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# When the Court Makes Title VII Law and Policy: Disparate Impact and the Journey from Griggs to Ricci

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# WHEN THE COURT MAKES TITLE VII LAW AND POLICY: DISPARATE IMPACT AND THE JOURNEY FROM *GRIGGS* TO *RICCI*

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## INTRODUCTION

In this "age of statutes,"[1] the federal judiciary performs the critical role and function of interpreting and applying statutes in cases and controversies brought to the courts for adjudication and decision. The courts act within the separation-of-powers structure of the United States Constitution,[2] a structure popularized prior to the nation's founding by French lawyer and political philosopher Baron de Montesquieu.[3]

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[1] *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 166 (1982).

[2] "All legislative Powers . . . shall be vested in a Congress of the United States," the "executive Power shall be vested in a President," and the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. I, § 1; art. II, § 1; art. III, § 1.

[3] *See* MONTESQUIEU, THE SPIRIT OF LAWS: A COMPENDIUM OF THE FIRST ENGLISH EDITION (David W. Carrithers ed., 1977). Bruce Ackerman has noted Justice Oliver Wendell Holmes's observation that Montesquieu's account of England's "threefold division of power into legislative, executive and judicial—was a fiction invented by him, a fiction which misled Blackstone and Delome." Bruce

Concerned with "the distribution of powers *among* the three coequal [b]ranches,"[4] the principle of separation of powers, implied in the Constitution's governmental structure, "left to each [branch, the] power to exercise, in some respects, functions in their nature executive, legislative and judicial."[5] Under this view, "legislatures rather than courts should make law."[6] This notion is reflected in the axiom—indeed, the mantra—that courts must only interpret and not make law.[7] Those who subscribe to this make-no-law position believe that courts should only identify and implement the legislative mandate and go no further, and courts should not "substitute their own policy preferences through the creation and application of public values canons for the preferences of Congress as articulated in the words and history of the statute."[8]

Others reject the idea that judges merely find and announce, but do not and should not make, law. In the view of one jurist, this "is a fictitious and even a childish approach."[9] Judge Richard Posner has remarked that "[a]ppellate judges are occasional legislators"[10] and that "judges make up much of the law that they are purporting to be merely applying."[11] That judges may make law is inevitable and necessary, for it is predictable that legislators cannot anticipate all of the postenactment issues and questions that will arise with regard to

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Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1795 n.181 (2007) (quoting OLIVER WENDELL HOLMES, *Montesquieu*, *in* COLLECTED LEGAL PAPERS 250, 263 (1920)).

[4] Touby v. United States, 500 U.S. 160, 167–68 (1991).

[5] Mistretta v. United States, 488 U.S. 361, 386 (1989) (alteration in original) (quoting Myers v. United States, 272 U.S. 52, 84 (1926) (Brandeis, J., dissenting)) (internal quotation marks omitted).

[6] Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1861 (1998).

[7] *See* Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 744 (1992).

[8] *Id.*

[9] Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 23 (2002).

[10] RICHARD A. POSNER, HOW JUDGES THINK 81 (2008) (emphasis omitted).

[11] RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 61 (2003); *see also* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) ("I am not so naive . . . as to be unaware that judges in a real sense 'make' law."); Erwin N. Griswold, *Cutting the Cloak to Fit the Cloth: An Approach to Problems in the Federal Courts*, 32 CATH. U. L. REV. 787, 801 (1983) ("Everyone knows that judges do make law, and should make law. It is rather a question of how much law they should make.").

the operative meaning of a statutory provision in specific cases, circumstances, and contexts.[12] Given this reality, courts will fill gaps in statutory text,[13] making law in the process.

This Article focuses on judicial lawmaking and policymaking in an important area of antidiscrimination law—Title VII of the Civil Rights Act of 1964's regulatory regime.[14] As enacted in 1964, Title VII only prohibited intentional employment discrimination on the basis of race, color, religion, sex, or national origin.[15] The statute requires a finding that an employer "has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint."[16] "[Such] 'disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others . . . . Proof of discriminatory motive is critical . . . ."[17] Thereafter, in *Griggs v. Duke Power Co.*,[18] the United States Supreme Court held that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[19] Title VII claims alleging such " 'disparate impact' . . . involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." The Court held, "Proof of discriminatory motive . . . is not required under a disparate-impact theory."[20]

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[12] *See* H.L.A. HART, THE CONCEPT OF LAW 128 (3d ed. 2012); 1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: RULES AND ORDER 119 (1973).

[13] *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113–14 (1921) ("He [the judge] legislates only between gaps. He fills the open spaces in the law. How far he may go without traveling beyond the walls of the interstices cannot be staked out for him upon a chart."); Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1420 (1987) ("The national legislature expresses itself too often in commands that are unclear, imprecise, or gap-ridden . . . .").

[14] *See* 42 U.S.C.A. § 2000e (West 2014).

[15] *See* § 2000e-2(a)(1).

[16] § 2000e-5(g)(1).

[17] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[18] 401 U.S. 424 (1971).

[19] *Id.* at 431.

[20] *Teamsters*, 431 U.S. at 335 n.15.

As discussed in Part I, the Court's landmark *Griggs* decision is an exemplar of judge-made law, a "judicial rather than a legislative creation."[21] The Congress that enacted Title VII in 1964 did not conceive of or intend to impose Title VII liability for the adverse effects of employer practices in the absence of proof of an employer's discriminatory motive.[22] Thus, the *Griggs* Court's expansion of the statute's scope to cover and prohibit certain facially neutral and concededly unintentional employer acts created a fundamental public value opposing—and provided a cause of action by which plaintiffs could challenge—disparate impact in the workplace.

*Griggs* was not the first and last stop in the Court's disparate-impact jurisprudence. As discussed in Part II, in its 1989 decision in *Wards Cove Packing Co. v. Atonio*,[23] the Court again made law when it made significant changes in the allocation of the evidentiary burdens borne by plaintiffs and employers in disparate-impact litigation.[24] Two years later, Congress responded to the *Wards Cove* Court's lawmaking by making a law of its own—the Civil Rights Act of 1991, wherein Congress codified the disparate-impact cause of action and expressly set out the elements of the plaintiff's claim and an employer's defense thereto.[25] Additionally, in its 2009 decision in *Ricci v. DeStefano*,[26] the Court, again making law, formulated a new and extrastatutory rule governing an employer's decision to discard what the Court believed to be a disparate-impact-causing

[21] Margaret Thornton, *Sexual Harassment Losing Sight of Sex Discrimination*, 26 MELB. U. L. REV. 422, 425 (2002).

[22] *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 197 (1992) ("If in 1964 any sponsor of the Civil Rights Act had admitted Title VII on the ground that it adopted the disparate impact test read into it by the Supreme Court in *Griggs*, Title VII would have gone down to thundering defeat and perhaps brought the rest of the act down with it."); Michael Evan Gold, Griggs' *Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429, 432 (1985) ("Congress did not intend to outlaw adverse impact; disparate treatment was the Eighty-eighth Congress' only definition of discrimination."); *id.* at 481 ("[T]here is overwhelming evidence that Congress did not intend to legislate adverse impact . . . .").

[23] 490 U.S. 642 (1989).

[24] *Id.* at 655–57, 659–61.

[25] *See infra* Part II.B.

[26] 557 U.S. 557 (2009).

employment examination.[27] The Court's journey from *Griggs* to *Ricci* and its repeated judicial lawmaking in this important area of antidiscrimination law are the foci of this Article.

## I. *GRIGGS V. DUKE POWER CO.*

### *A. The Case and the Court's Decision*

In *Griggs v. Duke Power Co.*,[28] the Court, interpreting Title VII section 703(a)(2)[29]:

> We granted the writ in this case to resolve the question whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.[30]

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[27] *Id.* at 563; *see also* discussion *infra* Part III.

[28] 401 U.S. 424 (1971).

[29] 42 U.S.C.A. § 2000e-2(a)(2) (West 2014). The provision in question reads:

> It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees . . . 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.

*Id.*; *see also* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2517 (2015) (noting that the *Griggs* Court "relied solely on [Title VII] § 703(a)(2)"). Note that the Court did not interpret section 703(a)(1), which provides that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). By focusing on section 703(a)(2) rather than section 703(a)(1)'s "standard harmful intent doctrine," civil rights lawyers "sought to exploit the dualism in [s]ection 703 (a)" and align section 703(a)(2) "with their new doctrine of harmful effects or disparate impact." HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960–1972, at 249–50 (1990). For a discussion of the pros and cons of the Court's interpretation of section 703(a)(2), see ALFRED W. BLUMROSEN, MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY 102–07 (1993). For an argument that Congress did not intend section 703(a)(2) to outlaw disparate impact, see Gold, *supra* note 22, at 567–78.

[30] *Griggs*, 401 U.S. at 425–26.

Prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, Duke Power overtly discriminated on the basis of race in hiring and assigning employees at its Dan River Steam Station, a power generating facility located in Draper, North Carolina.[31] That facility was divided "into five operating departments: (1) Labor, (2) Coal Handling, (3) Operations, (4) Maintenance, and (5) Laboratory and Test."[32] Until 1966, no African American had been employed in any department other than the Labor Department.[33] That department provided service to the other departments and was responsible for janitorial services, including mixing mortar, collecting garbage, and providing labor needed for the performance of miscellaneous jobs.[34] Labor Department employees were paid a maximum of $1.565 per hour; that wage was less than the minimum of $1.705 per hour paid to employees in the other operating departments, where maximum wages ranged from $3.18 per hour to $3.65 per hour.[35]

In 1955, the company adopted and implemented a policy requiring a high school education for an initial assignment to any operating department other than Labor and for transfer from Coal Handling to the "inside" Operations, Maintenance, or Laboratory Departments.[36] The high school education requirement was subsequently extended to those seeking transfers from Labor to any other department.[37] On July 2, 1965, Title VII's effective date, an additional requirement was added for new workers seeking placement in any department other than the Labor Department: registering satisfactory scores on the Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test.[38] Incumbent employees who did not have a

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[31] *Id.* at 425.

[32] *Id.* at 427.

[33] *Id.*

[34] *See* Griggs v. Duke Power Co., 420 F.2d 1225, 1228 (4th Cir. 1970), *rev'd*, 401 U.S. 424.

[35] *Id.*; *Griggs*, 401 U.S. at 427.

[36] *Griggs*, 420 F.2d at 1239.

[37] *Id.* at 1229. "The company claims that this policy was instituted because it realized that its business was becoming more complex and that there were some employees who were unable to adjust to the increasingly more complicated work requirements and thus unable to advance through the company's lines of progression." *Id.*

[38] *See Griggs*, 401 U.S. at 427–28.

high school education or its equivalent could qualify for transfer from the Labor or Coal Handling to "inside" jobs by passing the aforementioned aptitude tests.[39]

African American incumbent employees filed a class action against the company, alleging that the at-issue employment practices violated Title VII.[40] Dismissing the complaint, the district court concluded that the "plaintiffs have failed to carry the burden of proving that the defendant has intentionally discriminated against them on the basis of race or color."[41] On appeal, the United States Court of Appeals for the Fourth Circuit determined that the company's educational and testing requirements "did have a genuine business purpose and that the company initiated the policy with no intention to discriminate against Negro employees who might be hired after the adoption of the educational requirement."[42]

By a vote of eight to zero,[43] the Court, in an opinion authored by Chief Justice Warren E. Burger, reversed the Fourth Circuit and held that the challenged employment practices were prohibited by Title VII.[44] The Court determined that the "objective of Congress in the enactment of Title VII is plain from the language of the statute."[45] The Court continued, "It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable

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[39] *See id.* at 428 ("The requisite scores used for both initial hiring and transfer approximated the national median for high school graduates.").

[40] *Griggs*, 420 F.2d at 1227–28.

[41] Griggs v. Duke Power Co., 292 F. Supp. 243, 251 (M.D.N.C. 1968), *aff'd in part, rev'd in part*, 420 F.2d 1225, *rev'd*, 401 U.S. 424.

[42] *Griggs*, 420 F.2d at 1232. Judge Simon Sobeloff dissented from the majority's opinion upholding the company's educational and testing requirements:

> The statute is unambiguous. Overt racial discrimination in hiring and promotion is banned. So too, the statute interdicts practices that are fair in form but discriminatory in substance. . . . The critical inquiry is *business necessity* and if it cannot be shown that an employment practice which excludes blacks stems from legitimate needs the practice must end.

*Id.* at 1238 (Sobeloff, J., concurring in part and dissenting in part) (emphasis added). Moreover, Judge Sobeloff opined, "Title VII bars 'freeze-outs' as well as pure discrimination, where the 'freeze' is achieved by requirements that are arbitrary and have no real business justification." *Id.* at 1248.

[43] Justice William J. Brennan, Jr. did not consider or decide the case. *See Griggs*, 401 U.S. at 436; *see also* GRAHAM, *supra* note 29, at 386 ("Justice Brennan . . . recused himself from *Griggs* because he had once represented the Duke Power Company . . . .").

[44] *Griggs*, 401 U.S. at 436.

[45] *Id.* at 429–30.

group of white employees over other employees."[46] Facially neutral and intent-neutral employment "procedures, or tests . . . cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[47]

Noting that whites registered better on the company's qualification requirements than did African Americans,[48] the Court opined that, because of their race, the plaintiffs "have long received inferior education in segregated schools."[49] The Court considered congressional intent:

> Congress did not intend . . . to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.[50]

In a now well-known passage, the Court made clear that "[w]hat 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."[51] Congress has mandated "that the posture and condition of the job-seeker be taken into account" under a statute that "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[52] The Court noted, "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."[53]

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[46] *Id.*

[47] *Id.* at 430.

[48] *Id.* at 430 n.6 ("In North Carolina, 1960 census statistics show that, while 34% of white males had completed high school, only 12% of Negro males had done so."). As for standardized tests, including the Wonderlic and Bennett tests, fifty-eight percent of whites obtained passing scores as compared to six percent of African Americans. *See id.*

[49] *Id.* at 430. The Court cited Gaston County v. United States, stating, "There, because of the inferior education received by Negroes in North Carolina, this Court barred the institution of a literacy test for voter registration on the ground that the test would abridge the right to vote indirectly on account of race." *Id.* (citing Gaston Cnty. v. United States, 395 U.S. 285, 289 (1969)).

[50] *Id.* at 430–31.

[51] *Id.* at 431.

[52] *Id.*

[53] *Id.*

Turning to the company's high school completion requirement and intelligence test, the Court concluded that neither was "shown to bear a demonstrable relationship to successful performance of the jobs for which it was used."[54] The company, with no preadoption or meaningful study of the requirements' relationship to the ability to perform jobs, relied on its judgment that the requirements "generally would improve the overall quality of the work force."[55] The Court found it significant that employees who had not finished high school or performed satisfactorily on the aptitude tests performed satisfactorily and progressed in the departments in which they worked:[56] "The promotion record of present employees who would not be able to meet the new criteria thus suggests the possibility that the requirements may not be needed even for the limited purpose of preserving the avowed policy of advancement within the Company."[57]

The Court noted the Fourth Circuit's holding that in adopting the high school diploma and test requirements, the company had no "intention to discriminate against Negro employees."[58] The absence of discriminatory intent "is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training."[59] The Court did not suggest that this no-discriminatory-intent finding was erroneous:

> [B]ut good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.
>
> . . . Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.[60]

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[54] *Id.*
[55] *Id.*
[56] *Id.* at 431–32.
[57] *Id.* at 432.
[58] *Id.* (quoting Griggs v. Duke Power Co., 420 F.2d 1225, 1232 (4th Cir. 1970), *rev'd*, 401 U.S. 424) (internal quotation marks omitted).
[59] *Id.*
[60] *Id.*

In the final pages of its opinion, the Court considered and rejected the company's contention that its intelligence tests were permitted by section 703(h) of Title VII.[61] Noting the Equal Employment Opportunity Commission's Guidelines interpreting section 703(h),[62] the Court determined that the "administrative interpretation of the Act by the enforcing agency is entitled to great deference" and that the EEOC's construction, supported by the statute and its legislative history, "affords good reason to treat the guidelines as expressing the will of Congress."[63] Congress has prohibited giving testing "devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance" and "has commanded . . . that any tests used must measure the person for the job and not the person in the abstract."[64]

An act of judicial lawmaking, *Griggs* created a cause of action not expressly provided by Title VII as originally enacted.[65] The Court "bridge[d] the gap between the egalitarian ideals expressed in the law books and the everyday realities of the job market."[66] Instead of asking whether the company intentionally discriminated against African American employees, the Court asked whether the company's practices constituted "artificial, arbitrary, and unnecessary barriers to employment"[67] resulting in a disparate impact not justified by business necessity.[68] To be sure, the Court's focus on and interpretation of section 703(a)(2), and its references to congressional objectives and direction, gives the impression of a Court engaged in finding and not making

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[61] *Id.* at 433–36 (citing 42 U.S.C.A. § 2000e-2(h) (West 2014) ("[N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.")).

[62] *See id.* at 433 & n.9 (quoting EEOC Guidelines on Employment Testing Procedures (Aug 24, 1966); Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12,333 (Aug. 1, 1970) (codified as amended at 29 C.F.R. pt. 1607 (1978))).

[63] *Id.* at 433–34.

[64] *Id.* at 436.

[65] *See* Lewis v. City of Chi., 560 U.S. 205, 211 (2010) ("As originally enacted, Title VII did not expressly prohibit employment practices that cause a disparate impact.").

[66] 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 185–86 (2014).

[67] *Griggs*, 401 U.S. at 431.

[68] *See* JOSEPH FISHKIN, BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY 112 (2014).

law. That impression is illusory, however, as the Court's employee-protective opinion and analysis gave primacy of place to addressing the consequences of employment actions and is the judicial work product of a Court unwilling to turn a blind eye to the freezing and lock-in effects of prior discriminatory employment practices. The *Griggs* Court went where the 1964 Congress did not go; the Court made law.[69]

*B. Post-*Griggs *Rulings*

Court decisions issued in the years following *Griggs* gave further shape and content to disparate-impact law and doctrine. In *Albemarle Paper Co. v. Moody*,[70] the Court held that an employer's validation study assessing the job relatedness of employment tests was materially defective.[71] The Court noted that once a plaintiff or class makes out a prima facie case of discrimination, the employer bears the "burden of proving that its tests are 'job related.' "[72] If the employer meets that burden, the plaintiff could still "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.' "[73] Finding several flaws in the employer's test validation efforts,[74] the Court remanded the case to the district court for further proceedings.[75]

*Dothard v. Rawlinson*[76] addressed a plaintiff's disparate-impact action challenging facially neutral minimum weight and height requirements for all law enforcement officers established by an Alabama statute.[77] The plaintiff, who sought employment as a correctional counselor with the Alabama Board of Corrections, convinced a three-judge district court that the weight and height requirements constituted arbitrary barriers to

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[69] For the argument that *Griggs*' interpretation of Title VII is not legitimate and disparate-impact liability is "a rule without reason," see Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2526, 2531 (2015) (Thomas, J., dissenting).

[70] 422 U.S. 405 (1975).

[71] *Id.* at 431, 435–36.

[72] *Id.* at 425.

[73] *Id.*

[74] *See id.* at 431–36.

[75] *Id.* at 436.

[76] 433 U.S. 321 (1977).

[77] *See id.* at 323–24, 324 n.2. The minimum weight requirement was 120 pounds, and the minimum height requirement was five feet two inches.

employment opportunities that Title VII prohibited.[78] Guided by *Griggs* and *Albemarle Paper*, the Supreme Court, in an opinion by Justice Potter Stewart, concluded that the plaintiffs established a prima facie case as evidenced by the percentages of women excluded from work opportunities due to the weight and height requirements, considered separately and jointly.[79] Finding that the standards had a discriminatory impact on female applicants, the Court turned to the employer's argument that the requirements were job related.[80] The employer had the burden of showing that the requirements had "a manifest relationship to the employment in question."[81] According to the employer, the requirements had a relationship to strength essential to effective performance of the job of correctional counselor.[82] But the employer produced no evidence correlating the requirements with a requisite amount of job-related strength.[83] Additionally, the Court opined, if strength was a bona fide job-related quality, the employer could have adopted and validated a test directly measuring the strength of applicants.[84]

In *New York City Transit Authority v. Beazer*,[85] the question before the Court was whether a transit authority's regulation prohibiting the employment of users of narcotics, including former heroin addicts receiving methadone treatment, violated Title VII. The Court, per Justice John Paul Stevens, determined that the plaintiffs' statistical evidence did not establish a prima facie violation of Title VII.[86] Assuming that a prima facie case

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[78] *Id.* at 323, 328.

[79] *See id.* at 329–30. The Court noted the district court's determination that the minimum height requirement would exclude 33.29% of women in the United States between the ages of eighteen and seventy-nine and only 1.28% of men in that age range. The weight requirement would exclude 22.29% of women and 2.35% of men in that age group, and the height and weight requirements combined would exclude 41.13% of women and less than 1% of men. *See id.*

[80] *Id.* at 331.

[81] *Id.* at 329 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1974)) (internal quotation marks omitted).

[82] *Id.* at 331.

[83] *Id.*

[84] *See id.* at 332.

[85] 440 U.S. 568, 570–71 (1979).

[86] *See id.* at 583–84. The Court concluded that a statistic regarding the number of employees referred to the employer's medical director for suspected violations of the narcotics rule "tells us nothing about the racial composition of the employees suspected of using methadone," and noted that the record did not contain information about the number of African American, Latino, or white employees

had been established, the Court concluded that it was rebutted by the employer's demonstration that the narcotics rule was job related.[87] The employer's "legitimate employment goals of safety and efficiency require the exclusion of all users of illegal narcotics, barbiturates, and amphetamines, and of a majority of all methadone users," as well as the exclusion of all methadone users from "safety sensitive" positions.[88] Accordingly, the challenged rule bore a "manifest relationship to the employment in question."[89]

Consider *Connecticut v. Teal*,[90] wherein the Court, by a five-to-four vote, held that an employer's "bottom line" result in a promotion process did not preclude lawsuits alleging racial discrimination effected by an examination that had a disparate impact on African-American employees.[91] Writing for the Court, Justice William J. Brennan, Jr. noted that *Griggs* and its progeny established a three-part analysis of disparate-impact claims: (1) the plaintiff's prima facie case, (2) the employer's demonstration that the requirement has a manifest relationship to the employment in question, and (3) the plaintiff's showing that the employer's use of the practice was a pretext for discrimination.[92]

The results of the at-issue examination revealed that 54.2% of African-American candidates, but not the four African-American plaintiffs, passed the exam.[93] As that number was approximately sixty-eight percent of the pass rate for white candidates, the exam resulted in disparate impact under the EEOC's "eighty percent rule."[94]

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dismissed for using methadone. *See id.* at 584–85. While the district court noted that approximately sixty-three percent of persons receiving methadone maintenance in New York City public programs were African Americans or Latinos, it was not known "how many of these persons ever worked or sought to work for" the employer. *Id.* at 585–86 (discussing other problems with the statistical evidence).

[87] *Id.* at 587.

[88] *Id.* at 587 n.31 (internal quotation marks omitted).

[89] *See id.* (internal quotation marks omitted).

[90] 457 U.S. 440 (1982).

[91] *Id.* at 442–43 (internal quotation marks omitted).

[92] *See id.* at 446–47.

[93] *Id.* at 443.

[94] *Id.* at 443 n.4 (quoting 29 C.F.R. § 1607.4(D) (1981)) (internal quotation marks omitted). The eighty percent rule provides that a selection rate that "is less than [eighty percent] . . . of the rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact." 29 C.F.R. § 1607.4(D).

The employer asked the Court to recognize an exception for cases in which an employer hires or promotes a sufficient number of African-American employees in response to and as compensation for a discriminatory test.[95] The Court answered in the negative.[96] The suggestion of a "bottom line" defense to a discrimination claim brought by an individual employee "confuse[s] unlawful discrimination with discriminatory intent."[97] While an employer's good-faith effort to achieve a nondiscriminatory work force can in some instances rebut an inference of intentional discrimination, "resolution of the factual question of intent is not what is at issue in this case."[98] "It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group."[99] Title VII protects individual employees from disparate-treatment and disparate-impact discrimination; "[t]he principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole."[100]

From the foregoing discussion, one can glean the elements of a disparate-impact methodology in which plaintiffs' and employers' required showings were clearly defined. With regard to the employer's burden, the Court's jurisprudence made clear that the employer had to prove that a challenged employment practice was job related and had a manifest relationship to the employment in question. Failure to satisfy that burden was fatal to the employer's defense.

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[95] *Id.* at 452–53.

[96] *Id.* at 453.

[97] *Id.* at 454 (internal quotation marks omitted).

[98] *Id.*

[99] *Id.* at 455.

[100] *Id.* at 453–54. A dissenting Justice Lewis F. Powell, joined by Chief Justice Warren E. Burger and Justices William H. Rehnquist and Sandra Day O'Connor, argued that there cannot be a disparate-impact violation absent evidence of disparate impact on a group. *See id.* at 459 (Powell, J., dissenting). Justice Powell also expressed his discontent and predicted that the "practical effect of today's decision may well be the adoption of simple quota hiring." *Id.* at 463.

## II. FROM *WARDS COVE* TO THE CIVIL RIGHTS ACT OF 1991

The *Griggs* disparate-impact theory was and remains controversial. Under that theory, an employer can violate Title VII even in the absence of evidence that the employer intentionally discriminated on the basis of race, color, religion, sex, or national origin. The analysis "requires employers to reconsider policies adopted for legitimate reasons, but with little thought to their effect on workforce diversity."[101] This requirement has been criticized:

> Conservatives object that this unduly burdens innocent employers. It involves the courts and regulatory agencies in the intricacies of businesses and enterprises with which they have little familiarity. The employer is best suited to determine whether or not a test or selection practice is job related, they complain—not judges or government bureaucrats. Free-market incentives amply punish employers who select employees irrationally. Judicial intermeddling and bureaucratic micromanaging waste the resources of employers, who must navigate a maze of regulations to defend innocent selection practices. Worst of all, the harried employer, faced with the threat of liability, may insulate itself by adopting quota hiring so as to avoid disparate impact altogether, rather than face the costly and daunting task of defending its practices.[102]

Resistance to *Griggs* became official government policy with the 1981 election of Ronald Reagan to the presidency. "A major objective of the Reagan administration's civil rights agenda was getting rid of the *Griggs* disparate impact theory and enshrining forever in our civil rights laws and jurisprudence the proposition that our commitment to equality prohibits only disparate treatment or intentional discrimination."[103]

The administration's Solicitor General, Charles Fried, believed that *Griggs* "had greatly expanded the exposure of employers to Title VII lawsuits by minority workers" and subjected "to ruinous liability" employers who could not explain

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[101] RICHARD THOMPSON FORD, RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY 117 (2011).

[102] *Id.*

[103] ROBERT BELTON, THE CRUSADE FOR EQUALITY IN THE WORKPLACE: THE *GRIGGS V. DUKE POWER* STORY 278 (Stephen L. Wasby ed., 2014). The late Professor Belton was one of the legal strategists in the NAACP Legal Defense and Educational Fund's civil rights litigation campaign for workplace justice, out of which *Griggs* arose.

"to a court's or bureaucrat's satisfaction" how a challenged practice was justified by business necessity.[104] "[M]any employers, federal enforcement officials, and lower courts understood *Griggs* as a mandate for quota hiring."[105] Fried "concentrated on . . . taming *Griggs*, with its pressure toward quotas,"[106] and saw the opportunity to do just that in *Wards Cove Packing Co. v. Atonio*.[107]

### *A. The* Wards Cove *Decision*

In *Wards Cove*, the Court considered a disparate impact action brought by a class of nonwhite salmon cannery workers against two employers operating salmon canneries in Alaska.[108] Unskilled "cannery jobs" on the cannery line were filled predominantly by Filipinos and Alaska Natives, and skilled "noncannery jobs" were filled with predominantly white employees hired from the employers' offices in Washington and Oregon.[109] The plaintiffs alleged, among other things, that the employers' hiring and promotion practices "were responsible for the racial stratification of the work force and had denied them and other nonwhites employment as noncannery workers on the

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[104] CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 93, 94 (1991); *see also* Amy L. Wax, *Disparate Impact Realism*, 53 WM. & MARY L. REV. 621, 694 (2011) ("Disparate impact lawsuits also carry too great a risk of unjustified liability. . . . Given the legal uncertainties and practical difficulties . . . , employers run a significant risk of being found liable regardless of whether their methods [were] valid . . . .").

[105] FRIED, *supra* note 106, at 95.

[106] *Id.* at 119. Note that Title VII section 703(j) provides:

> Nothing contained in this subchapter . . . require[s] any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance . . . in comparison with the total number or percentage of [such] persons . . . in any community, State, section, or other area, or in the available work force in any community, State, section, or other area . . . .

42 U.S.C.A. § 2000e-2(j) (West 2014). One commentator has argued that section 703(j) "should have killed adverse impact aborning." Gold, *supra* note 22, at 510.

[107] 490 U.S. 642 (1989).

[108] *See id.* at 646–47.

[109] *See id.* at 647 (internal quotation marks omitted). Cannery workers and noncannery employees lived in separate dormitories and ate in separate mess halls. *See id.*

basis of race."[110] The district court rejected the plaintiffs' claims.[111] On appeal, the United States Court of Appeals for the Ninth Circuit reversed, holding that the plaintiffs had made out a prima facie case of disparate impact in hiring and that the employers bore the burden of proving that any disparate impact caused by their hiring practices was justified by business necessity.[112]

The Supreme Court, by a five-to-four vote, reversed the Ninth Circuit.[113] Writing for the majority, Justice Byron Raymond White, joined by Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, and Anthony M. Kennedy, reviewed the Ninth Circuit's holding that the plaintiffs' prima facie case was established by a comparison of the percentage of nonwhite cannery workers and the percentage of nonwhite noncannery workers.[114] Noting that the proper comparison in a disparate-impact case is "between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs,"[115] Justice White determined that the Ninth Circuit's analysis was flawed. "[W]ith respect to the skilled noncannery jobs at issue here, the cannery work force in no way reflected 'the pool of *qualified* job applicants' or the '*qualified* population in the labor force.' "[116] He thus concluded that "comparing the number of nonwhites occupying . . . [noncannery] jobs to the number of nonwhites filling cannery worker positions is nonsensical."[117]

Additionally, Justice White opined that the Ninth Circuit's approach could not be squared with the Court's precedents or the goals of Title VII[118]:

> [The Ninth Circuit's] theory . . . would mean that any employer who had a segment of his work force that was—for some reason—racially imbalanced, could be haled into court and

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[110] *Id.* at 647–48. The employment practices challenged by the plaintiffs 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.

[111] *Id.* at 648.

[112] *See* Atonio v. Wards Cove Packing Co., 827 F.2d 439, 444–45, 450 (9th Cir. 1987), *rev'd*, 490 U.S. 642.

[113] *Wards Cove*, 490 U.S. at 644, 650.

[114] *Id.* at 644–45, 649–50.

[115] *Id.* at 650.

[116] *Id.* at 651.

[117] *Id.*

[118] *Id.* at 652.

> forced to engage in the expensive and time-consuming task of defending the "business necessity" of the methods used to select the other members of his work force. The only practicable option for many employers would be to adopt racial quotas, insuring that no portion of their work forces deviated in racial composition from the other portions thereof; this is a result that Congress expressly rejected in drafting Title VII.[119]

Furthermore, Justice White continued, "Racial imbalance in one segment of an employer's work force 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."[120] Absent barriers or practices deterring qualified nonwhite workers from applying for noncannery jobs, "if the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite, the employer's selection mechanism probably does not operate with a disparate impact on minorities."[121]

Having reversed the Ninth Circuit, the Court remanded the case for further proceedings on the question of whether the plaintiffs could establish a prima facie case of disparate impact.[122] Justice White addressed the issue of disparate-impact causation, relying on and quoting Justice Sandra Day O'Connor's plurality opinion in *Watson v. Fort Worth Bank & Trust*:

> [W]e note that the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged . . . . Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.[123]

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[119] *Id.* (citing Title VII § 703(j), 42 U.S.C.A. § 2000e-2(j) (West 2014)).

[120] *Id.* at 653.

[121] *Id.*

[122] *Id.* at 649.

[123] *Id.* at 656 (alterations in original) (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (plurality opinion)) (internal quotation marks omitted). Justice Kennedy, who did not participate in *Watson*, provided the fifth and majority-creating vote in *Wards Cove*.

On remand, the plaintiffs would have to specifically show "that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites" and "to hold otherwise 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.' "[124]

The showing of a prima facie case would shift the focus of the case to "any business justification" an employer offers for using the challenged practice.[125] "The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice."[126] The employer "carries the burden of producing evidence of a business justification for his employment practice" and that practice need not be "essential" or "indispensable" to the business.[127] Justice White made clear that this approach conformed to the rule governing disparate-treatment cases in which "the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration."[128] This importation of disparate-treatment

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[124] *Id.* at 657 (quoting *Watson*, 487 U.S. at 992). A dissenting Justice Stevens argued that "[t]his additional proof requirement is unwarranted." *Id.* at 672 (Stevens, J., dissenting) ("[I]n a disparate-impact case, proof of numerous questionable employment practices ought to fortify an employee's assertion that the practices caused racial disparities. Ordinary principles of fairness require that Title VII actions be tried like 'any lawsuit.' The changes the majority makes today, tipping the scales in favor of employers, are not faithful to those principles."). *Id.* at 673 (footnote omitted) (citation omitted) (citing U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983)).

[125] *See id.* at 658 (majority opinion).

[126] *Id.* at 659.

[127] *Id.*

[128] *Id.* at 660. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court took up the issue of the order and allocation of proof in a Title VII intentional discrimination case. The Court stated that the plaintiff "must carry the initial burden under the statute of establishing a prima facie case of racial discrimination." 411 U.S. at 802. If the plaintiff makes that showing, the "burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* If the employer's articulated reason meets the plaintiff's prima facie case, the plaintiff must "be afforded a fair opportunity to show that [the employer's] stated reason . . . was in fact pretext." *Id.* at 804. In a subsequent case, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the Court addressed again the evidentiary burdens placed on employers defending Title VII disparate-treatment actions. The Court noted that the ultimate burden of persuading the factfinder that the employer discriminated remains with the plaintiff throughout the litigation. *Burdine*, 450 U.S. at 253. The plaintiff's establishment of a prima facie case creates a presumption that the employer has engaged in unlawful

methodology into disparate-impact analysis relieved the employer of its *Griggs*-mandated burden of proving the job relatedness and business necessity of its challenged practices. In an incredible passage, Justice White stated:

> We acknowledge that some of our earlier decisions can be read as suggesting otherwise. But to the extent that those cases speak of an employers' "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.[129]

The Court thus made a huge change in disparate-impact doctrine while denying that it was doing any such thing.

Finally, Justice White instructed, plaintiffs unable to carry their burden of persuasion on the question of the employer's business justification could still prevail by persuading the factfinder that other tests or selection devices would serve the employer's legitimate interests without the undesirable racial effect.[130] The alternative practice "must be equally effective as [the employer's] chosen hiring procedures in achieving [the employer's] legitimate employment goals."[131] Meeting that burden would establish that the employer's use of the challenged practice was a pretext for discrimination.[132]

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conduct. *Id.* at 254. The burden then shifts to the employer to rebut that presumption by producing evidence of a legitimate, nondiscriminatory reason for its action. *Id.* The employer "need not persuade the court that it was actually motivated by the proffered reasons." *Id.* Where that burden of production is met, the plaintiff's prima facie case is rebutted and the plaintiff must then prove pretext, that is, prove that "the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Id.* at 256. For more recent Court decisions addressing the shifting burdens of proof in disparate-treatment cases, see Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

[129] *Wards Cove*, 490 U.S. at 660 (citations omitted) (citing *Watson*, 487 U.S. at 1006–08 (Blackmun, J., concurring in part and concurring in judgment); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Nat'l Labor Relations Bd. v. Transp. Mgmt. Corp., 462 U.S. 393, 404 n.7 (1983)).

[130] *Wards Cove*, 490 U.S. at 660.

[131] *Id.* at 661. "Factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals." *Id.* (alteration omitted) (quoting *Watson*, 487 U.S. at 998 (plurality opinion)) (internal quotation marks omitted).

[132] *Id.* at 660.

Four Justices dissented. Justice Harry A. Blackmun, joined by Justices Brennan and Thurgood Marshall, argued that the majority had "upset[] the longstanding distribution of burdens of proof in Title VII disparate-impact cases."[133] "One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was."[134]

Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, stated, "I cannot join this latest sojourn into judicial activism."[135] *Griggs* made clear that in disparate-impact cases "[t]he touchstone is business necessity" and that "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."[136] The employer's disparate-impact burden "is proof of an affirmative defense of business necessity" and not "simply one of coming forward with evidence of legitimate business purpose."[137] Responding to Justice White's declaration that precedent "should have been understood to mean an employer's . . . burden,"[138] Justice Stevens opined that he was "astonished to read that the touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice."[139] He also noted, "[T]here is no requirement that the . . . practice be . . . 'essential.' "[140] "This casual—almost summary—rejection of the statutory construction that developed in the wake of *Griggs* is most disturbing."[141] In his view, *Griggs* "correctly reflected the intent of the Congress that enacted Title VII" and, even if it did not, he "could not join a rejection of a consistent interpretation of a federal statute"[142] Justice Stevens also noted, "Congress frequently revisits this statutory scheme and can readily correct [the Court's] mistakes if [the Court] misread[s] [Congress's] meaning."[143]

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[133] *Id.* at 661 (Blackmun, J., dissenting).
[134] *Id.* at 662.
[135] *Id.* at 663 (Stevens, J., dissenting).
[136] *Id.* at 665–66 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431–32 (1971)) (internal quotation marks omitted).
[137] *Id.* at 668.
[138] *Id.* at 660 (majority opinion).
[139] *Id.* at 671 (Stevens, J., dissenting) (internal quotation mark omitted).
[140] *Id.* (alterations in original).
[141] *Id.* at 671–72.
[142] *Id.* at 672.
[143] *Id.*

That *Wards Cove* is an exemplar of judicial lawmaking cannot be denied. Eighteen years of *Griggs*' Court-created regulatory regime did not stop the employer-protective *Wards Cove* Court from changing settled law. At the prima facie case stage of disparate-impact litigation, the Court introduced a " 'cumulation' principle"[144] and announced that plaintiffs would henceforth have to specifically identify and isolate the particular employment practice that caused the disparate impact. "This ruling posed a substantial proof problem for the plaintiffs in cases in which employers rely upon a group of interrelated practices in making employment decisions."[145] Moreover, and significantly, the Court jettisoned the employer's burden of proving that a challenged practice was job related and essential, replacing it with a business justification standard subject to a lesser burden-of-production requirement. While the structure of *Griggs* was left standing, the foundations of the Court's 1971 decision had been weakened.

### *B. The Civil Rights Act of 1991*

Congress responded to *Wards Cove* in the Civil Rights Act of 1991.[146] One of the stated purposes of the act was "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court" in *Griggs* "and in the other Supreme Court decisions prior to" *Wards Cove*.[147] The act amended Title VII section 703 by adding subsection (k).[148]

As amended, Title VII provides the framework for establishing the occurrence of an unlawful employment practice:

> An unlawful employment practice based on disparate impact is established . . . [when] a complaining party demonstrates that a respondent uses a particular employment practice that causes a

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[144] *See* BELTON, *supra* note 105, at 311.

[145] *Id.* at 310.

[146] *See* Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of 29 and 42 U.S.C.). This legislation responded to the Court's decisions in *Wards Cove*, 490 U.S. 642, *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989), *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *Lorance v. AT&T Technologies., Inc.*, 490 U.S. 900 (1989), and *Martin v. Wilks*, 490 U.S. 755 (1989). For a discussion of the 1991 Civil Rights Act and its impact on employment discrimination litigation, see Michael Selmi, *The Supreme Court's Surprising and Strategic Response to the Civil Rights Act of 1991*, 46 WAKE FOREST L. REV. 281 (2011).

[147] Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071.

[148] *Id.*

> 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 . . . .[149]

To demonstrate that a particular practice causes a disparate impact, "the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact."[150] This demonstration is not required where the "complaining party can demonstrate to the court that the elements of a respondent's decisionmaking [sic] process are not capable of separation for analysis"; where that showing is made, "the decisionmaking [sic] process may be analyzed as one employment practice."[151]

Section 703(k) provides, further, that a complaining party can establish disparate impact through "an alternative employment practice" which the employer refuses to adopt.[152] That demonstration "shall be in accordance with the law as it existed on June 4, 1989, [the day before the decision in *Wards Cove*,] with respect to the concept of 'alternative employment practice.' "[153]

In codifying the disparate-impact cause of action, Congress left in place the *Wards Cove* cumulation principle while providing a complaining party with the opportunity of showing that an employer's decision-making process should be analyzed as one employment practice. Congress rejected and legislatively overruled *Wards Cove*'s business justification standard and reinstated the *Griggs* burden-of-persuasion rule governing an employer's job-relatedness and business necessity defense.[154] As the Court recently noted, "Unless and until the defendant pleads and proves a business-necessity defense, the plaintiff wins simply by showing" the "essential ingredients of a disparate-impact claim."[155]

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[149] 42 U.S.C.A. § 2000e-2(k)(1)(A)(i) (West 2014). "The term 'demonstrates' means meets the burdens of production and persuasion." § 2000e(m).

[150] § 2000e-2(k)(1)(B)(i).

[151] *Id.*

[152] § 2000e-2(k)(1)(A)(ii).

[153] § 2000e-2(k)(1)(C).

[154] *See supra* note 145 and accompanying text.

[155] Lewis v. City of Chicago, 560 U.S. 205, 213 (2010).

## III. *RICCI V. DESTEFANO*

In *Ricci v. DeStefano*,[156] New Haven, Connecticut firefighters seeking to qualify for promotion to the rank of lieutenant or captain took examinations given by the city.[157] The results of the examinations revealed that white candidates received higher scores than minority candidates.[158] The city, "faced with a prima facie case of disparate-impact liability,"[159] threw out the test and made no promotions.[160] White firefighters and one Latino firefighter,[161] alleging that they likely would have been promoted under the discarded test,[162] sued the city and claimed that they had been subjected to intentional disparate-treatment discrimination on the basis of race in violation of Title VII.[163]

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[156] 557 U.S. 557 (2009).

[157] *Id.* at 564. The city's contract with the New Haven firefighters' union required applicants for lieutenant and captain positions to take written and oral examinations. *See id.* The written exam accounted for sixty percent of the applicant's total score, with the oral exam accounting for forty percent of that score. *See id.*

[158] *Id.* at 562.

[159] *Id.* at 586. The Court's prima facie case determination was based on the following:

> The racial impact here was significant . . . . On the captain exam, the pass rate for white candidates was 64 percent but was 37.5 percent for both black and Hispanic candidates. On the lieutenant exam, the pass rate for white candidates was 58.1 percent; for black candidates, 31.6 percent; and for Hispanic candidates, 20 percent.

*Id.* The minority pass rates "fall well below the 80-percent standard set by the EEOC to implement the disparate-impact provision of Title VII." *Id.*

[160] *See id.* at 574. Voting on a motion to certify the examination results, the city's civil service board, with one member recused, deadlocked two-to-two, resulting in a decision not to certify the results. *See id.*

[161] Richard Primus notes that published reports referred to the *Ricci* plaintiffs as a group of nineteen white firefighters and one Latino firefighter. "That said, 'Latino' and 'white' are not mutually exclusive categories, and according to published reports [Lieutenant Benjamin] Vargas [fell] into both categories." Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1342 n.4 (2010).

[162] *Ricci*, 557 U.S. at 562–63.

[163] The plaintiffs also alleged that the city violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."). The Court did not decide the equal protection question. *See Ricci*, 557 U.S. at 563. A concurring Justice Scalia stated that the Court's resolution of the case on statutory grounds "merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII . . . consistent with the Constitution's guarantee of equal protection." *Id.* at 594 (Scalia, J., concurring). He argued, "Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking [sic]

The city argued that discarding the test results was necessary to avoid exposure to liability in any disparate-impact suit brought by the minority firefighters.[164]

By a five-to-four vote, the Court, in an opinion by Justice Kennedy, concluded that "race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."[165] Finding no genuine dispute that the city did not have the requisite strong basis in evidence, Justice Kennedy determined that the plaintiffs' Title VII rights had been violated.[166]

Justice Kennedy's analysis rested on a questionable and contestable premise: "The City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense. All the evidence demonstrates that the City chose not to certify the examination results because of the statistical disparity based on race—*i.e.*, how minority candidates had performed when compared to white candidates."[167] Having characterized the city's actions as race-based,[168] he concluded,

is . . . discriminatory." *Id.* For more on this issue, see Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003).

[164] *Ricci*, 557 U.S. at 563.

[165] *Id.*

[166] *Id.*

[167] *Id.* at 579.

[168] Interestingly, and as noted by Justin Driver, Justice Kennedy's concern about the city's race-conscious conduct is set forth in an opinion in which the Justice himself considers race. *See* Justin Driver, *Recognizing Race*, 112 COLUM. L. REV. 404, 407 (2012). Justice Kennedy recounted the testimony of three witnesses who spoke to the city's civil service board about their views on testing and New Haven's promotion examinations. Justice Kennedy wrote that Vincent Lewis, a witness who looked at the exam and concluded that candidates should know the tested material, "is black"; he did not identify the race of the other two witnesses. *Ricci*, 557 U.S. at 570–71. Driver observes comments on this omission:

> This identification is striking because, in a decision that cautions against the dangers of racially disparate treatment, it treats Lewis disparately by race. *Ricci*'s disclosure that Lewis is black suggests that his race carries unusual significance, and that it is germane to the case in a way that the other two witnesses' racial identities are not.

Driver, *supra* note 169. For Driver, the "most compelling interpretation" of the communication of Lewis's race "understands Lewis's blackness to support the notion that New Haven's exam was nondiscriminatory." *Id.* Driver notes that another witness who distrusted the exam identified herself as black but was not so identified by Justice Kennedy; thus, "Justice Kennedy's opinion—perhaps unwittingly—

"The City rejected the test results solely because the higher scoring candidates were white" and invalidated the firefighters' efforts "in sole reliance upon race-based statistics."[169] On that view, the case before the Court did not involve an employer's "well intentioned or benevolent" efforts to comply with Title VII's disparate-impact provision, but rather involved the action of an employer who "made its employment decision because of race."[170]

Dividing Title VII into separate and, in his view, conflicting disparate-treatment and disparate-impact prohibitions, Justice Kennedy embarked on a search for a standard which would give effect to Title VII's prohibition of both intentional and unintentional discrimination. He found that standard—the "strong basis in evidence" standard—in race-conscious affirmative action cases interpreting and applying the Equal Protection Clause.[171] As Justice Kennedy noted, those cases held that certain race-conscious government actions remedying past racial discrimination "are constitutional only where there is a 'strong basis in evidence' that the remedial actions were necessary."[172] "Applying the strong-basis-in-evidence standard to Title VII gives effect to both the disparate-treatment and disparate-impact provisions, allowing violations of one in the name of compliance with the other only in certain, narrow circumstances. . . . And the standard appropriately constrains employers' discretion in making race-based decisions . . . ."[173]

Justice Kennedy's importation of equal protection analysis into Title VII effectively substituted the strong-basis-in-evidence standard for the business-necessity defense mandated by the statute. Explaining the reason for this move, he stated:

> Had the Court mechanically applied Title VII's burdens of proof, it would have been forced to conclude that the potential disparate impact claim against the city would have succeeded:

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highlighted an expert's blackness who supported the examination, but rendered raceless a black expert who cast doubt on it." *Id.* at 408.

[169] *Ricci*, 557 U.S. at 580, 584.

[170] *Id.* at 579–80.

[171] Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 82 (2010) (internal quotation mark omitted) *Ricci* imposes "on employers a standard imported" from equal protection review "to constrain employers from taking 'race-based action' to avoid disparate impact liability." *Id.*

[172] *Ricci*, 557 U.S. at 582 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989)).

[173] *Id.* at 583.

> there was a statistically disparate impact, and the city would clearly not satisfy its burden to show business necessity if its position was that the tests were not necessary. . . . The language of Title VII makes business necessity an affirmative defense, so the Court's analysis required some unacknowledged surgery on the United States Code.[174]

Empathy and sympathy for the *Ricci* plaintiffs were also on display in Justice Kennedy's opinion.[175] He noted statements from Frank Ricci, one of the plaintiff-firefighters.

> Ricci stated that he had "several learning disabilities," including dyslexia; that he had spent more than $1,000 to purchase the materials and pay his neighbor to read them on tape so he could "give it [his] best shot"; and that he had studied "8 to 13 hours a day to prepare" for the test.[176]

Examinations like those given by the city "create legitimate expectations on the part of those who took the tests" and "some of the firefighters here invested substantial time, money, and personal commitment in preparing for the tests,"[177] making the city's "reliance on raw racial statistics at the end of the

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[174] Primus, *supra* note 162, at 1368 (footnote omitted).

[175] Interestingly, President Barack Obama, speaking after Justice David H. Souter announced his retirement from the Court and prior to his nomination of Sonia Sotomayor as Souter's replacement, declared that the "quality of empathy, of understanding and identifying with people's hopes and struggles" was "an essential ingredient" for Souter's replacement. *See* Sheryl Gay Stolberg, *Say It With Feeling? Not This Time Around*, N.Y TIMES, May 29, 2009, at A15 (internal quotation mark omitted). For Senator Orrin Hatch, a Republican from Utah, empathy was "a code word for an activist judge." *Id.* (internal quotation marks omitted). During the Senate Judiciary Committee hearings on her nomination to the Court, Sotomayor repudiated the notion of empathy-based judging. *See* Peter Baker & Charlie Savage, *Groundwork for Next Time*, N.Y. TIMES, July 16, 2009, at A1. The *Ricci* case was mentioned during Sotomayor's confirmation hearings. Then-Judge Sotomayor was a member of the Second Circuit panel affirming the district court's grant of summary judgment for New Haven. In a per curiam opinion the court stated:

> We are not unsympathetic to the plaintiffs' expression of frustration. Mr. Ricci, for example, who is dyslexic, made intensive efforts that appear to have resulted in his scoring highly on one of the exams, only to have it invalidated. But it simply does not follow that he has a viable Title VII claim.

Ricci v. DeStefano, 530 F.3d 87, 87 (2d Cir. 2008) (per curiam), *rev'd*, 557 U.S. 557 (2009). Frank Ricci appeared before the Judiciary Committee and expressed his view that Judge Sotomayor had discriminated and ruled against him because he is white. *See* Robin Abcarian et al., *Conservatives Say It's Their Turn for Empowerment*, L.A. TIMES, Sep. 17, 2009, at A1.

[176] *Ricci*, 557 U.S. at 567–68 (alteration in original).

[177] *Id.* at 583–84.

process . . . all the more severe."[178] Of course, employees also have a legitimate expectation not to be judged on the basis of a flawed test.[179]

Justice Ruth Bader Ginsburg's dissent, joined by Justices John Paul Stevens, David H. Souter, and Stephen G. Breyer, found problematic several aspects of Justice Kennedy's majority opinion, an opinion that did not include "important parts of the story."[180] "Firefighting is a profession in which the legacy of racial discrimination casts an especially long shadow."[181] In the early 1970s, African Americans and Latinos made up 30% of New Haven's population but only 3.6% of the city's 502 firefighters.[182] A lawsuit filed against and a settlement agreement entered into by the city "produced some positive change": In 2003, thirty percent of the city's firefighters were African American and sixteen percent were Latino.[183] The fire department's senior officer ranks were nine percent African American and nine percent Latino, and one of the department's twenty-one captains was African American.[184] "It is against this backdrop of entrenched inequality that the promotion process at issue in this litigation should be assessed."[185]

Unlike Justice Kennedy, Justice Ginsburg saw not "even a hint of 'conflict' between an employer's obligations under [Title VII's] disparate-treatment and disparate-impact provisions,"[186] viewing those provisions as complementary. She also questioned the Court's turn to constitutional law for an evidentiary standard, noting that the Court has held that the Equal Protection Clause "prohibits only intentional discrimination; it does not have a disparate-impact component."[187] Justice Ginsburg argued, further, that employers who reject selection

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[178] *Id.* at 593.

[179] "The legitimacy of an employee's expectation depends on the legitimacy of the selection method." *Id.* at 630 (Ginsburg, J., dissenting).

[180] *Id.* at 609; *see also* Harris & West-Faulcon, *supra* note 172, at 88–91 (examining the facts of *Ricci* against the historical and contemporary patterns of exclusion and discrimination against minority firefighters).

[181] *Ricci*, 557 U.S. at 609.

[182] *Id.* at 610.

[183] *Id.*

[184] *Id.* at 610–11.

[185] *Id.* at 611.

[186] *Id.* at 624.

[187] *Id.* at 627 (citing Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979); Washington v. Davis, 426 U.S. 229, 239 (1976)).

criteria "due to reasonable doubts about their reliability can hardly be held to have engaged in discrimination 'because of' race," and that an employer's "reasonable endeavor to comply with the law and to ensure that qualified candidates of all races have a fair opportunity to compete is simply not what Congress meant to interdict."[188] Accordingly, Justice Ginsburg would have held, "[A]n employer who jettisons a selection device when its disproportionate racial impact becomes apparent does not violate Title VII's disparate-treatment bar automatically or at all, subject to this key condition: The employer must have good cause to believe the device would not withstand examination for business necessity."[189]

In Justice Ginsburg's view, "New Haven had ample cause to believe its selection process was flawed and not justified by business necessity," for no one disputed the existence of a prima facie case of disparate impact.[190] She also questioned the nature of the city's promotions examination and the heavy reliance on written tests.[191] "[M]ost municipal employers do not evaluate their fire-officer candidates as New Haven does," and testimony before the city's civil service board indicated that alternative methods were more reliable and less discriminatory.[192] "[T]he City had good cause to fear disparate-impact liability" and there was "no tenable explanation why the evidence of the tests' multiple deficiencies does not create at least a triable issue under a strong-basis-in-evidence standard."[193]

As one scholar has aptly noted, the *Ricci* Court "revert[ed] to its *Wards Cove* days":

> [T]he conservative majority of the Court invalidated an employer's voluntary efforts to remedy the adverse impact of several promotion tests it had administered. . . . [T]he Court deemed the tests valid even though the tests had not been subject to any legal scrutiny and despite strong arguments that the tests could not be validated under existing law.[194]

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[188] *Id.* at 625.
[189] *Id.* at 625–26.
[190] *Id.* at 632.
[191] *Id.* at 632–33.
[192] *Id.* at 634–35.
[193] *Id.* at 638.
[194] Selmi, *supra* note 147, at 298 (footnote omitted).

Making law again, the *Ricci* Court, as had the *Wards Cove* Court, imported an intentional discrimination and disparate-treatment analysis into disparate-impact litigation.

In so doing, *Ricci* adopted and implemented an employee-protective—more precisely, a nonminority-employee-protective—approach to Title VII. This approach was so protective that, having announced a new strong-basis-in-evidence standard, the Court did not remand the case for the lower court's consideration and application of the rule.[195] The Court determined that "there is no evidence—let alone the required strong basis in evidence—that the tests were flawed because they were not job related or because other, equally valid and less discriminatory tests were available to the City."[196] Accordingly, summary judgment was granted to the plaintiffs on their disparate-treatment claims.[197]

However, the Court did not stop there:

> If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.[198]

In a post-*Ricci* lawsuit, an African-American firefighter sued New Haven, alleging that the city's promotion examination violated Title VII's disparate-impact provision.[199] Vacating the district court's dismissal of the action, the United States Court of Appeals for the Second Circuit held that the action was not barred.[200] In the Second Circuit's view, the Court's sentence stating that the city would avoid disparate-impact liability was dicta and "d[id] not present a holding but rather a conclusion—an apparent logical truth—derived from the holding" in *Ricci*.[201] Thus, and as a consequence of the Court's lawmaking activities,

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[195] *See Ricci*, 557 U.S. at 631.

[196] *Id.* at 592 (majority opinion).

[197] *Id.* at 593.

[198] *Id.*

[199] *See* Briscoe v. City of New Haven, 654 F.3d 200, 201 (2d Cir. 2011).

[200] *Id.* at 203, 209.

[201] *Id.* at 206.

New Haven has to "suffer the whipsaw effect" of defending in a disparate-impact suit, the very same test which the city has duly certified pursuant to an order of the Court.[202]

## CONCLUSION

The Supreme Court's disparate-impact jurisprudence is a prominent example of judicial lawmaking at its best or worst, depending on one's perspectives and views. The Court initially created the disparate-impact cause of action in *Griggs* and has repeatedly formulated and implemented legislative-like evidentiary rules and schemes governing the litigation and adjudication of such claims. Congressional entry into the field with the Civil Rights Act of 1991, responding to *Wards Cove*, codified the disparate-impact cause of action and expressly set out the elements of a plaintiff's claim, the employer's defense thereto, and the parties' respective burdens of proof. But this legislative act did not deter or prevent the Court from making law yet again when, in *Ricci*, a bare majority created and applied a new and extrastatutory rule and held that an employer violated Title VII by discarding what the employer believed to be a disparate-impact-causing examination. Evidently, the Court has not hesitated to make Title VII disparate-impact law and policy. Whether and how it will continue to do so in the future warrants ongoing scrutiny.

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[202] *Id.* at 209.