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Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform

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This Article examines the adverse impact theory of employment discrimination under Title VII. The author begins by discussing the development of adverse impact in the case law, and by scrutinizing its theoretical underpinnings. He demonstrates that Congress did not intend to mandate adoption of adverse impact theory when it established Title VII. The author then argues that the Courts have exceeded their authority under Title VII by embracing the theory of adverse impact. He concludes that the courts should therefore return to a narrower theory of employment discrimination, namely, a theory based on the legal concept of "intent."

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INTRODUCTION

The last temptation is the greatest treason:
To do the right deed for the wrong reason.
T.S. Eliot, *Murder in the Cathedral*, pt. I

Two principal definitions of employment discrimination have evolved under Title VII of the Civil Rights Act of 1964 (Title VII, the Act, or the statute).[1] One definition, generally called "disparate treatment," is readily understood: motivated by a worker's race,[2] an employer[3] treats the worker less favorably than a worker of another race would have been treated. For example, an employer commits disparate treatment by hiring a white applicant instead of an equally qualified black applicant because of the employer's preference for white employees. The specific intent to disadvantage for racial reasons is critical in disparate treatment cases,[4] though racial animus is not. Disparate treatment occurs in our example whether the employer actively dislikes blacks or merely believes that whites make better employees.

In contrast, intent is irrelevant to the other important definition of employment discrimination, "adverse impact."[5] Only effect counts. A criterion an employer uses to make decisions concerning workers may be racially neutral on its face, but, if the criterion disfavors proportionately more qualified and interested blacks than whites and is not truly necessary to the business, the criterion has an illegal adverse impact.[6] For ex-

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1. Pub. L. 88-352, 78 Stat. 253 (codified at 42 U.S.C. §§ 2000e-2000e-17 (1982)).

2. Title VII outlaws discrimination because of race, color, religion, sex, and national origin. Accordingly, not only blacks, but also whites and other racial groups, Jews, Catholics, women, Hispanics, etc. are protected in several ways. The remarks in this article apply with equal force to all classes protected by the Act. Nevertheless, racial discrimination was the primary focus of the Congress which enacted the Civil Rights Act; also, Griggs v. Duke Power Co., 401 U.S. 424 (1971), which this article examines closely, dealt with racial discrimination. Consequently, for convenience, terms like "blacks" and "racial discrimination" are used to include all persons protected by Title VII and all forms of discrimination outlawed by the Act.

3. Title VII outlaws discrimination by employment agencies and labor organizations as well as by employers. The doctrine of *Griggs* applies to all of them equally. For convenience, unless otherwise indicated, the word "employer" includes all possible violators of the Act.

4. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

5. Following the first edition of Barbara Schlei and Paul Grossman's influential book EMPLOYMENT DISCRIMINATION LAW (1976), the Supreme Court has labeled the second definition of discrimination as "disparate impact." International Bhd. of Teamsters v. United States, 421 U.S. at 335 n.15 (1977). But the terms "disparate treatment" and "disparate impact" are so similar as to be confused easily. For this and the following reasons, "adverse impact" is used in this article instead of "disparate impact."

The Supreme Court has suggested that disparate treatment is outlawed by §703(a)(1) of the Act, and adverse impact is outlawed by §703(a)(2). *See* General Electric Co. v. Gilbert, 429 U.S. 124, 137 (1976). Also, §703(a)(2) is the statutory basis of decision in *Griggs*, the case in which the Court adopted adverse impact. The words "adversely affect" appear in §703(a)(2), and we use the root of the first of these words. In deference to the Supreme Court, we use the word "impact" instead of "effect," though the latter would serve as well. The result is a term, born of honorable parents, that is not likely to be confused with its sister definition of discrimination.

6. International Bhd. of Teamsters v. United States, 431 U.S. at 335 n.15 (1977).

ample, an employer may allow persons of all races to take a pre-employment examination, may score the examination fairly, and may hire the applicants with the highest scores. Nevertheless, if the examination disqualifies proportionately more blacks than whites and does not accurately predict who will succeed on the job and who will not, the employer violates the Act by using the test.

Adverse impact is not well understood. For example, it is widely held that proof that an examination is valid (that is, distinguishes qualified from unqualified persons) is a defense. In truth, such proof is not a defense,[7] but destroys the plaintiffs' prima facie case. Adverse impact has also spawned a number of difficult issues. For example, proportionately how many more blacks than whites must be excluded by a selection criterion to create a legally significant adverse impact?

These and other problems might be less important if Congress had intended to outlaw adverse impact. In fact, however, Congress did not intend to outlaw adverse impact; disparate treatment was the Eighty-eighth Congress' only definition of discrimination. If the intent of Congress were honored, many of the problems attending adverse impact would disappear; further, the legitimate values underlying the creation of adverse impact would still be served, and additional values would be promoted.

In the following pages, Part I explains the theory and problems of adverse impact. Part II demonstrates that disparate treatment was the only definition of discrimination intended by Congress. Part III discusses the results that would obtain if the courts returned to the intent of Congress.

I
THE THEORY AND PROBLEMS OF ADVERSE IMPACT

A. The Theory

The commonly accepted theory of adverse impact is well stated by Schlei and Grossman:

> The plaintiff bears the initial burden of establishing a prima facie case of substantial adverse impact, that is, of showing that the test at issue selects those from the protected class [blacks] at a "significantly" lesser rate than their [white] counterparts. If the plaintiff does not meet this burden, the test's validity is irrelevant. If sufficient impact is demonstrated, the burden shifts to the defendant to validate the selection device, that is, to show that it is "job-related." If the employer fails in its burden, use of

7. In a true defense, the defendant concedes that the plaintiff has proved a prima facie case, but offers a legally acceptable excuse. For example, a battery is an intentional harmful or offensive contact. A defendant may admit such a contact ("Yes, I did punch the plaintiff in the nose") yet successfully defend herself with a legitimate excuse ("I thereby prevented him from striking me with the ax he had raised over my head").

> the test will be deemed in violation of Title VII. If [the employer] succeeds, the plaintiff then attempts to rebut the defendant's evidence by showing that although the test is job-related, it does not constitute a business necessity in that an alternative selection device exists which would have comparable business utility but could have a lesser adverse impact.[8]

This formula, drawn from the Supreme Court's decisions in *Griggs v. Duke Power Co.*[9] and *Albemarle Paper Co. v. Moody*[10] envisions a three-step procedure. The plaintiffs put on their prima facie case. The employer puts on her defense. The plaintiffs may attack the defense. An accurate understanding of adverse impact, however, reveals that there is only one step. The employer's "defense" is actually a rebuttal of the plaintiffs' prima facie case, and the plaintiffs' attack on the "defense" is merely a further refinement of the prima facie case. In the end, the only question in adverse impact cases is whether an employment practice selects blacks and whites in numbers reasonably proportionate to the representations of the races in the available work force. This view of the theory of adverse impact is unorthodox and will now be explicated.

Consider the following hypothetical case. With the help of a well-funded civil rights organization, a class of black plaintiffs sued an employer located in a large city, the population of which was half-black and half-white. The plaintiffs proved that the employer, who was seeking drivers to handle dangerous cargo, required that applicants have a high school diploma. Eighty percent of the whites but only 55 percent of the blacks in the city had diplomas. During the time within Title VII's limitations period, many persons of both races applied; the employer hired sixty whites and forty blacks. When the plaintiffs rested their case, the employer moved to dismiss; the motion was denied. Then the employer proved that several different kinds of dangerous items had to be transported and each item had long and complex handling instructions. Further, experts testified that a statistically significant, positive correlation existed between having a high school diploma and performing successfully on the job at the end of one year, as measured by an objective performance evaluation. Then the plaintiffs offered expert testimony that a reading comprehension test, developed by an industrial psychologist and administered to drivers with one year of experience, yielded a statistically significant, positive correlation between scores of sixty-five points or more on the test and satisfactory scores on the drivers' first-year performance evaluations. The plaintiffs also proved that 90 percent of both whites and 85 percent blacks in a random sample of adults in the city

8. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, 91-92 (2d ed. 1983) (footnotes omitted) [hereinafter cited as B. SCHLEI & P. GROSSMAN 2d ed.].

9. 401 U.S. 424 (1971).

10. 422 U.S. 405, 425 (1975).

scored sixty-five or more points on the test. Administering and scoring the test cost one dollar per person. The judge held for the plaintiffs.

Let us analyze what happened in this case. The plaintiffs began by nominating a proxy for the available work force. The available work force is the class of workers who are willing and able to perform the job in question. In an adverse impact case, plaintiffs must demonstrate that an employer's selection criterion has an adverse impact on their class in the available work force because the effect of the criterion on other persons—who do not want the job or are not qualified for it—would be irrelevant.[11] But rarely if ever can a plaintiff produce direct evidence on the available work force. As a rule, the many persons who might be willing and able to perform a specific job are dispersed throughout a large area. Even if tools were readily available to measure which of these persons were genuinely interested in and qualified for the job, collecting the relevant information would be prohibitively expensive. Moreover, the necessary tools are not readily available. Other than counting applicants, measures of real interest in a specific job are highly problematic; and, as will be noted again below, valid ability tests for specific jobs are difficult and expensive to develop. Indeed, the basis of adverse impact cases against employers is their failure to use valid indicators of ability. In our hypothetical case, for example, many persons might have been willing and able to drive for the employer, and they were scattered about a large city. To produce direct evidence on the available work force, the plaintiffs would have had to devise valid tests both of ability to perform and of interest in holding the job of driving dangerous cargo for the defendant employer. Then the plaintiffs would have had to administer these tests to a significant number of persons in different parts of the city.

Accordingly, instead of trying to delineate the available work force, adverse impact plaintiffs must rely on the concept of proxies. A proxy is a class of persons with two important characteristics: first, the proxy is reasonably representative of the real class in which we are interested; second, the information we need about the real class can be obtained about the proxy. Thus, what can be proven to be true of the proxy is inferred to be true of the real class.

In our hypothetical case, the plaintiffs used the population of the

11. An employer can commit disparate treatment against an unqualified applicant for a job. For example, an advertisement stating, "Blacks need not apply," is discriminatory against even unqualified black workers, who deserve the same opportunity to apply that the employer affords unqualified whites. An injunction against the advertisement would therefore benefit unqualified blacks, who thus have a genuine legal interest. (Of course, an unqualified black would not be entitled to back pay because he would not have been hired.) But an employer cannot commit adverse impact against an unwilling or unable worker because such a worker has no legally relevant interest. An unqualified black who is excluded by a selection criterion that is neutral on its face, has an adverse impact on blacks, and is not job-related, occupies the same position as an unqualified white. An injunction against the selection criterion would not benefit the unqualified black in any way.

city as a proxy for the available work force. The proxy was half black and half white. What did the plaintiffs prove? Section 703(a)(2) prohibits conduct composed of four elements: (1) classification of workers or applicants (2) by an employer, which classification (3) disadvantages blacks (4) because of their race. The plaintiffs' evidence proved in a straightforward way the existence of the first two elements: the employer adopted a high school diploma as a selection criterion, thus dividing applicants into two classes: those with and those without diplomas.

The third element was more difficult to prove because whites as well as blacks failed to get the job. The plaintiffs argued that a large group of new hires should reflect the racial composition of the available work force. One hundred is a large group, and the city (which was their proxy for the available work force) was half-black and white; therefore, fifty of the newly hired employees should have been black. Because only forty of the new hires were black, the class of blacks in the available work force was disadvantaged vis-a-vis the class of whites.

Proof of the fourth element was even more difficult. The words "because of such individual's race" suggest the necessity of a causal connection between what happens to an individual and her race. The plaintiffs did not prove the employer adopted the diploma requirement purposefully to exclude blacks, so race as a cause in the sense of motivated behavior was not established. Nor did the plaintiffs prove that the diploma requirement excluded only blacks, so race as a cause in the sense of "but for" or necessary antecedent was not established. And the plaintiffs did not prove that all blacks were excluded, so race as a cause in the sense of sufficient antecedent was not established. What the plaintiffs did prove was a greater association between being white and being eligible for the job (80 percent of whites held diplomas) than between being black and being eligible for the job (55 percent of blacks held diplomas). This proof may be characterized as "associative causation."

In support of the motion to dismiss, the employer offered two arguments. First, he challenged the plaintiffs' proxy directly, arguing that the entire population of the city was an unacceptable representative of the class of willing and able drivers. He pointed out that the population included persons too young to work, persons too old to work, persons disabled from working, persons unqualified to be drivers, persons holding satisfactory jobs and therefore not interested in this job, etc. The plaintiffs responded that proportionately as many blacks as whites probably fell into most of these categories. There were perhaps proportionately more black than white children too young to work, but this fact was balanced by the likelihood that there were proportionately more blacks than whites in low-paying jobs who would be willing to change jobs and become drivers. The judge accepted the plaintiffs' argument. Her com-

mon sense told her that blacks as well as whites can drive trucks, and at least as many blacks as whites were probably interested in this job. Also, in *International Brotherhood of Teamsters v. United States*,[12] the Supreme Court had accepted the population as a proxy for the available work force in upholding a finding of discrimination against a trucking company.

The employer's second argument was that the plaintiffs had failed to show the diploma requirement had a sufficient adverse impact on blacks; he contended the difference between 55 percent and 80 percent was too small to constitute discrimination. The plaintiffs replied that the Supreme Court in *Griggs v. Duke Power Co.* had found that a high school diploma requirement had an adverse impact when 34 percent of whites but only 12 percent of blacks could satisfy the requirement;[13] also, the Guidelines of the Equal Employment Opportunity Commission (EEOC) state that adverse impact occurs if the selection rate of blacks is less than eighty percent of the selection rate of whites.[14] Seeing that the differential in rates of success on the diploma requirement was greater in the case at bar (80 percent − 55 percent) = 25 percent than in *Griggs* (34 percent − 12 percent = 22 percent), and that the black success rate was only (55 percent ÷ 80 percent = 60 percent) of the white success rate, the judge rejected the employer's second argument as well and denied the motion to dismiss.

At this point, three seemingly different tactics were open to the employer. First, he could have tried to prove that a better proxy for the available work force existed and that his selection criterion had no adverse impact on blacks in this proxy. Second, he could have accepted the plaintiffs' proxy and tried to prove through more refined statistical analysis that the criterion had no adverse impact. Third, he could have tried to validate his selection criterion, that is, prove the diploma requirement was job related because it distinguished qualified from unqualified candidates for the job. The first two tactics would have been obvious straightforward attacks on the plaintiffs' prima facie case. Though not so obvious, it is nonetheless true that the third tactic would also have been an attack on the prima facie case. Indeed, the third tactic is no different from the first, for although proof that a test is valid is generally considered a defense, in fact such proof destroys the plaintiffs' prima facie case. Speaking precisely, the employer persuades the judge to reject the plaintiff's proxy because a better one exists. Consider:

An employer is allowed to use a valid selection criterion, despite its adverse impact, because the criterion distinguishes qualified from unqual-

12. 431 U.S. at 337 n.17 (1977).

13. 401 U.S. 424 at n.6.

14. 29 CFR § 1607.4D (1981).

ified persons.[15] Therefore, proof that a selection criterion is valid is proof that persons who do not satisfy the criterion are not members of the available work force. It follows that, when an employer validates a selection criterion, he proves that the persons whom the criterion excludes are unqualified and, consequently, any adverse impact on them is legally irrelevant. Because these persons were included in the plaintiffs' proxy, the employer has proved that his proxy (generated by a valid selection criterion) more accurately represents the available work force. Thus, validation of a selection criterion is not a defense to discrimination, but an attack on a key element of the prima facie case.

Applying this analysis to our hypothetical case, we see that the plaintiffs had originally convinced the judge that interest in and ability to perform the job of driver were both probably distributed evenly among blacks and whites in the city. By proving that graduation from high school correlated positively with scores on performance evaluations, the employer established that possession of a high school diploma was a reliable index of ability to perform on the job. Thus, the judge was persuaded that application of the diploma requirement created a class that represented the available work force better than the plaintiffs' proxy did. The assumption of equal distribution of ability was replaced with evidence that the available work force was composed of 59 percent whites and 41 percent blacks.[16] The employer proved nothing about interest, but impliedly assumed that black and white high school graduates were equally interested in the job. Because (60 ÷ 100 =) 60 percent of the newly hired employees were white and (40 ÷ 100 =) 40 percent were black, the representation of blacks among newly hired employees was almost exactly what would have been expected, rebutting the plaintiffs' prima facie case of adverse impact.

There remained the possibility that the plaintiffs could improve on the employer's proxy. As noted above, this possibility almost never occurs; but because the plaintiffs were supported by a wealthy civil rights organization (and because a good hypothetical case should include major theoretical possibilities), the plaintiffs were able to offer proof of an alternative selection criterion that was valid, inexpensive, and had a lesser

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> 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. . . . Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.

Griggs v. Duke Power Co., 401 U.S. at 436.

16. In a population that was half white and half black, if 80% of whites and 55% of blacks held diplomas, (80 ÷ 135 =) 59% of high school graduates were white and (55 ÷ 135 =) 41% of graduates were black.

adverse impact. They proved that a professionally developed test of reading comprehension used as a selection criterion yielded a statistically significant, positive correlation between success on the criterion and success on the job. The plaintiffs also proved that the reading test had a lesser adverse impact on blacks, for the test could be passed by 90 percent of whites and 85 percent of blacks, whereas the diploma requirement was satisfied by only 80 percent of whites and 55 percent of blacks.[17] And, at a cost of only one dollar per person, the test was not costly to use. Like the employer, the plaintiffs proved nothing about interest; they too relied on an implied assumption, namely, that black and white scorers of sixty-five and better were equally interested in the job.

In the end, the judge decided the plaintiffs' reading test created a better proxy for the available work force than the diploma requirement. This proxy was composed half of whites and half of blacks.[18] The employer's diploma requirement had resulted in the hiring of sixty whites and forty blacks; based on the proxy generated by the reading test, we would have expected the hiring of fifty whites and fifty blacks. The judge concluded that the employer's diploma requirement had an adverse impact on the plaintiffs' class.

A correct understanding of adverse impact reveals not only that there is no true defense under this definition of discrimination, but also that the only issue is whether an employment practice selects proportionate numbers of blacks and whites. The plaintiffs must convince the court that the employer's selection criterion has an adverse impact on a proxy

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17. There was a difference between the plaintiffs' and the employer's validation strategies, but the difference was not important. The employer hired high school graduates and validated the diploma requirement against performance evaluations of the new hires after one year. The plaintiffs could not follow this strategy because they could not place those who scored above 65 on the reading test in drivers' jobs. Instead, the plaintiffs administered the test to drivers with one year's experience and validated the test against their performance evaluations.

The plaintiffs' strategy is widely accepted. Perhaps in an ideal validation study, an employer would rate each applicant according to a proposed selection criterion, hire applicants at random, later rate the applicants' performances on the job, and compare ratings on the selection criterion with ratings of job performance. But this strategy would be costly because of the inefficiency of random hiring. Therefore, it is acceptable to rate present employees against a proposed selection criterion and compare these ratings with ratings of the employees' job performance.

The latter strategy is possibly biased for two reasons. First, present employees were selected in the past according to a standard of some type and, if it was worth anything, the standard selected qualified persons. Results on a test administered to persons with talent for a job may not indicate results that will be obtained when the test is administered to all comers, many of whom are probably unqualified. Second, present employees have learned something from their experience on the job. Their scores on the test may not indicate the results that will be obtained when the test is administered to persons who have not learned from performing the job. This possible bias notwithstanding, the cost of an ideal validation strategy is considered so unreasonable that the less ideal strategy used by the plaintiffs is permitted. Moreover, the employer's strategy could also have been biased by the first of the reasons mentioned.

18. If 90% of whites and 85% of blacks passed a test, (90 ÷ 175 =) 51% of those who passed the test are white and (85 ÷ 175 =) 49% who passed are black.

for the available work force. If the plaintiffs succeed, the employer must defeat the proxy by validating his selection criterion, that is, by convincing the judge that the plaintiffs' proxy was false, that a better proxy exists (it is composed of persons who succeed on the valid selection criterion), and that there is no adverse impact on the proxy. If the employer succeeds, the plaintiffs must produce as good or better a selection criterion that has a lesser adverse impact. Plainly, the war is fought over whose proxy is better. Once the judge chooses the appropriate proxy, the only remaining question is whether blacks and whites are selected according to their representation in the proxy.

The practical significance of a correct understanding of the theory of adverse impact is demonstrated in the following discussion of the problems that have arisen under adverse impact.

B. The Problems

1. Proxies

The role of proxies in adverse impact theory was discussed above. Because of the practical impossibility of identifying each member of the available work force, plaintiffs resort to a proxy and examine the effect of employer's selection criterion on blacks and whites in the proxy. A commonly acceptable proxy in the social sciences is a random sample of the population under study, but random sampling is impractical in employment discrimination cases. Theoretically, plaintiffs could take a sample of the available work force, note the sample's racial composition, apply the employer's selection criterion to the sample, and compare the percentages of blacks and whites in the sample who passed the criterion with the percentages of blacks and whites in the sample. But this is easier said than done. Each person in the sample would have to be a member of the available work force; thus, plaintiffs would have to develop means of measuring interest in and ability to perform the job in question—in other words, develop a job-related test. Employees cannot afford to do what their employers find is all but impossible, regardless of cost. The problem, therefore, becomes how to choose another appropriate proxy.

When is a proxy close enough to the class the proxy represents to justify using it in a court of law? How should a judge choose between competing proxies? Consider this hypothetical case. An employer was located in a community that was half black and half white. She had job vacancies in the entry-level position of helper, which was paid the minimum wage. A thousand blacks and 500 whites applied for jobs. Each applicant was given a paper-and-pencil test; 100 passed and were hired over the course of a few weeks. Fifty of the new helpers were white, and fifty were black.

Two proxies for the available work force in this example spring to

mind. It can be argued that no reason exists to believe that blacks were less interested than whites in this sort of work and that, because the job of helper required no prior training, proportionately as many blacks as whites were qualified to do the work. This argument would support choosing the community as the proxy for the available work force. The community was half black and half white, and half of the new hires were black, half white. Thus, using the community as the proxy for the available work force might lead to an inference that the selection process had no adverse impact. On the other hand, it can also be argued that, although ability to do the job may not have varied across classes, interest in the job probably did vary. A good measure of interest is applying for the job. Accordingly, runs the argument, the right proxy was the pool of applicants. Two blacks for each white applied, yet only one black for each white was actually hired. Whereas we expected that sixty-seven blacks and thirty-three whites would be hired, in fact fifty members of each race were employed. Thus, using the applicant pool as the proxy for the available work force might lead to an inference that the selection process had an adverse impact.

The difficulty of choosing proxies is not hypothetical. Consider *Griggs*. The plaintiffs established that the high school diploma requirement had an adverse impact on blacks by proving that, in 1960, 34 percent of the white males in North Carolina had completed high school, as compared to only 12 percent of the black males in the state.[19] Was the male population of the state an appropriate proxy for the available work force for the jobs at the Duke Power Company? Reasons exist to doubt the validity of assumptions on which use of this proxy was based. First, it assumed that there were no women in the available work force, yet women were probably interested in and able to perform a number of the jobs at the station. Second, the proxy assumed that state-wide averages applied to the small, rural town of Draper, where the Dan River station was located.[20] But high school graduation rates tend to be lower in rural areas than in urban areas. Because the workers at the Dan River station certainly lived nearby, the state-wide figures, which included the 40 percent of the state's population that lived in cities,[21] were probably different from the graduation rates in the available work force. Whether the black-to-white graduation ratio was the same in a rural area as in the state as a whole is not clear *a priori*. Third, the proxy assumed that blacks and whites of all ages were equally interested in these jobs. In fact, however, jobs that require heavy physical labor are generally more attractive to younger workers. Because of changing attitudes and judicial

19. 401 U.S. at 430.

20. *Id.* at 426.

21. THE WORLD ALMANAC AND BOOK OF FACTS 322 (1966).

decisions like *Brown v. Board of Education of Topeka*,[22] more young blacks held high school diplomas in 1970 than did their elders.[23] As a result, the graduation rate for blacks of all ages in the state probably differed from the graduation rate of blacks in the available work force. Finally, the proxy assumed that all workers at the Dan River station lived in North Carolina. A map reveals, however, that Draper lay hard by the southern border of Virginia.[24] Some of the workers at the station probably lived in Virginia, where black and white graduation rates may have been different from those in North Carolina.

In spite of these objections, the male population of the state may have been a rough proxy for the available work force. After all, most of the jobs at the Dan River station were probably unattractive to women in 1966, so excluding them from the proxy may have had little effect. Both whites and blacks probably completed high school in lower numbers in rural areas of the state, so that the difference between the percentages of whites and blacks excluded by the diploma requirement was still large. Younger blacks may have held diplomas in higher proportions than older blacks, but the same was true of whites (albeit in less dramatic figures); thus, the spread between white and black graduation rates in the available work force was probably less than 34 percent to 12 percent but nonetheless substantial. And what was true of northern North Carolina was in all likelihood true of southern Virginia. The point, therefore, is not that the Supreme Court relied on an inappropriate proxy in *Griggs*, but that use of proxies is complex—much more complex than the Court seems to have realized in 1971.

Perhaps *Griggs* is the wrong case to examine so closely. It was the first case of its kind; the parties may not have appreciated the importance of identifying an accurate proxy for the available work force, and the Supreme Court may not have fully realized the assumptions on which its proxy rested. Unfortunately, the Court's understanding of proxies was little better in *Dothard v. Rawlinson*,[25] which was decided six years after *Griggs*. The plaintiff in *Dothard* applied to become a prison guard, but she was rejected because she failed to meet a requirement that guards weigh at least 120 pounds.[26] Representing the class of all women who might be employed as prison guards, she challenged this requirement, as

22. 347 U.S. 483 (1954).

23. In 1970, only 10.7% of blacks aged 55 to 64 and 19.8% of those aged 45 to 54 had completed four years of high school, whereas 39.7% of blacks aged 18 to 24 and 38.4% of those aged 25 to 34 had done so. WORLD ALMANAC AND BOOK OF FACTS 205 (1983). Younger whites also graduated from high school in greater numbers during comparable periods, *id.*, but the increases were smaller.

24. Draper is no longer on the map, but has been consolidated with two other towns to form Eden.

25. 433 U.S. 321 (1977).

26. *Id.* at 323-24.

Reliance on demographic data was not misplaced when there was no reason to suppose that the physical characteristics of men and women who were willing and able to be prison guards in Alabama differed from the physical characteristics of the national population. One may or may not accept this conclusion, but one must agree that the Court did not characterize the issue correctly.

The second error is equally serious. The Court wrote that a plaintiff need only introduce evidence that "conspicuously demonstrates a grossly discriminatory impact. If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own."[33] This language strongly suggests that the burden falls on the defendant to convince the court that the plaintiffs' proxy is not accurate, provided only that the plaintiffs' evidence reveals a sufficiently gross adverse impact. But surely when plaintiffs use a proxy, the burden is theirs to convince the court that the proxy is a reasonably accurate substitute for the available work force. This error is substantive as well as procedural. If a proxy is not acceptably accurate, even the grossest adverse impact on the blacks in proxy would be meaningless as an indication of the effect on the available work force. That a selection criterion excludes disproportionate numbers of blacks living in California is irrelevant if the available work force for the job in question is located in New York.

The Supreme Court's difficulty is dealing with proxies had not abated when *New York City Transit Authority v. Beazer*[34] was decided. The Transit Authority refused to hire anyone being treated for heroin addiction with the drug methadone.[35] The plaintiffs proved that blacks and Hispanics comprised 20 percent of the labor force for New York City and 36 percent of the metropolitan population,[36] but that at least 40 percent, and perhaps as many as 63 percent, of the persons in public and private methadone programs were minorities.[37] The district court held that the methadone rule had an adverse impact on minorities[38] and enjoined the Transit Authority from denying employment (except in safety-sensitive jobs) to persons who had used methadone successfully for one year.[39] Although the district court did not explain its reasoning, we can construct a likely analysis: Minorities constituted about one-third of the available work force, thus the class excluded by a non-discriminatory se-

33. *Id.* at 331.

34. 440 U.S. 568 (1979).

35. *Id.* at 576.

36. *Id.* at 586 n.30.

37. *Id.* at 579, 585. The Court quibbled with this percentage, arguing it could have been as low as 40%. *Id.* at 586 n.30. The actual percentage is irrelevant for the purpose of the argument in the following text.

38. Beazer v. New York City Transit Auth., 414 F. Supp. 277 (S.D.N.Y. 1976).

39. 440 U.S. at 578.

lection criterion would be about one-third minority as well. In fact, the class excluded by the Transit Authority's criterion was almost two-thirds minority. Although many participants in methadone programs were surely unwilling or unable to work for the Transit Authority, probably as many Anglo as minority participants were willing and able (and thus members of the available work force). For this reason, the class of participants in methadone programs was a fair proxy for the class of participants in the available work force. Because two-thirds of the persons excluded by the methadone rule were minorities, whereas a non-discriminatory criterion would have yielded a figure of one-third, the district court held the criterion had an adverse impact.

The majority of the Supreme Court held that these statistics did not prove a violation of Title VII.[40] Justice Stevens wrote:

> [T]he District Court noted that about 63% of the persons in New York City receiving methadone maintenance . . . are black or Hispanic. We do not know, however, how many of these persons ever worked or sought to work for TA [Transit Authority]. This statistic therefore reveals little if anything about the racial composition of the class of TA job applicants and employees receiving methadone treatment. More particularly, it tells us nothing about the class of otherwise-qualified applicants and employees who have participated in methadone maintenance programs for over a year—the only class properly excluded by TA's policy under the District Court's analysis. The record demonstrates, in fact, that the figure is virtually irrelevant because a substantial portion of the persons included in it are either unqualified for other reasons—such as the illicit use of drugs and alcohol—or have received successful assistance in finding jobs with employers other than TA. Finally, we have absolutely no data on the 14,000 methadone users in *private* programs, leaving open the possibility that the percentage of blacks and Hispanics in the class of methadone users is not significantly greater than the percentage of those minorities in the general population of New York City.[41]

Thus, the majority refused to accept participants in methadone programs as a proxy for methadone users who were willing and able to work for the Transit Authority (that is, who were in the available work force) for four reasons: there was no evidence on the ethnic composition of participants who had used methadone for one year; some participants had found other work (and therefore were unwilling to work for the Transit Authority); some participants had reverted to use of illicit drugs (and therefore were unqualified to work for the Transit Authority); and the racial composition of methadone users in public programs might have differed from that of methadone users in private programs.

Justice White dissented, offering persuasive reasons for accepting

40. *Id.* at 584.

41. *Id.* at 585-86 (footnotes omitted).

the proxy. Responding to the argument that some participants in methadone programs were not interested in working for the Transit Authority (for example, because they had found other jobs) and, thus, were not in the available work force, he pointed out that many participants certainly were interested in jobs with the Transit Authority; 5 percent of all Transit Authority applicants were rejected because of use of drugs, and this figure undoubtedly included many minorities using methadone. There being no reason to believe that proportionately fewer minority than Anglo users of methadone were unwilling to work for the Transit Authority, it followed that most methadone-using applicants were probably minorities.[42]

Justice White offered a similar response to the argument that many participants in methadone programs were disqualified from working for the Transit Authority because they had reverted to use of illicit drugs. Since there was no reason to believe that proportionately more minority than Anglo participants had lapsed into use of other drugs, it followed that most persons who had successfully been maintained on methadone for one year and who were qualified to hold jobs at the Transit Authority were minorities.[43]

We cannot dig too deeply into the disagreement over the racial composition of methadone participants in private as opposed to public programs; the dispute is factual, turning on interpretation of evidence in the record. Nevertheless, we may note the unlikelihood of the majority's suggestion that all participants in private programs might be white (in which case, the percentage of minorities in methadone programs would have been the same as the percentage of minorities in the metropolitan population). There was apparently no evidence to indicate that Anglos enrolled in private programs at a greater rate than minorities. Whatever reasons might *a priori* suggest this possibility would be dispelled by the fact that 80 percent of all heroin addicts in the metropolitan areas were minorities.[44] Justice White's inference was the more reasonable: minorities probably participated in private programs in about the same percentages as in public programs,[45] so that 60-65 percent of methadone users were black or Hispanic.

Whether one accepts the reasoning of the majority or the dissent, one point is established: the choice of proxies is a difficult issue under adverse impact.

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42. *Id.* at 599-600.
43. *Id.*
44. *Id.* at 601 n.7.
45. *Id.* at 601.

2. Methods of Comparison

Another issue concerning the prima facie case of adverse impact is the appropriate method of comparing the effects of an employment practice on racial classes. Two methods are possible: comparison of success rates and comparison of failure rates. The Supreme Court has used both, yet the two methods produce different results in similar cases.

In *Griggs* the Court compared success rates. In analyzing the diploma requirement, the Court used the adult male population of the state as a proxy for the available work force and compared the success rate on the requirement of blacks within the proxy to the success rate on the requirement of whites within the proxy. The diploma requirement had an adverse impact because 34 percent of white males, but only 12 percent of black males, had completed high school. In analyzing the testing requirement, the Court used the class of persons who took the tests as a proxy for the available work force and compared the success rate on the tests of blacks within the proxy to the success rate on the tests of whites within the proxy. The testing requirement had an adverse impact because 58 percent of whites, but only 6 percent of blacks, passed the test. Thus, in *Griggs* the Court determined the existence of adverse impact by comparing rates of success within proxies for the available work force.

In *Dothard* the Court compared, not success rates, but failure rates within the proxy. The national population was accepted as a proxy for the available work force, and adverse impact was found because the height and weight requirements excluded 41 percent of women, but less than 1 percent of men.

In *Beazer* the Court again compared failure rates. The court majority and minority battled over whether participants in public methadone programs constituted a fair proxy for methadone users in the available work force, but both sides determined the existence or absence of adverse impact by comparing the percentages of Anglos and minorities in the class of persons excluded by the methadone rule. Examining relative representations in the class of excluded persons is another way of comparing failure rates.[46]

In *Connecticut v. Teal*,[47] the Supreme Court reverted to comparing success rates. The plaintiffs proved that 48 blacks and 259 whites took an examination for a promotion, and 26 blacks (54 percent) and 206 whites (80 percent) passed. The Court implicitly accepted the class of test-takers as a fair proxy for the available work force. The black success rate was (54 percent ÷ 80 percent =) 68 percent of the white success rate. Although the employer did not contest the finding of the district

46. *See infra* notes 47-49 and accompanying text.

47. 457 U.S. 440 (1982).

court that this ratio constituted adverse impact, the Supreme Court specifically noted that the examination

> resulted in disparate impact under the "eighty percent rule" of the Uniform Guidelines on Employee Selection Procedures adopted by the Equal Employment Opportunity Commission. Those Guidelines provide that a selection rate that "is less than [80 percent] of the rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact."[48]

Comparing failure rates with representation in the class of excluded persons yields similar results; the methods used in *Dothard* and *Beazer* are interchangeable. But comparing success rates to either of these methods yields different results in similar cases. Indeed, results are the same only in the extraordinary case in which the success and failure rates are equal. The following examples demonstrate the truth of these assertions.

Let us begin with the extraordinary case. Suppose 1,000 blacks and 500 whites applied for work and were given a test; 100 blacks and 50 whites passed and were hired, and 900 blacks and 450 whites were rejected. Let us accept the pool of applicants as a proxy for the available work force. The black success rate was (100 ÷ 1,000 =) 10 percent; the white success rate was the same (50 ÷ 500 = 10 percent). Therefore, comparing success rates (as in *Griggs* and *Teal*) shows no adverse impact. Comparing failure rates (as in *Dothard*) produces the same result. The black failure rate was (900 ÷ 1,000 =) 90 percent, which is exactly the same as the white failure rate (450 ÷ 500 = 90 percent). Comparing representations in the class of excluded persons to representations in the available work force (as in *Beazer*) also shows no adverse impact. The test disqualified two blacks for each white (900:450), and this ratio matches the black:white ratio (1,000:500) in the pool of applicants. Thus, all three methods yield the same result when success and failure rates are exactly equal.

Now let us turn to the more usual case in which success and failure rates differ. Suppose 900 of 1,000 black and 495 of 500 white applicants passed a test and were hired. Comparing success rates shows no adverse impact. The black success rate was (900 ÷ 1,000 =) 90 percent; the white success rate was (495 ÷ 500 =) 99 percent; the eighty percent rule is satisfied because the black success rate was (90 percent ÷ 99 percent =) 91 percent of the white success rate. Comparing failure rates, however, tells a different story. The black failure rate was (100 ÷ 1,000 =) 10 percent; the white failure rate was (5 ÷ 500 =) 1 percent; thus, the black failure rate was ten times higher than the white failure rate, and that result seems disproportionate. Similarly, comparing representations in the excluded class to representations in the available work force seems

48. *Id.* at 443 n.4 (citations omitted).

to reveal a disproportionality. The black:white ratio in the available work force (1,000:500) leads us to expect to find two blacks for each white in the excluded class; instead, we find twenty blacks for each white, and this difference from our expectation suggests adverse impact.[49]

The adverse impacts in *Griggs*, *Dothard*, and *Teal* were so great that any of the methods discussed above would produce the same result. Lacking statistics on the number of persons in the available work force (or a proxy for it, for example, the number of applicants), we cannot calculate pass and fail rates for *Beazer*. Nevertheless, one day the Supreme Court will be presented with a case in which a choice must be made as to the method for measuring adverse impact, and the choice will be difficult.

3. *Legal Significance of Disparities*

An equally difficult issue under the prima facie case of adverse impact discrimination is whether a given disproportionality is legally significant. Suppose 1,000 blacks and 500 whites applied for jobs, and 50 whites and 50 blacks were hired. Assume the court decides the pool of

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49. An objection might be raised that the example in the text does not reveal adverse impact, but, rather, that expectations must be adjusted for each method. The following example rebuts this objection.

Suppose 700 of 1,000 whites (70 %) in a proxy for the available work force and 560 of 1,000 blacks (56 %) succeed on a selection criterion. The black success rate is (56% ÷ 70% =) 80 % of the white success rate. The black failure rate is (440 ÷ 1,000 =) 44 percent; the white failure rate is (300 ÷ 1,000 =) 30%; so the black failure rate is (44% ÷ 30% =) 147% of the white failure rate. Focusing on representations in the excluded class, we find it is composed of (300 whites + 440 blacks =) 740 persons. Because the available work force is half black, we would expect to find (740 ÷ 2 =) 370 blacks in the excluded class; instead, we find the actual number of blacks in this class is (440 ÷ 370 =) 119% more than expected. If comparing success rates yields the same results as comparing failure rates of representation in the excluded class, and all we need to do is adjust our expectations according to the method in use, adverse impact occurs if the black success rate is less than 80% of the white success rate; if the black failure rate is more than 147% of the white failure rate; or if blacks are represented in the excluded class at more than 119% of expectations.

Now let us modify the example somewhat. Beginning again with 1,000 blacks and 1,000 whites in the available work force, suppose 900 whites (90%) and 770 blacks (77%) succeed on the selection criterion. The black success rate is (77% ÷ 90% =) 86% of the white success rate; thus, the eighty percent rule is easily satisfied. Indeed, as measured by comparing success rates, there is less adverse impact in this example than in the example in the preceding paragraph. Failure rates paint a different picture. The black failure rate is (230 ÷ 1,000 =) 23%; the white failure rate is (100 ÷ 1,000 =) 10%. In the preceding example, we concluded that adverse impact occurs if the black failure rate exceeds 147% of the white failure rate; here, the black failure rate is (23 ÷ 10 =) 230% of the white failure rate. Thus, as measured by failure rates, there is an adverse impact in this example, even though, as measured by success rates, there is not. The same is true for comparing representations in the excluded class. It is composed of (100 whites + 230 blacks =) 330 persons. Because the available work force is half black, we would expect to find (330 ÷ 2 =) 115 blacks in the excluded class. In the preceding example, we concluded that adverse impact occurs if blacks are represented in the excluded class in excess of 119% of expectations; here, blacks are represented in the excluded class at (230 ÷ 115 =) 200% of expectations. Thus, as measured by representations in the excluded class, there is adverse impact in this example, even though, as measured by success rates, there is not.

applicants is a fair proxy for the available work force and that comparing success rates is the appropriate method for measuring adverse impact. Do the foregoing numbers reveal an adverse impact?

The answer begins with statistical analysis of the data. To illustrate this type of analysis, suppose a woman reported that she flipped a coin 100 times and observed 50 heads and 50 tails. We would trend to believe that the coin was fair, that this outcome truly occurred, and that she reported it correctly, because it reflects what we would expect in a random process. We would hold the same belief if the woman reported that she observed 45 heads and 55 tails because we expect some variation in a random process. On the other hand, if she reported that she observed 5 heads and 95 tails, we know this outcome is unlikely to occur by chance, and we would probably doubt the fairness of the coin, the accuracy of the woman's observation, or the accuracy of her report.

Suppose she reported observing 35 heads and 65 tails. Our common sense may not yield a ready impression. Statistics, however, provide a method for determining the probability that this outcome would occur by chance. The method reveals that 35 heads and 65 tails happen by chance about one time in a hundred.[50] In the argot of the statistician, this outcome is statistically significant at the .01 level of confidence. That is, if a fair coin is flipped 100 times and the numbers of heads and tails are recorded; and if the process (100 flips and recording the results) is repeated 100 times, it is likely that 35 heads and 65 tails will be observed and recorded no more than once. Accordingly, we would have reason to doubt some aspect of the woman's report. If we were certain that she observed and reported correctly—or, of course, if we made the observation ourselves—we would doubt the fairness of the coin. In other words, we would suspect that 35 heads and 65 tails were the outcome of a process that was not random.

Let us apply this form of analysis to our hypothetical case. If 1,000 blacks and 500 whites took a test for a job, and 50 blacks and 50 whites passed, is it likely that the selection criterion chose at random among the applicants? The answer is no; this outcome would occur by chance fewer than one time in a hundred.[51] We know, therefore, that the outcome of 50 blacks and 50 whites is probably not a chance variation in a process

50. The standard deviation is the square root of the product of the probability heads will occur (.5), the probability tails will occur (.5), and the number of coin flips (100) or 5. Ninety-nine percent of observations occur within three standard deviations of the mean, which here is 50 heads and 50 tails. Thirty-five heads and 65 tails is three standard deviations from the mean. *See* G. GLASS & J. STANLEY, STATISTICAL METHODS IN EDUCATION AND PSYCHOLOGY 101 (1970).

51. The standard deviation is the square root of the product of the probability of selecting a black (.67), the probability of selecting a white (.33), and the number of selections (100) or 4.7. Ninety-nine percent of random observations will occur within three standard deviations of the mean (67 blacks, 33 whites). Fifty blacks and 50 whites is more than three standard deviations from the mean.

that affects blacks and whites in the same way in the long run. This outcome is not like 45 heads and 55 tails, but is more like 35 heads and 65 tails.

We have determined that the test in our hypothetical case consistently disqualified a disproportionate number of blacks. Yet one more step is necessary before we may conclude that the test was discriminatory. We know the disparity between black and white success rates on the test is *statistically* significant. We must now decide whether the disparity is *legally* significant. The black success rate was (50 ÷ 1,000 =) 5 percent; the white success rate was (50 ÷ 500 =) 10 percent. Thus, blacks succeeded at (5 percent ÷ 10 percent =) 50 percent the rate of whites. This disparity appears to be legally significant.

The difference between statistical and legal significance is important, but commonly neglected. Suppose blacks passed our hypothetical test at the rate of 33 percent and whites passed at 34 percent. Suppose also that the group taking the test was large enough that we are satisfied that, if the test were administered many times, black and white success rates would not change; that is, the results were statistically significant. Should a court strike down a selection criterion on which blacks succeed at (33 percent ÷ 34 percent =) 97 percent the rate of whites? Suppose instead that 33 percent of blacks and 44 percent of whites passed the test, so that the black success rate was (33 percent ÷ 44 percent =) 75 percent of the white rate. Should a court intervene? We are not playing the law professor's game of showing that a cutoff is hard to justify. Rather, we are observing that the legal significance of a disparity between black and white success rates is a genuine and difficult issue.

Although it has decided a number of adverse impact cases, the Supreme Court has not adopted a rule for deciding when a disparity is legally significant.[52] In *Griggs*, the Court pointed out the disparities between black and white performances on the diploma and testing requirements and impliedly held the disparities were legally significant, but did not articulate a standard for judging legal significance. In *Dothard*, the Court characterized the difference between male and female failure rates on the height and weight requirements (1 percent versus 41 percent) as "gross . . . greatly exceed[ing] the 34 percent to 12 percent disparity that served to invalidate the high school diploma requirement in the *Griggs*

52. The Court has indicated when a disparity is statistically significant. In Hazelwood School Dist. v. United States, 433 U.S. 299 (1977), the Court wrote:

> A precise method for measuring the significance of such statistical disparities was explained in *Castaneda v. Partida*, 430 U.S. 482, 496-97 n.17. It involves calculation of the "standard deviation" as a measure of predicted fluctuations from the expected value of sample. . . . The Court in *Castaneda* noted that "[a]s a general rule for such large samples, if the difference between the value and the observed number is greater than two or three standard deviations," then the hypothesis . . . would be suspect.

Id. at 308-09 n.14.

case."[53] The Court was apparently aware of the need to have a standard, but left the task of defining it to another day. In *Teal*, as noted above, the district court's finding that the examination had an adverse impact was not contested before the Supreme Court; the majority opinion stated the eighty percent rule, but did not hold it was the legal standard of judgment.[54] Thus, except for disparities that exceed those in *Griggs*, whether a disparity is legally significant remains an open question in the courts.

The legal significance of a disparity is a troubling issue. Why should any statistically significant disparity—that is, any real disparity—be ignored? If blacks pass a test at only 85 percent the rate of whites, should not the employer be required to prove the test is job related? If the test does not predict success on the job, are not the excluded blacks victims of an irrational selection criterion that acts as an "artificial, arbitrary, and unnecessary barrier . . . to employment?"[55] Do not such tests "operate as 'built-in headwinds' for minority groups?"[56] On the other hand, how much precision can be expected? Is not any selection criterion likely to have some adverse impact on one of the many protected classes—blacks, whites, men, women, Hispanics, Asians, Catholics, Jews, etc.? If validating a test is expensive (it is), and if few tests can be validated at any cost (few can be), a finding of adverse impact is tantamount to a judgment against the employer. Should judgments be entered on relatively small disparities? That these are hard questions proves our point: whether a given disproportionality should be legally significant is a difficult and unsettled issue in the law of adverse impact.

4. *Burden of Persuasion*

We have discussed three problems with the prima facie case of adverse impact discrimination, namely, choice of proxies, methods of comparing effects on racial classes, and legal significance of disparities. Now let us turn to three problems with the "defense": the burden of persuasion regarding the validity or job relatedness of a selection criterion, proof of job relatedness, and quotas.

The word "defense" was enclosed in quotation marks in the preceding paragraph because, as has been demonstrated above, there is no true defense in adverse impact litigation. Rather, after the plaintiffs make out their prima facie case, the employer may attack that case in one of three ways: first, the employer may argue that the plaintiffs' proxy is so improbable that the effect of his selection criterion on the proxy reveals

53. 433 U.S. at 330 n.12.
54. 457 U.S. at 443 n.4.
55. Griggs v. Duke Power Co., 401 U.S. at 432.
56. *Id.*

nothing about the effect of the criterion on the available work force. Such an argument might succeed, for example, if the plaintiffs used the national population as a proxy for persons willing and able to become astronauts.[57] Second, the employer may argue that the plaintiffs' statistical analysis is faulty and proper analysis shows an absence of adverse impact. For example, an employer might show through multiple regression analysis that a disparity indicated by a simple association is spurious. Third, the employer may argue that the disproportionate impact on the plaintiffs' class is legally insignificant. Such an argument might succeed if the success rate of the plaintiffs' class were 90 percent of the success rate of the best scoring class.

Each of these methods of attack, if successful, would destroy an element of the plaintiffs' prima facie case: the plaintiffs must nominate an acceptable proxy, demonstrate by reliable statistical analysis a disproportionate adverse impact on their class, and persuade the court that the disparity is legally significant. Therefore, the burden of persuasion on each of these elements belongs on the plaintiffs. Because validation of a selection criterion is a variant of the first method of attack—a valid test identifies and selects qualified candidates for the job, thus proving the plaintiffs' proxy to be false because it includes unqualified persons—the burden of persuasion should remain on the plaintiffs to convince the court that the employer's test is invalid, that is, that their proxy is the better one.

This analysis shows the Supreme Court has incorrectly allocated to the employer the burden of persuasion on the issue of job relatedness. The Supreme Court wrote in *Griggs*, "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question";[58] and the Court has used words to the same effect in subsequent cases.[59] A correct understanding of the theory of adverse impact proves the Court was in error. This is not to say, however, that the initial burden of production ought not to fall on the employer. To the contrary, it clearly should be the employer's responsibility to offer evidence that a selection criterion is job related. As a theoretical matter, such an offering is an attempt to rebut the plaintiffs' prima facie case, which was persuasive enough to withstand a motion to dismiss. As a practical matter, the employer has better

57. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977) (the population may serve as a proxy for the available work force if the job requires a skill that many persons have or can easily acquire, but "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the qualifications) may have little value").

58. 401 U.S. at 432.

59. Connecticut v. Teal, 457 U.S. 440, 446 (1982); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

access than have the plaintiffs to the relevant evidence. Nevertheless, the ultimate burden of persuasion should remain with the plaintiffs.

The Supreme Court's formula for adverse impact cases—plaintiffs prove prima facie discrimination; employer proves validity of criterion; plaintiffs prove equally useful criterion with less adverse impact—leads to correct results in some cases but not in others. Suppose the plaintiffs successfully prove a prima facie case, and the employer offers no evidence at all. Under the Court's formula, the plaintiffs win because the employer has failed to carry his burden of proving the selection criterion was job related. This result is correct because the employer has not rebutted the judge's initial conclusions that the plaintiffs' proxy is fair and the criterion has an adverse impact on blacks in the proxy. The same can be said if the employer attempts, but fails, to prove the criterion is valid. Now suppose the employer satisfies the judge that the criterion is valid. Under the Court's formula, the employer has carried his burden and wins. This result is also correct because the employer has destroyed the plaintiffs' proxy and shown the absence of adverse impact on blacks in a better proxy. These are easy cases.

The difficult case is the one in which the judge is at sixes and sevens over whose evidence is the more persuasive. This is the case in which allocation of the burden of persuasion is critical—and the case in which the Supreme Court's formula leads to error. Suppose the plaintiffs' evidence has some, but not overwhelming, persuasive force. The employer's evidence falls in the range of indecision: the judge cannot decide whether the test is valid or not. Applying the Court's formula, the judge would think about the prima facie case and the defense as separate matters. She would reason that the plaintiffs had proved a prima facie case—marginal, perhaps, but strong enough to withstand a motion to dismiss. Then, she would continue, the burden shifted to the employer to prove the selection criterion was job related. The employer failed to carry that burden and, therefore, loses. But a correct understanding of the theory of adverse impact reveals the employer should win this case. The issues are three: whether the plaintiffs have identified a fair proxy for the available work force, whether the criterion has a statistically significant adverse impact on blacks in the proxy, and whether the adverse impact is great enough to be legally significant. The employer's evidence on the validity of his selection criterion applied to the first of these issues and created a genuine doubt whether the plaintiffs' proxy was appropriate. If the judge is unsure whether the plaintiffs have established an element of their prima facie case, they must lose.[60]

60. If the burden of persuasion were relevant only in cases in which the evidence is evenly balanced, this issue would be minor. But the author believes that, as a practical matter, the alloca-

5. *Proof of Job Relatedness*

A second problem with the "defense" is a set of issues concerning proof that a test is job related. If a test has an adverse impact, the employer must establish a relationship between success on the test and success on the job.[61] One issue is how to measure success on the job. Productivity may be determined easily for some jobs; for example, if the job is sewing buttons on shirts, productivity may be measured in terms of buttons sewed per hour. But for many jobs, determining productivity is difficult. Many employees perform tasks that do not lend themselves to quantitative assessment. A secretary may not only type, which can be evaluated in pages per day, but also take telephone messages, schedule appointments, and arrange travel, none of which is easily rated quantita-

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tion of the burden of persuasion decides cases in which the evidence is somewhat more probative on one side than on the other.

Let us say the burden of persuasion decides issues that fall within a judge's "range of indecision." Traditional doctrine holds that the range is very narrow, indeed—to attempt a crude quantification—applies only when the needle of belief stands at 50 on a scale of 100 when the standard of proof is preponderance of the evidence. The author believes the range is almost always wider, and it varies with the nature of the case, the issue, the parties, the judge, and perhaps the strength of the evidence on other issues in the case. Further, the author believes that the further outside the range of indecision the judge's belief stands, the more likely are other issues to be affected.

The range of indecision may be quite narrow in some cases. For example, on the issue of timely performance in a breach of contract case between two large businesses before a judge with a background in commercial law, the range of indecision might be 48-52. The range is narrow because all that is at stake is a small fraction of the profits of a large business; the issue can be resolved by more or less objective evidence; and the judge is familiar with this sort of case and has confidence in his or her ability to evaluate the evidence. If the judge evaluates the evidence on timely performance at 53 or higher, the plaintiff will prevail on this issue and, the higher the rating, the greater the probability that other issues will be affected favorably for the plaintiff; similarly for the defendant if the judge's evaluation is 47 or lower. If the evidence falls within the range of 48-52, the defendant wins on this issue because the plaintiff has not carried the burden of persuasion, but other issues will not be affected.

The range could be wide in other cases. For example, suppose a criminal rape case in which a major issue is the consent of the woman. The defendant is a clergyman; the accusing witness is one of his congregants. Intercourse occurred in a hotel room, and the state's evidence did not show any physical injury to the woman. The range of indecision of the same judge who decided the contract case (assuming that beyond reasonable doubt can be quantified as 85) might be 80 to 95. The consequence to the defendant is much more severe in this case than in the contract case; the issue requires a difficult inquiry into two parties' states of mind; the judge is less familiar with this sort of evidence; and the likelihood of consent has been enhanced by other facts in the case.

The author believes that the range of indecision in Title VII cases tends to be wide and shifted in favor of employers. Although discrimination is not criminal, it is shameful; such cases are usually defended vigorously, sometimes out of proportion to the money at stake. Also, judges are often uncomfortable with statistical evidence, and plaintiffs are rarely drawn from society's favored classes. The range of indecision on the appropriate proxy, for example, might average 45 to 60.

61. The relationship may be positive or negative. For example, high scores on a general intelligence test might correlate negatively with success as a pot washer. So long as the employer uses the test results properly, it does not matter whether the correlation is positive or negative. Thus, the employer of pot washers might hire applicants who make low scores on the test. Normally, however, tests are designed and used so that higher scores on the test predict higher scores on measures of job performance, in other words, so that the test, if valid, correlates positively with success on the job. For this reason, the text is cast in terms of positive correlations.

tively. Other employees hold jobs in which success is partly a function of the efforts of the employee and partly a function of the difficulty of the task. One sales representative may write fewer orders than another, yet have a more difficult territory. Supervisory ratings are often used to measure success on the job, but, because human judgment is involved, objectivity becomes problematic. For example, different supervisors may apply varying standards, or apply the same standards in varying ways.[62] Evaluation of success on the job may be more art than science.

Another issue concerning proof of job relatedness is choosing which aspects of the job against which to validate the test. This may not be a problem for a job that requires performing only one task; a spot welder who will be welding the same kind of materials all day long can be tested for ability to weld. Because jobs often require several tasks, however, and because tests typically measure skills that are specific to tasks, an employer must decide which skills to test for. An applicant for the job of science teacher may be tested for knowledge of the subject matter, but the job also requires teaching, counseling, and administrative skills. Assuming that success on the job is measured by a composite of success on each required task, success on a test of subject matter will probably predict only a fraction of a science teacher's total job performance. Should a test that has an adverse impact on blacks be lawful if the test measures only one of several required skills?[63] Also, some skills are more important to a job than others. What standard should govern the choice of skills to be measured?

A third issue is the degree of correlation needed to establish that a selection criterion is job related. The correlation between performance on a perfect test and success on the job is +1.0; the correlation between random selection and success on the job is 0. Suppose an employer proves a +.2 correlation between success on a test and success on the job. Such a result would be likely for a test that accurately measures one of several required skills. The test is somewhat better than random selection and may be the best test available; yet it captures only a small fraction of success on the job. Is this test valid enough?[64]

These issues are interrelated. For example, the reliability of the employer's ratings of job performance may affect the degree of correlation required between success on the test and success on the job: the less reliable the ratings, the higher the needed correlation. The breadth of skills evaluated by a test may also affect the required correlation: the

62. *See, e.g.*, Albermarle Paper Co. v. Moody, 422 U.S. at 429-33.

63. The answer may be yes. *See* United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977), *affirmed without opinion sub nom.* National Educ. Ass'n v. South Carolina, 434 U.S. 1026 (1978).

64. At least one court has suggested that nothing less than a +.3 is acceptable. NAACP v. Beecher, 504 F.2d 1017, 1024 n.13 (1st Cir. 1974).

fewer and less important the skills measured, the higher the needed correlation.

Related to the foregoing issues are the Uniform Guidelines on Employee Selection Procedures.[65] Section 1 states the Guidelines "are designed to assist employers . . . to comply with requirements of Federal law . . . They are designed to provide a framework for determining the proper use of tests and other selection procedures."[66] In fact, however, the Guidelines hamper more than assist. The General Accounting Office reported in 1982 that the level of reading difficulty of the Guidelines, as measured by the amount of education required to understand them, was beyond the doctor of philosophy level.[67]

Moreover, according to the Committee on Psychological Tests and Assessment of the American Psychological Association, "the Guidelines reflect a reliance on and use of measurement theory that does not represent the current state of research and theory in psychological testing."[68] For these and other reasons, the General Accounting Office, together with the Department of Justice, the Office of Personnel Management, and the Department of the Treasury,[69] recommended that the Guidelines be reviewed and revised.

A glance at the Guidelines reveals why so many agencies agree on the need for revision. Section 5 recognizes three varieties of validation strategies: criterion-related, content, and construct studies. A selection criterion (commonly called a test) has criterion-related validity if there is a statistical relationship between success on the test and success on the job or in a training program for the job. Accordingly, an employer attempting to establish criterion-related validity must, first, use a test that can be scored and, second, develop a means of evaluating in quantitative terms the quality of performance of workers on the job. Then the employer must determine whether there is a relationship between success on the test and success on the job. The degree of the relationship is expressed in a correlation coefficient.

A selection criterion has content validity if the test requires an applicant to perform a task or display mastery of a body of knowledge necessary on the job. For example, a would-be carpenter may be given a blueprint and asked to build what it indicates. But even this simple strategy is complicated. The task must be representative of the duties of the job. Also, statistical estimates of the reliability of the selection procedure

65. 29 C.F.R. §§ 1507.1-1607.18 (1984).

66. *Id.* § 1607.18.

67. UNITED STATES GENERAL ACCOUNTING OFFICE, UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES SHOULD BE REVIEWED AND REVISED 10 (1982).

68. *Id.* at 6.

69. *Id.* at 28-29, 32-33. The Department of Labor concurred in part. *Id.* at 24-27. The EEOC did not comment. *Id.* at 12.

are required if feasible. Finally, if applicants do not merely pass or fail the test, but are ranked, the ranking must be validated, too: that is, the employer must demonstrate that a higher ranking on the test leads to a higher ranking on the job.

A selection criterion has construct validity if the test measures a personality trait considered vital to success on the job. For example, an insurance company may be interested in recruiting aggressive, goal-oriented, resourceful sales agents and may attempt to test for the presence of these traits in an applicant. This sort of validation strategy is even more complex and arduous than the first two.

Finally, even if a selection criterion is valid for the class of all persons who take the test, the criterion may be unfair to (particularly small) subclasses of persons who take the test. For example, a test may be valid for whites but not for blacks. If 90 percent of the test-takers are white, the test may satisfy a validation strategy because the effect on blacks is obscured by the weight of the whites' scores. Accordingly, where feasible a test must be validated for fairness (sometimes called differential validity) across classes.[70]

Our purpose at this point is not to criticize the Guidelines. Rather, we seek to point out that the criticisms of the Guidelines, along with the other issues discussed concerning proof of job relatedness, are part of a more general question. That question is, how do we identify the point at which an employer's interest in efficient selection outweighs blacks' interest in equal employment opportunity? Because this question has no ready answer, proof that a test is job-related is another difficult problem growing out of the adverse impact definition of discrimination.

6. *Quotas*

Quotas and adverse impact are practically synonymous. In theory, an employer can win an adverse impact case by proving that the challenged selection criterion is valid. In practice, this burden can almost never be carried, and the result is that employers are forced to hire and promote by quotas.

In *Albemarle v. Moody*, the Supreme Court wrote:

> The EEOC has issued "Guidelines" for employers seeking to determine, through professional validation studies, whether their employment tests are job related. 29 CFR Part 1607. These Guidelines draw upon and make reference to professional standards of test validation established by the American Psychological Association. The EEOC Guidelines . . . constitute "[t]he administrative interpretation of the Act by the

70. The descriptions and characterizations of validation strategies are drawn from § 14 of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.14; *see* B. SCHLEI & P. GROSSMAN, *supra* note 5, at 66-67; Washington v. Davis, 426 U.S. 229, 247 (1976).

> enforcing agency, and consequently they are entitled to great deference." *Griggs v. Duke Power Co.*, 401 U.S. at 433-434.[71]

This language seems innocuous. Does not every rational employer want job-related selection criteria? Without them, hiring and promotion are surely inefficient. Also, would not any employer covered by Title VII seek professional help in determining whether existing selection criteria are valid and, if not, in developing valid criteria? In fact, however, a valid test—one that satisfies the EEOC Guidelines—is today's *rara avis*. This fact has been known for a long time. Consider the 1971 decision in *United States v. Georgia Power Co.*[72] The employer required that employees seeking promotion achieve satisfactory scores on three professionally developed aptitude tests, and blacks scored lower on the tests than whites. Using a technique known as discriminant analysis, the employer conducted a study to determine whether the tests predicted job performance. The study concluded that the tests were valid in many of their applications, and the district court held that "the testing program used by the Georgia Power Company is of significant help to the Company in predicting the job performance of applicants for employment and promotion."[73] The district court refused to follow the EEOC Guidelines, which did not recognize discriminant analysis but only the different technique known as correlation analysis, because "[u]nder this rigid standard, there is no test known or available today which meets the Equal Employment Opportunity Commission requirements for any industry."[74] The court knew that no test could satisfy the EEOC standards because the government conceded the fact: "[T]he rather startling evidence offered by the government was to the effect that there was no test known to exist or yet devised which meets such standards."[75]

On appeal, the district court was reversed for failing to enforce the EEOC Guidelines.[76] The court of appeals said that the Guidelines "undeniably provide a valid framework for determining whether a validation study manifests that a particular test predicts reasonable job suitability. . . . [W]e hold they should be followed absent a showing that some cogent reason exists for noncompliance."[77] The appellate court did not comment on the government's "startling evidence" that no known test met the standards in the Guidelines; apparently, the absence of any such test did not amount to a "cogent reason."

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71. 422 U.S. at 430-31 (footnote omitted).

72. 3 Fair Empl. Prac. Cas. (BNA) 767 (N.D. Ga. 1971), *aff'd in part* and *vacated in part*, 474 F.2d 906 (5th Cir. 1973).

73. *Id.* at 781.

74. *Id.* at 780.

75. *Id.* at 787 n.8.

76. 474 F.2d 906 (5th Cir. 1973).

77. *Id.* at 913.

Lawyers[78] and social scientists[79] know that the Guidelines impose unrealistic standards. Three Justices of the Supreme Court have also recognized that valid tests are almost non-existent. Justice Powell, joined by Chief Justice Burger and Justice O'Connor, dissented in *Connecticut v. Teal*.[80] Referring to "tests that accurately reflect the skills of every individual candidate," the Justices noted that "there are few if any tests that do so."[81]

If a test has an adverse impact, and if the test cannot be validated, the employer must choose from among three alternatives: abandon the test and substitute another valid test; abandon all tests and hire at random; or preserve the test and eliminate its adverse impact. The first alternative is impractical. Another valid test cannot be substituted for the same reason the first test could not be validated: few existing tests can be validated against the standards in the EEOC Guidelines. Moreover, con-

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78.

> If read literally, the 1970 Guidelines set forth requirements for validation so stringent as to effectively preclude almost all use of employment testing. In this regard, Dr. William Enneis, the senior industrial psychologist employed by the EEOC since 1966 and the principal draftsman of the 1970 Guidelines, testified in 1974 that he was aware of only three or four criterion-related validation studies which met all of the requirements of the 1970 Guidelines. Professional criticism of the 1970 Guidelines has been severe. The Psychological Corporation, a respected and long established developer of psychological tests, has taken the position that the 1970 Guidelines are "unreasonable, unrealistic, and unworkable." The Division of Industrial-Organizational Psychology of the American Psychological Association . . . has criticized the rigid application of the 1970 Guidelines as leading to "professionally unrealistic and effectively unattainable requirements."

Booth & Mackay, *Legal Constraints on Employment Testing and Evolving Trends in the Law*, 29 EMORY L.J. 121, 125 (1980).

79. The Committee on Ability Testing of the Assembly of Behavioral and Social Sciences, a division of the prestigious National Research Council, published a report on ability testing. ABILITY TESTS: USES, CONSEQUENCES, AND CONTROVERSIES (A. Wigdor & W. Garner eds. 1982) [hereinafter cited as ABILITY TESTS]. The report stated:

> The policy of the Equal Employment Opportunity Commission is clearly to make the justification of test use as demanding as possible whenever tests result in differential selection.[8] And, as we shall discuss below, the agency has received a good deal of backing for this policy from the courts. . . .

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8. *See, e.g.*, memorandum of David Rose (1976), chief, Employment Section, Civil Rights Division, U.S. Department of Justice [reprinted in Bureau of National Affairs, Daily Labor Reporter (June 22, 1976)]. Rose remarked that the thrust of the EEOC Guidelines was to "place almost all test users in a posture of noncompliance; to give great discretion to enforcement personnel to determine who should be prosecuted; and to set aside objective procedures in favor of numerical hiring."

Id. at 101.

> The striking fact is that most of the decisions [since *Griggs*] have ruled against the challenged tests; no selection program seems to have survived when the *Guidelines* were applied in any detail. . . . Carefully constructed and researched tests . . . seldom withstand legal challenge. Judges are requiring, in the face of evidence of differential impact, a degree of technical adequacy that tests and test users apparently cannot provide. . . . It is disingenious to impose test validation requirements that employers, even with the best will and a sizable monetary investment, cannot meet.

Id. at 105-07.

80. 457 U.S. 440 (1982).

81. *Id.* at 463.

structing and attempting to validate a test is a very expensive proposition, running into the hundreds of thousands of dollars.[82] The second alternative is improbable. Few employers would believe that their selection criteria yield no better results than chance. The third alternative remains. A test that cannot be validated may nevertheless be used under *Griggs* so long as there is no adverse impact; accordingly, an employer need only manipulate the results of the test to ensure that sufficient numbers of blacks pass. As Justice Blackmun foresaw in *Albemarle v. Moody*:

> I fear that a too-rigid application of the EEOC Guidelines will leave the employer with little choice, save an impossibly complex and expensive validation study, but to engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII.[83]

Such manipulation is the obvious explanation of what happened in the *Teal* case. Forty-eight blacks and 259 whites sat for a written examination that was the first of two steps in the promotion process. Twenty-six blacks (54 percent) and 206 whites (80 percent) passed. Thus, the black pass rate was only (54 percent ÷ 80 percent =) 68 percent of the white pass rate. Apparently because more persons passed the test than there were job openings, the process moved into a second step. Those who passed the tests were evaluated primarily on past work performance and recommendations. In this step, the employer applied an affirmative action program, and eleven blacks and thirty-five whites were promoted. Thus, the affirmative action plan yielded dramatic results: (11 ÷ 26 =) 42 percent of the blacks and (35 ÷ 206 =) 17 percent of the whites who passed the test were promoted; so that, in the second step, the black success rate was (42 percent ÷ 17 percent =) almost 250 percent of the white success rate. Overall, 11 of 48 blacks (23 percent) and 35 of 259 whites (14 percent) who sought promotion were successful; therefore, at the bottom line, the promotion rate of blacks was (23 percent ÷ 14 percent =) nearly 170 percent that of whites.[84]

What happened in *Teal* is evident. The employer perceived that the written examination had an adverse impact on blacks. Then, most likely in hopes of averting litigation, the employer applied the malleable criteria of work performance and recommendations so as to counterbalance the adverse impact of the examination. In short, the employer decided how many blacks had to be promoted and made sure that they were. The report of the Committee on Ability Testing indicates that this phenome-

82. According to Daniel E. Leach, who was vice-chair of the EEOC at the time he spoke in 1978, the cost of a criterion-related validity study ranged from $100,000 to $400,000. DAILY LAB. REP. (BNA) at D-4 (Dec. 5, 1978). Content-related studies were considerably less expensive, but hardly cheap.

83. 422 U.S. 405, 449 (1975) (Blackmun, J., dissenting).

84. 457 U.S. at 443 & n.4.

non may be widespread.[85]

Theory points to the same results.[86] Let us suppose an employer is able to validate a selection criterion. Unless every person who satisfies it is awarded the opportunity in question, another criterion must operate to determine which of the persons who satisfied the first criterion will be successful. Thus, even if the diploma requirement had been valid in *Griggs*, doubtlessly an additional criterion came into play, for the Duke Power Company certainly did not have a job for every high school graduate who cared to apply. If the first criterion adequately distinguishes qualified from unqualified persons, in other words, if everyone who satisfies the first criterion is able to do the job, the employer may simply hire the first applicant who satisfies the criterion. In this case, the additional criterion is order of application.

Truly random selection from a group of qualified and interested persons is unobjectionable, but two reasons indicate that an informed employer will avoid random selection. First, what appears to be random may not in fact be so. Order of application, for instance, may seem to be racially neutral, but it could have an adverse impact if whites' access to information about job openings is better than blacks'. Second, even random procedures produce unusual results from time to time. Suppose 1,000 blacks and 1,000 whites, all equally qualified, applied for 100 job vacancies. The employer decided to select according to distance of residence from the plant, a factor that turned out to be random in this case. The employer hired 44 blacks and 56 whites—a result that would happen by chance about 15 percent of the time.[87] The black success rate was less than 80 percent of the white success rate, and the appearance of adverse impact arose. An employer who realizes he cannot anticipate the various ways in which apparently neutral criteria can have an adverse impact, or who does not wish to be whipped by the tail of a binomial distribution, will not hire at random. Rather, such an employer will hire by the numbers. No one is likely to complain. If someone does, the employer can claim to have selected randomly, and the statistics will support the claim.

85.

> Given the repeated failure of tests and other modes of selection to withstand challenge, as well as the pressure from the compliance authorities to achieve a representative work force, it seems probable that many employers will quietly begin to select on the very bases that Title VII disallows . . . but now for the purpose of eliminating the work force imbalances that make them vulnerable to litigation.

ABILITY TESTS, *supra* note 79, at 106.

86. Conceivably, a selection criterion could not only identify qualified applicants, but also rank them in order of their aptitudes. With such a test in hand, an employer could avoid quotas by hiring the top scorer for the first job vacancy, the next best scorer for the second vacancy, etc. But valid rank-order criteria exist more in imagination than in reality.

87. The standard deviation is the square root of (.5) (.5) (100) = 5. Forty-four blacks and 56 whites is slightly more than one standard deviation from the mean. This and more unlikely results occur by chance about 15% of the time.

We have been assuming that all persons who satisfy the first selection criterion are qualified. Although there may be some such cases, in which final selection can be left to chance, there are probably many cases in which the first criterion achieves only a rough cut. In other words, unqualified persons often survive the first step in a selection process. In *Griggs*, for example, a significant number of high school graduates would have been unacceptable workers because they were not physically strong enough to shovel coal all day. In such a case, an employer is unlikely to hire randomly or proportionately. Rather, she will use a second criterion that, like the first, is intended to distinguish qualified from unqualified persons.[88] And, like the first, the second criterion must be valid if it has an adverse impact.[89] The same would be true of a third and additional criteria.[90]

No reason appears to believe that there are any more valid second- or third-step selection criteria than there are valid first-step criteria (of which there are apparently very few), and good reason exists to believe that employers are unwilling or unable to validate advanced-level criteria. The reason is efficiency. Each step in a selection process typically

88. Many criteria are needed for some jobs. For example, a law school searching for a senior professor to fill a vacancy created by the loss of a prestigious member of the faculty might establish the following set of criteria: (1) a law degree (2) from a good school along with (3) some years of private practice in a reputable firm and (4) some years of teaching experience at good schools plus (5) specialization in the appropriate area, as well as (6) many publications (7) that are excellent in quality, in addition to (8) satisfactory teaching ability, (9) solid recommendations from peers, and (10) a widely recognized name.

89. Nothing in the theory of adverse impact or in the decided cases suggests that only the first selection criterion must be valid, and in Connecticut v. Teal, 457 U.S. 440 (1982), the Supreme Court sustained an attack on a second criterion. The plaintiffs were black employees who sought promotion to supervisor. They were not promoted because they failed a written examination, which they challenged because blacks passed it at only 68% of the rate at which whites passed. The examination was not the first criterion in the selection process. Rather, the first criterion was that one had to be an employee in the department in order to sit for the examination.

Perhaps it cannot be said that the Court held in *Teal* that a second criterion must be valid, as the focus of the opinions was on the employer's argument that there was no discrimination because there was yet another step in the selection process and, at the end or bottom line, proportionately more blacks than whites who entered the process were successful. Nevertheless, the rationale of the majority opinion covers second selection criteria. Throughout the opinion, the majority stressed that Title VII protects each individual's right to be considered for an employment opportunity without regard to race. For example, "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race . . .," 457 U.S. at 454, *quoting* Furnco Constr. Corp., v. Waters, 438 U.S. 567, 579 (1978). If the first criterion in a selection process can be illegal because it denies individuals an employment opportunity, a second criterion would be illegal for the same reason: individuals are screened out by invalid standards.

90. Technical reasons also indicate that test validation becomes more difficult after the first step. The sample size is reduced; as a result, there is less statistical power, less chance of finding a significant positive relationship. Also, the range has been restricted; a sample that has been screened (by the first selection criterion) has a diminished chance of revealing a relationship that exists in the total population. Statistical corrections for these problems are possible but mysterious to the uninitiated.

narrows the field by fewer persons than the preceding step.[91] Assuming the cost of validating a criterion is not affected by when it is used in a multi-step selection process, the cost of validating each succeeding criterion returns less benefit per dollar than the cost of validating the preceding criterion. The employer will reach a point at which it is too expensive to validate an additional criterion: the cost of validation will exceed the marginal benefit of identifying the most productive workers from among applicants who have survived the earlier steps in the selection process. The employer could at this point select randomly from the survivors, but, as we have seen above, truly random selection is risky. A prudent employer will hire by the numbers at this point.

Thus, adverse impact leads to quotas. There are few if any first-step selection criteria that are valid under the EEOC Guidelines, yet employers are unprepared to hire and promote at random. The simple solution is to adjust the results on the best criterion available so that enough blacks succeed to avert a showing of adverse impact. Even if a first-step criterion can be validated, the benefit of validating second- and subsequent-step criteria diminishes rapidly. Again, the solution is proportionate selection. As the Committee on Ability Testing wrote: "The policies adopted by the Equal Employment Opportunity Commission are those that would be adopted if the desired effect were to force employers to a quota system to achieve a representative work force."[92]

7. *Costs and Benefits*

Let us now examine the problems that develop if the plaintiffs offer proof of an alternative selection device. Suppose an employer's test has an adverse impact, but success on the test correlates with success on the job. Suppose further that the plaintiffs demonstrate another test has a lesser adverse impact, correlates with success on the job—but costs more to administer than the employer's test. The extreme cases are easy. If the plaintiffs' test costs only a little more than the employer's and the business is large and profitable, surely she should switch to it. If the plaintiffs' test costs so much that using it would put the employer out of

91. A leading law firm that needs an additional associate attorney would begin with the criterion that applicants hold a law degree: this requirement excludes millions of persons. A second criterion may be that holders of law degrees must be graduates of a short list of acceptable schools; this requirement excludes hundreds of thousands of persons. The next criterion may be that graduates of acceptable schools must have served on the law review; this requirement excludes thousands of persons. Another criterion may be that law review editors who have graduated from acceptable schools must be personally compatible with members of the firm; this requirement excludes perhaps hundreds of persons. And a final criterion may be that sociable law review editors who have graduated from acceptable schools must be willing to work for the pittance offered by the firm; this requirement might exclude no one.

92. ABILITY TESTS, *supra* note 79, at 143.

business, surely she should not be required to use the test. But all the cases between the extremes are difficult.

The cases are also more complex. Suppose again that the plaintiffs' test has a lesser adverse impact than the employer's. In addition, there is a +.2 correlation between success on the employer's test and success on the job, whereas the plaintiffs' test correlates at only +.175. The plaintiffs' test, which is somewhat less efficient than the employer's test, would impose on the employer the costs of hiring, training, and discharging additional unsuccessful employees. The cost of using the plaintiffs' test would be relevant as well. How much cost is fair?

Another issue concerns the degree to which the plaintiffs' test diminishes the adverse impact. As before, the extremes are easy. If the employer's test disqualifies all blacks, but the plaintiffs' test disqualifies equal percentages of the races, the plaintiffs' test (other things being equal) is superior. If, on the other hand, blacks pass the employer's test at 79 percent the rate of whites and the plaintiffs' test at 80 percent the rate of whites, the benefit of switching to the plaintiffs' test is insignificant. What should the outcome be if blacks pass the employer's test at 70 percent the rate of whites and the plaintiffs' test at 80 percent the rate of whites?

These issues are interrelated. The degree to which adverse impact is reduced may affect the cost properly imposed on an employer. The general question is the same one we saw in connection with proving job relatedness: where is the point at which the employer's interest in efficient selection outweighs blacks' interest in equal employment opportunity? Plainly, the answer is difficult.

8. Back Pay

A final problem of adverse impact that we will discuss is how to remedy it. Section 706(g) empowers a court to enjoin unlawful employment practices and order additional relief, including back pay. No theoretical difficulty is presented by an injunction levied against a test that has an adverse impact and is not job-related; the employer need simply find another selection criterion. But a serious theoretical difficulty is presented by back pay. On the assumption that only victims of discrimination are entitled to relief, how do we identify which members of the plaintiffs' class were actually disadvantaged by the illegal selection criterion? The answer is that we cannot.

Not every qualified black excluded by an illegal selection criterion is entitled to back pay. In any given case, the available work force could easily include hundreds of blacks and whites who competed for a handful of jobs. Compensation should be awarded only to those blacks who the court determines would have won the opportunity in question but for the

discrimination.[93] Yet such a determination is generally impossible, for we cannot know who would have been successful under a non-discriminatory selection criterion. Plaintiffs will not offer evidence of such a criterion; they can hardly do what their employer could not do, and the court will have no rational way to identify the true victims of discrimination. Even if the employer were required and able to prove the existence of a particular valid criterion, there would be little reason to believe she would have used this criterion instead of some other criterion.[94]

For example, the high school diploma requirement in *Griggs* excluded 88 percent of black men in the state. Of course, only a few members of this group lost jobs they would otherwise have won because Duke Power had only a specific number of job vacancies during the limitations period. Suppose there were 100 such vacancies. Then, if Duke Power had not required a diploma, at most 100 blacks would have been hired. Yet actually there were fewer than 100 black victims of adverse impact discrimination because whites (including some of the 68 percent of white men in the state who lacked diplomas) would have competed for the available jobs and rightfully won a number of them. Perhaps the court could resort to the plaintiffs' proxy for the available work force to determine how many jobs would have been awarded to each race. Because the male population of North Carolina (which is the proxy on which the Supreme Court relied) was three-quarters white and one-quarter black, the court might conclude that blacks would have won (¼ x 100 =) 25 of the jobs.

The next problem is to identify which blacks would have been hired. Should the court ask, who were the 25 best qualified and interested blacks in the state? The difficulty with this question is that the court would have to apply a job-related standard to determine which blacks were the best qualified. Who should bear the cost of developing such a standard—if the task can be done at all? Perhaps the court will conclude the cost belongs on the employer, who has already been found to have discriminated. But whoever bears the burden of developing a valid selec-

93. Other qualified blacks lost the chance to compete for a job they would not have won. They may be entitled to an injunction guaranteeing their right to compete fairly in the future, but they lost no back pay.

94. In a sense, it is theoretically impossible to determine how much money the victim of a wrongful death would have earned during the rest of his life, for we cannot know what the future would have held for this person. Like Gauguin, he might have decided to go to Tahiti. Yet we can be sure the victim was wrongfully killed, and we are willing to award his family what the average person in his position would have earned.

Adverse impact presents the opposite case. We do not know which individuals were the victims of the discriminatory selection criterion. Yet, assuming we know the total number of such persons, we can learn with some precision the amount of money the whites hired in the victims' places actually earned. (Not knowing the identity of the victims, however, we cannot know how much money should be subtracted from an award of back pay by reason of the victims' other earnings or failure to seek suitable work.)

tion standard, there would be no guaranty that Duke Power would have used that particular standard during the limitations period. It is entirely possible that two tests, both valid to some degree, will select different persons.

Should the court ask instead, whom would Duke Power have hired if it had not used the diploma requirement? The hiring officer of the firm might be asked, "If your superior had ordered you to abandon the diploma requirement, how would you have decided whom to hire?" The answer to such a counter-factual question can only be speculative, of course.

Since it is theoretically impossible to identify the victims of Duke Power's discrimination, the court might look for a practical solution. Thus, if 25 jobs should have gone to blacks, and if blacks got only five jobs, the court might apportion the back pay for 20 jobs across the class of plaintiffs. In the alternative, the court might provide each member of the class of plaintiffs an opportunity to appear and demonstrate his right to recover, and the court could award relief (by some standard or other) to the 20 best qualified blacks who appeared. We would be sure that the employer paid her debt to the class of blacks, but we could never be sure that the real victims of discrimination have been made whole. For those reasons, perhaps back pay ought not be awarded in adverse impact cases,[95] and clearly back pay is a thorny issue in such cases.

II
ADVERSE IMPACT AND THE INTENT OF CONGRESS

The theory of adverse impact may not be well understood by the legal community, and administration of the doctrine may entail significant problems; yet if Congress intended to enact this definition of discrimination, the job of the courts would be to explicate the theory correctly and devise solutions for the problems of administration. If, on the other hand, Congress did not intend to enact adverse impact—indeed, considered and rejected its major applications—its theoretical and practical problems are great enough that the courts should seriously reconsider the doctrine. And if it appears that Congress disapproved of behavior to which adverse impact leads, the courts should overrule the doctrine in it entirety.

95. The writer believes that back pay should certainly be withheld in one type of adverse impact case. If the employer uses a validated selection criterion, but the plaintiffs establish the existence of an equally valid criterion that has a lesser adverse impact and is no more expensive than the employer's, the plaintiffs deserve to win the case but not to collect back pay. An employer who uses a validated test should not be penalized because another valid test (of which she was unaware) may exist.

A. The Opinions of the Courts

1. In the District Court: Present Effects of Past Discrimination and Adverse Impact Rejected

The source of the adverse impact definition of discrimination is the action Willie Griggs and others brought against their employer, the Duke Power Company. The case began in the United States District Court for the Middle District of North Carolina, District Judge Gordon presiding.[96] Duke Power generated and distributed electric power.[97] The plaintiffs were members of a class composed of present and future black employees at the Dan River Station,[98] which was located in Draper, North Carolina.[99] Aside from some miscellaneous jobs, the work force at Dan River was divided into five departments: operations, maintenance, laboratory and test, coal handling, and labor.[100] Before July 2, 1965, the effective date of Title VII,[101] black employees at Dan River were allowed to work only in the labor department, which had a lower pay scale than any other department.[102]

In an attempt to improve the general quality of its work force,[103] Duke Power in 1955 made a high school diploma a prerequisite to entering (whether as a new hire or a transferee) all departments except labor,[104] but no person who was employed at the time this requirement took effect was demoted or discharged for want of a diploma.[105] Because blacks were allowed at that time to work only in the labor department,[106] the high school diploma requirement effectively applied only to white employees and applicants.

Beginning on July 2, 1965, Duke Power ended its policy of segregating blacks into the labor department.[107] At this time Duke Power also implemented new hiring rules. To be hired into the labor department, an applicant had to score satisfactorily on the Revised Beta Test.[108] To be hired into any other department, an applicant had to have a high school diploma and score satisfactorily on both the Wonderlic Personnel Test

96. Griggs v. Duke Power Co., 292 F. Supp. 243 (M.D. N.C. 1968), *aff'd in part, rev'd in part and remanded*, 420 F.2d 1225 (4th Cir. 1970), *rev'd in part*, 401 U.S. 424 (1971).

97. *Id.* at 244.

98. *Id.*

99. *Id.*

100. *Id.* at 245.

101. President Johnson signed the Civil Rights Act into law on July 2, 1964. *See* 78 Stat. 241 (1964).

102. 292 F. Supp. at 247.

103. *Id.* at 248.

104. *Id.* at 245. The date 1955 does not appear in the opinion of the district court, but the date is given in the opinion of the court of appeals, 420 F.2d at 1229.

105. 292 F. Supp. at 245.

106. *Id.* at 247.

107. *Id.* at 248.

108. *Id.* at 245.

and the Bennett Mechanical Comprehension Test, Form AA.[109] The inter-departmental transfer policy was not changed; an employee who wanted to change departments needed only a high school diploma.[110]

Evidently, a problem with the new hiring rules developed quickly. Judge Gordon reported that, "at the instigation of employees in the coal-handling department,"[111] Duke Power began in September of 1965 to allow employees who lacked a high school diploma and who were working in the coal handling and labor departments to transfer to other departments by achieving satisfactory scores on the Wonderlic and Bennett tests.[112] This new rule probably grew out of racial discontent. From 1955 to 1965 white coal handlers who lacked a high school diploma were not allowed to transfer to the better departments, and apparently they never protested this rule. But when Title VII took effect, blacks who held high school diplomas[113] were eligible to transfer from labor into departments from which uneducated white coal handlers were excluded, and the latter must have complained. Accordingly, Duke Power allowed persons employed on September 1, 1965 to transfer to other departments, regardless of whether they had a high school diploma, so long as they passed the Wonderlic and Bennett tests.[114]

The plaintiffs claimed the diploma requirement was illegal because it impeded their access to better jobs.[115] In the past, blacks had been discriminatorily restricted to the labor department; thus, if black and white counterparts—both lacking diplomas—had been hired on the same date, the black would have been assigned to labor, whereas the white might have been assigned to a better department. In the future, argued the plaintiffs, if an opening developed in the better department, the white would be eligible to apply for the position, but the black would not be (at least, not without taking the Wonderlic and Bennett tests, which were the target of the plaintiffs' second claim). Judge Gordon rejected this argument, which reflected the "present effects of past discrimination" definition of discrimination.[116] He appreciated that plaintiffs labored "under the inequities resulting from the past discriminatory promotional practices of the defendant,"[117] but he found in the legislative history that Congress "realized the practical impossibility of eradicating all the con-

109. *Id.* at 246.

110. *Id.*

111. *Id.*

112. *Id.*

113. *See id.* at 247.

114. *Id.* at 246. The opinion of the court of appeals confirms that the coal handlers initiated the request for change. 420 F.2d at 1229.

115. 292 F. Supp. at 247.

116. *See* B. SCHLEI & P. GROSSMAN, *supra* note 5, at 29-31.

117. 292 F. Supp. at 248.

sequences of past discrimination."[118] The judge was particularly sensitive to the reach of the present effects definition of discrimination: "It is improbable that any system of classification used by an employer who has discriminated prior to the effective date of the Act could escape condemnation if [the plaintiffs'] theory prevailed, regardless of how fair and equal its present policies may be."[119] Accordingly, he concluded that Title VII must be applied prospectively, no retroactively,[120] and he turned to consider whether the high school diploma requirement was presently discriminatory. He found it was not, as it was intended to upgrade the quality of Duke Power's work force and had been administered fairly since the effective date of the Act.[121] In effect, Judge Gordon adopted the disparate treatment definition of discrimination,[122] which outlaws an act if it is harmful to an employee and the reason for the act is the employee's race. The high school diploma requirement did not offend this definition because the purpose of the requirement was to improve the work force, not to exclude blacks, and fair administration of the requirement confirmed its legitimate purpose.

The plaintiffs' second claim was that the rule of September, 1965, which allowed an employee who lacked a high school diploma to transfer to another department only if he passed the Wonderlic and Bennett tests, was discriminatory.[123] Judge Gordon did not state the plaintiffs' arguments in support of this claim, but they can be inferred from the opinion. Apparently, the plaintiffs first argued the testing requirement was like the diploma requirement in that testing was a burden imposed on blacks (who had to take the tests to enter a better department) that was not imposed on their white counterparts (who were already in the better departments). The judge rejected this argument "for the same reasons expressed previously in the discussion of the high school requirement,"[124] which seems to mean the judge found the tests were not discriminatory because the intent behind them was legitimate, namely, to ensure the quality of the work force, and they had been applied fairly since Title VII took effect.

It appears the plaintiffs also argued the tests were unlawful because

118. *Id.*

119. *Id. See supra* notes 132-42.

120. *See id.* at 248. The judge distinguished Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968), on the ground that the policy attacked in that case "continued the old discriminatory no-transfer policies except that four Negroes were allowed to transfer every six months without effect on their seniority rights." 292 F. Supp. at 249. The transfer restrictions in place at the time of trial served no business purpose, whereas the restrictions in *Griggs* served legitimate purposes. But he added that, if "*Quarles* may be interpreted to hold the present consequences of past discrimination are covered by the Act, this Court holds otherwise." *Id.* at 248.

121. *Id.*

122. *See* International Bhd. of Teamsters v. United States, 431 U.S. at 334 n.15.

123. 292 F. Supp. at 249.

124. *Id.*

they were outside the protection afforded by section 703(h) to "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. . . ." Judge Gordon responded by pointing out that Senator John G. Tower of Texas had introduced an amendment containing this language "to insure the employer's right to utilize ability tests in hiring and promoting employees which practice had been condemned by a hearing examiner for the Illinois Fair Employment Practices Commission."[125] The plaintiffs relied on the Guidelines of the EEOC, in which the meaning of the phrase "professionally developed ability test" was limited to "a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs."[126] The Wonderlic and Bennett tests could not satisfy this Guideline because they "were never intended to accurately measure the ability of an employee to perform the particular job available. Rather, they are intended to indicate whether the employee has the general intelligence and overall mechanical comprehension of the average high school graduate, regardless of race. . . ."[127] The judge found the Wonderlic and Bennett tests were lawful because they measured "qualities which the defendant would logically want to find in his employees,"[128] and the judge had already decided the tests did not discriminate on the basis of race because they had a legitimate purpose and were administered fairly since the Act took effect.

Having decided the diploma and testing requirements did not violate the Act, Judge Gordon dismissed the complaint,[129] whereupon the plaintiffs appealed.[130] Judge Gordon did not expressly rule on the validity of the adverse impact definition of discrimination, and apparently it was not urged on him.[131] Nevertheless, he rejected the heart and soul of

125. *Id.* at 249-50.

126. *See id.* at 250. The Guideline was issued by the EEOC on August 24, 1966. The full text of the Guideline may be found in the DAILY LAB. REP. (BNA) E-1-E-3 (Sept. 7, 1966).

127. 292 F. Supp. at 250. The plaintiffs also attacked the employer's allocation of overtime, *id.*, but their arguments and the judge's ruling have no bearing on the aspects of the case on which this article focuses.

128. *Id.*

129. *Id.* at 252.

130. 420 F.2d 1225 (4th Cir. 1970).

131. A showing of adverse impact begins with proof that proportionately more blacks than whites are disadvantaged by an employer's act. If the plaintiffs had argued the education requirement had an adverse impact, they would have compared percentages of blacks and whites who lacked diplomas. Because Judge Gordon's opinion did not state what percentages of black and white existing or potential employees of the defendant lacked diplomas, we may infer the plaintiffs did not argue the educational requirement had an adverse impact on blacks. Similarly, the opinion did no compare black and white performances on the Wonderlic and Bennett tests, supporting the inference that the plaintiffs did not argue the testing requirement had an adverse impact on blacks.

adverse impact, for he held the diploma and testing requirements were lawful because they were intended to serve a legitimate purpose and were administered fairly. For him, discrimination depended on the reasons for, not the effects of, an employer's act. This point is important, of course, because of the Supreme Court's eventual disposition of the case.

2. *In the Fourth Circuit Court of Appeals*

a. *Judge Boreman for the Majority: Present Effects Adopted But Adverse Impact Rejected*

On appeal, Judge Boreman of the Fourth Circuit, writing for himself and Judge Bryan, found only one error, albeit a significant one, in the decision of the district court. Judge Gordon had refused to accept the present effects of past discrimination definition of discrimination. The leading case recognizing this definition was *Quarles v. Phillip Morris, Inc.*,[132] in which Judge Butzner of the Fourth Circuit, sitting in the district court by designation, was confronted with an employer whose departments once had been segregated by race. Thereafter, strictly limited numbers of blacks were allowed to transfer into the formerly all-white department. Judge Butzner found violations of Title VII because a black who took a job in the better-paying, formerly white department "would find himself junior to white employees holding less employment seniority who got their positions by reason of the company's formerly racially segregated employment policy."[133] Although Judge Gordon in *Griggs* suggested a distinction between *Quarles* and the case before him, more significantly he had rejected the whole present effects definition of discrimination.[134] But the circuit court judges preferred the approach of their own Judge Butzner, whose views had already been adopted by the Fifth Circuit,[135] and held that "present and continuing consequences of past discrimination are covered by the Act."[136]

In applying the present effects definition to the appellants, Judge Boreman distinguished among the named plaintiffs. Ten of them had been hired before the high school diploma requirement was adopted in 1955. Three of these had diplomas at the time of their initial employment and, between the effective date of the Act and the decision of the court of appeals, each had been promoted out of the labor department. One black completed a high school equivalency course shortly before the court of appeals issued its opinion; too little time had elapsed to determine whether he would be advanced without discrimination, but it ap-

132. 279 F. Supp. 505 (E.D. Va. 1968).

133. *Id.* at 514.

134. *See supra* note 120.

135. 420 F.2d at 1230, *citing* United States v. Local 189, United Papermakers and Paperworkers, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

136. 420 F.2d at 1230.

peared to the court that Duke Power was no longer discriminating against blacks with high school diplomas. None of these four blacks received injunctive relief.[137] Six other blacks who had been hired before 1955 lacked high school diplomas.[138] These men the court found were suffering the present effects of past discrimination because they were locked into the labor department, while white employees who similarly lacked high school diplomas were allowed to remain in better departments and could be promoted within those departments.[139] These six blacks, wrote Judge Boreman, were entitled to a waiver of the diploma requirement. They were also entitled to a waiver of the testing requirement, since their white counterparts were not so burdened.[140]

Four blacks remained. They too lacked high school diplomas, but they had been hired after the diploma requirement had been put into place.[141] Whether they were the victims of discrimination depended on whether the diploma and testing requirements were lawful under Title VII,[142] and Judge Boreman proceeded to analyze those requirements under the Act. First, he ruled the employer had a valid business purpose for adopting the diploma requirement.[143] Then he considered whether the testing requirement ran afoul of the Tower amendment.[144] He said there was no evidence that the tests had been administered unfairly, but there was evidence that the tests were professionally developed, reliable, and valid.[145] Apparently, the criterion the judge thought the tests validly measured was the performance of an average high school graduate.[146] But this criterion was inappropriate, argued the plaintiffs, as the EEOC had construed the Tower amendment to authorize only tests that measure ability to do specific jobs,[147] and Judge Gordon had already held in the district court that Duke Power's tests were not job-related.[148] So the question in the court of appeals became, as it had become in the district

137. *Id.* at 1229, 1237. The plaintiffs had not requested monetary relief. *Id.* at 1236 n.9.

138. *Id.* at 1230.

139. *Id.* at 1230-31.

140. *Id.* at 1231.

141. *Id.*

142. *Id.* at 1232-33.

143. The purpose was that Duke Power preferred to train its own employees for supervisory positions; accordingly, it hired only high school graduates, who could have a reasonable expectation of promotion. An expert who had observed the Dan River operation testified without contradiction that a high school education provided training that was needed to perform tasks in the higher skilled classifications. Id. at 1232-33.

144. *Id.* at 1233.

145. *Id.* A test is reliable if it consistently produces the same results. A test is valid if it accurately measures the criterion the test is designed to measure.

146. "The minimum acceptable scores used by the company are approximately those achieved by the average high school graduate, which fact indicates that the tests are accepted as a substitute for a high school education." *Id.* at 1233.

147. *Id.*

148. *Id.* at 1234.

court, whether or not to adopt the EEOC's interpretation of the Tower amendment, and, as the district court had done, the court of appeals rebuffed the Commission. Relying on legislative history, Judge Boreman concluded that the Tower amendment to section 703(h) was intended to protect general intelligence and ability tests, so long as they were fairly administered and acted upon.[149]

The court of appeals also rejected the adverse impact definition of discrimination. In deciding whether the diploma and testing requirements were lawful, Judge Boreman focused on Duke Power's state of mind. He noted the diploma requirement had a legitimate motive, namely, facilitating the internal promotions policy.[150] He was convinced that the date of establishment of the diploma requirement (1955, when overt job segregation was still lawful, so that covert means of discrimination were unnecessary), the adverse effect of the diploma requirement on whites as well as blacks, and Duke Power's willingness to reimburse black employees for their expenses in completing their educations, proved the requirement was not meant to discriminate against blacks. And he found further evidence of good faith in Duke Power's fair post-Act hiring, promotion, and transfer behavior.

This focus is important. The plaintiffs had urged the court to adopt an essentially objective standard to decide whether the diploma and testing requirements were proper. On such a standard, the requirements would have been lawful only if they measured ability to do a job, as opposed to measuring "the extent to which persons have acquired educational and cultural background which has been denied to Negroes."[151] In other words, by the plaintiffs' standard, selection criteria which excluded proportionately more blacks than whites (as Duke Power's did) would have been illegal unless the criteria predicted success on the job. This standard reflected the adverse impact definition of discrimination but, like Judge Gordon of the district court, Judge Boreman of the court of appeals rejected adverse impact. For him, Duke Power's liability turned on whether the diploma and testing requirements were chosen in a good-faith attempt to serve legitimate business purposes or in an attempt to disadvantage black people.[152] That the requirements seemed to

149. *Id.*

150. The judge gave no examples of illegitimate motives, but some obvious ones would have been to give the better jobs to whites, to placate white employees who refused to work with blacks, or to satisfy customers' taste for segregation.

151. 420 F.2d at 1232 (quoting from the appellants' brief).

152. In a concurring and dissenting opinion, discussed in the next section, Judge Sobeloff expressed the same view of Judge Boreman's approach to the issues:

> Distilled to its essence, the underpinning upon which my brethren posit their argument is their expressed belief in the good faith of Duke Power. For them, the crucial inquiry is not whether the Company can establish business need, but whether it has a bad motive or has designed its tests with the conscious purpose to discriminate against blacks.

Id. at 1245-46 (Sobeloff, J., concurring in part and dissenting in part).

be reasonable steps towards legitimate business purposes was an indication of the employer's state of mind. Ultimately, the issue turned on the nature of the employer's judgment, not the court's.

b. *Judge Sobeloff, Concurring and Dissenting: Adverse Impact Endorsed*

Judge Sobeloff concurred with Judges Boreman and Bryan regarding the four blacks who had completed high school and the six who had been hired before 1955; he too accepted the present effects definition of discrimination. But he dissented regarding the four blacks who had been hired after the educational requirement had been implemented. Saying of Title VII, "[t]he statute is unambiguous,"[153] he approved of the adverse impact definition of discrimination because "the statute interdicts practices that are fair in form but discriminatory in substance."[154] He continued, "The critical inquiry is *business necessity* and if it cannot be shown that an employment practice which excluded blacks stems from legitimate needs the practice must end."[155]

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153. *Id.* at 1238.

154. *Id.*

155. *Id.* (emphasis in original). Judge Sobeloff cited three cases in support of this conclusion, but none relied on adverse impact. The first case was Quarles v. Philip Morris, 279 F. Supp. 505 (E.D. Va. 1968), in which strictly limited numbers of blacks were allowed to transfer from the formerly black department to the formerly white department. As mentioned in the text above, *Quarles* is the leading present effects case, but it is not an adverse impact case. *See supra* notes 132-34 and accompanying text. Judge Butzner expressly framed the issue as, "Are present consequences of past discrimination covered by the act?" *Id.* at 510. And he answered this question by saying, "The plain language of the act condemns as an unfair practice all racial discrimination affecting employment without excluding present discrimination that originated in seniority systems devised before the effective date of the act." *Id.* at 515. *Quarles* could have been an adverse impact case. That definition is broad enough to include most present effects cases. Thus, Judge Butzner could have held that Philip Morris's seniority system had an adverse impact on blacks and was not justified by business necessity; but he did not. And, whereas adverse impact generally includes present effects, the converse is not true: adverse impact reaches many cases in which the present effects of past discrimination are not at issue. For example, consider an employer who opens a new business and requires of applicants that they have attained a certain level of education, a certain height and weight, or a certain score on a paper-and-pencil test. Any of these practices may well have an adverse impact on a class protected by Title VII, yet none of the persons who are adversely affected was ever an employee of this employer, so none could claim to suffer the present effects of past discrimination. Accordingly, the substantive contents of the present effects and adverse impact definitions of discrimination are not congruent, and a court that expressly adopts the former does not impliedly adopt the latter. *Quarles*, therefore, provided no authority on which Judge Sobeloff could properly base his adoption of the adverse impact definition of discrimination.

The second case cited by Judge Sobeloff, Local 189, United Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), was also a present effects case. As in *Quarles*, there had been segregated lines of progression, and the issue was the appropriate way for blacks to enter the formerly white domain. The third case on which Judge Sobeloff relied was Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969), in which the union accepted as new members only the sons or nephews of present members. Because of discrimination before Title VII took effect, all present members were white. (This fact was implied by the court of appeals and expressly stated by the district court, 294 F. Supp. 368, 371 (E.D. La. 1967).) This case might

Having committed himself to adverse impact, Judge Sobeloff proceeded to apply it to the facts of *Griggs*. The first step was to establish that the high school diploma and testing requirements favored whites. He showed favoritism in the diploma requirement by citing 1960 data indicating that 34 percent of white males in North Carolina had completed high school, as compared with 12 percent of black males.[156] As for the testing requirement, the judge apparently lacked data on the specific forms of the Wonderlic and Bennett tests used by Duke Power;[157] nevertheless, he cited a law review article that argued that blacks generally scored lower than whites on standardized tests,[158] and he mentioned an EEOC decision concerning an employer who administered a battery of tests passed by 58 percent of the whites, but only 16 percent of the blacks, who took it.[159] As proof of the combined effect of the diploma and testing requirements, the judge said, "Whites far overwhelmingly better than blacks on all the criteria, as evidenced by the relatively small promotion rate from the Labor Department since 1965."[160] The Supreme Court relied on this proof, and our observations on it appear below.

The next step in establishing adverse impact is to prove a causal connection between the plaintiffs' race and their treatment by their employer. This step is necessary because Title VII was plainly not meant to outlaw all discrimination that may affect employment. For example, the Act was not intended to prohibit an employer from hiring his white brother-in-law instead of a better qualified black applicant. Rather, it is clear in the language of sections 703(a)(1) and (2) that Title VII outlaws only discrimination against an individual "because of such individual's race." Judge Sobeloff apparently articulated the causal link he thought

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perhaps have served as precedent for the adverse impact definition, were it not for the court's finding that the nepotic rule had been adopted for the purpose of excluding blacks. Also, in light of the defeat of an amendment specifically designed to prohibit nepotic admissions practices, *see infra* notes 360-61 and accompanying text, the decision seems erroneous. Accordingly, none of the cases cited by Judge Sobeloff supported the adverse impact definition of discrimination.

156. 420 F.2d at 1239 n.6 (Sobeloff, J., concurring in part and dissenting in part).

157. *Id.*

158. Cooper & Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1638-41, *cited at* 420 F.2d at 1239 n.6.

159. 420 F.2d at 1239 n.6. The interested reader will find it difficult to locate the EEOC decision. The citation given by Judge Sobeloff (CCH Empl. Prac. Guide ¶ 1209.25) now leads to discussion of another matter. The Supreme Court also cited this decision, 401 U.S. at 430 n.6, but that citation (CCH Empl. Prac. Guide ¶ 17,304.53) no longer leads to anything in print. Fortunately, a photocopy of the Commerce Clearing House report of the EEOC decision was appended to the Brief for Petitioner in the Supreme Court, and briefs in the Supreme Court are privately published. (One such publication is entitled Law Reprints, Labor Series, v. 4, no. 4, 1970/1971 Term, and the CCH report of the EEOC decision may be found at pp. 285-86.) The CCH report does not contain the full text of the EEOC's decision, but the report does reprint the information to which the courts referred.

160. 420 F.2d at 1239 n.6.

necessary when he wrote, "Since for generations blacks have been afforded inadequate educational opportunities and have been culturally segregated from white society, it is no more surprising that their performance on 'intelligence' tests is significantly different from whites' than it is that fewer blacks have high school diplomas."[161] Thus, the judge reasoned that Duke Power failed to promote the plaintiffs because of their race in that race caused blacks' segregation and inadequate education, which caused blacks to lack diplomas and score poorly on tests, which caused blacks to fail to satisfy Duke Power's requirements for promotion.

The final step in adverse impact analysis is to decide whether the selection criteria that favor whites over blacks because of race are justified by business necessity—that is, are job related or predict success on the job. Before taking this step, however, Judge Sobeloff addressed the argument that Duke Power's tests were protected by the Tower amendment, regardless of whether they were job related, because the amendment requires only that tests be professionally developed and not designed, intended, or used to discriminate. The judge rejected this argument because the EEOC Guidelines interpreted the Tower amendment as applying only to job-related tests,[162] and he offered five reasons for accepting the Guidelines. First, he said, the interpretation of a statute by the agency charged with the statute's administration is entitled to great deference in the courts.[163] Second, the EEOC's interpretation made good sense because a professionally developed test that is appropriate for one job (for example, a typing test for a secretary) might be inappropriate for another job (for example, a teacher).[164] Third, the majority's reading of the Tower amendment invited employers to evade the Act by choosing tests that favored whites and were irrelevant to job performance.[165] Fourth, the judge stated that other courts had reached similar results, and finally he said the Guideline was in conformity with congressional intent.[166]

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161. *Id.* at 1240.

162. *Id.*

163. *Id.* at 1240-41.

164. *Id.* at 1241.

165. *Id.*

166. *Id.* None of Judge Sobeloff's reasons is persuasive. Administrative interpretations are entitled to great deference only if they express the intent of Congress. That Congress did not intend to outlaw adverse impact is shown below. *See infra* notes 210-571 and accompanying text. An employer who uses a typing test to select a teacher may act irrationally, but Title VII is not a law against stupidity. An employer who attempts to evade the Act by choosing tests that favor whites is engaged in disparate treatment, which is illegal regardless of whether adverse impact is illegal.

Finally, Judge Sobeloff said that other courts had reached results similar to the EEOC's position. It appears he used "similar" loosely. He cited three cases: Quarles v. Philip Morris, 279 F. Supp. 505 (E.D. Va. 1968), United States v. Local 36, Sheet Metal Workers, 416 F.2d 123 (8th Cir. 1969), and Dobbins v. Local 212, Elec. Workers, 292 F. Supp. 413 (S.D. Ohio 1968). All of these

Having accepted the Guidelines, Judge Sobeloff turned to the question of whether Duke Power's tests were job related. The district court had found they were not, and the testimony of Duke Power's expert proved only that the tests determined if the subject had the ability of a high school graduate. In response to the argument that more intelligent employees were needed at the entry level so they could be promoted to higher jobs, the judge said the company had not shown its selection criteria were related to any job at all.[167]

Although Judge Sobeloff's views may not have persuaded his colleagues on the court of appeals, his reasoning apparently did influence the Justices of the Supreme Court, for the Court's unanimous[168] opinion followed the line of argument and incorporated the principal reasons Judge Sobeloff had advanced.

3. *In the Supreme Court: Adverse Impact Adopted*

Chief Justice Burger delivered the opinion of the Supreme Court. The opinion opened by accepting the adverse impact definition of dis-

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cases were decided under the present effects definition of discrimination, so their precedential value in an adverse impact context is uncertain. *Quarles* offered Judge Sobeloff the most support, holding that numerical restrictions on transfers from a formerly black department to a formerly white department were illegal. The judge quoted a sentence from the *Quarles* opinion: "The restrictions do not result from lack of merit or qualification." 279 F. Supp. at 513, *quoted at* 420 F.2d 1241. This language suggests that business necessity might have justified the transfer restrictions. No other possible defense was mentioned in the opinion, which may imply the belief that no other defense was possible. Therefore, because discrimination can be established under both the present effects and the adverse impact definitions without proof that the defendant had a specific intent to disadvantage blacks, the suggestion in *Quarles* that only business necessity would be a defense to a prima facie showing of present effects discrimination is, by analogy, a (faint) suggestion that only business necessity (for example, a job-related test) would be a defense to a prima facie showing of adverse impact. But the adverse impact definition applies to many more cases than the present effect definition, leading one to suspect that more defenses might be appropriate under the former, broader definition. The analogy to *Quarles* is at best weak.

Local 36, Sheet Metal Workers is not analogous at all. The opinion of course contained the language Judge Sobeloff quoted: "it is essential that journeyman's examinations be objective in nature, that they be designed to test the ability of the applicant to do that work usually required of a journeyman. . . ." 416 F.2d at 136, *quoted at* 420 F.2d at 1241. However, the defendant union to which this language applied had deliberately excluded blacks from membership, and one of the union's techniques was a subjective test that had no definite passing score and was administered by one man, whose decision was not subject to review. The court's requirement of an objective, job-related test in these circumstances says nothing about whether a test must be job-related if the disadvantage to blacks was not effected purposefully.

As for *Dobbins*, of which Judge Sobeloff said merely, "Accord," 420 F.2d at 1241, the court made abundantly clear (in a most refreshing style) that the defendant union had deliberately administered tests so difficult that no one, black or white, could pass them (except for three "Einsteins," of whose success the court seemed suspicious), and the union's purpose for giving such hard tests was to discourage blacks from pursuing membership. As in the *Sheet Metal Workers* case, the holding that the defendant had acted out of a motive to disadvantage blacks destroys any value *Dobbins* might have as precedent for a case like *Griggs*, in which there was no intent to disadvantage blacks.

167. 420 F.2d at 1243-44.

168. Justice Brennan took no part in the case. 401 U.S. at 436.

crimination.[169] Because adverse impact was a new way of defining dis-

169. *Id.* at 429-30. One may question how clearly the Court perceived the adverse impact definition. The first sentence of the opinion read:

> 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.

Id. at 425-26 (footnote omitted). Clauses (a) and (b) of this sentence are sufficient to define adverse impact; clause (c) is superfluous. But it is more than superfluous: for, by referring to a "longstanding practice of giving preference to whites," clause (c) incorrectly implies that purposeful discrimination in the past is a necessary element of adverse impact.

The same error occurs later in the opinion. After giving the facts of the case and the holdings below, the Court stated: "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory practices." *Id.* at 430. This sentence is a good statement of the present effects definition of discrimination, under which past discriminatory practices (such as segregation into an all-black department) may not be allowed to disadvantage blacks after the effective date of the Act. The sentence is a poor statement of the adverse impact definition, under which a selection criterion (such as a written test used for entry-level hiring) may be illegal because of its disproportionate exclusion of blacks whom an employer has never met, let alone discriminated against in the past.

Based on these sentences, it may be argued that the Supreme Court did not intend to adopt the adverse impact definition in *Griggs*. The foregoing passages notwithstanding, the intent to adopt adverse impact is evident from other statements in the opinion and the precise holding of the case.

Two other passages in the opinion reveal that the Court intended to accept the adverse impact definition of discrimination. An accurate statement of this definition is contained in this passage: "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." *Id.* at 431. The following sentence, though less precise, also defines adverse impact correctly: "[G]ood 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." *Id.* at 432.

The holding of the case also demonstrates that the Court meant to adopt adverse impact. The writ of certiorari was limited to the adverse impact claim. As we have seen, the court of appeals divided blacks without diplomas into two groups, those who had been hired before the diploma requirement was established and those who had been hired afterwards. The former group was afforded relief under the present effects definition; the latter group was denied relief because the appellate court rejected the adverse impact definition. The employer did not seek review of the holding in favor of the former group. The latter group petitioned for certiorari, framing the question as whether Title VII was violated by the use of selection criteria that excluded a disproportionate number of blacks and were not job related. Petition for Writ of Certiorari, at 2. Thus, the Supreme Court noted that the court of appeals had held the diploma and testing requirements were lawful because, "in the absence of a discriminatory purpose, use of such requirements was permitted by the Act. In so doing, the court of appeals rejected the claim that because these two requirements operated to render ineligible a markedly disproportionate number of Negroes, they were unlawful under Title VII unless shown to be job related." 401 U.S. at 429 (footnote omitted). In the next sentence, the Court wrote, "We granted the writ on these claims." *Id.*

The petitioners were victorious in the Supreme Court. They were blacks who lacked diplomas and were hired after the diploma requirement was established. They were not suffering the present effects of past discrimination because their white counterparts, who also lacked diplomas and were hired after the diploma requirement was established, were similarly restricted to the labor department unless they passed the tests. The Supreme Court was fully aware of these facts. *See id.* at 424 n.4. The court of appeals, which accepted present effects but not adverse impact, denied the petition-

crimination,[170] a reader might expect to find a serious effort in the opinion to justify the Court's acceptance of this definition. But instead of

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ers any relief because they were not suffering the present effects of past discrimination. 420 F.2d at 1235-36. Accordingly, when the Supreme Court wrote, "The judgment of the Court of Appeals is, as to that portion of the judgment appealed from, reversed," 401 U.S. at 436, the Court held a cause of action was proved by blacks who had experienced neither disparate treatment nor present effects of past discrimination, but who had suffered the adverse impact of the diploma and testing requirements.

170. B. SCHLEI & P. GROSSMAN, 2d ed., *supra* note 8, at 5 n.12, point out that *Griggs* was foreshadowed by Gregory v. Litton Sys., Inc., 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd as modified*, 472 F.2d 631 (9th Cir. 1972). The employer refused to hire persons who had been arrested for crimes other than minor traffic violations (regardless of whether the applicants had been convicted). The court held for the plaintiff because it found that blacks were arrested more often than whites, and there was no proof that persons who have been arrested but not convicted make less efficient or honest employees.

Blumrosen, *Strangers in Paradise*: Griggs v. Duke Power Co. *and The Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 71 n.46, claimed that several cases foreshadowed adverse impact, but most of the cases Blumrosen cited were based on the present effects definition of discrimination. Quarles v. Philip Morris, 279 F. Supp. 505 (E.D. Va. 1968); *see supra* notes 155, 166 and accompanying text. Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968); *see supra* note 166 and accompanying text. Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *see supra* note 155 and accompanying text.

In Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970), cited by Blumrosen, a black was denied employment because of negative recommendations from previous employers. He brought a class action and established that, as of the time of his charge to the EEOC, less than two percent of the defendant's employees were black, whereas blacks comprised nearly twenty-two percent of the population of the state. The court held that these statistics proved a violation of Title VII as a matter of law. This holding obviously ran counter to the clear language of §703(j); nevertheless, even if the holding were correct, it would provide scant basis for the claim that the case anticipated adverse impact. Another aspect of the case came closer. The defendant relied on present employees to refer applicants for vacant jobs. Because most existing employees were white, most applicants were white. We can easily see from today's perspective that this policy had an adverse impact on blacks, but the court's rationale for disapproving the policy was that it produced present discrimination by building on pre-Act bias.

A similar case Blumrosen cited is Clark v. American Marine Corp., 304 F. Supp. 603 (E.D. La. 1969). (The article mistakenly cites the opinion at 297 F. Supp. 1305 (E.D. La. 1970), which dealt only with class certification.) The pertinent issue in *Clark* was that the employer hired at the gate without publicly announcing or advertising openings. As the result of this practice, news of job openings spread by word of mouth primarily to whites. The court did not discuss adverse impact, however; rather, the court specifically held the defendant's conduct was deliberately intended to discriminate against blacks.

Blumrosen cited *Gregory*, which is appropriate. He also appropriately mentioned Hicks v. Crown Zellerbach Corp., 319 F. Supp. 314 (E.D. La. 1970). (The article mistakenly cites the opinion at 310 F. Supp. 537 (1970), which dealt only with racially segregated local unions.) The employer in *Hicks* required applicants and employees desiring to transfer to better jobs to pass written tests, which whites passed at substantially higher rates than blacks. Although the court relied for authority on present effects cases, the opinion explicitly stated that tests, though not adopted to disadvantage blacks, are illegal if they operate to prefer whites over blacks unless the tests are justified by business necessity. (This holding should come as no surprise to the reader; the plaintiffs were represented by Cooper and Sobel, who represented the plaintiffs in *Griggs*.)

Thus, the Supreme Court's 1971 decision in *Griggs* was anticipated by two district court opinions in 1970. Although the statement in the text that adverse impact was a new way of defining discrimination must be qualified to this extent, it remains basically true that adverse impact, like Pallas Athena from Zeus, sprang full grown from the mind of the Supreme Court.

citations to legislative history or precedent or even legal theory, one finds only a few undocumented assertions. For example:

> 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.[171]
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> * * * *
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> 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 to burden of showing that any given requirement must have a manifest relationship to the employment in question.[172]

The Court cited not a line in a committee report, not a colloquy on the

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171. 401 U.S. at 431.

172. *Id.* at 432 (emphasis in original). Most of the Court's other assertions about the Congressional intent to prohibit adverse impact were equally unsupported by argument or authority:

> Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory practices.

Id. at 430.

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

Id. at 431.

> [G]ood 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.

Id. at 432. Perhaps the Court believed that repeating a proposition many times can substitute for proving it.

One passage in the opinion, however, offered an argument to show that Congress intended to outlaw adverse impact:

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

Id. at 429-30. There are two problems with this argument. In the first place, it places far too much weight on the term "equality of opportunity," which appears in the title but not the text of the Act. In the second place, we can assume the truth of the first two sentences just quoted, and still it does not follow that Congress intended to outlaw adverse impact. The Court's argument assumed that equality of opportunity has a clear and settled meaning. In fact, of course, the term is ambiguous. It can mean anything from a chance to file an application to a strictly enforced ratio. Therefore, the Court's attempt to infer the means (proscribed conduct) from the ends (equality of opportunity) was bound to fail. It would have been much better to have reversed the process. The correct interpretation of equality of opportunity depends on the specific conduct that Congress chose to prohibit. If Congress intended to outlaw only disparate treatment, equality of opportunity would mean freedom from intentional disadvantage because of race.

floor of either house of Congress, not the testimony of a witness before a committee, not even the report of a journalist in a newspaper. The reason is that no such evidence exists. Indeed, there is overwhelming evidence that Congress did not intend to legislate adverse impact, as will appear below.

Having adopted the adverse impact definition of discrimination, the opinion briefly noted the evidence that Duke Power's diploma and testing requirements disproportionately disadvantaged blacks. Regarding the diploma requirement, a footnote recited the 1960 census data showing that 34 percent of the white males in North Carolina but only 12 percent of the black males had completed high school.[173] The Court did not explain why it chose to compare the absolute rates of success of blacks and whites in the total population on the diploma criterion. As shown above, other comparisons were possible, and the way a comparison is made can be important.[174] Nor did the Court reveal the standard it used to determine that the disparity between 34 percent and 12 percent was legally significant. Perhaps the Court believed the standard need not be stated because any disparity would be significant; or perhaps the Court believed that a small disparity might not be significant, but this one was large enough, and the line could be drawn in future cases.[175]

The evidence the Court accepted to prove that the testing requirement had an adverse impact is startling. The opinion stated:

> Similarly, with respect to standard tests, the EEOC in one case found that use of a battery of tests, including the Wonderlic and Bennett tests used by the Company in the instant case, resulted in 58% of whites passing the tests, as compared with only 6% of the blacks.[176]

Apparently, there was no evidence in the trial court that the blacks who took Duke Power's tests fared less well than whites. Also, the battery of tests in the EEOC decision apparently included tests besides the Wonderlic and Bennett, so that there was no evidence that any blacks scored below whites on the set of tests actually used by Duke Power.[177] Accord-

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173. *Id.* at 430 n.6.

174. *See supra* notes 46-54 and accompanying text. As a further illustration, suppose 1,000 blacks and 1,000 whites apply for jobs by taking a written test, and 15 blacks and 50 whites pass and are hired. The white success rate is (50 ÷ 1,000 =) 5%, the black success rate is (15 ÷ 1,000 =) 1.5%, and the absolute difference of success rates is (5% - 1.5% =) 3.5%—which is much less than the absolute difference of (34% - 12% =) 22% in *Griggs*. But looking at relative success rates reveals another picture. In our example, the black success rate is (1.5% ÷ 5% =) 30% of the white success rate, and this disparity is greater than the one in *Griggs*, where the black rate was (12% ÷ 34% =) 35% of the white rate. Thus, the way a disparity is calculated is an important question.

175. As noted above, the most widely used comparison today is between relative rates of success. It is generally considered that a disparity is significant unless the black success rate is four-fifths or 80% percent of the white race. In *Griggs*, the black rate was only (12 ÷ 34 =) 35% of the white rate.

176. 401 U.S. at 430 n.6 (citation omitted).

177. The EEOC decision involved a respondent/employer that allowed employees who passed

ingly, an employer was held liable because a battery of tests used by another employer had an adverse impact on blacks who applied for work at another company! Although it may be true that blacks tend to achieve lower grades than whites on standardized tests, considerations of due process surely require that a defendant be held responsible for his own behavior, not that of others.

In the next step of its argument, the Court dealt with the issue of causation. As noted above, the Act clearly requires proof of a causal link between the plaintiffs' race and what happened to them. Therefore, it was not sufficient for the Court to state merely that the plaintiffs failed to satisfy Duke Power's selection criteria while some whites passed the criteria. It was necessary for the Court to establish that the plaintiffs' failure was caused by their race. The Court essayed to establish such a causal connection in these words:

> The Court of Appeals' opinion, and the partial dissent, agreed that, on the record in the present case, "whites register far better on the Company's alternative requirements" than Negroes. This consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in *Gaston County* v. *United States*, 395 U.S. 285 (1969). 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.[178]

Containing express and implied claims, the reasoning in this argument was more complex than may appear on the surface.

The argument began with the implied claim that the "basic intelligence" of blacks was equal to that of whites. An unstated implication of this claim was that, other factors being equal, blacks would achieve equal

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certain tests to transfer from dead-end jobs, held chiefly by blacks, to line-of-progression jobs, held chiefly by whites. All employees wishing to transfer had to pass the Wonderlic Personnel Test, Form A (one cannot determine from the courts' opinions or the briefs in the Supreme Court which form of the Wonderlic Test was used at Duke Power) and, depending on the specific jobs the employees sought, one or two other tests, one of which was the Bennett Test of Mechanical Comprehension, Form AA. It appears from the EEOC decision that no employee took only the Wonderlic and Bennett tests given by Duke Power, and this is another reason why the statistics regarding the respondent before the EEOC cannot be applied to the employer in *Griggs*. A third reason is that the employees who took the test in the EEOC decision cannot be considered a random sample. In consequence, the EEOC decision shows only what happened to one group of people, taking a different combination of tests, at one point in time.

178. *Id.* at 430 (footnote and citation omitted). Judge Sobeloff had relied on the same reasoning in the court of appeals: "Since for generations blacks have been afforded inadequate educational opportunities and have been culturally segregated from white society, it is no more surprising that their performance on 'intelligence' tests is significantly different from whites' than it is that fewer blacks have high school diplomas." 420 F.2d at 1239, n.6.

success with whites in graduating from high school and in taking aptitude tests. We can accept the truth of these claims without hesitation.

Another implied claim was that quality of education accounted for the differences in black and white graduation rates and test scores. This claim might be questioned. For example, environmental factors like family wealth and social norms would also seem to affect graduation rates. Nevertheless, we can accept the truth of this claim if we believe that quality of education is probably the single most important determinant of graduation rates and test scores.

Then came three express claims. The first was that the education provided to the plaintiffs was inferior to the education provided to whites. Although the Court's proof of this claim was questionable,[179] the claim was in all probability true. The second express claim was that the cause of the plaintiffs' inferior education was their race. No proof was offered for this claim, but, in light of American history, the claim seems accurate in the sense that racial prejudice led to inferior education for blacks. The third express claim was that the plaintiffs were less successful than whites on Duke Power's selection criteria. The evidence supporting this claim has been discussed above.

The Court's argument on causation may be summarized as follows: Duke Power discriminated against the plaintiffs because of their race in that race caused the plaintiffs' inferior education; inferior education caused the plaintiffs to lack diplomas and score poorly on tests; and lack of diplomas and poor test scores caused Duke Power to reject the plaintiffs' applications. We may accept the truth of each of these claims, and nevertheless entertain reservations about the Court's reasoning. In particular, we will focus below on the notion of causation implied in this argument. We will see the Court adopted a theory of causation that is unusual in the law and was not intended by Congress.

The prima facie case of adverse impact discrimination was now in place: selection criteria disadvantaged proportionately more blacks than whites because of the blacks' race. Therefore, ruled the Court, the burden shifted to the employer to prove that the criteria were job related. The Court asseted that Congress intended the employer to carry this burden: "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employ-

179. The proof of the claim rested on a mischaracterization of *Gaston County*. The last sentence of the quotation above conveyed the impression that this case held that all blacks in North Carolina had received inferior education. Such a holding, of course, would have included the plaintiffs in *Griggs* (assuming they were educated in North Carolina). But in fact the case held only that blacks educated in Gaston County had received inferior education. Gaston County v. United States, 395 U.S. 285, 288, 293-96 (1969). Because Draper was more than 100 miles northeast of Gaston County, it is unlikely that the plaintiffs in *Griggs* had been educated there. Thus, there appears to have been no proof that the plaintiffs had received an inferior education.

ment in question."[180] This statement is troubling because of the language of the Act, its legislative history, and the theory of adverse impact.

First, let us consider the language. The sections that define conduct outlawed by the statute (sections 703(a), (b), (c), and (d), and 704(a) and (b)) all begin with the phrase, "It shall be unlawful employment practice. . . ." The sections that define conduct exempt from the statute (sections 703 (e)(1) and (2), (g), and (h)) all contain the phrase, "it shall not be an unlawful employment practice. . . ." These sections amount to a lengthy definition of discrimination that specifically includes some conduct and specifically excludes other conduct. Use of a professionally developed ability test, for example, "shall not be an unlawful employment practice." Such a test is simply not discriminatory under Title VII. Therefore, proof that a test meets the standards of section 703(h) is not a defense, but a demonstration that the employer's conduct was lawful *ab initio*. Analogous to evidence in an action for battery that the defendant never touched the plaintiff, proving that an employer's test meets the requirements of section 703(h) is not an excuse for discrimination, but proof that discrimination never occurred.

Legislative history confirms this interpretation of the Act. The "defenses" relevant to the argument of this article are contained in section 703(h), which protects seniority systems and ability tests. As first passed by the House of Representatives, the civil rights bill was silent on these practices.[181] This silence should not be mistaken for an absence of intent, however. All the proponents of the bill in the House agreed that seniority systems would not be endangered.[182] The issue of ability tests did not arise until the House sent the bill to the Senate.

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180. 401 U.S. at 432. This sentence not only indicated that the employer carries the burden, but also characterized the nature of the burden: the employer must prove the requirement has a manifest relationship to the employment in question. In other places in the opinion, the burden was characterized in somewhat different words (emphasized in the following quotations): "The touchstone is *business necessity*." *Id.* at 431. "If an employment practice which operates to exclude Negroes cannot be shown to be *related to job performance*, the practice is prohibited." *Id.* "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.* "In the context of this case, it is unnecessary to reach the question whether testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon a showing that such long-range requirements *fulfill a genuine business need*." *Id.* at 432. "The Equal Employment Opportunity Commission . . . has issued guidelines interpreting § 703(h) to permit only the use of *job-related tests*." *Id.* at 433 (footnote omitted). "What Congress has forbidden is giving [testing] devices and mechanisms controlling force unless they are demonstrably *a reasonable measure of job performance.*." *Id.* at 436. "What Congress has commanded is that any tests must *measure the person for the job* and not the person in the abstract." *Id.* Presumably, all of these characterizations were meant to express the same idea, that selection criteria with an adverse impact must be validated according to the standards in the EEOC Guidelines.

For another view of the meaning of these terms, see B. SCHLEI & P. GROSSMAN, 2d ed., *supra* note 8, at 112-14.

181. Title VII as passed by the House appears at 110 CONG. REC. 8202-05 (1964).

182. *See, e.g., id.* at 1518 (statement of Rep. Celler).

In the Senate, it was clear from the start that the proponents of the bill believed that it would not outlaw bona fide seniority systems[183] or ability tests.[184] Thus, Congress' definition of discrimination always excluded seniority systems and ability tests. Explicit protection for these practices was written in to section 703(h), explained Senator Hubert H. Humphrey, because many of his colleagues had complained, "if that's what you meant, why didn't you say it?"[185] Because seniority systems and ability tests were never thought to be discriminatory, legislative history demonstrates that proof that a seniority system or ability test is protected by section 703(h) cannot be considered a defense.

A third reason the Court's statement about defenses is troubling is conceptual. We have seen above that when an employer shows a test is valid, she destroys the plaintiffs' prima facie case by proving their proxy was false. Thus, the language of the Act, its legislative history, and the theory of adverse impact all militate against the Court's characterization of proof of job relatedness as a defense.

Finally, the Court dealt with Duke Power's reliance on the Tower amendment to section 703(h), which "authorizes the use of 'any professionally developed ability test' that is not 'designed, intended or *used* to discriminate because of race. . . .' "[186] The district court had found the tests were professionally developed, fairly administered, and adopted for the purpose of upgrading the work force, but these findings were unavailing, held the Supreme Court, because the EEOC Guidelines limit the protection of section 703(h) to tests that are job related.[187] "The administrative interpretation of the Act by the enforcing agency is entitled to great deference. Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress."[188]

None of the Court's reasons for accepting the Guidelines was persuasive. The first was the status of the EEOC as the enforcing agency. Whatever respect Congress intended the courts to pay rulings of other administrative agencies, Congress did not intend the courts to defer the EEOC rulings. Section 706(a)[189] of the Act invested the Commission

183. *See id.* at 5874 (statement of Sen. Keating); *id.* at 5423 (statement of Sen. Humphrey); *id.* at 6564 (statement of Sen. Kuchel), *id.* at 7207 (Dept. of Justice memorandum); *id.* at 7213 (Interpretative Memorandum). For a fuller discussion of this point see *infra* notes 362-69 and accompanying text.

184. 110 CONG. REC. 7213 (1964) (INTERPRETATIVE MEMORANDUM); *id.* at 6415-16 (statement of Sen. Case); *id.* at 9707 (statement of Sen. Clark); *id.* at 8370, 9107 (Bipartisan Civil Rights Newsletter); *id.* at 13,504 (statement of Sen. Humphrey). For a fuller discussion of this point see *infra* notes 370 to 428 and accompanying text.

185. 110 CONG. REC. 12,707 (1964) (statement of Sen. Humphrey).

186. 401 U.S. at 433 (emphasis added).

187. *Id.*

188. *Id.* at 433-34.

189. The substance of the relevant provisions of the Act now appears in § 706(b).

with responsibility to investigate charges of discrimination, to determine if there is reasonable cause to believe charges are true, and to endeavor to eliminate unlawful employment practices. Note that the Commission was empowered, not to decide whether discrimination exists, but only to decide whether there is reasonable cause to believe a charge of discrimination is true. An Interpretative Memorandum of Title VII, prepared by Senators Joseph S. Clark of Pennsylvania and Clifford P. Case of New Jersey, explained the narrowness of the Commission's role:

> The suit against the respondent [employer] . . . would proceed in the usual manner for litigation in the Federal courts. It would be a trial de novo and not, in any sense, a suit for judicial review of a Commission determination. In fact, the Commission never makes any determination that respondent committed an unlawful employment practice; it merely ascertains whether or not there is reasonable cause to believe that he did.[190]

Also, the first sentence of section 713(a) reads: "The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provision of this title." The word "procedural" was not put there carelessly. Representative Emmanuel Celler of New York inserted it on the floor of the House of Representatives for the express purpose of barring the Commission from issuing substantive regulations.[191] Sections 706(a) and 713(a) destroy the argument for deference to EEOC regulations (and may account for the EEOC's calling its regulations "Guidelines"). As a result, the Guidelines deserve deference only to the extent that they are persuasive. The Supreme Court itself has taken the same position in other cases.[192]

The Court's second reason for accepting the Guidelines was the Act itself. The evidence in the Act was apparently the word "used," which the Court italicized. The idea must have been that a test that has an adverse impact and is not job related is used to discriminate.[193] But this argument disregarded the ordinary meaning of the word "used." Human motivation is implied when the "s" is pronounced like a "z" and the word describes the action of an agent or object. To say, "The woman used the knife to disfigure her attacker," is clearly to imply that her purpose was disfigurement. Similarly, to say, "The employer used the test to discriminate," is to imply that her purpose was discrimination.[194] Moreover, interpreting "used" as the Court did was inconsistent with the nat-

190. 110 CONG. REC. 7213 (1964) (Interpretative Memorandum).

191. *Id.* at 2575.

192. *See, e.g.*, General Elec. v. Gilbert, 429 U.S. 125, 140-41 (1976).

193. In Board of Educ. v. Harris, 444 U.S. 130 (1979), Justice Stewart stated that the term "used to discriminate" incorporated an adverse impact standard into § 703(h). *Id.* at 157 n.4 (Stewart, J., dissenting).

194. When the "s" of "used" is pronounced like "s" in "sofa" and refers to a pattern of past behavior, "used" has another meaning that is not relevant here. "He used to go home at 5:00."

ural reading of the preceding verbs in the section—"designed, intended"—which undoubtedly point towards the employer's motivation. Thus, the language of the Act does not support the Guidelines.

The Court's third reason for accepting the Guidelines was the legislative history of the Act. The evidence in the legislative history was discussed in the following passage:

> Senators Case of New Jersey and Clark of Pennsylvania, co-managers of the bill on the Senate floor, issued a memorandum explaining that the proposed Title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, *must meet the applicable job qualifications*. Indeed the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color." 110 Congressional Record 7247.[195]

In a footnote, the Court mentioned that the court of appeals had erroneously concluded that employment tests need not be job related because the lower court had relied on

> an earlier Clark-Case interpretative memorandum addressed to the question of the constitutionality of Title VII. The Senators said in that memorandum:
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> "There is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance." 110 Congressional Record 7213.
>
> However, nothing there stated conflicts with the later memorandum dealing specifically with the debate over employer testing, 110 Congressional Record 7247 (quoted from in the text above), in which Senators Clark and Case explained that tests which measure "applicable job qualifications" are permissible under Title VII.[196]

One who went to the *Congressional Record* might be astonished to find that the Court committed three elementary errors of scholarship in this passage. First, the memorandum on which the Supreme Court relied was not the Clark-Case Interpretative Memorandum, but rather one prepared under the direction of Senator Case alone; the memorandum on which the court of appeals had relied was the genuine joint product. Naturally, the joint Interpretative Memorandum is the more authoritative of the two. Second, the Case memorandum was introduced on March 26th[197]—before, not after, the Interpretative Memorandum,

195. 401 U.S. at 434 (emphasis in original) (footnote omitted).

196. *Id.* at 434-35 n.11.

197. 110 CONG. REC. 6415-16 (1964). This memorandum was reprinted at *id.* at 7246-47. Perhaps the Court saw only the reprint.

which was introduced on April 8th.[198] The later expression of views, of course, is the more important. And, third, the genuine Interpretative Memorandum is silent on the issue of constitutionality.[199] Thus, the impression the Court gave—that testing was only a minor part of the memorandum on which the court of appeals relied, whereas testing was the principal burden of the memorandum of which the Supreme Court relied—was false. The Case Memorandum was directed exclusively at testing, but the Interpretative Memorandum was addressed to all of Title VII, and testing was a significant part of the document.[200]

Another part of the legislative history the Court cited was the Tower amendment. Its first version protected ability tests that were "designed to determine or predict whether [an applicant for employment] is suitable or trainable with respect to his employment in the particular business or enterprise involved."[201] This version (which, the Court implied, protected only job-related tests) was defeated because of "its loose wording which the proponents of Title VII feared would be susceptible of misinterpretation."[202] Two days later, the second version of the Tower amendment was introduced and adopted with the support of Title VII's supporters.[203] "The final amendment, which was acceptable to all sides, could hardly have required less of a job relation than the first,"[204] argued the Court, so that "the conclusion is inescapable that the EEOC's construction of § 703(h) to require that employment tests be job related comports with congressional intent."[205] But this conclusion is far from inescapable. Congress intended to protect all professional ability tests that were fairly administered and acted upon; it was altogether unaware of the concept of job relatedness, as we shall see below.[206]

The district court had found as fact that Duke Power's tests did not accurately measure the ability of a person to do a specific job, and the company had offered no evidence to show the diploma requirement was related to successful performance on the job; to the contrary, there was evidence that employees who lacked diplomas and were exempt from the testing requirement performed their work satisfactorily.[207] Accordingly, Duke Power failed to carry the burden of proving its selection criteria

198. *Id.* at 7212-15.

199. Immediately before the Interpretative Memorandum, there appears in the Congressional Record a memorandum on constitutionality introduced by Senator Clark. *Id.* at 7207.

200. The paragraph of the Interpretative Memorandum dealing with testing appears above in the text accompanying *supra* note 196 as part of the quotation from footnote 11 of *Griggs*. 401 U.S. at 434-35 n.11.

201. *Id.* at 436 n.12, *citing* 110 CONG. REC. 13,492 (1964).

202. 401 U.S. at 436 n.12.

203. *Id.* at 435.

204. *Id.* at 436 n.12.

205. *Id.* at 436.

206. *See infra* notes 370-428 and accompanying text.

207. *Id.* at 431-32.

were job related, and the court of appeals' judgment in favor of the company on this issue was reversed.

The Supreme Court, which was unfair to Duke Power in holding it liable based on evidence that another employer's tests had an adverse impact, may have been unfair in another way as well. With two unimportant exceptions,[208] *Griggs* was the first reported decision to hold that selection criteria that are adopted in good faith and that do not preserve the effects of past discrimination must be job related. The district court had held against the plaintiffs on this issue, so that, both at the time Duke Power applied the diploma and testing requirements to the plaintiffs and at the time Duke Power presented its evidence in the trial court, the law appeared to permit an employer to rely on a professionally developed test so long as it was not deliberately used to disadvantage because of race. As appears in its brief in the Supreme Court, the company directed its evidence at establishing that the diploma and testing requirements were adopted for legitimate purposes,[209] and the district court credited this evidence. A fairer disposition of the case would have been a remand to the trial court to allow Duke Power an opportunity to offer evidence showing the requirements were job related.

Demonstrating injustice in one case, however, is not the point of this article. Let us now turn to a close examination of the legislative history of Title VII and related materials to determine whether Congress intended to promulgate the adverse impact definition of discrimination.

B. The Intent of Congress

1. A Brief Legislative History of Title VII

Many civil rights bills were introduced into the Eighty-eighth Congress.[210] The most important of those dealing with equal employment opportunity was H.R. 405, sponsored by Representative James Roosevelt of California. This bill was referred to the House Committee on Education and Labor, which held hearings and recommended passage;[211] but the bill never came to a vote in the House of Representatives. While H.R. 405 was still in committee, Representative Celler introduced the Kennedy Administration's omnibus civil rights bill, H.R. 7152,[212] which eventually became the Civil Rights Act of 1964. Although this bill contained titles on voting, public accommodations, public facilities, and pub-

208. *See supra* note 170. *Gregory* was decided on July 28, 1970, after both the district court and court of appeals decisions in *Griggs*. *Hicks* was decided even later—November 6, 1970. Thus neither case could have served as notice to Duke Power of the need to prove the selection criteria was job related.

209. Brief for Respondent at 14-19, 401 U.S. 424.

210. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 433 (1966).

211. H.R. REP. NO. 570, 88th Cong., 1st Sess. (1963).

212. Vaas, *supra* note 210, at 434.

lic schools, the bill lacked provisions concerning fair employment practices in the private sector of the economy. H.R. 7152 was referred to the House Committee on the Judiciary,[213] which amended the bill to include a title on fair employment practices; this new title was patterned after H.R. 405 and incorporated without change the language in Representative Roosevelt's bill that defined unlawful employment practices by employers and unions.[214] The Judiciary Committee reported favorably on H.R. 7152,[215] and the House of Representatives passed the bill on February 10, 1964.[216] Except for the addition of sex as a protected class, the House did not change the language defining unlawful employment practices which the Judicary Committee had borrowed from H.R. 405. This language appeared as sections 704(a) and (c) of H.R. 7152.

In the Senate, the majority whip, Senator Humphrey, and the minority whip, Thomas Kuchel of California, served as floor managers for H.R. 7152.[217] Bipartisian co-captains were also designated for each major title of the bill. Senators Clark and Case were the co-captains for Title VII.[218] Because the Senate took the unusual step of placing H.R. 7152 directly on the calendar,[219] there was neither committee report nor hearing in the Senate on the bill that became the Civil Rights Act of 1964. Nevertheless, co-captains Clark and Case provided the Senate with a document entitled, "Interpretative Memorandum of Title VII of H.R. 7152."[220] This memorandum, which is a detailed discussion of the fair employment practices title of the civil rights bill, is tantamount to a committee report and is the single most authoritative piece of legislative history on Title VII.[221]

Although proponents of the civil rights bill at first hoped the Senate would adopt H.R. 7152 without amendment, the need for substantial revision soon became evident, and a bipartisan group began to meet privately. The group included Mike Mansfield of Montana, majority leader of the Senate; Everett McKinley Dirksen of Illinois, minority leader of the Senate; Senators Humphrey and Kuchel; Representative William McCulloch of Ohio, the ranking minority member of the House Judici-

213. 109 CONG. REC. 11,252 (1963).

214. This language was contained in §§ 5(a) and 5(c) of H.R. 405 as reported by the House Comm. on Education and Labor and in §§ 704(a) and 704(c) of H.R. 7152 as reported by the House Comm. on the Judiciary.

215. H.R. REP. NO. 914, 88th Cong., 1st Sess. (1963).

216. 110 CONG. REC. 2804-05 (1964).

217. *Id.* at 6812 (statement of Sen. Mansfield); *id.* at 9244 (statement of Sen. Jordan).

218. *Id.* at 6528 (statement of Sen. Humphrey).

219. *Id.* at 3693-96, 3719.

220. *Id.* at 7212.

221. *See* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576, 2589 n.14 (1984); American Tobacco Co. v. Patterson, 456 U.S. 63, 73 (1982); International Bhd. of Teamsters v. United States, 431 U.S. 324, 352 (1977).

ary Committee; and Attorney General Robert Kennedy.[222] The meetings of the group bore fruit on May 26, 1964, when Senator Dirksen introduced Amendment No. 656.[223] Commonly referred to as the Mansfield-Dirksen substitute, it was an amendment in the nature of a substitute for the entire bill. On July 10, 1964, Senator Dirksen offered Amendment No. 1052,[224] which was a substitute for Amendment No. 656. Both the first and the second Mansfield-Dirksen substitutes carried forward unchanged the language in the H.R. 7152 defining unlawful employment practices by employers and unions; however, the sections were renumbered 703(a) and (c) and now appear as such in the law.[225]

On June 11, 1964, Senator Tower called up his Amendment No. 605,[226] which was designed to protect employers' use of professionally developed ability tests. The amendment was opposed by the leadership and was defeated.[227] Two days later, Senator Tower offered a reworded version of the amendment.[228] The new language had been cleared through the leadership, was acceptable to all concerned, and was adopted by the Senate.[229]

On June 19, 1964 the Senate passed H.R. 7152, as amended, and returned the bill to that House of Representatives.[230] The House concurred in the Senate's amendments on July 2, 1964,[231] and President Lyndon Johnson signed the bill into law on the same date.

2. *Intent as an Element of Discrimination*

> The Court of Appeals held that the Company had adopted the diploma and test requirements without any "intention to discriminate against Negro employees." We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but 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.
>
> The Company's lack 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. But Congress directed the thrust of the Act to the *consequences* of employment prac-

222. Vaas, *supra* note 210, at 445.

223. 110 CONG. REC. 11,926 (1964).

224. *Id.* at 13,310.

225. Hereinafter, the two substitutes will be referred to in the singular (the Mansfield-Dirksen substitute) because they were identical for our purposes.

226. 110 CONG. REC. 13,492 (1964).

227. *Id.* at 13,505.

228. *Id.* at 13,724.

229. *Id.*

230. *Id.* at 14,511.

231. *Id.* at 15,897.

tice, not simply the motivation.[232]

Intent to discriminate is irrelevant to the adverse impact definition of discrimination. If Congress conceived of discrimination as including an element of intent, adverse impact was not meant to be part of Title VII. Both the language and the legislative history of the Act contain clear indications that the discrimination Congress meant to outlaw was purposeful, intentional, and motivated by racial animus or stereotyped thinking. Contrary to what the Supreme Court said in *Griggs*, the evidence shows that Congress did direct the thrust of the Act to the motivation behind employment practices.

Plain language in the Act demonstrates the importance of motive. Section 706(g) reads, "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may [order appropriate relief]." The word "intentionally" was not part of H.R. 7152, but was added by the Mansfield-Dirksen substitute. Senator Humphrey, a leading member of the team that wrote the substitute and one of its four co-sponsors, explained why "intentionally" was added to the bill:

> Section 706(g) is amended to require a showing of intentional violation of the title in order to obtain relief. This is a clarifying change. Since the title bars only discrimination because of race, color, religion, sex, or national origin it would seem already to require intent, and, thus, the proposed change does not involve any substantial change in the title. The expressed requirement of intent is designed to make it wholly clear that inadvertent or accidental discrimination will not violate the title or result in entry of court orders. It simply means the respondent must have intended to discriminate.[233]

The meaning of this passage is straightforward. Intent is part of the statute, and "intentionally" was added to section 706(g) so the courts would not forget it.[234]

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232. 401 U.S. at 432.

233. 110 CONG. REC. 12,723-24 (1964). The second sentence, which says that intent is part of the title, helps defeat any argument that intent is an element of the conduct prohibited by §703(a)(1) but not §703(a)(2). *See infra* notes 518-71 and accompanying text.

234. It can be argued that an employer intends to discriminate so long as he means to do the act which has a disproportionate exclusionary effect on blacks, and perhaps this argument draws strength from Senator Humphrey's reference to "inadvertent or accidental discrimination." This argument is misguided for common sense and technical reasons.

Senator Humphrey was not a lawyer, so that when he said "the respondent must have intended to discriminate," he probably meant what a layman would normally mean by those words. To intend to discriminate is, in ordinary speech, to disadvantage blacks purposefully, that is, to do them some harm with that desire in mind. The reason for adding "intentionally' to § 706(g) was simply to protect the innocent employer who means no harm to anyone, but perhaps gives the appearance of discrimination.

If it be objected that Senator Humphrey was hardly a layman in regard to the law and that other senators were lawyers, the rejoinder is that technical analysis leads to a similar result. "Acci-

It may be argued that the intent required by section 706(g) is merely the intent to act, but not the specific intent to disadvantage because of race; in other words, that discrimination is an intentional, not a negligent, act. After all, Senator Humphrey spoke of inadvertent or accidental discrimination. One problem with this argument is that inadvertent or accidental discrimination is hard to imagine. Would anyone seriously contend that an employer discriminated against a black because the wrong box on an evaluation form was carelessly checked and the black was rejected instead of hired? The Senator's words make more sense if we interpret them to mean that an employer who does not mean to disadvantage blacks, but does so inadvertently (for example, by hiring only high school graduates in the good-faith belief that they improve the quality of the work force) does not violate the law. Even if serious cases of accidental discrimination can be conceived, the argument is completely refuted by a passage in the Interpretative Memorandum that demonstrates that Congress's definition of discrimination included motive:

> Requirements for the keeping of records are a customary and necessary part of a regulatory statute. They are particularly essential in Title VII because whether or not a certain action is discriminatory will turn on the motives of the respondent, which will be best evidenced by his pattern of conduct on similar occasions.[235]

This passage demonstrates that motive was an element in Congress's definition of discrimination.[236]

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dental discrimination" can have two meanings to a lawyer. It may refer either to an employer who performs an act he does not mean to perform, or to an employer who performs an act which has a consequence he does not want to ensue. An example of the former possibility is a negligent act, for example, an automobile accident; an example of the latter possibility is use of a selection criterion (such as a test) that excludes blacks, not with the desire of excluding blacks, but in the mistaken belief that the test predicts success on the job. Either possibility leads to the conclusion that only purposeful discrimination was outlawed.

Assume Congress was thinking of an employer who performs an act he does not mean to perform. In this case, adding "intentionally" to § 706(g) was meant to protect the employer who discriminates negligently. The model would have been tort law, in which an act that is not negligent is intentional. In tort law, "intentional" means purposeful; consider, for example, the distinction between an intentional battery and a negligent blow. An intentional tort is an injury the defendant desired to inflict. Thus, if Congress sought to protect the employer who does something he really did not mean to do, the conclusion follows that only employers who purposefully discriminate are liable under Title VII.

Alternatively, assume Congress was thinking of an employer who performs an act that has an undesired consequence. This employer means to do the act, but does not desire its effect. If Congress sought to protect this employer, it clearly intended that only employers who act with a desire to disadvantage blacks would be liable. Such employers, of course, purposefully discriminate.

235. 110 CONG. REC. 7214 (1964).

236. Almost as important as language that got into the Act is language that did not get into the Act. In both the House and the Senate, an amendment was proposed that would have added the word "solely" to various sections of Title VII, including §§ 703(a)(1) and 703(a)(2), so that an employer's act would have been legal unless it was motivated by race and nothing else. *Id.* at 2728 (motion by Rep. Dowdy); *id.* at 13,837 (motion by Sen. McClellan). Although the amendment was defeated in both houses, *id.* at 2728, 13,838, it is useful for our purposes because it reveals that both

The House and Senate debates provide a wealth of evidence that motive was part of Congress's definition of discrimination. One of the most interesting colloquies took place between Senator Sam J. Ervin, Jr., of North Carolina, a staunch opponent of the civil rights bill, and Senator Case, one of the co-captains for Title VII. The following exchange clearly reveals the senators' common belief that motive was an element of discrimination. Indeed, Senator Case, after first seeming to deny the importance of mental state (perhaps for fear of being led into a trap by the wily senator from North Carolina), vigorously defended the role of motive:

> Mr. CASE. . . . What is an unlawful employment practice?
>
> Mr. ERVIN. It is the contents of a man's mind. It is the intent he has in mind.
>
> Mr. CASE. No. I would like the Senator to read the words, since he is talking about the bill.
>
> Mr. ERVIN. The language is "on account of race, color, creed, or national origin."
>
> Mr. CASE. That is correct.
>
> Mr. ERVIN. That is a matter of intent. The intent in the man's mind is going to be judged, not by him, but by somebody else.
>
> Mr. CASE. Yes, but in the time-honored custom of Anglo-Saxon jurisprudence, under the terms of the bill it would be determined by a court of law.
>
> Mr. ERVIN. It would be determined not by the external acts in the case, but by what some Federal employee believes was in the mind at the time period.
>
> Mr. CASE. The Senator from North Carolina is trying to make it appear that it is unusual to have a determination of what is right or wrong depend on a mental state. Practically speaking, this has been universally true.
>
> Mr. ERVIN. . . .
>
> It is dangerous to judge a man on the basis of the contents of his mind rather than on the basis of the character of his external act.
>
> . . . .
>
> Mr. CASE. Here we have a number of externals. There would

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chambers believed that motive was part of the definition of discrimination. If senators and representatives had believed otherwise, two arguments against the amendment would logically have been made. First, it was unnecessary because motive was irrelevant. Second, the amendment could have been construed by a court as adding motive where it was intended to be omitted. Neither of these arguments was made. Instead, the amendment was opposed because our legislators believed motive was an element of discrimination, and they perceived that the purpose of the amendment was to protect the employer who acted out of mixed motives. As Senator Case put it, "The difficulty with this amendment is that it would render Title VII totally nugatory. If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of." *Id.* at 13,837 (statement of Sen. Case). Thus, both the proponents and opponents of the amendment thought that motive was an integral part of discrimination.

> have to be an employment. There would have to be an employer. There would have to be a business. These are tangibles. There would have to be a refusal to give a person employment. Obviously, that is a physical fact, or at least a tangible factor.
>
> The only question that arises would be "why?" The question would be, Why was the man refused?[237]

Other evidence on the role of motive in Congress's definition of discrimination is discussed in the margin below.[238]

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237. *Id.* 7253-55. *See also id.*, at 13,078 (statement of Sen. Ervin).

238. Representative Joseph G. Minish of New Jersey had the employer's mental state in mind when he said, "It is essential that we assure equal employment opportunities for all Americans so that men and women will be considered for jobs on the basis of merit, not on the color of their skin. It is grossly unfair that the aspirations of so many of our fellow citizens continue to be frustrated by the discredited prejudices of racists." *Id.* at 1599. If prejudice was the evil, state of mind was the focus.

Representative John H. Dent of Pennsylvania believed that state of mind was an aspect of discrimination when he said, "I know, as you all know, nothing in this legislation will make a lamb lie down with a lion nor will it remove the spots from a leopard. Discrimination, bigotry, and prejudice are as old as man himself . . . ." *Id.* at 2601. This was a common theme in both the House and the Senate. Opponents of the civil rights bill said the law cannot change men's hearts or minds. Proponents agreed, but rejoined that the law can change behavior based on prejudice and bigotry.

Representative Robert P. Griffin of Michigan also conceived of discrimination in terms of state of mind. He was speaking in opposition to an amendment introduced by Representative William T. Cahill of New Jersy that would have outlawed the nepotic admission rules of some unions. *See id.* at 2593. Representative Griffin argued that Title VII as written would already reach the case of using such rules as a subterfuge, but "there are factors such as seniority, length of employment, and other factors which could affect union membership, union rights, and so forth, and have nothing to do with color, race, or creed." *Id.* at 2594. Then the following exchange occurred:

> Mr. CAHILL. I wonder if the gentleman would let me have his expert opinion about a small union which excluded applicants from membership because they were not sons or brothers of members. If they excluded a Negro because he was not a brother or son of one of the members, would the gentlemen say that the bill as presently written would take care of that situation?
>
> Mr. GRIFFIN. If the admission rule were adopted for that purpose, for the purpose of actually excluding Negroes, then I believe the bill would cover it; however, that would be a question of fact. Again, I must say that the gentleman's amendments raise a number of different problems and a lot of factors outside the scope of the limited subjects we are trying to deal with in this legislation.

Id. at 2594. In Representative Griffin's mind, Title VII covered purposeful discrimination and should not have been enlarged to apply to other kinds of conduct, even though the effect of those other kinds of conduct was disadvantageous to blacks.

Representative Durward G. Hall of Missouri, an opponent of the civil rights bill, also thought that discrimination required a hostile motive:

> In the technical sense of the word, an employer discriminates every time he hires someone, as long as there is more than one applicant for the position. What Federal officer can say whether such discrimination is based on race, education, religion, appearance, experience, personality, or the way an applicant responds to questions? . . . In short, moral intent is difficult to legislate.

Id. at 2603. Senator A. Willis Robertson of Virginia, another opponent of the bill, echoed the same theme and manifested the same belief that state of mind was an element of discrimination:

> I find it hard to see anyone will be able to tell when such illegal practices have occurred and when an employer is exercising his legitimate prerogative to hire and fire to promote the best interest of his business. There is no accurate way to measure the subjective intentions of an employer.

Further insight into Title VII can be gained from the other titles of

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Id. at 5092.

Senator Tower believed that an intent to disadvantage blacks was part of the definition of discrimination. He argued that the proponents of Title VII had failed to present evidence of widespread discrimination against minorities; then, perhaps to explain why the proponents had not presented such evidence, or perhaps to prove they could never present it, he added, "Indeed, unless they can read an employer's mind, they cannot be sure why an employer takes any action he takes in regard to his employees." *Id.* at 7773. Senator Robertson held a similar view. Speaking as a former prosecuting attorney, he said, "[I]n all criminal actions, the intent is the essence of whatever crime is charged. . . . Here we are speaking about a new crime, the crime of discrimination." *Id.* at 8428. And Senator Norris Cotton of New Hampshire counseled senators to

> think twice before they vote in favor of the passage of a bill which would make it possible for an investigator or a Federal administrative officer to reach a conclusion, and thus make it incumbent on the small businessman to carry the case to the courts if he is to get justice. In addition, let us remember . . . that this title deals with a state of mind; namely, that if it is charged that Mr. A or Mr. B was not promoted because of his race, his church, or his nationality, the question will be: What was the employer's intent?

Id. at 13,092. Senator Ervin criticized Title VII for its emphasis on state of mind:

> The bill would not make the guilt or innocence of an employer dependent on his external act. It would make his guilt or innocence depend upon the contents of his mind. The only basis upon which the man would be judged would be what he had in mind. That would be a dangerous power.

Id. at 5613.

> Therefore, I respectfully submit that if we want to have a safe legislation, just legislation, legislation under which truth can be determined with any degree of accuracy, we should have legislation based on the truth that, while God can look upon the heart, and while God can determine the state of mind of an individual, that power is beyond any bureaucrat. . . .

Id. at 5614.

Finally, during the debates on ability tests and the Tower amendment, which are discussed in detail below, the Senate focused exclusively on the employer's state of mind. For example, Senator George A. Smathers of Florida was plainly concerned with employers' intentions when he said:

> In addition to lawyers, corporations would also have to hire a herd of psychologists to discover whether an employer had some discrimination in his heart, or whether he will have to have two sets of tests for a man who applies for a particular job, because it may be that the applicant would come from a culturally disadvantaged group. I am not quite sure what that is. . . . But certainly it would take away from the employer his right to require an examination, give it to everyone, and say, 'I will take the man who makes the highest and best grade, because that is the man who can do the best for my company.' "

Id. at 7036. Senator Towers and Herman E. Talmadge of Georgia were discussing the Motorola case (which was the origin of the debates on ability tests) when both gentlemen revealed a focus on an employer's state of mind:

> Mr. TALMADGE. In the Motorola case in Illinois, an examiner of the State Commission determined that someone had been discriminated against because of the use of a certain examination; is that correct?
>
> Mr. TOWER: That is correct. Furthermore, it was ordered that the examination no longer be used by that company in connection with its employment practices.
>
> Mr. TALMADGE: Would the Senator from Texas venture a guess as to how such a government agency, using personnel who might be alleged to be experts in thought control, would be able to determine whether there had been an intent to discriminate when an employer had decided to employ a particular applicant, and when, thereafter, the applicant might have alleged that he had been discriminated against because he was a Baptist or because he was a Methodist, and so forth?
>
> Mr. TOWER. In my opinion, it could not be made; in my opinion, that could not be determined. For that purpose, the Commission or its assistants would have to be mind readers.

Id. at 9026. Lastly, Senator Humphrey, speaking of intelligence tests like the one used by the Motorola Co. and arguing that the Tower amendment was unnecessary because it was redundant, demonstrated an unmistakable focus on employers' intentions. He said, "These tests are legal. They do not

the Civil Rights Act of 1964.[239] Judges and scholars attempting to interpret Title VII typically ignore the rest of the bill, as though Title VII were a separate piece of legislation. In fact, Title VII was one of eleven titles of a single bill that was often times considered title by title, but other times considered as a whole. The Mansfield-Dirksen substitute, for example, applied to the entire bill, not merely to Title VII. Accordingly, we can learn about Title VII by examining the other titles of the bill. We can inquire whether a motive or purpose to discriminate was part of the definition of discrimination in the other titles of the bill.

The answer to the inquiry is clearly that Congress did intend motive to play a role in the other titles of the bill. Title I applies to voting rights. In determining whether a person is qualified to vote in a federal election, state officials must apply the same standards to blacks as to whites and may not deny a black the right to vote "because of error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." This language was aimed at the practice common in the South of disqualifying blacks for highly technical failures to complete registration forms correctly.[240] Such behavior, of course, was motivated by racial animus. Although the language of Title I could be read to establish purely objectively standards,[241] the legislators who enacted this language

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need to be legalized a second time. They are legal unless used for the purpose of discrimination." *Id.* at 13,504.

239. The Supreme Court has examined other titles of an act to learn the intent behind the title in issue. *See, e.g.*, United Steelworkers v. Sadlowski, 457 U.S. 102, 117 (1982).

240. *See, e.g.*, 110 CONG. REC. 1519 (1964) (statement of Rep. Celler); *id.* at 6529 (statement of Sen. Humphrey). Rep. Silvia O. Conte of Massachusetts recounted the story of

> the Negro who went to register to vote in a town in the Deep South that had a literacy test.
>
> He said to the registrar, "I want to vote." The registrar said, "Can you read?" He said, "I certainly can read." The registrar took a newspaper, which was written in Japanese and he says, "Can you read that headline?" He said, "No."
>
> The registrar said, "I want to give you every opportunity to vote. Can you read that subheadline?"—which was written in Japanese. He said, "No, I cannot."
>
> The registrar said, "Man, we love you people, so I will give you one other chance. Can you read this subheadline?"
>
> The Negro studied it intently and said, "Yes, I can. It says, 'No Negro is going to vote in this county.' "

Id. at 1635. *See also id.* at 1693-95 (statement of Rep. Celler); *id.* at 1547 (statement of Rep. Rogers).

241. Objective standards may be aimed at purposeful misconduct, for some conduct carries the index of the motive behind it. If a white is allowed to register to vote, but an otherwise identical black is not allowed to register, the most likely reason for the different outcomes is race. Indeed, unless the registrar could offer a satisfactory reason for the different outcomes, race would be not merely the most likely, but in fact the only reasonable explanation. Probably for this reason, Title I is cast in objective terms. It requires state officials to apply the same rules to blacks as to whites. This standard, though objective on its face, is plainly aimed at application of different rules for the purpose of disqualifying blacks. There is no legitimate reason for different rules for each race.

Title I also prohibits state officials from disqualifying voters because of immaterial errors on voter registration forms. This standard, too, is objective on its face, but is also plainly aimed at

had purposeful discrimination in mind.

Title II prohibits discrimination and segregation in public accomodations. The title begins, "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation. . . ." That motive was meant to be part of the definition of discrimination under this title is evident from a colloquy between Representative Robert P. Griffin of Michigan, who became concerned that the quoted language created a new, broad right, and Representative Celler, who focused on the proprietor's state of mind.[242] Because the subjective reasons of the owner of the restaurant control whether discrimination under Title II exists, motive is an element of the definition of discrimination in this title.

Title III creates no new substantive rights, but gives the Attorney General power to initiate law suits on behalf of blacks who, because of their race, are deprived of the equal protection of the laws in regard to use of public facilities (other than schools). Title IV also creates no new rights, but gives the Attorney General power to initiate law suits on behalf of blacks who, because of their race, are deprived of the equal protection of the laws in regard to public schools. Section 410 of Title IV reads, "Nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin." The word "reasons" plainly points to the actor's state of mind.

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registrars who purposely seized upon minor errors to disqualify blacks because of their race. Thus, while the language of Title I may seem to create objective standards, the congressional intent behind the language was to outlaw purposeful discrimination against blacks.

242. Representative Griffin posited a restaurant that required men to wear dinner jackets:

> Two men come to the door, one with a dinner jacket and one without. The restaurant admits them both. Five minutes later another gentleman comes to the door without his dinner jacket. The restaurant owner says, "You cannot come in; we have a rule that you must have a dinner jacket on." The prospective customer points to the language of section 201 and says, "All persons are entitled to the full and equal enjoyment of public accommodation and without discrimination."
>
> Suppose the owner is not discriminating on the basis of race or color because, let us say that all three of the prospective customers are white. . . .

Id. at 2000. Representative Celler replied:

> So that when one person comes in with a tuxedo, and another person comes into the restaurant without a tuxedo, and the one with the tuxedo is served and the one without a tuxedo is not served, that need not be discrimination based upon race, creed, or national origin. That may be based on something sartorial.
>
> Mr. GRIFFIN. Then the language does not apply to or control other types of discrimination that have nothing to do with race, color, religion, or national origin?
>
> Mr. CELLER. In order to fully comprehend what is sought by section 201, you have to read all of Title II.

Id. Then Representative Armistead I. Seldon, Jr. of Alabama joined the discussion:

> Mr. SELDON. Suppose the third man is not white, and did not have a dinner jacket.
>
> Mr. CELLER. If that is tantamount to discrimination on the ground that the man was not white, not because he did not wear a tuxedo, but for the reason he was nonwhite, then the proprietor of that restaurant could be subject to the provisions of the act.

Id.

Title V pertains to the duties and procedures of the Commission on Civil Rights and does not concern us here. Title VI, however, is very important to us. Section 601 reads, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." If Congress defined discrimination in Title VI to include motive, this fact would be further evidence that Congress intended motive to be an element of discrimination in Title VII.

The legislative history of Title VI reveals that Congress intended this title to outlaw purposeful misconduct; adverse impact was simply never discussed. For example, during debate in the House of Representatives on Title VI, Representative Harold D. Cooley of North Carolina said:

> I would be the first to recognize that race or color of skin is a basis for prejudicial discrimination. But can we look into the mind of any man and determine whether his discrimination is based on prejudice or some other basis? Some persons do not like people with red hair because they have had unfortunate experiences with people whose hair is this color. Some people are prone to distrust people who are narrow between the eyes. These are just two examples of thousands of reasons, sane or otherwise, that people use in reaching their bases of judgment in relation to their fellow men.[243]

Title VI was aimed at discrimination based on racial prejudice, but not at discrimination based on, for example, the gap between one's eyes. Because we cannot look into each other's minds, he argued, we will not know whether one person disadvantages another for lawful or unlawful reasons and, therefore, Title VI should be defeated. The focus on the actor's state of mind is unmistakable.

Senator Herman E. Talmadge of Georgia shared this focus. He threatened that, if Title VI were passed and

> if two people should ask for a job cutting weeds on the shoulders of the roads in the State of California, and one of them happened to be of one color and the other happened to be of another color, and the chairman of the highway board or the hiring authority of the State of California happened to pick someone for that particular job who was displeasing to the Federal Bureau of Roads under that interpretation, all Federal highway funds of the State of California could be cut off.[244]

Senator John O. Pastore of Rhode Island replied:

> The language is, "on the ground of race, color, or national origin." That is the standard. . . . If a foreman says, "You can do the work far better than a white man can, but I will not take you because you are colored," I

243. *Id.* at 2496.
244. *Id.* at 6048.

> do not think anyone would say there should not be some reprisal against action of that kind.[245]

In Senator Pastore's example, the foreman's reason for rejecting the black is his color. Without question, motive was an element of this definition of discrimination. Motive was also an element in the definitions of the several senators who believed that Title VI would establish the standard of color blindness for federal programs.[246] Once again, Senator Pastore's remarks were typical:

> Private prejudices, to be sure, cannot be eliminated overnight. However, there is one area where no room at all exists for private prejudices. That is the area of governmental conduct. As the first Mr. Justice Harlan said in his prophetic dissenting opinion in Plessy v. Ferguson, 163 U.S. 537, 559:
>
> "Our Constitution is colorblind."
>
> So I say to senators, must be our Government.[247]

Senator Pastore, who was a co-captain for Title VI,[248] equated color blindness with government agents' suppressing their private prejudices and disregarding the color of citizens. Unquestionably, he focused on the agents' reasons for action, that is, on state of mind.

The legislative history of Title VI is clear and uniform. Congress intended the title to outlaw purposeful discrimination—disparate treatment, not adverse impact.

The Supreme Court has dealt with the scope of Title VI on three occasions. The Court's interpretations reflect tension between clear legislative history, which shows an intent to outlaw only purposeful discrimination, and administrative (and perhaps judicial) desire to expand the title to adverse impact cases.

In *Lau v. Nichols*,[249] the plaintiffs were a class of thousands of students of Chinese ancestry who did not speak English. They sued the San Francisco school system under Title VI, claiming the system discriminated against them because the system neither taught them to speak English nor provided them with instructors who spoke Chinese. Since the plaintiffs did not contend the system purposefully disadvantaged them because of race or national origin, the issue was whether intent to discriminate is an element of section 601. Both the opinion of Justice Douglas for the Supreme Court and the concurring opinion of Justice Stewart and two other Justices were grounded on section 602 of Title VI, which

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245. *Id.* at 6049.

246. *See id.* at 12,675 (statement of Sen. Allott); *id.* at 5253, 5864, 5866, 6543, 6547 (statements of Sen. Humphrey); *id.* at 7102 (statement of Sen. Javits); *id.* at 6561 (statement of Sen. Kuchel); *id.* at 2494, 6047, 7055 (statement of Sen. Pastore); *id.* at 8346 (statement of Sen. Proxmire).

247. *Id.* at 7064.

248. *Id.* at 6528 (statement of Sen. Humphrey).

249. 414 U.S. 563 (1974).

directs federal agencies to issue guidelines to achieve the objectives of the title. A guideline promulgated by the Department of Health, Education, and Welfare barred use of "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race."[250] Relying on this guideline, the Court held the school system in violation of Title VI.

Although a reader of this case might reasonably conclude it held that motive is not an element of discrimination under Title VI,[251] the precise rationale of the majority opinion is uncertain. It is possible the Court held the regulation indicated that Congress intended the title to prohibit adverse impact;[252] it is also possible the Court held that, regardless of congressional intent, an administrative agency had properly exercised its authority in issuing a regulation by which the school system had agreed to abide. In light of the legislative history of Title VI, the former rationale would have been incorrect. We have just seen that Congress did not intend the title to outlaw adverse impact, whatever the executive branch of government may have thought.[253] Whether the latter rationale would have been correct need not concern us because out purpose is not to decide whether the outcome of *Lau* was right, but rather to learn how Congress defined discrimination in Title VI. That Congress may have authorized the executive department to prohibit additional conduct under Title VI does not bear on Title VII because no such authorization was given to the EEOC.

Title VI was at issue again in *Regents of the University of California v. Bakke*.[254] A state medical school had a special admissions program that reserved 16 of 100 entering positions for minorities. A white male applicant was denied admission, though his college grades and test scores were higher than those of applicants admitted via the special program, and he filed suit under Title VI and the equal protection clause of the federal Constitution. Basing its decision solely on the Constitution, the Supreme Court of California declared the special admissions program unlawful, enjoined the school from taking the race of applicants into con-

250. 33 Fed. Reg. 16,299 (1968).

251. So thought Justice White in Guardians' Ass'n v. Civil Serv. Comm'n of the City of New York, 103 S. Ct. 3221, 3226 (1983).

252. Justice Stewart's concurring opinion supports this possibility. He said it was unclear whether Title VI itself prohibited the school system's practices, but he concurred on the ground that the regulation was reasonably related to the purpose of the law. Had he understood the majority to hold against the school system on the ground on which he concurred, he probably would not have felt the need to write separately.

253. In fairness, it must be added that several federal agencies charged with enforcing Title VI issued regulations similar to the one in *Lau*. *See, e.g.*, 33 Fed. Reg. 16,275 (Department of Agriculture); *id.* at 16,280-81 (Housing and Home Finance Agency); *id.* at 16,284-85 (Department of Labor); *id.* at 16,288 (General Services Administration); *id.* at 16,293 (Department of the Interior); *id.* at 16,305 (National Science Foundation).

254. 438 U.S. 265 (1978).

sideration, and ordered the school to admit the plaintiff.[255] The United States Supreme Court ruled only on the statutory claim. Five Justices[256] held Title VI is coextensive with the prohibitions of discrimination in the Constitution, which they said permits an admissions process to take race into account; accordingly, the judgment against the special admissions program was reversed. The remaining four Justices[257] believed that "the proponents of Title VI assumed that the Constitution itself required a colorblind standard on the part of government."[258] Although these four Justices would not agree with the other five that Title VI prohibits no more or less than does the Constitution, the four concluded that Congress intended Title VI to bar the use of race to exclude anyone from participation in a federally funded program. These four Justices, joined by one of the other five[259] (who believed that the Constitution allowed taking race into consideration but prohibited quotas), held that the plaintiff had been wrongfully excluded from medical school.

Between *Lau* and *Bakke*, the Court held in *Washington v. Davis*[260] that the Constitution prohibits only intentional discrimination and does not reach cases of adverse impact. Therefore, a reader of *Bakke* might reasonably conclude that the five Justices who reversed the judgment against the special admissions program had implicitly overruled the holding of *Lau* that Title VI bars adverse impact.[261] If Title VI prohibits only what the Constitution does, it follows that Title VI bars only intentional discrimination.

The Court's most recent decision on the scope of Title VI is *Guardians Association v. Civil Service Commission of the City of New York*.[262] The plaintiffs challenged written examinations used to make entry-level appointments to the city's police department. The examinations had an adverse impact on blacks and Hispanics, but the city argued that the examinations were lawful under Title VI because it prohibited only conduct motivated by discriminatory intent. The court of appeals agreed, holding that intent was a necessary element of a Title VI claim,[263] but the Supreme Court overruled the second circuit on this issue. In three opinions, five Justices held that motive is not an element of a Title VI claim

255. 18 Cal.3d 34 , 553 P.2d 1152, 132 Cal. Rptr. 680 (1976).

256. Brennan, White, Marshall, Blackmun, Powell, J.J.

257. Burger, C.J., and Stewart, Rehnquist, Stevens, J.J.

258. 438 U.S. at 416.

259. Powell, J.

260. 426 U.S. 229 (1976).

261. So thought three Justices of the Supreme Court. Board of Educ. v. Harris, 444 U.S. 130, 159, 162 (1979) (Stewart, J., dissenting, joined by Powell and Rehnquist, J.J.). Two judges of the Second Circuit reached the same conclusion. Guardians Ass'n v. Civil Serv. Comm'n, 633 F.2d 232, 270 (Kelleher, J.) and 274-75 (Coffrin, J.).

262. 103 S. Ct. 3221 (1983).

263. 633 F.2d 232 (2d. Cir. 1980).

because of the regulation to this effect.[264] The dissenting Justices argued the regulation was invalid because *Bakke* established that Congress intended Title VI to prohibit only what the Constitution prohibits, that is, intentional discrimination.[265] No Justice of the Court took the position that Title VI of its own force bars adverse impact.

Reflecting on these three cases, one notes that in *Lau* both majority and concurring opinions relied on the administrative regulation; neither opinion examined the legislative history. In *Bakke*, the five Justices who held that race could properly be considered in the admissions process believed that Congress intended Title VI to prohibit what the Constitution prohibits. These Justices discussed the legislative history of Title VI at length. In *Guardians Association*, the Justices focused on *Lau*, *Bakke*, and the administrative regulation, not on legislative history. Thus, the Supreme Court has looked at the congressional intent behind Title VI on only one occasion—in *Bakke*—and a majority arrived at the same conclusion as this article: Congress intended Title VI to prohibit only intentional discrimination.

Titles VIII, IX, X, and XI do not create new substantive rights and are not important for present purposes. The evidence from Titles I, II, IV, and VI points unwaveringly towards the conclusion that motive was part of the definition of discrimination under these titles. It would be strange if Congress intended only Title VII to embody another definition and said absolutely nothing to this effect in the language or legislative history of the civil rights bill.

3. *Prohibition of Quotas*

Another persuasive indication that Congress had no purpose to enact the adverse impact definition of discrimination appears in the debates over quotas. Section 703(j) was added to Title VII to guarantee that a racial imbalance would not be equated with discrimination. This purpose defeats any argument that Congress intended adverse impact.

A recurring theme in the discussion of Title VII was whether it required or would lead to racial quotas. Opponents of the bill charged over and again that it prescribed or would result in quota hiring and reverse discrimination—that is, discrimination against whites in favor of blacks. The charge came in two varieties. In the simpler one, which characterized its earlier appearances, the charge was that the bill itself required quotas.[266] In the subtler variety, which characterized its later appear-

264. 103 S. Ct. at 3222 (White, J.); *id.* at 3239 (Marshall, J.); *id.* at 3249 (Stevens, J., joined by Brennan and Blackmun, J.J.).

265. *Id.* at 3236-37 (Powell, J., joined by Burger, C.J., and Rehnquist, J.); *id.* at 3238-39 (O'Connor, J.).

266. For example, Representative Cornelius E. Gallagher of New Jersey said, "Equally dangerous to the freedoms of all Americans, including those this bill professes to help, is the section which

ances, the charge was that the mere obligation not to discriminate would lead to quotas and reverse discrimination.[267]

To the simple charge that Title VII required quotas, proponents responded that the bill did not require them. When Senator Olin D. Johnston of South Carolina said it did, Senator Humphrey said it did not.[268] When a newspaper article claimed it would, Senator Humphrey replied it would not.[269] When Senator Smathers said it could, Senator Humphrey said it could not.[270] In explaining Title VII to the House of Representatives immediately before the House passed the final version of the bill, Representative McCulloch said without qualification, "The bill does not permit the Federal Government to require an employer or union to hire or accept for membership a quota of persons from any particular minority group."[271] And most authoritatively of all, the Interpretative Memo-

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will force employers to hire workers on the basis of color rather than ability." 110 CONG. REC. 1645. Similar concerns over quotas and reverse discrimination were expressed by several other representatives. *See id.* at 2557 (statement of Rep. Winstead); *id.* at 2557-58 (statements of Reps. Dowdy g and Ashmore); *id.* at 2560 (statements of Reps. Johansen and Alger); *id.* at 2569 (statement of Rep. Gross); *id.* at 2576 (statement of Rep. Poff). Senators Russell B. Long of Louisiana and Strom Thurmond of South Carolina took the same position. *Id.* at 7902.

267. As Senator George A. Smathers of Florida put it,

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

Id. at 7800. (Note the Senator's assumption that the EEOC would accuse an employer of purposeful discrimination ("you have in your heart a feeling of discrimination").) Senator Lister Hill of Alabama feared the same mechanism when he referred to a hypothetical employer

> who employs 50 men. Ten of those employees can be identified with a minority group. If the employer has to lay off eight men, would he be likely to discharge any of the ten men who could later claim "discrimination" whether it existed or not, and who could file charges with the Equal Employment Opportunity Commission, causing the employer expense and possible punishment?

Id. at 8447. *See also id.* at 8500-01 (statement of Sen. Smathers); *id.* at 8617-18 (statements of Sens. Sparkman and Stennis); *id.* at 13,076 (statement of Sen. Sparkman).

268. *Id.* at 5092.

269. *Id.* at 5423.

270. *Id.* at 6000-01. Other senators got into the act as well. Senator Harrison A. Williams, Jr. of New Jersey compared non-discrimination in employment to non-discrimination in jury selection: as Supreme Court decisions regarding juries had not required a quota of blacks on each jury, so Title VII would not require that each covered employer hire a certain number of blacks. *Id.* at 8921. Senator Hill charged that Title VII would require racial balance, to which Senator Clark responded with a memorandum from the Department of Justice. The relevant passage read:

> [I]t has been asserted Title VII would impose a requirement for "racial imbalance." This is incorrect. There is no provision, either in Title VII or ir any other part of the bill, that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance. No employer is required to hire an individual because that individual is a Negro. No employer is required to maintain any ratio of Negroes to whites. . . .

Id. at 7207.

271. *Id.* at 15,893.

randum said the same thing:

> There is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race.[272]

To the more subtle charge that Title VII would lead to quotas because evidence of racial imbalance would constitute proof of discrimination, proponents of the bill replied that racial imbalance was not discrimination. Representative Cellar said that an imbalance could not be rectified under the bill: "Only actual discrimination could be stopped."[273] Referring to the infamous *Motorola* decision, which he evidently interpreted to invalidate a pre-employment test because relatively fewer blacks than whites passed it (the case will be discussed in detail below), Senator Case said a similar decision could not happen under Title VII because "even a Federal court could not order an employer to lower or change job qualifications simply because proportionately fewer Negroes than whites are able to meet them."[274]

Clearly, there was no support for the theory that racial imbalance equals discrimination. Even the Civil Rights Commission rejected any such equation: "[R]acial patterns of employment do not necessarily prove discrimination."[275] The reason the theory was so unpopular was the conclusion to which the theory led, namely, quotas. If racial imbalances were discrimination, quotas were the solution. But quotas were rejected by every legislator who discussed them and by black leaders as well. For example, the National Director of the Congress of Racial Equality, James Farmer,[276] who characterized his organization as the nonviolent marines of the civil rights movement,[277] was asked by Senator Clark, on behalf of Senator Jacob J. Javits of New York, whether Mr. Farmer believed in quotas.[278] He answered, "Not a quota system, Sena-

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272. *Id.* at 7213. *See also id.* at 5808 (statements of Sens. Stennis and Keating); *id.* at 6563 (statement of Sen. Kuchel); *id.* at 8370 (Bipartisan Civil Rights Newsletter No. 28).

273. *Id.* at 1518.

274. *Id.* at 7246.

275. U.S. COMMISSION ON CIVIL RIGHTS, 1961 REPORT, 3 EMPLOYMENT 38 [hereinafter cited as 1961 REPORT]. *See also id.* at 32.

276. *Hearings Before the Senate Subcomm. on Employment and Manpower*, 88th Cong., 1st Sess. 217 (1964) (Hearings on S. 773, S. 1210, S. 1211, and S. 1937).

277.

> Senator CLARK. Mr. Farmer . . . perhaps you could briefly state for the record the relationship between the NAACP, CORE, and the Urban League? Where do these various organizations fit into each other's scheme and to what extent do they coordinate?
>
> Mr. FARMER. Yes; you might say, Senator, that the Urban League is the State Department of the civil rights movement. The NAACP, the War Department; I suppose then you would call the CORE the nonviolent marines.

Id. at 224 (Hearings on S.1937).

278. *Id.*

tor, we are opposed to a quota system. . . ."[279] Roy Wilkens, executive director of the National Association for the Advancement of Colored People (NAACP) and chairman of the Leadership Conference on Civil Rights,[280] held the same view: "[O]ur association has never supported the idea of quotas. We feel that quotas are not fair, not even to the [black] applicant."[281]

Everybody opposed quotas, but, unlike the weather, somebody finally did something about them. After expressing his distaste for quotas and his conviction that Title VII did not permit them, Senator Gordon Allott of Colorado offered an amendment to guarantee that "no quota system would be imposed if Title VII becomes law."[282] The amendment provided:

> The court shall not find, in any civil action brought under this title, that the respondent has engaged in or is engaging in an unlawful employment practice charged in the complaint solely on the basis of evidence that an imbalance exists with respect to the total number or percentage of persons of any race . . . employed by an employer . . . in comparison with the total number or percentage of persons of such race . . . in any community . . . without supporting evidence of another nature that the respondent has engaged in or is engaging in such practice.[283]

Senator Allott's amendment attacked quotas by disarming the mechanism that would purportedly lead to them: evidence of racial imbalance could not stand alone as proof of discrimination. As the story of Title VII unfolded, this amendment never came to a vote. The reason was not that the amendment was unacceptable or forgotten. Rather, the amendment was so obviously in line with the ideas of the proponents that it was incorporated into the Mansfield-Dirksen substitute. With minor changes, the Allott amendment became section 703(j), which reads:

> Nothing contained in this title shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . in any community . . . or in the available workforce in any community. . . .

In his analysis of the Mansfield-Dirksen substitute, Senator Humphrey made clear that this section was included to prevent Title VII from being interpreted to require quotas.[284] Senator Dicksen concurred.[285]

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279. *Id.*
280. *Id.* at 196.
281. *Id.* at 204.
282. 110 CONG. REC. 9881.
283. *Id.* at 9881-82.
284. Senator Humphrey stated:

Section 703(j) was written to guarantee that the Act would never require quotas, either directly or indirectly. Nothing in the language of the bill directly required quotas, as the proponents said on numerous occasions; but quotas could result indirectly if courts inferred discrimination from a racial imbalance. As a result, section 703(j) was meant to ensure that a racial imbalance would never be equated with discrimination. Therefore, the following two sentences were considered synonymous: Title VII does not require quotas. Racial imbalances are not discrimination.

This analysis is strengthened by taking into account the parallel treatment of racial imbalance under Title IV of the civil rights bill. Racial imbalance could have been equated with discrimination in schools as well as in jobs. Representatives and senators were well aware that imbalance existed in the North as well as in the South. But there was an important difference to our legislators: in the South, imbalance resulted from law; in the North, from housing patterns.[286] To the chagrin of Southerners,[287] Title IV was aimed only at *de jure* segregation and not at *de facto* segregation;[288] a provision that would have eliminated racial imbalances in public schools had already been killed by the House Judiciary Committee.[289] When the possibility was suggested that Northern practices might be considered discriminatory under Title IV, the House swiftly amended the definition of "desegreation" to include the clause, "but 'desegregation' shall not mean the assignment of students to public

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A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of the bill have carefully stated on numerous occasions that title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly.

Id. at 12,723.

285. Senator John J. Williams of Delaware objected that Title VII might require an employer "to maintain a racial ratio in his employment roughly equal to the racial ratio existing in his community"; Senator Dirksen responded, "The Senate substitute bill expressly provides that an employer does not have to maintain any employment ratio, regardless of the racial ratio in the community." *Id.* at 14,329. Then Senator Williams of Delaware placed in the *Congressional Record* a memorandum prepared by a staff member of the Judiciary Committee on the effect of the Mansfield-Direksen substitute on quotas:

> One of the important changes made by the Senate was the protection provided for employers who operate in areas where minorties live. An employer cannot be forced to discharge employees or employ additional employees in order to achieve a racial balance. An employer with 100 employees who may be all white cannot be required to meet a quota even though his plant is located in a neighborhood that is 50 percent Negro.

Id. at 14,331.

286. *Id.* at 5267-68 (statements of Sens. Ervin and Keating); *id.* at 5341-42 (statements of Sens. Russell and Douglas); *id.* at 5858-59 (statements of Sens. Eastland, Javits, and Keating).

287. *Id.* at 6840-41 (statement of Sen. Stennis); *id.* at 7563-64 (statements of Sens. Sparkman, Thurmond, and Long); *id.* at 12,161 (statement of Sen. Ellender).

288. *Id.* at 13,821 (statement of Sen. Humphrey).

289. *Id.* at 1530 (statement of Rep. McCulloch).

schools in order to overcome racial imbalance."[290] Yet the issue of racial imbalance in schools had not been laid to rest. Further to protect Northern ways, the Senate amended Title IV to prohibit any official or court of the United States from "seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another . . . ."[291] Both the House and Senate amendments survived a motion to delete them in the Senate.[292] In short, racial imbalance was not discrimination under Title IV.

Thus, in the places in the civil rights bill where racial imbalance was relevant, Congress scrupulously guarded against the risk that an imbalance might be equated with discrimination: for if imbalances were illegal, quotas would result, and quotas were abominated.

Yet the Supreme Court has approved of quotas. In *United Steel Workers v. Weber*,[293] an employer and a union agreed through collective bargaining that the employer would establish on-the-job training programs to teach unskilled workers how to become craft workers in several facilities. Recognizing that the employer's craft workers were almost exclusively white, while blacks composed a substantial fraction of the labor force surrounding each of the facilities, the agreement also provided that half of the openings in the training programs would be reserved for blacks.[294] The standard for admission to the programs was an employee's seniority relative to other members of his race. Brian Weber, a white, was not admitted to the program in Gramercy, Louisiana, though blacks with less seniority than his were admitted. He sued on the ground that Title VII outlaws discrimination against whites as well as blacks.[295] He lost. The majority of the Supreme Court held that race-conscious affirmative action programs that are designed to break down old patterns of racial discrimination and that do not unnecessarily trammel the interests of white employees are permitted by the Act.[296]

Justice Rehnquist in dissent presented the arguments for Mr. Weber.[297] Without repeating them in detail, we may note the two most powerful. First, the plain language of the statute protects whites as well as blacks from racial discrimination.[298] Second, the legislative history

290. *Id.* at 2280.

291. The amendment was contained in § 407(a)(2) of the Mansfield-Dirksen substitute. *Id.* at 13,312.

292. *Id.* at 13,819.

293. 443 U.S. 193 (1979).

294. *Id.* at 197-98.

295. *Id.* at 199.

296. *Id.* at 208.

297. *Id.* at 219-56 (Rehnquist, J., dissenting).

298. *Id.* at 226-30. For example, § 703(d) reads:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual because

leaves no doubt that the language of the statute means what it says.[299] For example, the Interpretative Memorandum said explicitly:

> Title VII would have no effect on established seniority rights. Its 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. It 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.[300]

These arguments are fully consistent with the legislative history of section 703(j), but the Court rejected them.

There is a straight line from *Griggs* to *Weber*. Once the Supreme Court adopted the adverse impact definition of discrimination, employers had to keep their numbers in order. Validation of tests is too costly. Indeed, because a test may turn out to lack job relatedness or differential validity, the money spent on validation can be completely wasted. Construction of valid tests is even more costly and carries its own risk: an ignored sub-class taking the test may suffer an adverse impact and, even if the test miraculously predicts success on the job for all protected classes, law suits still have to be defended against persons who, seeing only the adverse impact, claim discrimination. The desideratum—a job-related, differentially valid test without an adverse impact—remains to be realized (indeed, probably cannot be realized while characteristics vary across classes). Therefore, so long as the Court remained committed to *Griggs*, the result in *Weber* was the most efficient way to mold legal doctrine. Employers must be allowed to discriminate in favor of blacks in order to dispel the appearance of adverse impact. If Brian Weber had won his law suit, employers, who as a practical matter lack access to valid tests, would have lost adverse impact cases; but courts, as a matter of remedy, would have ordered the employers to give jobs and back pay to the black plaintiffs. Thus, the ultimate result would have been the same, however *Weber* was decided. The victory for the employer and the union was simply more efficient in terms of economics and allocation of judicial effort. Yet this result, the logical extension of *Griggs*, would have been abhorred by the Eighty-eighth Congress.

This is not to say the fact of an imbalance was thought to be altogether immaterial. An ambiguous act may take on meaning in light of an imbalance. According to the Interpretative Memorandum:

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of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

299. *Id.* at 230-52.

300. 110 CONG. REC. 7213 (1964).

> While the presence or absence of other members of the same minority group in the work force may be a relevant factor in determining whether in a given case a decision to hire or to refuse to hire was based on race, color, etc., it is only one factor and the question in each case would be whether that individual was discriminated against.[301]

In other words, although racial imbalance is not discrimination, imbalance may be evidence of discrimination. What does racial imbalance tend to prove? We have seen above that Congress intended motive to be an element of the definition of discrimination. An imbalance may explain the motive that lies behind a person's behavior. The employer who claims that she preferred a white over a black because of qualifications could be impeached by evidence that she consistently preferred whites over blacks.[302]

Section 703(j) should have killed adverse impact aborning. Congress did all it could to make proof of racial imbalance nothing more

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301. *Id.* at 7213. The Interpretative Memorandum was written before §703(j) was added to the bill. Nevertheless, the Memorandum remains a valid guide to legislative intent because, as Senator Humphrey explained, that section "does not represent any change in the substance of the title. It does state clearly and accurately what we have maintained all along about the bill's intent and meaning." *Id.* at 12,723.

Members of the House of Representatives also understood that racial imbalance could be evidence of an intent to discriminate. Representative August E. Johansen of Michigan posited the hypothetical case of an employer who needs to hire 100 unskilled workers; 75 blacks and 75 whites apply. All 75 whites but only 25 blacks are hired.

> Do the other 50 Negroes or any one of them severally have a right to claim they have been discriminated against on the basis of race or color . . . ?
>
> If all other factors were equal—or, at least, if there were not any differences which were distinguishable—and all the 150 applicants were entirely suited for employment, what protection would the employer or the union hiring agent have against a charge of discrimination . . . ?

Id. at 2560. Representative Goodell tried to reassure Representative Johansen that, "if applicants are equal in all other respects there will be no restriction. One may choose among equals. So long as there is no distinction on the basis of race, creed, or color it will not violate the act." *Id.* Yet Representative Johansen was not reassured: "How will it be possible to prove that subjectively there was not an element of discrimination. . . .?" *Id.* The best reply Representative Goodell could make was, "The burden would be on the complainant to show that there had been discrimination." *Id.*

Representative Johansen had a valid point. The imbalance in his example is so extreme that the employer would be hard pressed to convince a court that a motive other than race caused her to hire all of the white applicants but only one-third of the black applicants. For our purposes, however, the representatives were in perfect agreement. They agreed that statistics would be evidence of state of mind.

302. The House of Representatives shared this understanding:

> Nothing in the act is intended to allow charges to be brought based upon disproportionate representation of members of any race . . . within any business enterprise or labor organization. General rules as to percentages, quotas, or other proportional representation shall not be the basis of charges brought under this act. However, disproportionate representation may be considered as background evidence in an unlawful employment practice proceeding under this act.

H.R. REP. No. 570, 88th Cong., 1st Sess. 5-6 (1963). This report was written before § 703(j) was drafted and, thus, stands as evidence that congressional intent on quotas and the use of statistics was consistent.

than evidence of an employer's state of mind. Yet by adopting adverse impact, the Supreme Court has done precisely what Congress feared, for, as we have seen above, the existence of racial imbalance is the ultimate issue in adverse impact litigation, and the motivation to adopt quotas is overwhelming.

4. Causation

The words "because of race" in sections 703(a)(1) and (2) indicate that Congress did not intend to outlaw all discrimination against blacks, but only discrimination caused by race. It is discrimination of a sort for a white employer to hire his white son-in-law instead of a better qualified black; yet surely Congress did not mean Title VII to ban such behavior.[303] The notion of causation embodied in adverse impact is unorthodox in the law. The legislative history of Title VII not only lacks evidence that Congress intended to embrace such a notion, but in fact contains evidence to the contrary.

Three notions of causation are widely understood and, if any of them were reflected in adverse impact theory, an argument could be made that Congress intended this definition of discrimination. These notions are motive, necessity, and sufficiency. Motive, of course, is no part of adverse impact. Necessary (or but-for) causation exists if B would not have happened unless A had happened first. Race would have been a necessary cause of Duke Power's failure to hire blacks if only blacks had been rejected. But the selection criteria excluded whites as well as blacks; therefore, the plaintiffs' race was not a necessary cause of their fate.[304] Sufficient causation exists if B happens whenever A happens. Race would have been a sufficient cause of Duke Power's failure to hire blacks if all blacks had been rejected. But the selection criteria included some blacks; therefore, the plaintiffs' race was not a sufficient cause of

303. This example illustrates what has come to be called institutional racism. It is a social institution in this country for whites to marry whites. The white employer has a white wife, and their white daughter chooses a white husband. Thus, the employer may harbor no ill will towards blacks as employees, yet, because of the social institution to which he and his family conform, his preference for his son-in-law necessarily eliminates all black candidates for the job. Adverse impact tends to mitigate institutional racism, but there is no evidence that the Eighty-eighth Congress intended Title VII to affect this phenomenon. Rather, Congress focused on the more pressing problem of overt racism, for example, employers who openly refused to hire any blacks or assigned them to menial jobs.

304. In a superficial way, *Griggs* is a but-for case: but for their race, plaintiffs would have stood a better chance of being hired. But some whites were also excluded, and not all blacks were, so the true casual element overlapped race—was associated with race—but it was not identical with race. Certainly it cannot be said with respect to any individual black (and the Act protects individual, not groups; *see infra* notes 306 to 311 and accompanying text) that but for his race, he would have satisfied the section criteria. A host of factors other than race (for example, illness, poverty, and death of a parent) may have explained an individual case. All that can be said is that blacks as a group had a lower probability of success than whites, but the cause of the difference in probabilities is unknown.

their fate. Hence, it appears that the notion of causation reflected in adverse impact is not one of the ordinarily understood ideas that Congress might have accepted without debate.

As noted above, plaintiffs in an adverse impact action rely on a comparison of rates of association. Proof that proportionately more whites than blacks in an available work force are eligible for a job is proof that the association between being white and being eligible is higher than the association between being black and being eligible. We have referred to such proof as "associative causation." Thus, in *Griggs* the plaintiffs showed that 34 percent of white men, but only 12 percent of black men, satisfied the diploma requirement.

In what sense did race cause these associations? As we have seen, the Supreme Court argued in *Griggs* that race caused blacks' inferior education, which caused them to fall to satisfy the diploma and testing requirements, which caused Duke Power to refuse to promote the plaintiffs. Based on this argument, the Court effectively created an irrebutable presumption that disparities between black and white performances on selection criteria are caused by race.[305] In other words, if a selection criterion excludes more blacks than whites in the available work force, race is deemed to be the cause of the disparity. Association becomes causation.

There is no evidence that the proponents of Title VII had any such idea in mind. If Congress had intended to create an irrebutable presumption that race causes different rates of association, surely there would be traces of such an intent in the legislative history. There probably would have been discussion of the different notions of causation. For example, the maxim that correlation does not imply causation is widely known. An intent to use correlations or associations to establish liability would unquestionably have sparked considerable debate on Capitol Hill and in the press over whether correlations prove anything at all about race. In addition, all of the steps but the last in the Supreme Court's causal sequence are beyond an employer's control. Duke Power did not create

305. It may be argued that the presumption is rebuttable because a showing that a selection criterion is job related proves that the cause of a given disparity is not race, but blacks' relative inability to perform the job. This argument is erroneous because proof that a criterion is job related bears only on the issue of choosing a fair proxy for the available work force. Job relatedness demonstrates that the plaintiffs' proxy for the available work force was inappropriate because a better proxy (those who succeed on the job-related criterion) exists. If proof that a selection criterion is valid rebutted the presumption that race caused the disparity between black and white performances, then proof of another criterion with equal selective utility and a lesser adverse impact would rebut the rebuttal and reestablish race as the cause of the disparity. In truth, however, proof of a valid alternative criterion with a lesser adverse impact simply generates a new and better proxy for the available work force. None of these steps bears on causation. After all the dust has settled, the court must choose the best available proxy for the available work force. If a selection criterion has an adverse impact on this proxy, race is presumed to be the cause of the disparity and the employer loses the case.

the South's system of segregated schools, and Duke Power could not abolish the system. Duke Power did not force blacks to leave school early or score poorly on ability tests and could do little to change these facts. Had Congress intended to make an employer responsible for being the last actor in a chain of events, surely there would have been debate over whether an employer should be held liable for the acts of others. Yet one would search the *Congressional Record* and the transcripts of committee hearings in vain for any such debates or discussions. The issues simply were not raised.

Finally, we have seen above that motive was an element of our legislators' definition of discrimination. Thus, causation in its ordinary sense of motive (for example, an employer fails to promote a black because of a belief that other employees will not accept supervision from a black), and not an association between race and performance on a selection criterion, was the causal link Congress had in mind.

All these factors taken together—congressional silence on an issue obviously pertinent to the theory of causation implied in adverse impact, the unorthodox nature of associative causation, and the intent of Congress to include a more conventional notion of causation, namely, motive, in the definition of discrimination—amount to convincing proof that Congress did not intend the words "because of such individual's race" to signify the notion of causation underlying adverse impact.

5. *Individual Rights*

Further evidence that Congress did not intend the adverse impact definition of discrimination can be found in the focus on individual rights in the language of sections 703(a)(1) and (2):

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail and refuse to hire or to discharge any *individual*, or otherwise to discriminate against any *individual* . . . because of such *individual's* race . . .
>
> (2) to limit, segregate, or classify his employees in any way which would deprive . . . any *individual* of employment opportunities . . . because of such *individual's* race. . . . [Emphasis added.]

The same focus on individual rights appears in the language of the other major titles of the Civil Rights Act. Title I on voting rights does not guarantee that a certain percentage of blacks will register or vote, but that each black citizen will be treated like a white citizen. Title II on public accommodations does not require that a hotel or restaurant hold a certain number of beds or tables for blacks, but that an individual black be served on the same basis as a white. Title III on public facilities other than schools does not require that space be reserved for blacks in public facilities, but instead authorizes the Attorney General to sue on behalf of an individual who complains that she has been deprived of the equal pro-

tection of the laws in the use of public facilities. Similarly, Title IV on desegregation of public schools does not require that schools be integrated with a quota of blacks (we have already noted that "desegregation" does not mean assignment of students in order to overcome racial imbalance), but rather authorizes the Attorney General to sue on behalf of a student who has been denied equal protection by a school board or been denied the opportunity to attend a public college by reason of race. And Title VI on federally assisted programs also creates and protects individual rights. It begins, "No person in the United States shall, on the ground of race . . . be excluded form participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." The language of the titles that created and protected rights indicates a concern with individual, not group rights.

The legislative history of the civil rights bill confirms that Congress had only individual rights in mind. Consider this statement to the House of Representatives by John V. Lindsay of New York:

> This legislation, Mr. Chairman, does not, as has been suggested heretofore both on and off the floor, force acceptance of people in schools, jobs, housing, or public accommodations because they are Negro. It does not impose quotas or any special privileges of seniority or acceptance. There is nothing whatever in this bill about racial balance as appears so frequently in the minority report of the committee.
>
> . . .
>
> Everything in this proposed legislation has to do with providing a body of law which will surround and protect the individual from some power complex. The bill is designed for the protection of individuals. When an individual is wronged, he can invoke the protection to himself, but if he is unable to do so because of economic distress or because of fear then the Federal Government is authorized to invoke that individual protection for that individual, and not on behalf of anyone else.[306]

This speech reveals congressional intent to create and protect individual rights, not just in Title VII, but in the entire civil rights bill. The Interpretative Memorandum reveals the same intent specifically with regard to Title VII. The key sentence for present purposes is this: "It must be emphasized that discrimination is prohibited as to any individual."[307] Title VII unquestionably created individual rights, as the Supreme Court itself has twice recognized.[308]

In spite of this congressional intent to protect individuals, not groups, the Supreme Court created a group right and protected a group

306. 110 CONG. REC. 1540 (1964).

307. *Id.* at 7213.

308. Connecticut v. Teal, 457 U.S. 440, 453-54 (1982); City of Los Angeles, Dept. of Water and Power v. Manhart, 435 U.S. 702, 708 (1978).

interest when it adopted the adverse impact definition of discrimination. The plaintiffs in *Griggs* won by proving that the diploma and testing requirements were more onerous on blacks as a group than on whites as a group. It was immaterial that a significant number of individual blacks either had diplomas or could pass the tests; the requirements were illegal because they were discriminatory against the class of blacks. Had the facts of *Griggs* been that equal percentages of blacks and whites held diplomas and passed the tests, the plaintiffs would have lost the case; there would have been no adverse impact. Yet nothing about the individual plaintiffs would have changed. They still would have been excluded from employment opportunities by criteria that were not job related.

This result is completely at odds with what the Court was later to write about individual rights in *City of Los Angeles, Department of Water and Power v. Manhart*:[309]

> The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. . . . Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.[310]

This language is inconsistent with the theory of adverse impact, under which an employer may use a test that proportionately fewer blacks than whites pass if the test predicts success on the job. But the test need not be perfect; seemingly, any significant correlation between test and job performance suffices. It follows that some persons who score poorly on the test would in fact be good workers; yet they may be rejected. Therefore, "a true generalization about the class" of below average performers on the test becomes a lawful basis for "disqualifying an individual to whom the generalization does not apply." This fact is true of both blacks and whites. Accordingly, under adverse impact it is the performance of the group, not of individuals, on which the employer's liability turns.

That *Griggs* created a group right is further manifested in the notion of causation on which the Court relied—a notion we have seen Congress did not intend. The Court reasoned that race caused whites to provide blacks with inferior education, which caused blacks to drop out of school and score poorly on ability tests, which caused the plaintiffs to fail to meet Duke Power's requirements for promotion. There was no evidence that the individual plaintiffs had received inferior education; the evidence proved only that their group had been disadvantaged in this way. Assuming the plaintiffs' education was inferior, there was no proof that it caused them to drop out of school and flunk Duke Power's tests. For all the Court knew, the plaintiffs might have dropped out of school because

309. 435 U.S. 702 (1978).

310. *Id.* at 708.

of reasons like economic hardship or poor health, and the blacks who took the tests in the EEOC decision might have failed for any number of possible reasons. In reality, there was no proof that race accounted for these plaintiffs' failure to meet the promotion requirements. What was proved was that race was associated with the level of performance of the group to which the plaintiffs belonged. Clearly, the adverse impact definition protects a group interest and creates a group right.[311] Congress never intended and indeed, as all the signs indicate, rejected this sort of right.

In contrast, the disparate treatment definition of discrimination is fully consonant with the purposes of Congress. Under this definition, the employer's motive is the key: it is not unlawful to treat two employees differently, even if one is black and the other is white, unless the reason for the diference is race. This emphasis on motive ensures that only individual rights are protected. Suppose, for example, a black applies for a job, and she is rejected in favor of a white. The issue is why the employer rejected the black. She could offer direct or indirect proof of the employer's motive. She might present evidence that the employer had made disparaging comments about blacks' right or ability to hold jobs; the employer might reply that those comments did not affect his judgment about who was better able to do the work in question. The black might try to show that she was fully qualified for the job, and the employer might respond with proof that the white who got the job was better qualified. Or the black might introduce statistical evidence showing that so few blacks were hired that the employer's claim of racial indifference is incredible. Whatever the nature of the evidence, all of it would ultimately relate to this individual black—her qualifications for the job and the employer's feelings towards her. Even if the black brings a class action suit, alleging that she and a thousand other blacks were rejected because of race, the focus remains on individual rights so long as the employer's motivation is the key issue. If the plaintiff proves all members of her class were rejected because the employer had reached his quota for blacks, each member of the class was rejected because of her race. Of course, throughout disparate treatment analysis, the notions of causation are traditional. The focus is on motivational causation, i.e., the employer's reasons for action, and the nature of the causal nexus is the but-for standard. A plaintiff who proves that her race was the reason she was not hired has proved that, but for her race, she would have been hired.

311. The opinion of Justice Powell in Connecticut v. Teal frankly recognizes that group rights and interests are at stake under the adverse impact definition. 457 U.S. at 456, 457 (1982) (Powell, J., dissenting).

6. *State Legislation*

Other persuasive evidence that adverse impact was no part of the civil rights bill is provided by the way Congress regarded state fair employment practice (FEP) laws. Section 706(b) provides that, if state or local law prohibits a practice that a person believes is outlawed by Title VII, the person must pursue the state or local remedy for at least 60 days before filing a charge with the EEOC. Section 709(b) permits the EEOC to cooperate with state and local agencies; the Commission may "utilize the services of such agencies and their employees and, notwithstanding any other provision of law, may reimburse such agencies and their employees for services rendered to assist the Commission in carrying out this title." Section 708 provides that Title VII shall not relieve any person of any duty or liability created by state or local law unless the law requires or permits the doing of an act that is illegal under Title VII. Thus, Congress took pains to ensure that local agencies would have the first opportunity to deal with employment discrimination and that local law would not be preempted by federal law.

Many representatives and senators believed that Title VII would not affect their states because they already had FEP legislation in place. For example, Representative Celler told the House that one-half the states had laws against employment discrimination and that Title VII would simply extend those laws to the other states.[312] Representative Fred B. Rooney of Pennsylvania assured the House that Title VII would not create new obligations for employers in FEP states,[313] and Senator Humphrey provided similar assurance to the Senate.[314] The Assistant Attorney General for Civil Rights, Burke Marshall, wrote Senator Len B. Jordon of Idaho that Title VII would not affect his constituents because "discrimination in employment would be handled by State officials under the Idaho law and . . . title VII would have but little effect within the State."[315] Similarly, Senator Frank Carlson of Kansas thought Title VII would not affect the Sunflower State.[316] Some senators went even further. Senators Allott and Gaylord Nelson of Wisconsin believed their states had stronger, broader laws than Title VII already in force.[317]

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312. 110 CONG. REC. 1521 (1964).

313. *Id.* at 1625. *See also id.* at 1644 (statement of Rep. Cleveland); *id.* at 1646 (statement of Rep. Fraser).

314. *Id.* at 6548. Because the House had added sex as a protected class and few states had laws against sex discrimination in employment, Senator Humphrey excepted Title VII's ban on sex discrimination from his assurance. *See also id.* at 14,249 (statement of Sen. Russell).

315. *Id.* at 9244.

316. *Id.* at 10,519-20.

317. *Id.* at 5814 (statement of Sen. Nelson); *id.* at 8431 (statement of Sen. Allott). Senators Clark and Case, who were replying to objections that a federal statute was unnecessary because anti-discrimination laws were in effect in more than half the states, including all of the major industrial ones, gave three reasons why a federal law was needed. First, the states had experienced difficulty

This legislative history is relevant because no state had adopted the adverse impact definition of discrimination. Rather, only disparate treatment was banned by the states.[318] The members of Congress who said that Title VII would not create new obligations in states with FEP laws could not have understood Title VII to incorporate adverse impact, for this definition imposes obligations far beyond those created by disparate treatment.

Numerous scholarly articles contain evidence that only disparate treatment was illegal in the twenty-five states, not to mention local governments, that had FEP laws. Writing in the *Vanderbilt Law Review* in 1965, Arnold Sutin discussed *The Experience of State Fair Employment Commissions: A Comparative Study*.[319] He said that Congress entrusted the primary administration of Title VII to state agencies where they exist, and he set his purpose as determining whether the state commissions were ready to take on this responsibility. As part of this task, Professor Sutin devoted twenty pages to discussion of the substance of state FEP laws.[320] Although he discussed the issue of causation, he did not mention or exhibit any appreciation of adverse impact. Rather, he believed that state laws required proof of motive as an element of prohibited conduct. He wrote, "Statutory language, legislative history, and constitutional requirements unquestionably show that only prejudiced beliefs and attitudes regarding the prohibited grounds, causally related to overt acts, fall within the enforceable jurisdiction of the statute."[321]

In 1966 William Lamb published in the the *Temple Law Quarterly* an article entitled *Proof of Discrimination at the Commission Level*.[322] His avowed purpose was to examine "proving racial discrimination at the commission level, gathering and presenting evidence to a commission,

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with "large, multi-phased operations of business in interstate commerce." *Id.* at 7214. Second, a federal law would bring additional resources to bear on the problem of discrimination. *Id.* at 7217 (statement of Sen. Clark). This second reason appears to have been omitted by printer's error from the Interpretative Memorandum. See *id.* at 7214. Third, twenty-two states had no FEP legislation, and 60% of American blacks lived in those states. *Id.* If adverse impact had been part of Title VII, the co-captains for Title VII would probably have added an additional reason why a federal law was necessary: the states banned only disparate treatment, so Title VII was necessary to provide further protection to blacks. But of course the Senators did not offer this reason. They perceived no difference between the conduct prohibited by state laws and the conduct Title VII was meant to prohibit. Adverse impact was part of neither the existing state nor the proposed federal legislation.

318. The only pre-Title VII state decision we have found that approached adverse impact was the hearing examiner's opinion in *Motorola*. "The ruling was the first on record in which any of the more than 30 State FEPC's [Fair Employment Practice Commissions] had asserted authority over tests a company may use in screening job applicants." *Id.* at 8648 (statement of Sen. Hart), quoting an article by Todd E. Fandell in the Wall Street Journal of April 21, 1964. If *Motorola* did embrance adverse impact, Title VII most certainly did not, as Congress's reaction to *Motorola* demonstrates.

319. 18 VAND. L. REV. 965 (1965).

320. *Id.* at 1012.

321. *Id.* at 993-94.

322. 39 TEMP. L.Q. 299 (1966).

and the relevant burdens of proof."[323] Mr. Lamb said not a word on adverse impact. Like Professor Sutin, Mr. Lamb defined discrimination as "prejudice coupled with action or inaction motivated by the prejudice. . . . The mental element . . . forms a necessary part in any discrimination case. . . ."[324] Nothing could be further from adverse impact, under which motive is irrelevant and the act of using a selection criterion that is not job related and that excludes proportionately more blacks than whites is illegal in itself.

The Substance of American Fair Employment Practices Legislation I: Employers by Arthur Bonfield appeared in the *Northwestern Law Review* in 1967.[325] He shared the understanding that motive was an essential element of discrimination, for he stated that conduct becomes illegal "only when it is coupled with a certain state of mind."[326] Motive is so critical to discrimination that Professor Bonfield expressly rejected one of the clearest examples of adverse impact:

> It is true that courts will look at the results of an individual's conduct as evidence of his intent, and that no specific criminal intent is required under the fair employment laws. But the courts will not stop with just viewing the results of a person's conduct in these cases. If there is a satisfactory explanation for conduct causing a discriminatory result, inferences of illegal discrimination will be negated.
>
> So, for example, if an employer will hire only college graduates on the ground that he considers such training desirable for a particular position, he does not violate the fair employment law even if in practice the effect of this requirement is to discriminate against Negroes because there are relatively few Negro college graduates.[327]

The importance of this passage cannot be overstated. Professor Bonfield was well aware that a selection criterion might exclude proportionately more blacks than whites; he even went so far as to say that such a criterion discriminated against Negroes. But it was not illegal discrimination because of the absence of an unlawful motive. Whether the college requirement might be job related either did not cross the author's mind or was considered immaterial. This thoroughly documented article covers not only state law, but also federal law and the Model State Civil Rights Act. If adverse impact or job relatedness had any standing under any of these laws in 1967, Professor Bonfield would surely have discussed these ideas and could not have said what he did about a college requirement.

Finally, Michael Sovern published in 1966 a book entitled *Legal Restraints on Racial Discrimination in Employment*. Chapter 3 discussed

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323. *Id.*

324. *Id.* at 300-01.

325. 61 NW. U.L. REV. 907 (1967).

326. *Id.* at 955-56.

327. *Id.* at 964.

state FEP laws. The statutes of virtually every state with anti-discrimination legislation were cited, yet adverse impact was never mentioned. Thirty pages were devoted to Professor Sovern's assessment of the states' enforcement activities, and numerous recommendations for improvement were offered;[328] yet nowhere was it recommended that the definition of discrimination be enlarged to include adverse impact.

From these sources[329] it is evident that adverse impact was not part of state anti-discrimination laws in 1964. It follows that the belief of representatives and senators that Title VII would not affect states with FEP law—in other words, that the Act merely extended to blacks in states without FEP laws the same protection enjoyed elsewhere—stands as proof that Congress did not intend Title VII to prohibit adverse impact.

7. Unawareness and Protection of Adverse Impact

The debates on Title VII in the House and Senate constitute another significant body of proof that Congress did not intend the Act to include the adverse impact definition of discrimination. Representatives and senators did not discuss adverse impact or the issues arising from it, and legislators made statements that could not logically have been made if the speakers had been aware of adverse impact. Even more important, an amendment that would have outlawed an example of adverse impact was rejected, and two amendments that protected the major examples of adverse impact were adopted.

a. Unawareness of Adverse Impact and Statements Inconsistent With It

If Congress intended to outlaw adverse impact, several major issues would unquestionably have been aired during the extensive committee hearings and floor debates. The fundamental tenet of adverse impact is that an employment practice must not disadvantage blacks vis-a-vis whites. Anyone aware of this tenet—particularly, one not eager to see a civil rights bill enacted—would certainly have asked, "How do we know when blacks are disadvantaged? If two percent of white and one percent of black applicants are hired, are blacks disadvanaged?" Another important tenet of adverse impact is that a job-related selection criterion is lawful, regardless of its adverse impact. One aware of this tenet must

328. M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 31-60 (1966).

329. Other publications may be noted. For example, the State University of New York at Buffalo held a conference on the topic, "Toward Equal Opportunity in Employment: The Role of State and Local Government." Participants were leading practitioners and scholars in the field of civil rights. Not a word on adverse impact or related issues appears in the 175 pages of proceedings of the conference.

surely have wondered, "What proof establishes that a test predicts success on the job? How accurate must the test be in order to be considered valid?" Once these questions were asked, many related questions would have sprung to mind. For example, "How many employers now use tests that are valid? How costly is it to validate a test? How likely will employers be to save the cost of validation by hiring enough blacks to dispel the adverse impact of a test?"

But not even one such question was raised, or even hinted at, during the longest debate in the history of the Senate; nor was any such issue raised in the House debate or in the hearings on the employment discrimination bills in both houses of Congress. The civil rights bill was carefully studied and vigorously opposed. The absence of metion of these issues is persuasive evidence that Congress did not intend Title VII to outlaw adverse impact. Further substantiation of these assertions appears in the record.

(1) Title VII

Subcommittee No. 5. of the House Judiciary Committee held public hearings on H.R. 7152 for 22 days, and the full Judiciary Committee held two more days of open hearings; the printed record of the hearings ran to 1,874 pages.[330] The Rules Committee took testimony on the bill for five days, and the printed record was 663 pages.[331] The House of Representatives debated the bill for six days, and the Senate debated it for another 83 days.[332] (Lest one remark that a day of debate in Congress can be brief, we may note that the Senate debates lasted over 534 hours, for an average of six and one-half hours per day.[333]) Except for an amendment sponsored by Representative William T. Cahill of New

330. *Hearings Before Subcomm. No. 5, Comm. on the Judiciary, House of Representatives on Miscellaneous Proposals Regarding Civil Rights in Employment in Certain Cases Because of Race, Religion, Color, National Origin, Ancestry, or Age*, 88th Cong., 1st Sess. (1963).

331. *Committee on Rules, House of Representatives, Hearings on H.R. 7152*, 88th Cong., 2d Sess. (1964). *Committee on Rules, House of Representatives, Hearings on H. Res.* 789, 88th Cong., 2d Sess.

332. EEOC LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964 at 11 (1965) [hereinafter cited as EEOC LEGISLATIVE HISTORY].

333. *Id.* Nevertheless, the debates were not always well attended. Senator Clark remarked once, "I am now speaking at a time when, in the Senate Chamber, there are 11 Senators—an unusually large number of Senators to be present, I may say, during the civil rights debate. Three of those Senators are what might be termed 'captive Senators.' " 110 CONG. REC. 7199 (1964). The "captive senators" were the presiding officer, acting majority leader, and Southern vigilante; each of the latter two was present to guarantee against parliamentary tricks the other might deploy (for example, a request for unanimous consent to limit debate or table the bill). *See also id.* at 9675 (statement of Sen. Clark) and 12,827 (statement of Sen. Hruska).

Senators were not above attempting to take advantage of the empty chamber to make favorable legislative history appear in the Congressional Record. Said Senator Smathers:

> I would hope and presume that, as I speak this evening, if any senator does not agree with something which I shall say, he will make that fact known so that we may get the Record straight. If he stays and listens to that which I shall say, does not object to it, and

Jersey and the examples of adverse impact that Congress specifically protected (these are discussed in detail below), nowhere in any of this material did even one person present one example, real or hypothetical, that would fall within the adverse impact definition of discrimination and claim the bill under consideration would or should outlaw what happened.[334] Of course, the instances of disparate treatment were legion.

Yet the occasions to raise adverse impact were many. For example, in separate minority views in the report of the House Judiciary Committee on H.R. 7152, Representatives Richard H. Poff of Virginia and William C. Cramer of Florida named thirteen acts outlawed by Title VII,

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does not offer his reasons as to why he thinks it is not right, I shall assume he thinks I am right.

Id. at 7784. Perhaps Senator Smathers spoke ironically. He probably knew that most of Congress had accepted President Johnson's invitation to attend the theater that evening. *Id.* at 7788 (statement of Sen. Scott). Nevertheless, after Senator Smathers had gone on at some length about the likelihood that Title IV would lead to busing of students, Senator Scott replied:

> Conjuring up fears by reading into the bill that which is not in the bill, reminds me of a line in Shakespeare. . . . The line from Shakespeare that I have in mind is, I think, from "Henry IV" when Owen Glendower, the dour Welshman, says: "I can call spirits from the vasty deep."
>
> Hotspur replies: "Why, so can I, or so can any man; but will they come when you call for them?"
>
> The Senator from Florida can call spirits from the vasty deep of his fears, of his concerns; but these spirits will not come when the senator calls them unless the spirits are there to begin with.

Id.

334. The reader will note that the non-existent person in the text is described by a restrictive clause: who presented a case of adverse impact and claimed it should be illegal. Both parts of the clause are necessary because there were persons who presented cases of adverse impact. For example, Joseph Ross, President of Davidson Bros. of Detroit, said:

> Traditional testing methods have a built-in cultural bias which obscures, if not obliterates, [blacks'] basic abilities and general aptitudes.
>
> We have tried to use new employment interview techniques to eliminate this cultural bias and these historical circumstances and to try to determine these actual native abilities if we can probe into them.

Hearings on S. 1937, *supra* note 276, at 320. Roy Richardson, personnel manager of Honeywell-Aeronautical Division, Minneapolis, also understood how tests disadvantage blacks:

> We use aptitude tests, verbal ability tests, and, of course, typing tests and the like for clerical jobs. It has been my experience that with the exception of professionals, engineers and scientists, for example, that Negroes tend to score lower on verbal tests than one would assume from their conversation and their apparent intelligence when you talk to them. I don't know what [the] cause is of this phenomenon but I think it is true.
>
> Senator CLARK. Has it occurred to you that it might be due to the fact that their education has not been comparable in result although they might have gone through the same number of grades of school?
>
> Mr. RICHARDSON. I would think that would probably be a very important factor, yes.
>
> Partly because of that and partly for other reasons, therefore, I thin[k] any company has to take that into account when they interview a Negro applicant who has taken a verbal skills test. In general, we are not using tests as much as we used to. We do not lean on them since we are not certain they are as good as they are supposed to be.

Id. at 425. Both of these witnesses appreciated that a test might exclude more blacks than whites, yet not be job related. Neither of these witnesses, however, nor the senators who listened to the witnesses' testimony, suggested there should be a law against such tests.

but the representatives mentioned no form of adverse impact.[335] Senator Johnston read from and commented on this list on the floor of the Senate; he also said nothing of adverse impact.[336]

Equally enlightening are instances in which a legislator made a statement he could not logically have made if he had believed that adverse impact would be outlawed by Title VII. For example, Senator John Stennis of Mississippi estimated the number of employees Title VII would protect. He excluded all states with FEP laws.[337] We have seen that no state had adopted adverse impact in 1964. If the Senator had understood Title VII to promulgate a definition of discrimination not then existing in any state, would he not have included every employee of every covered employer in the country?

Representative Paul C. Jones of Missouri argued that Title VII would prohibit an employer from choosing employees who abstain from alcohol and tobacco and attend church regularly. Representative Griffin replied at once:

> In the event [the bill becomes] a law, I would not want the statement of the gentleman [Mr. Jones] to go unchallenged in the Record that under that title an employer could not set up qualifications for employment, such as required that the employee to be hired shall not drink or smoke or swear, and so forth, because under this bill he can require any qualification or discriminate on any other ground than race, color, religion, or sex.[338]

If Mr. Griffin had thought adverse impact was banned by Title VII, he could not have said that an employer could require any qualification for employment. Selection criteria such as attending a church or refraining from smoking or swearing are unlikely to be job related, but quite likely to have an adverse impact on one class or another.

(2) Titles, I, II, III, IV, and VI

The other titles of the Civil Rights Act also reveal that Congress was unaware of adverse impact or unwilling to prohibit it. Adverse impact in

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335. H.R. REP. NO. 914, 88th Cong., 1st Sess. 107 (1963).

336. 110 CONG. REC. 6053 (1964). *See also id.* at 7781 (Senator Tower listed undesirable rulings that might issue from the EEOC, but said nothing about rules on validating selection criteria or any other aspect of adverse impact); *id.* at 13,092 (Senator Norris Cotten of New Hampshire cried that Title VII would empower the federal government to harass small employers, but said nothing about, for example, the cost of validating tests); *id.* at 7225, 7248 (Senators Erwin and Allen J. Ellender of Louisiana belabored Senators Clark and Case that Title VII would be counter-productive because black unemployment exceeded white unemployment in states with FEP laws; the co-captains for Title VII, had they been aware of adverse impact, would surely have replied that black unemployment in the North was partially caused by employers' use of tests that had an adverse impact and were not job related and that, by outlawing such tests, Title VII would diminish black unemployment.

337. *Id.* at 9881.

338. *Id.* at 2603.

the context of voter registration would apply to a literacy test that is passed by proportionately fewer blacks than whites. Yet Title I does not outlaw such tests; it bans only the unequal administration of literacy tests.[339] Adverse impact in the context of public accommodations would apply to hotels and restaurants whose prices are too high for blacks to afford, but Title II does not require that prices be lowered. Adverse impact in the context of public facilities would apply to the money a local government spends on facilities used by blacks as compared to the money spent on facilities used by whites. Of course, Title III does not count coins, but refers merely to a denial of the equal protection of the laws. Adverse impact in the context of public education would apply to racially imbalanced schools. We have already seen how emphatically Congress excluded the concept of racial imbalance from Title IV.

Adverse impact could apply to federally assisted programs in three ways, but Congress was unconcerned with each of them, and this lack of concern evinces an intent not to outlaw adverse impact under Title VI. First, adverse impact could apply to the employment practices of recipients of federal funds. For example, if a farmer who received money under the Agricultural Production Act discriminated against black hired hands, the program would have an adverse impact on blacks. Congress knew of this exact possibility and decided it was acceptable. Representative Celler said that Title VI would not reach to the employment practices of the beneficiaries of federal programs.[340] Representative Lindsay agreed,[341] as did Senator Humphrey.[342]

A second way adverse impact could apply in the context of federally assisted programs is with regard to the volume of goods and services

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339. That Congress intended a state could set its literacy standards as high as it liked is clear from a colloquy in the House:

> Mr. WHITENER. I ask the gentleman also, whether, under the language the bill contains, what the Justice Department calls "standards" for testing literacy are not prescribed by Federal legislation or proposed to be prescribed by this proposed Federal legislation?
>
> Mr. CELLER. No; that is not the case. We would not touch the standard or the qualifications or what have you which might be prescribed by the State. All we could do is to provide that the State could have any kind of standard it wished but could not discriminate in the implementation of its standards.

Id. at 1694. Senator Humphrey agreed with Representative Celler. *Id.* at 6531.

Section 101(b) of Title I provides that, in any proceeding in federal court in which literacy is a relevant fact, there shall arise a rebuttable presumption that a person who has completed sixth grade is literate. Although Congress must have forseen that this presumption would tend to equalize the percentages of black and white registered voters, the presumption does not outlaw a literacy test merely because more blacks than whites flunk it. Moreover, the presumption is rebuttable; evidence that a test required an eight-grade reading ability and that proportionate numbers of blacks and whites with an eighth-grade education passed the test would seem to suffice to rebut the presumption, even though proportionately fewer blacks than whites had completed eighth grade.

340. *Id.* at 1521.

341. *Id.* at 1542.

342. *Id.* at 6545.

received by blacks and whites. If whites received proportionately more than blacks, the program would have an adverse impact on blacks. But nothing in Title VI requires pro rata distribution. Rather, the title requires nothing more than the avoidance of disparate treatment.[343]

A third way adverse impact could apply to federal programs is in the application of section 602, which allows the federal government to cut off funds from discriminatory programs. Critics of Title VI pointed out that blacks, being needy, would probably suffer the most from a cut-off. For example, Senator Sparkman mentioned the effect of withholding free school lunches.[344] Senator Humphrey also appreciated that blacks would be hit hardest if section 602 were invoked but, instead of opposing cut-offs, he called for "a balance between the goal of eliminating discrimination and the goal of providing education, food, and so forth, to those most in need of it, including Negroes and members of other minority groups."[345] The point is that Congress knew that actions can have unintended effects, but it did not define discrimination in terms of such effects. Indeed, if adverse impact were part of Title VI, the federal agency which cut off funds to a discriminatory program might itself be guilty of discrimination if blacks suffered more than whites. That Congress gave this power to federal agencies indicates that adverse impact was not part of the definition of discrimination under Title VI.

(3) Other Equal Employment Opportunity Bills in the Eighty-eighth Congress

As we have noted, H.R. 405, Representative Roosevelt's bill on equal employment opportunity, was the source of Title VII. H.R. 405 was referred to the House Committee on Education and Labor, which took testimony on this and similar bills for ten days. In the printed record of this testimony,[346] which ran to 557 pages, there is no mention of adverse impact.

The committee recommended passage of the bill, but this report is also completely silent on adverse impact.[347] Instead, the report focuses on disparate treatment:

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343. Representative Celler made this point clear when he said that Title VI requires an agency to "establish nondiscriminatory standards of general application. This means it cannot apply one standard of conduct to one person and a different standard of conduct to another." *Id.* at 1519. As examples he gave instances only of disparate treatment. He said that hospitals and colleges receiving federal money could no longer refuse to admit blacks. *Id.* He did not say that hospitals and colleges would have to admit proportionately as many blacks as whites.

344. *Id.* at 8626.

345. *Id.* 6547.

346. *Hearings Before the General Subcommittee on Labor of the Committee on Education and Labor, House of Representatives*, H.R. 405 and Similar Bills, 88th Cong., 1st Sess. (1963). Hearings were held on April 22, 30; May 3, 7, 21, 24, 27, 28, 29; and June 6, 1963.

347. H.R. REP. 570, 88th Cong., 1st Sess. (1963).

> The basic purpose of H.R. 405 is to seek to eliminate arbitrary employment discrimination because of race. . . .
>
> Job discrimination is extant in almost every area of employment and every area of the country. It ranges in degrees from patent and absolute rejection to more subtle forms of individious distinctions. Most frequently it manifests itself through relegations to "traditional" positions and through discriminatory promotional practices.[348]

The report also contains evidence that the House shared the Senate's feelings about quotas and the use of racial imbalance to prove discrimination:

> Nothing in the act is intended to allow charges to be brought based upon disproportionate representation of members of any race, religion, color, national origin, or ancestry within any business enterprise or labor organization. General rules as to percentages, quotas, or other proportional representation shall not be the basis of charges brought under this act. However, disproportionate representation maybe considered as background evidence in an unlawful employment practice proceeding under this act.[349]

H.R. 405 never reached the floor of the House, but many of its provisions, including the sections defining unlawful employment practices, were incorporated into Title VII of H.R. 7152, the Kennedy Administration's omnibus civil rights bill. This bill was referred to the Committee on the Judiciary, which extensively revised the bill—but did not change the definitions of unlawful employment practices borrowed from H.R. 405—and recommended passage. The committee report on this bill, like the report on H.R. 405, is completely silent on adverse impact and related issues.[350]

The House passed H.R. 7152 and sent the bill to the Senate. There is no Senate committee report on the bill because the bill was placed directly on to the floor of the upper chamber. Although the Senate adopted more than 100 amendments to H.R. 7152 and rejected even more,[351] only two of them—the unsuccessful attempt to insert the word "solely" before the word "because" and the equally unsuccessful attempt (discussed below) to outlaw nepotic admission practices of labor unions—affected the definitions of discrimination contained in sections 704(a)(1) and (2) of the House bill. These sections, renumbered sections 703(a)(1) and (2), were adopted by the Senate in exactly the same form as passed by the House. Accordingly, the absence of allusion to adverse impact and related issues in the House committee reports is solid evi-

348. *Id.* at 1.

349. *Id.* at 5.

350. *See, e.g.*, H.R. REP. NO. 914, 88th Cong., 1st Sess. (1963).

351. Vass, *supra* note 210, at 456 n.101.

dence that neither house of Congress intended Title VII to incorporate the adverse impact definition of discrimination.

H.R. 405 had a less successful cousin in the Senate, S. 1937. This bill, also directed exclusively at employment discrimination, has been ignored but deserves our attention because it was the subject of hearings and a favorable committee report.[352] This bill would have taken the intermediate step between disparate treatment and adverse impact, but did not reach adverse impact itself. Of course, even if S. 1937 would have outlawed adverse impact, Congress chose to enact H.R. 7152 instead. These facts are further proof that Title VII was not meant to prohibit adverse impact.

S. 1937 was introduced into the Senate by Senator Humphrey and thirteen co-sponsors[353] during the summer of 1963. The bill was concerned more with opportunity for equality than with equality of opportunity. The heart of the bill was section 4(a), which read:

> No person subject to this Act shall refuse or deny equal employment opportunity to any individual because of race, color, religion, or national origin. Such refusal or denial shall include any act or practice which, because of an individual's race, color, religion, or national origin, results or tends to result in material disadvantage or impediment to any individual in obtaining employment or the incidents of employment for which he is otherwise qualified.[354]

The language of this clause shows it was meant to sweep more broadly than disparate treatment. The fundamental goal was to guarantee equal employment opportunity, which was defined as the absence of any practice that results—or tends to result—in material disadvantage in employment opportunities. Did this goal reach as far as adverse impact? Although there is some evidence to the contrary, the answer is no.

S. 1937 occupied the middle ground between disparate treatment and adverse impact. To understand the lay of the land in the early 1960's, the contemporary meanings of three terms must be kept in mind. The first is "fair employment practices," which meant absence of disparate treatment. The second is "affirmative action." Today, this term is a synonym for goals and timetables, and it smacks of reverse discrimination (that is, a preference for blacks); then, the term meant only proactive steps to recruit, utilize, and sometimes train blacks who otherwise would not have applied for jobs or would have been assigned to jobs beneath the blacks' abilities. "Equal employment opportunity" meant fair employment practices plus affirmative action. The right to equal employment

352. S. REP. NO. 867, 88th Cong., 2d Sess. (1964).

353. The co-sponsors were Senators Case, Clark, Douglas, Engle, Gruening, Hart, Long of Missouri, McCarthy, Nelson, Newberger, Randolph, Ribicoff, and Williams of New Jersey.

354. S. 1937, 88th Cong., 1st Sess. § 4(a) (1963).

opportunity written into section 4(a) of S. 1937 must be understood in this sense.

And so the term was understood. In a statement to a Senate subcommittee, Erwin Griswold, Commissioner of the United States Commission on Civil Rights, supported S. 1937 because it mandated equal employment opportunity, which meant not only treating blacks without regard to their race, but also informing blacks of job vacancies, referring blacks through placement agencies, training blacks in the necessary skills, and utilizing those skills.[355] These steps constituted affirmative action; they fell short of the requirements of adverse impact.

Willard Wirtz, Secretary of Labor, held the same views. His statement to the subcommittee indicated his understanding that affirmative action included training programs within and without a firm.[356] He favored S.1937 because it would have created an Equal Employment Op-

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355. Mr. Griswold said:

> This bill appropriately emphasizes the positive concept of equal employment opportunity. The current economic and employment status of Negroes is not simply the result of employers refusing to hire qualified Negro jobseekers. It is more the result of restrictive practices of labor unions, both as to membership and apprenticeship training and of other personnel and manpower systems established by tradition, habit, or convenience which by their operation have the effect of excluding Negroes from employment opportunities.

Hearings on S. 1937, supra note 276, at 494. The last words of the quotation ("manpower systems established by tradition. . . which by their operation have the effect of excluding Negroes from employment opportunities") may seem to embrace adverse impact. The words do indicate that Mr. Griswold supported S. 1937 because it looked beyond the intent of employers to the effects of systems on blacks. Nevertheless, Mr. Griswold revealed that he had 1960's-style affirmative action in mind, and not adverse impact, as he elaborated on his general statements:

> The goal is not merely to insure nondiscriminatory treatment of the Negro applicant when he arrives at the personnel office, but rather to insure that Negroes as well as whites will know of job vacancies, will be referred by placement agencies, and will possess the requisite training to qualify. Nondiscrimination alone will not solve the problem we face if Negroes never learn of jobs, are denied referrals by employment agencies, and are barred from training facilities. Equal employment opportunity is properly defined by the statute in terms of the entire employment process.

Id.

356. Mr. Wirtz mentioned to the subcommittee that Executive Order 10,925 required affirmative action on the part of federal contractors. *Id.* at 394. He named five companies that were subject to this requirement and, failing to meet it, had been warned they would be debarred from bidding on federal contracts unless they mended their ways. *Id.* at 409. Typical of the steps taken by these companies to restore themselves to grace were the following measures adopted by Comet Rice Mills of Texas:

> 1. The company president had held conferences with heads of all divisions and managers of all plants detailing the company's policies and delegating responsibility to top management to see to it that equal employment opportunity was afforded in all respects.
>
> 2. The company wrote to all sources of recruitment stating specifically that it wished referrals to be made without regard to race, creed, color, or national origin. It broadened the base of its recuritement by including colleges and high schools which could refer minority group applicants.
>
> 3. It eliminated racial separation of departments and work assignments.
>
> 4. It eliminated racially separate sanitary facilities.
>
> 5. It standardized its rates of pay to provide a uniform system of evaluation without regard to race.
>
> 6. It undertook a survey of the abilities and qualifications of its minority employees to provide an objective basis for upgrading and promotion. (At the time of investigation, it

portunity Administrator with power to require affirmative action of this sort. But nothing in the Secretary's statement shows he believed the Administrator could have prohibited adverse impact.

Finally, the most authoriative source on the meaning of S. 1937, Senator Humphrey, told the subcommittee:

> I think it has become increasingly evident that many of the problems associated with the lack of employment opportunities result from the existing practices in the process of public and private employment, practices not directly related to overt discrimination. For example, there are recruiting systems which never locate qualified Negro technicians and typists because Negroes normally do not attend the trade and technical schools on the recruiter's schedule. . . .
>
> In short willful discrimination is often commingled with many impersonal institutional processes which nevertheless determine the availability of jobs for nonwhite employees.[357]

If the last sentence of this statement were taken out of context, the sentence might seem to embrace adverse impact. In context, however, the sentence reveals that Senator Humphrey meant to go only one step beyond non-discrimination: he meant to reach equal employment opportunity, which added affirmative action to non-discrimination. His following remarks indicate that he stopped shy of adverse impact:

> Therefore, this legislation departs from the traditional concept of enforcing non-discrimination in employment and seeks to establish the broader and more comprehensive obligation of promoting equal employment opportunities. Instead of, in other words, being the policeman, you are in a sense here being the affirmative worker. Thus the administrator is charged with the responsibility to see that no person subject to the act denies equality of treatment in employment in all incidents of employment including not only hiring, promotion, transfer, and seniority, but also the related areas of recruitment, recruitment advertising, apprenticeship, and training opportunities, membership in employee and labor organizations, and equality of access to the various facilities and services of employment agencies.[358]

Thus, the author and leading spokesperson for S. 1937 contemplated that it would empower the government to require of employers something more than ignoring the race of an applicant who appeared at the hiring

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had no idea of the qualifications of its minority group employees since the application form used for such applicants did not provide space for listing education or skills.)

7. Negro and Latin-American employees were upgraded to fill vacancies in various skilled categories on a permanent basis. Others were upgraded to such jobs on a temporary basis during the peak milling season.

8. As clerical vacancies occurred, minority group applications were solicited for the first time. Of two vacancies which occurred, one was filled by a Negro applicant.

Id. at 411. These steps were plainly intended to eliminate disparate treatment and promote affirmative action as contemporaneously defined.

357. *Id.* at 144-45.

358. *Id.* at 145.

gate; the bill was intended to lead to affirmative outreach programs to attract blacks and fully utilize their abilities. This intent, not an intent to promulgate the adverse impact definition of discrimination, was written into section 4(a) of the bill.[359]

Congress's action on S. 1937 supports the thesis of this article, whether or not S. 1937 was intended to enact adverse impact. If the bill was so intended, Congress's preference for Title VII suggests rejection of adverse impact. If S. 1937 was not intended to reach adverse impact, this fact is further proof that Congress was unaware of that definition of discrimination. A few individuals may have approached it by moving from advocacy of non-discrimination to advocacy of 1960's-brand affirmative action, but they (and certainly Congress) had not yet taken the final step.

b. Protection of Adverse Impact

Although our legislators indicated no understanding of adverse impact, they knew exactly what they wanted Title VII to outlaw. When amendments were proposed that would have broadened the bill beyond its purpose, they were defeated. One such amendment would have banned conduct that falls within the ambit of adverse impact. Two other amendments expressly designed to protect major instances of conduct within the same ambit were introduced and adopted. The defeat of the

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359. There is one piece of evidence that S. 1937 would have outlawed adverse impact. This evidence appeared in a letter that Senator Clark wrote to the *Wall Street Journal*:

> The opponents of the pending civil rights bill [H.R. 7152] have had striking success in stirring confusion about what the bill would or would not do, and the Motorola case has been a favorite hobby horse. Frankly, I prefer the Senate bill [S. 1937] to title VII, and so, I believe, do the 12 members of the Senate Labor and Public Welfare Committee who voted to report it favorably to the floor. I believe that the situation in the Motorola case should be covered by Federal law.
>
> But whatever my preferences, and those of my colleagues may be, the fact remains that the issues raised by the Motorola case have nothing to do with Title VII of the pending civil rights bill, and are plainly beyond its scope.

110 CONG. REC. 9107 (1964). The first paragraph of the quotation implies a belief that S. 1937 would have authorized the same result as the hearing examiner reached in the *Motorola* case, which certainly approximated adverse impact.

But Senator Clark was not consistent on this score. After discussing with Senator Case the differences between the enforcement provisions of several employment discrimination bills introduced into the Eighty-eighth Congress, Senator Clark introduced a memorandum comparing S. 1937 and Title VII of H.R. 7152. *Id.* at 12,596. Prepared by the staff assistant of the Senate Subcommittee on Employment and Manpower, whom Senator Clark praised highly, the memorandum specifically compared the behavior prohibited by the two bills—and mentioned nothing of advere impact. *Id.*, at 12,597. Taking into account Senator Clark's inconsistency, and weighing his *Wall Street Journal* letter against the statements of the author of S. 1937, the Commissioner of the Civil Rights Commission, and the Secretary of Labor, Senator Clark's separate view must be discounted heavily.

In another regard, though, Senator Clark's letter is entitled to considerable weight. Addressing the bill for which the Senator was a co-captain, the second paragraph of the letter clearly indicates that Title VII was not meant to go as far as S. 1937. Other senators also stated that Title VII was a moderate bill. *Id.* at 8352 (statement of Sen. Proxmire); *id.* at 5336 (Sen. Humphrey's comments on "Meet the Press"). By enacting Title VII, Congress indicated its preference for the more moderate legislation.

former amendment and the adoption of the latter two provide additional proof that adverse impact goes beyond what Congress intended Title VII to outlaw.

(1) Nepotism in Unions

The defeated amendment was offered by Representative Cahill. Proposed as an addition to the definition of discrimination in section 704 of H.R. 7152 (renumbered section 703 in the Act), the amendment would have made it illegal for a labor union "to give preference to one applicant for membership over another applicant for reasons other than job qualifications and for reasons which may have the indirect effect of causing discrimination because of race. . . ."[360] This amendment precisely identified the way a union's selection criteria can have an adverse impact. Admissions rules which are not discriminatory on their face, but which are not job related, can have the indirect effect of excluding blacks. Representative Cahill gave a perfect example when he alluded to "small unions that have handed down jobs from father to son and brother to brother, and who have declined to accept membership even though the members [applicants?] were qualified." A nepotic admissions rule was bound to have an adverse impact on blacks because in 1964 many unions had few or no black members; yet the House of Representatives rejected the Cahill amendment.[361] Its opponents argued that it dealt with labor relations, not discrimination. Clearly, the House's definition of discrimination did not reach adverse impact.

(2) Seniority Systems

Two other examples of adverse impact were considered by Congress, and they were explicitly exempted from the law. Both were significant issues. The first was the seniority system. When used to allocate job opportunities, for example, to decide who is promoted or laid off, a seniority system operates as a selection criterion. If blacks have been denied the opportunity to accumulate seniority, the system has an adverse impact, as the Supreme Court has recognized.[362]

Yet Congress not only exempted seniority systems from Title VII, but in fact believed at all times that seniority systems were beyond the reach of the bill. From the outset, the proponents of Title VII maintained that it would have no effect on seniority systems. In both houses of Congress, critics charged the bill would destroy seniority, but advocates consistently replied that seniority would not be affected.[363] The

360. *Id.* at 2593.

361. *Id.* at 2595.

362. International Bhd. of Teamsters v. United States, 431 U.S. 324, 349-50 (1977).

363. *See* citations in *id.* at 350. In the House of Representatives, for example, the minority report on H.R. 7152 of the House Judiciary Committee threatened, "The power gained by this title,

Interpretative Memorandum said unequivocally, "Title VII would have no effect on established seniority rights."[364] A statement from the Department of Justice took the same position.[365] Senator Keating aptly summed up the proponents' view of the effect of Title VII on seniority: "I cannot believe that President Kennedy, President Johnson, the Speaker of the House of Representatives, and the leaders of the House, on both sides of the aisle, in passing the bill so overwhelmingly were doing so to abolish the system of union seniority. . . ."[366] Senators Humphrey[367] and Kuchel[368] agreed. Thus, as in the House, so in the Senate, it was understood that seniority systems, which are a clear example of adverse impact, were considered outside the definition of discrimination.

After this understanding had been reached, a clause protecting bona fide seniority systems was added to section 703(h). It might be argued that the addition of this clause proves Congress intended to outlaw adverse impact, that the clause was necessary because seniority systems would have become unlawful had not specific protection been included. But this argument ignores the legislative history of the clause. As the Supreme Court has written, the clause:

> was enacted as part of the Manfield-Dirksen compromise substitute bill that cleared the way for the passage of Title VII. The drafters of the

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if invoked, would destroy seniority in unions." H.R. REP. NO. 914, 88th Cong., 1st Sess. 66 (1963). *See also id.* at 65, 71. But Representative Celler, chairman of the Judiciary Committee, assured the House that Title VII would not impair seniority systems. 110 CONG. REC. 1518 (1964). So firm was this assurance that a Southern attempt to amend the bill to exempt "any employer whose hiring and employment practices are pursuant to (1) a seniority system" was defeated. *Id.* at 2727-28. When H.R. 7152 left the House, the bill said nothing about seniority systems, yet it was understood that they were not affected.

Debate in the Senate flowed along similar lines. For example, Senator Dirksen asked a number of searching questions about Title VII. One question was, "Normally, labor contracts call for 'last hired, first fired.' If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?" *Id.* at 7217. To a person, every proponent of Title VII who addressed the issue said that existing seniority rights would not be impaired. Senator Clark responded to Senator Dirksen's question as follows:

> Seniority rights are in no way affected by the bill. If under a "last hired, first fired" agreement a Negro happens to be the "last hired," he can still be "first fired" as long as it is done because of his status as "last hired" and not because of his race.

Id. at 7217.

364. *Id.* at 7213. The Memorandum continued:

> [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.

365. *Id.* at 7207.

366. *Id.* at 5874.

367. *Id.* at 5423.

368. *Id.* at 6564.

> compromise bill stated that one of its principal goals was to resolve the ambiguities in the House-passed version of H.R. 7152. As the debates indicate, one of those ambiguities concerned Title VII's impact on existing collectively bargained seniority rights. It is apparent that section 703(h) was drafted with an eye toward meeting the earlier criticism on this issue with an explicit provision embodying the understanding and assurances of the Act's proponents: namely, that Title VII would not outlaw such differences in treatment among employees as flowed from a bona fide seniority system that allowed for full exercise of seniority accumulated before the effective date of the Act. . . . The statement of Senator Humphrey . . . confirms that the addition of section 703(h) "merely clarifies [Title VII's] present intent and effect." 110 Cong. Rec. 12723 (1964).[369]

Congress was fully aware that seniority systems would have an adverse impact on blacks, who, as the last hired, would be the first fired. Nevertheless, Title VII's definition of discrimination was never intended to reach seniority systems. These facts are evidence that Congress did not intend to outlaw adverse impact.

(3) Ability Tests

Much of the debate on Title VII centered on employers' use of ability tests. The issue grew out of the *Motorola* case,[370] in which Leon Myart, a black, claimed under the Illinois FEP law that the Motorola Company had refused to hire him because of his race. Mr. Myart had studied electronics in a vocational high school, received a high school diploma from an adult academy, where he satisfactorily completed a course for electrical and radio-television technicians, and subsequently passed electrical and radio-television courses at another school. He also had some practical experience "trouble-shooting" television sets in need of repair. On July 15, 1963, he applied to the Motorola Company in Chicago for the job of analyzer and phaser, which required trouble-shooting radio, television, and stereophonic sets as they came off the assembly line. Motorola gave Mr. Myart Test No. 10,[371] a 28-question paper-and-pencil examination that was routinely administered to all applicants, and he failed. The author of the examination, Dr. Phillip Shurrager, admitted that it was essentially an intelligence test. The hearing examiner for the Illinois Fair Employment Practices Commission determined that Test No. 10 was illegal because blacks, owing to their culturally deprived and disadvantaged background, achieved lower scores than

369. International Bhd. of Teamsters v. United States at 431 U.S. at 352 (footnote and citations omitted).

370. The decision and order of the hearing officer are reprinted at 110 CONG. REC. 9030-33 (1964).

371. The questions on Test No. 10 were read into the *Congressional Record* by Senator Tower. *Id.* at 9033.

whites.[372] The hearing examiner did not rule on the validity of the test; that is, he did not discuss evidence on whether the test predicted success on the job. Nor did he order that Motorola validate a new test (though he did require that a new test be free of adverse impact). He simply decided that intelligence tests were illegal selection criteria in Illinois so long as whites achieved higher scores than blacks.

The decision and order were issued on February 26, 1964, and reaction was swift. Within two weeks, the case was the subject of comment on the floor of the Senate,[373] and, before another week had passed, the full text of the decision had been printed in the minutes of both houses of Congress.[374] Because the House of Representatives had passed H.R. 7152 before the decision was announced,[375] congressional debate on *Motorola* occurred in the Senate.

This debate played an important role in the *Griggs* opinion. Duke Power argued its tests were protected by section 703(h) because they were professionally developed and were not designed or intended to discriminate; however, the company had not proved its tests were job related, and the Court sought to refute the company's argument by saying that Congress intended section 703(h) to protect only job-related tests. Nothing in the language of this section indicates such an intent. Indeed, the words of the section—"any professionally developed ability test [that is not] designed, intended or used to discriminate"—require only that the employer choose a reputable test and administer it in good faith. The section certainly says nothing about validating tests. Accordingly, the Court had to look outside the statute for support.

The Court advanced two lines of argument to prove that section 703(h) was meant to protect only job-related tests. The first line, which had two branches, focused on debates before the section became part of the bill. In one branch of this argument, the Court maintained that critics of Title VII claimed the *Motorola* case made illegal all standardized tests on which whites outperformed blacks, even if the tests were necessary to the business. (If sound, this branch of the argument would have established that the critics understood the concept of test validity and feared that the bill might jeopardize valid tests.) In the other branch of the first line of argument, the Court maintained that the proponents of Title VII replied to the critics with assurances that the bill would not affect job-related tests. (If sound, this branch of the argument would have established that the proponents also understood the concept of test validity and believed all along that valid tests would be lawful.) The

372. *Id.* at 9032.

373. *Id.* at 5081-82 (statement of Sen. Robertson).

374. *Id.* at 5312, 5662.

375. The House passed H.R. 7152 on February 10, 1964. *Id.* at 2804-05.

second line of argument focused on the Tower amendment, which was drafted, argued the Court, to protect only job-related tests. The initial version of the amendment (Tower-I) was defeated because its language would have protected tests that were deliberately used to discriminate. Senator Tower reworded the amendment to avoid this risk, but, said the Court, retained the purpose to protect only job-related tests. The revised amendment (Tower-II) was adopted as section 703(h).[376]

Under the Court's reading of the debates on *Motorola* and the Tower amendment, they would stand as evidence that Congress intended to promulgate the adverse impact definition of discrimination. The argument runs thus: the amendment, which was designed to protect job-related tests, was inappropriate if Congress intended to outlaw only disparate treatment. The validity of a test should not be a complete defense in a disparate treatment case because a valid test could be perverted to discriminatory ends. Validity is important, however, if Congress intended to outlaw adverse impact. Without the Tower amendment, a test with an adverse impact might have been banned, even if it were job related. Therefore, concludes the argument, adoption of the Tower amendment is evidence that Congress intended to outlaw adverse impact.

But the Court misread the *Motorola* debate and the Tower amendment. We find that Congress was altogether unaware of test validity or job relatedness. For this reason, Congress believed the *Motorola* decision threatened the use of all ability tests, not merely job-related tests. For the same reason, we find that the proponents of Title VII assured the Senate that the bill would protect all fairly administered tests. And we find that Tower-I was defeated not only because it might have protected ability tests purposefully used to discriminate, but also because it was thought to be unnecessary—for ability tests were not outlawed in the first place. Thus, the debates on the *Motorola* case and the Tower amendment reveal that Congress treated ability tests as it had treated seniority: Congress knew tests can have an adverse impact and, nevertheless, opted to protect them.

The Court's first line of argument was that, long before the Tower amendment was introduced, senators knew about and wanted to protect job-related tests. One branch of this argument concerned dire predictions about the effect of *Motorola*:

> The congressional discussion [of testing] was prompted by the decision of a hearing examiner for the Illinois Fair Employment Commission in *Myart v. Motorola Co.* . . . That case suggested that standardized tests on which whites performed better than Negroes could never be used. The decision was taken to mean that such tests could never be

376. 401 U.S. at 434-36.

justified even if the needs of business required them.[377]

The first two sentences of this statement were true. Congressional debate on testing was sparked by the *Motorola* case, which, threatened opponents of the bill, meant that all tests with an adverse impact on blacks would become illegal if Title VII passed. But the third sentence was false because it implied the Senate discussed justification of tests and believed that job-related tests were justified, regardless of their effect on blacks. In fact, the Senate never discussed justifying (validating) tests. As we have seen, neither house of Congress showed any awareness of job relatedness. No one seemed to appreciate that a test might be invalid because it failed to predict success on the job. Rather, senators simply assumed that tests were useful and business needed them. The Court said the Senate feared that *Motorola* endangered tests with an adverse impact, even though the tests were justified by business necessity. In truth, the opponents of Title VII did not distinguish between justified and unjustified tests. The opponents simply feared that *Motorola* endangered all tests with an adverse impact.

The Court's line of argument was that, even before the Tower amendment was introduced, senators sought to protect only valid tests. The first branch, that opponents of Title VII feared it would vitiate job-related tests, was misleading because opponents did not distinguish between valid and invalid tests. The second branch of the argument maintained that advocates of Title VII said it would not prohibit job-related tests. This branch was also erroneous. The Court wrote:

> Proponents of Title VII sought throughout the debate to assure the critics that the Act would have no effect on job-related tests. Senators Case of New Jersey and Clark of Pennsylvania, comanagers of the bill on the Senate floor, issued a memorandum explaining that the proposed Title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, *must meet the applicable job qualifications.* Indeed, the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color." 110 Cong. Rec. 7247.[11](Emphasis added.)

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11. The Court of Appeals majority, in finding no requirement in Title VII that employment tests be job related, relied in part on a quotation from an earlier Clark-Case interpretative memorandum addressed to the question of the constitutionality of Title VII. The Senators said in that memorandum:

> "There is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifica-

377. *Id.* at 434.

> tions 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.
>
> However, nothing there stated conflicts with the later memorandum dealing specifically with the debate over employer testing, 110 Cong. Rec. 7247 (quoted from in the text above), in which Senators Clark and Case explained that tests which measure "applicable job qualifications" are permissible under Title VII. Certainly a reasonable interpretation of what the Senators meant, in light of the subsequent memorandum directed specifically at employer testing, was that nothing in the Act prevents employers from requiring that applicants be fit for the job.[378]

We have noted above that this passage contains three errors of scholarship. These errors led the Court to rely on a memorandum prepared at the behest of Senator Case (which the Court mistakenly labeled as "an earlier Clark-Case interpretative memorandum"), rather than on the genuine, jointly authored Interpretative Memorandum. The choice of documents was important because the Court predicated much of its argument on a word that was used in one sense in one document but in a different sense in the other document. The Court argued that Congress intended all along to protect only job-related tests, and the proof of this intent was the use of the word "qualifications." The Court interpreted the word to mean fitness for a job. Thus, the Court argued, when the Case memorandum stated that Title VII would protect an employer's right to insist that a job candidate have the applicable qualifications, Congress meant that the employer would be free to apply qualifications that determine fitness—in other words, those which are job related.

The Court put too much emphasis on a single word; the meaning of a statute may better be learned from a more comprehensive study of the legislative history. Nevertheless, to the extent the word "qualifications" reveals the intent of Congress, the Court's argument fails because "qualifications" is an ambiguous word. It can mean fitness for a job, but it can also mean prerequisites for obtaining a job.[379] If the word were used in this latter sense, Congress meant that the employer would be free to apply any qualification except race as prerequisite to a job. In this event, the argument that the proponents of Title VII believed all along that the bill protected only job-related tests would lack support.

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378. *Id.* at 434-35.

379. A person may have one of these qualifications but not the other. For example, suppose an employer will hire as a sales representative only an applicant with five years of experience selling the company's product. Ms. A, who was the outstanding sales representative for the company's competitor for four years, is not qualified because she cannot meet the prerequisite for obtaining the job, but she is qualified in the sense of being fit to do the work. Ms. B, who was fired for inadequate performance after seven years as a sales representative for the company's competitor, is qualified because she meets the prerequisites for obtaining the job, but she is not qualified in the sense of being fit to do the work.

In the Case memorandum, on which the Supreme Court relied, "qualifications" may well have been used to mean fitness for the job. But in the Interpretative Memorandum, the word was probably used to mean prerequisites for obtaining a job. Two factors support this interpretation. First, Senators Clark and Case wrote that the employer could set his qualifications as high as he likes. Such qualifications could easily exceed the requirements of the job (for example, a high school diploma as a qualification for the job of shoveling coal). Second, another passage in the Interpretative Memorandum clearly used "qualification" to mean prerequisite for obtaining a job:

> To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 [renumbered 703] are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title.[380]

"Qualification" is equated with "criterion" (which in this context means the same as prerequisite) for obtaining a job, and examples of criteria are race, color, etc.—none of which affects ability to perform. Thus, in the document which, by the Court's own reasoning, is the more authoritative, there is no evidence that Congress intended to protect only job-related tests.

Although we risk staking too much on the meaning of a single word, nevertheless, if that word is critical (as the Supreme Court implied), we should not limit our search to two documents. We should examine the congressional debates to determine how several representatives and senators used the word. Predictably, we find the ambiguous word was used in both of its senses.

Once in a while, "qualifications" was used to mean fitness to do a job. For example, Representative Celler reported that some people claimed Title VII would thwart the hiring of cooks who specialized in cooking gumbo, grits, and southern fried chicken.[381] He replied, "Why, such charges are ridiculous. As we have seen, the bill specifically aims at the hiring of employees on the basis of qualification, not on the basis of race."[382] "Qualification" meant ability to cook.[383]

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380. 110 CONG. REC. 7213 (1964).

381. 420 F.2d 1242.

382. 110 CONG. REC. 1518 (1964).

383. Other examples include Representative Seymour Halpern of New York, who said that Title VII's "only purpose is to remove any standard in connection with securing and maintaining employment which is extrinsic to job qualifications." *Id.* at 1628. "Qualifications" could only have meant fitness to do a job because the word was used in contrast to the phrase "standard in connection with securing and maintaining employment," and this phrase plainly means prerequisite for obtaining a job. Senator Humphrey said, "We are attempting to pass a law which will provide that when someone seeks a job, he shall be considered on the basis of his qualifications, on the basis of his training, on the basis of his capacity, and that he shall not be excluded on the basis of his race." *Id.*

Other times—by far the majority—"qualifications" was clearly used to mean prerequisites for obtaining a job. Senator Tower—who, as author of the amendment that is so important to us, must be considered a particularly authoritative source—used "qualifications" to mean prerequisites for obtaining a job, in contradistinction to the word "skills," which he used to mean fitness to do the job:

> There are qualifications for a number of things. There are qualifications for service in the Senate. There are qualifications for service as President. There are qualifications for service as a Member of the House of Representatives.
>
> We lay down certain qualifications by law for various public offices which require peculiar skills. Most states, for example, require that judges be lawyers.
>
> It is certainly right and proper for a private company to require that a man possess certain skills necessary to perform the work required by that company, or that he possess a sufficient intellect to be trainable to do a specific job.[384]

"Qualifications" must have been used in its sense of prerequisites for obtaining a job because the Constitution and state law do not (unfortunately) spell out the abilities necessary for success in public office. The word "skills" referred to what a judge or an employee must do in his work, that is, fitness to do the job.

Speaking of Senator Fulbright, Senator Clark said:

> The Senator stated that this legislation "tampers with the right of employers to hire those who will best serve their business." I must frankly disagree. There is nothing in Title VII—or any reasonable construction of it—which supports this assertion. Its whole purport is simply to say to employers: "Choose any job applicant you want, and set any job qualification you want to use—except race, creed, color, national origin—or—except where it is a bona fide occupational qualification—sex."[385]

Senator Clark clearly implied that race or sex could—but should not—be a qualification for a job (except when sex is a bona fide occupational qualification). In this sense, "qualification" can only mean prerequisite for obtaining a job because the basic premise of Title VII was that race never, and sex only rarely, has something to do with actual fitness to perform.[386]

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at 5817. "Qualifications" meant fitness to do a job because the word was equated with training and capacity.

384. *Id.* at 9025. Senator Tower's reference to "sufficient intellect to be trainable" may indicate that his amendment was intended to protect intelligence tests.

385. *Id.* at 9678.

386. Other examples include Representative Griffin, who was replying to Representative Jones's argument that Title VII would bar an employer from choosing employees who do not smoke or drink and who go to church regularly. Representative Griffin said:

> In the event [this bill becomes] a law, I would not want the statement of the gentleman [Mr. Jones] to go unchallenged in the Record that under this title an employer could not

It is clear that the Supreme Court was mistaken to insist that the word "qualifications" meant fitness to do a job; therefore, support for the Court's argument that Congress always intended to protect only job-related tests disappears. Indeed, because representatives and senators used the word more often in its sense of prerequisite for obtaining a job, it is more likely—to the extent that legislative intent can be inferred from a single word—that Congress intended to protect the use of any selection criterion other than race.

The Court's second line of argument was that the legislative history of section 703(h) shows that the Tower amendment was meant to protect only job-related tests. The Court relied on legislative history, rather than on the language of the section itself, because even the most nimble mind would have to labor to find a requirement of validity in the text of the section.[387]

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set up qualifications for employment, such as required that the employee shall not drink or smoke or swear, and so forth, because under this bill he can require any qualification or discriminate on any other ground than race, color, religion or sex.

Id. at 2603. "Qualifications" meant prerequisites for obtaining a job because not drinking, smoking, and swearing have little to do with the performance of most jobs. The word had the same meaning in this colloquy on the floor of the Senate:

> Mr. STENNIS. If I lived in the Senator's state . . . would I have any right to be employed by the Senator in his little manufacturing plant?. . .
>
> Mr. McCELLAN. I do not believe I have a right to demand the fruits of another man's ingenuity, his enterprise, his industry, his thrift, his frugality. . . .
>
> Mr. STENNIS. If I understand the Senator correctly, we apparently have the shoe on the wrong foot. As a prospective employee, I have no basic right to have the Senator give me a job. . . . I might be otherwise qualified, but I might be an older man that the Senator would wish to hire.
>
> Mr. McCLELLAN. There might be many reasons. There are differences in the personalities of people. Two men might be eligible for a job in the sense of qualifications. They might have the qualifications to apply for the job. One might be a little superior to the other, but the one who has the superior qualifications might have some undesirable quirks of personality, whether he was black or white, Methodist or Baptist, Catholic or Jew. He might have quirks of character that would influence the judgment of any employer in employing him.

Id. at 7876. Certainly "qualifications" referred to the prerequisites for obtaining the job, as the man with the "superior qualifications" could not perform the work as well as the other man and was thus less qualified in the sense of fitness to do the job.

Finally, in responding to objections that had been raised during the debate on Title VII, Senator Clark used "qualifications" to mean prerequisites for obtaining a job:

> Objection: The bill would make it unlawful for an employer to use qualification tests based upon verbal skills and other factors which may relate to the environmental conditioning of the applicant. In other words, all applicants must be treated as if they came from low income, deprived communities in order to equate environmental inequalities of the culturally deprived group.
>
> Answer: The employer may set his qualifications as high as he likes, and he may hire, fire, and promote on the basis of test performance.

Id. at 7218. This quotation is particularly revealing. As in the Interpretative Memorandum, Senator Clark said an employer may set his qualifications at any level—even one higher than required by the job. And the employer may act on the basis of performance on tests of verbal skills, a statement that deals a body blow to the EEOC Guidelines.

387. In quoting §703(h), the Court italicized the word "used," perhaps suggesting this word indicates the intent of Congress to protect only job-related tests. But, as will appear below, "used"

> Senator Tower's original amendment provided in part that a test would be permissible, "if . . . in the case of any individual who is seeking employment with such employer, [a professionally developed ability] test is designed to determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise involved. . . ." 110 Cong. Rec. 13492. This language indicates that Senator Tower's aim was simply to make certain that job-related tests would be permitted. The opposition to the amendment was based on its loose wording which the proponents of Title VII feared would be susceptible of misinterpretation. The final amendment, which was acceptable to all sides, could hardly have required less of a job relation than the first.[388]

In this passage, the Court ignored an alternative interpretation of Tower-I under which the employer's motive, and not the validity of the test, would determine whether use of the test was protected. The Court also misconstrued the legislative history of the Tower amendment.

The Supreme Court considered it obvious from the text of Tower-I that the amendment was drafted to protect only job-related tests. A close reading of Tower-I, however, reveals an alternative construction that is more faithful to the language of the proposal. The proposal read:

> (h) Notwithstanding any other provision of this title, it shall not be unlawful employment practice for an employer to give any professionally developed ability test to any individual seeking employment or being considered for promotion or transfer, or to act in reliance upon the results of any such test given to such individual, if—
>
> (1) in the case of any individual who is seeking employment with such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise involved, and such test is given to all individuals seeking similar employment with such employer without regard to the individual's race, color, religion, sex, or national origin, or
>
> (2) in the case of any individual who is an employee of such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his promotion or transfer within such business or enterprise, and such test is given to all such employees being considered for similar promotion or transfer by such employer without regard to the employee's race, color, religion, sex, or national origin.[389]

Tower-I would have protected a test if it was designed by a professional to predict whether a job applicant was suitable or trainable for the job. Nothing in the language of the amendment said the test had to succeed its purpose. In other words, Tower-I required, not that a test truly be

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was added to the section for another purpose, namely, to prevent an employer from deliberately using an otherwise non-discriminatory test for discriminatory purposes.

388. 401 U.S. at 436 n.12.

389. 110 CONG. REC. 13,492 (1964).

job-related, but only that the professional designer of a test try to achieve such a result.[390]

Such a reading of Tower-I is plausible for three reasons. First, this reading gives their ordinary meanings to the words of the amendment. The Supreme Court's reading, on the other hand, requires us to construe the phrase, "such test is designed to determine or predict whether such individual is suitable or trainable," as though the phrase meant that such test in fact determines or predicts whether such individual is suitable or trainable. Second, this reading is consistent with the view that motive was an element of Congress's definition of discrimination. An employer acts in good faith if she uses a test that has been designed by a professional to predict suitability for the job—regardless of whether the test is in fact job related. Surely the employer may rely on a professional to develop the best possible test. Third, when Senator Tower described his amendment on the floor of the Senate, he never alluded to a requirement that a test be job-related. Rather, he emphasized that, to enjoy protection under the amendment, employers would be required to administer tests to all applicants without regard to race.[391] For these reasons, it is far from obvious that the language of Tower-I shows it was meant to protect only job-related tests. Accordingly, any support for the Supreme Court's interpretation of section 703(h) must lie in the debates on the amendment.

The Tower amendment was in large measure a response to *Motorola*.[392] An understanding of the amendment, therefore, begins with analysis of Congress's reaction to that case. The most salient fact about the debate is that no more than one senator expressed approval of the *Motorola* decision, and every proponent who spoke on the matter said the same result could not obtain under Title VII. As far as Congress was concerned, *Motorola* was a bastard from its birth.

The Court itself quoted the passage in the Interpretative Memorandum that clearly rejected the hearing examiner's opinion: "There is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than mem-

390. Looking at Tower-I with the benefit of a decade of experience under *Griggs*, we can see a strong objection could have been raised to this amendment. A test can be professionally designed to predict suitability or trainability, yet fail to do so; nevertheless, such a test might have been lawful under Tower-I, the language of which would have protected a test according to its design, not its effect. If Congress intended to prohibit adverse impact, senators would have directed their attention to the effects of employers' behavior, not merely the purposes, and would probably have argued against the amendment because it would have protected tests that were actually not job-related. That this argument was not advanced is a further indication that Congress did not intend to enact adverse impact. *See infra* note 404 and accompanying text.

391. 110 CONG. REC. 13,492 (1964).

392. *Id.* (statement of Sen. Tower).

bers of other groups."[393] The authors of the Interpretative Memorandum commented individually to the same effect, both on the floor of the Senate and in writing.[394]

Particularly revealing is a letter that Senator Clark sent to the *Wall Street Journal*. It read in part:

> The civil rights bill would not make unlawful the use of tests such as those used in the Motorola case, unless it could be demonstrated that such tests were used for the purpose of discriminating against an individual because of his race, color, religion, sex, or national origin. In other words, it is not enough that the effect of using a particular test is to favor one group over another, to produce a violation of the act.[395]

This letter reveals not only that Congress approved of tests like the one used by Motorola, but also that Congress intended to protect any ability test that was not purposefully used to discriminate. The last sentence of the letter also reveals that Congress was aware a test could have an adverse impact, but considered the impact of a test to be irrelevant.

Senator Clark's letter is important because he was a co-captain for Title VII. The letter is even more important because it expressed the

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393. 401 U.S. at 434-35 n.10, *quoting* 110 CONG. REC. 7213 (1964).

394. Senator Case stated:

> To clear away misconceptions on this whole case, I have had prepared a memorandum which makes clear, I believe, that it would not be possible for a decision such as the finding of the examiner in the Motorola case to be entered by a Federal agency against an employer under title VII.
>
> This is so, first, because the Equal Employment Opportunities [sic] Commission established by title VII would have no adjudicative functions and no authority to issue enforcement orders.
>
> Second, title VII clearly would not permit even a Federal court to rule out the use of particular tests by employers because they do not "equate inequalities and environmental factors among the disadvantaged and culturally deprived groups."

110 CONG. REC. 6415 (1964). Then Senator Case introduced into the Record the memorandum to which he had referred. After setting forth the assertions the Senator had made orally, the memorandum continued:

> There is no doubt . . . that such a result would be unmistakably improper under the proposed Federal law. The Illinois case is based on the apparent premise that the State law is designed to provide equal opportunity to Negroes, whether or not as well qualified as white job applicants.
>
> . . . .
>
> Whatever its merit as a socially desirable objective, title VII would not require, and no court could read title VII as requiring, an employer to lower or change the occupational qualifications he sets for his employees simply because proportionately fewer Negroes than whites are able to meet them. . . .
>
> Title VII says merely that a covered employer cannot refuse to hire someone simply because of his color, that is, because he is a Negro. But it expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. Indeed, the very purpose of title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color. Title VII would in no way interfere with the right of an employer to fix job qualifications and any citation of the Motorola case to the contrary as precedent for title VII is wholly wrong and misleading.

Id. at 6416. Senator Case made similar statements on other occasions. *See, e.g.*, *id.* at 7246, 13,076. Senator Clark shared the same views. *See id.* at 7217, 9107.

395. *Id.* at 9107. In this letter, Senator Clark expressed his personal approval of the *Motorola* decision. *See supra* note 359.

views of the leadership of the Senate and of the major advocates of Title VII. We know the leadership agreed with Senator Clark because his letter was reprinted in Bipartisan Civil Rights Newsletter No. 39.[396] This number was one of a series of newsletters that constitute an important but neglected part of the legislative history of Title VII. The newsletters were circulated to each proponent of the bill and to anyone else who asked to receive them.[397] They were prepared in the offices of Senators Humphrey and Kuchel.[398] The former, a Democrat, and the latter, a Republican, were not only the overall managers of the civil rights bill,[399] but were also their respective party's whips in the Senate. Expressing the views of the ranking members of the Senate and the principal advocates of the bill, the newsletters are entitled to considerable weight as an index of congressional intent.[400]

Nevertheless, the opponents of the bill continued to harp on the theme that Title VII would outlaw tests like the one used in *Motorola*. For example, Senator Smathers read aloud an account of the decision which claimed that "merit and ability and Motorola's standards of performance were cast aside. . . ."[401] Later, the Senator said Title VII "would take away from the employer his right to require an examination, give it to everyone, and say, 'I will take the man who makes the highest and best grade, because that is the man who can do the best for my company.' "[402] Senators Fulbright and Ellender also argued that *Motorola* would outlaw aptitude tests.[403]

Eventually, Senator Tower introduced his amendment to protect ability tests. Tower-I was rejected for two reasons. The Supreme Court mentioned one in *Griggs*, namely, the fear that the amendment would

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396. *Id.*

397. *Id.* at 7474 (statement of Sen. Humphrey). The top of each newsletter carried the following statement:

> (The bipartisan Senate leadership supporting the civil rights bill, H.R. 7152, headed by Senator Hubert H. Humphrey and Senator Thomas Kuchel, will distribute this newsletter to the offices of the Senators who support the legislation. This newsletter will help to keep Senators and their staffs fully informed on the civil rights bill. It will be distributed whenever circumstances warrant, daily if necessary.)

398. *Id.* at 7474 (statement of Sen. Humphrey).

399. *Id.* at 6812 (statement of Sen. Mansfield); *id.* at 9244 (statement of Sen. Jordan).

400. Other numbers of the Newsletter also indicated the leadership's opinion of *Motorola*. Newsletter No. 16 said, "under Title VII, even a Federal court could not order an employer to lower or change job qualifications simply because proportionately fewer Negroes than whites are able to meet them." *Id.* at 7479. Newsletter No. 28 expressed the same opinion: "The recommendation of the hearing examiner in the *Motorola* case could not be possible under this title." *Id.* at 8370. Thus, the leadership of both sides of the aisle knew a test can have an adverse impact, but consistently agreed that the bill would not outlaw ability tests as selection criteria unless the tests were purposefully used to discriminate.

401. *Id.* at 6000.

402. Senator Smathers was correct in one sense. Title VII did take away an employer's right to take the *man* who makes the highest grade on a test.

403. *Id.* at 9599-9600 (statements of Sens. Fullbright and Ellender).

protect an employer who deliberately used a professional test to exclude blacks.[404] (This reason, of course, is further evidence of the Senate's focus on employers' motives.) Senator Case stated:

> If this amendment were enacted, it could be an absolute bar and would give an absolute right to an employer to state as a fact that he had given a test to all applicants, whether it was a good test or not, so long as it was professionally developed. Discrimination could actually exist under the guise of compliance with the statute.[405]

The Senator seemed to fear an employer might commission a professional to write a test that blacks would fail, or choose an existing test known to favor whites. The Senator showed no sign of thinking about a job-related test.[406]

The Court failed to mention the other reason Tower-I was defeated, yet only by taking account of both reasons can we fathom the mind of Congress. The other reason was the belief that the amendment was unnecessary. The leadership in the Senate perceived that the amendment was aimed at protecting tests like the one used by the Motorola Company.[407] Believing that such tests were not endangered by the bill, the Senate concluded that Tower-I was unnecessary. Senator Case said, "The Motorola case could not happen under the bill the Senate is now considering."[408] Senator Humphrey agreed:

> Every concern of which this amendment seeks to take cognizance has already been taken care of in Title VII, as amended, and presented in the [Mansfield-Dirksen] substitute. These tests are legal. They do not need to be legalized a second time. They are legal unless used for the purpose of discrimination. The amendment is unnecessary.[409]

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404. That senators perceived this possibility is evidence that they read the amendment with care. Had they intended to prohibit adverse impact, such careful reading would also have revealed that Tower-I would have protected tests that were not job related. *See supra* note 390 and accompanying text.

405. 110 CONG. REC. 13,504 (1964).

406. It is remotely possible that a job-related test could be used discriminatorily. For example, suppose two tests predict success on the job with equal certainty, yet one test selects more whites than the other. A prejudiced employer might deliberately choose the test that favors whites. But this is a sophisticated example of discrimination. Nothing in the *Congressional Record* suggests that the proponents of Title VII had any such example in mind.

407. Senator Tower himself created this perception:

> Mr. President, I hope my colleagues in the Senate will give very careful attention to the amendment. I believe that proponents of the bill realize that this is not an effort to weaken the bill. It is an effort to protect the system whereby employers give general ability and intelligence tests to determine the trainability of prospective employees. The amendment arises from my concern about what happened in the Motorola FEPC case. I have discussed the case in great detail in the Senate, and I shall not repeat my argument.
>
> Let me say, only, in view of the finding in the Motorola case, that the Equal Employment Opportunity Commission, which would be set up by the act, operating in pursuance of Title VII, might attempt to regulate the use of tests by employers.

110 CONG. REC. 13,492 (1964).

408. *Id.* at 13,503.

409. *Id.* at 13,504.

Senator Frank J. Lausche of Ohio asked Senator Humphrey to read the language that made tests legal,[410] and the Senator from Minnesota (with some help from Senator Jack Miller of Iowa) pointed to section 703(h) of the substitute.[411] Speaking of this section, Senator Humphrey said, "That amendment was one that was added after the original substitute package had been tentatively agreed upon. We reviewed the entire Motorola case, and then added that particular section."[412] Senator Miller held the same view of the purpose of section 703(h): "Let me say that I feel very strongly, as all other Senators do, about the Motorola case. When the amendment to which I have referred was drawn up, I was satisfied that such a situation would be prevented by the new language.[413]

Note well the senators' disdain for the *Motorola* decision. Because rejection of Tower-I could have been construed as approval of *Motorola*, senators went out of their way to express their disapproval of that decision. This disapproval is clear in the comments of Senator Case, who opened his remarks by saying, "I feel certain that no Member of the Senate disagrees with the views of the Senator from Texas [Tower] concerning the *Motorola* case"[414] and later added:

> I want it to be clearly understood, so far as I am concerned—and I believe I speak for all members of the committee, the captains, and the leadership—that our position against this amendment and the vote we shall cast against it do not mean approval of the Motorola case or that the bill embodies anything like the action taken by the examiner in that case.[415]

The Senate believed that the *Motorola* decision could not be repeated under Title VII, even if no specific language were added to the bill. We have seen that the Senate was unaware of job relatedness. We have also seen that the Senate intended that the adverse impact of a test would not make it illegal. Therefore, the Senate believed that ability tests were not discriminatory, regardless of whether they had an adverse impact and regardless of whether they were job related.

The Senate rejected Tower-I.[416] Two days later, Senator Tower called up an amendment originally addressed to the frequency with which the EEOC should report to Congress and, in conformity with Senate rules, "modified" the amendment (but in fact completely changed it) to address testing. The discussion of Tower-II was brief. Senator Tower

410. *Id.* at 13,504.

411. *Id.* The language that was thought to protect ability tests was "bona fide . . . merit system." This point, which was implied by Senators Humphrey and Miller on June 11th, was expressly stated by Senator Miller on June 12th. *Id.* at 13,651.

412. *Id.* at 13,504.

413. *Id.*

414. *Id.* at 13,503.

415. *Id.* at 13,504.

416. *Id.* at 13,505.

reported that it was similar to Tower-I, "which was, I believe, agreed upon in principle. But the language was not drawn as carefully as it should have been. It is my understanding that the present language has been cleared through the Attorney General, the leadership, and the proponents of the bill."[417] Senator Humphrey confirmed this report by saying that Tower-II had been examined by interested senators, who found it in accord with the purpose of Title VII, and by asking that the amendment be adopted.[418] It was adopted, by a voice vote,[419] and it became the final clause of the first sentence of section 703(h).

Why was Tower-II adopted after Tower-I had been rejected only two days before? The answer is obvious: the objections were overcome. One objection was that Tower-I would have protected a professionally developed test even if it were purposefully used to discriminate. The proviso in Tower-II ("provided that such test, its administration or action upon the results is not designed, intended or used to discriminate") satisfied this objection.

The other objection was that the amendment was unnecessary because ability tests did not fall within the definition of discrimination. Nothing in Tower-II or in the colloquy between Senators Humphrey and Tower before the amendment's adoption answers this objection. Theoretically, the amendment remained unnecessary. Practically, however, the amendment had become a necessity. Thirty-eight senators voted in favor of Tower-I,[420] and three senators who were absent when Tower-I was voted upon favored it.[421] Fifteen of these 41 senators were proponents of the civil rights bill,[422] and three of them were co-captains of other titles of the bill.[423] Thus, the quantity and quality of the support for Tower-I were significant. Forty-one senators could not be ignored, especially because the opponents of Tower-I agreed with its purpose of protecting ability tests.

Other than the proviso to Tower-II, the major difference between

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417. *Id.* at 13,724.

418. *Id.*

419. *Id.*

420. *Id.* at 13,505.

421. Senators Ellender, Fullbright, and Robertson were absent but would have voted for Tower-I; they were paired with Senators Stuart Symington of Missouri, Mike Mansfield of Montana, and Daniel B. Brewster of Maryland, each of whom withheld his vote against the amendment because his absent pair would have voted for it. *Id.* at 13,505. A fourth absent senator, Herbert S. Walters of Tennessee, also probably would have voted for Tower I. He voted in favor of Senator Ervin's motion to delete Title VII, *id.* at 13,085, and against the entire civil rights bill, *id.* at 14,511. Senator Walters, however, was not counted in the numbers in the text.

422. They voted for the civil rights bill six days later. *Compare* the list of voters for Tower-I, *id.* at 13,505, *with* the list for the bill. *Id.* at 14,511.

423. The co-captains were: Senator John Sherman Cooper of Kentucky for Title IV, Senator Cotton for Title VI, and Senator Roman L. Hruska of Nebraska for Title II. *Id.* at 6528 (statement of Sen. Humphrey). Curiously, Senator Cotton eventually voted against the bill. *Id.* at 14,511.

the two versions of the amendment was the omission from Tower-II of the language limiting protection to tests that are "designed to determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise." The Supreme Court claimed this language required tests to be job related. If so, why was it omitted? The proponents of Title VII read the amendment so carefully that they discovered a tiny loophole: prejudiced employers might discover a way to use a professional test illegitimately. If these vigilant senators believed that the omitted language contained the words that limited protection to valid tests, and if these same sentators had intended to outlaw adverse impact and to create an exception for valid tests, would they have approved Tower-II without the operative words? Not likely. More likely, the senators knew nothing of job relatedness, and they intended to outlaw only disparate treatment. They voted in favor of Tower-II, minus the quoted language from Tower-I, because (except for the guarantee against perversion of a legitimate test) they saw no difference between the two versions of the amendment. It protected professionally developed ability tests, such as Motorola's Test No. 10, that were selected and administered in good faith. Although Congress may have realized that such tests can be imperfect, it never thought they were discriminatory.

After the Senate passed the Mansfield-Dirksen substitute for H.R. 7152,[424] the bill was sent to the House of Representatives. Representative Celler, chairman of the House Judiciary Committee and the leading Democratic spokesperson for the civil rights bill in the lower chamber, testified before the House Rules Committee on the changes made by the Senate. Of the Tower amendment, he said it "validates nondiscriminatory ability tests given by employers. . . . I take it that would be permitted anyhow. . . ."[425] He made much the same remark on the floor of the House immediately before it voted to accept the Senate's amendments.[426] Thus, the House shared the Senate's understanding that the Tower amendment was meant to protect professionally developed ability tests that are selected and administered with no intent to discriminate.

The errors of the Supreme Court's analysis of the *Motorola* debates and Tower amendment are now evident. All senators disapproved of *Motorola* and wanted to ensure the use of fairly administered ability tests, regardless of their adverse impact. Representatives and senators were unaware of test validation; they intended to protect all ability tests, not merely job-related tests. The text of Tower-I was not limited to job-related tests; rather, it would have protected tests designed to select suita-

424. *Id.*

425. *Committee on Rules, House of Representatives, Hearings on H. Res. 789,* 88th Cong., 2d Sess. 8 (1964).

426. 110 CONG. REC. 15,896 (1964).

ble or trainable employees, irrespective of whether such tests achieved their goals. Congress's unawareness of test validity and Senator Tower's failure to discuss it as he argued for his amendment prove that the text of the amendment meant what it said, not something else. Indeed, if Tower-I were in fact limited to valid tests, the proponents of Title VII would never have allowed the language effecting this limitation to be omitted from Tower-II. On the assumption that any professionally developed test will be designed to select suitable or trainable employees, Tower-II was seen as identical to its ancestor except in the former's proviso against perversion of legitimate tests.

Accordingly, the argument that Congress intended to outlaw adverse impact because section 703(h) protects only job-related tests is without support.[427] The section was meant to protect all professionally developed ability tests that are administered in good faith, regardless of their adverse impact. The debates on the *Motorola* case and the Tower amendment, therefore, stand as powerful evidence that Congress did not include adverse impact in Title VII's definition of discrimination. Congress knew tests can have an adverse impact, yet specifically protected them.[428]

Adverse impact was like pornography: few if any legislators could define it, but they knew it when they saw it, and every time they saw it, they rejected it. Seniority systems, ability tests, and nepotism in unions are practices that have an adverse impact on blacks, yet Congress intended that each of these practices be lawful under Title VII. In the face of this intent, no argument can be sustained that Congress intended to outlaw adverse impact.

8. Non-congressional sources

Proving a negative is difficult, and resort to unconventional argument becomes inevitable. We have scoured the *Congressional Record* for evidence of whether Congress intended to enact, or was even aware of, adverse impact. Although virtually all of the evidence points in the same

427. The contradictory argument is supported. Tower-I was considered unnecessary because tests used in good faith were not outlawed by the bill. Also, Tower-I was dangerous because it would have protected tests used in bad faith. Congress's focus was exclusively on the employer's state of mind, and this fact indicates that Congress meant to prohibit only disparate treatment.

428. An additional instance of express protection of adverse impact in Title VII is § 712, which reads, "Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans." Because the overwhelming majority of veterans are men, veterans' preference laws have an adverse impact on women.

This instance may be less important than nepotism, seniority, and ability tests. The debates paid little attention to sex discrimination, so the adverse impact of veterans' preference may have gone unnoticed. Also, Congress's special regard for veterans may have outweighed a general desire to outlaw adverse impact. Nevertheless, § 712 stands as an additional instance of congressional protection of practices with an adverse impact.

direction, doubts may persist. Congress's definition of discrimination included motive; a comment about an aspect of adverse impact was not made when, with the benefit of hindsight, the comment should have been made; a widely shared understanding that certain conduct would be lawful under the bill is inconsistent with an intent to adopt adverse impact; express language was adopted to protect forms of behavior that are obvious examples of adverse impact: each of these arguments, except the first, is essentially counterfactual, and all rest on the premise that Congress acted in an intellectually consistent way. But perhaps Congress wrote an act that is internally inconsistent, and perhaps representatives and senators made ill-informed or ill-considered statements during debate; legislators are human beings, after all. Because of these possibilities, we must buttress our discussion with an examination of non-congressional sources. The argument will partake of the same form—ability testing was approved, only intentional discrimination was disapproved; but the breadth, authority, and unanimity of these sources will combine to demonstrate that Congress did not intend to enact the adverse impact definition of discrimination.

a. Sources of Which Congress Might Have Known

Of significance rivaling the Interpretative Memorandum and House committee reports for understanding Title VII are the reports of the United States Commission on Civil Rights. Many provisions of H.R. 7152 originated as recommendations of the Commission,[429] and reports of the Commission were frequently cited by the legislators.[430] The Commission's 1961 report ran to five volumes;[431] the third volume, entitled *Employment*, devoted 248 + xii pages to employment discrimination, but said nothing about adverse impact or related issues. Tests were not ignored, however; there was comment on civil service hiring procedures, which involved testing. But rather than inquire whether civil service tests excluded proportionately more blacks than whites or whether the tests had been validated, the Commission focused only on the disparate treatment fostered by the "rule of three," under which any of the top three scorers on a test could be selected. "If the hiring agency discovers that one is a Negro, it may hire one of the others. If all are Negroes, it may . . . request more names or fill the job by transfer, reinstatement, or promotion."[432] The Commission also discussed in detail a settlement

429. Tables showing the provisions of H.R. 7152 that originated as recommendations of the Civil Rights Commission appear at 110 CONG. REC. 6970-71 (1964). Another table showing the impact of the Commission appears at *id.* at 698-99.

430. *See, e.g., id.* at 6543 (statement of Sen. Humphrey). *See also* S. REP. NO. 867, 88th Cong., 1st Sess., 10 (1963).

431. 1961 REPORT, *supra* note 275.

432. *Id.* at 39-40.

agreement over claims of discrimination involving the Lockheed Aircraft Corporation. The agreement, which President Kennedy called a milestone, contained affirmative action obligations such as seeking out minority candidates and establishing vocational training programs, but said nothing about adverse impact; nowhere in the agreement was the employer called upon to determine the effect of its selection criteria on blacks and the job relatedness of those criteria.[433] Likewise, the findings of the Commission said nothing about adverse impact,[434] and the recommendations of the Commission were equally silent on this score.[435]

Civil Rights '63 was the title of the Civil Rights Commission's 1963 report. It devoted nineteen pages to employment discrimination, but did not mention adverse impact or related issues. Instead, the report noted the increasing displacement of human workers by machines and stressed the need to train blacks in marketable skills.[436] There is no evidence that the Civil Rights Commission adopted, or was even aware of, the adverse impact definition of discrimination. Indeed, the evidence shows the Commission was altogether innocent of adverse impact.[437] And if the Civil Rights Commission knew nothing of this definition of discrimination, how probable can it be that Congress knew of the definition and wrote it into law?

A few other sources of which Congress may have been aware—all silent on adverse impact—may be cited. President Kennedy established the President's Commission on Equal Employment Opportunity, and the commission issued its report in November of 1963.[438] The commission instituted the "Plans for Progress" program, which was designed as a model of how to achieve equal employment opportunity.[439] The model plan called on employers to engage in affirmative action like recruiting minority applicants, informing supervisors of the goal of utilizing minority workers, and identifying employees with potential for advancement; but the model plan did not call for developing job-related selection criteria or avoiding criteria with an adverse impact on blacks.[440]

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433. *Id.* at 77-80.

434. *Id.* at 157-61.

435. *Id.* at 161-64.

436. U.S. COMMISSION ON CIVIL RIGHTS, 1963 REPORT 73.

437. The report discussed two job retraining programs in Pittsburgh, Pennsylvania. *Id.* at 86-87. More blacks than whites failed the qualifications tests for some courses, and there were many more times white than black participants in the programs. These programs, therefore, were similar to *Griggs*: access to the opportunities in question was conditioned on passing tests that proportionately more whites than blacks passed. If adverse impact had been known to the Commission, would it not have inquired whether the qualifications were valid?

438. PRESIDENT'S COMMISSION ON EQUAL EMPLOYMENT OPPORTUNITY, REPORT TO THE PRESIDENT (1983) [hereinafter cited as REPORT TO THE PRESIDENT].

439. *Id.* at 108.

440. *Id.* at 102. Perhaps the President's Commission was not far from these notions. Its vice chair, Hobart Taylor, pointed out that minorities receive inferior education, which "leads to inability

Congress may also have been aware of federal attempts to gain entry for blacks into apprenticeship programs. In the *Federal Register* of October 23, 1963, the Secretary of Labor published proposed rules regarding apprenticeship programs.[441] The key rule required "selection of apprentices on the basis of qualifications alone, in accordance with objective standards."[442] This rule was interpreted to allow selection on the basis of such criteria as aptitude tests, high school diplomas, grades, and previous experience. Although each criterion would probably have disqualified proportionately more blacks than whites, the rules accepted these criteria without requiring their validation against success in the specific apprenticeship program or the ultimate job.[443] Clearly, the Department of Labor had no notion of adverse impact as these rules were written. Rather, the Department was grappling for a way to get blacks into programs from which they had been excluded wholesale. Objective criteria were perceived as the way to overcome prejudicial admissions policies. Objective criteria can do this; they can defeat disparate treatment. That they open the door to adverse impact was not appreciated at the time.

Two final sources of which Congress may have been aware as it deliberated the civil rights bill were Executive Order 10,925[444] and the regulations issued pursuant to the order by the President's Committee on Equal Employment Opportunity.[445] The order and regulations required nearly all private firms that contracted with the federal government to agree not to discriminate against applicants or employees because of race, but were silent on adverse impact. As with all of the other sources we have examined, the executive order and enforcing regulations indicate that Congress neither knew of nor intended to enact the adverse impact definition of discrimination.

b. Sources Published Shortly After the Enactment of Title VII

Nor did the contemporary commentators believe that Title VII included adverse impact. Rather, the commentators believed the Act outlawed only intentional discrimination based on prejudice. Prejudice was defined broadly enough to include good-faith generalizations about the ability of blacks to work satisfactorily. Employers who refused to hire a black because of the beliefs that whites are better employees or that fellow employees or customers would not accept a black were acting out of

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to qualify at the college or job-training level. These facts, in turn, lead to inability to qualify for job opportunity." *Id.* at 133-34. Perceiving the causal links on which *Griggs* relied, Mr. Taylor was only one step short of challenging the validity of criteria for obtaining jobs.

441. 28 Fed. Reg. 11,313 (1963).

442. *Id.*

443. *Id.* at 11,315.

444. 26 Fed. Reg. 1977 (1961).

445. *Id.* at 6579, *amended by* 28 Fed. Reg. 9812.

prejudice as surely as were employers who refused to hire a black because of racial animosity. Although we cannot comment on every author who wrote on Title VII in the middle and late 1960s, we can review several important works in which adverse impact would logically have been discussed if it had been known.

The leading discussion of Title VII's legislative history was written by Francis Vaas.[446] He said nothing about adverse impact or related issues. In fact, as he commented on the unsuccessful attempts to add the word "solely" to the Act, Mr. Vaas implied the belief that motive was an essential element of the definition of discrimination:

> For an unfair [unlawful] employment practice to exist, what must be the causal nexus or relationship between the improper motive and the overt act? Must the improper motive be the dominant factor, a substantial contributing factor or merely a factor leading to the overt act? The answers to these questions await the clarification of the law by administrative practice and judicial decision.[447]

That motive might be irrelevant never occurred to this author.[448]

Carl Rachlin, General Counsel of the Congress of Racial Equality, wrote a provocative discussion of the Tower amendment.[449] He believed that general ability tests like Test No. 10 were unfair to blacks;[450] he also asserted that some employers administered very difficult entrance examinations to applicants[451] and that other employers imposed "artificially high *irrelevant* standards designed to exclude Negroes,"[452] for example, requiring a high school diploma of employees who perform menial tasks.[453] Then Mr. Rachlin implied that the effect of a test that excluded blacks, rather than the employer's intent, should be the legally relevant factor.[454] Further, Mr. Rachlin urged that, when an employer demands the right to use tests, they should "be directed to specific, job-related

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446. Vaas, *supra* note 210.

447. *Id.* at 456-57.

448. Nor did the possibility occur to Richard Berg, who wrote another discussion of the legislative history of Title VII. Commenting on the addition of the word "intentionally" to § 706(g), Mr. Berg said:

> Its effect, if any, is questionable. Discrimination is by nature intentional. It involves both an action and a reason for the action. To discriminate "unintentionally" on grounds of race, color, religion, sex, or national origin appears a contradiction in terms. For this reason Senator Humphrey described the insertion of "intentionally" as "a clarifying change. . . . It means simply that the respondent must have intended to discriminate."

Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62 (1966).

449. Rachlin, *Title VII: Limitations and Qualifications*, 7 B.C. INDUS. & COMM. L. REV. 473 (1966).

450. *Id.* at 486-87.

451. *Id.* at 488.

452. *Id.* at 487 (emphasis in original).

453. *Id.* at 488.

454. *Id.*

abilities (as demanding as necessary) rather than general abilities."[455]

Certainly, Mr. Rachlin understood the elements of the adverse impact definition of discrimination: effects instead of intentions are controlling and tests must be job related. But other passages in his article demonstrate that Mr. Rachlin did not believe Title VII incorporated adverse impact, that Mr. Rachlin was in fact arguing for an improvement on the work of Congress. First, immediately after he implied that result should be the defining feature of discrimination, Mr. Rachlin offered an illustration that reveals more precisely what he had in mind. "For example, where the [Ku Klux] Klan is strong among the employees of a plant and the employer is forced to continue discrimination against his will, the employer cannot be said to have a wrongful intent. Nevertheless, the lack of employment opportunity is no less existent."[456] Mr. Rachlin evidently believed that Title VII required a specific desire to disadvantage black workers. The employer dominated by the Klan means to deny jobs to blacks, and his reason is their race; the only sense in which he can be said to lack wrongful intent is that he has no desire to do what he is forced by his employees to do. If Mr. Rachlin believed the Act required a desire to disadvantage, he could not have believed it incorporated adverse impact. Even if he believed Congress intended the Act to capture the employer dominated by the Klan, Mr. Rachlin's view of Title VII was still a far cry from adverse impact.

Second, the thrust of Mr. Rachlin's article was to overcome a problem created by the Tower amendment. The problem began with Test No. 10. Mr. Rachlin believed it was not a good test; a "reputable industrial psychologist" said that "very few psychologists competent in test construction and use would defend it."[457] Despite its deficiencies, Test No. 10 was apparently protected by the Tower amendment.[458] Here arose the problem: general intelligence tests like Test No. 10 could easily be designed to discriminate against blacks, yet superficially appear to be fair. "What court, when faced by a barrage of expert testimony on both sides of the question, will be able to decide the intent of the giver of the test . . . ?"[459] The same sort of problem could arise with other selection criteria, such as a high school diploma requirement.[460] Congress could have avoided these problems by omitting the Tower amendment, argued Mr. Rachlin, but since it is in the Act, the best solution is to accept that all general intelligence tests are biased against blacks and to "interpret"

455. *Id.*

456. *Id.*

457. *Id.* at 486.

458. *Id.*

459. *Id.*

460. *Id.* at 487-88.

Title VII as permitting only job-related tests.[461] Thus, it is evident that Mr. Rachlin did not believe Congress required tests to be job-related; indeed, it was Congress's failure to protect only job-related tests that created the problem Mr. Rachlin attempted to resolve.

Finally, Mr. Rachlin claimed the Tower amendment was an obstacle to the enforcement of Title VII; he characterized the amendment as "a mass of ambiguities, due partly to poor drafting, partly to the refusal of the Legislature to investigate sufficiently the complex problems created by ability and aptitude testing, and partly (one hesitates to suggest) to something less than legislative good will."[462] However long he may have hesitated, Mr. Rachlin did bring himself to suggest that the purpose of the Tower amendment was less than benign, and the suggestion is significant. A writer who believed that Title VII defined discrimination in terms of effects and required tests to be job related would not have undermined his own cause by calling the relevant language in the Act ambiguous and impugning the motives of its author. Thus, although Mr. Rachlin unquestionably knew everything one has to know in order to understand adverse impact, his article is evidence that Congress did not intend to write this definition into law.

Michael Sovern of Columbia Law School, whose book on racial discrimination in employment was mentioned above,[463] was a leading scholar of labor law. In addition to a chapter on state FEP legislation, his book contained chapters on Title VII, the presidential executive orders, the National Labor Relations and Railway Labor Acts, and other topics. Nowhere was adverse impact discussed. Moreover, Professor Sovern made statements he could not have made if he believed Title VII outlawed adverse impact. For example, in connection with the Tower amendment, he said:

> many ability tests require a high degree of literacy when the job being tested for does not. A common example is the written examination for a job requiring manual skills. The marginally literate applicant is likely to lose the job to a better educated competitor who may not be as good at the job itself. That Title VII permits employers to use such examinations, provided that they are "not designed, intended or used to discriminate because of race," etc., should not prevent those administering the Act from seeking to educate and persuade employers to use tests better suited to their needs and less likely to heap an additional disadvantage on the Negro product of a segregated school system.[464]

Later, Professor Sovern commented on discrimination in apprenticeship programs:

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461. *Id.* at 488.

462. *Id.* at 490.

463. Sovern, *supra* note 328.

464. *Id.* at 73.

> To a large extent, then, equal opportunity in the construction industry depends on abolition of nepotic apprenticeship selection. Some abolition is possible under existing law. When . . . a union is shown to be implementing an animus against Negroes along with its preference for relatives, the remedial powers of the state commissions seem ample to strike down both. . . .
>
> Similarly, if a local can be shown to have excluded Negroes at some earlier time because of their race, the use of nepotic standards that preserve the effects of that earlier discrimination can fairly be held proscribed by the standard antidiscrimination law. . . .
>
> The standard law against discrimination does not, however, reach the union that cannot be shown to have engaged in racial discrimination. Without proof as to how it came to have few or no Negro members, a local probably cannot be found guilty of racial discrimination for favoring the friends and relations of its members. If Negroes are to gain entry to the crafts controlled by such locals, legislation going beyond the typical antidiscrimination law is needed.[465]

Lest one speculate on whether Professor Sovern believed that Title VII was "legislation going beyond the typical anti-discrimination law," we may note another sentence that appeared on the same page as the preceding quotation: "And a law that merely prohibits racial discrimination may not correct this situation: as we suggested above, unless the local's lack of Negroes is itself attributable to racial discrimination, it is hard to see how a preference for friends and relatives can be converted into discrimination because of 'race, creed, color or national origin.' "[466] Of course, the adverse impact definition of discrimination easily reaches the all-while local with a nepotic admissions policy, even if the union never discriminated in the past and the admissions policy were adopted and administered in good faith: the policy, though racially neutral on its face, excludes proportionately more blacks than whites and is not job related. Clearly, Professor Sovern did not believe that Title VII (or existing state laws) included adverse impact.

William Gould was a legal scholar who was personally concerned with the development of a body of law against employment discrimination. Formerly a consultant to the EEOC (and later a member of the faculty of the Stanford Law School), Professor Gould wrote several thoughtful articles towards this end during the 1960's.[467] None of these

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465. *Id.* at 188.

466. *Id.*

467. In addition to the articles discussed in the text above, Professor Gould wrote *The Negro Revolution and the Law of Collective Bargaining*, 34 FORDHAM L. REV. 207 (1965); *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40 (1969); *Black Power in the Unions: The Impact upon Collective Bargaining Relationships*, 79 YALE L.J. 46 (1969); and *Some Limitations upon Union Discipline under the National Labor Relations Act*, 1970 DUKE L.J. 1067. These articles appeared between the enactment of Title VII and the Supreme Court's decision in *Griggs*.

articles demonstrates a belief that Title VII outlawed adverse impact. Two articles in particular address subjects on which the adverse impact definition has a significant bearing.

Before examining these articles, let us review a third definition of discrimination that exists under Title VII. In addition to disparate treatment and adverse impact, there is present effects of past discrimination. Under this definition, an act that is performed in good faith may be illegal if it gives present force to or preserves the effects of discrimination that occurred in the past.[468] The Supreme Court has dealt a double blow to the present effects definition, and its continued vitality is doubtful today.[469] Nevertheless, in the late 1960's, at the time Professor Gould published the articles of interest herein, the present effects definition was alive and well.

One of these articles, entitled, *Employment Security, Seniority, and Race: The Role of Title VII of the Civil Rights Act of 1964*,[470] was written for the purpose of proposing to the EEOC how it should apply Title VII to seniority systems.[471] One might expect that an author who believed the Act included the adverse impact definition would have discussed how seniority systems, though neutral on their face, can have a disproportionate adverse impact on blacks and, but for the express language of section 703(h), would violate the Act. In the process, such an author would have tried to explain away the legislative history which suggests that Congress never intended to outlaw seniority systems[472] and that Congress considered section 703(h) as a clarification, not an exception.[473]

Professor Gould did part of this when he noted that "seniority is

468. The leading case adopting this definition is Quarles v. Philip Morris, 279 F. Supp. 505 (E.D. Va. 1968), in which an employer used to maintain racially segregated departments. Later, strictly limited numbers of blacks were allowed to transfer into the formerly all-white department. The court held the employer in violation of Title VII because a black who transferred to a job in the better-paying white department "would find himself junior to white employees holding less employment seniority who got their positions by reason of the company's former racially segregated employment policy." *Id.* at 514.

469. In United Air Lines v. Evans, 431 U.S. 553 (1977), the Court rigidly applied Title VII's short limitations period, holding that the present effects of a discriminatory act that was not the subject of a timely charge of discrimination cannot support a claim. *Id.* at 558. By extension, the present effect of an act that occurred before Title VII took effect also cannot support a claim. On the same day, in International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), the Court held a seniority system is not illegal merely because it preserves the effects of past discrimination. The principal application of present effects had been to seniority systems. See cases cited in B. SCHLEI & P. GROSSMAN, *supra* note 5, at 29-45.

470. 13 HOW. L.J. 1967 [hereinafter cited as Gould, *Employment Discrimination*].

471. *Id.* at 4.

472. For example, the language in the Interpretative Memorandum, 110 CONG. REC. 7213 (1964).

473. *E.g.*, 110 CONG. REC. 12,723 (statement of Sen. Humphrey); *id.* at 15,893 (statement of Rep. McCulloch).

literally discriminatory *per se* against minority employment because of its well-known 'last to be hired, first to be fired' effect. The employed Negro worker has yet to achieve tenure which is comparable to whites because of the disproportionate share of unemployment which has been borne by the former group."[474] But then he continued:

> An attempt to establish a statutory violation on the basis of deprivation of seniority which is attributable to minority unemployment, however, would be revolutionary as well as industrially chaotic. Moreover, it runs counter to the entire thrust of the legislative history of the Civil Rights Act in which Congress demonstrated its hostility to preferential hiring before even reaching the secondary issue of job priorities. . . . [S]uffice it to say that neither the Equal Employment Opportunity Commission [nor] the courts are likely to be persuaded that seniority accumulated by white employees where discriminatory hiring policies have existed can be affected by Title VII.[475]

This excerpt shows, first, that Professor Gould did not believe that seniority systems were prima facie illegal merely because of their adverse impact on blacks; and second, that his real objection to seniority systems was their tendency to preserve the effects of past discrimination. Seniority is an area in which the adverse impact and present effects definitions overlap; Professor Gould evidently had only the latter in mind.

Later in the article, Professor Gould wrote, "Wherever the effect of a practice impedes fair employment, the practice must be altered."[476] This sentence seemingly advocated adverse impact but, placed in context, did not. The context was Professor Gould's concern that grandfather clauses might be used to prefer whites over blacks; therefore, he argued that Title VII had to be read to preclude an employer from using lengthy recall lists compiled before the Act took effect.[477] Thus, the sentence just quoted was not a plea for the adverse impact definition of discrimination, but an admonition that the EEOC must not condone the present effects of intentional pre-Act discrimination. That this was Professor Gould's purpose is clear from the following paragraph, which concluded the section of the article in which all of the foregoing quotations from his article appeared:

> Thus, either one or more of a number of elements must be evidenced in the record. First . . . the fact that one race predominates to the near exclusion of another in a particular job or department is highly suspicious. This would seem to be a "result" of an intention to discriminate and, as indicated above, it may be often difficult to tell if the discrimination is in seniority rather than in hiring. The case would become easier if it could be shown that a company had refused to *consider* a Negro appli-

474. Gould, *Employment Discrimination*, supra note 470, at 8.
475. *Id.* at 8-9 (footnote omitted).
476. *Id.* at 10.
477. *Id.* at 9-10.

> cant for advancement or that a union had abritrarily refused to press grievances about the same matter.[478]

This paragraph focused so completely on intent as to eliminate any doubt that Professor Gould believed motive was an element of the definition of discrimination, even if the motive infected only pre-Act conduct.

The other of Professor Gould's late 1960's articles that deserves our attention is *Seniority and the Black Worker: Reflections on* Quarles *and Its Implications*.[479] As its title suggested, this article dealt with the courts' treatment of racial discrimination and seniority systems. Thus, the article was a logical successor to the one we have just examined, which dealt with how the EEOC should address the same problem. As in the earlier article, Professor Gould's primary concern was the way in which seniority systems can preserve the effects of past discrimination against black workers:

> Congress was anxious to make Title VII apply prospectively, and the legislative history did not specifically discuss whether new seniority agreements had to provide Negro employees with seniority credits that they might have obtained in a white department but for past discriminatory hiring and transfer practices. If Congress intended to bring into being an integrated work force, however, and not merely to create a paper plan meaningless to Negro workers, the only acceptable legislative intent on past discrimination is one that requires unions and employers to root out the past discrimination embodied in presently nondiscriminatory seniority arrangements so that black and white workers have equal job advancement rights. If this was *not* the congressional intent, questions concerning the constitutionality of Title VII are raised.[480]

As in the earlier article, Professor Gould did not maintain that a seniority system is illegal simply because it works proportionately greater hardship on blacks than on whites; he maintained only that a seniority system is illegal if it preserves the effects of past discrimination. The difference is important for our purposes, as a hypothetical case can illustrate. Suppose in 1966 an employer opened a plant in a labor market that was half black and half white. The plant needed highly skilled workers. The employer hired without regard to race but, because few blacks possessed the requisite skills, the initial work force was ninety-five percent white. As time passed, more blacks acquired the requisite skills, and by 1978 the work force reflected the racial composition of the community. Then the depression of 1981-1982 cost the plant half its business, and the employer has decided she must lay off workers. If she lays off according to seniority, more blacks than whites will lose their jobs because the white employees (some of whom have been with the firm

478. *Id.* at 12.

479. 47 TEX. L. REV. 1039 (1969) [hereinafter cited as Gould, *Seniority*].

480. *Id.* at 1042 (emphasis in original) (footnote omitted).

since it opened) have more years of service. In this case, the black employees cannot be said to suffer from the present effects of past discrimination, as this employer never discriminated, and the argument advanced by Professor Gould would avail them naught. Yet the black employees would certainly feel a disproportionate adverse impact, as more blacks than whites would be out of work.[481] The point is that the present effects and adverse impact definitions of discrimination are different, and Professor Gould advanced only the former.

Again as in the earlier article, Professor Gould continued to believe that intent was an element of the definition of discrimination. Consider these statements:

> All that *Quarles* says is that department organization has thwarted the advance of black workers on their own merits. Should this "effect" have been enough to establish discriminatory intent under the statute?[482]
>
> * * * *
>
> The position of the defendant in *H.K. Porter* is not more meritorious because Negroes could move up in their own departments without transfers. If anything, these "gains" establish discriminatory intent more clearly than in *Quarles*.[483]

Professor Gould would surely have advocated adverse impact if he thought it was outlawed by Title VII, for adverse impact sweeps broadly and can help many more minorities than present effects can (especially as we move further from pre-Act events). Professor Gould did not advocate adverse impact because, in all likelihood, he believed—along with practically everyone else—that intent was an element of the definition of discrimination. By identifying the requisite intent in pre-Act conduct that had post-Act effects, this commentator could justify the present effects definition, but adverse impact cannot be extruded from this formulation.[484] Thus, Professor Gould stands as another example of a knowledgeable and committed scholar who showed no signs of believing that Title VII incorporated adverse impact.

A comment published in the University of Chicago Law Review in 1965[485] indicates the author believed that intent was an element of the definition of discrimination under Title VII.

> *Proof of Intent.* Title VII . . . explicitly requires proof of intent to discriminate. This stipulation was incorporated into the bill late in the Senate debate when amendments to the wording of sections 706(g) and

481. *Cf.* American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) (holding that a bona fide seniority system established after the effective date of Title VII is protected by § 703(h), even though the system has an adverse impact on blacks).

482. Gould, *Seniority*, supra note 479, at 1052.

483. *Id.* at 1057.

484. *Id.* at 1063.

485. Comment, *Enforcement of Fair Employment Under the Civil Rights Amendment of 1964*, 32 U. CHI. L. REV. 430 (1965).

> 707 were offered from the floor. The additions were accepted only because the bill's sponsors understood them to be surplusage since section 703 defines an unlawful employment practice an as action taken "because of" the forbidden considerations. . . .
>
> The intent requirement may serve a valuable function as an affirmative defense, for even if the plaintiff has been subjected to de facto discrimination the defendant should prevail if he can prove that the discrimination was not purposeful.[201]

> 201. If the requirement of intent had not been added to the bill a strong case could have been made that since the statute's general policy is remedial and preventative, rather than punitive, relief for the plaintiff would be appropriate even for unintended violations. . . . But because of the amendment, if a defendant can prove affirmatively that the discrimination alleged was not purposeful, the decision should be in his favor even if discrimination did in fact occur.[486]

We may disagree with the author in a minor regard: a defendant need never prove affirmatively that his "de facto" discrimination was not purposeful; the burden of proving intent is on the plaintiff at all times.[487] Nevertheless, we must concur in the author's interpretation of the Senate's purpose in adding the word "intentionally" to the Act. Even if the reader does not agree on this score, however, the present point is proved: an author writing immediately after Title VII was enacted believed that intent was an element of the definition of discrimination and that "de facto" discrimination was not outlawed.

Irving Kovarsky published *Testing and the Civil Rights Act* in 1969.[488] His explicit concern was employment tests that were unintentionally discriminatory, that is, tests on which whites performed better than blacks, although blacks were equally good performers on the job.[489] Professor Kovarsky was well-informed on tests and searched for ways their negative effect on black employment could be minimized. If he had believed that Title VII incorporated adverse impact, surely he would have discussed it, for its bearing on testing is unmistakable. Yet throughout the article Professor Kovarsky demonstrated a belief that the Act could only be violated by intentional conduct:

> The doctrine of *res ipsa loquitor* had its origin in negligence cases as an aid to a plaintiff injured by a defendant having exclusive control over the instrumentality causing the accident. The use of a similar evidentiary aid seems desirable where the motive of an employer, who holds tight control over the testing process, is questioned. Fair employment does not involve the proving of negligence but rather the establishing of intent.

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486. *Id.* at 459-60.

487. Texas of Community Affairs v. Burdine, 450 U.S. 248 (1981).

488. Kovarsky, *Testing the Civil Rights Act*, 15 How. L.J. 227 (1969).

489. *Id.* at 228-33.

> But the technique used to shift the burden of proof seems apropos in a fair employment controversy centered about a test.[490]
>
> * * * *
>
> An employer using an unvalidated test is possibly negligent, but negligence is not the same as engaging in an intentional malpractice. Gross negligence can be treated as an intentional wrong in a tort or criminal case, but facts to establish gross negligence must be presented. Relying on an unverified test should be treated in the same manner as gross negligence and considered as an intentional wrong.[491]
>
> * * * *
>
> If an employer *intentionally* uses a test which is unrelated to the job, Title VII is presumably violated. On the other hand, if an irrelevant test is used *unintentionally*, there is doubt as to whether an employer can be held legally responsible. The *Guidelines on Employment Testing Procedures* refer to tests that are based on "specific job-related criteria" and concern tests "professionally developed in one situation" that may be misused "in another situation." The "fatherly" advice coming from EEOC does not fit the situation when an irrelevant test is innocently given. If the same irrelevant test is given to white and Negro job candidates, an intentional violation cannot be established.[492]
>
> * * * *

Because proof of an intent to discriminate is unnecessary to the adverse impact definition, Professor Kovarsky stood with the numerous other scholars who manifested no belief that this definition was part of Title VII.

The last and most important article we will examine in this context is Alfred Blumrosen's *The Duty of Fair Recruitment under the Civil Rights Act of 1964*.[493] Professor Blumrosen was (and remains) a recognized scholar of labor and employment discrimination law at the Rutgers University School of Law; in addition, he served as Chief of Conciliations for the EEOC from 1965 to 1967. Therefore, what he proposed, and did not propose, may fairly be taken as representative of the thinking of the concerned and informed activists who waged the battle against discrimination during the 1960's.

If Professor Blumrosen had believed that adverse impact was discriminatory under Title VII, this article was an ideal forum to assert that belief. The first sentence of the article indicated its focus: "Discrimination in recruitment and hiring is the chief measurable evil against which the modern law of employment discrimination is directed."[494] Recruit-

490. *Id.* at 236.

491. *Id.* at 241 (footnote omitted).

492. *Id.* at 244-45 (footnote omitted) (emphasis in original).

493. Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465 (1968).

494. *Id.*

ment and hiring are areas in which selection criteria can operate powerfully to disadvantage blacks. Moreover, Professor Blumrosen was well aware that facially neutral recruiting and hiring mechanisms could favor whites over blacks. Indeed, long before many others did, he understood how adverse impact operates. For example, he discussed word-of-mouth recruiting. It tends to preserve the racial composition of a work force because "circles of friendship and residence are segregated by race, [and] the employees will refer whites because they know them or know of them. But it is unlikely that the employees will know a Negro. . . ."[495] Another apparently neutral practice is refusing to accept applications except when jobs are available; but when word-of-mouth recruiting combines with refusing to keep applications on file, blacks can be disadvantaged because white employees will let their white acquaintances know when to apply.[496] Professor Blumrosen appreciated that blacks have less education and experience than whites, so that "if the employer establishes educational and prior experience standards as conditions for employment, he will necessarily exclude from consideration proportionately more Negroes than whites.[497]

In spite of his consciousness that facially neutral practices can have adverse effects on blacks, Professor Blumrosen did not argue that such practices were unlawful in and of themselves. He did not argue that Title VII defined discrimination in terms of effects. Rather, he maintained that we can reasonably expect employers to be aware of the effect of their behavior, and we can hold them accountable for what they are aware of:

> Where an employer has a segregated labor force and uses recruitment methods which perpetuate it, it is fair to assume that he is aware of the consequences of his recruitment system.[498]
>
> * * * *
>
> The awareness of the consequences of the recruitment system establishes the intent necessary for judicial proceedings under Title VII.[499]
>
> * * * *
>
> [W]hile the basic work force is all white, the system [word-of-mouth recruiting] is discriminatory. An employer who uses it is "failing to hire" [within the meaning of § 703(a)(1)] from the available labor market because he is restricting his recruitment efforts to the white labor market. The foreseeable, and hence intended, consequence of his action is the restriction of his labor force to whites only.[500]
>
> * * * *
>
> Under the circumstances described here [blacks having less educa-

495. *Id.* at 477.
496. *Id.* at 482.
497. *Id.* at 496.
498. *Id.* at 474.
499. *Id.* at 475.
500. *Id.* at 478.

> tion and experience than whites], with employer awareness of the exclusionary consequences of the use of educational and experience requirements, the elements of a prima facie case of discrimination arise and shift the burden of explanation to the employer. . . . The employer whose use of such criteria has produced or contributed to a segregated labor force may be unable to demonstrate a rational relation between the standard and the work to be done. In that case, his action constitutes discrimination, and his standards must be suspended.[501]

Professor Blumrosen clearly believed that motive was an element of the definition of discrimination. His emphasis on employers' awareness (or presumable awareness) of the effect of their conduct demonstrates this belief. He identified a serious problem and offered a solution: the problem was use of selection criteria with an adverse impact, and the solution was inferring intent from reasonably foreseeable effects; but he never abandoned the fundamental belief that Title VII requires proof of intent. We may laud Professor Blumrosen for his fidelity to the intent of Congress. We may also praise him and Professor Kovarsky for the quality of their solution, which we advocate below.

All of the leading contemporary commentators on the Civil Rights Act believed that Title VII prohibited only intentional discrimination. In reference to issues to which adverse impact clearly applied, none of the commentators considered adverse impact part of the definition of discrimination. The same statements are true of the Civil Rights Commission and of the President's Committee on Equal Employment Opportunity. Executive Order 10,925, which prohibited discrimination by government contractors, did not prohibit adverse impact, nor did the Secretary of Labor's rules on apprenticeship programs. This evidence completes the proof that Congress did not intend Title VII to include the adverse impact definition of discrimination.

9. *Congress's Definition of Discrimination*

The only definition of discrimination Congress intended to write into Title VII was disparate treatment. As Justice Rehnquist wrote in *General Electric v. Gilbert*:

> The concept of "discrimination," of course, was well known at the time of the enactment of Title VII, having been associated with the Fourteenth Amendment for nearly a century, and carrying with it a long history of judicial construction. When Congress makes it unlawful for an employer to "discriminate . . . because of [race or] sex . . . ," without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant.[502]

501. *Id.* at 496-97.

502. 429 U.S. 125, 145 (1976).

This statement correctly reflects the intent of the Eighty-eighth Congress. The Civil Rights Act contains no explicit definition of discrimination because everyone agreed that it meant what it had meant for many years.

This agreement is significant because opponents of the civil rights bill often criticized it for lacking a definition of discrimination.[503] Senators favoring the bill offered their own definitions, which invariably reflected disparate treatment and never adverse impact. These offers are unusually important because H.R. 7152 was placed on the floor of the Senate without benefit of committee report; thus, as Francis Vaas has observed, "Seldom has similar legislation been debated with greater consciousness of the need for 'legislative history,' or with greater care in the making thereof, to guide the courts in interpreting and applying the law."[504]

Senator Muskie certainly understood discrimination to mean disparate treatment: "Discrimination in this bill means just what it means anywhere: a distinction in treatment given to different individuals because of their race. . . . The term is used in a number of Federal statutes without definition. . . . And as a practical matter, we all know what constitutes racial discrimination."[505] What we all knew in 1964 was that discrimination meant disparate treatment. Some forward-thinking persons may have thought that discrimination included adverse impact, but Senator Muskie was plainly not one of them.

Nor were Senators Clark and Case. Answering an objection that the language of the bill was vague and unclear, Senator Clark said: "Discrimination is a word which has been used in State FEPC statutes for at least 20 years, and has been used in Federal statutes, such as the National Labor Relations Act and the Fair Labor Standards Act, for even a longer period. To discriminate is to make distinctions or differences in the treatment of employees. . . ."[506] The Interpretative Memorandum staked out the same position: "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. . . ."[507] The definition of discrimination contemplated by this passage is unquestionably disparate treatment. The adverse impact definition is neither clear nor simple, and it is full of hidden

503. 110 Cong. Rec. 2560 (statement of Rep. Johansen) (1964); *id.* at 2613 (statement of Rep. Alger); *id.* at 5863-64 (statement of Sen. Eastland); *id.* at 8428 (statement of Sen. Robertson); *id.* at 15,873 (1964) (statement of Rep. Wyman). *See also* the minority report of the House Judiciary Comm. on H.R. 7152, H.R. REP. No. 914, 88th Cong., 1st Sess., 68 (1963).

504. Vaas, *supra* note 210, at 444. *See also* 110 CONG. REC. 12,275-76 (1964) (statement of Sens. Manfield and Dirksen).

505. 110 CONG. REC. 12,617 (1964).

506. *Id.* at 7218.

507. *Id.* at 7213.

meanings for an employer who must measure adverse impact or hire experts to validate tests.

The word "discrimination" also appears in Title VI of the Civil Rights Act. Senators Ervin and Javits disagreed on the desirability of enacting this title, but both agreed on the meaning of discrimination under the title. "What is discrimination?" asked the Southerner. "Nowhere in the bill is it defined. It is defined in the court cases, and it is defined in the dictionary. Discrimination of that nature is simply treating a man of one race differently from a man of another race. That is how it has been defined."[508] The Northerner concurred: "I do not believe it is a vague standard. I am prepared to support it on the basis of the many cases which define what discrimination means, in terms of applying the same state of circumstances to a man of one color as to a man of another."[509]

Senator Abraham A. Ribicoff of Connecticut had the same definition in mind when he said:

> The purpose of title VI is due to the fact that the Hill-Burton Act [42 U.S.C. §§ 291 et seq., hospital construction] and the Morrill Act [7 U.S.C. §§ 321 et. seq., land grant colleges] specifically provided for separate but equal facilities. They made provision for Federal funds to go to separate but equal installations; furthermore, there are many programs in the Department of Agriculture and the Department of Labor which led to exactly the same situation.[510]

Of course, racially separate hospitals and colleges are the epitome of disparate treatment.

Other senators shared this understanding of discrimination. Senator Ervin asked Senator James O. Eastland of Mississippi whether the latter agreed that "the use of the word 'discrimination' in the context of 'on the ground of race or color' means treating a man of one race differently from a man of another race."[511] The latter did agree,[512] whereupon the former asked whether the latter agreed "that that is a most vague generalization,"[513] indeed, so vague as to amount to an unconstitutional abdication of legislative power to the executive agencies.[514] Not surprisingly, the latter agreed again.[515] Then Senator Humphrey joined the confabulation. In reply to the objection that the bill delegated power unconstitu-

508. *Id.* at 5606.

509. *Id.*

510. *Id.* at 7102.

511. *Id.* at 5863. Senator Ervin made this point so frequently that one may wonder whether the shrewd Southerner knew other definitions were possible and wanted to create a solid record on which to reject them.

512. *Id.*

513. *Id.*

514. *Id.*

515. *Id.*

tionally, the Democratic whip pointed to other federal acts which used the word "discrimination" without further explication, namely, the Interstate Commerce Act, the Federal Aviation Act, and the Hill-Burton Act.[516] In reply to the objection that the concept of discrimination was vague, he said:

> [T]here is no foundation for saying that the word "discrimination" has no precise, legal meaning. The eminent retired Supreme Court Justice, Mr. Charles A. Whittaker, in the article that was printed in the *Congressional Record* on March 17, page 5437, observes:
>
> The meaning of the term "discrimination," in its legal sense, is not different from its dictionary meaning.
>
> Webster's New International Dictionary defines discrimination as:
>
> A distinction, as in treatment; esp., an unfair or injurious distinction.
>
> . . . .
>
> The Senator knows that the word discrimination has been used in many a court case. What it really means in the bill is a distinction in treatment. It means a distinction in treatment given to different individuals because of their different race, religion, or national origin.
>
> . . . .
>
> . . .[T]he word "discrimination" has been used repeatedly without any separate statutory definition because the word "discrimination" is simply defined. It means "different treatment." That is all it means.[517]

Three points are evident. First, "discrimination" meant simply different (disparate) treatment. Second, the word was meant to carry the same meaning in the Civil Rights Act as in other legislation. Third, the word was used in its ordinary meaning, not in a radical new meaning. Disparate treatment fits in this matrix perfectly; adverse impact has no place at all.

It may be argued that it is erroneous to focus so intently on the definition of the word "discrimination," for the Supreme Court grounded the *Griggs* opinion on section 703(a)(2), and this section does not mention discrimination. Rather, the section says an employer may not "limit, segregate, or classify his employees in any way that 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. . . ." Did Congress intend section 703(a)(2) to outlaw adverse impact?[518]

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516. *Id.* at 5863-64.

517. *Id.* at 5864.

518. In General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), Justice Rehnquist implied that § 703(a)(1) prohibits disparate treatment, *id.* at 133, and § 703(a)(2) prohibits adverse impact, *id.* at 136-37. There is no basis in the legislative history for such a distinction. Indeed, only one legislator expressed any interest in the meaning of § 703(a)(2), *id.* at 5614 (statement of Sen. Ervin), and this

We have seen that the *Congressional Record*, committee reports, and transcripts of hearings are barren of references to adverse impact. This fact alone is sufficient to defeat any argument that section 703(a)(2) was intended to incorporate adverse impact. Congress could not have written into law what the legislators knew nothing of.

If section 703(a)(2) does not embody adverse impact, why is the section in the Act? The answer lies in the history of employment discrimination bills presented to Congress. Although many such bills were introduced before and during World War II,[519] none came near success. After the war, however, the enactment of the Ives-Quinn bill[520] in New York signaled that legislation of this sort was possible, and hundreds of bills were sponsored in Congress before Title VII was eventually passed.[521] Typical of the clauses defining unlawful conduct in many pre-, mid-, and early post-war bills were sections 3(a) and (b) of H.R. 229, introduced by Representative Dawson of Illinois on January 3, 1947:

> Sec. 3. (a) It shall be an unfair employment practice for any employer within the scope of this Act—
>
> (1) to refuse to hire any person because of such person's race, color, national origin, or ancestry;
>
> (2) to discharge any person from employment because of such person's race, color, national origin, or ancestry;
>
> (3) to discriminate against any person in compensation or in other terms or conditions of employment because of such person's race, color, national origin, or ancestry;
>
> (4) to confine or limit recruitment or hiring of persons for employment to any employment agency, placement service, training school or center, labor union or organization, or any other source that discriminates against persons because of their race, color, national origin, or ancestry.
>
> (b) It shall be an unfair employment practice for any labor union within the scope of this Act—
>
> (1) to deny full membership rights and privileges to any person because of such person's race, color, national origin, or ancestry;
>
> (2) to expel from membership any person because of such person's race, color, national origin, or ancestry; or
>
> (3) to discriminate against any member, employer or employee because of such person's race, color, national origin, or

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on only one occasion. Congress understood both sections to prohibit the same kind of conduct, namely, discrimination—in today's terms, disparate treatment.

519. C. WOODWARD, THE STRANGE CAREER OF JIM CROW 98 (3d ed. 1974), mentions pre-war bills. Examples of bills during the war are H.R. 7942 (1942) and S. 101 (1945).

520. 1945 N.Y. Sess. Laws 457.

521. Burnstein & MacLeod, *Prohibiting Employment Discrimination: Ideas and Politics in the Congressional Debate Over Equal Employment Opportunity Legislation*, 86 AM. J. OF SOC. 512, 516, 519 (1980). Prof. Burnstein kindly supplied the author with the list of enforceable bills he compiled. There were 124 such bills introduced into the House and 200 into the Senate between 1945 and 1964.

ancestry.[522]

Section 3(a) of this bill reads much like section 703(a)(1) of Title VII; over the years, the language of the earlier section was condensed but not changed materially (except for section (a)(4), which was dropped when employment agencies were made directly subject to the law). Section 3(b) also reads much like section 703(c)(1) of Title VII,[523] which applies to labor organizations; again, the later section is a condensation of the earlier. The important point is that there was no hint of the words "limit, segregate, or classify" that appear in sections 703(a)(2) and (c)(2) of Title VII.

Shortly after he was elected to the Eightieth Congress, Irving Ives of New York (the same of the Ives-Quinn bill) introduced S. 984 into the Senate.[524] Section 5(a) of this bill was conventional; unlawful employment practices by an employer were defined in terms plainly derived from the same source as section 3(a) of H.R. 229.[525] But section 5(b) of Senator Ives' bill was new:

> It shall be an unlawful employment practice for any labor organization to discriminate against any individual or to limit, segregate, or classify its membership in any way which would deprive or tend to deprive such individual of employment opportunities, or would limit his employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, or would affect adversely his wages, hours, or employment conditions, because of such individual's race, religion, color, national origin, or ancestry.[526]

This language is unquestionably the source of sections 703(a)(2) and (c)(2). What was it meant to do? Plainly, it applied only to labor unions, but, beyond this fact, the Senate hearings on S. 984 are not helpful.[527] Senator Ives testified that his bill was patterned after the Ives-Quinn law;[528] but that law contained no language similar to section 5(b), and Senator Ives did not comment on why the new section was added. Nor did the first chairman of the New York State Commission Against Discrimination, although he alluded briefly to the addition of section 5(b).[529]

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522. H.R. 229, 80th Cong., 1st Sess., 93 CONG. REC. 46 (1947).

523. Section 703(c)(1) reads: "It shall be an unlawful employment practice for a labor organization (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(c)(1) (1982).

524. S. 984, 80th Cong., 1st Sess. (1947).

525. *Id.* Section 5(a)(1) of S. 984 read: "It shall be an unlawful employment practice for an employer (1) to refuse to hire, to discharge, or otherwise to discriminate against any individual with respect to his terms, conditions, or privileges of employment, because of such individual's race, religion, color, national origin, or ancestry."

526. *Id.*

527. *Antidiscrimination in Employment, Hearings on S. 984 Before the Senate Subcomm. on Labor and Public Welfare*, 80th Cong., 1st Sess. (1947).

528. *Id.* at 7.

529. Henry C. Turner said: "Senate bill 984 is rather largely molded after and expresses the philosophy set forth in the Ives-Quinn law, the New York State law against discrimination. So

Nevertheless, we can identify the purpose of section 5(b), which was aimed at the way unions disadvantaged blacks, if we keep in mind that S. 984 was introduced in 1947.

The closed shop was still legal at the time S. 984 was introduced.[530] A union's refusal to admit black members could prevent an employer who had no desire to discriminate from hiring blacks. A union shop clause in a collective bargaining agreement could have the same effect: why should an employer hire a black if she would have to be discharged in a few weeks because the union refused to admit her to membership?[531] Even unions that accepted black members were free to classify them by race—for example, by maintaining segregated locals—and this practice could also have a profound effect on blacks' employment opportunities. These were not merely possible injuries; exclusion from and segregation within unions were widespread and injurious. In the 1940s, blacks were often excluded from a union altogether, even though the union represented them in collective bargaining, with the result that they had no voice in the formulation of the union's bargaining position or in the ratification or administration of the labor contract. If blacks were admitted to a union, they were commonly segregated into an auxiliary local and generally denied the right to participate in union elections. If blacks were not segregated into an auxiliary local, they were commonly placed at the bottom of the referral list in the hiring hall or restricted by their employer—without objection from their union—to low-paying, undesirable jobs.[532] Senator Ives was fully aware of the way labor unions treated blacks. In his report on S. 984 to the Senate, he wrote:

> Contrary to the general impression, discrimination in employment is not confined to certain sections of the country, certain industries, or certain groups. . . .
>
> Discrimination in employment is practiced by business, by government, and by labor unions. It is manifested by a refusal to hire, by a denial of in-service training or upgrading opportunity, by wage differentials, by the formation of auxiliary unions lacking the usual benefits of union membership, or by blanket exclusion from such membership.
>
> Discrimination is not only widespread; it has been increasing rapidly and continuously since the end of the war.
>
> . . . .
>
> From a statement submitted by Mr. Mike Masaoka, of the Japanese-

closely does it parellel that with the exception, possibly, of one or two of the definitions with respect to unlawful practices, it might also be said to duplicate it in principle. . . ." *Id.* at 328.

530. The closed shop was outlawed later that year by § 8(a)(3) of the Taft-Hartley Act, 29 U.S.C. § 158(a)(3) (1982).

531. The second proviso to § 8(a)(3), added by Taft-Hartley, was meant to eliminate the need to discharge persons a union unfairly refused to admit to membership. *Id.* § 158(a)(3).

532. *See* H. NORTHRUP, ORGANIZED LABOR AND THE NEGRO (1944).

American Citizen's League [to the Senate subcommittee holding hearings on S. 984]:

> Before the war, through the courtesy of several unions, persons of Japanese ancestry were permitted to organize auxiliary unions, to pay dues and assessments, but not to enjoy the usual benefits of union membership. Today in many west-coast localities we are not even granted the privilege of forming these segregated unions.[533]

Knowledgeable in the ways of unions and desirous of a law that would end all unequal treatment of blacks, Senator Ives added section 5(b) to his bill. The section was clearly aimed at a variety of forms of disparate treatment by unions. In fact, in his report to the Senate, Senator Ives described unlawful practices by unions as follows: The bill "declares as an unlawful employment practice: . . . (2) by a labor organization the limitation, segregation, or classification of its membership in any way which would deprive or limit any individual's employment opportunities. . . ."[534] This description did not use the word "discrimination," indicating quite plainly that the phrase "limit, segregate, or classify" was written to reach the ways in which unions disadvantaged blacks. In all probability, therefore, the words on which the Supreme Court grounded the adverse impact definition were originally intended to prevent labor unions from engaging in blatant forms of disparate treatment. Certainly there is no evidence that those words were incorporated into S. 984 in order to outlaw "practices that are fair in form, but discriminatory in operation."

S. 984 was not enacted. Thereafter, anti-discrimination bills sometimes used the formula in sections 3(a) and (b) of Representative Dawson's bill and sometimes the formula in sections 5(a) and (b) of Senator Ives's bill. For fifteen years, the phrase "limit, segregate, or classify" was used only in reference to labor unions. Because the anti-discrimination bills introduced into succeeding Congresses tracked the language of preceding bills, we may fairly conclude that his phrase came to have a settled meaning. It was that labor unions would be barred from disparate treatment such as segregating blacks into auxiliary locals, using segregated referral lists in hiring halls, and the like.[535]

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533. S. REP. NO. 951, 80th Cong., 2d Sess. 2 (1948).

534. *Id.* at 13.

535. Even after Representative Roosevelt applied the phrase "limit, segregate, or classify" to employers, other legislators continued to introduce bills that applied the phrase only to labor unions. For example, Senator Clark sponsored S. 773, introduced on February 11, 1963, which read in pertinent part:

> Sec. 5. (a) It shall be an unlawful employment practice for an employer—
>
> (1) to refuse to hire, to discharge, or otherwise to discriminate against any individual with respect to his terms, conditions, or privileges of employment, because of such individual's race, color, religion, or national origin. . . .
>
> . . . .
>
> (b) It shall be an unlawful employment practice for any labor organization to dis-

Not until the Eighty-seventh Congress did any bill apply "limit, segregate, or classify" to employers. This application occurred in H.R. 10144, introduced by Representative Roosevelt on February 7, 1962. Section 5(a)(2) of this bill is identical to section 5(a)(2) of H.R. 405 in the Eighty-eighth Congress, which was also Representative Roosevelt's bill and which, as we have noted, became Title VII. Except for the classes protected, sections 5(a)(2) of H.R. 10144 and H.R. 405 are identical to section 703(a)(2) of Title VII. Similarly, section 5(c)(2) of H.R. 10144 is identical to section 5(c)(2) of H.R. 405, and, except for the classes protected, these sections are identical to section 703(c)(2) of Title VII. Indeed, Representative Adam Clayton Powell of New York, chairman of the House Committee on Education and Labor, stated that Title VII was essentially Representative Roosevelt's FEP bill of 1962.[536] We may readily infer that, with regard to labor unions, the phrase "limit, segregate, or classify" in H.R. 10144, H.R. 405, and Title VII, meant what the phrase had always meant, that is, that disparate treatment as practiced by labor unions was outlawed. Accordingly, there is no basis on which to apply the adverse impact definition of discrimination to labor unions.

What conclusions may we draw about the application of "limit, segregate, or classify" to employers? Unfortunately, Representative Roosevelt did not reveal his reasons (or, more precisely, we have found no record of his reasons) for applying the phrase to employers. Nevertheless, we can infer the Representative's purposes. In the Eighty-sixth Congress, he had sponsored another equal employment opportunity bill, H.R. 427. This bill, introduced on January 7, 1959, defined unlawful practices by employers and unions in terms similar to sections 3(a) and (b) of Representative Dawson's 1947 bill.[537] What happened between 1959 and 1962 to prompt Representative Roosevelt to switch to the formula of Senator Ives's bill and to apply the phrase "limit, segregate, or

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criminate against any individual or to limit, segregate, or classify its membership in any way which would deprive or tend to deprive any individual of equal employment opportunities, or would limit his employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, or would affect adversely his wages, hours, or employment conditions, because of such individual's race, color, religion, or national origin.

Note particularly that § 5(b) provided that a union could not "discriminate . . . or . . . limit, segregate, or classify." Thus, a leading proponent of the civil rights bill and a co-captain for Title VII understood that "limit, segregate, or classify" applied to the way unions committed disparate treatment against blacks. H.R. 427, 86th Cong., 1st Sess. § 5(a) (1959).

536. 110 CONG. REC. 2551 (1964).

537. Section 5 of H.R. 427 read in relevant part:

UNLAWFUL EMPLOYMENT PRACTICE DEFINED

Sec. 5 (a) It shall be an unlawful employment practice for an employer—

(1) to refuse to hire, discharge, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, religion, color, national origin, or ancestry.

(2) to utilize in the hiring or recruitment of individuals for employment any employment agency, placement service, training school or center, or labor organization, or any

classify" to employers? By reconstructing the relevant aspect of the public debate on civil rights, particularly during 1959-1962, we can make an informed guess—a guess that is fully consistent with everything else we know about the definition of discrimination Congress intended in Title VII.

It was well known that labor unions as well as employers discriminated against blacks; we have seen that anti-discrimination bills included unions from the 1940's onwards. At first, racial discrimination was no cause for shame and could be freely acknowledged.[538] Later, as public opinion began to shift, unions and employers denied that discrimination existed.[539] Finally, when the civil rights movement was in full gear and the existence of discrimination could not easily be denied, employers and unions began to cooperate to preserve their old ways. The cooperation occurred in the usual adversarial fashion of American labor relations: employers blamed unions for discrimination,[540] unions blamed employers,[541] and the status quo was preserved.[542] In industries organized by craft unions, the employers claimed that they could hire only workers approved by the unions and that the unions refused to admit blacks into apprenticeship programs; the unions claimed there was no point in training black apprentices because they would never be hired by the employers. In businesses organized by industrial unions, the unions claimed that they had no power to control hiring practices and that the employ-

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other source which discriminates against such individuals because of their race, religion, color, national origin, o [sic] ancestry.

. . . .

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual or any employer because of the race, color, religion, national origin, or ancestry of any individual;

(2) to cause or attempt to force an employer to discriminate against an individual in violation of this section. . . .

S. 773, 88th Cong., 1st Sess. §§ 5(a), 5(b), 5(c) (1963).

538. For example, for many years the constitution of the International Brotherhood of Electrical Workers expressly excluded blacks. *Proposed Federal Legislation to Prohibit Discrimination in Employment in Certain Areas Because of Race, Color, Religion, National Origin, Ancestry, Age, or Sex, 1961: Hearings Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 87th Cong., 1st Sess. 350-51 (1961) (testimony of Louis Sean) [hereinafter cited as 1961 Hearings].

539. *See, e.g., id.* at 53-69 (testimony of James Crane); *id.* at 440-51 (testimony of Milton Genet).

540. *See, e.g., id.* at 43-53 (testimony of Joseph Garcia); *id.* at 666-83 (testimony of Irving Mendelson).

541. *See, e.g., id.* at 171 (testimony of Duane Greathouse); *id.* at 245-46 (testimony of Earl J. McMahon); *id.* at 391 (testimony of William E. Pollard).

542. These three phenomena—shameless admission, bold-faced denial, and buck-passing cooperation—overlapped one another in time. In 1961 denial and buck passing coexisted in public. *See supra* notes 539-41. An example of an admission (though not shameless) was the statement of George Meany, president of the AFL-CIO, that "in the District of Columbia . . . there are local unions whose membership and whose apprentice rolls are closed to Negro applicants." 1961 REPORT, *supra* note 275, at 131.

ers hired only whites; the employers claimed they could not hire blacks because whites would refuse to work next to blacks. These claims contained enough particles of truth to form a smoke screen for the real truth, which was that unions and employers wanted blacks to remain an underclass and that labor and management condoned and abetted each other's efforts to preserve this status.

But then the Civil Rights Commission and black leadership blew the smoke away. Devoting seven pages to discrimination in apprenticeship programs[543] and twenty-five pages to discrimination by labor unions,[544] the Commission's 1961 report interdicted the vicious circle of self-righteous buck passing. Both unions and employers were blamed for the exclusion of blacks from jobs.

Consider apprenticeship training, which was a prime focus of the report because blacks had long been denied access to skilled jobs. In the St. Louis area, said the report, 14.5 percent of the residents were nonwhite, but less than one-half of one percent of apprentices were nonwhite.[545] Black participation was similarly low in the cities of Atlanta, Baltimore, and Detroit and the states of California, New Jersey, and New York.[546] Who was responsible? In industries organized by craft unions, craftsmen were trained in formal apprenticeship programs. The bulk of these programs were operated by joint union and employer committees.[547] It was evident, therefore, that the paucity of black craftsmen was not the fault of unions alone, but was attributable to both unions and employers. In industries organized by industrial unions, "management is primarily responsible because, even in unionized plants, unions seldom have a voice in the selection of apprentices."[548] Of course, in non-union settings, responsibility for the lack of black trainees belonged exclusively to employers.

The Commission discussed discrimination in areas other than training and again made clear that unions and employers were often jointly responsible. Distinguishing once more between industries organized by craft unions and industries organized by industrial unions, the 1961 report noted that in the former there were sometimes segregated locals; blacks worked less than whites because employers hired through the white locals.[549] Where locals were integrated, blacks still encountered difficulty in being referred by their unions and in being accepted by the

543. *Id.* at 104-11.

544. *Id.* at 127-57.

545. *Id.* at 107.

546. *Id.* at 107-08.

547. *Id.* at 105.

548. *Id.* at 109.

549. *Id.* at 131.

employers.[550] Unions and employers also discriminated in concert in the industrial setting. Restrooms and eating facilities were segregated in some unionized plants, yet there was no indication that the unions were attempting to eliminate this racial insult.[551] Even more important was

> the frequently inferior job status of Negro employees in the industrial plants. Most of the firms interviewed in Atlanta [a Southern city], Baltimore [a border city], and Detroit [a Northern city] employed substantial numbers of Negroes. Often, however, Negro employees were found only in unskilled and semi-skilled jobs.
>
> . . . [S]ome unions in Detroit and Baltimore seem to have adopted a hands-off policy. . . .
>
> . . . .
>
> . . . [In Atlanta] Negro employees are confined to unskilled classifications, principally janitorial and common labor jobs. Unions apparently are unwilling to try to improve job opportunities for Negroes. For the most part these unions were confronted with company restrictions on Negro employment at the time collective bargaining was established. The departmental or occupational seniority provisions subsequently written into collective bargaining agreements have merely served to freeze preexisting discriminatory patterns.[552]

Plainly, in 1961 the Civil Rights Commission assigned responsibility for the inferior status of blacks to both unions and employers.

Representative Roosevelt was a leading proponent of a law against employment discrimination, and during the Eighty-seventh Congress he chaired the Special Subcommittee on Labor of the House Committee on Education and Labor. The subcommittee held hearings on employment discrimination in major cities across the country. Thus, in addition to the report of the Civil Rights Commission, with which he was surely familiar, Representative Roosevelt heard considerable testimony during the latter months of 1961 concerning the joint responsibility of employers and unions for racial discrimination. In Chicago, for example, he learned about the Washburne Trade School, a facility for apprentices operated by the city school system. Of more than 2,600 students, only twenty-six were black, and in seven of the twelve trades there were no black apprentices at all.[553] Who was responsible for this underrepresentation of blacks? One might be inclined to blame the unions until the following facts were known: all students in the school were adults, and they were employed; they were sent to the school at their employer's expense.[554] Students were selected to become apprentices in large part by the joint apprenticeship committees of unions and employers, though

550. *Id.* at 132.

551. *Id.* at 135.

552. *Id.* at 135-36.

553. 1961 Hearings, *supra* note 539, at 228 (testimony of Willoughby Abner).

554. *Id.* at 262 (testimony of Louis Newkirk).

some students were sent directly by employers.[555] Accordingly, responsibility for the small number of blacks in the school was attributable to both employers and unions. Earl J. McMahon, president of the Chicago & Cook County Building & Construction Trade Council, stated emphatically that "trade unions do not have complete control of the apprenticeship programs and it is not a field for unilateral control by our affiliates. We must work with the employer in the matter of apprentices and responsibility for the success or failure of the program is not ours alone."[556] In Los Angeles, Representative Roosevelt heard witnesses testify that employers and unions were jointly responsible for discrimination against blacks in the shipping,[557] film,[558] seafaring,[559] and restaurant[560] industries. And in New York City Representative Roosevelt received evidence about joint responsibility for discrimination in the building trades,[561] electric utilities,[562] and sundry other industries.[563] This evidence (of which he seemed to have been apprised by committee investigators before the hearings began) was evidently convincing to Representative Roosevelt, for at the opening of the hearings in each city he made the same statement: "We seek no whipping boy. We do not believe, for example, either organized labor or management is wholly responsible for employment discrimination."[564]

In addition, Representative Roosevelt heard at length about buck passing. For example, in Chicago, the Rev. S. S. Morris, president of the local branch of the NAACP, was speaking of apprenticeship programs when he referred to "[a] vicious cycle of excuses and buckpassing from board of education to union contractor, [that] has led to this miserable condition of racial exclusion. . . ."[565] Three members of the subcommittee—Representatives Roman C. Pucinski of Illinois,[566] Edward W.

555. *Id.* at 228 (testimony of Willoughby Abner).

556. *Id.* at 245-46.

557. *Id.* at 392-93 (testimony of William E. Pollard).

558. *Id.* at 393.

559. *Id.* at 401.

560. *Id.* at 472 (testimony of Joseph W. Walker).

561. *Id.* at 503-04 (testimony of Elmer Carter).

562. *Id.* at 513.

563. *Id.* at 712-13 (statement of Otis E. Finley).

564. *Id.* at 2, 280, 483.

565. *Id.* at 150.

566.

> [T]here is a tendency to not be able to effectively fix the blame for this. The labor groups maintain that the employer may be a very important role in this. The employer, on the other hand, turns around and says it is the labor groups. The board of education people blame both groups. . . .
>
> . . . You cannot pin the responsibility on any one source. . . .

Id. at 248. This statement also shows Representative Pucinski's belief that both employers and unions were responsible for discrimination.

Hiestand, of California,[567] and Roosevelt himself[568]—made comments which revealed a conviction that buck-passing was a serious problem.

Representative Roosevelt also believed that unions or employers were capable of eliminating discrimination if either party set its mind to the task. At the opening of the hearings in Chicago, he said, "I might observe, though, that when either labor or management strongly desires to effect change, change usually occurs."[569] He made identical statements at the openings of the hearings in Los Angeles[570] and New York.[571]

Representative Roosevelt believed that unions and employers were jointly responsible for discrimination, that each of the parties often denied its own responsibility by pointing a finger at the other, and that either party was capable of effecting change. He expressed these beliefs during the closing months of 1961, the period immediately preceding his introduction of H.R. 10144. These beliefs must have led him to adopt the formula in the Ives bill, which was more comprehensive than the formula in the Dawson bill; comprehensiveness would certainly be a virtue of a statute aimed at widespread, often subtle practices. These beliefs also led him to apply the phrase "limit, segregate, or classify" to employers. If both unions and employers were jointly responsible for discrimination, both parties needed to be governed by the same statutory provisions. If the parties tended to pass the buck, the answer was to make both liable so buck passing would accomplish nothing. If either party could effect change if so motivated, the risk of a law suit—with no chance to shift the blame to the other party—was likely to provide adequate motivation.

We may consider two additional explanations of section 703(a)(2). First, the perception that unions and employers cooperated to disadvantage blacks (or at least condoned each other's practices) probably led to a realization that the parties could easily take advantage of a statute that defined unlawful conduct by unions and employers in different terms. Very likely, Representative Roosevelt came to appreciate that the parties

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567.

> I notice that in these particular groups that is a pretty tightly closed group. I do not know whether management passes the buck to the union and the union passes the buck to the management, but it would seem that in these tightly closed groups there might be something to investigate. . . .

Id. at 401.

568.

> I am not blaming you as an individual. I am blaming you as part of an organization that has responsibility and does not seem to have moved in any direction on it at all, at the present time, except to pass the buck to management and then to say, "Our contract says that management has this right and, therefore, we withdraw from the field. If management wants to discriminate, there is nothing we can do about it.'

Id. at 430. *See also id.* at 247.

569. *Id.* at 2.

570. *Id.* at 280.

571. *Id.* at 483.

could manipulate their practices so as to shift apparent responsibility to the party whom the law did not reach. For example, section 5(b) of the Ives bill prohibited unions from discriminating or segregating, but section 5(a) prohibited employers only from discriminating. Therefore, all the parties had to do was to place responsibility for segregation solely on the employer. Of course, this problem did not have to arise. The solution was to define unlawful conduct by unions and employers in the same terms. Adding section 703(a)(2) had just this effect.

Second, a further possible purpose for applying "limit, segregate, or classify" to employers was that an employer without a labor union would have been permitted to segregate freely, so long as she did not discriminate. To the extent that discrimination and segregation were different concepts, the purpose behind Representative Roosevelt's bill required that employers be barred from both forms of behavior.

Section 703(a)(2) was incorporated into Title VII in response to the evidence that unions and employers were jointly responsible for discrimination and often cooperated purposefully to disadvantage blacks. Certainly there is no reason to believe that the section was written to legislate a new definition of discrimination. It follows that Congress intended Title VII to enact only one definition of discrimination, disparate treatment.

III
The Policies of the Act and a Proposal for Reform

Courts are constantly presented with claims that were not foreseen by legislatures, that cry for relief, and that statutes can be extended to cover. A general theory of when courts do or should extend a statute is beyond the ambition of this article. Nevertheless, one tenet of such a theory can be advanced with confidence: a court should not extend a statute if it was hotly contested and, in final form, represented a compromise, and if the proposed extension would undermine the purposes of the statute or lead to a result the legislature desired to avoid. The adoption of adverse impact violated this tenet.

We have seen that Congress did not intend to outlaw adverse impact, which must be considered an extension of an act that divided Congress deeply and was passed only after a compromise (the Mansfield-Dirksen substitute) was fashioned. We have also seen that adverse impact has led to quotas, which Congress abhorred. Below it will be shown that this result is contrary to the purposes of the Act and, indeed, contrary to the purposes underlying adverse impact itself. For these reasons, adverse impact should be abandoned.

The effort to achieve the purposes of Title VII should not be abandoned, however. If the statute can be construed [illegible]

sistent with congressional intent, serves the policies Congress sought to advance, and avoids or mitigates the problems of adverse impact, then that construction would deserve serious attention. Such a construction does exist. It results from applying the doctrine of foreseeable consequences to disparate treatment.

A. The Reasons for Adverse Impact and the Policies of the Civil Rights Act

Griggs was no accident. The Supreme Court normally documents with care its references to congressional intent. When the Court wrote, "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation"[572]—and omitted a footnote—the Justices must have been fully aware that nothing in the legislative history of Title VII supported this assertion. Furthermore, all of the Justices had lived through the civil rights era. Five of them[573] were members of the high court during the Eighty-eighth Congress, when the principal issue in the capital was the civil rights bill; they must have known that the idea of adverse impact had not been born or, at least, had not entered the public consciousness. Another Justice[574] was a key leader in the civil rights movement; he, too, must have known from his own experience what Congress intended and did not intend. Yet the decision in *Griggs* was unanimous (Justice Brennan not participating). Why did the Court ignore the will of Congress?

Two related explanations are possible. The first, psychological in character, springs from the opinion itself:

> [G]ood 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.[575]
>
> * * * *
>
> 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.[576]
>
> * * * *
>
> What Congress has commanded is that any tests used must measure the

572. 401 U.S. at 432.

573. Justices Black, Douglas, Harlan, Stewart, and White. Justice Brennan would have been included in this group, but he took no part in the consideration or decision of *Griggs*.

574. Justice Marshall.

575. 401 U.S. at 432.

576. *Id.* at 433.

person for the job and not the person in the abstract.[577]

Excluding Justice Brennan, the mean age of the Justices in 1970 was 65, the median age was 62, and the youngest Justice was born in 1917.[578] Therefore, all of the Justices had grown up in a period when education beyond elementary school was often a privilege of wealth; and all of them had lived through the Great Depression, when many promising young persons were forced to leave school and fend for themselves. Surely, each Justice personally knew individuals who, though lacking credentials, had achieved great success in life. The Justices had lived through the Second World War as well. During this time, there was a strong emphasis on know-how and an equally strong disdain for pedigree. Also, during and after the war, Americans came to realize that anti-Semitism was an important element in Hitler's rise to power. The opportunity to strike down a high school diploma requirement—a requirement that was not necessary to perform the job; a requirement that blacks could not satisfy because of the same kind of prejudice that corrupted Germany before the war; a requirement than prevented blacks from drawing on their ability and energy, as immigrants had done in the past, to improve their lives—the opportunity to strike down this sort of requirement must have beckoned to the Justices like the Sirens.

But *Griggs* is more than another example of a hard case that makes bad law. The Court was correct to write, "The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities. . . ."[579] Injustice to blacks was one of the reasons for Title VII, but economics was another. Congress sought to improve the economic position of blacks and thereby improve the economic welfare of the nation as a whole. Senator Clark said, "The Council of Economic Advisors . . . states that we could add $13 billion to our gross national product if Negroes could fully utilize the skills they already have in the job markets."[580] Senator Case asked rhetorically:

> How long can the United States continue to undertrain a sizable segment of its young people, limit their opportunities for entry into the labor market, hamper and restrict their employment advance, underutilize their professional skills, deprive them of job security, without serious consequences to the Nation's own economic and social advance?[581]

And Senator Humphrey declared:

> In title VII we seek . . . to release the tremendous talents of the American people, rather than to keep their talents buried under prejudice or discrimination.

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577. *Id.* at 436.

578. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW, App. 6-8 (9th ed. 1975).

579. 401 U.S. at 429-430.

580. 110 CONG. REC. 7205 (1964).

581. 110 CONG. REC. 7242.

> Racial prejudice in employment is one of the most wasteful practices for the economy. . . .
>
> Every bit of evidence we have in connection with fair employment practice laws indicates that such a statute not only is good law, good morals, and good labor-management practice, but it also is good economics.[582]

Similar views were held in the House of Representatives. Representative Lindsay said, "title VII concerns economic waste; the economic waste that is caused by denial of job opportunities to citizens in this country."[583] Representative McCulloch, the ranking Republican on the House Judiciary Committee, joined by six other Republicans on the committee, expressed the same idea in additional views on the need for H.R. 7152:

> The failure of our society to extend job opportunities to the Negro is an economic waste. The purchasing power of the country is not being fully developed. This, in turn, acts as a brake upon potential increases in gross national product. In addition, the country is burdened with added costs for the payment of unemployment compensation, relief, disease, and crime.
>
> National prosperity will be increased through the proper training of Negroes for more skilled employment together with the removal of barriers for obtaining such employment. Through toleration of discriminatory practices, American industry is not obtaining the quantity of skilled workers it needs. With 10 percent of the work force under the bonds of racial inequality, this stands to reason. Similarly, an examination of job openings that are regularly advertised discloses that the country is not making satisfactory use of its manpower. Consider how our shortage of engineers, scientists, doctors, plumbers, carpenters, technicians, and the myriad of other skilled occupations could be overcome in due time if we eliminate job discrimination.
>
> A nation need not and should not be converted into a welfare state to reduce poverty, lessen crime, cut down unemployment, or overcome shortages in skilled occupational categories. All that is needed is the institution of proper training programs and the elimination of discrimination in employment practices.[584]

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582. *Id.* at 6549. Later, the Senator stated:

> America has enjoyed many great scientific advances because we opened our doors to immigrants from other countries, immigrants who could not find freedom to live and work until they came to this country.
>
> I am of the opinion that some of the great discoveries yet to come will be because America kept its door open, because America kept its heart open. I am of the opinion also that when industries deny jobs to people because of race, they really deny opportunities to themselves. We cannot afford this artificial restriction on the productive capacity of free men.

Id. at 13,083.

583. *Id.* at 1639.

584. H.R. REP. NO. 914, Part 2, 88th Cong., 1st Sess., *reprinted in* EEOC LEGISLATIVE HISTORY, *supra* note 332, at 2149.

These ideas were not new in the Eighty-eighth Congress. The argument that discrimination should be outlawed because it is costly can be traced back at least as far as Senator Ives's bill in 1948.[585]

But new ideas did develop after Title VII was enacted. Psychologists learned that difference in intellectual ability is not the correct explanation of why blacks do not perform as well as whites on standardized ability tests.[586] Social scientists learned that racially neutral standards can exclude blacks from job opportunities.[587] The dominant economic theory of discrimination, based on the notion that employers and others have a taste for discrimination,[588] was challenged by a new theory, called statistical discrimination, in which taste and prejudice were irrelevant.[589] Even Congress learned. By the opening of the 1970's, our legislators knew what they had not known several years earlier:

> In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. It was thought that a scheme that stressed conciliation rather than compulsory processes would be most appropriate for the resolution of this essentially human problem, and that litigation would be necessary only on an occasional basis. Experience has shown this view to be false.
>
> Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements.[590]

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585. S. REP. NO. 951, *supra* note 534, at 3-5.

586. *See* Cooper & Sobol, *supra* note 156, at 1638-41.

587. *Id.* at 1599.

588. G. BECKER, THE ECONOMICS OF DISCRIMINATION (1957).

589. A good explanation and summary of theories of statistical discrimination is Aigner & Cain, *Statistical Theories of Discrimination in Labor Markets*, 30 INDUS. & LAB. REL. REV. 175 (1977).

590. S. REP. NO. 415, 92d Cong., 1st Sess. 5 (footnote omitted). Had the 1972 amendments to Title VII, P.L. 92-261, modified or reenacted §§ 703(a)(1) or (2) in any way relevant herein, an argument could be made that Congress ratified the *Griggs* decision; but these sections were not touched by the 1972 amendments except for the addition of the words "or applicants for employment."

If anything, the legislative history of the 1972 amendments proves that Congress did not approve of *Griggs*. Section 8 of H.R. 1746 proposed to modify § 703(h) of Title VII by striking the Tower amendment and substituting the following:

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

The House Committee on Education and Labor reported favorably on H.R. 1746. H. REP. NO. 238, 92 Cong., 1st Sess. Speaking of the quoted language, the report said that general intelligence tests,

The Supreme Court was learning at the same time Congress was. One of the attorneys for the plaintiffs in *Griggs* was George Cooper.[591] Along with Richard Sobel, Professor Cooper was a co-author of an influential article that appeared in the Harvard Law Review in 1969.[592] The authors argued:

> Performance on tests is to some extent dependent on innate ability, but in addition, tests measure how well a person has assimilated the knowledge and skills that the particular test is measuring. . . .
>
> The general patterns of racial discrimination, lesser educational and cultural opportunities for black people, and cultural separatism that have marked our society for generations have impeded blacks in attaining the background necessary for success on existing standardized tests. A consequence of this discrimination and segregation is the lower average black score on most standardized tests, nonverbal as well as verbal. This scoring discrepancy is particularly evident in the South, where the disparity in educational opportunity is the greatest.[593]

Although Cooper and Sobel conceded a central point of the argument of this article—in 1964 few people understood either that tests might be unfair to blacks or that merely forcing employers to allow blacks to take tests would not significantly improve blacks' employment opportunities[594]—nevertheless, the authors argued that "testing violate[s] fair employment laws in situations where an adverse racial impact is not adequately justified, without regard to the motive of the employer in adopting the practices."[595]

The EEOC took the same position as Cooper and Sobel. In Guidelines issued in 1970,[596] the Commission defined discrimination to include

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on which middle class groups outperform culturally disadvantaged groups, "are often irrelevant to the job to be performed by the individual being treated." *Id.* at 21. Then the report discussed *Griggs* and the EEOC's Guidelines on testing, concluding: "Section 8 perfects Title VII's provisions with respect to testing and apprenticeship training." *Id.* at 22. If H.R. 1746 as reported by the Committee on Education and Labor had been enacted, there would be little doubt that, as of 1972, Congress intended to outlaw adverse impact.

H.R. 1746 was not enacted, however. Despite the favorable committee report, a substitute that left the Tower amendment intact was agreed to. 117 CONG. REC. 32,142 (1971). The most likely conclusion to be drawn from this legislative history is that Congress rejected an attempt to ratify *Griggs*.

Accordingly, the quotation in the text above demonstrates what Congress had learned about racial discrimination. Similarly, the attempt to repeal the Tower amendment in favor of language that would have protected only job-related tests reveals what Congress had learned about testing. Neither piece of learning, however, found its way into law.

591. Mr. Cooper's name does not appear among the attorneys listed in the official report. 401 U.S. at 425. Nevertheless, Mr. Cooper is identified as being of counsel on the petition for certiorari, and he is identified as one of the petitioners' attorneys on the first page of the petitioners' brief in the Supreme Court.

592. Cooper & Sobel, *supra* note 156.

593. *Id.* at 1639-40.

594. *Id.* at 1600, 1645.

595. *Id.* at 1670 (footnote omitted).

596. 35 Fed. Reg. 12,333 (1970).

"[t]he use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by title VII . . . unless: (a) the test has been validated and evidences a high degree of utility as hereinafter described. . . ."[597] The Guidelines specified validation standards.[598]

Although the Supreme Court did not cite Cooper and Sobel's article, the Justices were surely aware of it: the article was mentioned three times in the petition for certiorari and three more times in the plaintiffs' brief; the article was also cited in the briefs of the United States and of the Chamber of Commerce as amici curiae. The Court did rely on the EEOC Guidelines,[599] going so far as to grant them great deference.[600] Although the Guidelines mentioned by the Court pertained only to the exception for tests in section 703(h), and not to the definition of discrimination, the two concepts are inextricably related. The issue of validation does not arise unless a test with an adverse impact is considered discriminatory. In short, the plaintiffs and the government presented the Court with a Brandeis brief which contained research and reflection that had occurred after Title VII was enacted.

With this knowledge in mind, we have the makings of another explanation of *Griggs*. The Supreme Court believed that Congress had made an error in 1964. Title VII was enacted without a full understanding of the ways and means by which blacks were disadvantaged in the economic system. Focusing on the South, our legislators thought the cause of the problem was ill will; accordingly, they outlawed purposeful discrimination. Then scholars and advocates learned that seemingly color-blind institutions like standardized ability tests can exclude qualified blacks from jobs just as surely as the color bar did. Accordingly, the Justices allowed themselves to be persuaded that, unless they expanded Title VII to reach such institutions, a major purpose of the Act would not be fulfilled. (They were predisposed to persuasion by their feeling about hiring by use of pedigree instead of ability.) It must have appeared to the Justices that, without adverse impact, the shortage of skilled workers would not be alleviated, the gross national product would not reach its potential, and the burden of crime and welfare would not be mitigated. Further, of course, black unemployment would not be reduced, and poverty among blacks would remain an open sore. Believing (albeit mistakenly) that the disparate treatment definition of discrimination was not sufficient to do the job, the Supreme Court completed the work of Congress by adopting the adverse impact definition.[601]

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597. *Id.* at 12,334.

598. *Id.* at 12,334-35.

599. 401 U.S. at 433.

600. *Id.* at 434.

601. *Griggs* was one aspect of a broader change that occurred in the late 1960's: race became a

It is now apparent that the policies the Court wanted adverse impact

definition of interest. Blacks made demands, not merely as individual victims of discrimination, but as a group entitled to a share of benefits; and such demands were increasingly considered legitimate. As a result, there developed the consciousness of blacks' group interest—which in *Griggs* became a group right—that underlies adverse impact. This development occured in many areas, and proof of it is beyond the scope of this article; but a sketch of the growth of group consciousness in relation to employment may be attempted.

An important manifestation (and later a cause) of the change in attitude towards group rights was the growth of the affirmative action required of federal contractors. Persons doing business with the federal government had been required since the administration of President Franklin Roosevelt to sign promises not to discriminate on the ground of race. Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941). The administration of President John Kennedy added affirmative action to the requirement of non-discrimination, Exec. Order. No. 10,925, 26 Fed. Reg. 1977 (1961), but in those days affirmative action was a comparatively mild obligation and required little more than active steps to eliminate discrimination. For example, the Lockheed Corp. agreed to "re-analyze its openings for salaried jobs to be certain that all eligible minority group employees have been considered for placement and upgrading." M. SOVERN, *supra* note 328, at 110.

Affirmative action in today's sense dates from the late 1960's, that is, the period immediately precedings *Griggs*. In 1965, President Lydon Johnson issued Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965); § 201 made the Secretary of Labor responsible for administering the parts of the order dealing with federal contractors and empowered the Secretary to issue regulations. The Secretary, Willard Wirtz, had previously expressed strong feelings against quotas. It is true that he believed that employers and unions should take measures to counteract the effects of discrimination in the past—for example, training blacks who would have been qualified but for previous discrimination. W. WIRTZ, LABOR AND THE PUBLIC INTEREST 102-03 (1964) (speech of May 22, 1964). Nevertheless, he firmly opposed reverse discrimination. He wrote, "There is argument about whether preferential hiring of Negroes, to counteract the effect of previous discrimination against them, is now in order. I think it is not. . . ." *Id.* at 112 (speech of November 7, 1963); *see also id.* at 115-16 (speech of November 18, 1963). But the Secretary changed his mind shortly after the executive order was issued. The first step occurred when he reversed a policy in place since 1962 by ordering that employers who operated programs under the jurisdiction of the Labor Department—including federal contractors—must keep records identifying employees by race. FACTS ON FILE 223 (1966) (Week of June 19-26, 1966). The next step was to compare the percentage of blacks in a labor market to the percentage of blacks in a firm, and the final step was to require federal contractors to hire enough blacks to make these percentages equal.

An early focus of the Secretary was the construction industry. In 1966, St. Louis construction contractors were required, before they were awarded federal contracts, to submit to an examination by the Office of Federal Contract Compliance (OFCC) in which the contractors had to identify the racial characteristics of their employees and specify recruitment sources and hiring procedures. Jones, *The Bugaboo of Employment Quotas*, 1970 WIS. L. REV. 341, 344. In 1967 construction contractors in the San Francisco Bay Area submitted detailed affirmative action programs. *Id.* at 346. In the same year, Cleveland construction contractors who submitted low bids were required to submit affimative action plans "with specifications intended to 'have the result of assuring that there was minority group representation in all trades on the job in all phases of the work.' " *Id.* When one contractor's plan detailed the total number of employees he would use in each trade and stated how many of that number would be his goal for minority employment, the government required similar goals of all construction contractors in the area. *Id.*

The OFCC's major thrust in the construction industry was the Philadelphia Plan. Beginning in 1967, affirmative action plans were to be reviewed before award of a contract, and each plan had to result in producing more minority group representation in all trades and phases of the construction project. Representation meant "representative numbers," not mere tokenism, and manning tables were developed. *Id.* at 348. In an opinion issued in 1968, the Comptroller General ruled the pre-award reviews of the Philadelphia Plan violated the statutory requirement of competitive bidding because minimum standards for affirmative action plans had not been promulgated. *Id.* at 359-60. In 1969 the Secretary announced a revised plan that satisfied the Comptroller's objection. The re-

to serve were the same policies Congress intended Title VII to serve: justice for individuals and improvement for the economy.[602] The unspo-

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vised Philadelphia Plan found there were substantial numbers of trained and trainable minorities in six crafts in the area and decreed that at least 4-6% of contractors' craft workers must be minorities by the end of 1970, rising annually to a minimum of 19-20% in 1973. *Id.* at 369-72. The Comptroller General decided the revised plan was invalid because its specific goals would lead to reverse discrimination, Comment, *The Philadelphia Plan and Strict Racial Quotas on Federal Contracts*, 17 UCLA L. REV. 817, 822 (1970), but the Attorney General later declared the plan to be lawful. Before *Griggs* was decided, a court had agreed with the Attorney General. Contractors Association of Eastern Pennsylvania v. Shultz, 311 F. Supp. 1002 (E.D. Pa. 1970).

Although the construction industry may have led the way into modern affirmative action, the regulations applicable to all federal contractors were more important because of the greater numbers of employers and employees affected—as much as one-third of the labor force. Note, *Executive Order 11246: Anti-discrimination Obligations in Government Contracts*, 44 N.Y.U. L. REV. 590, 591 (1969) [hereinafter cited as *Executive Order 11246*]. On July 1, 1968, the Secretary issued regulations that applied to all federal contractors. 41 C.F.R. § 60 (1969). Subpart C required each contractor and subcontractor who had 50 or more employees and a contract of $50,000 or more to develop a written affirmative action program. Each program had to contain "identification and analysis of problem areas inherent in minority employment and an evaluation of opportunities for utilization of minority group personnel." *Id.* at § 60-1.40. If minorities were underutilized—in other words, disproportionately represented—the program had to state specific goals and timetables. *Id.* James Jones, the Assistant Solicitor for Labor Relations, declared that the affirmative action required by these regulations included any action necessary to achieve social equality in an employer's job structure. *Executive Order 11246*, *supra*, at 592.

An example of an affirmative action program that met the requirements of the regulations was Burlington Industries' plan of 1969. The employer promised to keep records of minorities' status in the firm; to develop specific goals and timetables for hiring minorities with reference to their availability in the hiring area; to attempt to fill vacancies in skilled jobs from present employees; and to establish goals and timetables for upgrading minorities with reference to their proportion among all employees. *Id.* at 607-10, in which the entire plan is quoted.

In a nutshell, the executive branch of the federal government recognized the interest of the class of blacks in obtaining more employment opportunities and required federal contractors to provide those opportunities, regardless of whether the individuals who benefitted had been victims of discrimination by the contractors. The Philadelphia Plan and the regulations of the Secretary of Labor were widely and intensely publicized. The Justices of the Supreme Court were surely aware of the new definition of affirmative action and, as they decided *Griggs*, may have been influenced by the emerging legitimacy of blacks' group interest.

602. Some writers have argued that the law against employment discrimination was predicated on a desire to protect individuals from disadvantage based on immutable characteristics. *See, e.g.*, Smith, *The Law and Equal Employment Opportunity: What's Past Should Not Become Prologue*, 33 INDUS. AND LAB. REL. REV. 493, 498-500 (1980). Mr. Smith claimed that the law originally focused on characteristics such as race and sex, over which individuals have no control. Then, Mr. Smith argued, the law turned to age, a factor over which we have no control but which is experienced by everyone. And recently the law has begun to protect characteristics over which individuals presumably have control, for example, marital status. Mr. Smith disapproved of this step because it

> has further confused the role of the law in providing equal employment opportunity. The protection afforded to veterans of the Vietnam era, for example, is not logically related to the other forms of prohibited discrimination. In addition, prohibiting discrimination on the basis of pregnancy . . . or sexual preference, or political affiliation . . . draws the law even farther away from its original purpose: prohibiting employment discrimination against individuals on the basis of personal characteristics over which they possess no control.
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> . . . The absence of a coherent or consistent precept encompassing the new categories of prohibited discrimination raises a fundamental question: what is the law being asked to express by condemning categories of employment discrimination based on personal charac-

ken but palpable theory of *Griggs* was that justice for individuals would result if workers were evaluated by their abilities, not their pedigrees, and the economy would improve if selection were based only on criteria that predict success on the job.

Unfortunately, the theory underlying adverse impact did not work. It assumed that employers could economically adopt job-related criteria. This assumption has proved false. Employers have not adopted valid criteria because such criteria do not presently exist, and the cost of developing them may often exceed the gain of using them. Consequently, employers have been motivated to find a way around the law. They have looked for the loophole in the rule, and they have found it. They hire by quotas. If a selection criterion does not have an adverse impact, the rule does not require the employer to validate the criterion. So employers merely ensure that proportionate numbers of blacks are hired.

This behavior is inefficient because workers are chosen based upon their skins, not their skills. This behavior is unjust because workers are denied employment opportunities solely because of their race. At first, it is whites who suffer from quotas; the whites are denied jobs in favor of less qualified blacks. Later, the tables will be turned, and it will be blacks who suffer from quotas. For a quota that begins as a lower limit for blacks will one day become an upper limit. The mechanism of this transposition is simple. An employer wants to avoid litigation. He identifies a proxy for the available work force (for example, the total labor force or the community) and ensures that the percentage of blacks who pass his

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teristics that can be changed by the individuals involved? Such condemnation dilutes the moral underpinning of a body of law that is intended to implement the ethical precept that individuals should be judged in employment decisions solely on the basis of personal characteristics within their personal control.

Id. at 499-500.

The author disagrees with Mr. Smith in two regards. First, injustice is not inextricably tied to immutability. As a youth, the author dreamed of becoming a professional athlete; immutable characteristics, however—size, speed, and coordination, to name a few—stood in his way. Yet he does not feel he has been the victim of unjust discrimination. On the other hand, were he to lose his present job because of the way he voted in the next election—a matter of which he has complete control—he would take his case to the Supreme Court.

Second, the protected classes added to statutory law after 1964 do not represent a shift in direction. Congress has consistently been concerned with individual justice and productivity. The basic idea is that justice in employment requires a worker to be judged on his own characteristics that are related to productivity; judgments based on characteristics that are unrelated to productivity or that may be true of a class to which the worker belongs, but are not true of him, are unfair.

Thus, Mr. Smith was wrong to say there is no logical relationship between the older and newer protected classes. All are related because they promote productivity-related judgments based on individual ability. Further, Mr. Smith was wrong to say that the new protected classes dilute the moral underpinning of the law. American workers know, as Congress knew, that a woman can be as productive as a man, and a handicapped worker who can do the job can be as productive as an able-bodied worker. Contrary to Mr. Smith's assertion, Congress has uniformly acted on the precept that employment decisions should be predicated on individual productivity, and that precept is widely held in the nation.

test is the same as the percentage of blacks in the proxy. At first, this move may help blacks gain entry into jobs they might not otherwise have obtained. Knowing that few of their race held the job in question, blacks may have lost interest in it and prepared themselves for other jobs. Consequently, in the begining blacks may amount to a greater share of the proxy than they do of the available work force for the job in question. Thus, the employer who hires as many blacks as the proxy indicates may wind up with an overrepresentation of blacks. Soon, however, the word will spread that this employer does not discriminate, and blacks will be attracted to his firm. Witness the Post Office. Because whites have far more job opportunities than blacks, before long blacks will comprise a greater fraction of the available work force for a non-discriminatory employer than they comprise of the employer's proxy. In other words, whereas blacks may at first have been over-represented in the employer's proxy, eventually they will become under-represented. Yet the employer will not likely adjust his quota. The same fear of litigation that motivated him to hire a representative number of blacks will motivate him to hire a representative number of whites. In short, blacks will rush to jobs with a non-discriminatory employer, only to find themselves excluded—as they may have been excluded twenty years ago—by a quota. For these reasons, adverse impact is ultimately counterproductive.

B. A Proposal for Reform

For all its theoretical and practical problems, adverse impact has the virtue of attacking institutional discrimination. Injustice occurs when a black's application for a job is rejected, not because of her lack of ability, but because of characteristics white society has imposed on her race; and national productivity will never reach its potential so long as blacks are excluded from jobs for reasons unrelated to job performance. The plaintiffs in *Griggs* suffered a classic example of institutional discrimination: they were qualified for the work they sought, but they were rejected because they lacked high school diplomas that white society, through a myriad of discouragements, had hindered their obtaining. Congress may have been unaware of this phenomenon in 1964, but it is clearly an evil that should be eradicated, and it is close enough in kind to the problem Congress was attempting to solve that courts may properly prohibit institutional discrimination under the aegis of Title VII. But ends are different from means. Identifying an evil and agreeing that it may be dealt with under a statute are separate from choosing the appropriate way to eradicate the evil. Institutional discrimination is unjust and should be prohibited under Title VII, but adverse impact is the wrong tool for the job.

Judicial law making is not only inevitable but also desirable. A leg-

islature can address only so many problems when it enacts a statute; a vehicle must exist for handling the public demand that closely related problems be resolved. Such problems cannot practically be returned to the legislature because they are too many and it acts too slowly. Also, courts can experiment with rules, modifying or abandoning them as experience dictates, and courts can tailor rules to specific cases. But the courts should not play a free hand as they make law under a statute. They should keep in mind the purposes the statute was designed to serve; they should honor the accommodations of interest fashioned in the legislature and avoid the pitfalls the legislators feared.

The purposes of Title VII were to promote racial justice and to improve national productivity. Quotas were considered unjust. Any assault on institutional discrimination must respect the purposes of justice and productivity and avoid the pitfall of quotas. Measured against these criteria, adverse impact fails. It does not promote productivity because the EEOC Guidelines make test validation too difficult. Also, both the prima facie case and the "defense" under adverse impact are riddled with difficulties, with the result that it does not clearly promote justice. And because adverse impact is synonymous with quotas, it leads to the pitfall that Congress meant to avoid at any cost.

Although adverse impact must be abandoned, the effort to combat institutional discrimination need not be. If the doctrine of foreseeable consequences were read into disparate treatment, much of the good of adverse impact could be preserved, and much of the bad could be eliminated.

Discrimination outlawed by Title VII occurs when an employer judges a worker by his race rather than his productivity. We can read the doctrine of foreseeable consequences into disparate treatment because the doctrine serves the purposes of the Act. Under disparate treatment with foreseeable consequences, a rebuttable presumption would arise that the cause of a significant disproportionality was racial discrimination. The reasoning supporting the presumption is that a person intends the foreseeable consequences of her behavior. Thus, an employer would normally be held to have intended to discriminate if she used a test that was not job-related and that had a disproportionate effect of which she knew or reasonably should have known. The presumption could be rebutted by proof that the employer intended (made reasonable efforts) to select by productivity and not by race.[603] Thus, an employer could use a valid

603. For example, suppose an employer filled 100 vacancies in entry-level jobs in a given month with 70 whites and 30 blacks. If the plaintiff proved that half of the people living in the area surrounding the plant were black and half of the applicants for the jobs were also black, we would have reason to suspect the employer of discrimination. Why would we be suspicious? Because such an outcome is unlikely to occur by chance (the possibility that random hiring would yield a 70:30 ratio is approximately one in 3,333), but such an outcome is quite consistent with the hypothesis of

test, regardless of its disproportionate effect, because the test selects productive workers. Other considerations would become relevant for cases that fall between these poles, but the issue at all times would be whether the employer selected by race or productivity. A few hypothetical cases will demonstrate how foreseeable consequences applied to disparate treatment (hereafter, "disparate treatment") would serve the purposes of Title VII, mitigate the problems of adverse impact, and perhaps lead to new benefits through increased communication between blacks and employers.

Let us begin with a simple case. An employer required that all new employees hold a high school diploma; 80 percent of whites in the available work force, but only 70 percent of blacks, could satisfy this requirement. The employer had never tried to determine systematically whether the requirement predicted success on the job. Therefore, he cannot be heard now to say that he required a diploma because it distinguished productive from unproductive workers. He may have believed in good faith that high school graduates make better employees; his common sense may have suggested that graduation is proof of a certain level of intelligence, knowledge, and discipline, and workers at this level will be more productive than workers below it. But common sense can be wrong. Indeed, a high school diploma can be unrelated or inversely related to successful performance of some jobs. The goal of enhancing productivity is served by rational efforts to utilize the best available selection criteria, not by intuitive and often mistaken impressions. Accordingly, we may infer that Congress intended to protect reasonable, not merely good-faith, beliefs about productivity. This inference is supported by the Tower amendment, which was intended to protect professionally developed tests. An employer may reasonably believe that such a test, when used for the kind of jobs for which it was designed, is valid. In our hypothetical case, the belief of the employer was not reasonable because it was not verified in any way.

The employer cannot claim ignorance of the disproportionate effect; high school graduation rates are common knowledge and readily available in any almanac. Because he knew (or should have known) that a greater proportion of whites than blacks holds diplomas, we may infer that he intended the effects the diploma requirement produced. Thus, his conduct amounted to disparate treatment because he intentionally preferred whites over blacks for reasons other than productivity. He may

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discrimination. Still, the employer could win the case, for example, by proving that most of the white applicants were well-recommended, experienced workers whose former employer had recently gone out of business, while most of the black applicants were inexperienced youths without references.

Note that the role of statistics in a disparate treatment case is to help reveal the employer's state of mind.

have lacked any desire to injure blacks and may have been free of racial prejudice, yet he would remain liable. His position is the same as the employer who intentionally refuses to employ blacks because of fear that customers or co-workers will be dissatisfied.

Suppose the employer argues the disparity was not large enough to matter. Certainly a minuscule difference in the performances of the races ought to be disregarded. But any substantial disparity would be legally significant if the employer (foresaw and therefore) intended it and the test was not valid. The number of blacks to whom the test was unjust might be small, but each individual was entitled to protection under Title VII. In the face of the evidence that the employer lacked a reasonable belief that his test fairly measured productivity, he should lose this case.

Suppose another employer used a test that 80% of whites passed, but only 70% of blacks passed.[604] He had never used the test before, or had used it only a short while, and did not know whether the disproportionate effect was attributable to the test or to simple bad luck for the blacks who took the test. Here we would be interested in the likelihood that the disparity occurred by chance, the care with which the test was chosen, and the employer's behavior towards black employees. If statistical analysis revealed that the disparity in rates of success could easily have occurred by chance, we would be unsure whether the disparity was real or merely a random result. If the employer had carefully looked for a fair test, and if he generally treated black employees as well as white employees, we would believe the employer had taken reasonable steps to select by productivity, not race. On the other hand, if the disparity was unlikely to have occurred by chance, if the employer had chosen the test without due regard for its applicability to the job in question, and if he often treated individual blacks less favorably than whites, we would be inclined to find for the plaintiffs. We would believe the disparity was genuine and that the employer had not taken reasonable steps to select by productivity; thus, he should have foreseen and, accordingly, he intended the disproportionate effect the test produced.

Now let us consider another simple case. Suppose a test consistently had a disproportionate effect, and a validation study revealed the test was significantly better than chance at predicting success on the major aspects of the job. Plainly, the employer should win this case. Although

604. In the following analysis, test takers are used as a proxy for the available work force. Comparing relative rates of success on an identified selection criterion is one common way of establishing adverse impact. Two other common proxies for the available work force are the population of the community (or the labor force) and applicant flow; adverse impact is determined by comparing the percentage of blacks on the job with the percentage of blacks in the community (or in the area labor force) or by comparing the percentages of successful black and white applicants. *See* Green v. Missouri Pac. R.R. Co., 523 F.2d 1290, 1293-94 (8th Cir. 1975). The analysis that follows above in the text is equally applicable to these other proxies and methods of proof.

she knew of, and therefore intended, the disproportionate effect, she also knew the test selected qualified employees. Even if she were prejudiced against blacks and actively desired the disproportionate effect, she would win because the blacks whom the test disqualified were unable to do the work and consequently have no legal ground of complaint.

The difficult (and most common) cases fall between the easy ones. Suppose an employer hired according to score on a published ability test and was aware that it had a disproportionate effect on blacks. The test was professionally designed for the type of job for which the employer used the test, and its authors asserted it was significantly better than chance at predicting productivity on the job. The fundamental question would be: did the employer intend to hire by productivity or race? Knowing that the test was valid for this type of job, yet also knowing that the test has not been validated for the specific job in the employer's firm, we cannot be sure that only unqualified blacks were excluded; therefore, other evidence becomes important. A partial list of such evidence includes the likelihood and size of the disparity, the availability of better tests, the economics of testing for this employer, and the employer's treatment of black employees and potential employees. *Ceteris paribus*, a disparity that probably did not occur by chance—particularly a large one[605]—runs counter to the assumption that blacks and whites are equally qualified for most jobs. An employer genuinely interested in productivity-based decisions would normally be suspicious of a significant disparity and would investigate alternative selection criteria; an employer content with a disproportionate effect would be more likely to turn a blind eye to alternatives. Also, the amount of money an employer can economically spend on testing varies with individual circumstances. For example, a large firm with high turnover in a necessary job may profit from developing the best possible test for that job; a small firm with low turnover in a minor job may be wiser to minimize selection costs. An employer who uses the best test that the economics of the situation dictate is judging according to productivity; an employer who spends an unreasonably small amount on selection may be judging according to race. And an employer who behaves fairly towards blacks already on the job and who actively seeks black applicants is more likely to have used a test for its predictive power (as opposed to its disproportionate effect) than an employer who treats black employees unfairly and is hostile to affirmative action.[606]

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605. A disparity can be large in two ways. One is the percentage difference between rates of success, for example 80% vs. 15%. Another way is the absolute number of persons affected. The difference between 80% success for whites and 75% for blacks might be considered small if the difference in absolute numbers of successful applicants were 50, but large if the difference were 5,000.

606. In Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978), the employer hired for a job by contacting persons whom a supervisor knew to be qualified. The Supreme Court found the employer

Disparate treatment, applied with regard for the purposes of Title VII, would avoid some of the major problems of adverse impact, and those which remained would become less troublesome. The focus of litigation would be the employer's reason for adopting the challenged selection criterion. Was it used in a reasonable belief that the criterion measured productivity, or was it used because of its disproportionate effect on blacks? Clearly, the burden of persuasion would be on the plaintiffs to establish that the employer acted for improper reasons. The notion of causality involved would be precisely what Congress intended, namely, motivated behavior.

The costs and benefits of validated tests would be relevant evidence under disparate treatment. The law would no longer expect an employer to spend more money validating and administering a test than use of the test would save. The law would also expect an employer to consider seriously suggestions by employees of alternative recruitment and selection procedures that might reduce the disproportionate effect of a test.

Most important, the quotas that result from adverse impact would disappear. Employers resort to quota hiring because the cost of constructing a valid test far exceeds the benefit of using it. Because disparate treatment recognizes that Congress sought to enhance rather than diminish productivity, an employer acts within the law by making reasonable efforts to choose the selection criterion that best contributes to productivity. If such a criterion has a disproportionate effect on blacks and is only marginally better than random hiring in predicting success on the job (so that the employer has cause for concern that her good faith could be questioned), one solution would be elimination of the disproportionality via a quota; but this step would be unattractive because the employer would know she was hiring blacks who were less qualified than whites she could hire. Other solutions would be much more attractive: the employer could increase her efforts to find a better yet economical selection criterion; she could ensure that black employees were treated fairly on the job; she could encourage blacks to apply for work in her firm and help them improve their skills through on-the-job training. Steps like these—affirmative action as it was understood when Congress passed Title VII—would be neither unfair to whites nor costly to the employer, and they would protect her effectively against disparate treatment claims.

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had not discriminated, even though the employer might have hired more minority workers by accepting applications at the job site. The Court held that Title VII "does not impose a duty to adopt a hiring procedure that maximizes the hiring of minority employees." *Id.* at 57-78. The proposal suggested in the text is not inconsistent with this holding. The proposal would not require employers to maximize the hiring of blacks. Rather, the proposal holds that, if an employer uses a selection criterion that disproportionately excludes blacks when the employer is aware of a more (or at least equally) economical selection criterion that excludes fewer blacks, the employer's use of the former criterion is evidence of an intent to discriminate. Like other evidence of intent, of course, this sort of evidence would not necessarily be conclusive.

Of course, some of the problems associated with adverse impact would remain; yet these problems are attributable directly to Congress. Back pay can be troublesome under disparate treatment; for example, suppose an employer flatly refused to hire any blacks, and a court had to determine which blacks were interested and qualified and would have been hired in the absence of discrimination. Yet Congress knew there were such employers and specifically wrote back pay into the Act.

Because the disproportionate effect of a test would remain relevant evidence, courts would still need to decide whether the plaintiffs identified a fair proxy for the available work force, and courts would still need to compare the effect of the criterion on blacks and whites. Courts would also have to draw a line between legally significant and insignificant disparities (though we have argued that any disparity more than minimal is legally significant under disparate treatment). Thus, characteristics of a group would still bear on whether an individual suffered discrimination. But Congress is responsible for these problems, too, for it contemplated that statistical evidence would be relevant to the employer's state of mind.[607] Statistics must refer to properly defined classes, methods of

607. The Supreme Court has properly utilized statistical analysis to illuminate intent in Title VII cases in which intentional discrimination was at issue. The seminal case was Casteneda v. Partida, 430 U.S. 482 (1977), in which a prisoner in a Texas jail attacked his conviction on the ground of discrimination against Mexican-Americans in the selection of grand jurors. The prisoner proved that 79% of the county's population was Mexican-American, while the average percentage of Mexican-American grand jurors over an 11 year period was 39%; and during the two and one-half year period when the grand jury which indicted him sat, the percentage of Mexican-Americans on the list from which grand jurors were selected was 50%. (The average percentage of Mexican-Americans actually on grand juries during this period was 46%.) *Id.* at 495. The prisoner also proved that potential grand jurors were selected by "key men" who applied subjective standards that were susceptible to abuse as applied. *Id.* at 497. The state offered no evidence attacking the reliability of those statistics or the prisoner's allegations of discrimination. Rather, the state directed its fire at the probative value of the statistics, arguing the plaintiff had not established a prima facie case of discrimination. The Supreme Court, Justice Blackmun writing, disagreed:

> If the jurors were drawn randomly from the general population, then the number of Mexican-Americans in the sample could be modeled by a binomial distribution. . . . Given that 79.1% of the population is Mexican-American, the expected number of Mexican-Americans among the 870 persons summoned to serve as grand jurors over the 11-year period is approximately [870 x .791 =] 688. The observed number [of Mexican-American grand jurors] is 339. Of course, in any given drawing some fluctuation from the expected number is predicted. The important point, however, is that the statistical model shows that the results of a random drawing are likely to fall in the vicinity of the expected value. . . . The measure of the predicted fluctuations from the expected value is the standard deviation, defined for the binomial distribution as the square root of the product of the total number in the sample (here 870) times the probability of selecting a Mexican-American (0.791) times the probability of selecting a non-Mexican-American (0.209). . . . Thus, in this case the standard deviation is approximately 12. As a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standards deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist. The 11-year data here reflect a difference between the expected and observed number of Mexican-Americans of approximately 29 standard deviations. A detailed calculation reveals that the likelihood that such a substantial departure from the expected value would occur by chance is less than 1 in 10^{140}.

Id. at 496-97 n.17. In other words, given the data at hand, the observed low percentage of Mexican-

comparing statistics must be approved, and lines must be drawn between

American grand jurors was extremely unlikely to have occurred by chance. Therefore, a cause of some sort was working to limit the number of Mexican-American grand jurors. What was the cause? Only one cause was relevant in this, an equal protection case: namely, an intent to exclude Mexican-Americans. Given the history of human relations in Texas and the subjective method of selecting potential grand jurors, the Court rightly believed that purposeful discrimination was the most likely cause of the observed outcomes. The state having failed to convince the Court that another, legitimate cause explained the outcomes, the prisoner prevailed.

Three months later, the Supreme Court applied this mathematical model to a Title VII case. In Hazelwood School Dist. v. United States, 433 U.S. 299 (1977), the Attorney General sued a school district near St. Louis, claiming the district was engaged in a pattern or practice of discrimination against black applicants for teaching positions. The government proved that school principals had unlimited discretion in hiring. The only guideline was to hire the most competent person, competence including intangibles like personality, disposition, appearance, poise, voice, articulation, and ability to deal with people. *Id.* at 302. The government also proved that, of 1,231 teachers employed by the district during the 1972-1973 school year, only 22 (less than 2%) were black; while more than 15% of the teachers in the greater St. Louis area were black and nearly 6% of the teachers in the area surrounding but excluding the City of St. Louis were black. *Id.* at 303. The school district argued that these statistics lacked probative force on the issue of whether the district was engaged in a pattern or practice of discrimination, but the Court answered by quoting its recent decision in Teamsters v. United States:

> [A]bsent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of long-lasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though § 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population.

433 U.S. at 307, *quoting* 431 U.S. at 340 n.20. Was the disparity between the percentage of black teachers in the area and the percentage employed by the school district large enough to be significant on the issue of discrimination? The Court could not answer the question because of uncertainty over the appropriate proxy for the available work force. The proxy could have been all teachers in the greater St. Louis area, or only teachers in the area surrounding but excluding the city. Applying the methodology of *Castaneda*, Justice Stewart calculated that, in the former case, the number of black teachers employed by the school district in 1972-1973 would be more than five standard deviations from the expected number, whereas, in the latter case, the number hired would be less than two standard deviations from expectation. The case was therefore remanded for litigation of the issue of the appropriate proxy.

The Supreme Court was correct in applying the methodology of *Castaneda* to the facts of *Hazelwood*, for the issue in both cases was whether the defendant had intentionally disadvantaged a protected class of people. We have noted that *Castaneda* was an equal protection case, and the Court had previously held that motive is controlling in constitutional cases of this sort. *Hazelwood*, too, turned on motive. There was no showing that a facially neutral selection criterion had an adverse impact on black applicants; rather, the government proved that hiring was an unregulated, subjective process that could easily have been infected by a discriminatory motive. Thus, statistics were used in *Hazelwood* in exactly the manner foreseen by Congress: they helped to reveal the employer's state of mind.

One may be uncomfortable with the *Castaneda* methodology, for there are elements of irrationality about it. For example, what was the basis for believing that Mexican-Americans and Anglo-Americans in Texas were equally willing and qualified to serve as grand jurors, or that black and white teachers in the St. Louis area were equally willing and qualified to fill the positions available in Hazelwood schools? A presumption of equality is necessary to this form of reasoning—otherwise, disproportionate representation would be the expected result; yet evidence on which to support the presumption is rarely if every presented.

More important, *Castaneda* methodology all but forgets that rare events do occur by chance, even in random procedures. If a coin is flipped 10 times, the result is unlikely to be 10 tails. If the exercise is repeated often enough, however, a string of 10 tails will appear. If this result occurred on

significant and insignificant results. But whereas statistics are controlling under adverse impact, they are only informative under disparate treatment. Group characteristics would help explain how an employer intended to treat individuals, and liability would never hinge on statistics alone. As the Interpretative Memorandum stated, "While the presence or absence of other members of the same minority group in the work force may be a relevant factor in determining whether in a given case a decision to hire or to refuse to hire was based on race, color, etc., it is only one factor. . . ."[608]

Foreseeable consequences may be read into Title VII without doing violence to the separation of powers. Because the doctrine is old and settled, and the Act and its legislative history are silent on the point, we may fairly assume that Congress was not averse to the courts' invocation of the doctrine. It would lead to the same outcome in some cases as adverse impact does now, but to different results in other cases. In *Griggs*, for example, the testing issue would have been resolved against the employer. Passing the tests became a condition precedent to all jobs outside the labor department on July 2, 1965—the very date on which Title VII became operative. Given Duke Power's history of discrimination, this coincidence hardly seems accidental. Passing scores on the tests were set at the national median for high school graduates, so that a large fraction of all graduates could not qualify. Duke Power must have known that such high passing scores would exclude virtually all blacks from the very jobs from which blacks had been excluded in the past—another dubious coincidence. Duke Power could not have believed that passing the tests was necessary evidence of ability to succeed on the job: although the company could have afforded the cost of a validation study and probably hired sufficient employees to benefit from a job-related test, no attempt had been made prior to the litigation to determine whether success on the tests predicted success on the job; and common sense indicates that coal handlers and clerks do not need such impressive credentials. It follows that the testing requirement would have been struck down under disparate treatment.

The diploma requirement in *Griggs* presents a closer question. On the one hand, the requirement had been established in 1955, when discrimination against blacks did not have to be hidden behind facially neu-

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the first try and one was accused of cheating, the *Castaneda* methodology would support the accusation. It would be wrong, but a convincing rebuttal would be difficult to construct. Thus, a certain number of innocent employers and school districts, whose numbers simply fall in the tails of a binomial distribution, will be in serious trouble. However, these (and perhaps other) difficulties are not reasons to reject the use of statistics to prove motive. Congress intended such use. Congress also wisely limited such use: statistics are one factor, but not the only factor, that is relevant in proving state of mind.

608. 110 CONG. REC. 7213 (1964).

tral standards; and the diploma requirement was never applied to the black labor department. Thus, the genesis of the requirement was not discriminatory. After the Act took effect, Duke Power applied the diploma requirement to blacks and whites alike, and the company financed two-thirds of the tuition of employees who pursued diplomas. Furthermore, a modicum of education does not seem unreasonable for a job in a power plant, which is mechanized with expensive equipment that could be dangerous to employees or damaged by them. On the other hand, Duke Power surely knew the diploma requirement excluded disproportionate numbers of blacks. The company had reason to suspect the requirement was unnecessary, for several employees without diplomas performed satisfactorily on jobs for which diplomas were later required. Indeed, shortly after Title VII took effect, Duke Power began to allow employees who lacked a diploma to transfer to other departments by achieving satisfactory scores on the written tests. (We have noted that this policy was probably implemented because whites who lacked diplomas were not allowed to transfer into departments for which blacks with diplomas had become eligible. This fact suggests the diploma requirement may not have been applied in complete good faith.) Finally, as was true of the testing requirement, Duke Power had made no effort to validate the diploma requirement, but could probably have paid the cost and gained the benefit of more productive workers. Taking into account this employer's history of discrimination and our conclusion about the testing requirement, disparate treatment would probably have nullified the diploma requirement as well, though reasonable persons might differ on this issue.

In other cases, disparate treatment would yield a different—and better—outcome than adverse impact. Suppose a small employer used a standardized ability test to select among applicants.[609] The test had a moderate adverse impact on blacks and, though the publisher of the test claimed it was valid for the class of jobs to which the employer applied the test, it had not been validated for the specific job for which the test was used in this employer's firm. The cost of constructing a valid test, compared to the benefit of using such a test, would have been unreasonable in light of the employer's revenue and turnover. The employer dealt with her employees on an individual basis and did not tolerate racial harassment or epithets on the job. This employer would be liable under

609. There is a growing body of opinion that professionally developed cognitive ability tests (that is, "intelligence tests") are useful predictors of job performance. *See, e.g.*, Ghiselli, *The Validity of Aptitude Tests in Personnel Selection*, in G. DREHER & P. SACKETT, PERSPECTIVES ON EMPLOYEE STAFFING AND SELECTION 337 (1983); Schmidt & Hunter, *Employment Testing: Old Theories and New Research Findings*, in *id.* at 368. Some caution before accepting such opinions may be in order. *See id.* at 338-91. Nevertheless, this research indicates the wisdom of Congress's intent to protect professionally developed ability tests when used for the jobs for which the tests are designed.

adverse impact, as the test had a disproportionate effect on blacks and was not validated; yet liability on these facts would be unjust. Under disparate treatment, the employer would rightfully win this case.

Of course, the facts could change and, if they did, perhaps the greatest benefit of disparate treatment would be realized. Suppose black employees (perhaps aided by an organization in the community) approach the employer we have just described and complain of the adverse impact of her test. She answers that she will not hire by quotas (which are illegal), cannot hire at random, and has been satisfied with applicants who passed the test. The blacks respond that an unvalidated test might be unfair to black applicants—indeed, to qualified white applicants as well; a better selection criterion would produce better employees of both races. The employer replies that constructing a valid test for the job in question would be economically infeasible.

At this point, the sweetest fruits of disparate treatment would begin to appear. Perhaps the blacks or their friends in the organization helping them know of a valid test (possibly used by another firm) of which the employer was unaware. Perhaps the blacks know of experts in test development who would offer their services at moderate fees for a good cause. If these possibilities do not develop, others may. The employer may agree to recruit more heavily in black neighborhoods and media in order to offset the disproportionate effect of her test, or she may agree to give blacks advance notice of a job vacancy in order to provide them with a reasonable chance to identify qualified members of their race who could apply. This list of possibilities is limited by our imagination, but there is no limit to the possibilities an open line of communication could produce.

The motive to communicate would be strong. The blacks would be helping their fellow workers while probing for evidence that might support a law suit should the employer prove recalcitrant. The employer would be demonstrating her good faith while entertaining ways to improve her work force.

Congress hoped that claims of discrimination would be settled informally. The conciliation mechanism of section 706(a) was designed for this purpose. This purpose has not been fulfilled under adverse impact, but disparate treatment might well stimulate conciliation. Certainly, this approach would be closer to the will of the people in Congress assembled.