to the employer. The employer must show, first, its reasons for using the challenged practice and, second, a relationship between the practice and the employer’s legitimate employment goals. Once that evidence has been presented to the court, however, there is no need to depart from the ordinary civil rules by requiring that the employer bear the burden of persuasion. Placing the burden of production on the employer creates the proper incentives on the employer to justify the challenged practice, since the plaintiff need challenge only the justifications presented by the employer.

The Court’s refusal in \textit{Wards Cove} to treat job-relatedness as an affirmative defense was far more faithful to ordinary civil-pleading rules than its treatment of an employer’s affirmative-action defense, which met with no objection from opponents of \textit{Wards Cove}.\textsuperscript{155}


\textsuperscript{156} It makes little sense to say that an employer’s rebuttal burden is \textit{greater} where the plaintiff alleges that the employer’s actions were not intended to be discriminatory than where the plaintiff alleges intentional discrimination. In disparate-treatment cases, the prima facie case “raises an inference of discrimination . . . because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.” Fumco Construction Co. v. Waters, 438 U.S. 567, 577 (1978). There is no shifting of the burden of persuasion under \textit{McDonnell Douglas} even though it is based on the rationale that it is more likely than not that the employer engaged in illegal discrimination. A fortiori, in an impact case there should be no shifting of the burden of persuasion, since the prima facie case shows only imbalance; it does not imply that the imbalance is an impermissible one.

\textsuperscript{157} See, e.g., Blumoff & Lewis, supra note 15, at 29 (the allocation puts a burden on the plaintiff, who is more likely to lack knowledge of the employer’s business).
Cove. In Johnson v. Transportation Agency, the Court held that a plaintiff raising a reverse-discrimination claim must prove the invalidity of the employer's affirmative action plan. The employer need not prove that its plan is justified under the Court's affirmative-action precedents. However, requiring the employer to prove the validity of an affirmative-action plan is far more justifiable than requiring it to prove the job-relatedness of a facially neutral employment requirement. After all, when an employer disadvantages a white or a male by granting a hiring preference to a minority or a woman, it is doing what the express language of Section 703(a) of Title VII plainly prohibits: "fail[ing] or refus[ing] to hire . . . a[n] individual . . . because of such individual's race, color, religion, sex, or national origin." Thus, the employer's

158. 480 U.S. 616 (1986).
159. Id. at 626.
160. The Court held that challenges to affirmative-action plans should be considered under the standards of McDonnell Douglas. The Johnson Court stated:

This case . . . fits readily within the analytical framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid.

480 U.S. at 626.

The use of the McDonnell Douglas standard in affirmative-action cases is wholly inappropriate because its analysis provides a method for determining, through circumstantial evidence, whether a decision was based upon one of the prohibited classifications established by Title VII. In a reverse-discrimination case, the question is not whether race or sex was the reason for the decision, but whether the employer's use of race or sex was justified under the circumstances. As with the BFOQ defense, that is properly an affirmative defense for which the employer should bear the burden of persuasion.

161. Some have argued that the Court's decisions in Weber and Johnson are consistent with the statutory language because Congress did not define the term "discriminate" in Title VII, and therefore the Court could define it to exclude adverse action taken pursuant to an affirmative-action plan. Under such reasoning, it can be argued that affirmative action does not constitute an affirmative defense; it is simply action that falls outside the prohibitory language of the statute. The problem with such an argument is that it is inconsistent with both the language of the statute and the statute's legislative history.

Section 703(a)(1) does not simply make it unlawful to "discriminate against any individual . . . because of such individual's" membership in a protected class; instead, it makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's" membership in such a class. 42 U.S.C. § 2000e-2(a)(1). Therefore, regardless of what the term "discriminate" means, failure to hire because of race or sex is plainly encompassed by the language of the statute.

The legislative history suggests that Congress knew exactly what it meant by the
position is that he is discriminating, but he has a good reason. That is a classic affirmative defense. On the other hand, nothing in the language of Title VII suggests that an employer that is making employment decisions on the basis of race- or sex-neutral criteria is violating the statute; thus, there is no need for a defense.

If Wards Cove had actually held what many of its critics suggest, the uproar over the decision might be more understandable. The interpretation articulated in the Summary of the 1990 Act was that under Wards Cove, "victims of discrimination must bear the heavy burden of proving that the employer has no legal justification for its exclusionary practices."162 Similarly, a New York Times editorial characterized Wards Cove as requiring the plaintiff to prove that a practice having a disparate impact is "utterly unreasonable."163 Other critics have argued that Wards Cove puts on plaintiffs the impossible burden of proving a negative.164 For example, in his testimony on the 1990 Act, former Transportation Secretary William Coleman gave the following description of Wards Cove: "Wards Cove, as a practical matter, requires civil rights plaintiffs to 'prove a negative' — to demonstrate that among the enormous number of conceivable business interests, not one is

term "discriminate." The Clark-Case interpretive memorandum stated:

[What is now § 703] prohibits discrimination in employment because of race, color, religion, sex, or national origin. It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by [the section] are those which are based on any of the five forbidden criteria: race, color, religion, sex, and national origin.

110 CONG. REC. 7213 (1964).

162. Summary of the Civil Rights Act of 1990, 136 CONG. REC. S1021 (1990). The willingness of opponents of Wards Cove to characterize persons who have been adversely affected by practices with a disparate impact as "victims of discrimination" without a showing of either intent to discriminate or even arbitrariness of the practice shows just how far they have traveled from the perspective of the original supporters of Title VII.


connected in the requisite manner to the disputed job requirement. As previously demonstrated, the holding of Wards Cove did nothing of the sort. Wards Cove required only that the plaintiff identify the practice responsible for the disparate impact. Once the plaintiff accomplished this, the employer would lose unless it produced evidence to demonstrate that the practice “serve[d], in a significant way, the legitimate employment goals of the employer.” Moreover, not just any justification by the employer would meet this burden; the Court emphasized that “[a] mere insubstantial justification in this regard will not suffice” because under so low a standard of review discrimination could be carried out through the use of employment practices that appear neutral. The employer’s explanation must be “clear and reasonably specific.” Moreover, the plaintiff need not combat every conceivable justification for the employer’s practice as Secretary Coleman argued; instead, he need only attack the justification actually offered by the employer.

Some have argued that the burden on the employer is unduly light. For example, in their amicus brief in Wards Cove, the NAACP Legal Defense and Education Fund, et al., argued that were the Court to adopt the rule that it did, “[t]he employer’s burden would be reduced to such an extent that all but the most unimaginative employers — unable even to articulate a legitimate reason for practices having a significant adverse impact — would be able to rebut a showing of disparate impact discrimination, no

166. See supra notes 74-81 and accompanying text.
167. Wards Cove, 490 U.S. at 659.
168. Id.
169. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981). As in disparate-treatment cases, the employer's rebuttal burden is designed to allow the inquiry to proceed to a more specific level. The employer's rebuttal in a disparate-treatment case focuses the pretext inquiry, allowing the plaintiff to narrow in on the employer's offered justification, rather than excluding all conceivable legitimate nondiscriminatory reasons for the action. Similarly, in a disparate-impact case, the employer's evidence allows the plaintiff to focus on the asserted business justification.
170. Wards Cove, 490 U.S. at 658, 659.
manner how compelling."\(^{171}\) Such concern is unjustified. Although the employer may rebut the prima facie case by presenting evidence that the challenged practice substantially serves its legitimate employment goals, its burden is more than merely to "articulate a legitimate reason."\(^{172}\) Instead, unlike an employer in a disparate-treatment case, the employer under *Wards Cove* must introduce evidence to show that the practice *in fact* furthers its legitimate goals.\(^{173}\)

In sum, those who would impose the burden of persuasion on employers in disparate-impact cases cannot contend that they are simply insisting on application of general principles of pleading and proof. Such principles actually contradict their position. If opponents of *Wards Cove* were motivated by a desire to vindicate traditional pleading and proof rules in Title VII cases, they also would have opposed *Johnson*'s imposition on the plaintiff of the burden of proving that an employer's affirmative-action plan is invalid. The absence of any such opposition to a case that did override traditional burden-of-proof principles suggests that considerations far removed from concerns over the fair allocation of these burdens accounted for the vigor with which critics attacked *Wards Cove*.

\(^{171}\) Brief for the NAACP Legal Defense and Education Fund et al. at 47-48, *Wards Cove* Packing Co. v. Atonio, (No. 87-1387), 490 U.S. 642 (1989), *microformed* on U.S. Supreme Court Records and Briefs (Congressional Info. Serv.).

\(^{172}\) *Id.*

\(^{173}\) *Wards Cove*, 490 U.S. at 659.

Mack A. Player argues that the Court had assumed in its prior cases that the defendant's burden in a disparate-impact case was a burden of persuasion. Player bases his belief on the Court's suggestion that the defendant's burden in a disparate-impact case is heavier than its burden in a disparate-treatment case. Player, *supra* note 27, at 30 n.142. That conclusion does not follow. A defendant's obligation in a treatment case is merely to articulate some reason other than a discriminatory one. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). For example, if the defendant gave as a reason that it would not hire someone who was born on a Wednesday, it has satisfied its obligation. However, under the disparate-impact theory even if the plaintiff retains the ultimate burden of persuasion, the defendant must meet a burden of production to show that this apparently irrational preference was the basis for its action and that the practice in fact furthers the employer's legitimate goals.

The obligation of the employer to demonstrate that the practice actually serves its interests rebuts the suggestion of many of *Wards Cove*'s critics that the Court has rejected an impact model in favor of an intent model. See, e.g., William B. Gould, IV, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TUL. L. REV. 1485, 1497 (1990) ("The logic of *Wards Cove*, particularly as it relates to the employer's defense against a prima facie case, is that intent is now *sine qua non* to a statutory violation, a proposition explicitly rejected in *Griggs.*").
b. The Burden of Persuasion under the Civil Rights Act

Despite the ample foundation supporting a rule shifting only the burden of production, the Act shifted the burden of persuasion to the employer to justify the challenged practice. The Act provides that once the complaining party "demonstrates" that a particular employment practice causes a disparate impact, the employer must "demonstrate" that the challenged practice is justified.\textsuperscript{174} The Act defines the term "demonstrates" to mean "meets the burdens of production and persuasion."\textsuperscript{175} Politically, this provision was easiest to change because President Bush had not opposed shifting the burden of persuasion. As will be seen, this is the only unambiguous change in the disparate-impact rules that the 1991 Act effectuated.\textsuperscript{176}

2. The Particularity Requirement: Must the Plaintiff Demonstrate that Specific Practices Caused the Disparate Impact?

a. \textit{Wards Cove}

The \textit{Wards Cove} majority noted that a plaintiff must identify the specific practice or practices that produce the disparate impact.\textsuperscript{177} Just as a defendant cannot avoid liability by demonstrating racial balance at the bottom line,\textsuperscript{178} a plaintiff cannot establish a case of disparate impact by demonstrating imbalance at the bottom line.\textsuperscript{179} According to the Court, allowing such claims would "result in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.'"\textsuperscript{180}

Although Justice Stevens labelled the requirement of identifying specific practices as an "additional proof requirement,"\textsuperscript{181} all of the Supreme Court's prior disparate-impact cases had involved specific challenges to discrete employment practices, such as diploma

\textsuperscript{176} See, e.g., \textit{infra} note 193 and accompanying text.
\textsuperscript{177} \textit{Wards Cove}, 490 U.S. at 648, 656.
\textsuperscript{180} \textit{Wards Cove}, 490 U.S. at 657 (quoting \textit{Watson}, 487 U.S. at 992).
\textsuperscript{181} \textit{Id.} at 672 (Stevens, J., dissenting).
requirements or standardized tests.182 The Court had consistently analyzed attacks on an employer’s overall employment practices under a disparate-treatment analysis. For example, in *Furnco Construction Corp. v. Waters*, the Court held that where plaintiffs challenged an employer’s hiring processes, the case was properly analyzed as a disparate-treatment case rather than a disparate-impact case.183 The *Furnco* Court distinguished cases such as *Griggs*184 and *Albemarle Paper Co. v. Moody*185 on the ground that those cases involved employment tests or “particularized requirements.”186

The notion that Title VII had always permitted “bottom line” disparate-impact challenges is also inconsistent with the “pattern or practice” cases, such as *International Brotherhood of Teamsters v. United States*.187 In *Teamsters*, the United States attempted to support its claims of intentional discrimination by relying upon statistical disparities. The Court rejected the defendant’s argument that a plaintiff could not establish a violation of Title VII based solely on a statistical showing,188 holding that although the imbalance itself was not unlawful, it was relevant insofar as it tended to suggest that the employer had engaged in intentional discrimination.189 The Court in *Teamsters* made clear that imbalance by itself does not violate Title VII.190 If plaintiffs had a burden of showing only that the overall result of the hiring process was disproportionate, there would have been no need in class cases to consider whether the disparity was a consequence of intentional discrimination. This would be especially true if, as opponents of *Wards Cove* have argued, the defendant’s rebuttal burden is signific-

182. See infra text accompanying notes 264-66.
183. *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978) (the case involved an employer delegating hiring responsibilities to a supervisor, who, in turn, primarily hired people he had formerly employed).
185. 422 U.S. 405 (1975).
186. *Furnco*, 438 U.S. at 575 n.7.
188. Id. at 340.
cantly higher in a disparate-impact case than in a disparate-treatment case.\textsuperscript{191} Because the makeup of an employer's workforce is by definition a result of the sum total of its hiring practices, a theory of liability that is based upon the bottom-line results of the employer's hiring practices is equivalent to a rule that an absence of proportional representation in the employer's work force is prima facie unlawful.\textsuperscript{192}

b. The "Particularity" Requirement under the Civil Rights Act

One of the most contentious issues in the controversy leading up to the passage of the 1991 Act was whether plaintiffs would have to identify a specific practice that led to a numerical dispari-

\textsuperscript{191} The Supreme Court had never permitted disparate-impact challenges based upon the bottom line, and many Courts of Appeals had been similarly reluctant. The leading case is Poignant v. Prudential Ins. Co., 608 F.2d 795 (5th Cir. 1982), in which the plaintiff had argued that a number of employment practices had resulted in a concentration of blacks in lower-level positions. The Fifth Circuit rejected this claim, stating that the disparate-impact theory is not "the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices." \textit{Id.} at 800. George Rutherglen, in an article that appeared prior to the controversy engendered by \textit{Wards Cove} and its predecessor, Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988), characterized this holding of \textit{Pouncy} as being relatively noncontroversial. He observed, "[a]ll of the circuits apparently agree with this holding." Rutherglen, \textit{supra} note 27, at 1339-40 n.175 (citing Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1485 (9th Cir. 1987) (en banc), rev'd, 490 U.S. 642 (1989); Rossini v. Ogilvy & Mather, Inc., 798 F.2d 590, 605 (2d Cir. 1986); Griffin v. Board of Regents, 795 F.2d 1281, 1288-89 (7th Cir. 1986); Robinson v. Polaroid Corp., 732 F.2d 1010, 1014 (1st Cir. 1984); Mortensen v. Callaway, 672 F.2d 822, 824 (10th Cir. 1982)).

\textsuperscript{192} Many critics of the \textit{Wards Cove} reasoning understood that the burden they wished to place upon employers would be an impossible one to meet. For example, the amicus brief submitted by the Lawyers' Committee for Civil Rights Under Law in \textit{Wards Cove} urged the Court not to impose the burden on plaintiffs to demonstrate causation, stating: "[I]t would be virtually impossible for plaintiffs to prove with any more specificity the causal connection between a particular subjective practice and a particular disparate impact . . . . [M]ultiple regression analysis is ill-suited to deal with unquantifiable variables such as subjective hiring criteria. Indeed, it is difficult to envision any method of isolating the significance of an individual subjective practice in such a situation . . . ." Brief of the Lawyers' Committee for Civil Rights Under Law at 20, Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (No. 87-1387). The Lawyers' Committee further stated that "[e]ven to attempt such proof of specific causation is a daunting task," and reported that in an earlier disparate-impact case in which it had participated, it had been necessary to review 150,000 pages of records and to incur substantial expense. \textit{Id.} at 21 n.13. If it is impossible to demonstrate exactly what caused the disparity, as the Lawyers' Committee suggested, it is equally impossible for the employer to demonstrate the "business necessity" of the cause. Therefore, under this standard the employer automatically loses, a result that the Lawyers' Committee could scarcely have overlooked.
ty. The bill as passed is ambiguous on this point. The Act first states the general requirement that the plaintiff must demonstrate that "each particular challenged employment practice causes a disparate impact," but goes on to qualify this requirement by providing, "except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice." The critical issue under this provision will be determining what showing is necessary to persuade the court that the elements of the employer's decisionmaking process cannot be separated for analysis. A permissive approach will lead to routine bottom-line challenges and will substantially impair an employer's ability to select the best person for the job. On the other hand, a strict approach will lead to infre-

193. New § 703(k)(1)(A) provides in part:
   (A) An unlawful employment practice based on disparate impact is established under this title only if —
      (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity;


196. Id. § 2000e-2(k)(1)(B)(ii) (West Supp. 1992), infra Appendix H § 105. The proviso contained in subparagraph (ii) would be difficult to understand if not for the fact that it appears to be a carryover from earlier versions of the bill. It provides that "[i]f the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity." Id. § 2000e-2(k)(1)(B)(ii) (West Supp. 1992), infra Appendix H § 105. It is unclear how this proviso would ever be called into play under the enacted bill. Before the employer would get to the point of trying to exonerate a particular practice, the court would already have decided that the elements of the employer's decisionmaking were "not capable of separation for analysis." Id. § 2000e-2(k)(1)(B)(ii) (West Supp. 1992), infra Appendix H § 105. Unless the court was mistaken about separability, there is no way that the employer could demonstrate the lack of disparate impact caused by the practice. This proviso was important only under earlier versions that allowed the plaintiff to challenge a group of employment practices without also demonstrating their inseparability.
quent use of this exception.

The statutory language suggests a narrow exception. The "particularity" requirement is mentioned three times, followed by an exception that clearly puts the burden of proof on the plaintiff to demonstrate entitlement to the exception. On the other hand, earlier versions of the Act reveal a very different scheme. The original 1990 Act permitted a plaintiff to challenge "a group of employment practices," which was defined as "a combination of employment practices or an overall employment process." In response to objections that such a rule would allow routine bottom-line challenges and thereby increase the pressure on employers to engage in quota hiring, subsequent versions at least nominally placed some burden on plaintiffs to attempt to identify the particular practices involved. For example, the vetoed version of the 1990 Act allowed the plaintiff to challenge a group of employment practices, but it required that the plaintiff identify which specific practice or practices caused the impact unless the court determined after discovery that evidence was not available to identify the cause of the disparity. Under such a rule there would never

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200. The term "group of employment practices" was defined as "a combination of employment practices that produces one or more decisions." Vetoed Version of 1990 Act, H.R. REP. No. 856 § 3, 101st Cong., 2d Sess., 136 CONG. REC. H9552, H9552 (1990), infra Appendix D § 3.

201. The bill stated that:

the complaining party shall be required to demonstrate which specific practice or practices are responsible for the disparate impact in all cases unless the court finds after discovery (I) that the respondent has destroyed, concealed or refused to produce existing records that are necessary to make this showing, or (II) that the respondent failed to keep such records; and except where the court makes such a finding, the respondent shall be required to demonstrate business necessity only as to those specific practices demonstrated by the complaining party to have been responsible in whole or in significant part for the disparate impact.


The Civil Rights and Women's Equity in Employment Act appeared to place no burden on the plaintiff to demonstrate an inability to identify the responsible practice. The Act required only that the plaintiff identify a group of practices. Identification of specific
be a circumstance under which the employer did not have to justify bottom-line disparities. If the plaintiff could identify a practice causing the disparity, then the issue would be joined and the defendant would be put to its proof. If the plaintiff could not identify such a practice, then the exception would apply and the defendant would still be put to its proof.

Unlike earlier versions, the enacted version does not allow cumulation simply on a showing that the plaintiff is unable to separate out the components. Instead, the Act calls for a more rigorous approach. In the enacted version, the elements must not be capable of separation for analysis. The plaintiff has the burden of proving that he is entitled to rely on that exception and cannot satisfy that burden merely by showing that he has been unable to identify those elements or that it would be very difficult or expensive to do so. Furthermore, the "incapable of separation" standard places a substantially greater burden on the plaintiff than earlier versions of the Act, which would have required the plaintiff to show only that the employer's records do not reveal the effect of the various components of the practices.

Plaintiffs commonly attempt to demonstrate discrimination through the statistical technique of multiple regression analysis. Using this technique, the plaintiff separates the effects of the vari-

practices was required only if the court found that the complaining party could identify which practices contributed to the impact:

(B) a complaining party demonstrates that a group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such group of employment practices is required by business necessity, except that —

(i) except as provided in clause (iii), if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact;

* * * *

(iii) if the court finds that the complaining party can identify, from records or other information of the respondent reasonably available (through discovery or otherwise), which specific practice or practices contributed to the disparate impact —

(I) the complaining party shall be required to demonstrate which specific practice or practices contributed to the disparate impact . . .

ous components of a selection system. The particularity provision appears to place the burden of performing this analysis on the plaintiff rather than placing it on the employer whenever the plaintiff shows a bottom-line disparity.

Most significantly, a narrow view of the cumulation provision is consistent with the disavowal of all parties to the debate of any intention to encourage employers to hire by the numbers. A liberal interpretation of the cumulation provision would create substantial incentives for employers to engage in quota hiring. If the obligation to identify the responsible practices is easily dispensed with, statistical disparities become presumptively illegal. When a statute converts a statistical disparity into liability for discrimination, many employers will attempt to avoid the statute's consequences by ensuring that their work forces are statistically balanced.

202. See Bartholet, supra note 41, at 999 (suggesting that statistical analysis can determine what factors are important in decisionmaking "even if the employer has no clear policies setting the weight for various objective and subjective factors").

203. For example, § 13 of the vetoed 1990 Act provided that "[n]othing in the amendments made by this Act shall be construed to require or encourage an employer to adopt hiring or promotion quotas on the basis of race, color, religion, sex, or national origin." H.R. REP. No. 856 § 13, 101st Cong., 2d Sess., 136 CONG. REC. H9552, H9554 (1990), infra Appendix D § 13. See supra note 42 for a discussion of the disavowal of quotas by supporters of the legislation.

204. What little "official" legislative history there is also indicates that the exception is to be given a narrow meaning. According to the interpretive memorandum, in order for cumulation to be appropriate, the plaintiff must identify "particular, functionally-integrated practices" and these must be "components of the same criterion, standard, method of administration, or test." 137 CONG. REC. S15,276 (1991). Only under these circumstances can practices be analyzed as a single employment practice.

The parties to the compromise attempted to place a very different "spin" on the meaning of this provision. On the one hand, Senator Edward Kennedy viewed it as very broad, identifying three classes of cases in which it would be called into play: (1) where determination of the specific impact is made impossible because the employer "subjectively combines together several practices"; (2) where, after a diligent effort, the plaintiff is unable to obtain information that allows him to identify specific practices causing the disparate impact; and (3) where the employer's processes include "particular, functionally integrated practices which are components of the same criterion, standard, method of administration, or test . . . ." Id. at S15,234 (statement of Sen. Kennedy). Only the third situation finds any direct support in the "official" legislative history. The prior two are standards contained in previously rejected versions of the Act.

On the other hand, an interpretive memorandum placed in the record by Senator Dole viewed this as a very limited exception. The only example he gave besides the height-and-weight requirement was a challenge to an entire paper-and-pencil test without the need to challenge individual questions. Id. at S15,472, S15,474. See also id. at S15,315-19 (statement of Sen. Hatch). Even if reliance on these statements were not foreclosed by the Act, the disparity between them would severely limit their utility as interpretive aids.
A broad interpretation of the exception would create a blanket authorization for bottom-line challenges and frustrate an employer's good-faith efforts to obtain employees who are more than minimally qualified. Employers who reject the safe harbor of quota hiring might still avoid liability by relying on standards that could unquestionably pass muster under the most stringent standards. However, under a bottom-line rule, the employer could do so only in those instances where it used discrete requirements on an "up or down" basis.

Where the employer maintains minimum qualifications, it is usually not terribly difficult to ascertain their effects. On the other hand, whenever an employer makes judgments based upon an applicant's overall qualifications, a broad view of the exception would make the employer's bottom-line statistics subject to challenge in virtually every case. Consequently, the employer would have little chance of mounting an effective defense.

Most of the debate over the Act focused on the minimum qualifications considered by the employer as absolutely necessary attributes of a successful applicant. Some members of Congress seemed to assume that employers do most of their hiring by eliminating those who lack the minimum qualifications and then randomly hiring from the remaining applicants. While this assumption arguably holds true for the hiring decisions for some entry-level positions, it applies to little else. The notion that employees, even at the unskilled entry level, are fungible is simply incorrect. Although all potential applicants may possess the requisite job skills, they probably will not be equally good employees. In addition to possessing job skills, a good employee is punctual, dedicated, honest, reliable, able to get along with co-workers and supervisors, and does not present discipline problems. An employer will take these factors into account in any hiring decision, thus

205. See, e.g., Elizabeth Bartholet on fungibility:
Subjective assessments play a role in most upper level employment decisions regarding hiring, promotion, job placement, and salary. Tests and objective criteria such as education and experience requirements are ordinarily used on the upper level primarily as minimum qualifications for certain positions. Once minimum qualifications are met, they and other objective criteria are usually considered only as part of an overall subjective assessment, which is typically based on a variety of subjective procedures: an interview, an evaluation of biographical information, and evaluation of performance in previous educational or work settings.
Bartholet, supra note 41, at 973.
going beyond objective requirements such as skill level. If the Act is interpreted on the assumption that employers hire at random from the pool of minimally qualified applicants, the use of minimum qualifications will not be the primary casualty of the Act; instead, it will be the efforts of employers to find the most qualified employees that will be outlawed.

Consider how the bottom-line principle would apply in the following example: An employer establishes as minimum qualifications for the position of secretary one year’s prior experience, a high school diploma, and the ability to pass a typing and spelling test. The “qualified applicant pool” consists of all applicants who satisfy these properly validated requirements. If the employer hires randomly from this pool, the racial composition of its work force should approximate the racial composition of the qualified applicant pool and it need not worry about disparate-impact challenges.

But what if the employer does not hire randomly from within the pool? What if, instead, the employer decides that it will attempt to hire the best person? Thus, when there are multiple applicants for a single position, the employer considers everything that it believes relevant to predicting the quality of an employee, including: (1) the applicant’s demeanor in the interview; (2) the number of years the applicant has been in the field as well as the length of tenure in prior positions; (3) the quality of the applicant’s prior experience; (4) contents of letters of recommendation; (5) education beyond the minimum job requirements; (6) a score above the minimum on the typing and spelling test; and (7) anything else, either positive or negative, that might be in an applicant’s record that sheds any light on his ability or experience. For any given employment decision, these “plus factors” will play a greater or lesser role depending upon the number and profile of applicants. If there is only one applicant for a given position, they will play no role at all.

After three years of following the above procedure in a race-blind way, a disappointed, minimally qualified minority applicant sues the employer on the ground that the sum total of the employer’s employment process has had a disparate impact on minorities as measured by minority representation in the employer’s secretarial work force. At that point, the scope of the particularity requirement becomes critical because it determines whether the plaintiff must identify some specific element of the employer’s decisionmaking that is responsible for the impact — thereby requiring the employer to defend only that particular element — or whe-
ther it is enough to point to the bottom-line disparity and assert
that because everything that the employer considers has contributed
to the outcome, the entire process is subject to challenge. By al-
lowing a challenge based on bottom-line disparity, a court will
require the employer to defend every aspect of any applicant’s
record that it has ever considered in making hiring judgments.

For the employer, a great deal is at stake in determining the
scope of the cumulation provision. If the plaintiff in the above
example has established a prima facie case, then under the Act the
employer must prove that something is justified. The exact nature
of that something is not entirely clear, however. Either the employ-
er must show that every factor that it has ever considered in mak-
ing employment decisions is justified, or it must show that the
hiring process itself is justified. Even if the employer validates
every factor that it has ever considered in making employment
decisions, it may still be liable unless it can show that one or more
of the validated practices actually caused all of the disparate im-
 pact. Otherwise, the disparity is still unexplained. Under a rule that
makes a disparity itself prima facie unlawful, unexplained disparity
necessarily produces employer liability. Were this the rule, perverse
effects would follow. Even if the effect is not quota hiring (and at
times it will be), an interpretation of the Act that ignores the real-
ity that rational persons change their behavior in response to threats
of legal liability will produce a great deal of mischief in terms of
efficiency and fairness. Such an interpretation is grounded in a
simplistic model of employer decision-making that does not exist in
the real world. Ironically, an interpretation based on this false
model would promote a simplistic form of decisionmaking in
which race and sex are as important in hiring decisions as are the
few job qualifications that employers would still be permitted to
consider. Although some of the critics of Wards Cove demonstrate
a profound suspicion of the use of employment qualifications,206
there are in fact legitimate bases for assessing job qualifica-
tions.207 Therefore, a categorical hostility toward job qualifications
should not be implied into the new Act.

The difficulty that employers face in defending their selection

Perry, Two Faces of Disparate Impact Discrimination, 59 FORDHAM L. REV. 523, 554
(1991) (the ill-defined nature of subjective criteria makes them susceptible to concealed
discrimination).

207. See, e.g., Lerner, supra note 58, at 279.
criteria is that whether they opt for "objective" or "subjective" criteria, they will be subject to criticism, often by the same people. If employers use objective criteria, such as test scores, they are criticized because they are trying to reduce people to numbers. Instead, employers are told that they should consider the "whole person." After all, some people who do poorly on standardized tests will be good employees, and there may be something in an applicant's record to suggest that the test score is not a good measure of that person's qualifications.\footnote{On the other hand, if the employer does attempt to measure the whole person, the employer is criticized for using "subjective" criteria, since, given the infinite variety of background and experience that applicants may have, there is no way to quantify the total qualifications of the applicants. For many, the very subjectivity of the selection process is suspect, because it gives the employer the opportunity to engage in either conscious or unconscious discrimination. However, it must be remembered that even if multiple subjective criteria may not be challenged under the disparate-impact theory, they may still be challenged under a disparate-treatment theory as long as the plaintiff asserts that the employer is deliberately discriminating.}

In applying anti-discrimination laws, courts must bear in mind that separating the competent from the incompetent, the highly qualified from the minimally qualified, and the minimally qualified from the unqualified, all require human judgment. If we want

\footnote{This point was recognized by the Supreme Court:}

The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality. Griggs v. Duke Power Co., 401 U.S. 424, 433 (1971).

\footnote{See, e.g., Bibbs v. Block, 749 F.2d 508, 512 (8th Cir. 1984) (discussing the suspect subjective nature of the selection procedure); Martinez v. El Paso County, 710 F.2d 1102, 1104 n.2 (5th Cir. 1983) (discussing the suspect nature of subjective evaluations because they provide an easy way to discriminate). Cf. Nanty v. Barrows Co., 660 F.2d 1327, 1334 (9th Cir. 1981) (although the same potential for abuse of subjective criteria exists for low-level and high-level jobs, the necessity of employing subjective criteria for higher-echelon employment makes use of subjective criteria less "inherently suspect").}

\footnote{See Blumoff & Lewis, supra note 15, at 38 ("In fact, insistence on reliable evidence that an identified practice caused an adverse impact is reasonable, particularly since most intentionally discriminatory uses of unidentifiable or immeasurable discretionary practices will be redressable through individual or systemic evidence of disparate treatment.")}
employers to engage in those endeavors, we must be willing to accept that they will in fact be exercising judgment, rather than complaining whenever judgment is involved.\textsuperscript{211} It must also be recognized that as applicants become less and less fungible, selection criteria must become more and more subjective.\textsuperscript{212}

Subjectivity does not imply arbitrariness. There is a common but incorrect assumption that if an employer cannot quantify its hiring or promotion decisions, the employer does not take the process sufficiently seriously or wishes to mask invidious discrimination. When it is argued that hiring decisions are not always based upon quantifiable variables and that an undue burden should not be placed upon employers to defend their decisions, the argument is taken to imply that the employers' decisions are so arbitrary that even they cannot figure out how they made them. Al-

\textsuperscript{211.} Courts striking down lower level subjective systems have often suggested that systems based on purely objective criteria would be preferable. It is not clear that this solution is particularly good on the lower level, and it certainly does not make much sense on the upper level. Few would argue, for example, that business managers should be promoted solely on the basis of seniority or that academics should be hired on the basis of the number of hours taught or pages published.

\textsuperscript{212.} Some people tend to associate fungibility with the status of the job, the notion being that applicants are fungible for lower-level jobs, whereas for higher level jobs they are not. See \textit{id.} at 957. Thus, some have argued, subjective criteria are appropriate when hiring lawyers but not when hiring police officers. See Elaine W. Shoben, \textit{Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII}, 56 \textit{TEX. L. REV.} 1, 33 (1977) (discussing the fungibility of applicants for jobs requiring skills that are easily obtained or commonly possessed by large numbers of people such as police officers, fire fighters, many factory workers, and bank tellers).

The relevant distinction, however, is not between high-level and low-level jobs; it is between complex and simple jobs. The distinction is important, because many "low-level" jobs, such as police officer, are in fact quite complex. See Lerner, \textit{supra} note 59, at 279. As Barbara Lerner has pointed out, the job of a police officer is a very complex one, but the usual requirement is only a high school degree. \textit{id.} at 283. Many of the complex traits necessary for the job, such as physical courage and good judgment in a variety of tense situations are not easily measured. It is only a form of elitism that suggests that uneducated people are fungible, while educated people are not. See Lerner, \textit{supra} note 63, at 31, 32.
though a nice rhetorical point, the argument misses the mark.

To say that it is impractical, if not impossible, to assign numerical values to every attribute of each applicant does not mean that a decision favoring one applicant over another is arbitrary. It merely reflects the fact that people do not ordinarily make decisions in an entirely quantifiable way. This is due, in large part, to the difficulty of knowing ahead of time how much weight to give a particular attribute in the absence of knowledge of all of the other attributes of all the other options under consideration. The employer may be behaving in a perfectly rational manner, but with so many attributes to consider it would be very difficult to construct a model that would allow such judgments to be quantified in advance.

Deciding which applicant to hire or which employee to promote is necessarily a subjective process. Such a decision is similar in its subjectivity to other important decisions that we take quite seriously, such as the selection of a spouse, a home, a college, or a presidential candidate. Although most of us are reasonably confident that we have very good reasons for our choices, few of us could satisfy a court of law that our decisions were the best ones or even provide a replicable blueprint describing how the decisions were made. Few of us believe that a better decision would have been made by assigning varying numbers of positive and negative points for each attribute that was relevant and then accepting the choice dictated by the formula.

Important life decisions are not criticized for their frivolity because they were not reached by a quantifiable process. There is no reason to impose a greater burden of justification on an employer, and there is no way for an employer to satisfy such a burden. Yet, a bottom-line approach would place this more stringent burden on an employer. If an employer’s work force reflects imbalance at the bottom line and the employer is unable to justify that imbalance objectively, it is assumed that the employer is somehow at fault, if not because the hiring process is infected with discrimination, then because the employer has failed to ensure that its employment decisions are made “rationally.”

213. An appropriate analogy would be the prospective home buyer who, at the outset, might believe that a large backyard is very important and be unwilling to buy a house without this feature. However, the buyer may end up finding a house that has a great studio or a terrific wine cellar and decide to buy it even though it also has a small backyard.
Opponents of subjective employment criteria fail to realize that the more important a decision, the less likely it is that an objective method will be employed to make it.\^{214} Employers have a vital interest in selecting the best possible employees, and most take the selection decision quite seriously. It would be a mistake to interpret the Civil Rights Act in such a way as to codify a misplaced suspicion of subjective criteria, but the bottom-line approach to subjective criteria would do exactly that.\^{215} An employer would be faced with two options. First, the employer could eliminate the use of all subjective considerations, hiring randomly or relying solely on objective criteria that can be validated. Few employers will choose this option because the selection of employees is too important for the employer to abandon reliance on qualifications or, except perhaps in the case of some entry-level positions, to delegate the decision to the designers of standardized tests. Even if employers were otherwise disposed toward standardized tests, the validation requirements applied to these tests can often be so difficult and expensive to satisfy that employers, at least in the private sector, have substantially reduced reliance on them.\^{216}

Second, employers could continue to use subjective multifaceted judgments while simultaneously protecting against liability under Title VII. To accomplish this, they would, to the extent possible, rely on the qualifications necessary to maintain quality in the workforce, but at the same time ensure that there is no disparity at the bottom line by engaging in race- or sex-conscious hiring. Employers would select some employees not because they are the best candidates but because they are the appropriate race or sex.\^{217}

\^{214} For example, the decision of what brand of gasoline to buy is based almost entirely on two objective criteria: location of the gas station and price. On the other hand, the decision of what car to buy to put the gasoline in is a much more multifaceted subjective judgment. Price and location of the dealership are relevant, but many more, often unquantifiable, factors, go into the decision: judgments about reliability, safety, image, reputation of the manufacturer, performance, appearance, place of manufacture, as well as the way it makes the owner feel. Although many consumers have strong brand preferences for automobiles, the diversity of those preferences demonstrates their subjectivity.

\^{215} See Bartholet, supra note 41, at 1026-27 (urging adoption of quotas on the ground that subjective criteria cannot be validated effectively).

\^{216} See James Gwartney et al., Statistics, the Law and Title VII: An Economists' View, 54 NóRE DAME LAW. 633, 643 (1979) (estimating that it costs $20,000 to $100,000 to validate a single test).

\^{217} Although Connecticut v. Teal, 457 U.S. 440 (1982), establishes that the employer is not completely immunized by the absence of bottom-line disparities, lawsuits are substantially less likely to be filed where there is proportional representation.
In sum, bottom-line challenges must be the exception under the Act, rather than the rule. Congress did not intend to outlaw the selection of the best person for the job or to force employers to pay for the privilege of doing so by adopting hiring quotas. A broad interpretation of the "not capable of separation for analysis" exception would indeed make the Act a "quota bill."

3. The Standard of "Business Necessity"
   
a. Wards Cove

The Wards Cove formulation of the employer's justification — that the practice is justified if it "serves, in a significant way, the legitimate employment goals of the employer"218 — was responsible for a great deal of the outcry against Wards Cove, the assertion being that the Court was retreating from a test of strict necessity. Much of the confusion derived from the Griggs Court's use of the phrase "business necessity," a phrase that is not self-defining and that has been the subject of a great deal of disagreement. The term "business necessity," which was used in Griggs as a shorthand expression, seems to have assumed a talismanic significance for some courts and commentators. A more thorough examination of both the analysis and language of Griggs reveals that the Court did not lay down a test of "strict necessity," but rather a test of "job relatedness" or "non-arbitrariness." Wards Cove preserved this test.219

Introducing the phrase "business necessity" into the law of Title VII, the Court in Griggs stated: "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."220 The phrase "related to job performance" is key to the analysis of Griggs. The Court in Griggs did not hold that testing requirements were permissible only if the employer could not run its business without them, or if effective job performance was impossible without them, or if it had a compelling need to use

218. Wards Cove, 490 U.S. at 659.
219. See also Hamer v. City of Atlanta, 872 F.2d 1521, 1533 (11th Cir. 1989) ("Business necessity is closely akin to job relatedness and the terms are often interchanged.").
them. Instead, it held that testing requirements could not be used unless they were "job related." If the requirements were job-related, they satisfied the test of "business necessity." The Court's opinion reveals that it was concerned with the imposition of arbitrary requirements that tended to exclude minorities. As the Court stated, "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."

If the Court in Griggs meant, as Justice Stevens argued in Wards Cove, that a selection device must be "essential to effective

221. Id.
222. Although the phrase "business necessity" appears in the Griggs opinion only once, and then in the context of the "job related" idea, id., the concept of "job-relatedness" appears repeatedly. For example, the following statements are contained in Griggs:

"If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." Id. at 431 (emphasis added).

"On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used." Id. (emphasis added).

"Both were adopted . . . without meaningful study of their relationship to job performance ability." Id. (emphasis added).

"Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." Id. at 432 (emphasis added).

"The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting section 703(h) to permit only the use of job-related tests." Id. at 433 (emphasis added).

"The [EEOC] guidelines demand that employers using tests have available 'data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior . . . :'" Id. at 433 n.9 (emphasis added).

"Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance." Id. at 436 (emphasis added).

"What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." Id. (emphasis added).
223. Id. at 432.
224. Id. at 431.
job performance," it is curious that the Court had never held that a selection device that it believed was "job related" was nonetheless invalid because it was not "essential." Instead, the Court consistently inquired whether a challenged requirement was related to the job. The only support that Justice Stevens provided for his argument that a practice with a disparate impact must be "essential" is a passage from Dothard v. Rawlinson that he modified to support his point: "Later, we held that prison administrators had failed to 'rebut[t] the prima facie case of discrimination by showing that the height and weight requirements are . . . essential to effective job performance.'" A look at the actual passage in Dothard reveals a very different thought:

225. Wards Cove, 490 U.S. at 671 (Stevens, J., dissenting) (quoting Dothard v. Rawlinson, 433 U.S. 321, 331 (1977)).

226. In fact, just the opposite was done in New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979), and Washington v. Davis, 426 U.S. 229 (1976), in which the Court upheld practices with a lesser showing than strict necessity.

227. Justice Stevens' dissent in Wards Cove neatly summarizes the kind of showing the Court has required. Wards Cove, 490 U.S. at 668 n.14 (Stevens, J., dissenting). In addressing a different point — whether the employer's burden is one of production or persuasion — Justice Stevens included the following footnote:

See McDonnell Douglas, 411 U.S., at 802, n.14. See also, e.g., Teal, 457 U.S., at 446 ("employer must . . . demonstrate that 'any given requirement [has] a manifest relationship to the employment in question'"); New York City Transit Authority v. Beazer, 440 U.S. 568, 587 (1979) (employer "rebutted" prima facie case by "demonstration that its narcotics rule . . . is job related"); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (employer has to "prove that the challenged requirements are job related"); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (employer has "burden of proving that its tests are 'job related'"); Griggs, 401 U.S., at 432 (employer has "burden of showing that any given requirement must have a manifest relationship to the employment") (emphasis added).


229. Wards Cove, 490 U.S. at 671 (Stevens, J., dissenting) (quoting Dothard v. Rawlinson, 433 U.S. 321, 331 (1977)).
We turn, therefore, to the appellants' argument that they have rebutted the prima facie case of discrimination by showing that the height and weight requirements are job related. These requirements, they say, have a relationship to strength, a sufficient but unspecified amount of which is essential to effective job performance as a correctional counselor.\(^{230}\)

The Dothard Court then continued: "If the job-related quality that appellants identify is bona fide, their purpose could be achieved by adopting and validating a test for applicants that measures strength directly."\(^{231}\) Thus, the Court held, if the employer could show that strength was related to the job — not essential to the job — the employer could legitimately impose a strength requirement.\(^{232}\)

Justice Stevens' dissent in American Tobacco, Co. v. Patterson\(^{233}\) also reflects an understanding of the "business necessity" requirement that is much different from his exposition in Wards Cove. In American Tobacco, Justice Stevens argued that the Griggs analysis should be applied to attacks against seniority systems\(^{234}\) — a position that was rejected by the American Tobacco majority.\(^{235}\) Justice Stevens argued that such an approach would not place an undue burden on employers because "[i]f the initiation of a new seniority system — or the modification of an existing system — is substantially related to a valid business purpose, the

\(^{230}\) Dothard, 433 U.S. at 331 (emphasis added).

\(^{231}\) Id. at 332.

\(^{232}\) Footnote 14 in Dothard arguably supplies some support to the contrary. That footnote rejects the argument that public employers should be granted greater deference than private employers: "Thus for both private and public employers, '[t]he touchstone is business necessity,' Griggs, 401 U.S., at 431; a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge." Dothard, 433 U.S. at 331-32 n.14.

The term "necessary" is used in the context of the discussion of Griggs, which makes clear that the test is one of job-relatedness. Moreover, this footnote is contained in a paragraph that begins: "We turn, therefore, to the appellants' argument that they have rebutted the prima facie case of discrimination by showing that the height and weight requirements are job related." Id. at 331. If the Court were truly holding that the test is one of strict necessity, the above-quoted sentence should have been followed by one that read: "Even if they have made a showing that the requirements are job related, that is no defense because the standard is one of strict necessity." Instead, the Court went on to discuss whether the defendants had shown that the requirement was job related. Id.

\(^{233}\) 456 U.S. 63 (1982).

\(^{234}\) Id. at 89-90 (Stevens, J., dissenting).

\(^{235}\) Id. at 69-70.
system is lawful." Thus, at the time of *American Tobacco*, Justice Stevens’ understanding of what *Griggs* required was remarkably similar to the test contained in *Wards Cove*: "substantially related to a valid business purpose" in the former, and "serves, in a significant way, the legitimate employment goals of the employer" in the latter.

The Court in *New York City Transit Authority v. Beazer* also rejected a requirement of strict necessity in an opinion written, ironically enough, by Justice Stevens. In *Beazer*, the Court considered a disparate-impact challenge to the exclusion of methadone users under the New York City Transit Authority’s anti-narcotics policy. The Court described the relevant issue as whether the employer’s "[legitimate employment] goals are significantly served by — even if they do not require" the challenged practice. The Court held that the employer met the standard because it demonstrated that the practice bore, in the words of *Griggs*, a "manifest relationship to the employment in question."

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236. *Id.* at 90 (Stevens, J., dissenting). Justice Stevens’ full statement was:

   The Court’s strained reading of § 703(h) may be based on an assumption that if the *Griggs* standard were applied to the adoption of a post-Act seniority system, most post-Act systems would be unlawful since it is virtually impossible to establish a seniority system whose classification of employees will not have a disparate impact on members of some race or sex. Under *Griggs*, however, illegality does not follow automatically from a disparate impact. If the initiation of a new seniority system — or the modification of an existing system — is substantially related to a valid business purpose, the system is lawful. "The touchstone is business necessity." *Griggs*, supra at 431; cf. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587. A reasoned application of *Griggs* would leave ample room for bona fide systems; the adoption of a seniority system often may be justified by the need to induce experienced employees to remain, to establish fair rules of advancement, or to reward continuous, effective service.

237. *Id.* at 89-90 (emphasis added).


240. *Id.* at 576-77.

241. *Id.* at 587 n.31.

242. *Id.* (quoting *Griggs v. Duke Power*, 401 U.S. 424, 432 (1971)). The *Beazer* standard, given its similarity to the standard articulated in *Wards Cove*, embarrasses those who argue that *Wards Cove* was an unprecedented departure from an unbroken line of cases dating from *Griggs*. See, e.g., Player, *supra* note 27, at 23 (In *Watson*, the Court "embraced a version unlike any used in the lower courts. This standard was reminiscent of *Beazer’s* long-ignored (if not forgotten) footnote thirty-one."); *Id.* at 29 ("notwithstanding a cryptic closing comment in *Beazer’s* infamous footnote thirty-one, the lower courts and the Equal Employment Opportunity Commission agreed that when the plaintiff proved
Similarly, in Washington v. Davis, the Court upheld a verbal-ability test on the ground that "some minimum verbal and communicative skill would be very useful, if not essential, to satisfactory progress in the training regimen." The Court based its decision on the "positive relationship between the test and training-course performance." Justice Stevens, concurring, again demonstrated his understanding of the Griggs rule. He explained his belief that the tests were valid, as follows: "[T]he test serves the neutral and legitimate purpose of requiring all applicants to meet a uniform minimum standard of literacy. Reading ability is manifestly relevant to the police function . . . ." According to Justice Stevens, the test was valid because of "a correlation between success on the test and success in the training program." Again, this is not the language of strict business necessity. Even Justice Brennan's dissent in Washington v. Davis did not take issue with the majority's view that the correct inquiry was whether a correlation existed between the test scores and performance. Instead, he argued only that it was impermissible to rely upon the correlation between test scores and training-program performance without a showing that there was a correlation between training-program performance and later job performance.

Justice Blackmun, who dissented separately in Wards Cove and also joined Justice Stevens' dissent, at one time also took a very different view from the one that the dissenters in Wards Cove suggested had always been the law. In Albemarle Paper Co. v. Moody, the Court applied the EEOC Guidelines on employee testing and held that the employer's validation study was defec-
tive. Justice Blackmun declined to join the majority opinion because of what he perceived as the majority's over-reliance on the stringent guidelines. Then, in a prescient warning concerning an overly strict standard of justification, Justice Blackmun stated:

I fear that a too-rigid application of the EEOC Guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII.

Further evidence that the standard of "business necessity" espoused by the Wards Cove dissenters is at variance with prior law lies in the treatment of alternatives. Under pre-Wards Cove case law, once the defendant showed that the challenged practice was job related, the plaintiff could still prevail by demonstrating alternatives having less adverse impact. In Albemarle Paper Co. v. Moody, the Court clearly placed the burden of showing such alternatives on the plaintiff. That rule was reaffirmed in Wards Cove. Defining "business necessity" to mean "essential to ef-

250. Justice Blackmun stated:

I cannot join, however, in the Court's apparent view that absolute compliance with the EEOC Guidelines is a sine qua non of pre-employment test validation . . . . The simple truth is that pre-employment tests, like most attempts to predict the future, will never be completely accurate. We should bear in mind that pre-employment testing, so long as it is fairly related to the job skills or work characteristics desired, possesses the potential of being an effective weapon in protecting equal employment opportunity because it has a unique capacity to measure all applicants objectively on a standardized basis.

Id. at 449 (Blackmun, J., concurring).

In Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988), Justice Blackmun again described his view of the law: "The criterion must directly relate to a prospective employee's ability to perform the job effectively." Id. at 1005 (Blackmun, J., concurring).

251. Albemarle Paper, 422 U.S. at 449. (Blackmun, J., concurring).
252. Commentators frequently refer to the question as whether there are less "discriminatory" alternatives to the challenged practice. See, e.g., Blumoff & Lewis, supra note 15, at 17; Joel W. Friedman, Redefining Equality, Discrimination, and Affirmative Action Under Title VII: The Access Principle, 65 Tex. L. Rev. 41, 51 n.40 (1986); Caldwell, supra note 58, at 602; Julia Lamber, Alternatives to Challenged Employee Selection Criteria: The Significance of Nonstatistical Evidence in Disparate Impact Cases Under Title VII, 1985 Wisc. L. Rev. 1, 13; Player, supra note 27, at 20. The Supreme Court has never characterized alternatives with a lesser impact as "less discriminatory," suggesting that the Court may not share the assumption of the commentators that job-related requirements having a disparate impact are "discriminatory."

fective job performance" as Justice Stevens suggested in his dissent in *Wards Cove*, would necessarily place on the defendant the burden of showing that there are no alternatives that would have a lesser impact. If there were an alternative with a lesser impact, then the practice having the greater impact cannot be said to be "essential." It makes no sense to suggest that the Court had always required the defendant to prove that the practice was essential but had placed the burden on the plaintiff to prove the existence of less discriminatory alternatives.

Even if pre-*Wards Cove* case law did not require that the challenged practice be "essential to effective job performance," the question still remains whether the *Wards Cove* formulation of the standard — that the challenged practice must "serv[e], in a significant way, the legitimate employment goals of the employer" — differs from the standard of "job-relatedness" articulated by the Court repeatedly in prior cases. The Court stated that it had "phrased the query differently in different cases," but that the fundamental question remained the same, suggesting that the Court did not believe it was announcing a new standard. However, one might ask why the Court used this different terminology if it was not announcing a new standard.

The answer to this question appears to be two-fold. First, the Court's terminology was not new. In fact, the formulation em-

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255. *Id.* at 671 (Stevens, J., dissenting) (quoting Dothard v. Rawlinson, 433 U.S. 321, 331 (1977)).
256. See, e.g., Robinson v. Lorillard Corp., 444 F.2d 791, 798 n.7 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971) ("It should go without saying that a practice is hardly 'necessary' if an alternative practice better effectuates the intended purpose or is equally effective but less discriminatory.").
257. Cf. Mack A. Player: Viable alternatives to the challenged device could establish that the device was unnecessary and thus unjustified. Logically, if the employer must prove that a device is in fact "necessary" (as defined in the dictionary to mean "essential"), proof that alternatives exist establishes that the device is not "necessary" or "essential."
259. The Court emphasized that "[s] mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices." *Id.* at 659.
260. See Mack A. Player's discussion on the question of terminology: While the Court had never clearly defined "business necessity," the *Wards Cove Packing* clarification produced a definition akin to "substantial business justification." This definition does not expressly conflict with any prior pronouncements from the Supreme Court. Nonetheless, it will change how "business necessity"
ployed by the Court in *Wards Cove* is substantially the same as that used by the Court a decade earlier in *Beazer*. The second reason the *Wards Cove* Court used a different terminology is that the practices challenged in that case were different in kind from the practices challenged in most of the Court's previous disparate-impact cases. Prior to *Watson*, the disparate-impact cases decided by the Supreme Court involved challenges to objective measurements or to requirements that the employer used as a proxy for predicted performance. The question in these cases was whether the employers' requirements, which were adopted to separate the good from the bad applicants, were in fact related to the applicants' ability to perform the job competently and safely. *Watson* and *Wards Cove*, on the other hand, involved challenges to hiring and promotion procedures, rather than qualifications. *Watson* reviewed a challenge to a bank's practice of relying upon the subjective judgments of supervisors who were acquainted with the candidates for promotion; *Wards Cove* reviewed a challenge to a series of hiring and promotion practices such as nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, and a practice of not promoting from within.

The standard of "job-relatedness" is less appropriate in assessing hiring practices than it is in assessing job qualifications. When an employer uses job qualifications to predict future job performance, the relevant question is whether satisfaction of the challenged qualification is related to the applicant's ability to perform — as articulated in virtually all circuits. *Player*, supra note 27, at 16.

261. Under *Wards Cove* the practice has to "serve[], in a significant way, the legitimate employment goals of the employer." *Wards Cove*, 490 U.S. at 659. Similarly, *Beazer* requires that the employer's "legitimate employment goals . . . are significantly served by — even if they do not require" the challenged practice. New York City Transit Auth. v. *Beazer*, 440 U.S. 568, 578 n.31 (1979).


264. *See*, e.g., *Beazer*, 440 U.S. at 576-77 (discussing employer's interest in not hiring methadone users because of safety considerations).


the job. However, hiring procedures may be adopted for legitimate business reasons other than prediction of future job performance. For example, in *Wards Cove* the employers had entered into a hiring-hall agreement with a largely Filipino union local in Seattle. As a result, the positions for which the union supplied employees were held disproportionately by Filipinos. If a black person had challenged the employers' use of a hiring hall on the ground that a disproportionately small number of blacks were hired for cannery positions, the employers could not possibly defend on the basis of "job performance," since that would require a showing that employees procured through the hiring hall performed better than potential employees who were excluded because of the hiring-hall agreement. However, the usual reason for an employer's entering into a hiring-hall agreement is not that employees hired under such an agreement will perform better than other employees. Rather, it is to maintain a reliable source of labor. A standard tied to the employer's legitimate interests allows the employer to raise that kind of defense; a standard tied to job performance would not. Thus, had the Court in *Wards Cove* described the test in terms of relationship to job performance, it would have been providing the lower court with a test that could not be applied rationally on remand.

In sum, the *Wards Cove* standard was not a departure from precedent. Earlier cases had exhibited a range of standards, and *Wards Cove* fit neatly within those boundaries.

b. The Standard of Business Necessity under the Civil Rights Act

The 1991 Act does not explicitly alter the *Wards Cove* standard. Under the Act, in order for an employer to justify an employment practice having a disparate impact, the employer must prove that "the challenged practice is job related for the position in question and consistent with business necessity." On its face this standard appears to be two-pronged: the employer must show that the practice is both "job related" and "consistent with business necessity." However, the prior discussion demonstrates that "business necessity," at least for the *Griggs* Court, meant "job

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267. Id. at 647 n.3.
269. Id.
related. To the extent that the term "business necessity" is interpreted to have any independent meaning, it is probably the same meaning as the Wards Cove phrase "serves, in a significant way" or the Griggs requirement of a "manifest relationship" to the employment in question. There must be some requirement that the relationship between the practice and the justification be of sufficient strength, or else any relationship, however weak, would establish the justification.

The Act does not seem to alter the Griggs standard. In the "purposes" section of the Act, Congress listed as one of its purposes:

to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

Thus, the apparent consequence of the Act is merely to place the analysis of "business necessity" back to the point at which it was prior to Wards Cove. Although earlier versions of the Act would

270. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). See supra notes 220-224 and accompanying text. In the post-compromise attempt by partisans on both sides to influence later interpretation, diametrically opposed views were offered concerning the effect of the conjunctive in the employer justification. Senator Jeffords stated:

The use of the conjunctive "and" is very significant for it clarifies that the job related prong must be present in all cases even where other aspects of business necessity are asserted. The choice of proving either one or the other prong is not preserved in this compromise.

137 Cong. Rec. S15,383 (1991) (statement of Sen. Jeffords). However, Senator Jeffords also stated that the two-pronged definition was simply codifying the Griggs "requirement" that employment practices with a disparate impact must be "job related." Id.

On the other hand, the interpretive memorandum placed in the record by Senator Dole stated that the term "job related for the position in question" is to be read broadly, to include any legitimate business purpose . . . ." Id. at 15,476.

Because of the restriction on the use of statements as legislative history, the wisdom of which is demonstrated by comparing the statements of Senators Jeffords and Dole, statements of this kind may not be relied upon by courts in interpreting the Act.

271. Wards Cove, 490 U.S. at 659.


have explicitly overruled this aspect of *Wards Cove*, the enacted version dropped that overruling language.

Determining what change, if any, the amendment created presents a host of interpretational difficulties. First, the Act "codified" case law that was far from harmonious. Rather than setting forth a clear standard, the Act allows the Court in future cases to pick and choose from its prior precedents. These precedents permit a fair amount of latitude in judicial decision-making. Second, the Act leaves in place the precedents that led to the *Wards Cove* version of the business-justification standard. As a result, the Court is not precluded from reinstating the *Wards Cove* standard or a similar test.

Although it may be tempting to view the enacted version of the Civil Rights Act as a repudiation of the *Wards Cove* definition of "business necessity," the legislative history does not support such an interpretation. Instead, it shows a gradual weakening of the articulated business-necessity standard and the elimination of any stated intention to overrule this aspect of *Wards Cove*. Although some of the original supporters of the bill wanted to overrule the business-necessity test of *Wards Cove*, they ultimately lacked the political power to do so.

The original 1990 bill incorporated the standard that Justice Stevens had proposed in his *Wards Cove* dissent. This standard required the employer to demonstrate that a practice having a disparate impact was "essential to effective job performance." The definition of business necessity in that bill was subsequently relaxed by the "Kennedy-Danforth compromise." Instead of requiring an employer to show that a challenged practice having a


275. See supra notes 49-68 and accompanying text.

276. Perhaps the most important precedent that the Act leaves untouched is the *Beazer* formulation of the business-necessity standard.

277. See infra notes 275-99 and accompanying text.

278. See supra notes 83-99 and accompanying text (detailing the struggles in 1990 and 1991 to pass the legislation).

279. See S. 2104 § 3, 101st Cong., 2d Sess., 136 CONG. REC. S1019, S1019 (1990), infra Appendix A § 3.

disparate impact was essential to effective job performance, the revised bill would have required the employer to show that the practice "bears a substantial and demonstrable relationship" to effective job performance.\textsuperscript{281} This change was said to eliminate the pressure on employers to adopt quotas in order to avoid liability under the Act.\textsuperscript{282} However, the definition of business necessity was still tied completely to job performance.\textsuperscript{283}

The versions of the 1990 bill initially passed by the Senate\textsuperscript{284} and the House\textsuperscript{285} contained a qualitative change in the business-necessity concept. They provided two definitions of "business necessity": one applicable to employment practices "involving selection" and one applicable to all other employment practices. Under the House bill, the former practices would have to "bear a significant relationship to successful performance of the job," while the latter practices would have to "bear a significant relationship to a significant business objective of the employer."\textsuperscript{286} Under the Senate version, practices involving selection were required to be supported by a "substantial and demonstrable relationship to effective job performance," while other practices were to "bear[] a substantial and demonstrable relationship to a compelling objective of the [employer]."\textsuperscript{287} The conference version, which President Bush vetoed, contained the House's version, requiring that employers show that their practices involving selection "bear a significant relation-

\begin{footnotesize}
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\item[281.] \textit{Id.} Some versions of the bill required employers to satisfy their burden of proof by "demonstrable evidence." \textit{See} Vetoed 1990 Bill, H.R. REP. No. 856 \S 3, 101st Cong., 2d Sess., 136 CONG. REC. H9552, H9552 (1990), \textit{infra} Appendix D \S 3; Civil Rights and Women's Equity in Employment Act of 1991, H.R. 1 \S 201, 102d Cong., 1st Sess., 137 CONG. REC. H3876, H3879 (1991), \textit{infra} Appendix F \S 201. These versions stated that "unsubstantiated opinion and hearsay" were not sufficient. This requirement was not included in the final enacted version of the Act, presumably because of arguments that the ordinary rules of evidence sufficiently ensure the reliability of admissible evidence. All of these versions would have expressly allowed employers to defend practices without the need to engage in formal validation studies. Because the enacted version does not address the quality of evidence that employers can rely on, any probative evidence that is consistent with the Federal Rules of Evidence should suffice.
\item[282.] 136 CONG. REC. S9322 (1990) (statement of Sen. Kennedy) ("These changes should put to rest the spurious charge that this bill requires quotas. Restoring the prior law in the \textit{Griggs} case will not force employers to adopt quotas.").
\item[283.] \textit{See supra} note 281 and accompanying text.
\item[286.] \textit{Id} \S 3.
\item[287.] Amend. 2110, S. 2104 \S 3, 101st Cong., 2d Sess., 136 CONG. REC. S9325, S9325 (1990), \textit{infra} Appendix B \S 3.
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ship to successful performance of the job," and that other practices "bear a significant relationship to a manifest business objective of the employer." 

The version of the 1991 Act that the House initially passed retained the "significant relationship to successful performance of the job" standard for practices involving selection and returned to the "significant relationship to a significant business objective of the employer" standard for other practices.

The day before the House passed this bill, Senator Danforth attempted to break the stalemate over the Act by introducing three bills. Each bill dealt with only some of the issues contained in the omnibus bill. One of the express purposes of S.1208, the Danforth bill dealing with disparate-impact standards, was "to overrule the ... meaning of business-necessity in Wards Cove Packing Co. v. Atonio and to codify ... the meaning of business necessity used in Griggs v. Duke Power Co." Like the House version, the business-necessity standard contained in S.1208 was two-pronged. Practices "involving selection" would have to "bear[] a manifest relationship to requirements for effective job performance," and other practices would have to "bear[] a manifest relationship to a legitimate business objective of the employer." Thus, the relationship to job performance had to be "manifest," rather than "significant," and the objective of the em-

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289. Id.
No Democratic bill had been introduced in the Senate, because Senator Edward M. Kennedy was unable to obtain the support of "moderate Republicans," including Senator Danforth. Steven A. Holmes, Business and Rights Groups Fail in Effort to Draft Bill on Job Bias, N.Y. TIMES, April 20, 1991, at A1.
294. Id. § 5.
ployer need only be "legitimate," rather than "compelling," "significant," or "manifest."

The standards underwent another metamorphosis in S.1745, introduced by Senator Danforth on September 24, 1991. Under that bill, to defend "employment practices that are used as qualification standards, employment tests, or other selection criteria," the employer would have to show that the practices "bear a manifest relationship to the employment in question." Other practices would have to "bear a manifest relationship to a legitimate business objective of the employer." This modification was a substantial improvement, because it imposed a job-relationship standard for "practices that are used as qualification standards" rather than for practices "involving selection." Thus, practices that involved selection but not used as qualification standards no longer had to be justified in terms of job performance. However, a significant sticking point of this bill was its further definition of the term "the employment in question." That phrase was defined to mean either "the performance of actual work activities required by the employer for a job or class of jobs" or "any behavior that is important to the job, but may not comprise actual work activities." President Bush vowed to veto the bill because of what he perceived to be an overly stringent definition of business necessity.

The President's continued opposition to the Danforth standard of business necessity ultimately led to the compromise described at the outset of this section. The "Purposes" section of the bill

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296. Id.
297. Id.
298. Id. It was not clear under this standard whether an employer could justify a practice that was based on an employee's predicted ability to complete a training program. See Washington v. Davis, 426 U.S. 229, 250-51 (1976) (upholding the use of a test that predicted performance in a training program without requiring that the employer show a relationship to job performance as a police officer).
299. See Adam Clymer, Senate Approves Civil Rights Bill, 95-5, N.Y. TIMES, Oct. 31, 1991, at A20 ("business necessity" language in the Danforth Bill was at the heart of President Bush's complaints about the bill); Adam Clymer, Senators and Bush Reach Agreement on Civil Rights Bill, N.Y. TIMES, Oct. 25, 1991, at A1 (President Bush threatened to veto the Danforth Bill as late as October 23, 1991, because of the dispute over the "business necessity" language).
300. On October 23, 1991, the Office of Management and Budget issued a statement which threatened that the Administration would veto the bill in order to prevent it from "overturn[ing] two decades of Supreme Court precedent" and "drive[ing] employers to adopt quotas and other unfair preferences." Statement of Administration Policy on S. 1745, reprinted in DAILY LAB. REP. (BNA) No. 206, at F-1 (Oct. 24, 1991). The Statement also
was amended to exclude language indicating an intent to overrule the *Wards Cove* definition of business necessity. The new purpose of the bill was merely to codify pre-*Wards Cove* holdings. At best the bill adopted what might be described as an agnostic position as to what effect *Wards Cove* had on prior law. Also, rather than proposing a new definition inconsistent with the *Wards Cove* terminology, the bill simply used undefined terms that evoke memories of *Griggs*: "job related for the position in question and consistent with business necessity."

The statutory amendments raise a series of questions. First, in defending practices having a disparate impact, is an employer limited to a defense based upon job performance? Second, how

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303. There was an ill-publicized attempt in the vetoed version of the 1990 Act to expand greatly the kind of practice that could be challenged under the disparate-impact theory. In setting forth the standard for practices not involving selection, the bill contained language in the case of other employment decisions, not involving employment selection practices . . . (such as, but not limited to, a plant closing or bankruptcy) . . . .” H.R. REP. No. 856 § 3, 101st Cong., 2d Sess., 136 CONG. REC. H9552, H9552 (1990), infra Appendix D § 3.

This language raised a significant issue by suggesting that a plaintiff could challenge as practices “not involving employment selection practices” fundamental business decisions such as whether to close a plant or declare bankruptcy. *Id.* The Supreme Court has never suggested that such an approach is permissible, and the lower courts have likewise not endorsed such a theory. See Marley S. Weiss, *Risky Business: Age and Race Discrimination in Capital Redeployment Decisions*, 48 Md. L. REV. 901, 903 (1989). Instead, the Court has permitted challenges under *Griggs* only to decisions that are properly considered employment decisions. Of course, if the employer chooses to close a plant, its method of selecting employees for layoff or transfer can be scrutinized under the disparate-impact theory. However, courts have always seemed to assume that the initial decision whether to close a plant was unreviewable. *See* Fumco Construction Co. v. Waters, 438 U.S. 567, 578 (1978) (“Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.”).

In the early 1970s, the EEOC itself repudiated application of the disparate-impact theory to such business judgments. In fact, in 1972, the Chairman of the EEOC strenuously disavowed an internal 1971 EEOC memorandum asserting that a prima facie case of disparate-impact discrimination exists whenever a company relocates from an inner city to a suburban area with a lower percentage of minorities in the work force. See EEOC Memorandum of July 7, 1971, *reprinted in* 118 CONG. REC. 4925-27 (1972), and in
substantial must the employer's interest be in order to justify a practice having a disparate impact? Third, can an employer defend its actions based upon an employee's ability to progress to another job?

(1) Is the employer limited to performance-based justifications?

Under the original 1990 bill, an employer could defend practices having a disparate impact only by showing that they were "essential to effective job performance." Apparently in response to criticisms of the early versions of the 1990 Act, the bill (as ultimately vetoed by President Bush) contained a dual standard. Employment practices which involved selection, including recruitment and retention practices, could be justified only through a relation-
ship to job performance, while other practices could be justified by any "manifest business objective" of the employer.\textsuperscript{305} Most versions of the 1991 bill also contained a bifurcated standard that varied depending upon the nature of the challenged practice. The original draft of S. 1745, on the other hand, provided a more sensible dichotomy that distinguished between "employment practices that are used as qualification standards, employment tests, or other selection criteria" and all other practices.\textsuperscript{306} This distinction allows the employer to tailor its defense in terms of the reasons that the employer adopted the practice.\textsuperscript{307} Unfortunately, the provision as enacted lacks clarity. After negotiations between Senators and the White House, the bill seems to contain a unitary standard: "job related for the position in question and consistent with business ne-

\textsuperscript{305} H.R. REP. NO. 856 § 3, 101st Cong., 2d Sess., 136 CONG. REC. H9552, H9552 (1990), infra Appendix D § 3. The difficulty with this standard was that not all employment practices, not even all practices involving selection, are adopted because of their relationship to job performance. For example, the use of a hiring hall is certainly a recruitment practice but not one that is justified, or justifiable, on the basis of job performance. \textit{See supra} note 269 and accompanying text. Similarly, an employer's decision about where and how to advertise for employees may not be based on assumptions about job performance. For example, a decision to advertise in one newspaper rather than another may be made on the basis of a limited recruiting budget and the desire to get the most "bang for the buck," and not on the assumption that potential employees reading one paper will be better employees than those reading others papers. Similarly, practices involving retention can be defined as practices "involving selection." \textit{Id.} Therefore, an employer's decision about which employees to retain in a layoff would also be governed by this standard. Yet, employers often base such judgments on factors other than predictions about job performance. For example, an employer who makes retention decisions on the basis of seniority may be seeking to further its legitimate goals, but not the goal of successful job performance. Indeed, employers typically view the decision of whether to lay off employees based on their seniority or performance as a choice between two radically different alternatives.

The "bona fide seniority system" exception found in section 703(h) of Title VII would protect many employers from liability for basing their retention decisions on seniority. 42 U.S.C. § 2000e-2(h) (1988). However, it is not clear that an employer having no collective bargaining agreement and no established layoff policies, which is true of many small employers, would be able to establish the existence of a "system." \textit{See Williams v. New Orleans S.S. Ass'n}, 673 F.2d 742, 754 (5th Cir. 1982) (practice of relying on seniority must be applied with sufficient regularity in order to be considered a "system"). \textit{See also} Alfred W. Blumrosen, \textit{Society in Transition I: A Broader Congressional Agenda for Equal Employment — The Peace Dividend, Leapfrogging, and Other Matters}, 8 YALE L. & POL'Y REV. 257, 268 n.51 (1990) ("The question of whether the 'bona fide seniority' proviso protects unilateral employer-established seniority systems has not been explicitly decided by the Supreme Court.").


\textsuperscript{307} \textit{Id.}
cessity.\textsuperscript{308}

The question thus arises whether the compromise version eliminated non-performance-based justifications, such as an employer's argument that a hiring hall was justified by its legitimate interest in ensuring a steady supply of employees. Several factors suggest that it did not. As the bill evolved, the permissible scope of employer justifications was broadened. The final compromise resulted from negotiations between Senators who were already willing to allow non-performance-based justifications\textsuperscript{309} and an Administration that contended that the standards in prior versions of the bill unduly constrained employers.\textsuperscript{310} Consequently, it is difficult to sustain a conclusion that the outcome of these negotiations was a bill that imposed greater burdens on employers. Moreover, the compromise negotiations leading to the enacted bill eliminated references to overruling the \textit{Wards Cove} conception of business necessity, which would have permitted non-performance-based justifications. The use of such justifications is also supported by the \textit{Griggs} rationale, which condemned arbitrary impediments to minority advancement.\textsuperscript{311} If, for whatever reason, a facially neutral practice serves the employer's legitimate interests, then the practice cannot be said to be arbitrary.

Elimination of non-performance-based defenses would not be good policy. If the generic purpose of the disparate-impact theory is to prohibit employers from adopting, even innocently, practices that have a disparate impact unless they have a good reason for doing so, any good reason should suffice. Prohibiting employers from acting in good faith and in furtherance of legitimate business goals — and instead requiring them to employ practices that are

\begin{footnotesize}
\begin{enumerate}
\item[310.] See \textit{supra} note 300 and accompanying text.
\item[311.] 401 U.S. at 430-31. See also Lmnber, \textit{supra} note 252, at 39 n.152 ("Clearly, the \textit{Griggs} Court did not intend to limit a defendant's justification to considerations of how well employees do their jobs. After all, a company's primary motive is maximizing profits — accomplished in a variety of ways by pursuing a number of different policies.").
\end{enumerate}
\end{footnotesize}
not as good for their business — simply to obtain a proportionately representative workplace places an additional economic drag on businesses. Of course, if the real purpose of the legislation is to discourage employers from adopting any practice having a disparate impact without regard to justification, then any rule limiting the employer’s defense would be a good one. No doubt there are some who would subscribe to that purpose, but that was not the stated objective of the Act’s proponents, who steadfastly denied any intent to impose a proportional-representation rule or any other untoward burden on business.

(2) How substantial must the employer’s business objectives be?

Varying characterizations of the kind of employer justification necessary to uphold a challenged practice not involving selection were proposed during the course of the legislative struggle: “compelling business objective” from the Kennedy-Jeffords Substitute,312 “significant business objective” from the House version of the 1990 Act,313 “manifest business objective” from the vetoed conference version,314 and “legitimate business objective” from the bills introduced by Senator Danforth in 1991.315 The “legitimate employment goals” standard announced in Wards Cove seems indistinguishable from the standard of both Danforth bills.

The bill as enacted does not specifically address the issue, providing only the general standard of “job related for the position in question and consistent with business necessity.”316 It gives little guidance as to the magnitude of the required employer interest. However, given the fact that pressure for the final compromise came from the White House, the Act should not be interpreted to impose a greater burden on employers than the earlier Danforth bills. Consequently, any legitimate employer goal should suffice, provided there is the necessary nexus between the goal and the
At first glance, this issue may seem merely a matter of semantics, with the distinction between "significant business objectives" and "legitimate business objectives" being at best a minor one. Upon closer examination, however, a tremendous practical difference becomes apparent. When an employer seeks to justify a practice on the basis of its business objectives, courts would probably have little difficulty deciding whether a business goal was legitimate. Judges who have grown up in our society probably share a view about what sorts of business goals are acceptable under our economic system. These determinations may involve issues such as whether the goals are legal, ethical, and consistent with public policy, and whether they further goals of profit-making and efficiency. Judges from a broad variety of backgrounds would probably resolve these questions with a reasonable degree of consistency, and employers could generally anticipate the resolution.

The distinction between "significant business objectives" and business objectives that are "legitimate but less than significant" is far less objective in this context. How does one decide whether a legitimate business objective is "significant" or not? A consensus is unlikely to exist, and the answer would probably vary depending upon the philosophy of the judge. The less predictable the standard, the more likely it is that employers will take the defensive measure of hiring by the numbers to avoid litigation.

Perhaps the worst possible approach — in practice as opposed to principle — is a "sliding scale" standard such as that advocated by George Rutherglen. Under this approach, the magnitude of the employer's interest must increase as the disparate impact of its action increases. Not only is it difficult to find any statutory warrant for this approach, but requiring that two variables be determined and then balanced makes predictability all the more elusive. Because the statute provides no guidance for balancing the impact against the employer's interest, judges must necessarily draw upon some internal standard and are likely to have dramatically different views about how strong an employer interest must be to justify a given statistical disparity. Moreover, the magnitude of the justification that an employer must prove to validate a given practice would not be constant. Instead, the magnitude would vary over time as the impact of the practice changed. Thus, a test that is

317. Rutherglen, supra note 27, at 1320.
validated and justified in the workplace one year may not be legal in the next year if the impact of the test increases, even if the test is unchanged in its ability to predict performance. Such a standard would also make it considerably riskier for an employer to rely on the validation experience of other employers.

Because the employer would not know in advance the identity of the person who would be reviewing its practices, it would be forced to act very conservatively in order to ensure that its hiring practices could satisfy the most demanding of judges. As Rutherglen has noted, a heavy burden of justification places substantial pressure on employers to avoid statistical disparities in the first place. 318 However, the indeterminate standard that Rutherglen advocates is functionally equivalent to an onerous standard and would operate with striking efficiency to create just the sort of pressure that he wishes to avoid. If the primary purpose of the law were simply to provide a formula for deciding cases once they have arisen, a sliding scale approach might be acceptable. However, the primary purpose of the law is to channel behavior, and in that enterprise such an approach cannot produce the behavior it seeks to induce. Since employers cannot predict whether their actions will pass muster under a complex balancing test, they may be left with no option but to engage in litigation-proof hiring. Efficiency and fairness would become casualties of a well-meaning, but fundamentally misguided, approach.

(3) May the employer justify a practice based upon the employee’s ability to progress to the next job?

One of the issues left open in Griggs was whether an employer could take into account an employee’s ability to progress beyond the job in question. 319 The EEOC has traditionally taken the view that an employer may not take into account an employee’s ability to progress in the job unless all or substantially all employees will in fact progress to such positions. In Albemarle Paper, the Court endorsed that aspect of the EEOC Guidelines in the context of the validation of standardized tests, 320 but it has never had reason to address that issue in the context of other job criteria. 321 The 1991

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318. Id. at 1313.
319. 401 U.S. at 432.
321. See Caldwell, supra note 58, at 594 (discussing the failure of courts, generally, to apply the strict EEOC Guidelines beyond paper-and-pencil tests).
Act's "job related for the position in question and consistent with business necessity" standard arguably excludes consideration of an employee's ability to progress beyond the position in question. However, such an argument begs the ultimate question of whether ability to progress out of a given position is a qualification that is related to the job when moving into it.

The requirement that a qualification bear a "manifest relationship to the employment in question" found in the initial version of S. 1745\textsuperscript{322} was coupled with a definition of "employment in question" that included only "the performance of actual work activities required by the employer for a job or class of jobs" or "any behavior that is important to the job, but may not comprise actual work activities."\textsuperscript{323} This focus on "actual work activities for a job or class of jobs" presumably would have prevented an employer from relying on ability to progress, at least to progress out of a "class of jobs." The standard also may not have permitted an employer's reliance on an employee's ability to complete a training program,\textsuperscript{324} since this ability, although important to the job, might not be deemed to comprise actual work activities.\textsuperscript{325}

One of the reasons that there has been so little thoughtful analysis of the ability-to-progress issue is that most of the discussion has focused on absolute requirements, as opposed to "plus factors."\textsuperscript{326} The EEOC's position assumes that the issue is one of absolute requirements, thereby obscuring the important question, which is not whether the employer may require that all applicants to an entry-level job be qualified for higher-level jobs, but whether the employer may consider an applicant's potential for promotion at all.

Consider, for example, a not-atypical industrial setting in which the entry-level job is "laborer"; above the laborer position are various production and maintenance positions that require a substantial

\textsuperscript{322} S. 1745 § 7, 102d Cong., 1st Sess. § 7, \textit{reprinted in DAILY LAB. REP. (BNA)} No. 186, at D-1, D-3 (Sept. 25, 1991), \textit{infra} Appendix G § 7.

\textsuperscript{323} Id.

\textsuperscript{324} See \textit{Washington v. Davis}, 426 U.S. 229, 250-51 (1976) (upholding use of a test that was predictive of performance in a training program without need for demonstration of a relationship to performance as a police officer).

\textsuperscript{325} The primary focus of the phrase "behavior that is important to the job" seemed to be on rules relating to such things as punctuality, attendance, and refraining from misconduct. \textit{See} Equal Employment Opportunity Act of 1991, S. 1208 § 5, 102d Cong., 1st Sess., 137 CONG. REC. S7023, S7023 (1991), \textit{infra} Appendix E § 5.

\textsuperscript{326} See \textit{supra} notes 208-09 and accompanying text (listing examples of "plus factors").
amount of on-the-job learning. Employees may be hired directly into production and maintenance jobs, or they may be hired as laborers, depending upon their experience. All supervisory levels up to plant manager are usually filled by employees who started out in these lower-level jobs. However, most incumbents in any given job are never promoted to supervisory levels because of high turnover in the lower-level positions and varying qualifications of the incumbent workers. Likewise, most of those who are promoted into a given supervisory level are never promoted into higher-level management positions.

In these circumstances, what qualifications are relevant to the entry-level jobs? Under the EEOC view, because most lower-level employees are never promoted to supervisory positions, the employer may not require that everyone hired into lower-level positions be “supervisor material.” That result is not so much wrong as inconsequential since few employers would impose such a requirement given the high turnover in lower-level jobs and the relative dearth of management positions. What is important is whether the employer can give preference to applicants deemed to have the potential to move up in the organization or whether it must instead treat the applicants as fungible despite substantial differences in potential. The EEOC position on this highly consequential matter is that the employer may not prefer applicants who have the potential to be supervisors if a statistical imbalance would result.

The policy justification for prohibiting an employer from advancing its long-term business needs in filling positions is far from apparent and has never been adequately articulated by those who would impose such a prohibition. Perhaps the EEOC position is animated by a suspicion that an employer that requires all of its janitorial applicants to be qualified to run the factory is using the requirement as a pretext for intentional discrimination. Such a suspicion might be justified in circumstances where the employer imposes such an absolute, and unusual, requirement. However, few employers would impose such a requirement given the additional cost of hiring such people and the difficulty of getting highly qualified people to take and remain in jobs for which they are substantially overqualified. As discussed above, the real issue is whether the employer can take into account an applicant's potential to advance within the organization, or whether it must simply ignore
that potential. The wisdom of compelling employers to ignore their long-term interests is open to substantial doubt.

4. Alternatives

a. Wards Cove

Under pre-Wards Cove law, the employer's demonstration of business necessity did not necessarily end the inquiry. In Albemarle Paper Co. v. Moody the Court held, or at least stated, that the plaintiff could then "show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" According to the Court, "Such a showing would be evidence that the employer was using its tests merely as a 'pretext' for discrimination."

Wards Cove did not question this rule. Instead, the Court quoted Albemarle Paper, stating that plaintiffs could persuade the factfinder that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interest[s]"; by so demonstrating, [plaintiffs] would prove that "[the employer was] using [its] tests merely as a 'pretext' for discrimination."

The Court then went on to say that if the plaintiffs, having established a prima facie case, come forward with

327. See supra notes 208-16 and accompanying text.
329. Id. (quoting McDonnell Douglas v. Green, 411 U.S. 792, 801 (1973)). In New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979), the Court reinforced the view that the function of alternatives is to demonstrate a pretext for intentional discrimination. The Court stated:

At best, respondents' statistical showing is weak; even if it is capable of establishing a prima facie case of discrimination, it is assuredly rebutted by TA's demonstration that its narcotics rule (and the rule's application to methadone users) is "job related." The District Court's express finding that the rule was not motivated by racial animus forecloses any claim in rebuttal that it was merely a pretext for intentional discrimination.

Id. at 587 (emphasis added) (footnote omitted).

The Court thus contemplated a three-stage inquiry: (1) the plaintiff's prima facie case, (2) the defendant's justification, and (3) the plaintiff's opportunity to demonstrate that the job-related practice had been adopted for discriminatory reasons.

alternatives to petitioners’ hiring practices that reduce the racially-disparate impact of practices currently being used, and petitioners refuse to adopt these alternatives, such a refusal would belie a claim by petitioners that their incumbent practices are being employed for non-discriminatory reasons.  

The Court further observed that “any alternative practices which respondents offer up in this respect must be equally effective as petitioners’ chosen hiring procedures in achieving petitioners’ legitimate employment goals.” In determining equal effectiveness, “‘[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant.’”

Critics of the Wards Cove treatment of alternatives have focused on three points: (1) their disagreement with the Court’s holding that evidence of alternatives is relevant only insofar as it tends to reveal a pretext for intentional discrimination; (2) their questionable interpretation of the case as holding that in order for the plaintiffs to prevail after the employer’s demonstration of business necessity, the employer must have refused to adopt the alternative after it has been suggested by the plaintiffs; and (3) their disagreement with the Court’s suggestion that increased costs or other burdens are relevant in determining equal effectiveness.

The validity of the criticism largely depends on the proper function of the “pretext” stage of a disparate impact case. As far as the first and most fundamental criticism is concerned, there are three competing explanations of that function: (1) proof of alternatives may show that the employer is using a practice as a pretext for intentional discrimination despite the fact that the practice may be job related; (2) proof of alternatives may show that the challenged practice was not strictly “necessary,” or (3) proof of alternatives may provide a safety valve that allows plaintiffs to win who would otherwise lose.

The first of these explanations seems most consistent with the Albemarle Paper characterization of the issue in terms of “pretext,”

331. Id. at 660-61.
332. Id. at 661.
333. Id. (quoting Justice O’Connor in Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 998 (1988)).
which denotes a false reason given to mask the real reason.  

Under such a view, the importance of evidence of alternatives is that it prevents exploitation of what might otherwise have been an important loophole that would allow an employer to adopt a facially neutral practice because of its impact, not merely in spite of it. The fact that the Court in Albemarle Paper noted that acting in the face of alternatives with a lesser impact was “evidence” of discrimination, rather than discrimination itself, buttresses this view of the alternatives approach. The Court’s citation to McDonnell Douglas, a disparate-treatment case, also supports this perspective.

If Albemarle Paper had been endorsing the second function, under which an employer would be liable as a matter of substantive law for not adopting the practice having the least impact, it would have made no sense for the Court to talk about evidence of pretext. Because the employer’s intent is not relevant to a disparate-impact case, the plaintiff would not have to demonstrate what motivated the defendant; the entire focus would be on whether the alternative was superior. Thus, the function of alternatives would not be an evidentiary one, but rather a substantive one. This is a function that is inconsistent with the Court’s reasoning. The Wards Cove requirement that the employer knew of the existence

334. Albemarle Paper Co. v. Moody, 422 U.S. 405, 436 (1975). See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1797 (1986) (defining “pretext” as “a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs: EXCUSE; PRETENSE: COVER.”).

Blumoff and Lewis question whether the Court could have been using the term “pretext” in this way, since “[t]aken literally, the Court is saying that a plaintiff’s demonstration of a less discriminatory alternative must be so powerful as to yield the conclusion that the employer’s earlier adoption of a different practice to accomplish the same goal was motivated by a desire to discriminate.” Blumoff & Lewis, supra note 15, at 42. Why this should be at all startling is unclear. Albemarle Paper clearly stated that the existence of other devices without an undesirable effect “would be evidence that the employer was using its tests merely as a ‘pretext’ for discrimination.” Albemarle Paper, 422 U.S. at 425. There is nothing, other than, perhaps, the fact that it placed quotation marks around the word “pretext,” to suggest that the Court was using the term “pretext” in a way any different from its dictionary definition and its use in disparate-treatment cases.


336. Id.

337. See Lamber, supra note 252, at 2:

Under the prevailing view, showing the existence of alternative employee selection criteria only aids in determining whether there is intentional discrimination. Most commentary and a superficial reading of Supreme Court decisions suggest that employees alleging discrimination must show that alternative selection criteria are so superior to the existing criteria that a court can infer discriminatory motivation from an employer’s failure to adopt them.

Id.
of the alternative and refused to adopt it after a demand by the plaintiff.\(^{338}\) shows that \textit{Wards Cove} was following in the footsteps of \textit{Albemarle Paper} by viewing the function as an evidentiary one. Suggesting as much is the \textit{Wards Cove} statement that the employer’s refusal to adopt the alternative “would belie a claim by petitioners that their incumbent practices are being employed for non-discriminatory reasons.”\(^{339}\) Thus, \textit{Wards Cove} was simply an elaboration on the rule and rationale of \textit{Albemarle Paper} that looks to the employer’s intent.

If the rule were a substantive one, it would also effectively heighten the standard of employer justification of practices having a disparate impact. A requirement that the employer adopt the alternative with the least impact effectively commands that the alternative chosen be strictly necessary.\(^{340}\) Such an interpretation would be inconsistent with the rejection by both Congress and the Court of a strict necessity standard.\(^{341}\) It would also be contrary to the Court’s statement in \textit{Furnco Construction Corp. v. Waters} that “Title VII . . . does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees.”\(^{342}\)

It appears that for some commentators the real value of evidence of alternatives is that it serves the third function of simply increasing the number of victorious plaintiffs. For example, Mack Player has complained that “[t]he viability of ‘lesser discriminatory alternatives’ as a liability producing concept” has been “bled” by the Court’s treatment of the issue in \textit{Wards Cove}.\(^{343}\) Similarly, Blumoff and Lewis criticize the \textit{Wards Cove} Court for having drained the rule of “practical vitality,” since most employers would probably adopt an alternative with lesser impact if it satisfied their business objectives.\(^{344}\) However, instead of drawing comfort from

\(^{338}\) \textit{Wards Cove}, 490 U.S. at 660-61.

\(^{339}\) \textit{Id.} at 661.

\(^{340}\) \textit{Cf.} \textit{Robinson v. Lorillard Corp.}, 444 F.2d 791, 798 n.7 (4th Cir.) (holding that the existence of an equally effective alternative with lesser impact demonstrates that the challenged practice is not necessary), \textit{cert. dismissed}, 404 U.S. 1006 (1971).

\(^{341}\) \textit{See supra} notes 255, 265 and accompanying text.


\(^{343}\) Player, \textit{supra} note 27, at 28 (emphasis added).

\(^{344}\) Blumoff & Lewis, \textit{supra} note 15, at 42.

[If the employer, with its greater knowledge of the demands and possibilities of the business, could implement an alternative practice that serves its needs as well and cheaply as the original practice but with less discriminatory impact, would it not have done so initially, to avoid the expense of litigation?]

\textit{Id.}
their observation that most employers will choose the less discriminatory practice rendering litigation unnecessary, Blumoff and Lewis conclude that the rule is defective because plaintiffs will not have viable claims.435 One is reminded of the old saying that the smartest criminals are the ones who do not break the law, because then they get off scot free.

If the purpose of the discrimination law is to create employer liability, then, of course, any requirement of proof by the plaintiff and any recognition of employer defenses is a flaw in the system. However, that is not the articulated purpose of the law. The mere fact that few employers will adopt practices supported by legitimate business justifications for the purpose of discrimination is no more reason to expand the scope of liability than is the fact that not many drivers exceed a given speed limit a valid reason for reducing the limit.

The second aspect of the Wards Cove alternatives rule that has come under attack is its ostensible holding that an employer's refusal to implement the suggested alternative practice is a condition precedent to recovery.346 The offending phrase is as follows:

[i]f respondents, having established a prima facie case, come forward with alternatives to petitioners' hiring practices that reduce the racially disparate impact of practices currently being used, and petitioners refuse to adopt these alternatives, such a refusal would belie a claim by petitioners that their incumbent practices are being employed for non-discriminatory reasons.347

345. Blumoff and Lewis despair over the plaintiff's burden in disparate-impact cases under Wards Cove:
To justify a significant disproportionate adverse impact the employer would henceforth only have to offer some evidence that its practice served, to an uncertain degree, any legitimate business purpose. Plaintiffs would then bear the ultimate burden of proving the contrary, and in doing so they would be limited to evidence of less discriminatory alternatives as cheap and effective as the employer’s own chosen practice.

Id. at 45.

346. See id. at 43.

Finally, if on remand the case reaches this point, and respondents cannot persuade the trier of fact on the question of petitioners' business necessity defense, respondents may still be able to prevail. To do so, respondents will have to persuade the factfinder that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interest[5];" by so demonstrating, respondents would prove that "[petitioners were]
If the critics were correct in their assumption that the Court was thereby ruling that plaintiffs could establish pretext only by showing the employer's refusal to adopt the plaintiff's alternative, their displeasure would be understandable. However, the passage is at least as susceptible of an interpretation that the employer's refusal of superior alternatives was only an example of pretext evidence and by no means the exclusive method of proof. Indeed, it is inconceivable that the Court would hold, for example, that a plaintiff could not demonstrate pretext by presenting evidence that officers of the employer had talked about their desire to select one job-related test over another because of its greater adverse impact on minorities.

Finally, critics of *Wards Cove* complain of the Court's recognition that "[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant." Yet, cost must be a relevant factor in light of both the pretext rationale and the requirement that the alternative practice "must be equally effective as petitioners' chosen hiring procedures in achieving petitioners' legitimate employment goals." As long as the issue is one of pretext, then cost is a legitimate consideration, since the employer is saying that it adopted the challenged practice and rejected the alternative because of cost considerations rather than a desire to exclude. Moreover, if, as *Albemarle Paper* suggested, the employer's interest in "efficient and trustworthy workmanship" must be equally well served by the proffered alternative, that interest is not served as well by an alternative that is more expensive.

Much of the criticism of the *Wards Cove* treatment of cost-

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348. *Id.* at 661 (quoting Justice O'Connor in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988)). *See* Blumoff & Lewis, supra note 15, at 42 ("The suggestion that increased financial or other costs associated with the proposed alternative preclude it from being considered 'equally as effective as the challenged practice' usually should render the option unavailing to the plaintiff." (footnote omitted)); Alexander, supra note 90, at 607 ("[T]he Court weakened the effectiveness of the showing of viable alternatives by quoting with approval the *Watson* plurality's holding that factors such as cost are relevant to a determination of the viability of proposed alternatives."). Again, the "effectiveness" of the doctrine is measured by how many plaintiffs win, rather than by how well the doctrine furthers the purposes of the statute.


justification results from a failure to distinguish between the different roles of a cost defense in disparate-treatment and disparate-impact cases, and a failure to recognize that there is no inconsistency in rejecting such a defense in the former cases and recognizing it in the latter. For example, Blumoff and Lewis suggest that the *Wards Cove* analysis is unprecedented because "the Court has consistently rejected a general cost defense to discrimination in employment."\(^{351}\) Interestingly, critics who assume that cost should play the same role under the disparate-impact theory as under the disparate-treatment theory are often the same people who argue that the fundamental flaw in the *Wards Cove* decision was its tendency to blur the differences between disparate-impact theory and disparate-treatment theory.\(^{352}\) However, cost evidence has a different doctrinal function under the two theories and should be treated differently.

In a disparate-treatment case, the employer is saying that it took race or sex into account, but did so not because of racial or sexual animus, but because it costs more to employ minorities or women. In effect, the employer is contending that increased cost, in itself, justifies disparate treatment. However, the Court has held in *City of Los Angeles Department of Water & Power v. Manhart*\(^{353}\) and subsequent cases that an incremental increase in the cost of employing members of a particular group does not warrant differential treatment.\(^{354}\) The Court's rationale in *Manhart* was that Title VII requires that each person be treated as an individual and that Congress had not created an affirmative defense of

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351. Blumoff & Lewis, *supra* note 15, at 42. See also Belton, *Causation and Burden-Shifting Doctrines*, *supra* note 22, at 1396-97 (suggesting that the Court "recogniz[ed], for the first time in employment discrimination law, a cost-justification defense" and that the Court's prior rejection of a cost-justification in *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978), "is now in question").

352. See Blumoff & Lewis, *supra* note 15, at 45 ("Under a regime of functional equivalence, a finding of impact looks very much like a proxy for intent.").


354. *Id.* at 711. See, e.g., *International Union, UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 1209 (1991) (the potential extra cost of employing fertile woman in a battery making operation does not provide a legitimate reason for excluding them); *Arizona Governing Comm'n for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1089 (1983) (an optional fringe-benefit scheme that requires women to pay higher rates due to actuarial predictions violates Title VII). *But see Johnson Controls*, 111 S.Ct. at 1209 (suggesting that its holding might not apply in "a case in which costs would be so prohibitive as to threaten the survival of the employer's business").
differential cost. 355 Thus, no room remains for a general cost defense in a disparate-treatment case.

In a disparate-impact case where pretext is the issue, the employer is saying that it did not take race or sex into account. The employer chose the particular job-related employment practice because it was cost-effective, not because it created an adverse impact. In this context, the role of cost is an important evidentiary one, since it supports the employer’s claim that it adopted the practice for job-related rather than impermissible reasons. 356

The argument against a cost-justification in disparate-impact cases is a fundamentally incoherent one. Indeed, a cost-justification defense is compelled by the logic of the disparate-impact theory. 357 Under the disparate-impact theory, any facially neutral employer practice that has a disparate impact, even if adopted with an innocent intent, is unlawful if it does not further the employer’s legitimate (or important) interests such as its “legitimate interest in ‘efficient and trustworthy workmanship.’” 358 If the practice does further the employer’s legitimate business interests, then the employer prevails in the absence of a showing of alternatives that would serve the employer’s interests just as well but would have a


356. See Personnel Adm’r v. Feeney, 442 U.S. 256, 279 (1979) (Discriminatory purpose “implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”).


Prohibition of any consideration of the additional overhead an employer must incur by hiring one employee as opposed to another extends the job relation requirement so far as to undercut the maxim, for, if enough money and time are expended, virtually anyone can perform almost any job satisfactorily.

Business necessity can only be meaningfully measured in terms of dollars and cents. And, since money is fungible, it is of little concern to the rational employer whether additional costs arise from an employee’s poor performance of a specific job, from added administrative costs, from the disruption of other employees’ normal workload, from extraordinary training or supervisory expenses, or from any other cause. Unless the lower courts intend to use the Griggs ruling as a means of forcing employers to pay for society’s shortcomings, they should be careful to consider the question of job relatedness in the context of business necessity.

lesser adverse impact. Those rejecting a cost defense would require the employer to adopt alternatives even if they are substantially more expensive than the practices actually adopted. That, however, subverts a key aspect of the disparate-impact theory, which allows an employer to defend on efficiency grounds practices causing a disparate impact. According to the critics, in the absence of alternatives, the employer may defend a practice having a disparate impact on the ground that it saves the employer a great deal of money. Yet if a more expensive alternative is suggested, the employer at that point may not defend its declining to adopt it on the ground that it would cost the employer a lot of money. Moreover, since the suggested alternative must serve the employer's interests equally well, it does not make sense to say that a more expensive alternative satisfies that standard, since the costlier alternative would not serve the employer's interests as well as the cheaper one.

b. Alternatives with Lesser Impact under the Civil Rights Act of 1991

The potential effect of the 1991 Act on the alternatives issue is ambiguous. The Act provides that even if an employer demonstrates the business necessity of a practice, the plaintiff still can prevail if he demonstrates the existence of an alternative employment practice and the employer "refuses to adopt such alternative

359. The relevance of cost-justification to the pretext issue is discussed supra at notes 351-60 and accompanying text, but its significance is not limited to the pretext issue.
360. See supra notes 353-56.
361. See, e.g., Belton, supra note 22, at 1397 (Wards Cove seems to endorse a cost-justification defense that would allow employers to validate a practice with a disparate impact on the ground that to change the practice would interfere with profit maximization).
362. Consider, for example, an employer that adopts a standardized test to predict applicants' job performance. The test has a disparate impact on minorities, but the employer can show that it is a reasonably good, although not perfect, predictor of job performance. At that point the employer has satisfied its obligation to demonstrate business necessity. Suppose the plaintiffs then argue that rather than using the test as a screening device, the employer could do its screening three months after hire, at which point it would have reliable evidence of job performance. Suppose further that the plaintiffs could convince the court that if this method were adopted there would be a lesser impact on minorities. The employer would argue that to adopt an on-the-job screening program would impose substantial additional personnel costs and would result in decreased efficiency because for the first three months of employment, many of the employees would not have the necessary ability. As a result, their work would have to be more closely scrutinized and the work would not get done as fast. Yet this is still a "cost defense," and those who would deny the validity of any cost defense should require the employer to do all its screening on a post-hire basis.
employment practice.” This demonstration is to be made in accordance with pre-\textit{Wards Cove} law. This provision presents four primary issues: (1) whether the existence of alternatives creates liability in itself or is instead merely evidence of pretext; (2) whether a plaintiff must demonstrate the employer’s refusal to adopt the alternative in order to prevail in the face of the employer’s business-necessity defense; (3) at what point chronologically the employer’s rejection must come; and (4) whether an alternative may be less than adequate because of its cost or other burdens to the employer.

The first issue is whether the existence of alternatives creates liability in itself or is instead merely evidence of pretext. As previously discussed, \textit{Albemarle} identified the importance of alternatives evidence as showing pretext, and it is under the rule of \textit{Albemarle} that the demonstration of alternatives is to be made. This suggests that the pretext rule of \textit{Albemarle} remains unchanged. An argument could be made, however, that the Act modifies the \textit{Albemarle Paper} rule by making the employer’s refusal to adopt suggested alternatives illegal in itself, rather than merely evidence of pretext. The Act provides that an employer has committed an unlawful employment practice if the plaintiff demonstrates an alternative employment practice and the employer refuses to adopt it. The Act further provides that the above-described “demonstration” shall be in accordance with pre-\textit{Wards Cove} law. It does not say that the consequences of that demonstration shall be the same as prior to \textit{Wards Cove}. However, examination of the “purposes” section of the statute gives no indication that Congress was attempting to modify \textit{Albemarle Paper}, a case that was generally considered a substantial plaintiffs’ victory. Likewise, the legislative history does not reveal any widespread dissatisfaction with

\begin{itemize}
\item 364. Newly added Section 703(k)(1)(A)(ii) provides that an unlawful employment practice is established if “the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.” \textit{Id.} Subparagraph C provides: “The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of ‘alternative employment practice.’” \textit{Id.} § 2000e-2(k)(1)(C) (West Supp. 1992), infra Appendix H § 105.
\end{itemize}
Albemarle Paper, although earlier iterations of the Act would clearly have rejected the pretext implications of Albemarle Paper.

These earlier versions of the Act included a clear departure from Albemarle Paper's pretext approach. Although the Civil Rights Act of 1990 originally did not address the subject of alternatives, the version that President Bush ultimately vetoed, as well as early versions of the 1991 Act, stated that an employment practice supported by business necessity was not unlawful except that an employment practice or group of employment practices demonstrated to be required by business necessity shall be unlawful where a complaining party demonstrates that a different employment practice or group of employment practices with less disparate impact would serve the respondent as well.

Under these versions, the existence of alternatives was seemingly enough to establish liability.

The Act's apparent requirement that the plaintiff establish that the employer refused to adopt the alternative practice after it was pointed out to the employer lends support to the conclusion that the Act calls for a pretext analysis. If the governing rule were that the employer is required as a matter of substantive law to select the justified practice that has the least impact, there would be no basis for the rejection requirement. The employer's rejection provides a basis for transforming innocent conduct into culpable conduct, because it may justify attributing a particular mental state to the employer. Because intent, although critical to a disparate-treatment case, is irrelevant to a disparate-impact case, it appears that the pretext rule remains.

As to the second issue — the necessity of an employer rejec-

368. See S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S1018 (1990), infra Appendix A.
— the 1991 Act may be stricter than Wards Cove itself. The Act appears to make rejection of alternatives the sole basis for a finding of liability once the employer has demonstrated business necessity. This turns what was probably an illustration in Wards Cove into a necessary requirement. Notwithstanding the apparent codification of the rejection requirement, the Act should not be interpreted as foreclosing other methods of demonstrating pretext. By demonstrating pretext, the plaintiff is establishing that this is not a standard disparate-impact case where a facially neutral practice, adopted without discriminatory intent, has had an adverse impact on members of a particular group. Instead, the plaintiff is showing that the employer's action is a species of intentional discrimination. Consequently, the plaintiff would not appear to be limited by the disparate-impact rules, because the case has now become one of disparate treatment. For example, it is well established that a plaintiff in a constitutional equal protection case cannot prevail by a showing that a state law has a disparate impact. Nonetheless, if the plaintiff can show that the state adopted a facially neutral policy because of its disparate impact, not merely in spite of it, the plaintiff can prevail on an intentional discrimination theory. There is no requirement that this intent be demonstrated in any particular way, and absent a clear statement by Congress that it intends to limit the disparate-treatment theory, the disparate-impact rules should not be so interpreted.

Another substantial ambiguity of the rejection requirement concerns timing. The plaintiff establishes an unlawful employment practice if he “makes the demonstration ... with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.” This language suggests

373. As previously discussed, see supra text accompanying notes 264-65, it is doubtful that the Supreme Court in Wards Cove intended to make an employer's refusal to adopt an alternative practice the exclusive method of demonstrating pretext. Other strong evidence that the employer selected the alternative for discriminatory reasons would establish pretext as well.

374. It could be argued, of course, that interpreting the bill as retaining the Albemarle Paper pretext approach to alternatives renders the rejection requirement surplusage.

375. Washington v. Davis, 426 U.S. 229, 239 (1976) (a law or other official act is not unconstitutional solely because it has a racially disparate impact).

376. Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (Discriminatory purpose "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

a temporal sequence of a plaintiff’s demonstration followed by the employer’s rejection. Although the term “demonstration” is not defined in the Act, the term “demonstrates” is defined to mean “meets the burdens of production and persuasion.”

Thus, the implication is that the plaintiff must first prove the existence of the alternative in court, and then the employer must reject it.

This chronological implication was expressed in *Wards Cove* itself, where the Court stated:

If [plaintiffs], having established a prima facie case, come forward with alternatives to [the employers’] hiring practices that reduce the racially disparate impact of practices currently being used, and [the employers] refuse to adopt these alternatives, such a refusal would belie a claim by [the employers] that their incumbent practices are being employed for non-discriminatory reasons.

The *Wards Cove* description clearly contemplates that the plaintiffs must first establish their prima facie case and then come forward with evidence of alternatives. At that point, liability of the employer turns on whether, after the plaintiffs’ showing, the employer adopts the alternatives.

Although one could argue that the refusal at trial retroactively invalidates the earlier adoption of the challenged practice, it is difficult to articulate a rationale to justify such a rule; by definition, the practice will have been justified by business necessity and not adopted for discriminatory purposes. Under the “retroac-

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378. 42 U.S.C.A. § 2000e(m) (West Supp. 1992). One might argue that the definition of the term “demonstration” should not be limited by the definition of the term “demonstrates.” However, the original version of S. 1745 — the version immediately preceding the compromise bill — treated the alternatives issue as follows:

“[t]he practice . . . is . . . unlawful if the complaining party demonstrates that a different available employment practice, which would have less disparate impact . . . would serve the respondent’s legitimate interests as well and the respondent refuses to adopt such alternative employment practice.”

S. 1745 § 8, 102d Cong., 1st Sess., reprinted in DAILY LAB. REP. (BNA) No. 186, at D-1, D-4 (Sept. 25, 1991), infra Appendix G § 8 (emphasis added). There is no indication that the change in terminology from “demonstrates” to “demonstration” was intended to have any substantive effect, and, again, given the history of the 1991 Act, there is no basis for inferring that the ultimate compromise bill places greater burdens on employers than the bill that preceded it.


380. Blunoff & Lewis predicted that under the *Wards Cove* formulation an employer would not prevail in arguing that liability for back pay could not begin until the employer rejects the alternative. They argued that “[t]he Court generally has not absolved em-
tivity" analysis, the employer’s legitimate adoption of a business-justified employment practice would be rendered illegal by something that happened perhaps years later — the employer’s rejection of an alternative that might not even have existed at the time the employer adopted its initial practice. If the wrong is the rejection of the practice, availability of relief should run from the date of the rejection.

A coherent rationale for alternatives is also necessary to deal with the questions of how much information the employer must have at the time of the rejection in order to hold it liable and how to deal with an employer’s good-faith refusal to adopt the suggested alternative. If the plaintiff’s identification of alternatives can precede trial, or even the commencement of the litigation itself, employers will be faced with suggested alternatives about which they have varying amounts of information. They often will not know whether the alternatives would serve their interests equally well or whether the alternatives would reduce the disparate impact. If evidence of alternatives is relevant only insofar as it shows pretext, then if the employer declines to adopt a suggested modification in its practices because of a good-faith belief that the modification would not serve its interests as well (or that it would not reduce the disparate impact), the plaintiff’s suggestion of pretext would be rejected. On the other hand, if liability based on rejection of alternatives is predicated on some rationale other than pretext, then the employer’s motivation may not be relevant. Under such an analysis, an employer that adopted a practice that in fact is justified by business necessity could be held liable for refusing to adopt an alternative practice even if the refusal was both reasonable and in good faith.381

The practical significance of this distinction is enormous. Suppose, for example, that in response to an employer’s adoption of a validated standardized test that has a disparate impact on blacks,
lawyers for black employees protest the practice and provide a list of twelve suggested alternative tests, without demonstrating in any way that they would either decrease the impact or serve the employer’s interests equally well. The employer rejects the suggested practices because it believes that they would not serve its interests as well or would not reduce the impact, or because it is completely in the dark with respect to their effect and not inclined to devote resources to discovering it. At a subsequent trial, possibly years later, after the employer has demonstrated the business necessity of its challenged practice, plaintiffs convince the court that one of their twelve alternatives would serve the employer’s interests as well as the challenged practice. If pretext is the issue, employer liability would not be justified because the employer did not continue to use the original practice as a pretext for harming blacks, since it had no basis in fact for concluding that the suggested modifications would improve the situation of blacks. However, under a rationale that makes the employer’s good faith irrelevant, our hypothetical employer is liable for its rejection of the plaintiffs’ laundry list of alternatives. Thus, under a non-pretext-based rule, the employer would have to perform validation studies on all twelve of the alternatives to determine whether they were good predictors of job performance. The employer would also have to perform studies concerning the relative impact of each alternative on blacks. It is difficult to conceive of a greater incentive to quota hiring.

One final question remains: will higher costs justify an employer’s rejection of an alternative with a lesser impact? As discussed above, if the issue is one of pretext, then the answer is simple.\textsuperscript{382} If an employer adopts a facially neutral policy without an intent to harm minorities and refuses to adopt an alternative practice on the basis of its higher cost, then a pretext analysis would not aid the plaintiff. If the underlying rationale is simply to aid plaintiffs or increase incentives for minority hiring, then one should conclude that the employer must adopt the more expensive policy even if it is substantially more expensive. If that is indeed the rationale, there would be no basis for requiring that the alternative with lesser impact serve the employers’ interests as well as the

\textsuperscript{382} See supra notes 348-62.
employer's chosen policy.\footnote{383} Rather, we would say that the employer is obligated to adopt the alternative even if it is less effective.

Although the statute is not free from ambiguity, two reasons suggest that the alternatives issue should be examined under a pretext rationale. First, a pretext rationale was employed in \textit{Albemarle Paper}, and no overt attempt to overrule \textit{Albemarle Paper} appears in the legislative record.\footnote{384} Second, the pretext rationale provides a coherent framework for analyzing the collateral issues that will necessarily arise.\footnote{385} The two primary policy justifications for rejecting pretext as a guiding principle are maximizing plaintiff victories and maximizing minority hires. These are rationales that none of the participants who enacted the legislation will admit to endorsing. Therefore, pretext offers the only coherent theory of alternatives. Without this theory, each issue must be addressed on an ad hoc basis without guidance from any discernible statutory purpose.

\footnote{383. The Act does not specifically require that the alternative serve the employer's interest as well, but such a requirement is implicit in the notion of alternatives. The employer always has the alternative of not adopting the challenged practice at all, so it always has an alternative. If the challenged practice has a disparate impact, the alternative of no practice would eliminate that impact. Nonetheless, the employer is not obligated to select the no-practice alternative.

Earlier versions of the statute expressly addressed the issue of effectiveness of alternatives. For example, the original version of S. 1745 required the plaintiff to show that the alternative would "make a difference in the disparate impact that is more than negligible [and] would serve the respondent's legitimate interests as well." S. 1745 \S 8, 102d Cong., 1st Sess., reprinted in \textit{Daily Labor. Rep. (BNA)} No. 186, D-1, D-4 (Sept. 25, 1991), infra Appendix G \S 8. The vetoed version of the 1990 bill provided that a practice required by business necessity is unlawful if the plaintiff "demonstrates that a different employment practice or group of employment practices with less disparate impact would serve the [employer] as well." H.R. REP. NO. 856 \S 4, 101st Cong., 2d Sess., 136 CONG. REC. H9552, H9553 (1990), infra Appendix D \S 4. Nothing about the compromise with the White House suggests an understanding or expectation that the employer's right to reject less-effective alternatives was being eliminated.

384. Even if some members of Congress were dissatisfied with the pretext rationale of \textit{Albemarle Paper}, it is not surprising that they did not express dissatisfaction with it, given that their theme was that \textit{Wards Cove} had broken with almost two decades of consistent precedent that had not resulted in quotas. It is difficult to make such an argument at the same time one is overtly modifying that pre-existing precedent.

385. In addition to the issues already discussed, another issue that will have to be resolved is how much less impact is necessary in order to decide that this alternative is one that the employer should have adopted. Some earlier versions of the statute required the plaintiff to show only that the difference in impact was "more than negligible." See S. 1745 \S 8, 102d Cong., 1st Sess., reprinted in \textit{Daily Labor. Rep. (BNA)} No. 186, D-1, D-4 (Sept. 25, 1991), infra Appendix G \S 8.}
III. CONCLUSION

Although the original responses to Wards Cove seemed to be animated by a powerful group-equality sentiment, the history of the disparate-impact provisions demonstrates a continual retreat from a strong version of such a policy. The original 1990 Act would have resulted in the widespread adoption of hiring quotas by employers because the burden on employers of justifying statistical disparities would have made those numerical disparities intolerably expensive. While some of the proponents of the Act may not have abandoned their individual desires to impose a proportional-representation requirement, there was insufficient support in Congress and in the White House to enact that wish into law.

Instead, what is seen in the evolution of the Act is an increase in the burden on plaintiffs to demonstrate the causal nexus between particular practices and disparate effects, as well as a decrease in the burden on employers to justify statistical disparities. Congress disavowed any intent to pressure employers to adopt quotas and finally dropped its stated goal of overruling the business-necessity test of Wards Cove. In the end Congress settled for an overruling of the burden-of-proof holding.\(^3\)\(^8\)\(^6\) Congress also outlawed race norming as a form of affirmative action\(^3\)\(^8\)\(^7\) and declined to en-

\(^3\)86. Even the 1990 Act, which was a stronger Act than its successor, was criticized by some as too weak. See Blumoff & Lewis, supra note 15, at 85 ("[I]t is surprising that legislation so largely inspired by outrage in the civil rights community over the Court's dismemberment of the impact case in Watson and Wards Cove would do so little to revive it.").

dorse the Supreme Court's permissive precedents on affirmative action, such as Weber and Johnson, despite the known desire of several Justices to overrule them. It also declined to overrule City of Richmond v. J.A. Croson Co., which had struck down a minority set-aside program, despite the dissatisfaction of


In the glare of publicity, race norming found few supporters, since it became implausible simultaneously to denounce quotas and to support race norming, which is, in substance, simply one way to obtain quotas. But see Editorial, Race-Norming: Necessary, for Now, N.Y. TIMES, May 30, 1991, at A24.


Representatives Brooks and Fish offered an unsuccessful amendment that would have taken a more definitive stance by specifically approving affirmative action. That amendment provided in part:

Sec. 111. VOLUNTARY AND COURT-ORDERED AFFIRMATIVE ACTION APPROVED; QUOTAS DEEMED UNLAWFUL EMPLOYMENT PRACTICE.

(a) RULES OF CONSTRUCTION. — Nothing in the amendments made by this Act shall be construed —

(1) to limit an employer in establishing its job requirements if such requirements are lawful under title VII of the Civil Rights Act of 1964, as amended; or

(2) to require, encourage, or permit an employer to adopt hiring or promotion quotas on the basis of race, color, religion, sex, or national origin, and the use of such quotas shall be deemed to be an unlawful employment practice under such title: Provided, That the amendments made by this Act shall be construed to approve the lawfulness of voluntary or court-ordered affirmative action that is —

(A) consistent with the decisions of the Supreme Court of the United States in employment discrimination cases; or

(B) in the absence of such decisions, otherwise in accordance with employment discrimination law; as in effect on the date of the enactment of this Act.

(b) DEFINITION. — For purposes of subsection (a), the term "quota" means a fixed number or percentage of persons of a particular race, color, religion, sex, or national origin which must be attained, or which cannot be exceeded, regardless of whether such persons meet necessary qualifications to perform the job.


389. In Johnson v. Transportation Agency, 480 U.S. 616 (1987), Justice Scalia, Justice White, and Chief Justice Rehnquist called for the overruling of Weber. Id. at 657 (White, J., dissenting); id. at 673 (Scalia, J., dissenting). At the time of that decision, Justices Kennedy, Souter, and Thomas had not yet joined the Court.


391. Id. at 511.
some of the leading proponents of the Act with that case.\textsuperscript{392} Even the provision of the statute overruling \textit{Martin v. Wilks},\textsuperscript{393} which had allowed plaintiffs to challenge affirmative-action plans contained in consent decrees,\textsuperscript{394} was defended primarily on the basis of finality of judgments, rather than in terms of support for racial preferences.\textsuperscript{395}

The history of the 1991 Act demonstrates that congressional supporters of a group-equality/proportional-representation approach to employment discrimination do not consider that philosophy politically viable.\textsuperscript{396} The anti-quota arguments had a powerful effect on members of Congress because polls have shown that the majority of American citizens oppose not just rigid "quotas," but the whole notion of racial and sexual preferences.\textsuperscript{397} The actions

\textsuperscript{392} For example, Senator Paul Simon complained about the "six decisions by the U.S. Supreme Court that unquestionably erode basic civil rights in this country," with the sixth decision being \textit{Croson.} 136 CONG. REC. S15,339-40 (1990) (statement of Sen. Simon). That decision was excluded from the bill, although he indicated an intent to move forward "next year" on a separate bill to overrule \textit{Croson.} \textit{Id.} at S15,340. The wisdom of deferring consideration of a bill to enshrine affirmative action at a time when proponents of the Act were disclaiming any intent to create a quota society is manifest.

On the other hand, Senator Specter, one of the co-sponsors of the Danforth Bill, in expressing his opposition to quotas, described the set-aside program struck down in \textit{Croson} as a "quota." 136 CONG. REC. S15,372 (1990) (statement of Sen. Specter).

Of course, the Act declined to overrule \textit{Weber} and \textit{Johnson} as well. On July 18, 1990, Senator Dole offered an unsuccessful amendment that read in part: "Nothing in the amendments made by this Act, or in any statute amended by this Act, shall be construed to require, permit, or result in the adoption or implementation of hiring, promotion, or termination quotas . . . on the basis of race, color, religion, sex, or national origin." 136 CONG. REC. S9555 (1990). That amendment was rejected in favor of language that provides that "[n]othing in the amendments made by this Act shall be construed to require or encourage an employer to adopt hiring or promotion quotas." H.R. REP. NO. 856 \textsection 13, 101st Cong., 2d Sess., 136 CONG. REC. H9552, H9554 (1990), infra Appendix D \textsection 13.

\textsuperscript{393} 490 U.S. 755 (1989).

\textsuperscript{394} \textit{Id.} at 769.

\textsuperscript{395} \textit{Martin} \textit{v. Wilks} was overruled by \textsection 108 of The Civil Rights Act of 1991.

\textsuperscript{396} Cf. Robert A. Sedler, \textit{Employment Equality, Affirmative Action, and the Constitutional Political Consensus,} 90 Mich. L. Rev. 1315 (1992) (book review). Professor Sedler infers from congressional failure to overturn \textit{Weber} and from the continuing enforcement of Executive Order 11,246 that there exists a "constitutional political consensus" favoring race and sex preferences. \textit{Id.} at 1336-37. To the extent that this inference is correct, it is at best a semi-surreptitious consensus, since there is little publicly expressed willingness to grant overt preferences.

\textsuperscript{397} A New York Times/CBS News poll conducted from June 3-6, 1991, asked respondents the question: "Do you believe that where there has been job discrimination against blacks in the past, preference in hiring or promotion should be given to blacks today?" 61% of respondents said "no," while only 24% said "yes." Robin Toner, \textit{Symbolic Justice; Capturing an Era's Racial Conflicts and Ironies,} N.Y. TIMES, July 7, 1991, at \textsection 4, p. 1. The number of negative responses to that question has been increasing for the last six
of Congress during debates over the Act were responsive to those public sentiments, and the Act should be interpreted in that light.\textsuperscript{398}

The perceived political danger of endorsing racial and sexual preferences no doubt contributed to the volatility of the reaction to \textit{Wards Cove}.\textsuperscript{399} Affirmative action in employment has largely been the product of the courts and the administrative bureaucracy, the least politically accountable institutions of government.\textsuperscript{400} \textit{Wards Cove} was apparently perceived to threaten the accommodation between Congress, on the one hand, and the courts and the bureaucracy, on the other, under which preferences would be repudiated by the former yet embraced by the latter.\textsuperscript{401} Ironically, one

\textsuperscript{398} The political risk of appearing to endorse preferences no doubt contributed to the lack of discussion about affirmative action during the confirmation hearings of Clarence Thomas, despite the fact that it was in large part his opposition to affirmative action that made him such a controversial figure. Linda Greenhouse, \textit{Who's Judge Thomas? For Now, it Depends on Who You Are}, N.Y. TIMES, Sept. 8, 1991, § 4, at 4 ("His blunt criticism of Government programs that confer special benefits on minorities, and his opposition to affirmative action policies during eight years as chairman of the Equal Employment Opportunity Commission, put him at odds with much of the civil rights establishment."); see also W. John Moore, \textit{Like Souter, Thomas Left Few Ripples}, 23 NAT'L J., No. 38, at 2274 (Sept. 21, 1991) ("More important, Democrats were unwilling to ask questions that exposed their own political vulnerabilities. Few Democrats lingered on such hot-button issues as affirmative action or civil rights.").


\textsuperscript{400} There are those who defend this kind of "policy making by deception." For example, David Strauss has advocated the adoption of "a requirement that every firm employ minorities in proportion to their percentage in the national population." Strauss, supra note 19, at 1655. Recognizing the political unpopularity of quotas, however, he suggests that the requirement be "implemented in a low-visibility way." \textit{Id.} at 1652-54. His method of choice is the method that the proponents of group equality have been using since the implementation of goals-and-timetables two decades ago: "[a]n administrative agency oper-
of the arguments against the quota claim was that opponents of the 1964 Act had raised the same claim, thus demonstrating its speciousness.\textsuperscript{402} History, however, suggests a very different conclusion. It is true that opponents argued that the 1964 Act would result in hiring quotas, and it is equally true that proponents of that Act denied that it would have such an effect. In fact, proponents of the 1964 Act, such as Hubert Humphrey, not only denied that the Act would require quotas and preferential treatment, but asserted that it would not permit such treatment.\textsuperscript{403} However, the assurance that the statute required a color-blind approach was disregarded by the majority in \textit{United Steel Workers v. Weber}.\textsuperscript{404} In light of this history, the skepticism of opponents of the bill to the quota disclaimers is understandable.

Any theory of discrimination that relies for its proof on statistical disparities, whether it is the disparate-impact theory of \textit{Griggs} or classwide pattern-or-practice cases such as \textit{International Brotherhood of Teamsters v. United States},\textsuperscript{406} imposes pressures on employers to engage in affirmative action in order to avoid the statistical disparities that they otherwise would be called upon to defend.\textsuperscript{407} \textit{Wards Cove} did not eliminate that pressure, although it reduced it in comparison to what some lower courts were requiring. In that sense, then, even the compromise Civil Rights Act is a "quota bill." However, one deals in degrees and not in absolutes and it may fairly be said that the compromise bill was less of a quota bill than its predecessors.

A proper interpretation of the Civil Rights Act of 1991 should take into account the nature of the incentives that are created by any given interpretation. The primary purpose of this law, like most laws, is the voluntary compliance with its strictures rather than its application in the context of litigation. There is an unfortu-

\textsuperscript{403} See supra note 34.
\textsuperscript{404} 443 U.S. 193 (1979).
\textsuperscript{405} Id. at 208.
\textsuperscript{406} 431 U.S. 324 (1977).
\textsuperscript{407} See Michael H. Gottesman, \textit{The Law and Economics of Racial Discrimination in Employment: Twelve Topics to Consider Before Opting for Racial Quotas}, 79 GEO. L.J. 1737, 1750 (1991) (arguing that the disparate-impact doctrine itself is a form of preferential treatment because it imposes increased search costs on employers if lower-cost methods do not yield a proportionate percentage of blacks).
nate tendency for legal commentators to focus on the application of rules in litigation, as if the only reason for having a law is to separate those cases where the plaintiff should win from those where the plaintiff should lose. A strongly pro-plaintiff interpretation of this law would have dramatic effects on employer behavior that both opponents and proponents of the law specifically eschewed.

The fundamental stated purpose of the proponents of the 1990 and 1991 Acts was to “restore” Griggs. As we have seen, Griggs needed no restoration, and the disparate-impact provisions of the new Act thus effected no major change in discrimination law other than the shifting of the burden of persuasion to the employer. The purpose of Griggs was not to require employers to lower their standards. Rather, the purpose was to ensure that any standards that had the effect of excluding minorities not be arbitrary. The purpose of Title VII was to make race, color, national origin, religion, and sex irrelevant to employment decisions, and that purpose was not repudiated by the 1991 Congress. Courts that interpret the new Act in the light of the failed goals of its original proponents would be doing a disservice to both the intent of the Congress that passed the bill and the cause of true equality in employment.

408. There also seems to be a further bias in favor of plaintiffs that tends to view a law as fundamentally flawed if it is conceivable that a plaintiff who is actually deserving might lose in a given case, without regard to the fact that interpreting the law in a way that eliminates the possibility of incorrect findings in favor of defendants substantially increases the likelihood of incorrect findings in favor of plaintiffs. See Epstein, supra note 13, at 225:

Why should the (assumed) importance of the antidiscrimination laws require us to slight the errors of overenforcement? The consensus that murder is a grave wrong, punishable under the criminal laws, has never been regarded as a reason to make life easy for prosecutors . . . .

Id.

409. See 136 Cong. Rec. S1022 (daily ed. Feb. 7, 1990) (statement of Sen. Jeffords) (“All that is intended by the framers of this provision and, we believe, all that is accomplished therein is the restoration of the Griggs v. Duke Power rule . . . .”).

410. See supra note 1 and accompanying text.
APPENDICES


APPENDIX A


SEC. 3. DEFINITIONS.

Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end thereof the following new subsections:

“(n) The term ‘group of employment practices’ means a combination of employment practices or an overall employment process.
“(o) The term ‘required by business necessity’ means essential to effective job performance.”

SEC. 4. RESTORING THE BURDEN OF PROOF IN DISPARATE IMPACT CASES.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end thereof the following new subsection:

“(k) PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE IMPACT CASES.—
“(1) An unlawful employment practice is established under this subsection when—
“(A) a complaining party demonstrates that an employment practice results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice is required by business necessity; or
“(B) a complaining party demonstrates that a group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practices are required by business necessity, except that—
“(i) if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices
within the group results in such disparate impact; and
“(ii) if the respondent demonstrates that a specific employment
practice within such group of employment practices does not con-
tribute to the disparate impact, the respondent shall not be required
to demonstrate that such practice is required by business necessity.”

APPENDIX B

Kennedy-Jeffords Substitute, Amend. 2110, S. 2104, 101st Cong.,
2d Sess., 136 CONG. REC. S9325, S9325 (July 10, 1990) (passed
by the Senate on July 18, 1990).

SEC. 3. DEFINITIONS.
Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e)
is amended by adding at the end thereof the following new sub-
sections:

“(n) The term ‘group of employment practices’ means a combi-
nation of employment practices that produces one or more deci-
sions with respect to employment, employment referral, or admis-
sion to a labor organization, apprenticeship or other training or
retraining program.
“(o) The term ‘required by business necessity’ means—
“(1) in the case of employment practices involving selection
(such as hiring, assignment, transfer, promotion, training, appren-
ticeship, referral, retention, or membership in a labor organization),
bears a substantial and demonstrable relationship to effective job
performance; or
“(2) in the case of employment practices not involving selec-
tion, bears a substantial and demonstrable relationship to a compel-
ling objective of the respondent.”

SEC. 4. RESTORING THE BURDEN OF PROOF IN DISPA-
RATE IMPACT CASES.
Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2) is amended by adding at the end thereof the following new subsection:

“(k) PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPA-
RATE IMPACT CASES.—
“(1) An unlawful employment practice based on disparate im-
impact is established under this section when—

“(A) a complaining party demonstrates that an employment practice results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice is required by business necessity; or

“(B) a complaining party demonstrates that a group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such group of employment practices are required by business necessity, except that—

“(i) except as provided in clause (iii), if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact;

“(ii) if the respondent demonstrates that a specific employment practice within such group of employment practices does not contribute to the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity; and

“(iii) if the court finds that the complaining party can identify, from records or other information of the respondent reasonably available (through discovery or otherwise), which specific practice or practices contributed to the disparate impact—

“(I) the complaining party shall be required to demonstrate which specific practice or practices contributed to the disparate impact; and

“(II) the respondent shall be required to demonstrate business necessity only as to the specific practice or practices demonstrated by the complaining party to have contributed to the disparate impact.”


APPENDIX C


SEC. 3. DEFINITIONS.

Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end thereof the following new sub-
sections:

“(o)(1) The term ‘required by business necessity’ means—

“(A) in the case of employment practices involving selection (such as hiring, assignment, transfer, promotion, training, apprenticeship, referral, retention, or membership in a labor organization), the practice or group of practices must bear a significant relationship to successful performance of the job; or

“(B) in the case of employment practices that do not involve selection, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

“(2) In deciding whether the standards in paragraph (1) for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The defendant may offer as evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence, and the court shall give such weight, if any, to such evidence as is appropriate.

“(3) This subsection is meant to codify the meaning of ‘business necessity’ as used in Griggs v. Duke Power Co. (401 U.S. 424 (1971)) and to overrule the treatment of business necessity as a defense in Wards Cove Packing Co., Inc. v. Atonio (109 S. Ct. 2115 (1989)).”

SEC. 4. RESTORING THE BURDEN OF PROOF IN DISPARATE IMPACT CASES.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end thereof the following new subsection:

“(k) PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE IMPACT CASES.—(1) An unlawful employment practice based on disparate impact is established under this section when—

“(A) a complaining party demonstrates that an employment practice results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice is required by business necessity; or

“(B) a complaining party demonstrates that a group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such group of employment practices is required by business necessity, except that—
“(i) except as provided in clause (iii), if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact;

“(ii) if the respondent demonstrates that a specific employment practice within such group of employment practices does not contribute to the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity; and

“(iii) if the court finds that the complaining party can identify, from records or other information of the respondent reasonably available (through discovery or otherwise), which specific practice or practices contributed to the disparate impact—

“(I) the complaining party shall be required to demonstrate which specific practice or practices contributed to the disparate impact; and

“(II) the respondent shall be required to demonstrate business necessity only as to the specific practice or practices demonstrated by the complaining party to have contributed to the disparate impact; except that an employment practice or group of employment practices demonstrated to be required by business necessity shall be unlawful where a complaining party demonstrates that a different employment practice or group of employment practices with less disparate impact would serve the respondent as well.”

. . . .

APPENDIX D

SEC. 3. DEFINITIONS.
Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end thereof the following new subsections:

. . . .

“(m) The term ‘demonstrates’ means meets the burdens of production and persuasion.

“(n) The term ‘group of employment practices’ means a combi-
nation of employment practices that produces one or more decisions with respect to employment, employment referral, or admission to a labor organization, apprenticeship or other training or retraining program.

“(o)(1) The term ‘required by business necessity’ means—

“(A) in the case of employment practices involving selection such as tests, recruitment, evaluations, or requirements of education, experience, knowledge, skill, ability or physical characteristics, or practices primarily related to a measure of job performance, the practice or group of practices must bear a significant relationship to successful performance of the job; or

“(B) in the case of other employment decisions, not involving employment selection practices as covered by subparagraph (A) (such as, but not limited to, a plant closing or bankruptcy), or that involve rules relating to methadone, alcohol or tobacco use, the practice or group of practices must bear a significant relationship to a manifest business objective of the employer.

“(2) In deciding whether the standards described in paragraph (1) for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The court may receive such evidence as statistical reports, validation studies, expert testimony, performance evaluations, written records or notes related to the practice or decision, testimony of individuals with knowledge of the practice or decision involved, other evidence relevant to the employment decision, prior successful experience and other evidence as permitted by the Federal Rules of Evidence, and the court shall give such weight, if any, to such evidence as is appropriate.

“(3) This subsection is meant to codify the meaning of ‘business necessity’ as used in *Griggs v. Duke Power Co.* (401 U.S. 424 (1971)) and to overrule the treatment of business necessity as a defense in *Wards Cove Packing Co. V. Atonio* (109 S. Ct. 2115 (1989))."

... ... ...

SEC. 4. RESTORING THE BURDEN OF PROOF IN DISPARATE IMPACT CASES.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end thereof the following new subsection:

“(k) PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE IMPACT CASES.—(1) An unlawful employment practice
based on disparate impact is established under this section when—

"(A) a complaining party demonstrates that an employment practice results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice is required by business necessity; or

"(B) a complaining party demonstrates that a group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such group of employment practices is required by business necessity, except that—

"(i) except as provided in clause (iii), if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact;

"(ii) if the respondent demonstrates that a specific employment practice within such group of employment practices is not responsible in whole or in significant part for the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity; and

"(iii) the complaining party shall be required to demonstrate which specific practice or practices are responsible for the disparate impact in all cases unless the court finds after discovery (I) that the respondent has destroyed, concealed or refused to produce existing records that are necessary to make this showing, or (II) that the respondent failed to keep such records; and except where the court makes such a finding, the respondent shall be required to demonstrate business necessity only as to those specific practices demonstrated by the complaining party to have been responsible in whole or in significant part for the disparate impact; except that an employment practice or group of employment practices demonstrated to be required by business necessity shall be unlawful where a complaining party demonstrates that a different employment practice or group of employment practices with less disparate impact would serve the respondent as well.

. . . . .

"(4) The mere existence of a statistical imbalance in an employer's workforce on account of race, color, religion, sex, or national origin is not alone sufficient to establish a prima facie case of disparate impact violation."
SEC. 13. LAWFUL COURT-ORDERED REMEDIES, AFFIRMATIVE ACTION AND CONCILIATION AGREEMENTS NOT AFFECTED.

Nothing in the amendments made by this Act shall be construed to require or encourage an employer to adopt hiring or promotion quotas on the basis of race, color, religion, sex, or national origin: Provided, however, That [sic] nothing in the amendments made by this Act shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law.

APPENDIX E


SEC. 2. FINDING AND PURPOSES.

(a) FINDING.— Congress finds that the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) has weakened the scope and effectiveness of Federal civil rights protections.

(b) PURPOSE.— The purposes of this Act are —

(1) to overrule the treatment of business necessity as a defense in Wards Cove Packing Co., [sic] v. Atonio and to codify the meaning of business necessity used in Griggs v. Duke Power Co., 401 U.S. 424 (1971); and

(2) to provide statutory authority and guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.).

SEC. 3. BURDEN OF PROOF IN DISPARATE IMPACT CASES.

(a) IN GENERAL.— Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end the following new subsection:

"(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if —

"(i) a complaining party demonstrates that a particular employment practice or group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin; and

"(ii)(I) the respondent fails to demonstrate that the practice or
group of practices is required by business necessity; or

"(II) the complaining party makes the demonstration described in subparagraph (C) with respect to a different employment practice or group of employment practices.

"(B)(i) With respect to an unlawful employment practice based on disparate impact as described in subsection (A), the complaining party shall identify with particularity each employment practice that is responsible in whole or in significant part for the disparate impact, except that if the complaining party can demonstrate to the court, after discovery, that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the group of employment practices as a whole may be analyzed as one employment practice.

"(ii) If the elements of a decisionmaking process are capable of separation for analysis, the complaining party must identify each element with particularity, and the respondent must demonstrate that the element or elements identified that are responsible in whole or in significant part for the disparate impact are required by business necessity. If the respondent demonstrates that a specific employment practice within a group of employment practices is not responsible in whole or in significant part for the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

"(C) An employment practice or group of employment practices responsible in whole or in significant part for a disparate impact that is demonstrated to be required by business necessity shall be lawful unless the complaining party demonstrates that a different employment practice or group of employment practices, which would have less disparate impact and make a difference in the disparate impact that is more than merely negligible, would serve the respondents as well.

"(2) In deciding whether a respondent has met the standards described in paragraph (1) for business necessity, the court may receive evidence as permitted by the Federal Rules of Evidence, and the court shall give such weight, if any, to the evidence as is appropriate.

"(3) A demonstration that an employment practice or group of employment practices is required by business necessity may be used as a defense only against a claim under this subsection.

. . . . .

"(5) The mere existence of a statistical imbalance in the work force of an employer on account of race, color, religion, sex, or
national origin is not alone sufficient to establish a prima facie case of disparate impact violation."

SEC. 5. DEFINITIONS.

(a) IN GENERAL.—Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end the following new subsections:

"(n) The term 'group of employment practices' means a combination of particular employment practices in which each practice is responsible in whole or in significant part for an employment decision.

"(o) The term 'required by business necessity' means—

"(1) in the case of employment practices involving selection, that the practice or group of practices bears a manifest relationship to requirements for effective job performance; and

"(2) in the case of other employment decisions not involving employment selection practices as described in paragraph (1), the practice or group of practices bears a manifest relationship to a legitimate business objective of the employer.

"(p) The term 'requirements for effective job performance' includes—

"(1) the ability to perform competently the actual work activities lawfully required by the employer for an employment position; and

"(2) any other lawful requirement that is important to the performance of the job, including, but not limited to, factors such as punctuality, attendance, a willingness to avoid engaging in misconduct or insubordination, not having a work history demonstrating unreasonable job turnover, and not engaging in conduct or activity that improperly interferes with the performance of work by others."

(b) INTERPRETATION.—It is the intent of Congress in enacting sections 701(o) and 703(k) of the Civil Rights Act of 1964 (as added by subsection (a) of this section and subsection (a) of section (3) respectively) that the sections codify the meaning of business necessity used in Griggs v. Duke Power Co., 401 U.S.C. [sic] 424 (1971) and overrule the treatment of business necessity as a defense in Wards Cove Packing Co. v. Attonio, 109 S. Ct. 2115 (1989), with respect to an employment practice or group of employment practices.
APPENDIX F


SEC. 201. DEFINITIONS.

Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end thereof the following new subsections:

“(n) The term ‘group of employment practices’ means a combination of employment practices that produces one or more decisions with respect to employment, employment referral, or admission to a labor organization, apprenticeship or other training or retraining program.

“(o)(1) The term ‘required by business necessity’ means—

“(A) in the case of employment practices involving selection (such as hiring, assignment, transfer, promotion, training, apprenticeship, referral, retention, or membership in a labor organization), the practice or group of practices must bear a significant relationship to successful performance of the job; or

“(B) in the case of employment practices that do not involve selection, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

“(2) In deciding whether the standards in paragraph (1) for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The defendant may offer as evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence, and the court shall give such weight, if any, to such evidence as is appropriate.

“(3) This subsection is meant to codify the meaning of ‘business necessity’ as used in Griggs v. Duke Power Co. (401 U.S. 424 (1971)) and to overrule the treatment of business necessity as a defense in Wards Cove Packing Co., Inc. v. Atonio (109 S. Ct. 2115 (1989)).”

SEC. 202. RESTORING THE BURDEN OF PROOF IN DISPARATE IMPACT CASES.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C.
2000e-2) is amended by adding at the end thereof the following new subsection:

"(k) PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE IMPACT CASES.—(1) An unlawful employment practice based on disparate impact is established under this section when—

"(A) a complaining party demonstrates that an employment practice results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice is required by business necessity; or

"(B) a complaining party demonstrates that a group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such group of employment practices is required by business necessity, except that—

"(i) except as provided in clause (iii), if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact;

"(ii) if the respondent demonstrates that a specific employment practice within such group of employment practices does not contribute to the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity; and

"(iii) if the court finds that the complaining party can identify, from records or other information of the respondent reasonably available (through discovery or otherwise), which specific practice or practices contributed to the disparate impact—

"(I) the complaining party shall be required to demonstrate which specific practice or practices contributed to the disparate impact; and

"(II) the respondent shall be required to demonstrate business necessity only as to the specific practice or practices demonstrated by the complaining party to have contributed to the disparate impact; except that an employment practice or group of employment practices demonstrated to be required by business necessity shall be unlawful where a complaining party demonstrates that a different employment practice or group of employment practices with less disparate impact would serve the respondent as well.

"(4) The mere existence of a statistical imbalance in an
employer's workforce on account of race, color, religion, sex, or national origin is not alone sufficient to establish a prima facie case of disparate impact violation.

SEC. 211. LAWFUL COURT-ORDERED REMEDIES, AFFIRMATIVE ACTION AND CONCILIATION AGREEMENTS NOT AFFECTED.

Nothing in the amendments made by this Act shall be construed to require or encourage an employer to adopt hiring or promotion quotas on the basis of race, color, religion, sex or national origin: Provided, however, That nothing in the amendments made by this Act shall be construed to affect otherwise lawful affirmative action, conciliation agreements, or court-ordered remedies.

APPENDIX G


SEC. 3. PURPOSES.

The purposes of this Act are—

(2) to overrule the proof burdens and meaning of business necessity in Wards Cove Packing Co. v. Atonio and to codify the proof burdens and the meaning of business necessity used in Griggs v. Duke Power Co., 401 U.S. 424 (1971);

SEC. 7. DEFINITIONS.

Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end the following new subsections:

“(n) The term ‘the employment in question’ means—

“(1) the performance of actual work activities required by the employer for a job or class of jobs; or

“(2) any behavior that is important to the job, but may not comprise actual work activities.

“(o) The term ‘required by business necessity’ means—
“(1) in the case of employment practices that are used as qualification standards, employment tests, or other selection criteria, the challenged practice must bear a manifest relationship to the employment in question; and
“(2) in the case of employment practices not described in paragraph (1), the challenged practice must bear a manifest relationship to a legitimate business objective of the employer.”

SEC. 8. BURDEN OF PROOF IN DISPARATE IMPACT CASES.
Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end the following new subsection:
“(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if—
“(i) a complaining party demonstrates that a particular employment practice or particular employment practices (or decisionmaking process as described in subparagraph B(i)) cause a disparate impact on the basis of race, color, religion, sex, or national origin; and
“(ii)(I) the respondent fails to demonstrate that the practice or practices are required by business necessity; or
“(II) the complaining party makes the demonstration described in subparagraph (C) with respect to a different employment practice and the respondent refuses to adopt such alternative employment practice.
“(B)(i) With respect to demonstrating that a particular employment practice or particular employment practices cause a disparate impact as described in subsection (A)(i), the complaining party shall demonstrate that each particular employment practice causes, in whole or significant part, the disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent’s decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.
“(ii) If the respondent demonstrates that a specific employment practice does not cause, in whole or significant part, the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.
“(C) An employment practice that causes, in whole or significant part, a disparate impact that is demonstrated to be required by business necessity shall be unlawful if the complaining party dem-
onstrates that a different available employment practice, which would have less disparate impact and make a difference in the disparate impact that is more than negligible, would serve the respondent’s legitimate interests as well and the respondent refuses to adopt such alternative employment practice."

APPENDIX H


SEC. 3. PURPOSES.

The purposes of this Act are—

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;

(2) to codify the concepts of “business necessity” and “job related” enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989);

(3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and

(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

SEC. 105. BURDEN OF PROOF IN DISPARATE IMPACT CASES.

(a) Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end the following new subsection:

"(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if—

"(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or
national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

“(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

“(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent’s decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

“(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

“(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of ‘alternative business practice’.”

SEC. 116. LAWFUL COURT-ORDERED REMEDIES, AFFIRMATIVE ACTION, AND CONCILIATION AGREEMENTS NOT AFFECTED.

Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law.