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War and Peace between Title VII's Disparate Impact Provision and the Equal Protection Clause: Battling for a Compelling Interest

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INTRODUCTION

"[T]he war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them."[1] This Article addresses Justice Scalia's premonition in *Ricci v. DeStefano*[2] by providing an analysis of how that war may be waged and whether peace can be made between Title VII's disparate impact provision and the Equal Protection Clause.

Ricci involved a challenge to the City of New Haven's decision to void the test results of an examination required for promotion within the City's fire department. Firefighters were required to pass the examination to qualify for promotion to the rank of lieutenant or captain. In 2003, 118 firefighters took the examination.[3]

The test adversely affected African-American firefighters, who passed the examination at a lower rate than Caucasian firefighters. Twenty-five out of forty-three Caucasians, six out of nineteen African-Americans, and three out of fifteen Hispanics who took the lieutenant examination passed.[4] Sixteen out of twenty-five Caucasians, three out of eight African-Americans, and three out of eight Hispanics who took the captain examination passed.[5]

Because of the disproportionate number of African-American firefighters who failed the test, the City feared that it would be subject to discrimination lawsuits[6] under the disparate impact provision of Title VII of the Civil Rights Act of 1964.[7] Disparate impact focuses on the results of employment decisions and imposes liability when employment practices cause a disparate impact on the basis of race or any other protected class.[8] Under the "four-fifths" or "80%" rule promulgated by the Equal Employment Opportunity Commission through the Uniform Guidelines, adverse impact can be shown when the pass rate for any racial group is less than four-fifths of the pass rate of

1. 129 S. Ct. 2658, 2683 (2009) (Scalia, J., concurring).
2. *Id.*
3. *Id.* at 2664 (majority opinion).
4. *Id.* at 2666.
5. *Id.*
6. *Id.* at 2664.
7. Pub. L. No. 88-352, § 703(a)(2), 78 Stat. 241, 253 (codified as amended at 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2008)).
8. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (stating that Congress intended to focus on the consequences of employment decisions).

the most successful group.[9] An employer may be liable for disparate impact even when the employer lacks any intent to discriminate,[10] whereas disparate treatment liability rests on proving employer intent.[11] "The City was faced with a prima facie case of disparate-impact liability"[12] because the pass rates for the Hispanic and African-American test takers fell below the 80% rule.[13] Consequently, the City refused to certify the tests and thereby voided the results.[14]

As it turned out, the City found itself stuck between Title VII's disparate impact and disparate treatment provisions. Although it avoided discrimination lawsuits from African-American firefighters for the disparate impact of the examination, in the end, the City was sued by seventeen Caucasian firefighters and one Hispanic firefighter[15] who passed the examination and believed they would have likely been promoted if the test results were used.[16] The plaintiff firefighters contended that the City violated the Equal Protection Clause of the Fourteenth Amendment and the disparate treatment provision of Title VII of the Civil Rights Act of 1964.[17] The Title VII and Equal Protection claims rested on the assertion that by voiding the test results, the City intentionally discriminated against the plaintiffs based on race.[18]

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9. The "four-fifths rule" or "80% rule" functions in the following way:

> A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group.

U.S. Equal Emp't Opportunity Comm'n, Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D) (2008).

10. *See Griggs*, 401 U.S. at 432 (stating that even good intentions are immaterial when mechanisms are unrelated to job capacity and adversely affect minorities).

11. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805–07 (1973) (stating that the plaintiff must demonstrate that the employer's reason for refusing to hire was "discriminatory in its application").

12. Ricci v. DeStefano, 129 S. Ct. 2658, 2677–78 (2009).

13. On the lieutenant examination, the pass rate for each racial group was the following: 58.1% for Caucasians, 31.6% for African-Americans, and 20% for Hispanics. On the captain examination, the pass rate for Caucasians was 64% and for Hispanics and African-Americans was 37.5%. *Id.* at 2678.

14. *Id.* at 2664.

15. *Id.* at 2671.

16. *Id.* at 2664.

17. *Id.* at 2671.

18. *Id.*

The Supreme Court held that the City violated the disparate treatment provision by invalidating the tests because of their adverse impact on African-Americans.[19] In order to be justified in voiding the test results, the City was required to show a "strong basis in evidence" for a potential disparate impact violation.[20] The Court found no such basis.[21] Although the Court reconciled the tension between Title VII's disparate impact and disparate treatment provisions, the Court sidestepped the constitutional question of whether Title VII's disparate impact provision may cause an employer to violate an employee's constitutional right to Equal Protection.[22] The Court's failure to resolve the tension between Title VII's disparate impact provision and the Equal Protection Clause prompted Justice Scalia's prediction of an impending war between the two. Justice Scalia feared that "[the Court's] resolution of this dispute merely postpone[d] the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?"[23]

The war that Justice Scalia foreshadowed might not be too distant. In the term following *Ricci*, the Court decided *Lewis v. City of Chicago*, which involved a disparate impact claim by African-Americans challenging the city's hiring procedures for its fire department.[24] The plaintiffs alleged that the city's use of test scores to hire firefighters had a disproportionate adverse effect on African-Americans.[25] Although the Court did not decide whether the plaintiffs adequately proved their claim, the Court held that they stated a cognizable claim.[26] The Court relied on *Ricci* to conclude that "a plaintiff establishes a prima facie disparate-impact claim by showing that the employer 'uses a particular employment practice that causes a disparate impact' on one of the

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19. *Id.* at 2681.
20. *Id.*
21. *Id.*
22. The Court stated:

> Our statutory holding does not address the constitutionality of the measures taken here in purported compliance with Title VII. We also do not hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case. As we explain below, because respondents have not met their burden under Title VII, we need not decide whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution.

Id. at 2676.
23. *Id.* at 2681–82 (Scalia, J., concurring).
24. 130 S. Ct. 2191, 2195 (2010).
25. *Id.* at 2196.
26. *Id.* at 2198.

prohibited bases."[27] This case is likely to lead to an increase in disparate impact claims,[28] and soon the disparate impact provision may have to reckon with the Equal Protection Clause.

This Article examines the constitutional question left open by the Court in *Ricci*, by exploring the possible outcomes when the war that Justice Scalia predicted is waged. Professor Richard Primus first noted the conflict between Title VII's disparate impact provision and Equal Protection[29] in his seminal article cited by Justice Scalia in *Ricci*.[30] Recent works have responded to *Ricci*'s statutory implications, but none has given extensive treatment to the constitutional issue since Professor Primus.[31] This Article seeks to answer the constitutional question—whether Title VII's disparate impact provision violates the Equal Protection Clause by requiring employers to consider race in their employment practices. Under Equal Protection jurisprudence, racial classifications trigger strict scrutiny and are permitted only if necessary to serve a compelling purpose.[32] This Article seeks to test Title VII's disparate impact provision under strict scrutiny to determine if it can survive an Equal Protection challenge. This Article's focus is to provide an extensive search for a compelling purpose that may justify the racial classifications that are required under Title VII's disparate impact provision.[33] Specifically, this Article evaluates six compelling purposes that may be asserted to defend Title VII's disparate impact provision under an Equal Protection Clause challenge and anticipates the attacks that may be lodged against those defenses. In so doing, the

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27. *Id.* at 2197 (emphasis omitted).

28. The city warned that "[e]mployers may face new disparate-impact suits for practices they have used regularly for years." *Id.* at 2200.

29. Professor Primus was the first to explore the tension between Title VII's disparate impact provision and the Equal Protection Clause, but there had been other discussions concerning the Equal Protection Clause and facially neutral acts with discriminatory effects. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 494 (2003). Professor Primus described the first round of legal questions as centering on whether facially neutral state action that had a discriminatory effect but lacked a discriminatory intent violated the Equal Protection Clause. *Id.* at 494–95. The issue that arose in the second round involved whether Section 5 of the Fourteenth Amendment or the Commerce Clause could validate facially neutral laws that prohibited practices with racially disparate impact. *Id.* at 495.

30. Ricci v. DeStefano, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring).

31. One commentator has briefly taken up the issue in reviewing the *Ricci* opinion. *See generally* Kenneth L. Marcus, *The War between Disparate Impact and Equal Protection*, 2009 CATO SUP. CT. REV. 53, 55 (2008–2009) (arguing that equal protection is consistent with disparate impact only when impact is narrowly construed).

32. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995).

33. A discussion of whether disparate impact satisfies strict scrutiny's second prong—whether disparate impact's use of racial classifications is narrowly tailored—is beyond the scope of this Article.

inquiry should not be interpreted as hostility toward affirmative action; the Article makes no normative arguments on the subject. Rather, the focus of this work is on a discussion of how Title VII disparate impact fits within the analytic framework of the Equal Protection Clause, as it specifically relates to race. A discussion about other forms of disparate impact is also beyond the scope of this Article.[34]

Part I of this Article traces the development of disparate impact theory and its codification, the development of strict scrutiny, and the Supreme Court's treatment of cases involving Equal Protection Clause challenges against governmental use of racial classifications. Additionally, Part I discusses the ways that disparate impact implicates racial classifications by centering liability on racial proportions and forcing employers to consider race in making employment decisions. Consequently, Part I concludes that disparate impact is likely to be subject to strict scrutiny. Part II briefly explores whether there is a theoretical conflict between Title VII's disparate impact provision and the Equal Protection Clause and concludes they are symmetrical in their focus on protecting individuals, as opposed to groups.

Part III explores whether there is a doctrinal conflict between Title VII's disparate impact provision and Equal Protection. Operating on the assumption that the disparate impact provision implicates racial classifications, this Part examines six rationales that may be asserted as compelling interests to defend the provision against an Equal Protection challenge: (1) remedying past discrimination; (2) smoking out discrimination (intentional or unconscious); (3) obtaining the benefits of diversity; (4) providing role models; (5) satisfying an operational need; and (6) providing equal employment opportunity by removing barriers. This Part analyzes whether case law and empirical evidence support each rationale. Part III also explores how each rationale can be applied in the employment context to serve as a compelling interest for Title VII's disparate impact provision and provides a critique of each justification. Finally, this Article concludes that five of the six rationales are inadequate to serve as a compelling interest that can justify the disparate impact provision's use of a "highly suspect tool" like racial classifications.[35] The disparate impact provision, however, is

34. Disparate impact can also occur when an employment practice causes a disparate impact on the basis of color, religion, sex, or national origin. *See* Pub. L. No. 88-352, § 703, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2008)).

35. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (explaining that the purpose of strict scrutiny is to assure that the legislative goal is important enough to warrant racial classifications).

most likely to survive strict scrutiny by serving the compelling purpose of removing barriers to provide equal employment opportunities.

I. SURVEYING THE BATTLEFIELD TERRAIN: BACKGROUND CASES AND DOCTRINES

This Part briefly traces the development of the disparate impact theory and its codification. Also, this Part discusses the level of scrutiny applied to racial classifications under the Equal Protection Clause and concludes that strict scrutiny should be applied to disparate impact because disparate impact relies on racial classifications.

A. Disparate Impact

1. Civil Rights Act of 1964

Congress enacted section 703(a) of Title VII of the Civil Rights Act of 1964 to provide protections against employment discrimination and other illegalities by providing as follows:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to *discriminate* against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; 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.[36]

The difference between the two provisions of § 703(a) is intent. Under § 703(a)(1), commonly known as the disparate treatment provision, courts require a showing of conscious intent to discriminate or a discriminatory motive for employer liability.[37] In contrast, § 703(a)(2), the disparate impact provision, as interpreted by *Griggs*, does not require intent.[38] Disparate impact is result-oriented, focusing on consequences instead of motive.[39] The Court recently clarified in *Lewis*

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36. 42 U.S.C. § 2000e-2 (2008) (emphases added).

37. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988) ("In such 'disparate treatment' cases, which involve 'the most easily understood type of discrimination,' . . . the plaintiff is required to prove that the defendant had a discriminatory intent or motive." (citing Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977))).

38. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

39. *See* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 136 (2003) ("Defining

that "[u]nless and until the defendant [employer] pleads and proves a business-necessity defense, the plaintiff wins simply by showing the stated elements" of disparate impact.[40] Under the disparate impact provision, employers may be liable when they use neutral criteria that cause a disproportionate adverse effect on a protected group and cannot justify the criteria based on business necessity and job relatedness.[41] Even with a showing of necessity and job relatedness, employers whose practices have a disproportionate adverse effect may be liable if they refuse to use equally effective alternatives that have a less adverse effect.[42]

2. *Griggs v. Duke Power Co.*

The landmark case *Griggs v. Duke Power Co.*[43] was only the Supreme Court's second interpretation of Title VII of the Civil Rights Act of 1964,[44] which led to the Court's adoption of the disparate impact theory.[45] The issue in *Griggs* was whether Title VII permitted an employer to condition employment or job transfers on a high school diploma or passing a standardized general intelligence test.[46] Before Title VII became effective, Duke Power Company had discriminated on

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discrimination in terms of consequences rather than purpose or motive, disparate impact theory interprets Title VII to require that members of protected groups not be unnecessarily harmed in employment because of group differences.").

40. Lewis v. City of Chicago, 130 S. Ct. 2191, 2198 (2010).

41. *Griggs*, 401 U.S. at 431.

42. Ricci v. DeStefano, 129 S. Ct. 2658, 2673 (2009). "The constitutional standard for adjudicating claims of invidious racial discrimination is [not] identical to the standards applicable under Title VII." Washington v. Davis, 426 U.S. 229, 239 (1976). In *Washington v. Davis*, the Court held that disproportionate impact alone is not sufficient to prove invidious racial discrimination under the Equal Protection Clause. *Id.* at 242. In contrast, the disparate impact provision in Title VII only requires proof of a disproportionate effect—not intent. *See Griggs*, 401 U.S. at 432.

43. 401 U.S. 424 (1971). For excellent summaries of the development of disparate impact, see Lorin J. Lapidus, *Diversity's Divergence: A Post-*Grutter *Examination of Racial Preferences In Public Employment*, 28 W. NEW ENG. L. REV. 199, 211–27 (2006); Michael Selmi, *Was the Disparate Impact Theory A Mistake?*, 53 UCLA L. REV. 701, 701–34 (2006); Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's* Griggs *Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 600–07 (2004); Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1513–24 (2004); Ronald Turner, Grutter, *The Diversity Justification, And Workplace Affirmative Action*, 43 BRANDEIS L.J. 199, 222–36 (2004–2005).

44. Selmi, *supra* note 43, at 708.

45. The disparate impact theory was ultimately adopted by the Supreme Court in *Griggs*, but it did not originate with the Court. *See id.* ("[T]wo important cases, two influential law review articles, and a strategic decision by the Equal Employment Opportunity Commission (EEOC) all contributed to the creation of the [disparate impact] theory . . . .").

46. *Griggs*, 401 U.S. at 425–26.

the basis of race in its hiring and transfer policies.[47] African-Americans were employed only in the one department that offered the lowest paying jobs.[48] After Title VII's passage, the company changed its policies to include the high school diploma and aptitude test requirements.[49]

The new requirements imposed by the company adversely affected African-Americans.[50] The district court, however, found no intentional discrimination by the employer because the high school diploma and aptitude tests were applied equally to Caucasians and African-Americans.[51]

The Supreme Court unanimously invalidated the policies, holding that the Civil Rights Act prohibited "not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[52] The Court explained that employers acting with good intent or absent discriminatory intent cannot "redeem" employment practices that cause a disparate impact[53] and must justify their policies with a business necessity related to job performance.[54] Because there was evidence that workers who did not have a high school education or who did not take the intelligence test performed their jobs satisfactorily, the Court concluded that the company failed to show a business necessity for the requirements.[55] As a result of *Griggs*, the Court's interpretation of Title VII expanded the protection afforded by the statute to include both disparate treatment and disparate impact.

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47. *Id.* at 426–27.

48. *Id.* at 427.

49. *Id.* at 427–28.

50. *Id.* at 429. The Court noted that in 1960, 34% of white males had completed high school as compared with 12% of African-American males in the state, and that the EEOC found 58% of whites passed the generalized intelligence tests as compared with 6% of African-Americans. *Id.* at 431 n.6.

51. *Id.* at 429. The Court recognized the employer's efforts to assist employees by financing two-thirds of the cost for high school training. *Id.* at 432. These efforts likely militated against a finding of intent by the lower court. *See* Selmi, *supra* note 43, at 719 ("The company's explanation for the test, and its willingness to pay some of the education costs for those who sought to finish high school, transformed the case, at least in the Supreme Court's eyes, from one of intentional discrimination to something different.").

52. *Griggs*, 401 U.S. at 431.

53. *Id.* at 432.

54. *Id.* at 431.

55. *Id.* at 431–32.

3. Post-*Griggs* Cases: From *Albemarle* to *Wards Cove*

Four years after *Griggs*, the Court clarified in *Albemarle Paper Co. v. Moody*[56] the requirement of job relatedness announced earlier in *Griggs*. In this case, the company imposed similar requirements as in *Griggs*.[57] The company argued that the high school education and intelligence test requirements were necessary for safety and efficiency[58] because of the increasing sophistication of the plant's operations.[59] The company, however, failed to validate the tests.[60] The Court reaffirmed, "[D]iscriminatory tests are impermissible unless shown, by professionally acceptable methods, to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."[61] The Court also expanded the disparate impact theory by allowing plaintiffs to rebut an employer's business necessity and job relatedness justification by showing that reasonable, less discriminatory alternatives existed.[62]

In 1982, the Supreme Court additionally fortified the disparate impact theory in *Connecticut v. Teal*[63] by rejecting an employer's bottom-line defense. In its defense, the employer contended that although the test at issue caused a disparate impact upon minorities, the result of the entire hiring process rendered no disparate impact because minorities were proportionately hired and promoted.[64] The Court emphasized, "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionally represented in the work force."[65]

Several years later, in *Watson v. Fort Worth Bank & Trust*, the Court extended disparate impact liability to include the use of subjective or discretionary employment practices.[66] The following year, however,

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56. 422 U.S. 405 (1975).
57. *Id.* at 410–11.
58. *Id.* at 411.
59. *Id.* at 428.
60. *Id.*
61. *Id.* at 431 (quoting U.S. Equal Emp't Opportunity Comm'n, Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(c) (2008)) (internal quotation marks omitted).
62. *Id.* at 425.
63. 457 U.S. 440 (1982).
64. *Id.* at 452.
65. *Id.* at 454–55.
66. 487 U.S. 977, 991 (1988).

the Court began to curtail its expansion of disparate impact. In *Wards Cove Packing Co. v. Atonio*,[67] the Court relaxed the standard for showing business necessity[68] and shifted the burden of persuasion to the plaintiff.[69]

4. Codification of Disparate Impact

Congress regarded the Court's decision in *Wards Cove*, as well as the others that followed,[70] as a diminution[71] of employment rights protected in Title VII[72] and accordingly responded by passing the Civil Rights

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67. 490 U.S. 642 (1989).

68. *Id.* at 659. The Court modified the business necessity requirement to a showing of "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer" and rejected a requirement that the employer show that the practice is "essential" or "indispensable." *Id.*

69. The employer has the burden of producing evidence of a business necessity, but plaintiff bears the burden of persuasion to "prove that it was 'because of such individual's race, color,' etc., that [the plaintiff] was denied employment opportunity." *Id.* at 659–60 (quoting 42 U.S.C § 2000e-2(a)).

70. Congress also sought to redress the damage brought on by *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; *Martin v. Wilks*, 490 U.S. 755 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; and *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. For a historical review of the Civil Rights Act of 1991, see David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, 8 LAB. LAW. 849, 849–55 (1992); Roger Clegg, *Introduction: A Brief History of the Civil Rights Act of 1991*, 54 LA. L. REV. 1459, 1463 (1994); Douglas W. Kmiec, *The 1991 Civil Rights Act: A Constitutional, Statutory, and Philosophical Enigma*, 68 NOTRE DAME L. REV. 911, 913 (1993); Claude Platton, Note, *Title VII Disparate Impact Suits Against State Governments After* Hibbs *and* Lane, 55 DUKE L.J. 641, 665–69 (2005).

71. *But see* Kingsley R. Browne, *The Civil Rights Act of 1991: A "Quota Bill," a Codification of* Griggs*, a Partial Return to* Wards Cove*, or All of the Above?*, 43 CASE W. RES. L. REV. 287, 293 (1993) ("The most important aspect of *Griggs* . . . was not challenged by a single Justice in *Wards Cove*. At most, the *Wards Cove* opinion made only marginal adjustments to the disparate-impact doctrine, although . . . it arguably did not change the doctrine at all.").

72. Congress stated in the Civil Rights Act of 1991 the following purposes for the Act:

> (1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;
>
> (2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989);
>
> (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and
>
> (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection for victims of discrimination.

Act in 1991.[73] In § 703(k) of Title VII, Congress codified disparate impact, which previously had been merely an interpretation of § 703(a)(2) applied by the courts. The amended statute provides:

> (1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
>
> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.[74]

B. Racial Classification Under Equal Protection and Strict Scrutiny

Whether disparate impact can prevail under an Equal Protection challenge depends on the level of scrutiny applied, which in turn depends on whether disparate impact involves racial classifications. This section discusses the circumstances under which strict scrutiny is applied and considers whether disparate impact implicates racial classifications and is, therefore, subject to strict scrutiny.

1. Racial Classification

The Equal Protection Clause of the Fourteenth Amendment protects against governmental racial classification.[75] *City of Richmond v. J.A. Croson*[76] and *Adarand v. Peña*[77] established that all racial classifications, even with a benign purpose, are subject to strict scrutiny[78]—"that is, such classifications are constitutional only if they

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

73. H.R. REP. NO. 102-40(II), at 3 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694 (stating the intent of Congress was to "respond to recent Supreme Court decisions by restoring the civil rights protections that were dramatically limited by those decisions . . . [and] to strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination").

74. Pub. L. No. 102-166, 105 Stat. 1074 (codified at 42 U.S.C. § 2000e–2(k)(1)(A) (2008)).

75. The Supreme Court has "consistently repudiated '[distinctions] between citizens solely because of their ancestry' as being 'odious to a free people whose intuitions are founded upon the doctrine of equality.'" Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986) (alteration in original) (quoting Loving v. Virginia, 388 U.S. 1, 11 (1967) (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943))).

76. 488 U.S. 469 (1989).

77. 515 U.S. 200 (1995).

78. Initially, there were several factors for determining if a racial classification is

are narrowly tailored measures that further compelling governmental interests . . . ."[79] Classifications based on race, alienage, or national origin are subject to strict scrutiny because "these factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others."[80] Strict scrutiny functions to "'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."[81]

It is unclear if the disparate impact provision is an express racial classification,[82] but the Court's analysis in *Ricci* may shed light on how the Court might answer this question. Because the city decided not to certify the examination scores as a result of "the statistical disparity based on race,"[83] the Court characterized the city's action as "express, race-based decisionmaking."[84] The Court explained, "[T]he City rejected the test results because 'too many whites and not enough minorities would be promoted were the lists to be certified.'"[85] The City's interest in avoiding disparate impact liability led it to make

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constitutional: whether it is benign as opposed to invidious and whether it is state or federal action, which bears on whether a Fifth Amendment or Fourteenth Amendment violation is being asserted. *Croson* held that "the standard of review under the *Equal Protection Clause* is not dependent on the race of those burdened or benefitted by a particular classification" and adopted strict scrutiny as the unified standard for benign and invidious racial classifications. 488 U.S. at 493 (emphasis added). The Court explained the necessity of subjecting benign classifications to strict scrutiny: "[T]here is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id. Adarand* reaffirmed *Croson*'s adoption of strict scrutiny "despite the surface appeal of holding 'benign' racial classifications to a lower standard." 515 U.S. at 226. The Court's decision in *Adarand* clarified that it makes no difference whether the actor is the federal, state, or local government or whether a Fifth Amendment Due Process or the Fourteenth Amendment Equal Protection Clause claim is being asserted: "[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny . . . ." *Id.* at 227.

For a discussion of the development of strict scrutiny, see Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1273–85 (2007); K.G. Jan Pillai, *Phantom of the Strict Scrutiny*, 31 NEW ENG. L. REV. 397, 397–419 (1997); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 798–801 (2006).

79. *Adarand*, 515 U.S. at 227.

80. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

81. *Croson*, 488 U.S. at 493.

82. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2696–704 (2009) (Ginsburg, J., dissenting) (arguing that no racial classification exists).

83. *Id.* at 2674 (majority opinion).

84. *Id.* at 2673.

85. *Id.* (quoting Ricci v. DeStefano, 554 F. Supp. 2d 142, 152 (D. Conn. 2006)).

decisions based on race. Similarly, for other employers, it would be difficult to divorce considerations of race from their employment decisions that are centered on avoiding disparate impact liability.

Additionally, if the City's race-conscious action taken to avoid disparate impact liability can be characterized as racial classification, then *a fortiori* Title VII's imposition of disparate impact liability on the basis of race can be similarly characterized. It would be impossible to assess compliance with the disparate impact provision without grouping employees or candidates into racial categories. Thus, although Title VII does not explicitly classify people into different racial categories, the application of the disparate impact provision, as seen in *Ricci*, may be the functional equivalent.

There may be disagreement as to whether Title VII's disparate impact provision should be subject to strict scrutiny,[86] but the purpose of this Article is to test the provision under the most rigorous conditions—that being strict scrutiny—to determine if it can withstand an Equal Protection Clause challenge.[87] Therefore, this Article will proceed on the presumption that the disparate impact provision is a racial classification that triggers strict scrutiny.

2. Strict Scrutiny

Once strict scrutiny is invoked, the application of strict scrutiny requires the government to show that its action is narrowly tailored to serve a compelling purpose.[88] The point of the compelling purpose

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86. A normative discussion of whether neutral practices that are race conscious should be subject to strict scrutiny is a subject for an article in itself.

87. I recognize that the ability of Title VII's disparate impact provision to withstand an Equal Protection Clause challenge might depend on the level of scrutiny applied.

88. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (explaining that racial classifications imposed by a governmental actor "are constitutional only if they are narrowly tailored measures that further compelling governmental interests"). The application of strict scrutiny has been described as "'strict' in theory and fatal in fact." Professor Gerald Gunther first coined this now oft-quoted phrase. Gerald Gunther, *The Supreme Court, 1971 Term: Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

Whether a case survives strict scrutiny depends on the context. In an empirical study of cases in 1990–2003 subjected to strict scrutiny, Professor Adam Winkler found that 27% of the suspect classification cases survived. Winkler, *supra* note 78, at 814–15. In comparison, the study reported the survival rate of other cases reviewed under strict scrutiny:

religious liberty	59%
freedom of association	33%
fundamental rights	24%
freedom of speech	22%

Id. at 815; *see* Stephen E. Gottlieb, *Tears for Tiers on the Rehnquist Court*, 4 U. PA. J. CONST. L.

requirement is to evaluate the importance of the government's objective and ensure that the particular goal is worthy of pursuit when compared to the harm that may ensue.[89]

The narrow tailoring component serves to verify that the purported purpose is indeed the actual purpose. It aids in "smoking out" any illegitimate purpose[90] and assures, by evaluating other alternatives, that the challenged action is necessary to accomplish the government's goal.[91]

II. PHILOSOPHICAL OR THEORETICAL CONFLICT?

Before this Article turns to the main inquiry of whether there is a doctrinal conflict between the disparate impact provision and Equal Protection Clause, another relevant query worth exploring is whether there is a theoretical or philosophical conflict between the two. In terms of whom the two doctrines are intended to protect, there is symmetry between the disparate impact provision and the Equal Protection Clause. The Equal Protection Clause protects "persons, not groups,"[92] as expressed in the plain language of the Fourteenth Amendment.[93]

The disparate impact provision similarly protects persons rather than groups. This conclusion is supported by the Court's reasoning in *Connecticut v. Teal* because of its rejection of the bottom-line defense.[94] In *Teal*, the test the employer used as a basis for promotion had a disparate impact on African-Americans,[95] which the employer did not dispute.[96] The employer, however, argued that there was no disparate impact overall—on the bottom-line—because the test did not actually "deprive disproportionate numbers of blacks of promotions."[97]

350, 366–67 (2002) (critiquing the Rehnquist Court's approach to equal protection).

89. *See* Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. PA. L. REV. 1, 14 (2000) (explaining that the "compelling governmental interest" requirement allows a reviewing court to evaluate the importance of the government's goal in using a classification, and also permits the court to weigh the government's goal with potential "harm wrought by use of the classification").

90. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

91. Rubin, *supra* note 89, at 14.

92. *See Adarand*, 515 U.S. at 227 (recognizing "the basic principle that the Fifth and Fourteenth Amendments protect persons, not *groups*").

93. The Fourteenth Amendment provides that "[n]o State shall . . . deny to any *person* within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added).

94. 457 U.S. 440, 452 (1982).

95. *Id.* at 442–43. The passing rate for African-Americans was 68% of the passing rate for Caucasians. *Id.* at 443. This resulted in disparate impact as defined by the four-fifths rule of the Uniform Guidelines implemented by the EEOC. *Id.* at 444.

96. *Id.* at 444.

97. *Id.* at 452.

Although a smaller percentage of African-Americans passed the test than Caucasians, after the employer applied an affirmative action program, a greater percentage of African-Americans than Caucasians were promoted.[98] The bottom-line defense used in *Teal* was premised on the argument that, overall, no group suffered as a consequence of the test.[99] The Court, however, rejected this defense because Title VII affords equal opportunity to "*each* applicant."[100] Relying on the language in § 703(a)(2), the Court concluded that the disparate impact theory "prohibits practices that would deprive or tend to deprive '*any individual* of employment opportunities'"[101] and "the principle focus . . . is the protection of the *individual* employee, rather than the protection of the minority *group* as a whole."[102] Thus, at least theoretically, the disparate impact provision and Equal Protection Clause are consistent in their focus on protecting individuals.

III. BATTLEFIELD STRATEGIES FOR FINDING A COMPELLING INTEREST

The question left lingering in *Ricci* is whether Title VII's disparate impact provision violates the Equal Protection Clause by causing employers to take race into account in deciding which employment policies to adopt.[103] Consequently, if disparate impact is to survive the war, it must first shield itself with a compelling interest.

The purpose of this Part is to explore the possible compelling interests that may justify the use of racial classifications that underlie disparate impact. This Part will examine six grounds that may serve as compelling justifications: (1) remedying past discrimination; (2) smoking out intentional or unconscious discrimination; (3) obtaining the benefits attributable to diversity; (4) providing role models; (5) meeting operational needs; and (6) providing equal employment opportunities by removing barriers. An exploration of each rationale includes an analysis of whether case law or empirical evidence can support the rationale as a compelling interest. Finally, this Part provides a critique for each justification.

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98. *Id.* at 444.

99. *Id.* at 452.

100. *Id.* at 454–55.

101. *Id.* at 453.

102. *Id.* at 453–54 (emphases added).

103. State action exists because Congress is requiring employers to act in a certain way. *See* Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 614–16 (1989) (holding that regulations that authorized, but not required, employers to administer blood and urine tests constituted state action because the government encouraged this practice).

A. Remedying Past Discrimination Versus Societal Discrimination

Governmental bodies have used racial classifications to address generalized societal discrimination and past discrimination by the governmental actor. This section discusses the Supreme Court's treatment of remedying societal discrimination and past discrimination as compelling interests under Equal Protection and examines whether the disparate impact provision can be appropriately used as a remedial measure to survive strict scrutiny. This section concludes that it is difficult to justify disparate impact's use of racial classification on a remedial need because a showing of past discrimination by a state actor is necessary.

1. Societal Discrimination

The Court has unequivocally disallowed remedying past societal discrimination to be a sufficient compelling governmental interest[104] because "societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."[105] If the interest of the disparate impact provision is to remedy past social wrongs, then it would fail the compelling interest component of the strict scrutiny test. The Court's statement in *Teal* could lead one to believe that *Griggs*, at least in part, involved an interest in remedying past societal discrimination. In *Teal*, the Court stated, "*Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives."[106] The Court's statement in *Teal* suggests that *Griggs* was intended to be a remedy for the past societal discrimination that resulted in inadequate education and limited employment opportunities for African-Americans.

Griggs, however, rejected the interpretation of Title VII as a remedial measure for past social harms. The Court clarified:

> [Title VII] does not command that any person be hired simply because he was formerly the subject of discrimination . . . . 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.[107]

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104. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 269 (1986) (plurality opinion).
105. *Id.* at 276.
106. *Teal*, 457 U.S. at 447.
107. Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971).

This clarification in *Griggs* rebuts the suspicion that the disparate impact provision's use of racial classification was intended to promote the impermissible purpose of rectifying past societal discrimination.

2. Remedial Purpose Recognized as Compelling

While remedying societal discrimination is not sufficiently compelling, the Court has recognized a remedial need to compensate for the government's own past discrimination as a compelling purpose. The Court has set forth in *Regents of University of California v. Bakke*[108] that to justify using racial classification as a remedy for past discrimination, a government actor must show that it engaged in statutory or constitutional violations.[109] A mere recitation of remedial need is not enough.

a. Insufficient Evidence of Remedial Need

In *Bakke* and its progeny, the Court invalidated purported remedial policies because the government failed to substantiate its race-based program with evidence showing a remedial need. In *Bakke*, the controversy centered on a medical school's admission procedure that reserved sixteen out of one hundred seats in its entering class for minorities.[110] The Court invalidated the admissions policy because the "history of discrimination in society at large"[111] could not justify the medical school's use of a racial quota in its admissions process when there lacked "judicial, legislative, or administrative findings of constitutional or statutory violations."[112] As the Court explained, "Only then does the government have a compelling interest in favoring one race over another."[113]

In *Wygant v. Jackson Board of Education*,[114] the Court reaffirmed *Bakke*'s "distinction between 'societal discrimination,' which is an inadequate basis for race-conscious classifications, and the type of identified discrimination that can support and define the scope of race-based relief."[115] The issue in *Wygant* involved a school board's layoff procedure that required the retention of the most senior teachers unless the percentage of minority teachers laid off exceeded the percentage of

108. 438 U.S. 265 (1978) (plurality opinion).
109. *Id.* at 301–02, 309.
110. *Id.* at 279.
111. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 496 (1989).
112. *Bakke*, 438 U.S. at 307.
113. *Croson*, 488 U.S. at 497 (citing *Bakke*, 438 U.S. at 307–09).
114. 476 U.S. 267 (1986).
115. *Croson*, 488 U.S. at 497 (discussing *Wygant*, generally).

minority teachers retained.[116] The policy, which was instituted because of racial tension in the community and schools,[117] resulted in the retention of minority teachers with less seniority than the nonminority teachers who were laid off.[118]

The school board defended its policy as providing minority role models for minority students in an effort to ameliorate the effects of societal discrimination.[119] The Court rejected this justification, declaring that "[t]his Court has never held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing use of racial classifications in order to remedy such discrimination."[120] The school board did not have "a strong basis in evidence for its conclusion that remedial action was necessary"[121] because the "statistical disparity between students and teachers had no probative value in demonstrating the kind of prior discrimination in hiring or promotion that would justify race-based relief."[122]

Similarly, in *Richmond v. J.A. Croson Co.*, the government lacked a strong basis in evidence for its remedial measures.[123] In *Croson*, the city council adopted a plan that required prime contractors that receive city construction contracts to subcontract at least 30% of the contract award to Minority Business Enterprises.[124] The city council passed the plan for a remedial "purpose of promoting wider participation by minority business enterprises in the construction of public projects."[125] However, there was no evidence of discrimination by the city in awarding contracts or by the prime contractors against minority-owned subcontractors.[126] The Court reiterated the requirement that there be "some showing of a prior discrimination by a governmental unit involved"[127] and explained that "if the city could show that it had

116. *Wygant*, 476 U.S. at 269–70.

117. *Id.* at 270.

118. *Id.* at 272. The nonminority teachers affected by the policy sued the school board, alleging violations of the Equal Protection Clause and Title VII, among other claims. *Id.*

119. *Id.* at 274.

120. *Id.* at 269.

121. *Id.* at 277.

122. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 497 (1989) (discussing the failure of the role model theory that was presented in *Wygant*, 476 U.S. at 276, 294).

123. *Croson*, 488 U.S. at 500.

124. *Id.* at 477.

125. *Id.* at 478.

126. *Id.* at 480, 485.

127. *Id.* at 492. Subsequent cases adhered strictly to *Croson*'s and *Wygant*'s requirement that

essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, . . . the city could take affirmative steps to dismantle such a system."[128]

Finally, in *Parents Involved in Community Schools v. Seattle School District No. 1*,[129] there was no compelling interest because the remedial need had ceased. In this case, the Court considered whether public school districts that had not previously engaged in segregation may assign students to schools based on racial classifications.[130] The Seattle School District allowed its students to submit a list of preferences in selecting a high school to attend. In cases where too many students chose a particular school, the school district used "tie breakers" to decide which students would attend the school.[131] Students who had siblings attending the chosen school received first priority in enrollment.[132] The second-level tiebreaker involved consideration of the "racial composition of the particular school and the race of the individual student."[133] If the school's racial composition was not within ten percentage points of the district's white to non-white racial distribution, then the district assigned students on the basis of how they would contribute to the school's racial balance.[134]

The school district was unable to justify its racial classification on remedial grounds because although the public schools in one particular county had previously segregated students based on race, the schools eventually "achieved unitary status" and were no longer subject to desegregation decrees.[135] The achievement of unitary status rebutted any necessity of using racial classifications to remedy constitutional or statutory violations.[136]

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the government must show past discrimination to substantiate remedial racial classifications. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2675 (2009) ("The Court has held that certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a 'strong basis in evidence' that the remedial actions were necessary." (citing *Croson*, 488 U.S. at 500)); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 220 (1995) ("'[I]t must have sufficient evidence to justify the conclusion that there has been prior discrimination.'" (quoting *Wygant*, 476 U.S. at 277)).

128. *Croson*, 488 U.S. at 492.

129. 551 U.S. 701 (2007).

130. *Id.* at 711.

131. *Id.*

132. *Id.* at 711–12.

133. *Id.* at 712.

134. *Id.* The final tiebreaker was the distance between the student's residence and the preferred school. *Id.*

135. *Id.* at 720–21.

136. *Id.* at 721.

b. Sufficient Evidence of Remedial Need

In two cases, however, the Court found a sufficient need to remedy past discrimination. In *Local 28 of the Sheet Metal Workers' International Association v. EEOC*,[137] the Court upheld a race-conscious quota that provided remedial relief for prior union discrimination against African-Americans. In this case, the union had previously excluded African-Americans from union membership and participation in its apprenticeship program.[138] Consequently, it was sued for its discriminatory activities. To resolve the suit, the district court established a 29% non-white membership goal[139] because of the union's "long and persistent pattern of discrimination" that had "consistently and egregiously violated Title VII."[140] During a span of seven years, the union delayed implementing the district court's order[141] and was twice cited for contempt by the court.[142] At the last hearing, the district court modified the membership goal and ordered the union to establish a fund "to be used for the purpose of remedying discrimination."[143] The Supreme Court upheld the membership goal and fund against an Equal Protection challenge[144] because both measures were necessary to remedy the union's persistent discrimination and Title VII violations.[145]

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137. 478 U.S. 421 (1986).

138. *Id.* at 427.

139. *Id.* at 432. This goal was later upheld by the Court of Appeals for the Second Circuit.

140. The Second Circuit Court of Appeals affirmed the district court's order. *Id.* at 433.

141. The district court found that the union had resisted implementing the court's prior order in the following ways:

> (1) adopted a policy of underutilizing the apprenticeship program in order to limit nonwhite membership and employment opportunities; (2) refused to conduct the general publicity campaign required by the O & J and RAAPO to inform nonwhites of membership opportunities; (3) added a job protection provision to the union's collective-bargaining agreement that favored older workers and discriminated against nonwhites (old workers provision); (4) issued unauthorized work permits to white workers from sister locals; and (5) failed to maintain and submit records and reports required by RAAPO, the O & J, and the administrator, thus making it difficult to monitor [the union's] compliance with the court's order.

Id. at 434–35.

142. The district court entered an order and judgment after the trial in 1975. *Id.* at 431. The two contempt proceedings took place in 1982 and 1983. *Id.* at 434–35.

143. *Id.* at 436.

144. *Id.* at 440. The plaintiffs pursued a claim under the equal protection component of the Due Process Clause, which for all intents and purposes, is analytically equivalent to the Equal Protection Clause of the Fourteenth Amendment. For an explanation of the congruence between the equal protection component of the Fifth Amendment and Fourteenth Amendment, see also *supra* text accompanying note 78.

145. *Sheet Metal Workers*, 478 U.S. at 436.

Also, in *United States v. Paradise*,[146] the Court upheld a quota for the promotion of African-Americans that was intended to remedy the systematic exclusion of African-Americans as state troopers.[147] In 1972, the district court found that the Alabama Department of Public Safety had discriminated against African-Americans.[148] As a result, the district court issued an order that the department hire one African-American trooper for each Caucasian trooper until the percentage of African-American troopers within the state reached 25%.[149] Eleven years later, there was still not one African-American trooper in the upper ranks.[150] Consequently, the district court imposed a 50% promotional quota in the upper ranks.[151] In reviewing this quota, the Supreme Court upheld the quota because the district court substantiated a compelling purpose of remedying the department's past discrimination in the hiring and promotion of African-Americans among the state trooper force.[152] The relief crafted by the district court was justified by "the department's failure after almost twelve years to eradicate the continuing effects of its own discrimination."[153]

The above cases, whether the Court found a compelling need or not, illustrate the Court's insistence on a showing of past discrimination by the government actor as a predicate to establishing a racial classification, even a benign one.

3. Analysis of Disparate Impact Serving a Remedial Purpose

An argument could be made that the disparate impact provision's use of racial classification serves a compelling interest because it was intended to remedy past discrimination. The disparate impact theory was conceived to address seniority systems and lines[154] used to

146. 480 U.S. 149 (1986).

147. *Id.* at 153.

148. *Id.*

149. *Id.* at 154–55.

150. *Id.* at 162–63. There were only four black corporals out of sixty-six, but no blacks among the ranks of sergeants, captains, or majors. *Id.* at 163.

151. *Id.* at 163.

152. *Id.* at 170.

153. *Id.* at 169.

154. Congress expressed concern over the misuse of such employment practices:

> Employment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs. The literature on the subject is replete with discussions of the mechanics of seniority and lines of progression, perpetuation of the present effects of earlier discriminatory practices through various institutional devices, and testing and validation requirements.

H.R. REP. NO. 102-40, pt. 2, at 694 (1991).

perpetuate past intentional discrimination.[155] The allusion to prior discriminatory practices in several of the Court's opinions could support an inference that disparate impact was intended to provide remedial relief for these pervasive and systemic discriminatory schemes.

In *Griggs*, the Court stated,

> The objective . . . of Title VII is . . . 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.[156]

Similarly, the Court in *Sheet Metal Workers* opined,

> Congress enacted Title VII based on its determination that racial minorities were subject to pervasive and systematic discrimination in employment. It was clear to Congress that the crux of the problem was to open employment opportunities for Negroes in occupations which have been traditionally closed to them, . . . and it was this problem that Title VII's prohibition against racial discrimination was primarily addressed.[157]

Notwithstanding these passages showing a remedial intent behind disparate impact, "the mere recitation of 'benign' or legitimate purpose for a racial classification is entitled to little or no weight."[158] The lessons of *Bakke*, *Wygant*, and *Croson* prove that there must be an administrative, legislative, or judicial finding that employers have violated the Constitution or a statute before disparate impact can be implemented as a remedial measure. Additionally, *Parents Involved* is instructive for the lesson that once discrimination has been rectified, a remedial purpose cannot sustain a racial classification.

Defending disparate impact on a remedial need rationale is difficult because disparate impact seems to suffer the same defects as the

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155. *See* Selmi, *supra* note 43, at 705 ("[T]he disparate impact theory arose initially to deal with specific practices, seniority systems and written tests, that were perpetuating past intentional discrimination.").

Section 703(h) of Title VII protects "bona fide" seniority systems if they "are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(h) (2006); *see also* SAMUEL ESTREICHER & MICHAEL C. HARPER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION LAW 192 (2004) (stating that the federal involvement in fighting discrimination in employment began in response to resistance to integration and the emergence of a national civil rights movement).

156. Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971) (emphasis added).

157. 478 U.S. at 448 (internal quotation marks and alterations omitted) (citing United Steelworkers of Am. v. Weber, 443 U.S. 193, 203 (1979)).

158. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989).

programs in *Bakke*, *Wygant*, and *Croson*. According to the Court's interpretation in *Griggs* and *Sheet Metal Workers*, an argument can be made that Congress intended for disparate impact to remedy the discriminatory practices that excluded African-Americans from employment. Such an interest, however, would be as amorphous as the interest in setting a quota in *Croson* to remedy the exclusion of African-Americans from unions and training programs.[159] As the Court stated in *Croson*,

> While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to the lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota . . . . Like the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding quota.[160]

In *Wygant*, the Court concluded that the "statistical disparity between students and teachers had no probative value in demonstrating the kind of prior discrimination in hiring or promotion that would justify race-based relief."[161] Similarly, the *Croson* court found that the 30% set-aside "[could] not in any realistic sense be tied to any injury suffered by anyone."[162] Likewise, in the context of disparate impact, it could be argued that the disparity manifested by the application of the four-fifths

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159. The city contended that past exclusion of African-Americans "has prevented them from following the traditional path from laborer to entrepreneur." *Id.* at 498 (internal quotation marks omitted).

160. *Id.* at 499. The Court was not persuaded by a "highly conclusionary statement of a proponent of the Plan that there was racial discrimination in the construction industry 'in this area, the State, and around the nation'" and by "the city manager [who] had related his view that racial discrimination still plagued the construction industry in his home city of Pittsburgh." *Id.* at 500. These statements, the Court explained, were

> of little probative value in establishing identified discrimination in the Richmond construction industry. The factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary. But when a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals.

Id.

161. *Id.* at 497 (discussing *Wygant*).

162. *Id.* at 499. At the time when the Court decided *Croson*, there were 234 Minority Business Enterprise programs. Jeffrey M. Hanson, Note, *Hanging By Yarns?: Deficiencies in Anecdotal Evidence Threaten the Survival of Race-Based Preference Programs for Public Contracting*, 88 CORNELL L. REV. 1433, 1444 (2003). To salvage some of these programs after *Croson*, state and local governments spent fifty-five million dollars to commission more than 140 disparity studies to substantiate a compelling remedial interest in using racial set-aside programs. *Id.*

rule[163] reflects merely a current state of racial imbalance resulting from the employer's selection process. A showing that racial disparity exists in success rates among candidates or applicants lacks probative value in showing that a *particular* employer had engaged in prior discrimination. The disparate impact provision cannot be tied to a remedial need because it applies to all employers and may subject a new employer to liability, even when the employer lacks any business history.

In contrast, the remedial plans in *Paradise* and *Sheet Metal Workers* were upheld because the Court found that the government actor itself engaged in prior discrimination and court-ordered remedial programs were directed at providing relief from that particular government actor's past discriminatory activities. An extension of *Paradise* and *Sheet Metal Workers* to disparate impact would require a demonstration that a particular employer had discriminated before disparate impact can be applied as a remedial measure against that employer. This would limit the application of disparate impact to a case-by-case basis, rather than its current broad utilization.

The Court has waived the requirement for demonstrating prior constitutional or statutory violations as a prerequisite for remedial racial classifications, but that case is inapposite. In *United Steelworkers of America v. Weber*,[164] a union and employer voluntarily entered into an agreement requiring a quota for minority employees to be admitted into a training program.[165] The Court approved of this program, holding that Title VII did not prohibit voluntary compliance.[166] *Weber* is inapposite because the Court reviewed the program at issue under Title VII, not the Equal Protection Clause. Moreover, *Weber* involved a quota voluntarily instituted by private parties, not a government actor.

Some statements made by the Court in dicta, however, complicate the discussion as to whether there is a remedial need for disparate impact. In passing, the *Bakke* Court discussed the disparate impact standard under Title VII:

> [T]he presumption in *Griggs*—that disparate impact without any showing of business justification established the existence of discrimination in violation of the statute—was based on legislative determinations, . . . that past discrimination had handicapped various

163. For an explanation of the "four-fifths" rule, see *supra* text accompanying note 9.
164. 443 U.S. 193 (1979).
165. *Id.* at 197.
166. *Id.* at 209.

> minority groups to such an extent that disparate impact could be *traced to identifiable instances of past discrimination*.[167]

The Court's belief that disparate impact can be linked to "*identifiable* instances of past discrimination" may imply that the Court would find a strong basis in evidence that there is a remedial need for disparate impact. But under subsequent Court decisions, those identifiable instances of discriminatory conduct must be traced to the actor seeking to implement the remedial program. In the present case, because disparate impact is being federally enforced, it is the federal government that seeks to remedy past discrimination if a remedial argument is to be made. If disparate impact can be defended as serving a remedial need, the federal government must show that the particular employer had previously discriminated. Without particularized evidence of prior discriminatory misconduct by a specific employer, disparate impact would be susceptible to the criticism that it is attempting to remedy past societal discrimination.

B. "Smoking Out" Discrimination

Justice Scalia, in his concurrence in *Ricci*,[168] suggested that another possible defense of disparate impact against an Equal Protection claim might be to frame it as a tool for smoking out discrimination. This section considers different forms of discrimination—intentional and unconscious discrimination—and how disparate impact might be used to uncover them. Also, this section examines case law and empirical evidence to determine whether smoking out discrimination can be a compelling interest for disparate impact's use of racial classifications to survive strict scrutiny.

1. Pretextual or Intentional Discrimination

There are varying forms of discrimination. Overt discrimination is the most obvious. Pretextual discrimination is a subtle form of "intentional discrimination hidden behind a veneer of facially neutral practices."[169]

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167. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 309 n.44 (1978) (plurality opinion) (emphasis added).

168. Ricci v. DeStefano, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring) (citing Primus, *supra* note 29, at 498–99, 520–21).

169. Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479, 1541 (1996).

a. The Need for Disparate Impact Because of Difficulty in Proving Intent

Because pretextual discrimination is subtle, it makes detection of intentional discrimination difficult. Consequently, one justification for allowing racial classifications in disparate impact is to compensate for the difficulty in identifying instances of intentional discrimination. One can argue that *Griggs* is a prime example of pretextual discrimination and why disparate impact is needed to address the subtle forms of intentional discrimination, such as the use of neutral criteria. The peculiar timing of events and the history of the employer's actions raise concern about the employer's intent behind the neutral criteria implemented in *Griggs*. Prior to Title VII, the employer in *Griggs* had engaged in "overt racial discrimination"[170] by restricting African-American employees to work in the lowest paying department.[171] But after the Act became effective, the employer replaced its intentionally discriminatory practice with the intelligence test and high school education requirements.[172] *Griggs* seems to represent intentional use of neutral criteria to discriminate.[173]

The district court, however, found in *Griggs* that there was no discriminatory intent behind the adoption of the hiring and promotion requirements.[174] The district court's finding is problematic to the argument that *Griggs* is a vindication of employees' rights against intentionally discriminatory use of neutral criteria. *Griggs* makes clear that disparate impact is not predicated on intent, and courts have subsequently interpreted *Griggs* "as an endorsement of 'pure' disparate impact theory" independent of intent.[175]

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170. Griggs v. Duke Power Co., 401 U.S. 424, 428 (1971).

171. *Id.* at 427.

172. *Id.* at 427–28. Professor Rutherglen argues that "in *Griggs*, the fact that the employer substituted an intelligence test for outright segregation of its employees suggests that it was not genuinely seeking to measure intelligence . . . ." George Rutherglen, *Disparate Impact under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1320–21 (1987).

173. *See* Rutherglen, *supra* note 172, at 1331 ("In hindsight, *Griggs* appears to be a case of obvious pretextual discrimination . . . .").

174. The appellate court affirmed this finding:

> The Court of Appeals noted, however, that the District Court was correct in its conclusion that there was no showing of a racial purpose or invidious intent in the adoption of the high school diploma requirement or generalized intelligence test and that these standards had been applied fairly to whites and Negroes alike.

Griggs, 401 U.S. at 429.

175. Martha Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305, 342 (1983).

On the other hand, the district court's inability to find intentional discrimination in *Griggs* can bolster the argument that disparate impact is needed because of the challenging task of proving an employer acted with discriminatory intent. The fact that the seemingly pretextual discrimination in *Griggs* can escape a finding of intentional conduct underscores a possible justification for disparate impact.[176]

b. How Disparate Impact Can Smoke Out Intentional Discrimination

Assuming that detecting intentional discrimination is a compelling purpose served by disparate impact, how might disparate impact smoke out such discrimination if it is hard to prove? Disparate impact can smoke out intentional discrimination through the requirements that an employer show business necessity and job relatedness[177] and use less adverse alternatives. When a plaintiff proves a prima facie case through a showing of disparity, the employer must demonstrate that the practice is consistent with business necessity and is job related.[178] Then, the plaintiff may rebut business necessity with evidence of the availability of alternatives that have less adverse impact.[179] Business necessity and job relatedness help to detect discrimination because if an employment practice lacks a significant relationship to job performance, one could doubt the legitimacy of the practice. The requirement that employers use less disparate alternatives contributes to the ability to smoke out intentional discrimination because availability of alternatives would refute the necessity of the practice. As explained in *Albemarle*, the employer's refusal to adopt an equally effective alternative that has a

176. *See* Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 318 (2009) (citing Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 290–91 (1997)) (stating the difficulty of proving intent).

177. The conjunctive requirements of both job relatedness and business necessity have puzzled scholars and commentators. *See, e.g.*, Michael Carvin, *Disparate Impact Claims under the New Title VII*, 68 NOTRE DAME L. REV. 1153, 1158 (1993). The requirement for both job relatedness and business necessity seems to be duplicative. As some have pointed out, it is difficult to imagine a selection criteria that is job related but not consistent with business necessity, or vice versa. *Id.*

178. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2008) (stating that upon the complaining party's demonstration of a disparate impact, an employer must show "that the challenged practice is job related" and "consistent with business necessity").

179. *See id.* § 2000e-2(k)(1)(A)(ii) (explaining that an employment practice is unlawful based on disparate impact if the complaining party makes a demonstration of available alternative employment practices and also demonstrates the employer's refusal to adopt such an alternative practice).

less disparate impact would be evidence of "pretextual" discrimination.[180]

In order for the requirements of disparate impact to aid in the disparate impact provision's ability to detect intentional discrimination, courts need to be clear as to the contours of business necessity and job relatedness. Concurrent with codifying disparate impact, Congress provided an interpretative memorandum as a guide to enforcing the business necessity and job relatedness requirements.[181] The memorandum instructed that business necessity and job relatedness would retain their definitions in *Griggs* and the cases before *Wards Cove*.[182] The memorandum, however, provided little clarity because there was no settled understanding of business necessity and job relatedness in *Griggs* or subsequent cases.

In *Griggs* alone, the Court articulated several definitions for business necessity: Employers must show that their practices are "related to job performance,"[183] "have a manifest relationship to the employment in question,"[184] "are a reasonable measure of job performance,"[185] and "measure the person for the job and not the person in the abstract."[186] Because the Supreme Court has not decided a disparate impact case under Title VII since the codification of disparate impact in the Civil Rights Act of 1991,[187] its indirection throughout the development of disparate impact has resulted in varying interpretations by the lower courts.

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180. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) ("Such a showing would be evidence that the employer was using its tests merely as a 'pretext' for discrimination.").

181. *See* 137 CONG. REC. 30630, 30662 (1991) (stating that the purpose of the legislation was to codify the definitions of "business necessity" and "job related" according to the Supreme Court's decision in *Griggs v. Duke Power Co.*, which determined that an employment practice that merely relates to a legitimate business purpose or serves the employer's legitimate business goals will not exculpate the employer under the disparate impact provision (citing Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971)).

182. *Id.* Congress was unable to agree on a statutory definition of "business necessity." *See* Hugh Davis Graham, *The Act and the American Regulatory State*, *in* LEGACIES OF THE 1964 CIVIL RIGHTS ACT 59 (Bernard Grofman ed., 2000). As a result, Congress accompanied the Act with contradictory memoranda from various congressional leaders. *Id.* Among the memoranda published in the *Congressional Record* was Senator John Danforth's, which is cited as the exclusive source for the legislative history and intent concerning the burden of proof in disparate impact cases. *Id.* "This attempt within a statute to establish its own exclusive legislative history may [have been] unprecedented in the United States Code." *Id.* (citation omitted).

183. *Griggs*, 401 U.S. at 431.

184. *Id.* at 432.

185. *Id.* at 436.

186. *Id.*

187. William R. Corbett, *Fixing Employment Discrimination Law*, 62 SMU L. REV. 81, 100 (2009).

The varying formulations of the disparate impact requirements include the following:

> (1) [R]equiring proof of either job-relatedness or necessity, or failing to distinguish between the two; (2) . . . requiring absolute necessity; and (3) . . . requiring reasonable necessity, including cases where the reasonableness of an employment criteria is determined on a sliding scale depending upon the nature of the employment and risks involved.[188]

According to one commentator, the most rigorous standard requires that an employer substantiates a business necessity through showing "minimum qualifications that are necessary to perform the job in question successfully."[189] Another commentator regards the strict necessity standard to be the most arduous for employers.[190] The most lax standard requires only that an employment practice "serves, in a significant way, the legitimate employment goals of the employer."[191]

The selection of a particular formulation over another will bear on the ability of disparate impact to smoke out intentional discrimination. Thus, without an agreement as to a unified formulation of the disparate impact requirements, it is difficult to assess the effectiveness of disparate impact as a detection device for intentional discrimination.

c. Problems with the "Smoking Out" Discrimination Rationale

i. Disparate Impact Is Not More Difficult to Prove than Intentional Discrimination

One justification for disparate impact is that it is needed to smoke out intentional discrimination because such discrimination is difficult to prove. But if this is not the case, then the compelling interest for the racial classification in disparate impact is greatly diminished. Disparate impact is presumed to be easier to prove than intentional

188. Rosemary Alito, *Disparate Impact Discrimination under the 1991 Civil Rights Act*, 45 RUTGERS L. REV. 1011, 1029–30 (1993).

189. Corbett, *supra* note 187, at 114–15 (citing Lanning v. Se. Pa. Transp. Auth., 181 F.3d 478, 490 (3d Cir. 1999)).

190. Spiropoulos, *supra* note 169, at 1543.

191. Corbett, *supra* note 187, at 114 (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989)).

discrimination[192] because a prima facie case of disparate impact rests merely on showing a disproportionately adverse effect.[193]

One study, however, has shown that disparate impact claims, contrary to popular assumptions, are more difficult to prove than disparate treatment claims.[194] One explanation for the difficulty in proving disparate impact claims is that the business necessity defense poses a significant obstacle for plaintiffs[195] due to the deference that courts give to employers when evaluating business necessity.[196] Additionally, disparate impact claims appear to have little success outside of the context of written tests.[197] Finally, "many successful disparate impact claims also succeeded under a disparate treatment approach,[198] thus rendering the disparate impact theory largely superfluous."[199] If disparate impact is not easier to prove, then this undermines the "smoking out theory": intentional discrimination need not be smoked out if it is easier to prove than disparate impact. Therefore, this could eliminate "smoking out" intentional discrimination as one possible compelling interest served by disparate impact.

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192. Selmi, *supra* note 43, at 734 ("[O]ne of the central attractions to disparate impact claims is the perception that they are easier to prove than claims of intentional discrimination . . . . In reality, however, the opposite is true: Disparate impact claims are more difficult to prove than standard intentional discrimination claims.").

193. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2008) (explaining that a complaining party can demonstrate a disproportionately adverse effect by showing that use of a particular employment practice causes a disparate impact on the basis of race, color, religion, sex, or national origin, and that the challenged practice is unrelated for the position in question or consistent with business necessity).

194. Selmi, *supra* note 43, at 734.

195. *See id.* at 749 ("The expectation that these [disparate impact] claims would be easier to establish than intentional discrimination claims rests entirely on the first part of the theory regarding the prima facie case of discrimination, but ignores the business necessity prong, which has always proved the greater hurdle.").

196. *See* Jennifer L. Peresie, *Toward a Coherent Test for Disparate Impact Discrimination*, 84 IND. L.J. 773, 778 (2009) ("[B]usiness necessity [is] a standard which is rather deferential to employers.").

197. *See* Selmi, *supra* note 43, at 753–57 (arguing that written tests and their inherent shortfalls remain prevalent because there has been very little development or progress in the ability to predict academic or employment potential).

198. *See* Rutherglen, *supra* note 172, at 1331 (suggesting that *Griggs* "could equally well have been the subject of a claim of disparate treatment").

199. Selmi, *supra* note 43, at 742.

ii. Disparate Impact as an Alternative Method of Proving Disparate Treatment

It is appealing to treat disparate impact as another method of proving intentional discrimination or disparate treatment.[200] The problem with this theory, however, is that it "does not offer any real constraints . . . . After all, the courts could scarcely invoke disparate impact any time they suspected a trial court's or jury's findings of no intent to discriminate were incorrect."[201] Another limitation to treating disparate impact as an evidentiary tool to identify intentional discrimination is Justice Scalia's criticism that "the disparate-impact provisions sweep too broadly to be fairly characterized in such a fashion—since they fail to provide an affirmative defense for good-faith (*i.e.*, nonracially motivated) conduct, or perhaps even for good faith plus hiring standards that are entirely reasonable."[202]

Also, if Congress had intended for disparate impact to provide an alternative method of establishing intentional discrimination, then the remedies for disparate impact would mirror those of disparate treatment. This, however, is not the case: the remedies for disparate impact are more limited than for disparate treatment. For example, compensatory and punitive damages are not available for disparate impact cases. Section 102 of the Civil Rights Act of 1991 provides that a plaintiff may recover compensatory and punitive damages for claims of "unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact)."[203] Additionally, the burdens of

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200. The modes of proof for disparate treatment include "(1) direct vs. indirect modes of proof; (2) individual vs. pattern and practice cases or class actions; and (3) single motive vs. mixed motives cases." Ann C. McGinley, *¡Viva La Evolución!: Recognizing Unconscious Motive In Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 448 (2000). *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804–05 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981), provided an indirect method of proving intent for individual cases. *Teamsters v. United States*, 431 U.S. 324, 334–43 (1977), developed a method of proof for cases involving a pattern or practice of discrimination. *Price Waterhouse v. Hopkins* addressed the issue of mixed motives. 490 U.S. 228, 241 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071 (codified at 42 U.S.C. § 1981(a)), *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

201. Sullivan, *supra* note 43, at 1522.

202. Ricci v. DeStefano, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring).

203. Pub. L. No. 102-166, § 102, 105 Stat. 1071 (codified at 42 U.S.C. § 1981(a)); *see also* Penn Lerblance, *Introducing the Americans with Disabilities Act: Promises and Challenges*, 27 U.S.F. L. REV. 149, 157 (1992) ("The equitable remedies for employment discrimination available under Title VII and the ADA were expanded in cases of intentional discrimination (not disparate impact cases) by the Civil Rights Act of 1991 to include compensatory and punitive damages and the right to a jury trial. Compensatory damages include future pecuniary losses, emotional pain, suffering, inconvenience, loss of enjoyment of life, and other non-pecuniary

production and proof differ for disparate treatment and disparate impact. These differences suggest that "disparate impact is not merely a surrogate proof method for intentional discrimination, but instead is a distinct theory aimed more broadly at practices that disproportionately burden protected groups, whether or not intent to discriminate is present."[204]

2. Implicit Bias

Another possible defense for Title VII's disparate impact provision against an Equal Protection challenge is that it serves a compelling interest by remedying unconscious or implicit bias. Unconscious or implicit bias is bias that occurs subconsciously, beyond our awareness and control.[205]

This section describes the science of implicit social cognition, which studies subconscious mental processes and the results of implicit bias research. After a discussion of the implications of implicit bias in the workplace and the magnitude and pervasiveness of implicit bias, this section explains why disparate impact might be needed to remedy implicit bias. Additionally, this section examines the reliability of implicit bias research and whether disparate impact can serve to correct implicit bias. Finally, this section concludes that disparate impact's reliance on racial classifications to correct implicit bias does not serve a compelling interest because of the inconclusive results of implicit bias studies and contradictory interpretations of those studies.

a. The Science of Implicit Social Cognition

Studies show that bias occurs without our awareness. The science of implicit social cognition "examines those mental processes that operate without conscious awareness or conscious control but nevertheless influence fundamental evaluations of individuals and groups."[206] Implicit social cognition science describes stereotypes and biases as a result of human cognitive processing that categorizes persons and experiences in order to make sense of the information encountered

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losses. Punitive damages are authorized if the employer acted with malice or with reckless indifference.").

204. Sullivan, *supra* note 43, at 1524.

205. *See* Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 337 (1987) (noting that hidden prejudice has become the prevalent form of racism as society increasingly rejects racial prejudice as immoral and unproductive).

206. Jerry Kang & Mahzarin R. Banaji, *Symposium on Behavioral Realism: Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1064 (2006).

daily.[207] Professor Linda Hamilton Krieger explains, "Categories and categorization permit us to identify objects, make predictions about the future, infer the existence of unobservable traits or properties, and attribute the causation of events. . . . Categories are guardians against complexity."[208] As Professor Charles Lawrence first brought to light in his seminal work, stereotypes and biases are the result of the normal process of categorization that takes place at the subconscious level.[209] The cognitive bias theory posits that biases[210] are cognitive, not motivational, and occur without our self-awareness. Consequently, biases can be "both unintentional and unconscious."[211]

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207. McGinley, *supra* note 200, at 423.

208. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1189 (1995).

209. *See* Lawrence, *supra* note 205, at 337 ("Cognitivists see the process of 'categorization' as one common source of racial and other stereotypes. All humans tend to categorize in order to make sense of experience. Too many events occur daily for us to deal successfully with each one on an individual basis; we must categorize in order to cope."); *see also* Krieger, *supra* note 208, at 1188 ("To function at all, we must design strategies for simplifying the perceptual environment and acting on less-than-perfect information. A major way we accomplish both goals is by creating categories.").

210. Implicit bias or cognitive bias theory originates from the science of implicit social cognition. To aid the exploration of this theory, it is necessary to set out a few definitions.

> The terms "stereotyping," "prejudice," and "discrimination," as used in psychology, refer to different aspects of category-based reactions to people from groups perceived to differ significantly from one's own. Stereotyping is generally understood as the cognitive component of these category-based reactions: the part arising from and relating to the thought process, by which we process information and assign meaning to experience. Prejudice is a term with a fairly broad range of meanings; as used in the social-psychological literature, it can refer either to a subject's immediate emotional response to a target group (e.g., pity, anger, fear), or to the attitudes or beliefs that result from this response (e.g., contempt, inferiority). [Prejudice] refer[s] to the affective, or emotional, component of these reactions: how one feels about a member of a different group, or about that group generally. In order to distinguish between the two potential meanings, [bias] refer[s] to the attitudes and beliefs that result from affective prejudice . . . . Discrimination refers to how people implement their stereotypic thoughts and prejudicial feelings in dealing with members of different groups: refusing to hire them, marry them, speak to them, etc.

Elizabeth E. Theran, *"Free to Be Arbitrary and . . . Capricious": Weight-Based Discrimination and the Logic of American Antidiscrimination Law*, 11 CORNELL J. L. & PUB. POL'Y 113, 116–17 (2001) (alteration in original). For other definitions of "bias," "prejudice," and "discrimination," see Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1035–40 (2006).

Additionally, it is helpful to understand the distinction between motive and intent: "Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted." Krieger, *supra* note 208, at 1171 (citing Burlew v. Eaton Corp., 869 F.2d 1063, 1066 (7th Cir. 1989)).

211. Krieger, *supra* note 208, at 1188. For additional discussion of implicit bias, see Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477 (2007) [hereinafter Bagenstos, *Implicit Bias*]; Samuel R. Bagenstos, *The Structural Turn and*

The study of social implicit cognition has broad implications when applied to employment. Employers operating on biases are "not necessarily withholding their 'true' attitudes and beliefs but rather . . . they are unable to know the contents of their mind."[212] If people are unaware of their biases, then discrimination resulting from cognitive biases can occur in the workplace without the decision maker's awareness.

Professor Jerry Kang points out that "the presence of implicit bias can produce discrimination by causing the very basis of evaluation, merit, to be mismeasured."[213] For example, in one study by the Civil Rights Investigations Project of the Legal Assistance Foundation of Metropolitan Chicago, resumes of applicants with equivalent qualifications and experience were sent to employers who had posted job openings.[214] The applicants were African-American and Caucasian females; the race of the applicants was easily discernable from their names and addresses that were provided on the resumes.[215] The results showed that Caucasian applicants were 21% more likely to be contacted for an interview than their African-American counterparts.[216] In another component of the same study, when African-American applicants with stronger qualifications applied in person, the Caucasian applicants were 16% more likely to be offered the position.[217] Additionally, the study showed differences in the wages being offered. The employers offered Caucasian applicants an average of thirty-six hours of work a week, which amounted to $16,600 per year, whereas the African-American applicants received offers for twenty-eight hours per week, amounting to $12,900 per year.[218] This study illustrates the

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the Limits of Antidiscrimination Law, 94 CALIF. L. REV. 1 (2006) [hereinafter Bagenstos, *Structural Turn*]; Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969 (2006); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Kang & Banaji, *supra* note 206, at 1063; Lawrence, *supra* note 205; McGinley, *supra* note 200, at 417–18; Mitchell & Tetlock, *supra* note 210.

212. Kang & Banaji, *supra* note 206, at 1071.

213. *Id.* at 1066.

214. Michael L. Foreman et al., *The Continuing Relevance of Race-Conscious Remedies and Programs in Integrating the Nation's Workforce*, 22 HOFSTRA LAB. & EMP. L.J. 81, 87 & n.26 (2004) (citing LEEANN LODDER ET AL., CHI. URB. LEAGUE, RACIAL PREFERENCE AND SUBURBAN EMPLOYMENT OPPORTUNITIES 2 (2003)). Similar research conducted in Boston and Chicago by Marianne Bertrand and Sendhil Mullainathan revealed similar biases for the Caucasian applicants. Kang, *supra* note 211, at 1515–16.

215. Foreman, *supra* note 214, at 87.

216. *Id.*

217. *Id.*

218. *Id.*

effects of discrimination on the "mismeasurement" of qualifications and merit.

The susceptibility to unconscious bias reaches beyond employers, though employers are most relevant to the present discussion. The Implicit Association Test ("IAT") demonstrated that the magnitude and pervasiveness of bias[219] reach all groups. The IAT measured "group-valence and group-trait associations that underlie attitudes and stereotypes."[220] Since the availability of the IAT in 1998[221] for the public to self-administer via the Internet,[222] researchers have collected data from over three million tests from individuals who have visited the IAT website.[223] The studies measured the extent of participants' unconsciously-held biases against outwardly-expressed biases that they self-reported. The IAT showed that not only did people have an implicit bias against traditionally disadvantaged groups,[224] but also that they have greater implicit bias in favor of the advantaged group.[225] Americans held implicit biases against "Blacks, Latinos, Jews, Asians, non-Americans, women, gays, and the elderly."[226] Additionally, this implicit bias against socially disadvantaged groups was not limited to Americans but extended to populations in other countries.[227] In sum, the IAT revealed that regardless of their race or where they live, people are unaware of their preference for or against a particular social group.

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219. Greenwald & Krieger, *supra* note 211, at 966 (concluding the "pervasiveness of implicit bias . . . was clearly demonstrated by the data").

220. *Id.* at 952.

221. *Id.* at 955.

222. The IAT can be taken at https://implicit.harvard.edu/implicit/ (last visited Oct. 25, 2010).

223. Kang & Banaji, *supra* note 206, at 1072.

224. The "disadvantaged" groups consisted of the following categories: "African-American[s]," "Asians," "Canadian[s]," those from "foreign places," "gay people," "Muslims," "old people," the "poor," "fat people," and those from "Japan." Greenwald & Krieger, *supra* note 211, at 957.

225. *Id.* at 955. Professor Kang describes numerous other fascinating studies, such as the math test, shooter bias test, and resume test, that all indicate implicit bias. Kang, *supra* note 211, at 1515–29.

226. Kang, *supra* note 211, at 1512.

227. *Id.*

Specifically, the Race IAT[228] found a significant discrepancy between the amount of preference people openly acknowledged for certain racial groups through surveys and the implicit bias they unconsciously held.[229] A central finding in these studies is that most people were implicitly biased in favor of European-Americans over African-Americans.[230] Only among African-Americans was there an equal implicit bias for European-Americans and African-Americans alike.[231] Strikingly, the IAT showed that even among African-Americans, there is significant lack of awareness of their own favoritism toward European-Americans despite their outward expressions of preference for their own race.[232]

What are the implications of the IAT for real world behavior? Some scholars conclude that "implicit bias plays a causal role in discrimination"[233] and implicit bias measured by the IAT is predictive of discriminatory behavior.[234]

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228. In the Race IAT, the program presents faces for the participants to identify as European-American or African-American. Next, participants identify which among the words presented are pleasant-meaning, as opposed to unpleasant-meaning. Then, the participant distinguishes among the categories in random order. The participant is instructed to respond by pressing a particular key when African-American faces or pleasant words appear, and to press another key when European-American faces or unpleasant words appear. This same exercise is completed for European-American faces and pleasant words, which requires pressing a different key than when the participant sees African-American faces or unpleasant words. Greenwald & Krieger, *supra* note 211, at 952–53. The IAT measures the speed of the responses. The speed with which a person responds to a particular pairing (e.g., European-American with pleasant words) shows the strength of preference for that association. The Race IAT shows a quicker response time among American participants when European-American faces are paired with pleasant words, indicating a stronger association than when African-American faces are paired with pleasant words. *Id.* at 953.

229. Approximately 40% of Caucasian participants outwardly expressed a preference in favor of European-Americans, but the IAT showed that 71.5% of Caucasians actually held an implicit bias in favor of European-Americans. *Id.* at 958.

230. *See id.* (highlighting that 60.5% of Hispanics and 67.5% of Asian and Pacific Islanders held an implicit bias toward European-Americans).

231. *See id.* (showing that 34.1% of African-Americans implicitly favored other African-Americans, while 32.4% held an implicit bias in favor of European-Americans).

232. The IAT revealed that the implicit bias of African-Americans in favor of European-Americans was significantly higher than explicitly reported on surveys. Only 4.8% of African-Americans explicitly reported being favorably biased in favor of European-Americans, but the IAT showed 32.4% of African-Americans were biased in favor of European-Americans. *Id.*

233. *Id.* at 966.

234. *See id.* (noting there is a substantial and actively accumulating body of evidence that supports this assertion); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1034 (2006) (explaining how subtle forms of bias "can latently distort" information on which employment decisions are based); Kang, *supra* note 211, at 1514 (asserting that the IAT accurately predicts disparate behavior even when one explicitly self-reports a commitment to racial equality).

b. Disparate Impact as a Remedy for Implicit Bias

If implicit bias results in discrimination, one compelling interest for the disparate impact provision's racial classifications may be its ability to correct implicit bias. Disparate impact is needed because disparate treatment is inadequate to address implicit bias. Disparate treatment's ability to remedy implicit bias is theoretically and practically limited by its centering liability on intent.[235] A focus on employer intent[236]—the state of mind of the employer when the discriminatory act is done—presumes that employers are cognizant of their discrimination.[237] *Price Waterhouse v. Hopkins*[238] is illustrative of this presumption. In this sex discrimination case, the Court evaluated the sufficiency of the evidence in establishing that sexual stereotyping played a role in the employer's evaluation of the employee's candidacy for partnership. Justice Brennan stated:

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235. The Court in *Watson* recognized the limitation of disparate treatment. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988) ("[E]ven if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain."). Many scholars have also noted this limitation of disparate treatment as a remedy for employers' implicit bias. *See, e.g.*, Green, *supra* note 39, at 119 ("[J]udicial responses in the individual disparate treatment context illustrate the inadequacy of a conception of discrimination that focuses on a particular decisionmaker's state of mind at a discrete point in time to address the subtle, ongoing operation of discriminatory bias common in the modern workplace."); Krieger, *supra* note 208, at 1213 (explaining that *Wilson v. Stroh*, 9 F.2d 942 (6th Cir.1992), illustrates this shortfall, because although the plaintiff proved that his immediate supervisor's conduct was motivated by racial animus, he could not prove that the ultimate decisionmaker was racially motivated, and therefore lost); Lawrence, *supra* note 205, at 322 ("Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes."); McGinley, *supra* note 200, at 417–18 (cautioning against how oversimplifying the definition of intent distorts the current nature of prejudice and how it results in discriminatory behavior).

236. Some courts have applied a strict interpretation of intent: "Discrimination is about actual knowledge, and real intent, not constructive knowledge and assumed intent." Silvera v. Orange Cnty. Sch. Bd., 244 F.3d 1253, 1262 (11th Cir. 2001) (citing Brungart v. BellSouth Telecomms., Inc., 231 F.3d 791, 800 (11th Cir. 2000)); *see also* Pressley v. Haeger, 977 F.2d 295, 297 (7th Cir. 1992) ("Racial discrimination is an intentional wrong. An empty head means no discrimination. There is no 'constructive intent,' and constructive knowledge does not show actual intent.").

237. Professor Charles Lawrence points out that "[b]y insisting that a blameworthy perpetrator be found before the existence of racial discrimination can be acknowledged, the Court creates an imaginary world where discrimination does not exist unless it was consciously intended." Lawrence, *supra* note 205, at 324–25; *see also* Krieger, *supra* note 208, at 1213 ("Decisionmaking is not . . . structurally disjoined from those perceptual and inferential processes which compromise it.").

238. 490 U.S. 228, 250 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071 (codified at 42 U.S.C. § 1981(a)).

> In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman. In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.[239]

The Court conceptualized a framework for disparate treatment liability that rests not just on showing that an employer treated an employee differently, but that the employer took such actions because of the employee's race or other traits—in other words, that the employer was aware of its own motives. If, according to social cognition studies, people are unconscious of their biases when they act, it would be difficult to use employer intent as a method of counteracting implicit bias.[240]

On the other hand, disparate impact is not restrained by intent and may be a more appropriate mechanism for correcting the discriminatory effects of implicit bias. One way disparate impact may mute the effects of implicit bias is by increasing diversity within the workforce. Some studies support the conclusion that the level of implicit bias may be reduced by diversity.[241] The evidence shows that implicit bias can be affected merely by exposing an IAT participant to another person of a different race in the room.[242] In one study, IAT participants took the test with an African-American experimenter in the room and took the test at another time with a Caucasian experimenter in the room.[243] The presence of the African-American experimenter rather than the Caucasian experimenter reduced the level of implicit bias.[244] Another study measured the effect of pairing test takers with different racial partners.[245] Caucasian IAT participants who were paired with an African-American partner showed less implicit bias than when paired

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239. *Id.*

240. Professor David Oppenheimer has proposed a theory of negligent discrimination for employer liability resulting from unconscious stereotyping. *See generally* David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993) (proposing that an employer would be held liable under the negligent supervision theory for failing to take reasonable steps to prevent discrimination, knowing or having reason to know it is occurring, or expecting it or having reason to expect it to occur).

241. *See* Jolls & Sunstein, *supra* note 211, at 981 (specifying that presence of population diversity in an environment will reduce the implict bias).

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

with a Caucasian partner.[246] This body of evidence from the IAT supports the inference that diversity in the workplace might similarly reduce the level of implicit bias.

c. Problems with the Rationale that Disparate Impact Can Remedy Implicit Bias

Disparate impact must overcome several hurdles to justify its use of racial classifications as a remedy for implicit bias. First, studies about implicit bias are not conclusive because there are doubts about the validity of the IAT and the effectiveness of disparate impact to address implicit bias. The IAT is played out like a tennis match in the scholarly arena where scholars lob the IAT results back and forth. Some scholars are persuaded by the findings of the IAT, while others like Professors Gregory Mitchell and Philip Tetlock challenge the construct and the internal and external validity of the IAT, as well as the interpretations of IAT results.[247] Professors Mitchell and Tetlock argue that "[t]he explicit measures of prejudice used in most construct validation studies are themselves politically controversial—and open to alternative explanations. For instance, measures of modern, symbolic, and aversive racism often include items that could easily serve as measures of ideological conservatism, traditional values, and the Protestant work ethic."[248] A high IAT score can be explained as reflecting empathy for a social group, performance anxiety of being characterized racist, or awareness of social stereotypes, rather than inwardly held animus.[249] Differences in IAT scores may also be the result of mental flexibility in adapting to the changes in testing instructions and hand-eye coordination.[250] Mitchell and Tetlock caution against making conclusions about IAT scores based on differences of milliseconds.[251] They point out that while studies have confirmed a correlation between implicit bias and "micro-level" behaviors, such as body language and facial expressions, few can link implicit bias with "macro-level" behaviors such as engaging in discriminatory employment practices.[252]

On the other hand, notwithstanding "some effective points" made by Mitchell and Tetlock, Professor Samuel Bagenstos finds redeeming

246. *Id.*
247. Mitchell & Tetlock, *supra* note 210, at 1031–34.
248. *Id.* at 1064.
249. *Id.* at 1031.
250. *Id.* at 1089–90.
251. *Id.* at 1046–47.
252. *Id.* at 1051.

arguments for applying discrimination law to implicit bias.[253] Professor Bagenstos explains, "Although they ostensibly attack the 'science' of implicit bias research, Mitchell and Tetlock's real target is the normative view of antidiscrimination law as reaching beyond acts reflecting individual fault of the discriminator."[254] Professor Bagenstos concludes that regardless of what implicit bias truly reflects, whether animus or empathy or other explanations, the consequence is that it limits opportunities for racial groups.[255] He argues, "The point of antidiscrimination law, however, is not to identify and punish prejudice as an inherent personal quality. The point is to prevent and provide remedies for conduct that deprive minorities of opportunities."[256]

Consistent with Professor Bagenstos's recommendation that conduct that limits opportunities for racial groups should be prevented, some scholars suggest remedies for implicit bias such as removing stereotype threats, increasing self-awareness of implicit biases, cloaking social categories, and employing debiasing agents.[257] Stereotype threat is the phenomenon that occurs when people who belong to social groups with negative stereotypes about particular capabilities underperform when they are reminded of their group identity.[258] For example, in one experiment, researchers gave a verbal test to African-American and Caucasian participants.[259] When the participants were told that the test measured their intellectual capabilities, the African-American participants underperformed compared with the Caucasian participants.[260] With another group of participants, the researchers told them that the test was merely a laboratory task.[261] In this situation, there was no significant difference between performance of the Caucasian and African-American participants.[262] Studies on stereotype threats showed that this phenomenon negatively affected the performance of African-Americans on intellectual tests, women on math tests, the elderly on memory tests, and people of low socio-economic status on verbal tests.[263] Cloaking social categories involves the

253. Bagenstos, *Implicit Bias*, *supra* note 211, at 479.
254. *Id.* at 480–81.
255. *Id.* at 485.
256. *Id.* at 487.
257. Kang & Banaji, *supra* note 206, at 1101–15.
258. *Id.* at 1087.
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.* at 1088.

removal of any identification of social group membership, such as names and pictures.[264] A debiasing agent is a person who helps to break down racial stereotypes[265] by having characteristics counter to the stereotypes associated with the person's social group membership: "women construction workers, male nurses, Black intellectuals, White janitors, Asian CEOs, gay boxers, and elderly marathon runners."[266]

However, while these strategies may combat implicit bias, it remains to be seen how they relate to disparate impact. Disparate impact does not rely on these strategies. In fact, even if an employer were to utilize all these strategies, an employer could still be at risk for disparate impact liability. For example, if an employer eliminates stereotype threats and cloaks social categories by removing the test taker's identity on an employment test, an employer would find itself defending against a disparate impact suit if the test results had a disproportionately adverse effect on a racial group. This, therefore, leads to the question, how does disparate impact mitigate implicit bias? In the prior hypothetical, it seems that disparate impact would not serve the purpose of detecting bias. If detecting and mitigating implicit bias were to be a compelling purpose for disparate impact, it is necessary to first show the relationship between implicit bias and unconscious discriminatory acts and then show how disparate impact can be utilized to correct implicit bias. The studies do not provide a definitive answer.

Additionally, others have found that disparate impact is theoretically and practically flawed as a device to provide adequate relief against bias in the workplace[267] and opportunities for minorities. Professor Tristin Green explains, "[D]isparate impact theory conceptualizes discrimination solely at the institutional level, neglecting an exploration of the interplay between institutional choices and the operation of discriminatory bias in individuals and groups at multiple levels of interaction in the workplace."[268] The failure of disparate impact theory, according to Professor Green, results from focusing on a "purely structural account of discrimination," rather than on how the structure, systems, and dynamics of institutions contribute to discriminatory bias.[269]

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264. *Id.* at 1093.
265. *Id.* at 1112.
266. *Id.* at 1109.
267. Green, *supra* note 39, at 136.
268. *Id.* at 138.
269. *Id.*

d. Summary

The ambivalence among scholars about the validity of implicit bias tests, the interpretations of that research, and the role of disparate impact in providing relief for implicit bias are problematic to defending use of racial classification in disparate impact to combat unconscious bias. Operating on the assumption that disparate impact relies on racial classification, the Supreme Court is unlikely to sustain the use of a "highly suspect tool" such as racial classification without conclusive evidence that it serves a compelling purpose.[270] The inconclusive nature of the research may be the Achilles' heel to justifying the use of disparate impact to mitigate implicit bias as a compelling interest.

Additionally, the Court is unlikely to respond to using antidiscrimination law to redress unconscious bias in which everyone engages. Professor Bagenstos points out:

> If antidiscrimination law is to respond to such bias effectively, the concept of wrongful discrimination must expand to embrace not only the deviant acts of especially immoral people but also the everyday actions of virtually all of us. In the end, because implicit biases draw on widely shared cultural understandings, any effort to eliminate those biases requires a massive, society-wide effort to change the significance of race and gender in our culture. Courts are likely to balk at undertaking such a colossal task; they are particularly unlikely to conclude that particular employers are at fault for failing to police conduct that has been programmed into our brains by overarching societal influences.[271]

C. Diversity

Another rationale for the disparate impact provision's use of racial classifications is that it is necessary to attain a diverse workforce. This

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270. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1989) (striking down the city's Minority Business Utilization Plan because the city failed to demonstrate a compelling governmental interest justifying the plan, which was not narrowly tailored to remedy the effects of prior discrimination).

271. Bagenstos, *Structural Turn*, *supra* note 211, at 42–43. Additionally, Professor Barbara Flagg points out:

> To hold both unconscious and conscious race discrimination equally blameworthy is also unlikely to produce desirable consequences. First, blaming individuals for unconsciously held attitudes may produce paralyzing guilt when the racist character of those attitudes comes to light. Furthermore, condemning the individual for matters not within his conscious control seems inconsistent with the very concept of blameworthiness. Finally, assessing blame for what, in effect, nearly every white person does seems equally incongruous.

Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 989 (1993).

section explores the contexts in which achieving diversity is compelling and if that rationale can be extended to employment. Specifically, this section discusses the Supreme Court's response to the diversity rationale, benefits of diversity, and limitations of the diversity rationale to the workplace.

1. Diversity Rationale Recognized by the Supreme Court

a. *Bakke*

Diversity was first recognized as a compelling interest in *Bakke*.[272] In *Bakke*, Justice Powell, who announced the judgment,[273] considered several justifications made by the school for its racially-based admissions quota. First, the school asserted that the purpose of its admissions policy was to "reduc[e] the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession," but Justice Powell rejected this as impermissible racial balancing that would unnecessarily burden innocent parties.[274] When the school defended its program on the interest of "increasing the number of physicians who will practice in communities underserved," Justice Powell also rejected this assertion due to the lack of evidence that the program was designed to advance that interest. Finally, the Court approved the school's racial classification for the purpose of "obtaining the educational benefits that flow from an ethnically diverse student body."[275] Justice Powell's approval of the "attainment of a diverse student body" was premised on the academic freedom of institutions of higher education, which has been traditionally understood to be protected by the First Amendment.[276] The Court espoused the view that the "'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of

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272. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311 (1978) (plurality opinion).

273. The *Grutter* Court observed:

> The [*Bakke*] decision produced six separate opinions, none of which commanded a majority of the Court. Four Justices would have upheld the program against all attack on the ground that the government can use race to "remedy disadvantages cast on minorities by past racial prejudice." Four other Justices avoided the constitutional question altogether and struck down the program on statutory grounds.

Grutter v. Bollinger, 539 U.S. 306, 322 (2003) (reflecting upon the divided opinions of the *Bakke* Court).

274. *Id.* at 323–24 (citing *Bakke*, 438 U.S. at 306–07).

275. *Bakke*, 438 U.S. at 306.

276. *Id.* at 311–12.

many peoples"[277] and reasoned that the medical school's admissions program would promote a "robust exchange of ideas."[278]

b. *Grutter*

Following *Bakke*, *Grutter* reaffirmed that diversity could be a compelling interest.[279] In *Grutter*, the law school's justification for considering race in its admissions procedure was for the singular purpose of "obtaining 'the educational benefits that flow from a diverse student body.'"[280] The law school sought to enroll a "critical mass of underrepresented minority students."[281] The school did not define diversity solely based on race or ethnicity and allowed for consideration of other factors.[282]

In defining critical mass, the school stated that it did not focus on a particular number or percentage but on attaining "'meaningful numbers' or 'meaningful representation,' . . . a number that encourages underrepresented minority students to participate in the classroom and not feel isolated."[283] The purpose of attaining a diverse student body, as the law school explained, was not remedial, but to promote "cross-racial understanding [to help] break down racial stereotypes, . . . enable students to better understand persons of different races," and engender "livelier, more spirited, and simply more enlightening and interesting" classroom discussions.[284]

Grutter unequivocally repudiated the belief that only an interest in remedying past discrimination could survive strict scrutiny and held that an interest in attaining a diverse student body was a compelling purpose.[285] Although the Court employed strict scrutiny, it afforded the law school deference in the determination that diversity was necessary to the educational functions of the school[286]: "We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional

277. *Id.* at 313.

278. *Id.* The Court found that diversity was a compelling interest but invalidated the program because it was not narrowly tailored. *Id.* at 267.

279. *Grutter*, 539 U.S. at 328.

280. *Id.*

281. *Id.* at 316 (internal quotation marks and original alterations omitted).

282. *Id.*

283. *Id.* at 318 (internal quotation marks omitted).

284. *Id.* at 330 (internal quotation marks and original alterations omitted).

285. *Id.* at 328.

286. *Id.*

tradition."[287] The Court embraced the rationale previously stated in *Bakke* that, consistent with the First Amendment contours of academic freedom, a university's educational prerogatives include the "selection of its student body."[288] The Court summarized its reasoning as follows: "Our conclusion that the Law School has a compelling interest in a diverse student body is . . . at the heart of the Law School's proper institutional mission, and that 'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'"[289]

c. *Parents Involved*

Finally, in *Parents Involved*, the Court firmly established the boundaries of the diversity rationale previously embraced in *Grutter*. In *Parents Involved*, the Court rejected the school district's use of diversity as a compelling interest to justify the district's racially based method of school assignments. The district contended that assigning students to schools based on race "help[ed] to reduce racial concentration in schools and to ensure that racially concentrated housing patterns do not prevent nonwhite students from having access to the most desirable schools."[290] The "school district[s] argue[d] that educational and broader socialization benefits flow from a racially diverse learning environment, and . . . because the diversity they seek is racial diversity—not the broader diversity at issue in *Grutter*—it makes sense to promote that interest directly by relying on race alone."[291] The Court concluded, however, that the racially based assignments were not narrowly tailored to achieve the educational and social benefits sought by the districts because the "plans [were] tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits."[292]

2. The Benefits of Diversity

a. Intrinsic or Extrinsic Value of Diversity

In the three foregoing cases, the Court endorsed diversity as a compelling interest, with some limitations. But why is diversity important? Is diversity a thing of value in and of itself or merely an

287. *Id.* at 329.
288. *Id.* (internal quotation marks omitted).
289. *Id.*
290. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 725 (2007).
291. *Id.* at 725–26.
292. *Id.* at 726.

instrument that brings about favorable consequences?[293] These questions can be answered by considering a hypothetical. Assume that the students who were educated in the diverse environment at the law school in *Grutter* graduated and each decided to live as hermits on a secluded island in total isolation. The benefits of having cross-racial understanding and a robust exchange of ideas from their diverse education are of little use *to these students* as they live in seclusion. This example illustrates that diversity has extrinsic value, as opposed to unconditional, intrinsic value.[294] The compelling nature of diversity is reliant on how it can benefit the students' chosen profession or their societal interactions with others.[295] If students were to become hermits, the diverse education would be of little benefit to society. The value of diversity stems from its usefulness outside of the classroom; otherwise, diversity would be merely useful as an academic exercise at the university. Therefore, the value of diversity in the workplace must be evaluated at an extrinsic level.

b. Business Case for Diversity

A possible defense for the disparate impact provision is that its use of racial classification is necessary for obtaining the benefits flowing from diversity for public and private employers. Relying on "expert studies and reports," the *Grutter* Court concluded that "student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."[296] Additionally, the Court endorsed the concept that "[t]hese benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[297] The Court also accepted the assertions of military leaders that a "highly qualified,

293. *See* Patrick S. Shin, *Diversity v. Colorblindness*, 2009 BYU L. REV. 1175, 1188–89 (2009) (discussing that the social good flowing from racial diversity is not intrinsic or unconditional, but rather extrinsic, depending on the particular conditions and circumstances in which it is present).

294. *Id.*

295. *See* Pamela S. Karlan, *Compelling Interests/Compelling Institutions: Law Schools as Constitutional Litigants*, 54 UCLA L. REV. 1613, 1625 (2007) (pointing out the "concrete nature of the [*Grutter*] Court's discussion of the way that racially diverse student bodies contribute to the extrinsic function of producing members of leadership professions").

296. Grutter v. Bollinger, 539 U.S. 306, 330 (2003) (internal quotation marks omitted).

297. *Id.*

racially diverse officer corps is essential to the military's ability to fulfill its principle mission to provide national security."[298]

In Justice Scalia's dissent in *Grutter*, he pointed out that the benefits that the university sought through enrolling a diverse student population are "lesson[s] of life"[299] and that employers could equally insist on using racial classifications to teach these same civic lessons in "socialization and good citizenship" to their employees.[300] Although Justice Scalia was being ironic, the question of whether diversity could be equally compelling in the employment context is worth examining because the Supreme Court has not reviewed a case that advances diversity in an employment decision. *Taxman v. Board of Education of Township of Piscataway*[301] would have been the test case, but the parties settled months before oral arguments were scheduled before the Supreme Court.[302] The issue in *Taxman* centered on the school board invoking its affirmative action program to layoff a Caucasian teacher rather than an African-American teacher who was equal in seniority.[303] Although the statistics showed that African-Americans were not underrepresented in the school system's workforce,[304] the school board retained the African-American teacher because she was the only African-American teacher in the Business Education Department.[305] The school board justified its layoff decision based on cultural diversity:

> [The educational objective] was sending a very clear message that we feel that our staff should be culturally diverse, our student population is culturally diverse and there is a distinct advantage to students, to all students, to be made—come into contact with people of different cultures, different background, so that they are more aware, more tolerant, more accepting, more understanding of people of all background.[306]

Although the Supreme Court did not have an opportunity to review the *Taxman* case, the Third Circuit Court of Appeals rejected the diversity argument and held that Title VII only permits remedial programs.[307]

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298. *Id.* at 331 (original alteration omitted).
299. *Id.* at 347 (Scalia, J., joined by Thomas, J., dissenting in part and concurring in part).
300. *Id.* at 348.
301. 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117 (1997).
302. Foreman, *supra* note 214, at 98 nn.114–15.
303. *Taxman*, 91 F.3d at 1551.
304. *Id.* at 1550.
305. *Id.* at 1551.
306. *Id.* at 1552.
307. *Id.* at 1567.

Diversity has been touted by corporations for increasing productivity through the improvement of intra-office dynamics, facilitating unique problem solving approaches, and improving the delivery of services and development of products for a diverse customer base.[308] The following discussion will evaluate if the benefits attributable to diversity are applicable outside of the classrooms of higher education institutions and if there are any limitations to extending the diversity rationale to the employment context.

3. Critiquing the Diversity Rationale as Applied to Employment

a. Similarity to Racial Balancing

Advancing disparate impact as a method of promoting diversity may be vulnerable to an attack that it is an attempt to achieve racial balancing. The Court has reiterated that "racial balance is not to be achieved for its own sake."[309] In *Parents Involved*, the Court rejected any attempt to disguise racial balancing as racial diversity or racial integration: "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'"[310] Lower courts have similarly construed the objective of ameliorating under-representation as an effort to relabel racial balancing.[311]

Courts might suspect disparate impact as an effort to achieve racial balancing because of disparate impact's focus on racial proportions in the applicant pool. Disparate impact necessitates a comparison of the representative numbers among each racial group. In essence, application of the four-fifths rule means that there must be a representation in the smallest racial group of at least 80% of the largest racial group selected. The failure to attain this proportion in the

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308. *See* Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 682–83 (2004) (discussing affirmative action and the use of bona fide occupational qualifications in society and in law, focusing on policing, education, business, and voting rights); Bryan W. Leach, Note, *Race as Mission Critical: The Occupational Need Rationale in Military Affirmative Action and Beyond*, 113 YALE L.J. 1093, 1129 (2004) (surveying the various amicus filings in *Grutter* that concern the occupational benefits of racial diversity in a business environment).

309. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 729 (2007) (original alteration omitted) (citation omitted).

310. *Id.* at 732.

311. *See, e.g.*, Wessmann v. Gittens, 160 F.3d 790, 799 (1st Cir. 1998) ("Underrepresentation is merely racial balancing in disguise—another way of suggesting that there be optimal proportions for the representation of races and ethnic groups . . . .").

applicant pool subjects employers to defending against a prima facie case of disparate impact.

b. Limited to the Context of Higher Education

Another substantial hurdle for disparate impact is persuading the Court that considerations of diversity should be extended beyond higher education. As Justice O'Connor stated, "Context matters."[312] In *Parents Involved*, the Court emphasized that it upheld the use of racial classification in *Grutter* because of the unique circumstances of institutions of higher education.[313] In the Court's analysis, due to "the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."[314] Justice Roberts chastised the lower courts for disregarding the expressed limitation of the Court's holding "to the unique context of higher education" in *Grutter*.[315]

If elementary and secondary schools failed to persuade the Court to apply *Grutter* even within the educational context—albeit not higher education—it is not realistic to think that the Court will accept a diversity argument in the employment context. Additionally, in the employment context, there is no constitutional principle that must be counterbalanced with the prohibition against racial classification that would justify extending diversity beyond higher education. In the educational context, the Court articulated sensitivity to the First Amendment considerations unique to universities. No such unique considerations exist in the employment context. It is unlikely, therefore, that the Court will extend the diversity argument beyond the context of higher education.

At least one lower court has rejected an attempt to apply the diversity rationale outside the classroom. In *Lomack v. City of Newark*, the Third Circuit rejected the city's race-based transfers of firefighters for "creat[ing] a rainbow at each firehouse."[316] The city argued that integrating its fire companies led to increased camaraderie, sharing of information, and support.[317] The court found this argument

312. Grutter v. Bollinger, 539 U.S. 306, 327 (2003).

313. *Parents Involved*, 551 U.S. at 725.

314. *Id.* at 724 (quoting *Grutter*, 539 U.S. at 329).

315. *Id.* at 725 ("The Court in *Grutter* expressly articulated key limitations on its holding—defining a specific type of broad-based diversity and noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in extending *Grutter* to uphold race-based assignments in elementary and secondary schools.").

316. 463 F.3d 303, 305 (3d Cir. 2006).

317. *Id.* at 309.

unpersuasive because while the benefits attributable to diversity were important to the educational mission of academic institutions, they were not central to firefighting.[318]

c. Studies Provide Mixed Results Regarding Benefits of Diversity

Related to the issue of whether the diversity rationale can be extended beyond the higher education context is whether using diversity in the workplace produces benefits sufficient to justify the disparate impact provision's use of racial classifications. If the Court were to extend diversity beyond higher education, there must be a showing that the social good flowing from diversity that benefits education would also benefit businesses. The following discussion evaluates whether diversity in the workplace can increase efficiency and profits by enhancing inter-office cooperation and breaking down stereotypes.

i. Increasing Efficiency and Profits

Studies show mixed results about the benefits of diversity in the workplace.[319] Some studies find that diversity has a positive effect in the employment context.[320] Psychological research shows that heterogeneous groups offer more creative solutions to problems.[321]

On the other hand, other studies show that diversity has no effect—or worse, a negative effect—at work.[322] Research by the Massachusetts Institute of Technology's Sloan School of Management found that "racial and gender diversity do[es] not have the positive effect on performance proposed by those with a more optimistic view of the role diversity can play in organizations."[323] Some research suggested that

318. *Id.* at 310.

319. Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 84 & n.348 (2000).

320. Allan G. King & Jeremy W. Hawpe, Gratz *v.* Grutter*: Lessons for Pursuing Diversity in the Workplace*, 29 OKLA. CITY U. L. REV. 41, 59 (2004).

321. Steven A. Ramirez, *The New Cultural Diversity and Title VII*, 6 MICH. J. RACE & L. 127, 135 (2000).

322. In terms of national costs, studies show that the goal of advancing affirmative action has had a negative effect. *See* Jared M. Mellott, Note, *The Diversity Rationale for Affirmative Action in Employment After* Grutter*: The Case for Containment*, 48 WM. & MARY L. REV. 1091, 1155 n.335 (2006) (describing the study of two economists who estimated that "affirmative action caused businesses to lose $225 billion annually in direct, indirect, and opportunity costs" and another study that "estimate[d] that affirmative action in public contracting with private businesses cost the taxpayers approximately $2 billion in 2004, based on the higher bids submitted by minority subcontracting firms that primary contractors are induced to accept").

323. King & Hawpe, *supra* note 320, at 58 (quoting Thomas Kochan et al., *The Effect of Diversity on Business Performance: Report of the Diversity Research Network*, 42 HUM. RES. MGMT. 3, 17 (2003)).

whether diversity increases productivity depends on the group members buying in to the value of diversity.[324] If groups do not value diversity as enhancing their work, "diverse groups are less likely to benefit from their diversity and may even perform less well than homogeneous groups that do not have to negotiate the kinds of conflict and communication issues that often beset diverse groups."[325] While group diversity may broaden the "range of ideas considered and of alternatives generated,"[326] group diversity may also produce "lower levels of satisfaction and commitment, lower performance evaluations for those who are different, and high levels of absenteeism and turnover."[327] Overall, the research concluded that "diversity is most likely to impede group functioning."[328]

ii. Breaking Down Stereotypes

Additionally, research showed mixed results regarding whether diversity can break down stereotypes by increasing contact with individuals of different social groups. As described earlier, one study showed that when Caucasian IAT participants are paired with an African-American partner, or take the test with an African-American experimenter in the room, their implicit bias is reduced.[329]

Another study, however, showed an opposite result. In that study, participants played a video game in which the objective was to shoot persons who were armed with a gun.[330] The game flashed images of Caucasians or African-Americans; in these images, the persons were either holding a gun or a harmless object.[331] The participants more often shot the African-American, believing the person to be armed when he was not, and they more often failed to shoot the Caucasian whom they mistakenly believed was unarmed when he was actually armed.[332] Strikingly, both African-American and Caucasian participants had "shooter bias" against African-Americans, and the "shooter bias" was

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324. David B. Wilkins, Symposium: *Brown* at Fifty, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1587 (2004).

325. *Id.*

326. Estlund, *supra* note 319, at 27.

327. *Id.* at 28 (quoting Katherine Y. Williams & Charles A. O'Reilly III, *Demography and Diversity in Organizations: A Review of 40 Years of Research*, 20 RES. ORG. BEHAV. 77, 116 (1998) (internal citations omitted)).

328. *Id.* (quoting Williams & O'Reilly, *supra* note 327, at 120).

329. Jolls & Sunstein, *supra* note 211, at 981.

330. Kang & Banaji, *supra* note 206, at 1104.

331. *Id.*

332. *Id.*

correlated to contacts with African-Americans.[333] If the participants' self-reports are true about their amount of contact with African-Americans, then the study "shows that increased interracial contact produces a greater tendency to 'shoot' African-Americans."[334] Professors Kang and Banaji concluded that "research supports the value of intergroup contact to ameliorate negative attitudes (also called 'prejudice'). However, intergroup contact may not counteract negative stereotypes."[335] Thus, Professors Kang's and Banaji's conclusions about the "shooter bias" study[336] would appear to contradict the assumption that increased diversity would lead to decreased stereotypes. The contradictory results of the research on whether diversity increases productivity and reduces stereotypes undermine the argument for diversity as a compelling interest for disparate impact.

d. Benefits Accrue to Businesses, Not Individuals

Assuming arguendo that research supports the conclusion that diversity reduces stereotypes in the workplace and fosters interracial relations, one must pause to ask how that benefits the individual employee. While seemingly altruistic for advancing diversity, businesses support diversity not to promote the cause of civil rights, but to increase efficiency for the ultimate goal of increasing profits.[337] Professor David Wilkins points out, "[N]ot every diverse viewpoint is valued by corporate America. . . . Despite all the talk about fostering multiple viewpoints, managers are interested only in 'opinions about the best way to build or sell cars or whatever other good is being produced by the business.'"[338] Businesses may not encourage diverse ideas that are disruptive to maximizing the corporate bottom line, which in turn may cause minorities to withhold their diverse expressions. Consequently, this reinforces minorities' perceptions that their diversity matters little in the workforce.[339]

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333. *Id.*

334. *Id.*

335. *Id.* at 1105.

336. I rely on the studies as presented by other scholars. An independent determination of the reliability or validity of the studies is beyond my expertise and beyond the scope of this Article.

337. Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589, 1591 (2001) ("[K]ey proponents of the new managerial model—managers and management consultants—explicitly dissociate their efforts from civil rights law, arguing that diversity is directly valuable to organizational efficiency and important in its own right rather than because it might promote legal ideals.").

338. Wilkins, *supra* note 324, at 1587–88 (quoting Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573, 589 (2000)).

339. *See id.* (arguing that minorities with diverse viewpoints may not offer their divergent

In contrast, in the educational context, the social goods asserted as flowing from a diverse student population benefit the students directly. If diversity does in fact foster cross-racial understanding by breaking down racial stereotypes and promoting livelier and more enlightening discussions in the classroom, students are the recipients of those benefits. An argument can be made that the university is also the recipient of benefits flowing from a diverse student body. A diverse student body could improve the image of the school, which may impact financial contributions to the university, attract desirable faculty who might not otherwise consider working at the university, and attract employers to recruit at the university. However, even conceding that the university may be positively impacted from having a diverse student body, those benefits are directly transferable to the students. The ability to attract faculty and recruiters has a direct positive effect on students. Contributions to the school can result in improved resources for students and better facilities. Diversity is a compelling purpose in the educational context because it is centered on the individual. On the other hand, the rationale for increasing diversity in the workplace appears to be employer-centered and is contrary to the focus of the Equal Protection Clause and disparate impact provision on protecting individuals.[340] In the end, increasing corporate profit margins hardly seems compelling.

An argument, however, could be made that the benefits accruing to the employer, whether private or public, benefit the public at large. The contributions of diversity, such as enhancement of interracial group dynamics and creative thinking, help to improve the development of products and delivery of services to the public. But even conceding this argument, there is no direct benefit flowing to the diversity contributor; in this regard, minorities who contribute diversity benefits can be seen as a means to an end for public and private employers alike.

e. Leads to Stereotyping, Not Necessarily Viewpoint Diversity

Another concern with advancing diversity for the social good it generates is the risk of perpetuating stereotypes. Although diversity is extolled for its ability to break down stereotypes through increasing contact between diverse groups, it may actually lead to stereotyping. The law school in *Grutter* disavowed "its need for critical mass on 'any belief that minority students always (or even consistently) express some

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opinions for fear of being perceived as too diverse).

340. For a discussion relating to the protection intended by the Equal Protection Clause, see *supra* Part II.

characteristic minority viewpoint on any issue.'"[341] But the justification that classroom discussions are livelier and more interesting with a diverse group of students is premised on the notion, or even expectation, that minorities will have a different viewpoint, or at least different experiences, than nonminorities.

Professor Sanford Levinson offers a counter explanation:

> Race and ethnicity, . . . at least on occasion, may act as proxies, not so much for holding specific views, but for the probability of being deeply interested (and at least somewhat knowledgeable) at all in certain issues, i.e., those issues most germane to the group in question. . . . African-Americans are more likely to be concerned with the problems facing African-Americans—and, for that matter, more aware of the complexities and divisions within the group of those comprising the community of African-Americans—than are non-African-Americans.[342]

But this explanation also seems to be premised on a stereotype—the presumption that a person is more likely to be attuned to the matters concerning that individual's group.

A related concern is that the rationale for attaining critical mass of diverse employees is similar to the racial isolation justification. Critical mass, like the "racial isolation justification[,] is extremely suspect because it assumes that [individuals] cannot function or express themselves unless they are surrounded by sufficient number of persons of like race or ethnicity."[343] This discussion serves as a reminder that whether extolling diversity in the educational or employment context, one must proceed with caution to not perpetuate the very stereotypes that were intended to be mitigated.

f. Some Benefits of Robust Discussions Flowing from Diversity Apply Only to Particular Contexts

An additional impediment to advancing the diversity rationale is that the benefits of livelier discussions resulting from a diverse group may be relevant to limited contexts. Assuming that diversity correlates with diverse viewpoints, the richer discussions that emanate from diverse groups would be useful to occupations in which group discussions are central to the job at hand. For example, having a lively conversation with diverse coworkers is unlikely to have much impact in the execution

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341. Grutter v. Bollinger, 539 U.S. 306, 333 (2003) (quoting Brief for Respondent at 30, *Grutter*, 539 U.S. 306 (No. 02-241)).

342. Levinson, *supra* note 338, at 597.

343. Wessmann v. Gittens, 160 F.3d 790, 799 (1st Cir. 1998) (internal quotation marks omitted).

of a janitor's duties. Robust discussions are largely relevant to jobs involving problem-solving or where an exchange of ideas is helpful.

Even granting Professor Levinson's point that diversity increases the probability that there will be some who are deeply interested in issues germane to their group membership, one wonders if this correlation is relevant to other contexts. Would deep interest in matters concerning a particular social group be relevant to a chemistry class discussion? Or how would having an interest germane to an individual's social group apply in the workforce? Would the fact that African-Americans are more concerned about issues facing African-Americans have any application to a lone toll booth operator or an assembly-line factory worker? Even if one conceptualizes diversity as having a likely correlation of providing persons deeply interested in matters concerning their racial group, this alternative conception may not be sufficient to extend the application of the diversity rationale to the workplace.

g. Adverse Effects of Diversity in the Workplace

Finally, the last concern that the diversity rationale raises is that while diversity is advanced for the social good that may flow from it, the diversity rationale may have the unintended consequence of harming minorities in some segments of the workforce. The diversity rationale may lead employers who want to capitalize on the benefits of diversity to exploit employees for a particular market, matching the employee to the race of the clients.[344] As one African-American lawyer explained: "They expect you to know every black politician in the city and every black businessman in the state."[345] Race matching results in detrimental effects for some minorities because they may receive the bulk of the undesirable assignments, be confined to niches, and have limited opportunity to branch out.[346] This effect is notable among professionals like lawyers, doctors, and securities and financial agents, whose jobs are dependent on developing clientele.[347] In these professions, African-Americans are more likely to be assigned to serve

344. Wilkins, *supra* note 324, at 1594; *see also* Jessica Bulman-Pozen, Note, Grutter *at Work: A Title VII Critique of Constitutional Affirmative Action*, 115 YALE L.J. 1408, 1440–41 (2006) (discussing that employers may segregate and exploit minority employees by assigning them to serve minority communities).

345. Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 46 AM. U. L. REV. 669, 743 (1997) (citation omitted).

346. *See* Bulman-Pozen, *supra* note 344, at 1441; Wilkins, *supra* note 324, at 1595–98 (noting that African-American lawyers are often engaged in practice areas where their race might be a valuable credential).

347. Eric Grodsky & Devah Pager, *The Structure of Disadvantage: Individual and Occupational Determinants of the Black-White Wage Gap*, 66 AM. SOC. REV. 542, 560 (2001).

minority communities that are a less affluent client base.[348] Therefore, the diversity rationale has potential to cause unintended consequences such as increasing racial stereotypes and restricting opportunities for minorities, which may defeat the use of disparate impact to promote diversity as a compelling interest.

D. Role Model

Another defense that may shield the disparate impact provision from an Equal Protection Clause challenge is the rationale that the provision's use of racial classifications is necessary to provide role models. A role model is someone whose behavior is emulated by another.[349] A role model is distinguishable from a mentor in several respects. Those in a mentor-mentee relationship have a reciprocal interest in each other that is personal.[350] A role model differs because the role model does not need to take an interest in the emulator and may not even know the emulator personally.[351] This section explores the possibilities for applying a role model rationale in the workplace.

1. The Supreme Court's Treatment of the Role Model Justification

a. Rejected in *Wygant*

The Court first considered the adequacy of the role model theory as justification for racial classifications in *Wygant v. Jackson Board of Education*.[352] The school board defended its retention of a less senior minority teacher because it sought to provide minority role models for the minority students. The district court upheld the layoff procedures, explaining that "[t]eachers are role-models for their students. More specifically, minority teachers are role-models for minority students. This is vitally important because societal discrimination has often deprived minority children of other role-models."[353]

The Supreme Court rejected the role model rationale as a means for correcting societal discrimination.[354] Additionally, the Court criticized

348. *Id.* at 561.

349. Adeno Addis, *Role Models and the Politics of Recognition*, 144 U. PA. L. REV. 1377, 1389 (1996).

350. *Id.*

351. *Id.*

352. 476 U.S. 267, 275–76 (1986).

353. Wygant v. Jackson Bd. of Educ., 546 F. Supp. 1195, 1201 (E.D. Mich. 1982), *aff'd*, 746 F.2d 1152 (6th Cir. 1984), *rev'd*, 476 U.S. 267 (1986).

354. *Wygant*, 476 U.S. at 276 ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. The role model theory announced by the District Court and the resultant holding typify this indefiniteness.").

the role model theory because it lacked a "logical stopping point" as it permitted "discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose."[355] The Court was also concerned that the role model theory could have the unintended consequence of allowing employers to "escape" remedial obligations by justifying its hiring of few African-American teachers on the low enrollment of African-American students.[356] The Court reasoned, "Carried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected in *Brown v. Board of Education*."[357]

b. Accepted in *Ambach v. Norwick*

Although the Court has rejected the need to provide role models as a justification for racial classifications, it has accepted the role model justification for sustaining alienage classifications. In *Ambach v. Norwick*, the Court upheld a prohibition against employing elementary and secondary school teachers who lacked the intent to become United States citizens.[358] The Court's holding rested on the belief that teachers occupy a unique position to impart lessons in civics and citizenship. The Court reasoned, "[A] teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values . . . toward government, the political process, and a citizen's social responsibilities."[359]

Wygant and *Ambach* would appear to be inconsistent, but there is little that can be gleaned from *Wygant* about whether the Court would regard teachers as proper role models. The *Wygant* Court invalidated the role model justification because it was grounded in remedying societal discrimination and was not narrowly tailored.[360]

2. Benefits of Providing Role Models

One seeks out a role model to aspire to achieve the role model's level of success in a given profession. One basis for the role model rationale is that a role model of the same racial group as the emulator will

355. *Id.* at 275.

356. *Id.* at 276.

357. *Id.* (citation omitted).

358. 441 U.S. 68, 72–81 (1979).

359. *Id.* at 78–79.

360. Chief Judge Posner has opined that "[t]here are many weak arguments for discrimination, and the 'role model' theory, at least to the extent that it has been developed in the cases to date, is one, because of lack of substantiation and a well-nigh unlimited reach." Wittmer v. Peters, 87 F.3d 916, 920 (7th Cir. 1996).

enhance the emulator's ability to achieve. This theory has merit for mentors and mentees because their relationship depends on their comfort level with each other, which would affect the guidance that the mentor imparts.[361] However, there is no empirical evidence to support the notion that a role model who shares the same racial background as the emulator will have "qualitatively more influence" than someone of a different race.[362] Additionally, there is no evidence that shows an emulator will achieve his or her goals better or faster with a role model of the same race.[363]

Although there is a lack of empirical evidence to support the role model theory, it may not be dispositive of whether the role model theory should be applied in the workplace. In *Ambach*, there was no evidence to support the Court's inference that children are more receptive to civic lessons that are taught, whether explicitly or implicitly, by teachers who are United States citizens. Despite the lack of evidence, the Court endorsed the role model theory in the context of alienage classifications.

Perhaps the reason for providing minorities with role models from their racial group can be justified beyond consideration of empirical evidence. Another justification for providing role models is the following:

> [G]iven the dearth of minorities and women in certain professions, it . . . [is] necessary for aspiring minority and female role occupants to see minorities and women in those roles to reassure themselves that they can indeed occupy those roles and perform those functions and to show them how those who share similarly historical and institutional vulnerabilities can best occupy, perform in, and redefine those roles.[364]

This theory conceptualizes the role model as someone who can "provide[] a counternarrative intended to destabilize the narrative of exclusion that accompanied marginalization and devaluation of members of those groups."[365] This view of role models may better bolster the need to provide role models for minorities of the same racial group and substantiate a compelling interest for disparate impact.

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361. Addis, *supra* note 349, at 1406–07.
362. *Id.* at 1405–06.
363. *Id.* at 1406.
364. *Id.* at 1409–10.
365. *Id.* at 1410–11.

3. Critiquing the Role Model Rationale

Notwithstanding the benefits that may result from using racial classifications in disparate impact to provide role models, there are some limitations with applying the role model rationale in the employment context. This section considers those limitations and concludes that the role model rationale risks disadvantaging minorities in the workplace.

a. Limited Application in Employment Context

Like the diversity rationale, there may be limited use of the role model argument to justify racial classifications in the workforce. First, the need to provide role models at work may be prevalent in higher-ranked positions within an occupational field. Common sense dictates that an emulator is generally interested in imitating the behavior of a role model whom the emulator perceives as being more successful or in a more advantageous position than the emulator. Therefore, the role model argument is more applicable in occupations with a hierarchical structure.

b. Sending a Message of Inferiority and Being a Means to an End

What may be of greater concern about the role model rationale for justifying racial classifications in disparate impact are the unintended negative consequences that may result. As Professor Anita Allen eloquently pointed out, "One problem with the role model argument is that while it trumpets our necessity, it whispers our inferiority. . . . [T]he role model argument gives white males a reason for hiring minority women that is perfectly consistent with traditional assumptions of white male intellectual superiority."[366] Advancing a role model argument in the employment context risks the implication that minorities are intellectually inferior and unqualified for anything other than serving as a role model for minorities.[367] This may perpetuate the feeling among minorities that they are undervalued.[368]

The sense of being undervalued may be even more heightened if minority role models perceive themselves as a means to an end.[369] The

366. Anita L. Allen, *On Being a Role Model*, 6 BERKELEY WOMEN'S L.J. 22, 37–38 (1990–1991).

367. *Id.* at 38–39.

368. *See id.* at 39 ("Understandably, some black female academics resent the role model argument. We resent it in the way that we resent all faint praise. It undervalues.").

369. Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222, 1227 (1991).

employer may be advancing the role model rationale not to benefit the individual employee, but the employer. Like the problem with the diversity argument, minority role models are sought out to serve a constituency that the employer seeks to reach.

Another related problem with the role model argument is "it signals to [nonminorities] . . . that they may abandon efforts to serve as a positive role model for [minorities]."[370] A reliance on minorities to serve as role models for other minorities suggests that it is a narrowly-focused problem that only minorities can resolve.

c. Masking Discrimination

Like the diversity argument, the role model justification poses another common threat to minorities—it has the potential to mask discrimination. In *Wygant*, the Court warned that the role model rationale could be abused to warrant a school's refusal to hire African-American teachers based on the low enrollment of African-American students.[371] Similar to the concern expressed in *Wygant*, an employer may use the role model theory to justify not hiring or promoting minorities to supervisory or other elevated positions when there are few minority employees. Or, an employer may defend hiring or promoting a Caucasian over a minority because there is a greater percentage of Caucasians in need of a role model.

Using the role model argument can be a double-edged sword in another respect. While the role model argument can open opportunities for minorities who can serve as positive role models, it can concomitantly be used to reject minorities from jobs for not being positive role models. *Chambers v. Omaha Girls Club*[372] illustrates this exact problem. In *Chambers*, the Girls Club trained its staff to act as role models for the girls served by the organization.[373] As part of its role model approach, the Club instituted a policy of prohibiting employees from engaging in certain acts that would result in immediate discharge.[374] Among the prohibitions were single parent pregnancies.[375] The district court found that the policy had a disparate impact: "[B]ecause of the significantly higher fertility rate among black

370. Allen, *supra* note 366, at 40.

371. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986).

372. 834 F.2d 697 (8th Cir. 1987).

373. *Id.* at 699.

374. *Id.* at 699 n.2 ("Negative role modeling for Girls Club Members [includes] such things as single parent pregnancies.").

375. *Id.*

females, the rule banning single pregnancies would impact black women more harshly."[376] However, the Eighth Circuit Court of Appeals upheld the policy against single parent pregnancies based on the role model theory and the employer's business necessity for the policy.[377] The court accepted the Girls Club's assertion that single-parent pregnancies among the Girls Club staff would send a message that the Girls Club condoned pregnancies among the girls it served.[378] Consequently, the likely potential for unintended consequences such as sending a message of inferiority to minorities, treating minorities as a means to an end, and masking discrimination undermine the role model rationale to justify disparate impact's use of racial classifications.

E. Operational Need

Additionally, the disparate impact provision might be shielded from an Equal Protection Clause challenge on the basis of operational need. The use of racial classification in disparate impact may be compelling if race is essential to the job.

1. Defining Operational Need

The concepts of operational need, role modeling, and diversity are distinct, though sometimes used interchangeably by courts. Operational need refers to an employer's "need to carry out its mission effectively."[379] "Role models, in contrast, are people whose very existence conveys a feeling of possibility to others; they give hope that a previously restricted opportunity might now be available."[380] The diversity rationale relies on the positive effects generated by differences in racial background.

2. The Courts' Responses to the Operational Need Rationale

The Supreme Court has not decided a case involving a race-based employment practice justified on an operational need under the Equal Protection Clause. In *United States v. Paradise*, the Supreme Court was presented with the argument that a diverse police force is necessary to foster community trust and facilitate law enforcement services by enhancing community cooperation.[381] The Supreme Court, however,

376. Chambers v. Omaha Girls Club, 629 F. Supp. 925, 949 (D. Neb. 1986).
377. *Chambers*, 834 F.2d at 701–02.
378. *Id.* at 702–03.
379. Barhold v. Rodriguez, 863 F.2d 233, 238 (2d Cir. 1988).
380. *Id.* (internal quotation marks omitted).
381. The Court avoided deciding this issue in *United States v. Paradise*:

did not address this operational needs rationale because evidence of past discrimination was sufficient to satisfy a compelling interest.[382]

Although the Court has not decided this issue, it may be possible to glean from prior cases how the Court would respond to the operational need rationale. It could be argued that *Grutter* and *Ambach* provide some optimism for the operational need rationale. Some have argued that *Grutter* can be viewed to support racial diversity as an operational need when the government functions as an educator.[383] This interpretation is based on the Court's deference to the law school that "diversity is essential to its educational mission."[384] Even granting this interpretation, racial diversity may be an operational need that justifies race-conscious admissions procedures but may be insufficient to justify race-conscious employment decisions. The distinction between using race to decide graduate school admission and to decide employment is important because of the implication of individual rights. It may be acceptable to allow race-conscious decisions in *Grutter* to advance the

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> Amici, the city of Birmingham, the city of Detroit, the city of Los Angeles, and the District of Columbia, state that the operations of police departments are crippled by the lingering effects of past discrimination. They believe that race-conscious relief in hiring and promotion restores community trust in the fairness of law enforcement and facilitates effective police service by encouraging citizen cooperation. [*See also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 314 (1986)] (Stevens, J., dissenting) ("[I]n a city with a recent history of racial unrest, the superintendent of police might reasonably conclude that an integrated police force could develop a better relationship with the community and do a more effective job of maintaining law and order than a force composed only of white officers"); [NAACP v. Allen, 493 F.2d 614, 621 (5th Cir. 1974)] ("This is a police department and the visibility of the Black patrolman in the community is a decided advantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement" (citation omitted)). Amicus NAACP Legal Defense and Educational Fund, Inc., suggests that the governmental interest in a racially integrated Department is amplified here due to community perceptions of, and reactions to the Department's historical role in defense of segregation and its active opposition to the civil rights movement. We need not decide if either the generalized governmental interest in effective law enforcement or the more particularized need to overcome any impediments to law enforcement created by perceptions arising from the egregious discriminatory conduct of the Department is compelling. In this case the judicial determinations of prior discriminatory policies and conduct satisfy the first prong of the strict scrutiny test.

480 U.S. 149, 167 n.18 (1987) (plurality opinion).

382. *Id.*

383. *See, e.g.*, Michelle Adams, *Stifling the Potential of* Grutter v. Bollinger*:* Parents Involved in Community Schools v. Seattle School District No. 1, 88 B.U. L. REV. 937, 966 (2008) (arguing that the government's ability to function as an effective educator is diminished without racial diversity).

384. Grutter v. Bollinger, 539 U.S. 306, 328 (2003); *see* Adams, *supra* note 383, at 966 (arguing that *Grutter* supports an operational need argument because diversity is necessary to the educational mission of schools).

operational need of the university because education, let alone graduate education, is not a fundamental right.[385] In contrast, the Court has recognized that persons have a fundamental right to earn their livelihood.[386]

Additionally, *Ambach* could be viewed as an endorsement of an operational need rationale by the Court. In *Ambach*, the Court believed it was necessary for teachers to be United States citizens to inculcate in students lessons about civics and citizenship.[387] In effect, *Ambach* can be construed as endorsing an operational need argument—that the nationality of the teacher was essential to the educational mission of schools. *Ambach* lends greater support than *Grutter* for extending the operational need argument to educators because at least in *Ambach* the Court addressed hiring decisions. Even granting this interpretation of *Ambach*, at most it would support an operational need for employment decisions based on alienage and does not directly address race-based decisions. Thus, construing *Grutter* and *Ambach* as accepting an operational need argument may not be directly applicable to employment.

Among the lower courts, several circuits have reviewed and accepted race-based actions premised on an operational need in the fields of law enforcement and corrections. In *Barhold v. Rodriguez*,[388] while considering a challenge made by New York parole officers to the affirmative action plan used by the state division of parole, the Second Circuit recognized that an operational need could be a compelling interest for a "balanced workforce."[389]

Similarly, in *Wittmer v. Peters*, the Seventh Circuit endorsed operational need as a compelling interest when an African-American correctional officer was promoted on the basis of his race for a lieutenant's position in a boot camp.[390] The boot camp was an experimental program for young criminals to experience the "old-

385. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 3 (1973) (asserting that education is not a fundamental right).

386. *See* Sup. Ct. of N.H. v. Piper, 470 U.S. 274, 277–78 (1985) (discussing the right to earn a livelihood under the Privileges and Immunities Clause and finding that the practice of law is a fundamental right); Lester Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 371 (1978) (recognizing that Art. IV, § 2 protects a person's right to "pursue a livelihood in a state other than his own"); Allgeyer v. Louisiana, 165 U.S. 578, 589–90 (1897) ("The 'liberty' mentioned in [the Fourteenth] amendment means . . . the right of the citizen . . . to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation . . . .").

387. Ambach v. Norwick, 441 U.S. 68, 78–79 (1979).

388. Barhold v. Rodriguez, 863 F.2d 233, 235 (2d Cir. 1988).

389. *Id.* at 238.

390. 87 F.3d 916, 917 (7th Cir. 1996).

fashioned military basic training, in which harsh regimentation, including drill-sergeant abuse by correctional officers, is used to break down and remold the character of the trainee."[391] The court upheld the race-based promotion, reasoning that "[t]he black lieutenant is needed because the black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp."[392]

Operational need has also been found to be a compelling interest in some cases involving law enforcement. The Sixth Circuit endorsed an operational need rationale in *Detroit Police Officers' Association v. Young*.[393] In *Young*, the court upheld a voluntary affirmative action program implemented in the police department because minority officers were needed for effective community policing.[394] The court opined,

> The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions.[395]

The Fourth Circuit has echoed a similar rationale to advance the operational needs of the police. In *Talbert v. City of Richmond*, the court upheld the city's race-based promotion of officers to increase diversity within the police department that served a city with a population comprised of approximately 50% African-Americans.[396] Reiterating the Sixth Circuit's reasoning in *Young*,[397] the court concluded that the city had a legitimate purpose to consider race in addressing the "operational needs of an urban police department serving a multi-racial population."[398]

In *Reynolds v. City of Chicago*, the Seventh Circuit upheld a race-based promotion of a Hispanic officer on the justification of operational

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391. *Id.*

392. *Id.* at 920.

393. 608 F.2d 671, 695 (6th Cir. 1979).

394. *See id.* at 696 (asserting that the community would have more trust in a police force with a higher percentage of minorities).

395. *Id.*

396. 648 F.2d 925, 928 (4th Cir. 1981).

397. *Id.* at 931 (quoting *Young*, 608 F.2d at 695–96).

398. *Id.*

need.[399] The court accepted the city's justification that it was necessary to promote minorities to lieutenant and captain positions because as "principal supervisors, . . . [t]hey set the tone for the department"[400] and would help to "sensitize" non-Hispanic police officers "to any special problems in policing Hispanic neighborhoods."[401] The court concluded that "[e]ffective police work, including the detection and apprehension of criminals, requires that the police have the trust of that community and they are more likely to have it if they have 'ambassadors' to the community of the same ethnicity."[402]

In another case involving Chicago police officers, the Seventh Circuit reaffirmed in *Petit v. City of Chicago* that operational need could serve as a compelling interest.[403] The court pointed out that having a diverse police force may be even more compelling in large metropolitan cities that are racially and ethnically divided.[404] There was an operational need to have a diverse police force in Chicago because minorities in urban areas "are frequently mistrustful of police and are more willing than nonminorities to believe that the police engage in misconduct."[405] As one expert explained, policing depends upon the cooperation of the community, which is negatively affected by lack of trust and confidence in the police.[406] Increased minority representation in the police force, according to the expert, improves the community's perception of the police's crime-prevention and crime-solving abilities.[407]

Not all circuits, however, have found an operational need to use racial classification for police work.[408] Although the Second Circuit recognized operational need as a compelling interest in the penal context in *Barhold*, it did not accept this justification in a case involving law enforcement. In *Patrolmen's Benevolent Association of New York v. City of New York*, the Second Circuit invalidated the city's racially

399. 296 F.3d 524, 530–31 (7th Cir. 2002).
400. *Id.* at 529.
401. *Id.* at 530.
402. *Id.*
403. 352 F.3d 1111, 1115 (7th Cir. 2003).
404. *Id.* at 1114.
405. *Id.* at 1115.
406. *Id.*
407. *Id.*
408. The First Circuit was sympathetic to an operational needs argument in *Cotter v. City of Boston* but did not reach the issue. 323 F.3d 160, 172 n.10 (1st Cir. 2003) ("We need not reach the issue of whether avoiding litigation or meeting the operation needs of the [Police] Department are compelling state interests. . . . We are much more sympathetic to the argument that communities place more trust in a diverse police force and that the resulting trust reduces crime rates and improves policing.").

motivated transfers of police officers that had been done in anticipation of community violence.[409] In that case, police officers had beaten and tortured a Haitian immigrant.[410] The community responded with public demonstrations, causing city officials to fear that the protests would degenerate into violence.[411] As a result of this concern, the police department transferred black and Hispanic police officers to the precinct.[412] The black and Hispanic police officers transferred to the precinct were subjected to insults and epithets from the community[413] and hostility by the precinct's existing officers.[414] Persuaded by expert testimony that cultural skills were more important to policing than race because African-American officers are "not necessarily better at policing black communities than white officers,"[415] and by the lack of evidence to support a fear of community violence,[416] the court invalidated the city's transfers.[417] The court explained, "The mere assertion of an 'operational need' to make race-conscious employment decisions does not, however, give a police department *carte blanche* to dole out work assignments based on race if no justification is established."[418]

While an operational need has been recognized in law enforcement work, it has not been extended to firefighters. In *Lomack v. City of Newark*, the Third Circuit, in dicta, appeared to refuse to accept an operational need assertion for race-based transfers of firefighters.[419] Other circuits have not directly answered the question whether an operational need can be considered a compelling interest for a fire department to consider race in making employment decisions.[420]

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409. 310 F.3d 43, 44 (2d Cir. 2002).

410. *Id.* at 47.

411. *Id.*

412. The word "black" is used here to be more inclusive than "African-American," because some of the officers who were transferred identified themselves as African-American, Black-Hispanic, Jamaican, West Indian, Trinidadian, or Guyanese. *See id.*

413. *Id.* at 48 ("[F]ar from being welcomed by black residents of the 70th Precinct, the transferred officers endured frequent insults and epithets from community members angry about the [Haitian immigrant's] assault.").

414. *Id.* ("Several plaintiffs also testified to tensions with the other officers in the precinct, who viewed the new officers with suspicion, believing they were part of an NYPD internal affairs investigation into the 70th Precinct.").

415. *Id.*

416. *Id.* at 53.

417. *Id.* at 54.

418. *Id.* at 52.

419. 463 F.3d 303, 310 (3d Cir. 2006) ("Even if we were to liberally construe those assertions as an operational needs argument, however, utterly no evidence supports it.").

420. In *McNamara v. City of Chicago*, the Seventh Circuit was confronted with this very issue

3. Critiquing the Operational Need Rationale

a. Limited to Certain Occupations: Law Enforcement and Correctional Institutions

The utility of the operational need rationale, like the diversity rationale, may be limited to certain contexts. The Seventh Circuit, for example, has confined operational need to a "small window for forms of discrimination that are supported by compelling public safety concerns, such as affirmative action in the staffing of police departments and correctional institutions."[421]

But even within the occupations of law enforcement and corrections, there are limits to the application of operational need. One circumstance that would necessitate using racial classification is in the instance of emergencies. Justice Stevens specified his approval under such circumstances:

> [I]n a city with a *recent history* of racial unrest, the superintendent of police might reasonably conclude that an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of white officers.[422]

Justice Scalia similarly conditioned the use of race in emergencies only:

> At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates, . . . can justify an exception to the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens."[423]

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but the insufficiency of the evidence at trial precluded the court's determination of the issue. 138 F.3d 1219, 1222 (7th Cir. 1998). Similarly, although *Alexander v. Estepp* raised the defense that the fire department's affirmative action program was needed for "promoting more effective fire prevention and firefighting by fostering the trust of a diverse public," the Fourth Circuit did not directly address this defense and invalidated the program because it was not narrowly tailored. 95 F.3d 312, 316 (4th Cir. 1996).

421. Reynolds v. City of Chicago, 296 F.3d 524, 530 (7th Cir. 2002). Arguments have been made that the operational need rationale should be applied to the military as well. *See* Leach, *supra* note 308, at 1116–19 (arguing that the military is unique because of life and death consequences, where mistrust breeds delay or hesitation).

422. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 314 (1986) (Stevens, J., dissenting) (emphasis added).

423. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (alteration in original) (citation omitted).

Likewise, Justice Thomas concluded "that only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a 'pressing public necessity'"[424] for racial classifications.

One such social emergency that might have warranted racial preferences was the racial unrest of the 1960s. During this time, there was racial tension in communities across America that erupted in violence.[425] President Johnson created the National Advisory Commission on Civil Disorders (also known as the Kerner Commission) to study and make recommendations on the state of the nation's civil unrest.[426] The Commission recommended "[i]ncreasing communication across racial lines to destroy stereotypes, to halt polarization, end distrust and hostility, and create common ground for efforts toward public order and social justice."[427] To achieve these objectives, the Commission also recommended increasing the hiring of African-American police officers "to ensure that the police department is fully and visibly integrated" because a police department comprised mostly of Caucasians "can serve as a dangerous irritant; a feeling may develop that the community is not being policed to maintain civil peace but to maintain the status quo."[428]

In contrast, the situation in *Patrolmen's Benevolent Association* did not necessitate the city's racially based transfer of police officers. Although there were public protests in that case, protests do not necessarily lead to violence, as illustrated by the peaceful demonstrations led by Dr. Martin Luther King, Jr.[429] *Patrolmen's Benevolent Association* lacked the requisite urgency contemplated by Justices Stevens, Scalia, and Thomas to justify racial classifications.

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424. Grutter v. Bollinger, 539 U.S. 306, 353 (Thomas, J., concurring in part and dissenting in part).

425. The National Advisory Commission on Civil Disorders recounted: "The summer of 1967 again brought racial disorders to American cities, and with them shock, fear and bewilderment to the nation. The worst came during a two-week period in July, first in Newark and then in Detroit. Each set off a chain reaction in the neighboring communities." NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, SUMMARY REPORT 1 (1968) [hereinafter REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, SUMMARY REPORT]; *see also* Frymer & Skrentny, *supra* note 308, at 688–89 (describing the high level of violence in the 1960s).

426. Frymer & Skrentny, *supra* note 308, at 689–90.

427. REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, SUMMARY REPORT, *supra* note 425, at 20.

428. Frymer & Skrentny, *supra* note 308, at 690 (quoting REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, SUMMARY REPORT, *supra* note 425, at 165).

429. *See* David B. Filvaroff & Raymond E. Wolfinger, *The Origin and Enactment of the Civil Rights Act of 1964*, *in* LEGACIES OF THE 1964 CIVIL RIGHTS ACT 1, 28 (Bernard Grofman ed., 2002) (describing Martin Luther King, Jr. as a "student of Gandhi who was able to instill in his followers his own commitment to nonviolence").

The other circumstance where the operational need rationale in law enforcement and corrections would be most appropriate is where a person's race is essential to the task at hand. As Justice Stevens recognized, considerations of race may be appropriate when "an undercover agent is needed to infiltrate" a criminal group composed of the same race.[430] For example, in *Perez v. FBI*, the Fifth Circuit approved of the use of racially based assignments of Hispanic agents to undercover assignments.[431]

But while racial classifications may be necessary for some limited circumstances, the operational need for race-based actions is unlikely to justify disparate impact in most occupations. Among the cases that upheld the operational need rationale, there was an asserted need that community safety depended upon race-conscious hiring decisions, either to enhance community cooperation or for authenticity in undercover investigations. Aside from law enforcement and corrections, it would be difficult to find other occupations where public safety necessitates that an employee be of a particular race. For example, firefighting is essential to public safety, but race-conscious hiring is not necessary to ensure community cooperation because the contact that firefighters have with the community differs from that of law enforcement. Firefighters do not have the power and discretion that police officers have, which could be abused and lead to community distrust. Additionally, the contacts that firefighters have with the community generally result from community initiated calls for emergencies like fires or vehicular accidents. In contrast, although police officers respond to emergency calls, they are also on patrol duty, traffic duty, etc., where unsolicited contact may lead to resentment or distrust by the community members. Likewise, ambulance services are also essential to public safety and dependent on community cooperation, but that cooperation is unlikely to be affected by the race of the ambulance drivers and emergency response personnel. Because there are few occupations where racial tension affects community cooperation in ensuring public safety or where authenticity is necessary for investigations essential to public safety, the operational need rationale is inapplicable to most occupations.

430. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 314 (1986) (Stevens, J., dissenting).
431. 707 F. Supp. 891, 912 (W.D. Tex. 1988), *aff'd*, 956 F.2d 265 (5th Cir. 1992).

b. Similar to Using Race as a Bona Fide Occupational Qualification

i. Legislative History and Jurisprudence Against Race as a BFOQ

Using an operational need rationale to justify racial classifications in disparate impact raises another concern—it is the equivalent to the impermissible use of race as a bona fide occupational qualification ("BFOQ"). Although Title VII prohibits discrimination, it allows for certain exceptions. An employer may act "on the basis of religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[432] The BFOQ exception permits employment practices based on religion, sex, or national origin if religion, sex, or national origin is essential to the job. A BFOQ "rests on the belief that there is something essential about the behavior . . . of the demographic group."[433]

Race was intentionally omitted from the list of exceptions to discrimination, and thus race cannot be a BFOQ.[434] Congress entertained an amendment to add race as a BFOQ but ultimately rejected the amendment for fear that Caucasians could use race as a BFOQ to the exclusion of minorities.[435]

Consistent with Title VII, courts have prohibited the use of race as a BFOQ. One such case is *Knight v. Nassau County Civil Service Commission*.[436] In *Knight*, the Second Circuit invalidated the county Civil Rights Commission's involuntary transfer of an African-American

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432. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(e), 78 Stat. 241, 260 (codified as amended at 42 U.S.C. § 2000e-2(e) (2000)).

433. Frymer & Skrentny, *supra* note 308, at 681–82.

434. *See* Miller v. Tex. State Bd. of Barber Exam'rs, 615 F.2d 650, 652 (5th Cir. 1980) ("This provision of Title VII permits intentional or unintentional discrimination where religion, sex or national origin is a bona fide occupational qualification. Race is conspicuously absent from the exception; there the bare statute could lead one to conclude that there is no exception for either intentional or unintentional racial discrimination."); Ray v. Univ. of Ark., 868 F. Supp. 1104, 1126 (E.D. Ark. 1994) ("Thus, in certain limited circumstances, courts are to recognize the bona fide occupational qualification ["BFOQ"] defense. Race is conspicuously absent from the statutory exceptions. This was clearly not an oversight. The plain language of the statute thus precludes a race-based [BFOQ]. Courts have recognized that it is not irrational, but it is clearly forbidden by Title VII, to refuse on racial grounds to hire someone because your customers or clientele do not like his race." (citations and internal alternations omitted)).

435. Leach, *supra* note 308, at 1095 n.15 (citing 110 CONG. REC. 2563 (1964)). For a historical review of the development of the BFOQ exception, see Frymer & Skrentny, *supra* note 308, at 685–86.

436. 649 F.2d 157, 162 (2d Cir. 1981).

employee to the minority recruitment division.[437] The Commission conceded that Knight's race was a predominant factor in its decision to transfer him[438] because it thought that Knight would more effectively develop a rapport with the minorities who were being recruited for civil service jobs.[439] The court invalidated the Commission's racially based assignment on the following basis:

> [The Commission's employment decision] was based on a racial stereotype that blacks work better with blacks and on the premise that Knight's race was directly related to his ability to do the job. No matter how laudable the Commission's intention might be in trying to attract more minority applicants to the Civil Service[,] the fact remains that Knight was assigned a particular job (against his wishes) because his race was believed to specially qualify him for the work.[440]

ii. How an Operational Need Based on Race Is Similar to Using Race as a BFOQ

Considerations of race as an operational need and race as a BFOQ stand as a constitutional and statutory paradox. The lower courts have upheld the use of race as an operational need under the Equal Protection Clause in some circumstances, such as in *Wittmer*, *Young*, *Talbert*, *Reynolds*, and *Petit*, but have consistently invalidated the use of race as a BFOQ under Title VII, as seen in *Knight*. It is, however, conceptually difficult to distinguish when race is permissibly used as an operational need and when it is impermissibly used as a BFOQ. If there is a line between the two, one must need X-ray vision to see it because it can be argued that *Wittmer*, *Young*, *Talbert*, *Reynolds*, and *Petit* violated Title VII's prohibition against using race as a BFOQ. These cases relied on the same stereotypical notion, as in *Knight*, that persons will work more effectively with other members from their own racial group or that a person's race is linked to that person's abilities. As Justice O'Connor stated, "Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think."[441] The justification of operational need seems to assume that race or ethnicity determines how constituents will act or think.

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437. *Id.* at 159–60.

438. *Id.* at 160.

439. *Id.* at 162.

440. *Id.*

441. Metro Broad., Inc. v. Fed. Commc'ns Comm'n, 497 U.S. 547, 602 (1990), *overruled by* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 225–27 (1995) (rejecting *Metro*

c. Similar to Customer Preference as a BFOQ

Another related problem is that race as an operational need is similar to the prohibited use of customer preference as a BFOQ. The EEOC Guidelines prohibit the use of customer preference in hiring,[442] which courts have enforced. In *Diaz v. Pan American World Airways, Inc.*, the Fifth Circuit invalidated the airline's exclusion of males from employment as cabin flight attendants.[443] The airline, based on its considerable experience, believed that female flight attendants were superior at "providing reassurance to anxious passengers, giving courteous personalized service and, in general, making flights as pleasurable as possible within the limitations imposed by aircraft operations."[444] Additionally, the trial court was persuaded by the evidence that the airline passengers "overwhelmingly preferred to be served by female stewardesses."[445] The airline presented expert testimony of a psychiatrist who found that the unique environment of an airplane cabin required consideration of the psychological needs of its passengers, which was better met by female attendants.[446] Despite the evidence, the Fifth Circuit held that the airline was prohibited from allowing customer preference to be used in its hiring decisions.[447]

Similarly, the Ninth Circuit has rejected an attempt to use customer preference to justify gender discrimination on the basis of a BFOQ. In *Fernandez v. Wynn Oil Co.*, the employer asserted that its South American clients preferred to conduct business transactions with a male Director of International Operations and would refuse to interact with a female holding this position.[448] Notwithstanding the employer's claims that hiring a female director would "destroy the essence" of the employer's business or "create serious safety and efficacy problems,"[449] the Ninth Circuit held that customer preference cannot justify the employer's discriminatory action.[450]

Broadcasting's use of intermediate scrutiny to review some benign racial classifications and broadly applying strict scrutiny to all federal racial classifications).

442. "The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers," 29 C.F.R. § 1604.2(a)(1)(iii) (2010), "do[es] not warrant the application of the bona fide occupational qualification exception," *id.* § 1604.2(a)(1).

443. 442 F.2d 385, 389 (5th Cir. 1971).

444. *Id.* at 387 (internal quotation marks omitted).

445. *Id.*

446. *Id.*

447. *Id.* at 389.

448. 653 F.2d 1273, 1276 (9th Cir. 1981).

449. *Id.*

450. *Id.* at 1277.

Although the prohibition against relying on customer tastes to dictate hiring decisions applies specifically to sex, it would apply more so to race because race is not even a permissible BFOQ. *Ray v. University of Arkansas*[451] illustrates an impermissible attempt to base employment decisions on customers' racial preferences.[452] In *Ray*, the court invalidated the firing of a white security officer in a predominately black university; the termination occurred because the employer believed that "a white officer would be perceived negatively by a portion of his constituent community which, in turn, could lead to racial responses and confrontations."[453] The court held that some students' "predisposition of racial animus toward white officers . . . [is a] form of 'client' preference [that] is no more permissible than any other, and will not justify the different treatment of white officers."[454]

As *Ray* demonstrates, using race as an operational need is similar to using customers' racial preferences as a BFOQ. When race is accepted as an operational need, there is a reliance on the preference of the customers, whether they are in the form of consumers, constituency, or community members.[455] *Wittmer* relied on the preference of the African-American criminals whose cooperation depended upon the presence of an African-American drill sergeant. *Young*, *Talbert*, *Reynolds*, and *Petit* relied on the preference of the minority community members who preferred to cooperate with minority officers. In fact, *Young* and *Talbert* emphasized that the police department's employment decisions focused on the "public's perception of law enforcement officials and institutions,"[456] and *Reynolds* and *Petit* stressed the belief that increased minority representation in the police force improves the public's perception and willingness to work with the police.[457] The focus of the police department in *Young*, *Talbert*,

451. 868 F. Supp. 1104 (E.D. Ark. 1994).

452. The Fifth Circuit was also faced with a case of an employer using customer preference to make race-based decisions. In *EEOC v. Olson's Diary Queens, Inc.*, the employer defended its hiring decisions based on a perceived customer preference "to be served by persons of their own 'culture.'" 989 F.2d 165, 169 (5th Cir. 1993). The Fifth Circuit dismissed, without much discussion, the employer's attempt to use customers' racial preference as a justification. *Id.*

453. *Ray*, 868 F. Supp. at 1126.

454. *Id.* at 1126–27.

455. One court has rebutted this argument, relying on the city of Detroit's history of racial unrest to approve the Detroit Police Department's operational needs defense for using racial quotas. *See* Baker v. City of Detroit, 483 F. Supp. 930, 995–1003 (D.C. Mich. 1979), *aff'd sub nom.* Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1983). This case, however, occurred during a time of unyielding racial tension in Detroit.

456. Talbert v. City of Richmond, 648 F.2d 925, 931 (4th Cir. 1981) (quoting *Young*); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 696 (6th Cir. 1979).

457. *See* Petit v. City of Chicago, 352 F.3d 1111, 1115 (7th Cir. 2003) (stating that lack of

Reynolds, and *Petit* on the public's perception is akin to a concession that the police department was guided by its constituents' preference for race. Therefore, even if using race as an operational need would satisfy a compelling interest, which the Supreme Court has not yet decided, it would violate the statutory prohibition against using race and EEOC Guidelines against using customer preference as BFOQ exceptions to discrimination.

d. Adverse Effects of Operational Need Rationale

The last problem with race as an operational need is that it could, like diversity, be used for pretextual discrimination and to disproportionately burden minorities. For example, in *Perez v. FBI*, Hispanic agents were disproportionately assigned to wiretaps because of their language skills.[458] These wiretap assignments posed particular hardships, requiring agents to be confined to a vehicle or listening room with limited movement for eight to twelve hours,[459] and had a negative impact on promotions.[460] The FBI argued that the assignments were based on its need for the Hispanic officers' special language skills.[461] The court held that "[t]he protection of the public safety and welfare [did] not justify the discriminatory practices demonstrated at trial."[462] As *Perez* demonstrates, minorities whose race is perceived to be essential to a job may risk bearing the burden of dangerous or undesirable assignments.

Similarly, in *Baker v. City of St. Petersburg*, African-American police officers were assigned to patrol a zone consisting predominately of African-American residents and businesses.[463] The police chief rationalized the assignment with his belief that African-American officers "are better able to cope" with African-American residents who may act with hostility toward police officers.[464] Additionally, the police chief believed African-American police officers can more effectively communicate with African-American residents, identify

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confidence in police officers may negatively affect the willingness of community residents to cooperate with non-minority officers); *see also* Reynolds v. City of Chicago, 296 F.3d 524, 530 (7th Cir. 2002) (explaining that non-minority police officers may be "less likely to be sensitized to any specific problems" in minority communities).

458. 707 F. Supp. 891, 907 (W.D. Tex. 1988), *aff'd*, 956 F.2d 265 (5th Cir. 1992).

459. *Id.* at 909.

460. *Id.* at 910.

461. *Id.*

462. *Id.*

463. 400 F.2d 294, 296 (5th Cir. 1968).

464. *Id.*

members of their own race, and investigate criminal activities in African-American neighborhoods than Caucasian officers.[465] The Fifth Circuit invalidated the police department's practice of race-based assignments, holding that the argument that "Negro officers are better able to police Negro citizens cannot justify the blanket assignment of *all* Negroes . . . ."[466]

Likewise, in *Bridgeport Guardians, Inc. v. Delmonte*, the police department disproportionately assigned African-American and Hispanic officers to patrol the high-crime, high-risk neighborhoods that were more stressful and dangerous than the assignments that Caucasian officers endured.[467] The department explained that the officers were assigned according to "the relative importance that they may have in different types of neighborhoods."[468] The court found this justification to be based on racial stereotypes and invalidated the department's assignment practices.[469]

Additionally, even if race is an operational need, there is a potential that it could be applied to rationalize the exclusion of minorities, as Congress had feared when it rejected allowing race as a BFOQ. The same rationale in *Wittmer*, *Young*, *Talbert*, *Petit*, and *Reynolds* that allowed race to justify the hiring and promotion of minorities could equally be applied to their disadvantage. Assume in *Wittmer* that the Caucasian inmates refused to play the drill sergeant game with an African-American officer. The operational need rationale would support the hiring of a Caucasian officer for the role of drill sergeant. Or assume in *Young*, *Talbert*, *Petit*, and *Reynolds* that the community was entirely composed of Caucasians and that Caucasians distrusted and refused to cooperate with minority officers. In this situation, too, the operational need rationale would justify hiring Caucasian officers.

Finally, as the U.S. Commission on Civil Rights reminds us, a reliance on an operational needs argument for racially-based employment decisions has the potential to undermine the progress that minorities have achieved. In 1984, the Commission issued a statement relating to the case of *Vanguard Justice Society, Inc. v. Hughes*, which involved the City of Detroit's use of racial quotas within its police department.[470] The Commission warned:

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465. *Id.*
466. *Id.* at 301.
467. 553 F. Supp. 601, 610 (D. Conn. 1983).
468. *Id.* at 611.
469. *Id.*
470. 592 F. Supp. 245, 272–73 & n.88 (D. Md. 1984).

> The city asserts that the promotion quota was necessary to increase black police officers at all ranks, in order to achieve more effective law enforcement and reduce discriminatory treatment against black citizens. This amounts to little more than a claim that only black police officers can effectively provide law enforcement services to black citizens or supervise lower-ranking black officers. Such a claim has no place in a free, pluralistic society. If accepted, it would justify a claim that members of a racial or ethnic group can be properly served or treated only by members of that group. This would turn the clock back to the "separate but equal" days of the past, when public entities dispensed benefits, entitlements, and penalties of all kinds on the basis of a person's skin color.[471]

Therefore, using race as an operational need poses many of the same problems as diversity: reliance on stereotypes, potential for exclusion of minorities, and potential for minorities to shoulder the burden at a particular job. These problems pose significant obstacles to justify a compelling interest in using racial classifications in disparate impact.

F. Removing Barriers to Employment

One last defense that might protect Title VII's disparate impact provision against an Equal Protection Clause challenge is the compelling interest of removing barriers to employment. This section discusses the historical context and legislative intent of Title VII of the Civil Rights Act and the Fourteenth Amendment. This section also examines whether the goal of removing barriers to employment is sufficient to sustain the disparate impact provision's racial classifications.

1. What is the Government's Purpose?

As early as *Griggs*, the Court recognized that "[t]he 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 . . . employees over other employees."[472] The intent of Congress, as the *Griggs* Court explained, was not to "command[] that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race . . . become[s] irrelevant."[473] *Ricci* reiterated "the important

471. *Id.*

472. Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

473. *Id.* at 436.

purpose of Title VII—that the workplace be an environment free of discrimination, where race is not a barrier to opportunity."[474]

Congress, however, may not have had disparate impact theory in mind when it enacted Title VII.[475] Congress had amended the Act several times since its initial passage in 1964,[476] but Congress did not expressly authorize disparate impact claims until the Civil Rights Act of 1991. Consequently, some argue that Congress's sole concern was with intentional discrimination when it enacted Title VII.[477] Regardless of whether Congress originally intended the disparate impact theory when it enacted the Title VII of the Civil Rights Act in 1964, Congress's subsequent adoption of *Griggs* and codification of disparate impact in the 1991 amendment evinces intent for disparate impact to serve as an additional means of effectuating the Act's intent—removing barriers and providing equal employment opportunities.

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474. Ricci v. DeStefano, 129 S. Ct. 2658, 2674 (2009).

475. *See* Robert Belton, *The Dismantling of the* Griggs *Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 YALE L. & POL'Y REV. 223, 223 (1990) ("The Act, however, remains silent about whether it is also concerned with facially neutral employment practices, adopted without a discriminatory motive, that adversely affect the employment opportunities of racial minorities and women. The legislative history of Title VII, as originally enacted, is inconclusive on this issue."); Browne, *supra* note 70, at 293 ("The language of Title VII does not easily lend itself to the disparate-impact theory. Likewise, nothing in the legislative history supports the assertion that the 1964 Congress in any way intended to outlaw job qualifications that were not intended to discriminate. In fact, the relevant legislative history suggests the contrary."); Michael E. Gold, Grigg*'s Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429, 492 (1985) (arguing that Congress did not intend to regulate non-intentional discrimination when enacting Title VII and that employment discrimination should be analyzed according to intent); Mack A. Player, *Is* Griggs *Dead? Reflecting (Fearfully) on* Wards Cove Packing Co. v. Atonio, 17 FLA. ST. U. L. REV. 1, 2 (1989) ("Title VII . . . suggest[s] that liability is premised on improper motivation. Little in the language of the Act and even less from its legislative history suggests that liability can be premised solely on the effect a selection device has on a class protected by the statute."); Rutherglen, *supra* note 172, at 1298 ("Only under an extremely strained interpretation can the [principal prohibitions of Title VII] be forced to yield an explicit prohibition against neutral practices with adverse impact.").

476. Congress amended the Civil Rights Act in 1972, expanding Title VII to cover private and governmental employers. ESTREICHER & HARPER, *supra* note 155, at 15. In 1978, Congress amended Title VII of the Civil Rights Act by the Pregnancy Discrimination Act of 1978. *Id.* at 731; *see* Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 275 (1987) (deciding whether the Pregnancy Discrimination Act of 1978 preempts state statute regarding leave and reinstatement for pregnancy).

477. *See, e.g.*, Gold, *supra* note 475, at 492 (arguing that Congress's sole intent in enacting Title VII was to prohibit intentional discrimination by employers).

2. Determining Whether Removing Employment Barriers and Providing Equal Employment Opportunities Is Compelling

Is a governmental interest in removing barriers and providing equal employment opportunities compelling to justify the disparate impact provision's racial classifications? The Constitution does not provide a direct answer to this question because the Constitution does not explicitly define compelling interests or provide the weight to be accorded to particular interests.[478] Turning to whether Congress has the power to act does not answer the query because "[t]he mere existence of a power is an insufficient basis for finding a compelling interest."[479] The governmental powers rationale is inadequate to support an inference of compelling governmental interests because statutes' original objectives may have "become irrelevant or unattainable, or changed circumstances may have created unintended consequences for application of the original expectation that such statutes were proper."[480] For example, when Congress passed the Civil Rights Act of 1964, it chose to act under the authority of the Commerce Clause because *The Civil Rights Cases*: *United States v. Stanley*[481] led Congress to believe that the Fourteenth Amendment would be a tenuous basis for congressional authority.[482] In *The Civil Rights Cases*, the Court held that Congress lacked the power to enact legislation regulating private conduct under the Fourteenth Amendment.[483] Acting under the Commerce Clause, Congress succeeded. In *Heart of Atlanta Motel, Inc. v. United States*[484] and *Katzenbach v. McClung*,[485] the Court upheld the Civil Rights Act of 1964.[486] In this instance, because the Commerce Clause was not Congress's initial choice of powers to sustain the Civil Rights Act of 1964, a reliance on the governmental

478. *See* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 919 (1988) ("[C]ompelling interests lack a strong textual foundation in the Constitution.").

479. *Id.* at 938.

480. *Id.* at 939.

481. 109 U.S. 3 (1883).

482. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 168 (3d ed. 2009).

483. *The Civil Rights Cases*, 109 U.S. at 11.

484. 379 U.S. 241, 258 (1964).

485. 379 U.S. 294, 300–04 (1964).

486. Although the Civil Rights Act of 1875 was invalidated as applied to private conduct, the Civil Rights Act of 1964 contained provisions similar to the 1875 Act. *See* J. Morgan Kousser, *What Light Does the Civil Rights Act of 1875 Shed on the Civil Rights Act of 1964?*, *in* LEGACIES OF THE 1964 CIVIL RIGHTS ACT 33 (Bernard Grofman ed., 2002) (highlighting, for example, that the 1875 Act and the Civil Rights Act of 1964 both contained provisions providing for the full and equal enjoyment of public accommodations).

powers rationale to determine compelling interests would be misguided. Rather, more reliable sources of governmental purpose may be found in the "rights described in the constitutional text, penumbras, and means to constitutionally specified ends."[487]

"[C]ertain explicitly guaranteed rights may provide a firmer basis for finding a compelling governmental interest than either purposes or powers."[488] For example, rights to life, liberty, and property may justify inferences of compelling governmental interests because of their explicit description in the Fifth and Fourteenth amendments.[489] Additionally, an "obligation of equality, which is explicitly developed in five amendments,"[490] including the Fourteenth Amendment, may support an inference of compelling governmental interests.

An inference that Title VII's disparate impact provision serves a compelling governmental interest may be made because the provision protects explicitly guaranteed liberty and equality rights. As the Court has recognized, the right to earn a livelihood is a liberty interest.[491] Title VII's disparate impact provision advances this liberty interest through its objective in removing barriers to employment. The provision also protects the right to equality by prohibiting employment discrimination, regardless of employer intent, and thereby provides for equal employment opportunities.

Title VII of the Civil Rights Act of 1964 advances the same egalitarian interests as guaranteed by the Fourteenth Amendment because the two were created to address similar social injustice. Congress enacted the Fourteenth Amendment to respond to the post-Civil War discrimination directed at former slaves. After the Civil War, southern states discriminated against former slaves by passing Black Codes[492] that restricted full exercise of their liberty[493] and "imposed a

487. Gottlieb, *supra* note 478, at 937.

488. *Id.* at 939.

489. *Id.*

490. *Id.*

491. *See supra* note 386 and accompanying text (describing the Constitutional basis of the right to earn a livelihood as a liberty interest).

492. The Codes prohibited African-Americans from renting land, prevented "servants from leaving their masters' premises" and authorized the arrest and return of African-Americans who breached labor contracts to their employers. DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 425 (2d ed. 2005); *see also* MICHAEL KENT CURTIS ET AL., CONSTITUTIONAL LAW IN CONTEXT 677 (2d ed. 2006) (providing excerpts from Louisiana's "Black Code" for regulating Freedmen); HOWARD N. MEYER, THE AMENDMENT THAT REFUSED TO DIE 86 (2000) (discussing the "Black Codes, which the states passed to limit the freedom of movement of the newly emancipated after the Civil War . . . .").

493. *See* CURTIS ET AL., *supra* note 492, at 703 ("To address the deprivations of civil rights

second-class status just short of slavery on blacks."[494] In response, Congress passed the Civil Rights Bill of 1866 to void the Black Codes and protect the civil rights of African-Americans.[495] At this time, Congress also drafted the Fourteenth Amendment,[496] one of the Civil War or Reconstruction-Era Amendments, to address the prevailing discrimination against former slaves after the Civil War.[497] "One purpose of the Fourteenth Amendment was to 'constitutionalize' the Civil Rights Act . . . ."[498] The Fourteenth Amendment and the Civil Rights Act of 1866 were "inextricably linked . . . , since section one was added to the amendment at least in part to remove doubts about the constitutionality of the 1866 act."[499]

The vision of equality for African-Americans that fueled the drafting of the Civil Rights Act of 1866 and the Fourteenth Amendment also gave rise to the Civil Rights Act of 1964. When the states ratified the Fourteenth Amendment, the plight of African-Americans did not end. As the Reconstruction Era came to a close, many states adopted "Jim Crow laws" that discriminated against African-Americans by requiring separation of the races, such as segregation in public accommodations, transportation, and schools.[500] In response, Congress enacted the Civil Rights Act of 1964 to eliminate segregation in public places and

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and civil liberties in the post-Civil War South, Congress passed a series of civil statutes . . . .").

494. WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 43 (2d ed. 1995).

495. CURTIS ET AL., *supra* note 492, at 678; NELSON, *supra* note 494, at 48.

496. CURTIS ET AL., *supra* note 492, at 678.

497. HENRY J. ABRAHAM & BARBARA A. PERRY, FREEDOM & THE COURT: CIVIL RIGHTS & LIBERTIES IN THE UNITED STATES 36 (8th ed. 2003) ("[Congress] wanted to do something to ameliorate the lot of blacks; . . . they intended to embody the provisions of the Civil Rights Act of 1866, forbidding 'discrimination in civil rights or immunities . . . on account of race' . . . ; at least to some extent they were concerned with civil rights generally . . . ."); RANDY E. BARNETT, CONSTITUTIONAL LAW: CASES IN CONTEXT 264 (2008) ("It is generally accepted that the Fourteenth Amendment was formulated to ensure that Congress had the power to enact this legislation, and to prevent a future repeal of the protections contained in the Civil Rights Act."); WILLIAM A. KAPLIN, AMERICAN CONSTITUTIONAL LAW: AN OVERVIEW, ANALYSIS, AND INTEGRATION 261 (2004) ("The Fourteenth Amendment is one of the three Reconstruction-Era amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments) that abolished slavery and resolved other slavery and Civil War-related issues."); JOHN C. KNECHTLE & CHRISTOPHER J. ROEDERER, MASTERING CONSTITUTIONAL LAW 114 (2009); David S. Bogen, Slaughter-House Five*: Views of the Case*, 55 HASTINGS L.J. 333, 337 (2003) ("The Fourteenth Amendment to the Constitution was adopted to deal with the aftermath of slavery and the racial discrimination that prevailed after the Civil War.").

498. FARBER & SHERRY, *supra* note 492, at 429; *see also* NELSON, *supra* note 494, at 3 (discussing an interpretation of the Fourteenth Amendment that the Fourteenth Amendment's purpose was "to concretize in constitutional law the right to equality and other rights . . . .").

499. NELSON, *supra* note 494, at 104.

500. CHEMERINSKY, *supra* note 482, at 765.

blatantly discriminatory employment practices.[501] Specifically, "[Title VII of the Civil Rights Act] reflect[ed] Congress's concern with the problem of racism in American labor markets, and with the failure of the descendants of those brought to America as slaves to achieve economic equality."[502] Therefore, their parallel origins and purpose of protecting liberty and equality rights harmonize Title VII of the Civil Rights Act of 1964 and the Fourteenth Amendment, fortifying the inference that Title VII's disparate impact provision serves a compelling interest.

3. How the Disparate Impact Provision Eliminates Barriers and Provides Equal Employment Opportunities

Congress's vision for eliminating barriers and providing equal employment opportunities might not have included the disparate impact theory at Title VII's conception, but the disparate impact provision achieves Title VII's objective nonetheless. The disparate impact provision removes barriers by ensuring that business practices lacking business necessity and job relatedness do not deprive any racial group of employment opportunities. Disparate impact's racial classifications may be justified because they are needed to determine if such a barrier exists. But the existence of such a barrier alone is not the basis of liability—it merely prompts an inquiry into the business practice. Rather, liability results only when an employer fails to show business necessity and job relatedness, or when the employer refuses to use a less adverse alternative that still serves the needs of the employer.[503] The consequence of finding an employer in violation of the disparate impact provision means simply that the employer may not use the selection criterion or employment practice at issue.[504] The disparate impact provision does not substantially interfere with an employer's

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501. *See* LEGACIES OF THE 1964 CIVIL RIGHTS ACT 1 (Bernard Grofman ed., Univ. Press of Va. 2002) ("[T]he Civil Rights Act of 1964 . . . broke once and for all the Jim Crow legacy of the post-Reconstruction South and largely ended the overt and legally sanctioned forms of discrimination against blacks . . . .").

502. ESTREICHER & HARPER, *supra* note 155, at 4.

503. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2673 (2009) (explaining that an employer may defend itself against liability for employment discrimination if the employer can show the practice is job related for the position at issue, a business necessity, and that there is no available alternative that has less disparate impact).

504. *See* Bacon v. Honda of Am. Mfg., Inc., 205 F.R.D. 466, 473 (S.D. Ohio 2001) ("The plaintiff in a disparate impact case may seek only equitable relief such as injunctive and declaratory relief, reinstatement to a position and back pay, and a jury trial is not mandated. 42 U.S.C. § 1981a(a)(1) (compensatory and punitive damages not available in disparate impact case); 42 U.S.C. § 2000e-5(g) (providing for equitable relief under Title VII)."), *aff'd*, 370 F.3d 565 (6th Cir. 2004).

prerogatives because the employer is free to explore other selection methods. Additionally, the employer is not subject to compensatory or punitive damages as in disparate treatment cases.[505] Consequently, it is difficult to justify an employer's insistence to continue a business practice that adversely affects racial groups when there is no business necessity or when there are equally effective alternatives that have less adverse effect.

Although

> Congress did not intend by Title VII . . . to guarantee a job to every person regardless of qualifications, . . . [w]hat is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.[506]

A business practice that causes an adverse impact but not invidious discrimination is nonetheless an artificial, arbitrary, and unnecessary barrier if there is no business necessity for that practice or other alternatives exist that will meet the employer's needs but have less adverse effect. By eliminating business practices unnecessarily causing an adverse impact, the disparate impact provision removes racial barriers and thereby serves to achieve equality in employment opportunities.

CONCLUSION: PEACE TREATY?

The intent of this Article was to do as Justice Scalia advised—to "begin thinking about how—and on what terms—to make peace

505. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071 (codified at 42 U.S.C. § 1981(a)); *Bacon*, 205 F.R.D. at 473; Zachery v. Texaco Exploration & Prod., Inc., 185 F.R.D. 230, 237 (W.D. Tex. 1999) ("[I]n a Title VII disparate impact case, the employee may seek only equitable relief, to include back pay; no damages are permitted."); Judith J. Johnson, *Rehabilitate the Age Discrimination in Employment Act: Resuscitate the "Reasonable Factors Other Than Age" Defense and the Disparate Impact Theory*, 55 HASTINGS L.J. 1399, 1439 (2004) ("Remedies in disparate impact cases remain exclusively equitable under Title VII . . . ."); Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 193 (2003) ("[T]he Civil Rights Act of 1991 provides for compensatory and punitive damages in employment discrimination cases brought under Title VII of the Civil Rights Act of 1964 when plaintiffs prove that the defendant 'engaged in unlawful intentional discrimination,' while providing equitable relief alone for plaintiffs who show only a disparate impact."); Gerald A. Madek, *Tax Treatment of Damages Awarded for Age Discrimination*, 12 AKRON TAX J. 161, 164 (1996) ("Title VII allows only for equitable relief for successful disparate impact claims and not for compensatory or punitive damages.").

506. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800–01 (1973) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971)), *aff'd*, 528 F.2d 1102 (8th Cir. 1976), *superceded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987 (D. Minn. 2003).

between"[507] disparate impact and Equal Protection before the war that he predicted occurs. If we agree that disparate impact uses racial classifications, then disparate impact is vulnerable to attack by an Equal Protection Clause challenge. Title VII's disparate impact provision may be defended by asserting that it remedies past discrimination, smokes out discrimination, enhances diversity, provides role models, or meets an operational need. None of these defenses, however, provide a compelling interest for the disparate impact provision. The diversity, role model, and operational need rationales are inadequate defenses because they can be manipulated to exploit minorities as means to an end. These three rationales do not focus on advancing the interests of the individual employees, but rather on facilitating working relations with racial groups in order to increase efficiency and maximize employer profits. They are employer-centered rationales. These justifications also risk subjecting minorities to pretextual discrimination, perpetuating stereotypes, and excluding minorities from employment opportunities.

The smoking out discrimination and remedial need rationales are the most faithful to *Griggs* and the purpose of Title VII because they focus on opening opportunities for individuals. However, the smoking out intentional discrimination justification seems antithetical to disparate impact because disparate impact does not rely on intent. Additionally, the smoking out unconscious bias justification is undermined by inconclusive implicit bias research that is subject to contradictory interpretations.

The remedial need rationale offers a stronger justification for disparate impact's reliance on racial classification because the remedial need rationale has long been accepted by the Supreme Court. The remedial need rationale, however, may provide the narrowest protection for disparate impact. The remedial need rationale is dependent on showing that an employer previously discriminated. It is unlikely that, when the government enforces the disparate impact provision, it can trace back instances of prior constitutional or statutory violations by the particular employer.

This search for a compelling interest has revealed that these justifications—remedying past discrimination, smoking out discrimination, enhancing diversity, providing role models, and meeting an operational need—are likely insufficient to serve as a compelling interest after consideration of their shortcomings. A rationale advanced

507. Ricci v. DeStefano, 129 S. Ct. 2658, 2683 (2009) (Scalia, J., concurring).

to support disparate impact's use of racial classifications must be an impenetrable defense in light of the government's use of a "highly suspect tool"[508] like racial classification.

Removing barriers to employment, however, might be the strongest defense for the disparate impact provision because it protects liberty and equality rights. The disparate impact provision removes arbitrary and unnecessary barriers to employment by eliminating business practices that adversely impact racial groups without a business justification or where there are equally effective alternatives with less adverse effect. In this way, the provision affords people economic liberty and equality by allowing them to attain their livelihood without unnecessary racial barriers. Ironically, what potentially could have led to the disparate impact provision's destruction could lead to its defense—the Fourteenth Amendment. The Fourteenth Amendment's Equal Protection Clause and Title VII of the Civil Rights Act can be harmonized by the commonality of their origins and purpose in protecting liberty and equality rights. Thus, when the war is waged between the Equal Protection Clause and Title VII's disparate impact provision, peace might be made between the two through the compelling interest of achieving equal employment opportunity through the removal of barriers.

508. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).