From Griggs to Wards Cove: The Blurring of Disparate Impact and Disparate Treatment Under Title VII of the 1964 Civil Rights Act

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INTRODUCTION

On June 5, 1989, the Supreme Court, in a 5-4 opinion, decided Wards Cove Packing Co. v. Atonio,1 which delineated the evidentiary burdens now applicable in Title VII disparate impact cases. The Court placed on employment discrimination plaintiffs a number of evidentiary burdens which they previously have not had to bear. Specifically, plaintiffs must now demonstrate the particular employment practice or practices creating the disparate impact;2 moreover, the Court held that the burden of persuasion remains with the plaintiff at all times.3 The holdings in Wards Cove represented clear departures from prior law, as disparate treatment burdens were applied to disparate impact cases.

Media and legal commentators4 expressed the opinion that Wards Cove effectively overruled the landmark disparate impact case of Griggs v. Duke Power Co.5 The majority opinion by Justice White6 in Wards Cove drew a sharp dissent from Justice Stevens7 which accused the majority of unfairly tipping the scales in favor of employers. In his dissent, Justice Blackmun wondered whether a majority of Supreme Court justices actually believed employment discrimination is still a problem in this country.8

The Wards Cove decision prompted Ohio Senator Howard Metzenbaum to introduce a bill in Congress9 which would explicitly overrule Wards Cove. On January 23, 1990, Senator Metzenbaum joined Senator Kennedy in introducing the Civil Rights Act of 1990.10 This Act incorporates the provisions for Senator Metzenbaum's bill.

2. Id. at 2124.
3. Id. at 2131.
6. Justice White was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia and Kennedy.
7. Justice Stevens, joined by Justices Brennan, Marshall and Blackmun wrote the first of two dissenting opinions. The other was written by Justice Blackmun, joined by Justices Brennan and Marshall.
8. 109 S. Ct. at 2136 (J. Blackmun dissenting).
10. S. 2104, 101st Congress, 2d Session, February 7, (legislative day, January 23),
baum's Fair Employment Reinstatement Act and would create a subsection (k) of Title VII: "Proof of Unlawful Employment Practices in Disparate Impact Cases."

This Note traces the history of judicial interpretations of Title VII, focusing on the Court's development of the disparate impact theory. It demonstrates that while the decision in Wards Cove is ostensibly in direct opposition to Griggs, a careful analysis of the disparate impact and disparate treatment cases handed down by the Supreme Court in the eighteen years since Griggs reveals an identifiable progression towards the result in Wards Cove. It analyzes the two circuit court cases decided in the wake of Wards Cove. Further, it critiques the proposed Civil Rights Act of 1990 and explains that, while statutory reform may be the best approach to bring Title VII back in line with the intent of Congress, Senator Metzenbaum made some serious errors in drafting his contribution which could cause the Civil Rights Act of 1990 to be defeated.

I. BACKGROUND

The Civil Rights Act of 1964 was enacted in response to economic boycotts, mass marches and other forms of protest on the part of black Americans who demanded equality in voting, housing, education and employment. Title VII was specifically intended to eliminate workplace discrimination based on race, color, religion, sex or national origin.

Courts have developed two distinct theories of liability or causes of action under Title VII. The first, disparate treatment, addresses situations where the employer has intentionally discriminated against the employee. The other, disparate impact, involves employment practices which are discriminatory in effect even though the employer has no discriminatory intent. Although the funda-

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1990.


12. Section 2000e-2(a) of the Act provides:
   It shall be an unlawful employment practice for an employer—
   (1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

13. See Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36, n.15 (1977), where the Court distinguishes between disparate treatment and disparate impact as follows:
mental distinction between disparate treatment and disparate impact is clear, the courts have had difficulty in maintaining this distinction when applying these two theories to particular factual situations. After setting out the evidentiary burdens delineated in the seminal cases, this Note reviews in chronological order the Supreme Court cases applying these two theories. This will demonstrate that the distinction between the two theories was blurred well before the recent companion cases of Watson v. Fort Worth Bank and Trust\textsuperscript{14} and Wards Cove, which will be treated together.

II. EVIDENCIARY BURDENS UNDER DISPARATE TREATMENT AND DISPARATE IMPACT

A. Disparate Treatment

In McDonnell Douglas Corp. v. Green,\textsuperscript{16} the Court outlined the order and allocation of proof in a disparate treatment case. According to the Court, the plaintiff initially has the burden of establishing a prima facie case of discrimination. The plaintiff must show:

(i) that he belongs to a racial minority;
(ii) that he applied and was qualified for a job for which the employer was seeking applicants;
(iii) that despite his qualifications, he was rejected;
(iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.\textsuperscript{16}

Green, the black plaintiff in McDonnell Douglas, successfully established a prima facie case by showing that he applied and was qualified for rehire as a mechanic, that he was rejected, and that the employer continued to seek applications from persons with his qualifications.\textsuperscript{17}

"Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . ["Disparate impact" claims] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate impact theory.

(Citation omitted).

15. 411 U.S. 792 (1973). Justice Powell delivered the opinion for a unanimous Court.
16. Id. at 802. This prima facie case, while flexible, applies only to failure to hire cases. Other elements must be proven in wrongful termination cases.
17. Id. at 804.
In *McDonnell Douglas*, the Court further held that in order to rebut plaintiff's prima facie case, the employer must articulate "some legitimate, nondiscriminatory reason for the employee's rejection."\(^{18}\) In this case, the employer cited Green's unlawful civil rights protest activity against it as the reason for rejecting his application.\(^ {19}\) The Court accepted this reason as legitimate and nondiscriminatory, and thus concluded that the employer had successfully rebutted Green's prima facie case.\(^ {20}\) The Court, however, remanded the case to afford Green a fair opportunity to show that the employer's stated nondiscriminatory reason for his rejection was merely a pretext for discrimination.\(^ {21}\)

In sum, *McDonnell Douglas* established that the allocation and burdens of proof in a Title VII disparate treatment case consist of three distinct stages:

1. the plaintiff must establish a prima facie case of discrimination;
2. the defendant must articulate a legitimate, non-discriminatory reason for its rejection of the plaintiff; and
3. the plaintiff must establish that this supposedly legitimate, nondiscriminatory reason was a pretext to mask an illegal motive.\(^ {22}\)

Notice that the burden which shifts to the defendant is merely one of articulating a non-discriminatory reason, or burden of production. The burden of persuasion remains with the plaintiff at all times.\(^ {23}\)

### B. Disparate Impact

The disparate impact cause of action is reserved for cases involving facially-neutral employment practices which more harshly affect a protected group and cannot be justified by business necessity. Proof of discriminatory intent is not a requirement.\(^ {24}\) The

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18. *Id.*
19. Green's protests included organizing a traffic stall-in to obstruct the main entrance to the plant during the morning rush hour. Green was also implicated in a lock-in, whereby the building was chained and padlocked to prevent workers from leaving. *Id.* at 794-95.
20. *Id.* at 804.
21. *Id.*
23. The burden of production is sometimes called the burden of evidence or the duty of going forward. CLEARY, MCCORMICK ON *EVIDENCE* 947 n.2 (3d ed. 1984). If the burden is not met, the judge is empowered to issue a directed verdict.
   The burden of persuasion only comes into play if both parties have sustained their burden of producing evidence. *Id.* at 947. In civil cases, the burden of persuasion means proof by a preponderance of the evidence. *Id.* at 956.
seminal disparate impact case, *Griggs v. Duke Power Co.*,\(^{26}\) illustrates this concept.\(^{26}\)

The day Title VII went into effect,\(^{27}\) Duke Power Company instituted a requirement that employees who wished to be promoted must attain satisfactory scores on two standardized aptitude tests and possess a high school diploma.\(^{28}\) Neither requirement measured nor was intended to measure the capability of employees to perform a particular job or category of jobs at the plant.\(^{29}\)

Although the Court held that the defendant power plant did not have any discriminatory intent, the requirements were still found to have an adverse effect on blacks. A 1960 North Carolina census showed that 34% of white males had completed high school, while only 12% of black males had high school diplomas.\(^{30}\) Since the employment requirements instituted by the employer created an adverse impact upon blacks, the Court found the employer in violation of Title VII, despite a lack of discriminatory intent.\(^{31}\)

The problem remaining after *Griggs* is that the Court failed to clearly state the evidentiary burdens of the new disparate impact theory of liability. Specifically, the Court stated:

The Act prescribes 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. . . . Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.\(^{32}\)

The only element of a prima facie case for disparate impact which is given in *Griggs* is that the plaintiff has the burden of asserting

\(^{25}\) 401 U.S. 424 (1971). Chief Justice Burger delivered the opinion of the Court in which all members joined except Justice Brennan, who took no part in the consideration or decision of the case.


\(^{27}\) Title VII was effective July 2, 1965; see 401 U.S. 424, at 426.

\(^{28}\) 401 U.S. at 427-28. The two tests were the Wonderlic Personnel Test, which measures general intelligence, and the Bennett Mechanical Comprehension Test.

\(^{29}\) Id. at 428.

\(^{30}\) Id. at 430, n.6. Similarly, the Equal Employment Opportunity Commission (EEOC) found that the use of standardized tests, including those used by the defendant in *Griggs*, resulted in 58% of whites passing the tests, while only 6% of blacks received passing scores. *Id.* at 431.

\(^{31}\) The court of appeals held that the Company had adopted the diploma and test requirements without any "intention to discriminate against Negro employees." 420 F.2d at 1232.

\(^{32}\) 401 U.S. at 431-32.
that a facially-neutral standard or test in practice selected applicants in a discriminatory pattern. The employer must counter by showing that the standard was job related. By "burden of showing" does the Court mean burden of persuasion or burden of production? Is "manifest relationship" the same as "job relatedness" or "business necessity" (which the Court stated is the "touchstone" of the Act)? By virtue of its vagueness, the elements of a disparate impact case have been subjected to numerous interpretations, reflecting the will of the majority of the Court.33

III. DISPARATE IMPACT CASES AFTER GRIGGS

It fell on the first disparate impact case decided by the Court after Griggs to clarify the allocation and burdens of proof under this new theory of liability. This occurred in Albemarle Paper Co. v. Moody.34 By relying on both Griggs (the primary disparate impact case) and McDonnell Douglas (the primary disparate treatment case), the Court, however, foreshadowed the impending confusion between these two causes of action.35

Prior to 1964, the defendant paper plant in Albemarle strictly segregated its lines of promotion, precluding blacks from the higher-paying positions.36 The paper plant discontinued its overt segregation in 1964, but allowed blacks to transfer to the skilled lines only if they could pass two standardized tests.37 The Court noted that only a "few" blacks successfully passed the tests.38

The Court began its discussion of the testing issue by citing its holding in Griggs: "This Court unanimously held [in Griggs] that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets the burden of showing

33. Proper allocation of the burdens is critical since "to allocate the burden of production and persuasion is, in many instances, to decide the case." Smith, Employer Defenses in Employment Discrimination Litigation: A Reassessment of Burden of Proof and Substantive Standards Following Texas Dept. of Community Affairs v. Burdine, 55 EMPLOYMENT DISCRIMINATION LITIGATION 372, 373 (1982).
35. Since McDonnell Douglas was the only case since Griggs to address the shifting burdens of proof in Title VII cases, the reference to McDonnell Douglas in Albemarle did not signal the merger of two theories. It was only in retrospect that it appeared that the reference to McDonnell Douglas in a disparate impact case might alter the magnitude of the employer's burden. See Note, Business Necessity: Judicial Dualism and the Search for Adequate Standards, 15 GA. L. REV. 376, 409-10 (1981).
36. 422 U.S. at 401.
37. Id. at 428-29. As in Griggs, the employer required employees seeking promotion to pass the Beta and Wonderlic Tests.
38. Id. at 429.
that any given requirement [has] ... a manifest relationship to the employment in question." 39 The Court then proceeded to cite McDonnell Douglas, a disparate treatment case, to explain that this burden arises only after the plaintiff has made out a prima facie case of discrimination, "i.e. has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." 40 The Albemarle Court then contradicted itself and stated that if the employer "meets the burden of proving that its tests are 'job related,'" the burden is then on the employee to show that other tests without an undesirable racial effect would serve the employer's purpose. 41

In sum, the Court in Albemarle outlined the order and allocation of proof for a disparate impact case as follows:

(1) The plaintiff must establish a prima facie case of discrimination by showing that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants;
(2) The employer then has the burden of proving that its tests are job related;
(3) It then remains open to the plaintiff to show that other tests or selection devices would serve the employer's legitimate interest without an undesirable racial effect. 42

Notice the tripartite order of proof, similar to the disparate treatment structure. Note also the addition of the third prong, requiring the plaintiff to show suitable alternatives to the employer's practice, which is conspicuously absent in Griggs.

To summarize, it would appear that after Albemarle, the major distinction between disparate treatment and disparate impact is the standard of proof necessary for the employer to rebut the plaintiff's prima facie case of discrimination. In a disparate treatment case, the employer may rebut by merely producing a legitimate, non-discriminatory reason for the plaintiff's rejection, whereas in a disparate impact case, the employer has the burden of proving that its tests are job related.

The next disparate impact case, Dothard v. Rawlinson, 43 was handed down by an extremely splintered Court. 44 Rawlinson, the

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39. Id. at 425, quoting Griggs at 432. The Court in this passage in Griggs was construing 42 U.S.C. § 2000e-2(h) relating to testing.
40. Id. at 425, citing McDonnell Douglas, at 802.
41. Id. at 425, citing McDonnell Douglas, at 801 (emphasis added).
42. Id. at 425.
44. Justice Stewart delivered the opinion of the Court in which Justices Powell and Stevens joined. Chief Justice Burger and Justices Blackmun and Rehnquist joined in all but Part II; Justices Brennan and Marshall joined in all but Part III. Justice Rehnquist
female plaintiff, was denied employment as a prison guard in Alabama's state men's prison for failing to meet a minimum weight requirement.\textsuperscript{45} She demonstrated that the height and weight parameters, when taken together, excluded 41.13\% of women in the United States between the ages of 18 and 79, while excluding less than 1\% of the men.\textsuperscript{46} She further contended that these figures constituted a disparate impact on women in violation of Title VII.

The Supreme Court agreed with the district court's finding that the height and weight standards had a discriminatory impact on women. It went on to hold that the employer\textsuperscript{47} failed to rebut Rawlinson's prima facie case because it failed to sufficiently correlate height and weight to the physical strength which it maintained was essential to job performance as a prison guard.\textsuperscript{48} Despite this, the employer escaped liability by showing that the requirement constituted a bona fide occupational qualification and was permitted due to its necessity for the normal operation of the business or enterprise.\textsuperscript{49}

Since the majority failed to refine the evidentiary burdens in disparate impact cases, we must look to the concurring opinion of Justice Rehnquist\textsuperscript{50} in order to "take the pulse" of the Court in 1977 as to the relative burdens of proof. Citing McDonnell Douglas, Griggs, and Albemarle, Rehnquist stated:

Appellants, in order to rebut the prima facie case under the statute, had the burden placed on them to advance job-related reasons for the qualification . . . [O]nce the burden has been placed on the defendant, it is then up to the defendant to articulate the asserted job-related reasons underlying the use of the minima.\textsuperscript{51}

"Articulate" is the word used by Justice Powell in McDonnell Douglas, a disparate treatment case, to signify the defendant's burden of production. Therefore, we are apparently being told, albeit by a minority of the Court, that the employer's rebuttal bur-

\textsuperscript{45} While meeting the minimum height requirement of 5 feet 2 inches, Rawlinson did not meet the minimum 120 pound requirement established by Alabama statute. 433 U.S. 321, at 323-24.
\textsuperscript{46} Id. at 329-30.
\textsuperscript{47} Dothard, the employer, was the Director of the Alabama Department of Public Safety.
\textsuperscript{48} 433 U.S. 321, at 331.
\textsuperscript{49} 42 U.S.C. § 2000e-2(e) permits sex-based discrimination if, as in this case, it is reasonably necessary for the normal operation of the business or enterprise. Id. at 334.
\textsuperscript{50} Chief Justice Burger and Justice Blackmun joined in the concurrence.
\textsuperscript{51} Id. at 339, citing McDonnell Douglas, at 802, Griggs, at 431 and Albemarle, at 425.
den in disparate impact cases is also one of production, not persuasion. It is not surprising, therefore, to find Justice Rehnquist still advocating this lesser burden for employers in *Wards Cove*.

The next disparate impact case, *New York City Transit Authority v. Beazer,*52 is important for several reasons. The Court held that the plaintiffs failed to prove a violation of Title VII, agreeing with the district court's express finding that the Transit Authority's rule against hiring persons in methadone-treatment programs "was not motivated by racial animus."53 This finding "foreclose[d] any claim in rebuttal that it was merely a pretext for intentional discrimination."54 It is significant because the motivation of the employer in a disparate impact case had always been thought irrelevant, and this analysis indicates confusion as to the distinctions between the two theories of liability. The case is also important for the glimpse into Justice White's thoughts on disparate impact, since his views seem to change dramatically in the majority opinion he authored in *Wards Cove*.

The plaintiffs in *Beazer* were two former employees of the Transit Authority (TA) and two potential employees, all four of whom had been involved in a methadone program for the treatment of heroin addiction. They alleged that TA's blanket exclusion from employment of former heroin addicts receiving methadone treatment was violative of Title VII and the Equal Protection Clause of the Fourteenth Amendment.55

The district court found that TA's policy was unconstitutional because it lacked a rational relation to the business needs of TA,56 and that it violated Title VII because it had a disparate impact on minorities. The district court based its finding of disparate impact on the following facts: (1) 81% of employees referred to TA's medical consultant for suspicion of drug use were black or Hispanic; and (2) between 62 and 65% of all people in methadone-treatment programs in New York are black or Hispanic.57 The district court did not find the policy to be racially motivated; in fact, it expressly found the policy to have been adopted without a discriminatory intent.58

The court of appeals affirmed the district court's constitutional

53. *Id.* at 587, citing 414 F. Supp. at 279.
54. *Id.*
55. *Id.* at 577.
56. *Id.* at 579.
58. *Id.* at 279.
holding, while declining to reach the statutory issue. It has long been established, however, that constitutional grounds are not to be addressed if statutory grounds for a decision are available. Therefore, the Supreme Court first addressed the issue of Title VII liability.

The Supreme Court disagreed with the district court that the two statistics noted above constituted a violation of Title VII. Relying on Griggs and Albemarle, the Court found that even if the statistical evidence was capable of establishing a prima facie case, it was rebutted by TA’s showing that the narcotics rule was job related. Furthermore, the district court’s finding of no racial animus was held to foreclose a claim in rebuttal that the rule was a pretext for intentional discrimination. Therefore, no violation of Title VII was found. This introduction of pretext and intent, hallmarks of disparate treatment analysis, indicates that the melding of disparate impact into disparate treatment was well underway at this juncture.

Beazer is also noteworthy because it demonstrates the dramatic shift in Justice White’s thinking in the ten-year span between this case and Wards Cove. Unlike the Beazer majority, White thought it “insufficient that the rule as a whole has some relationship to employment so long as a readily identifiable and severable part of it does not.” Relying on Griggs, White said that “[p]etitioners had the burden of showing job relatedness . . . By petitioner’s own stipulation, this employment barrier was adopted ‘without meaningful study of [its] relationship to job-performance ability.’” This is a far cry from Justice White’s language in Wards Cove. There he stated that if a plaintiff makes out a prima facie case of disparate impact, “the case will shift to any business justification petitioners offer for their use of these practices.”

Connecticut v. Telep is another example of the Court wrestling with the distinction between disparate impact and disparate treatment. The majority held that the “bottom line” statistics neither preclude employees from establishing a prima facie case nor pro-

59. 558 F.2d 97.
61. 440 U.S. at 584.
62. Id. at 587.
63. Id.
64. Id. at 602.
65. Id., quoting Griggs at 431.
66. 109 S. Ct. at 2125.
vide employers with a defense in disparate impact cases.68 Justice Powell, writing for the dissent, stated that the focus in a disparate impact case must be on the protected group, while only disparate treatment cases may focus on an individual’s treatment.69

On the basis of a written test, which was the first step in being upgraded from provisional to permanent status as a Welfare Eligibility Supervisor, 54.17% of the black candidates passed, compared to 79.54% of the whites.70 The four respondents in this case were among the blacks who failed the examination. One month before trial, however, petitioners promoted 11 blacks and 35 whites to supervisory positions. Of the 48 black candidates who applied for promotion, 22.9% were elevated to supervisor, while only 13.5% of the 259 white candidates were promoted.71

The district court treated respondents’ claim as one of disparate impact and, since the “bottom-line” result was more favorable to blacks than whites, entered judgment for petitioners. Because the “bottom-line” percentages were not indicative of a Title VII violation, the employer was not required to demonstrate the job-relatedness of the promotional examination.72 The court of appeals reversed, stating that “where an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process, that barrier must be shown to be job related.”73

Relying on Griggs, Albemarle and Dothard, the Supreme Court concluded that the focus in a disparate impact claim should be on employment and promotion requirements that create a discriminatory bar to opportunities, not on the actual number of minorities ultimately hired or promoted.74 In other words, the racial composition of the “bottom-line” is no defense to the plaintiff’s prima facie case.75

Justice Powell’s dissent was premised on the notion that “while disparate treatment cases focus on the way in which an individual has been treated, disparate impact cases are concerned with the protected group.”76 In disparate treatment cases, the focus is on a person who is attempting to prove intentional individualized dis-

68. Id. at 442.
69. Id. at 457.
70. Id. at 443.
71. Id. at 444.
72. Id. at 445.
73. Id.
74. Id. at 957.
75. Id. at 452.
76. Id. at 452 (emphasis in original).
crimination. In disparate impact cases, the burden of proof is carried by showing that the employer's selection process rejects a disproportionate number of persons from a protected group and, by inference, the plaintiff himself was a victim of the process' "built-in headwinds." 77

The majority countered this argument by suggesting that those who believe the "bottom-line" is a defense to a claim of discrimination may be confusing unlawful discrimination with discriminatory intent. 78 Proof that a work force is racially balanced is relevant when intent is an issue to be decided. But under Title VII, "[a] racially balanced work force cannot immunize an employer from liability for specific acts of discrimination." 79 It is again noteworthy that Justice White, who joined the majority in Teal, turned the racially-balanced work force argument on its head in Wards Cove to cut against employees. 80

IV. DISPARATE TREATMENT CASES AFTER MCDONNELL DOUGLAS

This Note will now analyze the two most significant disparate treatment cases decided after McDonnell Douglas in order to document the judicial application of this theory of liability.

Even though McDonnell Douglas appeared to do a better job than Griggs of setting forth the respective burdens and allocation of proof, Furnco Construction Corp. v. Waters 81 demonstrates that the Court was still confused about the parties' respective evidentiary burdens in disparate treatment cases.

Plaintiffs were three black bricklayers who sought employment with Furnco by submitting applications at a job site. Highly qualified bricklayers were required, and Furnco's policy was to hire only workers known to management. Since Furnco had a self-imposed affirmative action plan and had hired several bricklayers who had previously filed a discrimination suit against Furnco, the district court concluded that plaintiffs failed to state a disparate impact claim. 82 The district court also held that since Furnco's hiring practices were justified as a business necessity, plaintiffs

77. Id. at 459, quoting Griggs at 432.
78. Id.
79. Id. at 454, citing Furnco Construction Corp. v. Waters, 438 U.S. 567, 579 (1978).
80. See infra note 114 and accompanying text.
82. Id. at 572.
failed to state a case of disparate treatment as well.\textsuperscript{83} This reference to business necessity in a disparate treatment rebuttal indicates a confusion as to the proper burden to be borne by the employer. Business necessity is the stricter rebuttal burden of disparate impact, as contrasted with the requirement that the employer simply articulate a reason for its rejection of the plaintiff.

The court of appeals reversed the district court, holding that plaintiffs had made out a prima facie case of disparate treatment.\textsuperscript{84} The reason the court of appeals gave, for not finding a successful rebuttal to the prima facie case, however, was that the employer had failed to utilize the hiring method calculated to give consideration to the largest number of minority applicants.\textsuperscript{85}

The Supreme Court granted certiorari in order to determine whether the court of appeals "had gone too far in substituting its own judgment as to proper burden as to proper hiring practices."\textsuperscript{86} In its effort to clarify the burden of proof in a disparate treatment case, the Court confused the issue by first stating that the burden which shifts to the employer in a disparate treatment case is that of "proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race."\textsuperscript{87} Proving a legitimate consideration is the standard reserved for disparate impact cases. Three sentences later, the Court quoted 	extit{McDonnell Douglas} and told us that the employer need only "articulate some legitimate, nondiscriminatory reason for the employee's rejection."\textsuperscript{88} This reflects the burden of production usually associated with disparate treatment cases. The end result—the Court's decision to reverse the judgment of the court of appeals and "remand for further proceedings consistent with this opinion"\textsuperscript{89}—is slightly ironic. Consistent with what?

\textit{Texas Department of Community Affairs v. Burdine}\textsuperscript{90} is important because it represents a unanimous decision by the Supreme Court in which certiorari was granted for the express purpose of resolving the defendant's evidentiary burdens in a disparate treatment case. \textit{Burdine} also makes clear that neither \textit{Furnco} nor Title VII requires an employer to restructure hiring policies to maximize the number of women and minorities hired or give preferen-

\textsuperscript{83} Id.
\textsuperscript{84} This was established because plaintiffs were members of a racial minority; they applied for employment; even though qualified, they were not offered employment; the employer continued to seek applications from persons with similar qualifications. \textit{Id.} at 576.
\textsuperscript{85} Id. at 576.
\textsuperscript{86} Id. at 574.
\textsuperscript{87} Id. at 577.
\textsuperscript{88} Id. at 578, quoting 411 U.S. 792, at 802.
\textsuperscript{89} Id. at 581.
\textsuperscript{90} 450 U.S. 248 (1981). Justice Powell delivered the opinion of a unanimous Court.
tial treatment to members of the protected groups. Burdine, a woman, alleged that a male was promoted in her place to the position of Project Director of the Public Service Careers Division of the Texas Department of Community Affairs. She claimed she was denied this promotion and subsequently terminated on the basis of gender in violation of Title VII.

While the district court held that neither decision was impermissibly based on sex, the court of appeals reversed. It maintained that the defendant in a disparate treatment case bears the burden of proving by a preponderance of the evidence the existence of legitimate nondiscriminatory reasons for the employment action. In addition, the court of appeals ruled that the defendant must prove by objective evidence that those hired or promoted were better qualified than the plaintiff.

Reversing the court of appeals, the Supreme Court relied on McDonnell Douglas. According to the Court, that case established the articulation standard or burden of production as the proper rebuttal standard. The court of appeals exceeded the demands of the burden of production by requiring introduction of evidence which would persuade the trier of fact that the subject employment practice was lawful.

The Court established that the plaintiff retains the ultimate burden of persuasion at all times. Thus, the burden which shifts to the defendant is one of production: "to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."

While the burden of proof issue was now clearly resolved by a unanimous Court for disparate treatment cases, the same could not be said for disparate impact cases. It was this lack of resolution on the latter theory of liability which set the stage for Watson and Wards Cove.

V. DISPARATE IMPACT RESTATED—WATSON AND WARDS COVE

The Supreme Court granted certiorari in Watson v. Fort Worth Bank and Trust ostensibly to resolve the conflict in the circuits as to whether disparate impact analysis is applicable to cases in which subjective criteria were used to make employment deci-

91. Id. at 259.
92. Id. at 252.
93. Id.
94. Id. at 257.
95. Id. at 255-56.
Having decided that question in the affirmative, Justice O'Connor went on to "clarify" the evidentiary burdens in disparate impact cases. This caused the issue to be reopened and hotly debated.

Plaintiff Clara Watson was a black woman who was rejected on four occasions in favor of white candidates for promotions to supervisory positions in the defendant's bank. Instead of utilizing formal selection criteria for promotions, the bank relied solely upon the subjective judgment of white supervisors who were acquainted with the candidates and the nature of the jobs.

The district court applied a disparate treatment analysis to Watson's case and found that, although she successfully presented a prima facie case, the bank rebutted it by presenting legitimate and nondiscriminatory reasons for each of the promotion decisions. The district court accepted the rebuttal argument and dismissed the action.

The court of appeals panel affirmed in part, holding that challenges to a discretionary promotional system were properly analyzed under the disparate treatment rather than disparate impact model. Since other circuits had held that disparate impact was the appropriate theory for subjective hiring and promotion claims, certiorari was granted to resolve the conflict.

The Supreme Court held that subjective employment practices could be analyzed under the disparate impact model. The Court reasoned that the holding of Griggs could be largely nullified if an employer could escape liability simply by inserting subjective criteria into its promotional decision-making process. The rejected employee could then bring only a disparate treatment claim, and

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97. Id. at ___, 108 S. Ct. at 2786.
98. Id. at ___, 108 S. Ct. at 2782.
99. Id.
100. Watson established a prima facie case of disparate treatment by showing: (1) she belonged to a racial minority; (2) she applied and was qualified for promotion; (3) despite her qualifications, she was rejected; and (4) after her rejection the positions remained open and defendant bank continued reviewing applications. Id. at ___, 108 S. Ct. at 2783.
101. Id.
102. 789 F.2d 791, 797 (5th Cir. 1986).
103. See, e.g. Griffin v. Carlin, 755 F.2d 1477 (9th Cir. 1985); Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984).
105. ___ U.S. ___, 108 S. Ct. at 2787. This portion of the decision was unanimously accepted by the Court 8-0, with Justice Kennedy taking no part in the decision. Justice O'Connor delivered the opinion, joined by Chief Justice Rehnquist and Justices White and Scalia. Justice Blackmun, with whom Justices Brennan and Marshall joined, concurred in part and concurred in the judgment. Justice Stevens wrote separately, concurring in the judgment.
106. Id. at ___, 108 S. Ct. at 2786.
would thereby be forced to bear the heavier burden of proving intentional discriminatory conduct.

The plurality\(^{107}\) went beyond the holding and turned to a reexamination of the order and allocation of proof in a disparate impact case. Attempting to deter employers from feeling compelled to set quotas, the Court stated that the plaintiff’s initial burden in a disparate impact case goes beyond simply showing statistical disparities in the work force and is met only by the plaintiff identifying the specific employment practice or practices which created the disparity.\(^{108}\) Not only must the specific practice be identified, but the plaintiff must offer statistical evidence that this practice caused the exclusion of applicants because of membership in a protected group.\(^{109}\)

The Court then dealt with the burden which shifts to the employer. It ruled that the burden of showing job relatedness should be read as a burden of production, not persuasion.\(^{110}\) When the employer has met this burden, the plaintiff must then show that other tests or selection devices would serve the employer’s interest without the concomitant negative racial effect.\(^{111}\)

In his concurring opinion, Justice Blackmun, citing Griggs, Albemarle, and Dothard, argued that, contrary to the plurality’s assertion, it is the burden of proof, not production, which shifts to the employer once the plaintiff has made out a prima facie case of disparate impact.\(^{112}\) Blackmun noted the similarity between the plurality’s handling of disparate impact and disparate treatment and accused them of “turn[ing] a blind eye to the crucial distinctions between the two forms of claims.”\(^{113}\)

While only dicta, the significance of the plurality’s discussion of the evidentiary burdens under disparate impact analysis should not be minimized. Watson set the stage for the Court’s final erosion of disparate impact one year later in Wards Cove. In Wards Cove, we see the Court split into virtually identical camps as in Watson, with the addition of Justice Kennedy giving the Watson plurality a majority.\(^{114}\)

107. As noted supra, the plurality opinion was written by Justice O’Connor and joined by Chief Justice Rehnquist and Justices White and Scalia. Since the discussion of evidentiary burdens received only four votes, it has no binding legal precedent.

108. Id. at ___, 108 S. Ct. at 2788.

109. Id. at ___, 108 S. Ct. at 2789.

110. Id. at ___, 108 S. Ct. at 2790.

111. Id.

112. Id. at ___, 108 S. Ct. at 2792.

113. Id. at ___, 108 S. Ct. at 2793.

114. In Wards Cove, Justice White delivered the opinion of the Court with Chief Justice Rehnquist and Justices O’Connor, Scalia and Kennedy joining. Justice Stevens filed the dissenting opinion with Justices Brennan, Marshall and Blackmun joining. Justice
Wards Cove was a class action suit brought by cannery workers working in remote areas of Alaska. In 1974, a group of nonwhites, predominantly Filipinos and Alaska Natives, alleged that hiring and promotion practices gave rise to both disparate impact and disparate treatment liability under Title VII.\(^\text{116}\) The district court rejected the disparate treatment claims and the disparate impact challenges involving subjective employment criteria on the ground that these could not be dealt with under disparate impact. The objective employment practices were rejected for failure of proof.\(^\text{116}\)

The court of appeals held, as did the Supreme Court in Watson, that disparate impact analysis could be applied to subjective hiring practices\(^\text{117}\). The court then stated that once disparate impact had been shown, the burden shifted to the employer to prove business necessity.\(^\text{118}\) Certiorari was granted to resolve the questions regarding the burdens of proof raised by Watson but answered by only a plurality.\(^\text{119}\)

The Court first dealt with the statistics used to state a valid prima facie case of disparate impact. The proper comparison was held to be between the racial composition of the at-issue jobs and the composition of the qualified work force, not a comparison of the racial composition of the cannery versus skilled workers. This was because the cannery workers did not form the pool of qualified applicants for the noncannery jobs.\(^\text{120}\) Consequently, the Court reversed the court of appeals’ disparate impact claim and remanded for a determination of other bases (other than racial disparity) for a valid claim.\(^\text{121}\)

Without a finding of statistical disparity to support a claim of disparate impact, the Court could have stopped there. Since on remand, a case for disparate impact may be made on other grounds, however, the Court addressed the other issues raised in Watson.

First, the Court affirmed the finding in Watson that the plaintiff’s burden extends beyond a showing of statistical disparity to that of identifying a specific challenged practice. Analogizing to the finding in Teal of the impermissibility of defending a claim of

\(^{115}\) Blackmun also filed a dissenting opinion, joined by Justices Brennan and Marshall.

\(^{116}\) Id. at 2120.

\(^{117}\) Id. at 2120.

\(^{118}\) 810 F.2d 1477, 1482 (9th Cir. 1987).

\(^{119}\) Id. at 1486.

\(^{120}\) 487 U.S. ___ (1988).

\(^{121}\) 109 S. Ct. 2115 at 2121.
disparate impact by demonstrating that the employer's work force is racially balanced, the Court held that the plaintiff may not argue that at the bottom-line there is racial imbalance.122

If the plaintiffs can successfully establish a prima facie case of disparate impact for a particular practice, the Court stated that "the case will shift to any business justification petitioners offer for their use of these practices."123 This element is two-pronged: (1) a consideration of the "justifications an employer offers for his use of the practice" and (2) the "availability of alternate practices to achieve the same business ends, with less racial impact."124

The court then added that the burden of persuasion must remain with the plaintiff at all times.125 This comports with the usual methods for allocating burdens of persuasion and production in federal courts, but, more specifically, it conforms to the rule in disparate treatment cases.126 The Court was willing to acknowledge that, while some of its earlier decisions can be read as suggesting otherwise, "to the extent that those cases speak of an employer's 'burden of proof' with respect to a legitimate business justification defense, [citation] they should have been understood to mean an employer's production—but not persuasion—burden."127

Justice Stevens pointed out that federal courts have repeatedly recognized that while the employer's burden in a disparate treatment case is simply one of coming forward (burden of production), the burden in a disparate impact case is proof of an affirmative business necessity (burden of persuasion).128 Justice Stevens further noted that

I have always believed that the Griggs opinion correctly reflected the intent of the Congress that enacted Title VII. Even if I were not so persuaded, I could not join a rejection of a consistent interpretation of a federal statute. Congress frequently revisits this statutory scheme and can readily correct our mistakes if we misread its meaning.129

In summary, the employer's evidentiary burden in demonstrating business necessity was ambiguous in Griggs and was subjected

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122. Id. at 2124.
123. Id. at 2125.
124. Id.
125. Id. at 2126, citing Watson, 487 U.S. at _____, 108 S. Ct. at 2790.
126. Id. at 2126.
127. Id.
128. Id. at 2130.
129. Id. at 2132. In fact this statutory scheme was revisited in 1972 when Congress added the provision that federal employees were to be protected by Title VII. The 1972 amendment ratified Griggs and the disparate impact theory of discrimination. Thompson, The Disparate Impact Theory: Congressional Intent in 1972—A Response to Gold, 8 INDUS. REL. L.J. 105, 116 (1986).
to numerous interpretations. In the 1970s and early 1980s when Chief Justice Burger, who authored the opinion in Griggs, was still on the Court, the subsequent cases mirrored his intent that the employer’s burden be weighty. On the other hand, in Watson and Wards Cove the Rehnquist Court took great liberties to constrict the accepted interpretation of Griggs—to the point where it is difficult to see what more it would take to state that Griggs has been overturned.

VI. THE SEVENTH CIRCUIT INTERPRETS WARDS COVE

Less than two months after Wards Cove was handed down, Judge Posner, writing for the Seventh Circuit Court of Appeals, simultaneously remanded two cases for hearing in light of Wards Cove. Review of these cases demonstrates how disparate impact’s new evidentiary standards are being applied.

In Allen v. Seidman, Judge Posner stated that, prior to Wards Cove, the burden of persuasion to show business necessity shifted to the employer. Posner interpreted Wards Cove as returning the burden of persuasion to the plaintiff and leaving the employer with the burden of production. Posner also found the business necessity defense to have been diluted in the manner anticipated by Watson, and believed that perhaps this defense should be renamed the “issue of legitimate employer purpose.”

The plaintiffs in Allen were representatives of a class of black bank examiners employed by the Federal Deposit Insurance Corporation who failed the Program Evaluation Test and were denied promotion to the rank of commissioned bank examiners. The district court held that a disparate impact had been demonstrated. Since the test had not been shown to be a business necessity, judgment was entered for the class.

The court of appeals agreed that the statistics made out a prima facie case of disparate impact, but held the lower court erred in holding for the plaintiffs. The bank’s failure to show that the test was a reliable selection device was an insufficient basis for the claim. “Showing” is the language of persuasion, and it was wrong to place the burden of persuasion on the employer. Currently, the only issue on remand is whether the employer had a

130. 881 F.2d 375 (7th Cir. 1989).
131. Id.
132. Id. at 381.
133. Id. at 378.
134. Only 39% of black candidates who took the Program Evaluation test passed, while 84% of the white candidates passed. Id.
135. Id. at 381.
legitimate purpose in using the challenged test.\textsuperscript{136} It will be incumbent on the employees to prove the inherent unreliability of the test.

\textit{Evans v. Evanston},\textsuperscript{137} decided the same day as \textit{Allen}, was a class action suit involving 39 women applicants who failed the physical agility test given by the Evanston fire department. The district judge found the test to have a disparate impact on women and that the method of scoring the test was uncorrelated to a legitimate interest of the employer.\textsuperscript{138} The city was obliged to produce evidence that the method of determining who passed the test was related to the city’s need for a physically capable firefighting force. Judge Posner found that, in light of \textit{Wards Cove}, all the city needed to do was satisfy the burden of production (since it is up to the plaintiffs to prove that the test’s scoring method did not serve the legitimate ends of the employer and unreasonably excluded women).\textsuperscript{139}

On remand, using \textit{Wards Cove} as a guideline, the city of Evanston will meet its burden by articulating the reasons for requiring the tests, e.g. physical agility is an important attribute for firefighters. The onus will be on the plaintiffs to state which of the three tests involved (agility, intelligence or stability) is causing the alleged disparate impact. Thus, the plaintiffs must prove there is no relationship between these tests and the city’s legitimate interests.

It can be seen from these two concrete examples that the employers in both \textit{Allen} and \textit{Evans} should have no problem meeting their burden of articulating a justification for the tests or hiring criteria. This is true even though statistically the plaintiffs established a prima facie case of disparate impact. In anticipation of just such a judicial result, steps were taken in another arena to stem the backslide into pre-1964 employment tactics.

\textbf{VII. THE CIVIL RIGHTS ACT OF 1990}

On June 23, 1989, Senator Howard Metzenbaum of Ohio introduced Senate Bill 1261 in Congress which would have added a new subsection to Title VII entitled “Proof of Unlawful Employment Practices in Disparate Impact Cases.” Senator Metzenbaum’s bill was subsequently incorporated into Senator Kennedy’s proposed Civil Rights Act of 1990.\textsuperscript{140} The intent of Senator

\textsuperscript{136} \textit{Id.} Note the similarity to the language of disparate treatment.
\textsuperscript{137} \textit{881} F.2d \textit{382} (7th Cir. 1989).
\textsuperscript{138} \textit{Id.} at \textit{383}.
\textsuperscript{139} \textit{Id.} at \textit{385}.
\textsuperscript{140} \textit{See supra} note \textit{10}. 

https://scholarlycommons.law.cwsl.edu/cwlr/vol26/iss2/9

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Metzenbaum's proposal is twofold: (1) to make clear that when a plaintiff has made out a prima facie case of disparate impact, the burden shifts to the employer to prove the affirmative defense of business necessity; and (2) to allow a plaintiff to challenge a group of employment practices without having to demonstrate which specific practices within the group resulted in the disparate impact.141 The effect of this bill's passage would be the overturning of Wards Cove.

Unfortunately, Senator Metzenbaum made two strategic errors when drafting and presenting his Act to Congress which were not corrected when it was merged with the Civil Rights Act of 1990. The Act defines business necessity as "essential to effective job performance."142 In Griggs, we learned that Congress placed on the employer the burden of showing a manifest relationship to the employment practice in question. The word "essential" was not used in Griggs or in any of its progeny except Dothard. There, it was reserved for a discussion of bona fide occupational requirements (bfoq), which comprise a very narrow exception to Title VII. Section 703(e) requires that a bfoq be "reasonably necessary to the normal operation of that particular business or enterprise."143 While those words may facially express Senator Metzenbaum's intent, the consistent interpretation of the Equal Employment Opportunity Commission has been that the bfoq exception was meant to be an extremely narrow exception to the general prohibition of discrimination.144 By defining business necessity with the word "essential," the Act exceeds the requirements as set forth in Griggs and crosses the line into the narrow language of bfoq.

Senator Metzenbaum's second error was in his elaboration on the definition of business necessity. He stated that the business necessity defense is not established "if other comparably effective employment practices are available that would not have an undesirable effect on minorities or women."145 Section 703(j)146 of Title VII states that no employer will be required to give preferential treatment to any member of a protected group. Title VII was not intended to "diminish traditional prerogatives,"147 nor does it require the employer "to restructure his employment practices to

142. S. 2104, p. 3.
144. 29 C.F.R. § 1604.1.
maximize the number of minorities and women hired.”

Whether intentionally or inadvertently, it appears that Senator Metzenbaum is attempting to do more than reverse Wards Cove; he is proposing an expansion of Title VII liability beyond its bounds even prior to the decision in Watson. It is to be hoped that Senator Metzenbaum will be able to garner enough support for the intent of his contribution to the Civil Rights Act of 1990 to prompt revision of the proposal rather than defeat. Watson and Wards Cove provide a good indication of the direction in which the Rehnquist Court is heading in the area of civil rights. The Court’s liberal camp is shrinking and the potential is great that two more conservative appointments will be made when Justices Brennan and Marshall (both of whom are in their 80’s), decide to retire. Therefore, it is unlikely that the tide will be turned absent the interjection of a new congressional mandate.

CONCLUSION

Unless Wards Cove is preempted by the Civil Rights Act of 1990, the clock will be turned back 26 years on civil rights protection for women and minorities. The burden imposed by Watson and confirmed by Wards Cove, albeit by a narrow majority, creates an almost insurmountable task for plaintiffs. Today, a member of a protected class who demonstrates a disparate impact must also isolate the particular practice responsible for this statistical outcome and further prove that the employer has no business justification for the practice. Even with liberal discovery techniques, it is naive to think that employers will document employment practices potentially damaging to their case. This Note has demonstrated that, while certainly cause for alarm, Watson and Wards Cove had their roots in earlier decisions. If Griggs had been more clearly written, it would not have been subjected to the multitude of interpretations which caused it to be eroded over the past eighteen years. “Business necessity” is a chameleon, able to command either a burden of production or burden of persuasion, depending on its context. A straightforward articulation of the evidentiary burdens in Griggs would have forced the Rehnquist

148. Furnco, at 477-78.
149. See appendix.
Court to admit they were overruling this landmark decision, rather than to contend in Wards Cove that they had merely been "misunderstood" in the past. 150

Carrie McCrea*
## Appendix

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New York City Transit Auth. v. Beazer (1979)

Plaintiff establishes prima facie case. Defendant has burden of showing job relatedness. Fact that defendant harbored no racial animus foreclosed rebuttal argument of pretext. (Significant because motivation of employer reserved up to this point for disparate treatment analysis.)

Texas Dept. of Comm. Affairs v. Burdine (1981)

Plaintiff establishes prima facie case. Defendant must present legitimate reason for the action. Plaintiff retains ultimate burden of persuasion. Defendant's burden is merely one of production.


Significant because even when "bottom line" percentages not indicative of Title VII violation, employer must still demonstrate job relatedness of the criteria.

Watson v. Fort Worth Bank & Trust (1988)

Plaintiff must show not only statistical disparity in work force, but must also show specific employment practice(s) causing the disparity. Defendant bears burden of production to establish job relatedness. Plaintiff must show other tests would serve employer's purpose without negative racial effect.


Plaintiff must establish prima facie case by comparing racial composition of at-issue jobs with qualified work force, not by comparing racial composition of skilled vs. unskilled workers. Affirmed Watson that plaintiff must identify specific challenged practice(s). Defendant may articulate any business justification for use of practice(s). Burden of persuasion remains with the plaintiff at all times to conform with disparate treatment.

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Allen v. Seidman (7th Cir. 1989) Judge Posner interpreted Wards Cove to return burden of persuasion to plaintiff and leave employer with burden of production. Business necessity defense should be renamed “issue of legitimate employer purpose.”

Evans v. Evanston (7th Cir. 1989) Burden on the plaintiff to prove defendant's criteria did not serve legitimate ends of employer. Defendants meet burden by articulating reasons for criteria. Onus on plaintiff to show which criteria creating the disparate impact.