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When "The Evil Day" Comes, Will Title VII's Disparate Impact Provision be Narrowly Tailored to Survive an Equal Protection Clause Challenge?

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ARTICLES

WHEN “THE EVIL DAY” COMES,
WILL TITLE VII’S DISPARATE IMPACT
PROVISION BE NARROWLY TAILORED
TO SURVIVE AN EQUAL PROTECTION
CLAUSE CHALLENGE?

EANG L. NGOV*

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INTRODUCTION

When one thinks about discrimination, blatant acts or bad motives usually come to mind. Title VII of the Civil Rights Act of 1964 (“Title VII”) protects against this type of intentional discrimination in the workplace through its disparate treatment provision.¹ Title VII also, however, imposes liability even in situations where the employer acts without bad intentions.² An employer may be liable simply because one group passes a neutral promotion test or meets a hiring qualification at a substantially higher rate than other groups, even when the selection criterion applies to everyone and is not devised to

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

(a) Employer Practices. 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 employments, 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.

42 U.S.C. § 2000e-2 (2006) (emphasis added).

2. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (stating that even good intentions are not a defense when an employer’s selection criteria that are not job related cause an adverse effect).

disadvantage one group over another.³ Nevertheless, if an employer’s neutral employment practice causes a disproportionate impact on a racial group or other protected class, it is a prima facie violation of Title VII’s disparate impact provision.⁴ The employer must defend the charge by showing that the employment practice is job related and a business necessity.⁵ Mounting a defense may involve validating the test or selection criterion, which can cost \$100,000–\$400,000.⁶ Even after an employer validates a business practice, the employer may still be liable if there are other equally effective alternatives that have less adverse effect.⁷

Consequently, the employer may be concerned about the racial composition of its employees and may make race-conscious employment decisions to avoid disparate impact liability. To the extent that employers feel induced by the disparate impact provision to make such decisions, it is possible that the provision violates the Equal Protection Clause because it encourages employers to act on the basis of race.

In *Ricci v. DeStefano*,⁸ the city of New Haven faced this very predicament and decided to void a promotion test given to firefighters because it was concerned about disparate impact liability.⁹ A disproportionate number of African Americans and Hispanics who took the test failed.¹⁰ Under the four-fifths rule, a Guideline enforced by the Equal Employment Opportunity Commission (“EEOC”), disparate impact exists when the selection or pass rate of one group is less than eighty percent of the most successful group.¹¹ Had the minority firefighters sued, they would have been able to show a prima facie case of disparate impact based simply on the numbers.¹² This potential litigation led the city to discard the test results.¹³ Consequently, Caucasian firefighters and a Hispanic firefighter who

3. See *id.* at 431–32 (discussing the lack of discriminatory intent in designing tests or criteria for promotion).

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

5. 42 U.S.C. § 2000e–2(k)(1)(B)(ii); *Griggs*, 401 U.S. at 431.

6. See *infra* note 164 (discussing costs of validating selection criteria).

7. 42 U.S.C. § 2000e–2(k)(1)(A); *Griggs*, 401 U.S. at 432.

8. 129 S. Ct. 2658 (2009).

9. *Id.* at 2664.

10. *Id.* at 2677–78.

11. EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D) (2010).

12. *Ricci*, 129 S. Ct. at 2677–78. On the lieutenant examination, the pass rate for each racial group was the following: 58.1 percent for Caucasians, 31.6 percent for African Americans, and 20 percent for Hispanics. *Id.* at 2678. On the captain examination, the pass rate for Caucasians was 64 percent and for Hispanics and African Americans was 37.5 percent. *Id.*

13. *Id.* at 2664.

passed the test, and would likely have been promoted, sued.¹⁴ These plaintiffs alleged that the city's action violated Title VII's disparate treatment provision and the Equal Protection Clause.¹⁵

In *Ricci*, the Court resolved the disparate treatment issue under Title VII¹⁶ but did not address whether the disparate impact provision violates the Equal Protection Clause.¹⁷ Justice Scalia observed that the Supreme Court's resolution "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? The question is not an easy one."¹⁸

This Article completes the initial inquiry I embarked upon to answer this difficult question.¹⁹ In my prior work, I identified and examined six compelling interests that might be asserted to justify the disparate impact provision's racial classifications under an Equal Protection Clause challenge: remedying past discrimination, smoking out discrimination (intentional or unconscious), obtaining the benefits of diversity, providing role models, satisfying an operational need, and providing equal employment opportunity by removing barriers.²⁰ I concluded that removing barriers to employment might provide the strongest defense for the disparate impact provision.²¹ This Article will explore whether the disparate impact provision's use of racial classifications is narrowly tailored to achieve these compelling interests. Although Title VII protects employees from discrimination on the basis of race, color, religion,

14. *Id.*

15. *Id.*

16. *Id.* at 2681 (holding that the city needed to show a "strong basis in evidence" that its selection process would cause a potential disparate impact violation, which the city lacked).

17. 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.

18. *Id.* at 2682 (Scalia, J., concurring).

19. See Eang L. Ngov, *War and Peace Between Title VII's Disparate Impact Provision and the Equal Protection Clause: Battling for a Compelling Interest*, 42 LOYOLA U. CHI. L.J. 1, 8 (2010).

20. See *id.* at 8–9.

21. See *id.* at 88 (discussing the removal of barriers as a compelling interest because it affords people economic liberty and equality).

sex, or national origin, this Article focuses on racial classifications, and a discussion of other groups is beyond its scope.

Commentators have focused on other constitutional issues raised by the disparate impact provision,²² but none have explored this particular constitutional inquiry—whether the disparate impact provision is narrowly tailored to pass strict scrutiny should “the evil day” come when an Equal Protection Clause challenge is made. In fact, little scholarship has been written about narrow tailoring generally.²³

It is surprising that there is a dearth of scholarship discussing narrow tailoring given its significance in the evaluation of governmental actions that affect equal protection and individual rights.²⁴ It is said that strict scrutiny is “‘strict’ in theory and fatal in fact,”²⁵ but a review of the Supreme Court’s equal protection cases reveals that perhaps strict scrutiny is fatal because of narrow tailoring. When governmental use of racial classifications is challenged under the Equal Protection Clause, strict scrutiny requires that the government have a compelling purpose and that the racial classifications be narrowly tailored to achieve that purpose.²⁶ The asserted governmental purpose may either be remedial (to remedy past discrimination) or nonremedial (for some purpose other than to remedy past discrimination). The narrow tailoring requirement has been particularly fatal in cases involving nonremedial interests. *Korematsu v. United States*²⁷ and *Grutter v. Bollinger*²⁸ are among the few

22. Much scholarship has been written about the validity of laws that prohibit disparate impact, without a showing of intent, under Section 5 of the Fourteenth Amendment or the Commerce Clause, and about whether neutral state action that has a discriminatory effect but lacks a discriminatory intent violates the Equal Protection Clause. The latter point was raised by *Washington v. Davis*, 426 U.S. 229, 235, 237, 238–39 (1976). See Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 494–95 (2003) (discussing the Court’s treatment of statutory disparate impact standards in *Washington v. Davis*).

23. See Ian Ayres & Sydney Foster, *Don’t Tell, Don’t Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 518 (2007) (discussing how *Grutter v. Bollinger* and *Gratz v. Bollinger* changed the narrow tailoring analysis); Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1782 (1996) (considering the types of affirmative action programs that would pass the narrow tailoring requirement).

24. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (establishing that local, state, or federal government action that implicates rights bestowed by the Fifth Amendment Due Process Clause or Fourteenth Amendment Equal Protection Clause will be reviewed with strict scrutiny).

25. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

26. *Adarand Constructors*, 515 U.S. at 227.

27. 323 U.S. 214 (1944) (invoking national security concerns for the government’s racial classifications during the internment of Japanese Americans).

cases involving nonremedial interests to survive strict scrutiny's requirement for narrow tailoring, but in light of the universal condemnation of *Korematsu*,²⁹ *Grutter* is the more viable example.

This Article explores whether the disparate impact provision can survive strict scrutiny's narrow tailoring requirement by examining the factors considered by the Court in evaluating this requirement.³⁰ This Article begins by briefly tracing the development of the disparate impact provision and the four-fifths rule in Part I and explaining how the two are related. Part II discusses the significance of narrow tailoring and the factors used to evaluate whether the narrowly tailored requirement is met.

In Part III, this Article examines the first factor: whether the enforcement of the four-fifths rule operates like a quota and draws a line on the basis of race,³¹ or operates as a permissible goal, like in *Grutter v. Bollinger*. Part III also considers whether *Grutter*'s "critical mass" approach, which did not refer to any specified number, is applicable to the disparate impact provision.³² This Part concludes that while the law school in *Grutter* may assess the attainment of diversity without reference to a defined number of minorities, the critical mass approach is inapplicable because the EEOC must refer to some sort of threshold to maintain uniformity in enforcing the disparate impact provision. Additionally, the EEOC must refer to a predetermined number or ratio as to what constitutes disparate impact in order to provide notice and due process to employers.

Part IV considers the factors of individualized consideration and flexibility. If the disparate impact provision functions as a quota, it is unlikely to afford flexibility or individualized consideration. Whether

28. 539 U.S. 306 (2003) (invoking an interest in diversity for the law school's race-conscious admissions program).

29. See, e.g., *Adarand Constructors*, 515 U.S. at 275 (Ginsburg, J., dissenting) ("[T]he Court . . . nonetheless yielded a pass for an odious, gravely injurious racial classification. . . . Such a classification, history and precedent instruct, properly ranks as prohibited."); *Farag v. United States*, 587 F. Supp. 2d 436, 467 (E.D.N.Y. 2008) ("[*Korematsu*] is now widely regarded as a black mark on our constitutional jurisprudence."); Jonathan M. Justl, Note, *Disastrously Misunderstood: Judicial Deference in the Japanese-American Cases*, 119 YALE L.J. 270, 278 n.34 (2009) (citing David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 993 (2002)) (pointing out that by 2002, eight Supreme Court Justices have stated that *Korematsu* was incorrectly decided).

30. I acknowledge that the application of the narrowly tailored requirement is fact specific, and this Article will explore the question using general facts derived from the Supreme Court's precedent. This Article does not make a normative argument regarding whether the cases were rightly decided, but rather, accepts the Court's holdings as a basis for analysis.

31. *Bakke*, 438 U.S. at 289-90 (rejecting set-aside program because it was "a line drawn on the basis of race and ethnic status").

32. *Grutter*, 539 U.S. at 335-36 (2003) (accepting the school's concept of "critical mass" as narrowly tailored to achieve diversity).

a race-conscious program is narrowly tailored is dependent upon whether race is used as the decisive factor and whether case-by-case considerations are possible.

Part V examines the scope and duration of the disparate impact provision. The reasonableness of a program’s scope depends upon its ability to encompass only similarly situated persons for purposes of the program and may be affected by the overinclusion or underinclusion of people. Part V discusses whether the disparate impact provision’s probability for error would render it underinclusive or overinclusive and whether the provision excludes white males from asserting disparate impact claims, thereby making it underinclusive. Part VI explores whether the provision’s racial classifications are reasonable in duration or seek to maintain racial balance.

Part VII evaluates the final factor of whether the disparate impact provision’s racial classifications are necessary after consideration of race-neutral alternatives and whether there are race-neutral means to achieve the compelling purposes previously identified. Part VIII assesses the likelihood of the disparate impact provision’s survival, taking in consideration the totality of the narrow tailoring factors.

This Article concludes that the disparate impact provision is unlikely to pass the narrowly tailored requirement and risks being invalidated on “the evil day” when the provision is challenged under the Equal Protection Clause.

I. EVOLUTION OF THE DISPARATE IMPACT THEORY AND PROVISION AND THE FOUR-FIFTHS RULE

A. *The Beginnings of Disparate Impact Theory in the Supreme Court*

The Supreme Court first adopted the disparate impact theory in *Griggs v. Duke Power Co.*,³³ in which the Court considered the breadth of Title VII’s protection against discrimination.³⁴ In *Griggs*, an employer required employees seeking jobs or promotions to have a high school diploma and to pass an intelligence test.³⁵ These requirements were applied equally to Caucasians and African Americans³⁶ but adversely affected African Americans.³⁷ The Court invalidated the employer’s practices, concluding that the Civil Rights

33. 401 U.S. 424 (1971).

34. *Id.* at 430–31.

35. *Id.* at 427–28.

36. *Id.* at 429.

37. *Id.*

Act of 1964 prohibited “not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”³⁸ Thus, employers who act with good or non-discriminatory intent must nevertheless justify employment practices that have an adverse effect by showing a business necessity related to job performance.³⁹

B. Congress’s Passage of the Disparate Impact Provision

After *Griggs*, Congress codified disparate impact liability in the Civil Rights Act of 1991. Section 703 of Title VII of the Civil Rights Act of 1991 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.⁴⁰

Section 703(k)(1) encompasses the same principles of disparate impact articulated in *Griggs* by affording employers an opportunity to defend their employment practice by showing that the practice is job related and consistent with business necessity.⁴¹ Additionally, § 703 provides plaintiffs an opportunity at the surrebuttal stage to show that the employer refused to use less adverse alternatives.⁴² An employer’s refusal to use such options will render it liable under the disparate impact provision, even if the employer’s practice is job related and consistent with a business necessity.⁴³

C. The Four-Fifths Rule

The EEOC is charged with enforcing Title VII.⁴⁴ In 1978, the EEOC promulgated the four-fifths rule as part of its Guidelines on

38. *Id.* at 431.

39. *Id.*

40. 42 U.S.C. § 2000e-2(k)(1)(A) (2006).

41. *Id.* § 2000e-2(k)(1)(A)(i).

42. *Id.* § 2000e-2(k)(1)(A)(ii).

43. *Id.* § 2000e-2(d)(1)(A).

44. *Id.* § 2000e-5(a).

Employee Selection Procedures⁴⁵ that were designed to assist with compliance with federal law prohibiting discrimination and to “provide a framework for determining the proper use of tests and other selection procedures.”⁴⁶ The four-fifths rule has become an important rule because a violation of the rule is a prima facie case of disparate impact.⁴⁷ The four-fifths rule or eighty percent rule provides as follows:

Adverse impact and the “four-fifths rule.” 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.⁴⁸

The Supreme Court has not yet reviewed the Guidelines⁴⁹ but has made varying statements regarding the deference it accords to the Guidelines generally. *Griggs* accorded the Guidelines “great deference,”⁵⁰ explaining that “[s]ince the Act and its legislative history support the Commission’s construction, this affords good reason to treat the guidelines as expressing the will of Congress.”⁵¹ *Albemarle Paper Co. v. Moody*⁵² followed the deference given in *Griggs*,⁵³ opining

45. Jacob Van Bowen, Jr. & C. Allen Riggins, *A Technical Look at the Eighty Per Cent Rule as Applied to Employee Selection Procedures*, 12 U. RICH. L. REV. 647, 648 (1978).

46. Uniform Guidelines on Employee Selection Procedures, 43 Federal Register 38290, 38296 (Aug. 25, 1978).

47. See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2673, 2677–78 (2009) (“Under the disparate-impact statute, a plaintiff establishes a prima facie violation by showing that an employer uses ‘a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.’”) (citing 42 U.S.C. § 2000e-2(k)(1)(A)(i)). The Supreme Court has stated that “[u]less and until the defendant [employer] pleads and proves a business-necessity defense, the plaintiff wins simply by showing the stated elements” of disparate impact. *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2198 (2010). The four-fifths rule is an articulation of when the stated elements of disparate impact has been met.

48. The four-fifths rule also considers situations in which a ratio higher or lower than four-fifths may constitute evidence of adverse impact. EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D) (2010). See Marion Gross Sobol & Charles J. Ellard, *Measures of Employment Discrimination: A Statistical Alternative to the Four-Fifths Rule*, 10 INDUS. REL. L.J. 381, 388–91 (1988) for an explanation of how to compute disparities using the four-fifths rule.

49. George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1319 (1987).

50. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433–34 (1971).

51. *Id.* at 434.

52. 422 U.S. 405 (1975).

53. *Id.* at 431 (citing *Griggs*, 401 U.S. at 433–34); see also Dean Booth & James L. Mackay, *Legal Constraints on Employment Testing and Evolving Trends in the Law*, 29 EMORY L.J. 121, 128 (1980) (stating that *Albemarle* “represents the ‘high-water mark’ of deference to the 1970 Guidelines”).

that “[t]he EEOC Guidelines are not administrative regulations[] promulgated pursuant to formal procedures established by the Congress. But . . . they do constitute ‘[t]he administrative interpretation of the Act by the enforcing agency.’”⁵⁴ Additionally, in *Ricci*, the Court recognized the role of the Guidelines in implementing the disparate impact provision.⁵⁵

Since the promulgation of the four-fifths rule in 1978,⁵⁶ the Supreme Court has not explicitly approved or rejected this particular rule. The Court in *Watson v. Fort Worth Bank & Trust*⁵⁷ viewed the four-fifths rule as “not provid[ing] more than a rule of thumb for the courts.”⁵⁸ In *United States v. Paradise*,⁵⁹ the Court did not directly endorse the four-fifths rule but acknowledged that the parties agreed to use the four-fifths rule to determine the adverse effect of the selection procedure.⁶⁰ The Court also provided an illustration of the application of the four-fifths rule through an example.⁶¹ In *Connecticut v. Teal*,⁶² the Supreme Court implicitly endorsed the four-fifths rule by recognizing the district court’s uncontested finding that the examination failed the four-fifths rule.⁶³ The Court provided a more direct discussion regarding the four-fifths rule in *Ricci v. DeStefano*, where the Court applied the rule and concluded that

54. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 433–34 (1971)).

55. See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2678 (2009) (citing EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D) (2008)) (applying the four-fifths rule). Justice Ginsburg, in her dissent, stated, “Recognizing EEOC’s ‘enforcement responsibilities’ under Title VII, we have previously accorded the Commission’s position respectful consideration.” *Id.* at 2699–700 (Ginsburg, J., dissenting).

The circuit courts, however, “have accorded them a limited degree of deference. The circuit courts have generally accepted the guidelines as expert advice on technical issues, but not as binding authority on questions of statutory interpretations.” Rutherglen, *supra* note 49, at 1319.

56. *Van Bowen & Riggins*, *supra* note 45, at 648. In addition to the EEOC, the Department of Justice, the Civil Service Commission, and the Department of Labor used the four-fifths rule to carry out their respective enforcement charges. *Id.* at 648–49.

57. 487 U.S. 977 (1988) (plurality opinion).

58. *Id.* at 995 n.3.

59. 480 U.S. 149 (1987) (plurality opinion).

60. *Id.* at 159.

61. *Id.* at 159 n.10 (“In other words, if 60% of the white troopers who take a promotion test pass it, then 48% of the black troopers to whom it is administered must pass.”).

62. 457 U.S. 440 (1982).

63. *Id.* at 444 n.4; Paul Meier et al., *What Happened in Hazelwood: Statistics, Employment Discrimination, and the 80% Rule*, 1984 AM. B. FOUND. RES. J. 139, 143 (stating that the Supreme Court had implicitly approved the eighty percent rule when it noted that the petitioners did not contest the lower court’s finding of disparate impact).

“[t]he pass rates of minorities . . . fall well below the 80-percent standard set by the EEOC to implement the disparate-impact provision of Title VII.”⁶⁴

Additionally, there is little agreement among commentators as to the deference that should be accorded to the Guidelines. One commentator has argued “Congress did not intend the courts to defer [to] the EEOC rulings.”⁶⁵ Congress empowered the EEOC to investigate charges of employer discrimination and determine whether a reasonable basis exists for the charges, but not to determine the existence of discrimination.⁶⁶

Another commentator, however, has concluded that the Guidelines should be viewed as “more than informal.”⁶⁷ According to this view, the courts have erroneously interpreted the Guidelines as being entitled to deference but not binding.⁶⁸ As the argument goes, this interpretation is a mistake because the EEOC promulgated the Guidelines with the participation of agencies empowered with substantive rulemaking authority.⁶⁹ Ultimately, the argument concludes that the Guidelines are binding because *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*⁷⁰ accords greater weight to agency statements resulting from the rulemaking process.⁷¹

Despite the disagreement among commentators and inconclusive remarks by the Court, the four-fifths rule remains critical in the determination of disparate impact liability. Therefore, it is necessary that this Article considers how the application of the four-fifths rule affects the factors used in evaluating the narrowly tailored requirement.

II. NARROW TAILORING

When the government implements racially based policies, its policies are reviewed under strict scrutiny.⁷² Strict scrutiny requires

64. Ricci v. DeStefano, 129 S. Ct. 2658, 2678 (2009).

65. Michael Evan Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429, 485 (1985).

66. *Id.* at 485–86.

67. Alfred W. Blumrosen, *Society in Transition IV: Affirmation of Affirmative Action Under the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 903, 910 (1993).

68. *Id.*

69. *Id.*

70. 467 U.S. 837 (1984).

71. Blumrosen, *supra* note 67, at 910.

72. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“[A]ll racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny . . .”).

that racial classifications be necessary to achieve a compelling governmental purpose.⁷³ Strict scrutiny serves the following purposes:

[It] “smoke[s] 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 . . . [and] ensures that the means chosen “fit” this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.⁷⁴

Narrow tailoring is the component of strict scrutiny that ensures “the means chosen ‘fit’ [the] compelling goal.”⁷⁵ The Court has examined a number of factors in determining whether governmental racial classifications are narrowly tailored⁷⁶: the use of quotas,⁷⁷ the flexibility of the program,⁷⁸ the duration of the relief,⁷⁹ the scope of the program,⁸⁰ individualized considerations,⁸¹ and the necessity of the program compared with the efficacy of race neutral alternatives.⁸²

73. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (explaining that all restrictions based on racial classification are suspect unless justified by public necessity).

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

75. *Id.*

76. See generally Ayres & Foster, *supra* note 23 (discussing the Supreme Court’s approach to narrow tailoring after two recent decisions); Michael K. Fridkin, *The Permissibility of Non-Remedial Justification for Racial Preferences in Public Contracting*, 24 N. ILL. U. L. REV. 509, 519 (2004) (discussing the narrow tailoring issue after *Croson*).

77. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477, 485, 505 (1989) (invalidating a program that set aside thirty percent of contract-award value to Minority Business Enterprises); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305, 320 (1978) (invalidating medical school’s admissions program that set aside sixteen seats for underrepresented minorities).

78. *United States v. Paradise*, 480 U.S. 149, 171 (1987).

79. See *Croson*, 488 U.S. at 510 (“Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.”); *Paradise*, 480 U.S. at 171.

80. See *Croson*, 488 U.S. at 506 (“The gross overinclusiveness of Richmond’s racial preference strongly impugns the city’s claim of remedial motivation.”).

81. See *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (“As Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, nonmechanical way.”); *Croson*, 488 U.S. at 508 (“Based upon proper findings, such programs are less problematic from an equal protection standpoint because they treat all candidates individually, rather than making the color of an applicant’s skin the sole relevant consideration.”); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 n.52 (1978) (“The denial to respondent of this right to individualized consideration without regard to his race is the principal evil of petitioner’s special admissions program.”).

82. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237–38 (1995) (pointing out that the circuit court failed to “address the question of narrow tailoring in terms of our strict scrutiny cases, by asking, for example, whether there was any consideration of the use of race-neutral means to increase minority business participation in government contracting” (quoting *Croson*, 488 U.S. at 507) (internal

Because “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause,”⁸³ evaluation of the factors for narrow tailoring in some instances will depend on the compelling purpose asserted.

Whether the disparate impact provision must be narrowly tailored depends upon whether it is subject to strict scrutiny review. Consequently, because racial classifications may violate the Equal Protection Clause, a preliminary determination of whether the disparate impact provision implicates racial classifications is necessary. Relying on *Ricci*, this Article assumes that Title VII’s disparate impact provision uses racial classifications. In *Ricci*, the Court characterized the city’s action as “express, race-based decisionmaking”⁸⁴ because the city voided the examination scores as a result of “the statistical disparity based on race.”⁸⁵ The Court explained that “the City rejected the test results because too many whites and not enough minorities would be promoted were the lists to be certified.”⁸⁶ Therefore, this Article proceeds on the premise that the disparate impact provision uses racial classifications because it induces employers to consider race when making employment decisions, triggering strict scrutiny.⁸⁷

quotations omitted)); *Paradise*, 480 U.S. at 171 (“In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies”); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (plurality opinion) (“The term ‘narrowly tailored,’ . . . has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used. Or, as Professor Ely has noted, the classification at issue must ‘fit’ with greater precision than any alternative means.” (citing John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727 n.26 (1974))).

Another factor that the Court has considered is whether the use of racial classifications “unduly harms members of any racial group.” *Grutter*, 539 U.S. at 341. Discussion of this factor is beyond the scope of this Article because it is not directly applicable to the disparate impact provision.

83. *Grutter*, 539 U.S. at 327.

84. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2673 (2009).

85. *Id.*

86. *Id.* (internal quotations omitted).

87. 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 did not require, employers to administer blood and urine tests constituted state action because the government encouraged this practice).

III. QUOTA OR GOAL: LINE DRAWING, A NUMBERS GAME, OR A MATTER OF SEMANTICS?

The use of quotas is one factor in determining whether the disparate impact provision's use of racial classifications is narrowly tailored. The Court's treatment of quotas varies depending on whether there is a remedial need for racial classifications. In cases involving a need to remedy past discrimination, the Court has been more accepting of quotas.⁸⁸ On the other hand, in the absence of a remedial need, the Court has generally rejected quotas but has permitted goals.⁸⁹

This Part first provides a brief legislative history of the Civil Rights Act of 1964 and its 1991 amendment codifying the disparate impact provision. This Part also explores whether the disparate impact provision can be properly characterized as a quota or a permissible goal in order to determine if the provision is narrowly tailored. The analysis proceeds by accepting the Court's jurisprudence regarding quotas because a normative discussion of quotas is beyond the scope of this Article.

A. *Brief Legislative History Showing Apprehension of Quotas*

Legislative history reveals that, prior to the passage of the Civil Rights Act of 1964, critics were concerned that the Act would require quotas.⁹⁰ “[M]any opponents of Title VII argued that an employer could be found guilty of discrimination under the statute simply

88. See *United States v. Paradise*, 480 U.S. 149, 166 (1987) (“It is now well established that government bodies, including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination.”); *Local 28 of the Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 478 U.S. 421, 479 (1986) (emphasizing the measure’s automatic termination once the remedial need ends); Richard L. Barnes, *Quotas as Satin-lined Traps*, 29 NEW ENG. L. REV. 865, 867 (1995) (“Judicially ordered quotas continue to have a place in remedying discrimination”); 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, 363–64 (1983) (“Indeed, judicially imposed quotas designed to remedy unlawful discrimination and affirmative action quotas voluntarily instituted by employers to serve as insulation from possible Title VII liability are commonplace and have generally fared well under attack in litigation.”).

89. *C.f. Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003) (discussing the difficulty in classifying measures as remedial or illegitimate); *City of Richmond v. Croson*, 488 U.S. 469, 507 (1989) (emphasizing the impossibility of determining whether the measure at issue was remedial); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978) (explaining that a measure with without a remedial purpose was unjustified because it imposed disadvantages on persons who bore no responsibility for the harms suffered by the measure’s beneficiaries).

90. See *Sheet Metal Workers*, 478 U.S. at 453–65 (describing the congressional debates surrounding the Civil Rights Act of 1964 and tracing the Act’s development); Gold, *supra* note 65, at 503–07.

because of a racial imbalance in his work force, and would be compelled to implement racial 'quotas' to avoid being charged with liability."⁹¹ Similar objections to quotas resurfaced during the passage of the Civil Rights Act of 1991.⁹² "[C]ounsel to three of the key Senate sponsors" revealed that the disparate impact provision of the proposed Act triggered the quota objection because the provision attempted to codify both liability for unintentional discrimination and the business necessity defense.⁹³

Senator Orin Hatch, for example, expressed his concerns:

[W]hat kind of a society do we really wish to establish? . . . [I]s it a society that . . . requires every job in America to match perfectly the numerical mix of the surrounding, relevant labor pool; a society where every employment policy is governed by numerical quotas?⁹⁴

Ultimately, the fear of quotas led President George H. W. Bush to veto the Civil Rights Act of 1990.⁹⁵ President Bush stated, "Primarily through provisions governing cases in which employment practices are alleged to have *unintentionally* caused the disproportionate exclusion of members of certain groups, the [1990 Act] creates powerful incentives for employers to adopt hiring and promotion quotas."⁹⁶

91. *Sheet Metal Workers*, 478 U.S. at 463.

92. For discussions of the legislative history of the Civil Rights Act of 1991, see generally Roger Clegg, *Introduction: A Brief Legislative History of the Civil Rights Act of 1991*, 54 LA. L. REV. 1459 (1994); Andrew M. Dansicker, *A Sheep in Wolf's Clothing: Affirmative Action, Disparate Impact, Quotas and the Civil Rights Act*, 25 COLUM. J.L. & SOC. PROBS. 1 (1991); Gary A. Moore & Michael K. Braswell, "Quotas" and the Codification of the Disparate Impact Theory: What Did Griggs Really Say and Not Say?, 55 ALB. L. REV. 459, 472-79 (1991).

For an insider's perspective see C. Boyden Gray, *Disparate Impact: History and Consequences*, 54 LA. L. REV. 1487, 1491 (1994); Peter M. Leibold et al., *Civil Rights Act of 1991: Race to the Finish—Civil Rights, Quotas, and Disparate Impact in 1991*, 45 RUTGERS L. REV. 1043 (1993). Peter Leibold, Stephen Sola, and Reginald Jones "were intimately involved in the negotiations surrounding the 1991 bill" as counsel to senators. *Id.* at 1043. C. Boyden Gray played a key role during the negotiations of the Civil Rights Act of 1991 by serving as Counsel to the President of the United States. Gray, *supra*, at 1487.

93. Leibold et al., *supra* note 92, at 1043-44.

94. 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, 288 n.5 (1993) (quoting 136 CONG. REC. 29,527 (1990) (statement of Sen. Hatch)).

95. See Douglas W. Kmiec, *The 1991 Civil Rights Act: A Constitutional, Statutory, and Philosophical Enigma*, 68 NOTRE DAME L. REV. 911, 913-14 (1993) (discussing the failure of the 1990 Act).

96. *Id.* at 913-14 (quoting Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 2 PUB. PAPERS 1437, 1438 (Oct. 22, 1990)).

Interestingly, the Democrats in both the House of Representatives and Senate had adopted anti-quota language in the 1990 bill.⁹⁷ Later, as a result of compromise, the anti-quota language was deleted.⁹⁸ Senator Dole and the President explained that the anti-quota language was omitted because it was unnecessary, as “the bill was not a quota bill at all.”⁹⁹ In November 1991, after a tumultuous two-year battle, the President signed the Civil Rights Act of 1991.¹⁰⁰

B. The Court’s Treatment of Quotas for Non-Remedial Need

Except for *Grutter v. Bollinger*, the Court has invalidated most cases involving governmental racial classifications for nonremedial need, purposes other than remedying past discrimination, under strict scrutiny’s narrowly tailored prong. In *Regents of the University of California v. Bakke*¹⁰¹ the Supreme Court invalidated a medical school’s admissions program, which set aside sixteen out of one hundred seats in its entering class for minorities.¹⁰² Although the Court recognized that the medical school’s goal of advancing diversity was a compelling interest,¹⁰³ the Court held that the program was not narrowly tailored.¹⁰⁴

In its defense, the medical school attempted to distinguish its program from a quota. A quota, according to the medical school, is “a requirement which must be met but can never be exceeded, regardless of the quality of the minority applicants.”¹⁰⁵ The medical school argued that its admissions process was not a quota because there was “no ‘floor’ under the total number of minority students admitted; completely unqualified students [would] not be admitted simply to meet a ‘quota.’ Neither [was] there a ‘ceiling,’ since an unlimited number could be admitted through the general admissions process.”¹⁰⁶

The Court rejected this “semantic distinction” because sixteen seats were reserved for minority applicants without competition from white applicants.¹⁰⁷ White applicants could vie only for eighty-four seats

97. See Blumrosen, *supra* note 67, at 914 (discussing the disappearance of the anti-quota language adopted by both houses of Congress).

98. Blumrosen, *supra* note 67, at 914.

99. *Id.* (internal quotations omitted).

100. Leibold et al., *supra* note 92, at 1043.

101. 438 U.S. 265 (1978).

102. *Id.* at 289.

103. *Id.* at 314.

104. *Id.* at 320.

105. *Id.* at 288 n.26.

106. *Id.*

107. *Id.* at 289.

while minorities were able to compete for all one hundred seats.¹⁰⁸ The Court concluded, “[w]hether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.”¹⁰⁹

The Court, however, later found the distinction between a quota and a goal significant.¹¹⁰ In *Grutter*, the Court upheld a law school’s admissions program that considered race as one factor to advance the school’s objective of attaining a “critical mass” of diverse students in its entering class.¹¹¹ The Court declared that “[t]o be narrowly tailored, a race-conscious admissions program cannot use a quota system” and validated the law school’s program because it did not rely on a rigid quota.¹¹² As the Court defined:

[A] quota is a program in which a certain fixed number or proportion of opportunities are reserved exclusively for certain minority groups. Quotas impose a fixed number or percentage which must be attained, or which cannot be exceeded, and insulate the individual from comparison with all other candidates for the available seats.¹¹³

In contrast, “a permissible goal requires only a good-faith effort to come within a range demarcated by the goal itself, and permits consideration of race as a plus factor in any given case while still ensuring that each candidate competes with all other qualified applicants.”¹¹⁴ Ultimately, the Court decided that the admissions program fell within a permissible goal.¹¹⁵

Additionally, in *City of Richmond v. J.A. Croson Co.*,¹¹⁶ the Court invalidated a program that required contractors who were awarded city contracts to subcontract at least thirty percent of the award to Minority Business Enterprises.¹¹⁷ The city could not show a remedial

108. *Id.*

109. *Id.* The Court compared the medical school’s program to Harvard’s, pointing out that “[i]n Harvard College admissions the Committee did not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year.” *Id.* at 316 (citation omitted). By implication, the Court seemed to view the program in *Bakke* as a quota.

110. *Grutter v. Bollinger*, 539 U.S. 306, 335–36 (2003).

111. *See id.* at 318 (defining critical mass as “‘meaningful numbers’ or ‘meaningful representation,’ which [the school] understood to mean a number that encourages underrepresented minority students to participate in the classroom and not feel isolated”).

112. *Id.* at 334.

113. *Id.* at 335 (citations omitted) (internal quotations omitted).

114. *Id.* (citations omitted) (internal quotations omitted).

115. *See id.* at 335–36 (“The Law School’s goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota.”).

116. 488 U.S. 469 (1989).

117. *Id.* at 477, 485–86.

need for the program because there was no evidence of past discrimination by the city.¹¹⁸ The Court concluded that the thirty percent figure was a “rigid racial quota”¹¹⁹ that was not narrowly tailored because race neutral alternatives were available and it unrealistically assumed that minorities will select a particular job in proportion to their representation in the local population.¹²⁰

C. *The Court’s Treatment of Quotas for Remedial Need*

Quotas designed to remedy past discrimination have had greater success in meeting the narrow tailoring requirement. For example, in *Local 28 of the Sheet Metal Workers’ International Ass’n v. EEOC*,¹²¹ (“*Sheet Metal Workers*”) the Court upheld a “membership goal” imposed as remedial relief for prior union discrimination against African Americans as being narrowly tailored.¹²² Due to the union’s “long and persistent pattern of discrimination” that had “consistently and egregiously violated Title VII,”¹²³ the district court established a twenty-nine percent non-white membership goal.¹²⁴ The Court concluded that the goal was necessary to redress the “lingering effects of past discrimination.”¹²⁵

The flexibility of the goal, evidenced by the district court’s adjustments in response to changes in the union, was another persuasive factor in *Sheet Metal Workers*.¹²⁶ The Court highlighted that the district court’s flexibility in adjusting the deadline for achieving the membership goal was evidence that the goal was not a device for attaining and maintaining racial balance, but “rather [w]as a bench mark against which the court could gauge [the union’s] efforts to remedy past discrimination.”¹²⁷ Additionally, the temporary nature of the goal—that the program would end as soon as the union achieved

118. *Id.* at 480.

119. *Id.* at 499.

120. *Id.* at 507.

121. 478 U.S. 421 (1986).

122. *Id.* at 476–77. The court ordered goal in *Sheet Metal Workers* survived challenges under equal protection and Title VII. *See id.* at 479–80 (stating that petitioners raised a claim under the “equal protection component of the Due Process Clause of the Fifth Amendment”).

123. *Id.* at 433.

124. *Id.* at 432.

125. *Id.* at 477. The Court did not review the appropriateness of the twenty-nine percent figure because that figure had been set for at least ten years, the court of appeals had affirmed that figure twice before, and the parties did not raise this particular issue for the Court’s review. *Id.* at 441.

126. *Id.* at 477–78.

127. *Id.*

the sought after membership—was significant in the Court’s analysis of whether the goal was narrowly tailored.¹²⁸

In *United States v. Paradise*,¹²⁹ the Court upheld another “goal” intended to redress past discrimination against African Americans by the Alabama Department of Public Safety.¹³⁰ The district court ordered the hiring of one African American trooper for each Caucasian trooper until the state-wide percentage of African American troopers reached twenty-five percent.¹³¹ Concluding that the one-for-one requirement was “flexible, waivable, and temporary,”¹³² the Court explained that it was not a goal, but rather the pace at which the twenty-five percent goal would be met,¹³³ similar to the objective in *Sheet Metal Workers*.¹³⁴

D. Does the Disparate Impact Provision Impose or Operate as a Quota?

The disparate impact provision does not explicitly require quotas,¹³⁵ and in fact, § 703(j) of Title VII disavows any requirement for preferences on the basis of race, color, national origin, sex, or religion.¹³⁶ But this disavowal is not sufficient to dispel the suggestion that the provision operates as a quota.

An argument can be made that when the disparate impact provision is applied, it falls within the definition of “quota”¹³⁷ provided in *Bakke* and *Grutter*.¹³⁸ Similar to the quota in *Bakke*,¹³⁹ the disparate impact provision reserves a percentage exclusively for other racial groups without competition. Under the four-fifths rule, if

128. *Id.* at 479.

129. 480 U.S. 149, 153 (1986).

130. *Id.* at 185–86. The Court also upheld quotas in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), but this Article does not rely on *Weber* because it involved a voluntary quota agreement entered into by private parties lacking state action and the parties raised only a Title VII claim, not an Equal Protection challenge. *See id.* at 197 (describing a collective bargaining agreement between employer and union).

131. *Paradise*, 480 U.S. at 154–55.

132. *Id.* at 178.

133. *Id.* at 179.

134. *Id.* at 180 (citing *Sheet Metal Workers*, 478 U.S. at 487–88 (Powell, J., concurring)).

135. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring) (“To be sure, the disparate-impact laws do not mandate imposition of quotas . . .”).

136. 42 U.S.C. § 2000e-2(j) (2006).

137. I do not use “quota” as a pejorative but rather as a label for programs that are not permissible goals.

138. *See Grutter v. Bollinger*, 539 U.S. 306, 311 (2003) (identifying race as a factor in determining admission to a law school); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269–70 (1978) (noting the set-aside program was implemented to ensure a specified number of minority students were admitted to the medical school program).

139. *See Bakke*, 438 U.S. at 275 (describing the medical school’s policy of admitting a prescribed number of minority students).

there is at least twenty percent separation between the selection rate of the highest performing racial group and other groups, then a plaintiff can prove a prima facie case of disparate impact.¹⁴⁰ In this way, the disparate impact provision essentially reserves a representation rate that is eighty percent of the most successful group's selection rate. Additionally, the *Grutter* Court permitted universities to "consider race or ethnicity only as a 'plus' in a particular applicant's file, without insulating the individual from comparison with all other candidates for the available seats."¹⁴¹ The disparate impact provision's twenty percent reservation insulates groups from comparison, contrary to the program approved in *Grutter*.¹⁴²

On the other hand, it is possible to characterize the disparate impact provision as a permissible goal like *Grutter's* critical mass.¹⁴³ One can argue that the disparate impact provision functions like a goal because like critical mass, the disparate impact provision does not establish a set number needed to meet the goal.¹⁴⁴ Even though the four-fifths rule equates to eighty percent, it is set in relation to the group with the highest pass rate.¹⁴⁵ Consider two examples. First, if Caucasians had the highest pass rate in *Ricci* with one hundred percent passing the test, then there would be a prima facie case of disparate impact if less than eighty percent of African American firefighters passed. Second, assume again that Caucasians had the highest pass rate, but with only fifty percent passing the test. In this case, there would be a disparate impact if less than forty percent of African American firefighters passed. Thus, there is no "quota" because the number of people required to pass in order to avoid prima facie liability would depend on the group with the highest pass rate.

Also, the disparate impact provision can be characterized as a permissible goal because it allows consideration of race plus other

140. See *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2197 (2010) (holding that a claim is established by showing that an employer "uses a particular employment practice that causes a disparate impact" on one of the prohibited bases); EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D) (2010).

141. *Grutter*, 539 U.S. at 334 (quoting *Bakke*, 438 U.S. at 317) (internal quotations omitted).

142. See *id.* (explaining that the policy allowed race to be considered in "a flexible, nonmechanical way").

143. See *id.* at 315–16 (describing the law school's goal of achieving a critical mass of diverse students to enrich education).

144. See *id.* at 335 (emphasizing that the law school did not maintain specified numbers for minority enrollment).

145. EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D) (2010).

factors, similar to critical mass. The provision does not rest solely on race but takes into consideration other factors, such as whether the employment practice is justified by business necessity and is job related and whether other equally effective alternatives with fewer adverse effects exist.¹⁴⁶

There are, however, several problems with equating the disparate impact provision to critical mass. First, although there is no predetermined number set by the disparate impact provision, there is a predetermined percentage or proportion established by the four-fifths rule that must be met to avoid a prima facie case of disparate impact.¹⁴⁷ In contrast, the critical mass concept approved by the *Grutter* Court was not quantified by numbers or percentages.¹⁴⁸

Second, the disparate impact provision does not allow for "a range demarcated by the goal itself" like with critical mass.¹⁴⁹ In an admissions program, the number of students that are needed for a critical mass of diverse students in the entering class can change from year to year.¹⁵⁰ But the proportion or percentage set by the four-fifths rule needed to satisfy the disparate impact provision is fixed not only from year to year (unless the EEOC passes new Guidelines), but also fixed for all employers.

Third, the disparate impact provision differs from critical mass because critical mass affords consideration of race plus other factors. Although the disparate impact provision considers other factors for ultimately determining liability, race is the only consideration at the initial stage. A plaintiff can show a prima facie case of disparate impact merely on race alone. "Unless and until the defendant [employer] pleads and proves a business-necessity defense, the plaintiff wins simply by showing the stated elements" of disparate impact.¹⁵¹ If an employment practice fails the four-fifths rule, an employer must defend against a prima facie case of disparate impact.¹⁵² Although the disparate impact provision affords employers the defense of business necessity and job relatedness, it may be of limited consolation because the costs associated with mounting the defense can be prohibitive.¹⁵³

146. 42 U.S.C. § 2000e-2(k)(1)(A) (2006).

147. 29 C.F.R. § 1607.4(D).

148. *Grutter*, 539 U.S. at 318–19.

149. *Id.* at 335 (quoting *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 495 (1986) (O'Connor, J., concurring in part and dissenting in part)).

150. *Id.* at 336.

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

152. *Id.*

153. To mount a defense, an employer would need to validate its selection criteria, at the very least, which would require considerable expense of time and

Fourth, the disparate impact provision is distinguishable from critical mass because it lacks a demonstrated need for the quota set by the provision. In *Grutter*, the Court approved critical mass because the school justified that a critical mass of diverse students was integral to the school's educational mission.¹⁵⁴ In contrast, in *Parents Involved in Community Schools v. Seattle School District No. 1*,¹⁵⁵ ("Parents Involved") the school board's failure to show a need for the sought-after level of diversity led to the Court's conclusion that the board's student assignment was not narrowly tailored.¹⁵⁶ In that case, the school board used each school's racial balance as one factor in placing students.¹⁵⁷ If the school's racial distribution was not within ten percentage points of the district's white to non-white racial composition, then a student who would contribute to the school's racial balance would be assigned to the school.¹⁵⁸ The Court

money. For example, in *Ricci*, the city spent \$100,000 to hire a testing consultant to develop and administer the examinations. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2665 (2009). One commentator has remarked that "[i]n theory, an employer can win an adverse impact case by proving that the challenged selection criterion is valid. In practice, this burden can almost never be carried, and the result is that employers are forced to hire and promote by quotas." Gold, *supra* note 65, at 457.

For additional discussion of the expense and challenges of validation, see Booth & Mackay, *supra* note 53; Gold, *supra* note 6565, at 460 n.82 (explaining that Daniel E. Leach, vice-chair of EEOC in 1978, estimated criterion validation costing employers \$100,000–\$400,000); Steven R. Greenberger, *A Productivity Approach to Disparate Impact and the Civil Rights Act of 1991*, 72 OR. L. REV. 253, 319 (1993) (noting that validation tests are so exacting and demanding that smaller employers will often forgo the tests); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1235 (1995) ("Formal validation of even relatively straightforward objective selection devices is an expensive and time-consuming process, often requiring several years and hundreds of thousands of dollars in professional fees and employee time."); Rutherglen, *supra* note 49, at 1317–18 (explaining that validation tests are expensive, costing an estimate of \$100,000 and must be completed each time a test is used for a different job); 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, 1543 (1996) ("For example, the cost of the most favored form of validation, criterion validation, has been estimated to be at least \$100,000, an expense that has to be incurred each time a practice is used for a particular job."); Van Bowen & Riggins, *supra* note 45, at 651 ("The burden of validation can be costly as well as impossible in at least some cases.").

For a description of the types of validation, see Booth & Mackay, *supra* note 53, at 162–65; Doreen Canton, *Adverse Impact Analysis of Public Sector Employment Tests: Can a City Devise a Valid Test?*, 56 U. CIN. L. REV. 683, 691–96 (1987).

154. *Grutter*, 539 U.S. at 329 ("Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that 'good faith' on the part of the university is 'presumed' absent 'a showing to the contrary.'" (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318–19 (1978))).

155. 551 U.S. 701 (2007).

156. *Id.* at 726.

157. *Id.* at 710.

158. *Id.* at 712.

explained, “[t]he plans are 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.”¹⁵⁹

Similarly, the disparate impact provision fails to demonstrate a need for the level specified by the four-fifths rule. Researchers have criticized the four-fifths rule as arbitrary.¹⁶⁰ This “arbitrariness” could be due to the fact that the four-fifths or eighty percent rule resulted from two compromises:

- (1) a desire expressed by those writing and having input into the Guidelines to include a statistical test as the primary step but knowing from an administrative point of view a statistical test was not possible for the FEPC consultants who had to work the enforcement of the Guidelines, and (2) a way to split the middle between two camps, the 70% camp and the 90% camp.¹⁶¹

Consistent with *Parents Involved*, the EEOC would need to provide data to support the chosen eighty percent over seventy percent, ninety percent, or any other percentage and that the four-fifths rule is necessary to achieve the goal envisioned by the disparate impact provision.¹⁶² Absent supporting evidence for the four-fifths rule, it is, as the Court pointed out in *Sheet Metal Workers*, “completely unrealistic to assume that individuals of each race will gravitate with mathematical exactitude to each employer . . . absent unlawful discrimination.”¹⁶³

Additionally, even if the EEOC were to jettison the four-fifths rule or another variation of the rule, the disparate impact could not operate practically as a “goal” like critical mass. The unique concerns of uniformity of enforcement as well as giving notice to prospective plaintiffs and defendants as to when liability may result for disparate impact make the critical mass approach inapplicable to disparate

159. *Id.* at 726.

160. Anthony E. Boardman & Aidan R. Vining, *The Role of Probative Statistics in Employment Discrimination Cases*, 46 LAW & CONTEMP. PROBS. 189, 189 (1983).

161. Jennifer L. Peresie, *Toward a Coherent Test for Disparate Impact Discrimination*, 84 IND. L.J. 773, 782 n.61 (quoting DAN BIDDLE, ADVERSE IMPACT AND TEST VALIDATION: A PRACTITIONER’S GUIDE TO VALID AND DEFENSIBLE EMPLOYMENT TESTING 3 (2005)).

162. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 733 (2007) (plurality opinion) (noting the requirement of showing that a racial classification is necessary to achieve a stated purpose).

163. *Local 28 of the Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 478 U.S. 421, 494 (1986) (O’Connor, J., concurring in part and dissenting in part).

impact. Critical mass is an approach to using racial classifications that is unique to the educational context.¹⁶⁴

Critical mass has been used to describe three conditions:

[T]he existence of a precise minimum level of the required material for a change to take place; a change that is sudden and transformative; and that the change is not simply a function of a minimum level of the resource but also a function of how elements of that resource interact with one another.¹⁶⁵

In the educational context, the law school in *Grutter* used critical mass to refer to “meaningful numbers” or “meaningful representation” needed to encourage minority participation in the classroom without the sense of isolation.¹⁶⁶ In this regard, a university can practically operate an admissions program without a defined number as to when critical mass is achieved. It would be hard to imagine, however, how the EEOC could enforce the disparate impact provision without a defined number or percentage to serve as a point of reference in assessing when a disproportionate adverse effect rises to the level of disparate impact. First, the EEOC would need to establish a threshold to ensure that it uniformly enforces the disparate impact provision and does not violate employers’ equal protection rights by varying its application.¹⁶⁷

Second, the EEOC would also need to be wary of due process claims for assessing liability upon employers without giving them notice as to what constitutes disparate impact. The Due Process Clause has been interpreted to encompass procedural and substantive due process.¹⁶⁸ Procedural due process requires providing

164. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978) (stating that the interest of diversity is compelling in the context of a university admissions program).

165. Adeno Addis, *The Concept of Critical Mass in Legal Discourse*, 29 *CARDOZO L. REV.* 97, 98–99 (2007).

166. *Grutter v. Bollinger*, 539 U.S. 306, 318 (2003). The concept of critical mass originated in science and refers to the precise minimum amount of mass needed to create and sustain an explosion. Addis, *supra* note 165, at 98. Professor Addis points out that *Grutter* can be criticized for imprecisely and improperly using the concept of critical mass because the scientific reference to critical mass is dependent upon ascertaining a precise minimum amount, whereas the law school in *Grutter*, despite Justice Scalia’s prodding, declined to quantify critical mass. *Id.* at 125–26. Nonetheless, this section proceeds with an analysis of critical mass as conceptualized by the law school, since its interpretation of critical mass was accepted by the Court in *Grutter*.

167. See *Bakke*, 438 U.S. at 289–90 (“The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.”).

168. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 603 (3d ed. 2009).

notice before a person’s life, liberty, or property can be taken away.¹⁶⁹ An employer would not have adequate notice if it did not have sufficient information to conform its behavior to the law. Here, if the disparate impact provision operates without a defined threshold, like critical mass, employers will not know what level of disparity is actionable against them. Concomitantly, without a defined threshold that would trigger disparate impact, prospective plaintiffs would not know the appropriate circumstances under which to file a disparate impact claim. Thus, even if the EEOC were to proceed without the four-fifths rule, it would be difficult for the disparate impact provision to be enforced without some numerical or percentage threshold. Whatever the form, any threshold is likely to operate as a quota because it draws a line on the basis of race.¹⁷⁰

IV. FLEXIBILITY AND INDIVIDUALIZED DECISION MAKING

A second factor in considering whether a program is narrowly tailored includes the program’s flexibility and individualized decision making. A program’s flexibility and individualized decision making are interrelated with each other and the quota factor in that the characteristics relevant to the quota factor may also be relevant to the flexibility and individualized decision making of the program.

A. Flexibility

In evaluating whether remedial race-conscious measures are narrowly tailored, the Court has been concerned with the flexibility of the remedy. In *Paradise*, the Court concluded that the one-for-one promotion quota was flexible because the plan allowed for waiver in the absence of qualified African American candidates.¹⁷¹ In *Sheet Metal Workers*, the membership goal was narrowly tailored because the goal was flexible—the district court twice extended the deadline and accommodated the union’s economic changes by adjusting the apprenticeship class size.¹⁷² The flexibility of the Harvard admissions program countenanced by *Bakke* allowed for variation in the weight accorded to a particular factor each year, as the mix of the student body changed.¹⁷³ Similarly, the flexibility of the program in *Grutter*

169. *Id.*

170. *Bakke*, 438 U.S. at 288–89.

171. *United States v. Paradise*, 480 U.S. 149, 177 (1987).

172. *Local 28 of the Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 478 U.S. 421, 487–88 (1986).

173. *Bakke*, 438 U.S. at 317–18.

allowed for yearly fluctuation in the number of underrepresented minority student enrollment.¹⁷⁴

In contrast, the disparate impact provision does not appear to be flexible like the goals in *Paradise*, *Sheet Metal Workers*, *Bakke*, or *Grutter*. There are no waivers or exceptions to the enforcement of the disparate impact provision. Additionally, the disparate impact provision does not allow for yearly variation based on an employer's need like the Harvard plan in *Bakke* or the plan in *Grutter*.¹⁷⁵ The ratio established by the four-fifths rule remains constant in each case, regardless of whether an employer's needs necessitate variation.

The constancy of the four-fifths rule is problematic for another reason. The Court requires that for a race-conscious program to satisfy the narrow tailoring requirement, the weight placed on race should be no more than is necessary to achieve the compelling government interest.¹⁷⁶ The four-fifths rule places the same amount of weight on race regardless of the compelling interest being asserted to justify the disparate impact provision's racial classification. Whether the provision might be justified because it seeks to obtain the benefits of diversity, provide role models, meet operational needs, smoke out discrimination, or provide equal employment opportunities, the four-fifths rule is the only method allowed for achieving the desired objective.

In *Bakke*¹⁷⁷ and *Grutter*,¹⁷⁸ the Court recognized the need for the program to vary the weight placed on racial factors. Allowing for variation ensures that the weight placed on race will be no more than necessary. The four-fifths rule does not afford variation depending upon the asserted goal or the employer's needs.

174. *Grutter v. Bollinger*, 539 U.S. 306, 336 (2003).

175. *Id.* at 336; *Bakke*, 438 U.S. at 317–18.

176. See Ayres & Foster, *supra* note 23, at 523–24 (listing factors the Court has considered relevant to narrow tailoring).

177. See *Bakke*, 438 U.S. at 317–18 (distinguishing the Harvard admissions program from the medical school program in that the Harvard program allowed for “the weight attributed to a particular quality [to] vary from year to year depending upon the ‘mix’ both of the student body and the applicants for the incoming class”).

178. See *Grutter*, 539 U.S. at 336 (“[T]he number of underrepresented minority students who ultimately enroll in the Law School differs substantially from their representation in the applicant pool and varies considerably for each group from year to year.”). Commentators have pointed out that in actuality the admissions program in *Grutter* placed greater emphasis on race than the program in *Gratz v. Bollinger*, 539 U.S. 244 (2003). Ayres & Foster, *supra* note 23, at 538–39. Additionally, the use of race via the “critical mass” approach had a greater impact on admissions than the point system used in *Gratz*. *Id.* at 535–36.

B. Individualized Decision Making

Individualized decision making is another factor relevant to determining whether disparate impact meets the requirement of narrow tailoring. Individualized decision making includes requiring preferences that are not quantified,¹⁷⁹ are differentiated,¹⁸⁰ and are not excessive.¹⁸¹ In *Bakke*, the Court was concerned by the medical school admissions program’s sole focus on ethnic diversity.¹⁸² The Court concluded that assigning a fixed number of seats to minorities was not necessary¹⁸³ because it was not the only means to achieve diversity.¹⁸⁴ In juxtaposition, the *Bakke* Court discussed with approval the admissions program administered at Harvard College.¹⁸⁵

Although race or ethnicity may have operated as a “plus” for an applicant, race was not a decisive factor in Harvard’s admissions program.¹⁸⁶ Instead, the Harvard policy included other qualities in consideration of diversity and allowed the weight accorded to each factor to vary each year, depending upon the attributes of the current student body and candidates for the incoming class.¹⁸⁷ Thus, the Harvard program employed race “in a flexible, nonmechanical way” that permitted individualized consideration of each applicant.¹⁸⁸ The *Bakke* plurality “developed the individualized consideration requirement in order to police the distinction between an affirmative action program in which race was a legitimate (but not predominant) element of difference, and an affirmative action program that was sliding toward ‘the functional equivalent of a quota system.’”¹⁸⁹

In *Grutter*, the Court concluded that the law school’s program was narrowly tailored like the Harvard program because of its flexibility.¹⁹⁰

179. See Ayres & Foster, *supra* note 23, at 545 (clarifying that “no quantified preferences” means that the decision-making process does not have specified weights in a formula for admission).

180. See *id.* at 547 (citing *Gratz*, 539 U.S. at 271–73) (noting that the Supreme Court’s decision in *Gratz* implies that differentiation is required in a decision making process).

181. See *id.* (noting that the Supreme Court also attacked placing excessive emphasis on any single characteristic in the decision making process).

182. *Bakke*, 438 U.S. at 315.

183. *Id.* at 316.

184. *Id.* at 314–15.

185. *Id.* at 321–24.

186. *Id.* at 317.

187. *Id.* at 317–18.

188. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

189. Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 68–69 (2003) (quoting *Bakke*, 438 U.S. at 318).

190. *Grutter*, 539 U.S. at 334.

The law school's program provided a "highly individualized, holistic review [for] each applicant's file," regardless of race.¹⁹¹

In contrast to the Harvard program discussed in *Bakke* and the *Grutter* program, the lack of individualized decision making was one factor that led to the invalidation of the admissions program in the companion case *Gratz v. Bollinger*.¹⁹² In *Gratz*, an undergraduate university employed a multi-factored admissions system that included the following: "the quality of an applicant's high school (S), the strength of an applicant's high school curriculum (C), an applicant's unusual circumstances (U), an applicant's geographical residence (G), and an applicant's alumni relationship (A)."¹⁹³ In addition to these factors, the university considered an applicant's "underrepresented minority status, socioeconomic disadvantage, or attendance at a high school with a predominantly underrepresented minority population, or underrepresentation in the unit to which the student was applying."¹⁹⁴ The Court held that the University's program was not narrowly tailored because the school automatically awarded twenty points to every underrepresented minority, which amounted to one-fifth of the necessary points for admission.¹⁹⁵ Although the admissions program in *Gratz* used race as a "plus" factor like the Harvard program and *Grutter* program, the automatic distribution of twenty points did not allow for individualized decision making.¹⁹⁶

Similarly, in *Parents Involved*, although the school district employed a multi-tiered system of tiebreakers, the Court nonetheless concluded that "under each plan when race comes into play, it [was] decisive by itself."¹⁹⁷ Consequently, the school assignment policy was not

191. *Id.* at 337.

192. 539 U.S. 244, 273–74 (2003).

193. *Id.* at 254.

194. *Id.* at 255.

195. *Id.* at 270.

196. *Id.* Justice Souter argued in his dissent that the college in *Gratz* applied a "holistic review" of its applicants like the law school in *Grutter*. *Id.* at 295 (Souter, J., dissenting). The only difference was that in using the numbered scale, the college did not "hide the ball." *Id.* at 298; see also Ayres & Foster, *supra* note 23, at 519 ("If the government decisionmaker does not 'tell' courts how much of a racial preference it is giving[,] . . . courts will essentially not 'ask' probing questions about whether the preferences are differentiated or excessive."); Post, *supra* note 189, at 74 ("[T]he value assigned to race is camouflaged by an opaque process of implicit comparisons [in *Grutter*]. Although transparency is ordinarily prized in the law, the Court in *Grutter* and *Gratz* constructs doctrine that in effect demands obscurity."). Commentators have pointed out that the "[l]aw [s]chool may have been more formulaic than the [c]ollege," but the Court "took the law school at its word its admissions program was nuanced." Ayres & Foster, *supra* note 23, at 549, 552.

197. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007) (plurality opinion).

narrowly tailored because it employed racial factors in a mechanical, rather than individualized manner.¹⁹⁸

As seen in the above cases, in order for the disparate impact provision to satisfy the narrowly tailored requirement, it must provide individualized consideration through case-by-case evaluation. Determining whether the provision meets this requirement can be evaluated by framing the issue in two ways. First, does the disparate impact provision force employers to use racial classification in making employment decisions in a non-individualized fashion? When framed this way, it appears that the provision removes individualized decision making from employers because of the four-fifths rule. Even if an employer were to evaluate each candidate’s application individually, an employer would create a prima facie violation of the provision if a disparity of more than twenty percent occurs between the selection rate of the most successful group and other racial groups. Even though other factors are later considered in assessing liability, race is the only factor in determining if there is a prima facie violation. Like the impact of the automatic twenty point distribution in *Gratz* and the multi-tiered tiebreaker system in *Parents Involved*, the four-fifths rule makes race a decisive factor for identifying prima facie violations. Thus, the decisive role that race plays in implicating a prima facie case of disparate impact supports Justice Scalia’s criticism that “the disparate-impact provisions sweep too broadly . . . 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.”¹⁹⁹

Another way to frame the issue is whether the provision allows for individualized consideration by the courts in assessing disparate impact liability. It is possible that the disparate impact provision satisfies the requirement for individualized decision making because the provision affords consideration of multiple factors in ultimately determining liability. Before liability is finally assessed under the provision, a court reviews whether an employer’s business practice is a business necessity and job related.²⁰⁰ Additionally, a court considers whether an employer refused to use an equally effective alternative with less adverse effect.²⁰¹

When framed in this way, the disparate impact provision avoids the deficiency of *Gratz*. In *Gratz*, individualized decision making could

198. *Id.* at 723.

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

200. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

201. 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2006).

take place once a file was flagged, but the Court was unpersuaded by this possibility because individual review occurred in exceptional cases, not as a general rule.²⁰² The disparate impact provision, however, provides individual consideration of other factors in every case of prima facie disparate impact to ultimately determine liability.²⁰³ In this regard, the provision comports with *Grutter* and *Bakke*'s conceptions of holistic, individual review because race is not the decisive factor in the final assessment of disparate impact liability.²⁰⁴ Thus, whether the disparate impact provision affords individualized consideration to meet strict scrutiny's narrowly tailored requirement depends upon whether the provision is evaluated at the initial stage when a prima facie case of disparate impact arises or at the final stage of determining liability when defenses are considered.

V. SCOPE OF THE PROGRAM: OVERINCLUSIVE AND UNDERINCLUSIVE

A. *The Court's Treatment of Underinclusive and Overinclusive Acts*

For the disparate impact provision's use of racial classification to be narrowly tailored, such classifications must not be underinclusive or overinclusive. An underinclusive classification results when legislation fails to encompass all similarly situated people in terms of the legislation's objective; some people are included while others who are similarly situated for purposes of the law are excluded.²⁰⁵ Overinclusiveness occurs when the legislation overreaches in its inclusion of all persons similarly situated for the purpose of the law and of persons whose inclusion is not relevant to the law's objective.²⁰⁶

Although the Court did not explicitly use the term "underinclusive" in its analysis in *Parents Involved*, two concepts of underinclusiveness can be construed from that case. First, underinclusive can mean failure to include the persons who should be included for the purpose of the law.²⁰⁷ The plurality in *Parents Involved* questioned the school districts' purported interest in

202. *Gratz v. Bollinger*, 539 U.S. 244, 283–84 (2003).

203. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

204. *See Grutter v. Bollinger*, 539 U.S. 306, 337 (2003) (allowing race as a contributing factor); *see also Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (holding that a program that incorporates a "plus" system for race but still compares all applicants satisfies equal protection).

205. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 746 (8th ed. 2010).

206. *Id.*

207. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007) (plurality opinion).

achieving diversity when the districts focused solely on ethnic diversity, without considering the “far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”²⁰⁸ In this regard, the focus on racial or ethnic origin was underinclusive for the goal of achieving diversity.²⁰⁹ Moreover, with respect to the consideration of racial diversity, the districts were underinclusive by considering race exclusively in terms of white and non-white or black and “other.”²¹⁰

A second concept of underinclusiveness entails the minimal impact or effectiveness of the legislation at achieving its goal. In *Parents Involved*, the Court pointed out that the racial tiebreaker ultimately shifted a small number of students.²¹¹ The limited impact undermined the necessity of using racial classification to achieve the asserted goal of racial integration for socialization and education.²¹²

Overinclusiveness is another factor that is detrimental to a race-conscious program. In *Croson*, the “gross overinclusiveness” of the plan undermined the argument that the plan was narrowly tailored.²¹³ The Court criticized the plan for its “random inclusion” of racial groups that were not victims of discrimination²¹⁴ by allowing any qualified Minority Business Enterprise to take advantage of the thirty percent set aside.²¹⁵

Similarly, in *Bakke*, the Court questioned the medical school’s inclusion of African Americans, Mexican Americans, American Indians, and Asians among the preferred groups for the sixteen seats set aside, noting that Asians were already admitted in great numbers.²¹⁶ This remark implied that Asians did not need preferential treatment through the quota and that the Court deemed admissions policy to be overinclusive because of their inclusion.²¹⁷

208. *Id.* at 722 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003)) (internal quotations omitted).

209. See *Parents Involved*, 551 U.S. at 733 (“To the extent the objective is sufficient diversity[,] . . . using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end.”).

210. *Id.* at 703.

211. *Id.* at 733.

212. *Id.* at 734; see also 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, 285 (2009) (suggesting that limited impact indicates existence of alternatives).

213. *City of Richmond v. J.A. Croson*, 488 U.S. 469, 506, 508 (1989).

214. *Id.* at 506.

215. *Id.* at 478.

216. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 309 n.45 (1978).

217. *Id.*

The impact of underinclusiveness and overinclusiveness on satisfying the narrowly tailored requirement is even more pronounced beyond the context of racial classifications. In *Citizens United v. FEC*,²¹⁸ the Court invalidated a statute as violative of the First Amendment because the statute prohibited independent corporate expenditures advocating a candidate's election or defeat.²¹⁹ The purpose of the statute was to protect shareholders from being compelled to finance corporate political speech, but the statute was considered both underinclusive and overinclusive.²²⁰ As to underinclusiveness, the statute only prohibited speech in certain media and within a certain time frame, even though a shareholder's interest would be affected regardless of the type of media or time.²²¹ Overinclusiveness resulted from the statute's inclusion of all corporations, including nonprofit and single-shareholder for-profit corporations.²²²

In *Carey v. Brown*,²²³ the Court invalidated a statute that prohibited picketing of residences or dwellings but allowed peaceful labor picketing.²²⁴ The state enacted the statute for the purposes of protecting the peace and privacy of residents from nonlabor picketing,²²⁵ but the Court concluded that the statute violated the Equal Protection Clause.²²⁶ The statute was both overinclusive and underinclusive because it permitted peaceful labor picketing without regard to the disturbances that would result while it broadly banned nonlabor picketing without distinguishing among the harms to residential privacy.²²⁷ Therefore, the cases demonstrate that overinclusiveness or underinclusiveness undermines the reasonableness of a program's scope and its satisfaction of the narrowly tailored requirement.

B. Overinclusive and Underinclusive Due to Probability for Error

When the disparate impact provision is evaluated for overinclusiveness and underinclusiveness to determine narrow tailoring, one may find the provision's scope to be problematic. The

218. 130 S. Ct. 876 (2010).

219. *Id.* at 911.

220. *Id.*

221. *Id.*

222. *Id.*

223. 447 U.S. 455 (1980).

224. *Id.* 457–58.

225. *Id.* at 458.

226. *Id.* 457–58.

227. *Id.* at 465.

disparate impact provision is not narrowly tailored because it may be overinclusive or underinclusive as a result of its probability for error. If the provision is overinclusive or underinclusive, its racial classifications are unnecessary and alternatives are likely available.

A program may be overinclusive and/or underinclusive if it is not accurate. Studies show that the probability of error with applying the four-fifths rule is high.²²⁸ Researchers have identified three problems arising from the four-fifths rule:

- (1) there is a high probability that an employer will be found to be discriminating under the four-fifths rule, when in fact, he is not discriminating;
- (2) there is a high probability that an employer will be held harmless due to compliance with the four-fifths rule when, in fact, he is discriminating against a group of employees; and
- (3) the four-fifths rule and statistical significance criterion indicate discrimination in quite different situations.²²⁹

In one study, Professor Anthony Boardman determined the probability of making Type I errors (false positives) and Type II errors (false negatives).²³⁰ Professor Boardman calculated the outcomes in situations involving two groups and in situations with more than two groups.²³¹ He found that the probability for error in claiming an adverse impact when none existed (Type I error) was greater than fifty percent when there were two groups with fewer than twenty-five people.²³² For situations involving more than two groups, the probabilities for Type I errors were higher.²³³ The chances that people who were adversely impacted but failed to claim adverse impact (Type II errors) were higher than forty percent, regardless of whether there were two or three groups.²³⁴

As Professor Boardman concluded, "the EEOC's rule appears to invite considerable inappropriate litigation" while "fail[ing] to clearly

228. Anthony E. Boardman, *Another Analysis of the EEOC "Four-Fifths" Rule*, 25 MGMT. SCI. 770, 776 (1979).

229. Anthony E. Boardman & Aidan R. Vining, *The Role of Probative Statistics in Employment Discrimination Cases*, 46 LAW & CONTEMP. PROBS. 189, 189 (1983). *But see* Meier et al., *supra* note 63, at 169 ("The 80% rule appears to be a reasonable articulation of a statistical criterion to determine whether statistically significant differences are substantial enough to warrant legal liability.").

230. Boardman, *supra* note 228, at 770 (using a model that assumed that the number of people promoted is predetermined).

231. *Id.*

232. *Id.* at 776. Professor Boardman provides detailed explanation of his model and formulas, but there is no explanation for what may account for Type I and Type II errors, or why the percentages for these errors are so high.

233. *Id.*; *see also* Irwin Greenberg, *An Analysis of the EEOC "Four-Fifths" Rule*, 25 MGMT. SCI. 762, 765 (1979) ("As the number of groups increases, the chance of making a type I error increases.").

234. Boardman, *supra* note 228, at 776.

indicate discrimination when discrimination exists.”²³⁵ Although it is not clear whether a fifty percent likelihood of a Type I error by a prospective claimant will necessarily equate to a fifty percent likelihood of enforcement by the EEOC and private parties,²³⁶ an over-filing of adverse impact claims increases the chances that these mistaken claims will lead to erroneous over-enforcement of the disparate impact provision and erroneous assessment of liability.

The implication of Type II errors is clearer. Assuming that the bulk of disparate impact litigation result from claimants filing charges with the EEOC (as opposed to the EEOC initiating charges),²³⁷ if there is a forty percent likelihood that potential claimants are failing to file adverse impact charges, it is reasonable to conclude that this percentage strongly correlates to the percentage of under-enforcement by the EEOC and private parties. Thus, Professor Boardman’s study reveals the immense likelihood that the four-fifths rule will be overinclusive, casting its enforcement net so widely that it captures employers who are not in fact causing an adverse impact.²³⁸

235. *Id.*; see also Richard M. Cohn, *On the Use of Statistics in Employment Discrimination Cases*, 55 INDUS. REL. L.J. 493, 493 n.3 (1979) (concluding that the four-fifths rule “can lead either to the false charge of adverse impact or to the conclusion that no adverse impact exists when, in fact, the employer’s selection procedure is discriminatory”); Greenberg, *supra* note 233, at 766 (“[I]t is clear that the four-fifths rule is not well-suited to achieve equal employment opportunities.”).

236. An unlawful employment complaint begins with a written charge filed by a complainant under oath. 42 U.S.C. § 2000e-5(b) (2006). The Commission determines, after an investigation, whether it has a reasonable cause to believe the charges are true. After such a determination, the Commission may pursue the charges by “informal methods of conference, conciliation, and persuasion.” *Id.* If the Commission is unable to obtain voluntary compliance within a set time, the complainant or, under certain circumstances, another alleged to be aggrieved, or the EEOC may file a civil action. *Id.* § 2000e-5(f)(1). Thus, although the Commission is responsible for reviewing every charge, the Commission may not pursue every charge beyond the investigation phase. The right-to-sue letter imposes a condition precedent for private parties filing a Title VII claim in federal court. Roy L. Brooks, *Beyond Civil Rights Restoration Legislation: Restructuring Title VII*, 34 ST. LOUIS U. L.J. 551, 557 (1989).

For example, in 2010, the Commission received 35,890 charges alleging race-based discrimination. Of those charges filed, the Commission determined “no reasonable cause” existed for 26,319 charges (70.1%) and “reasonable cause” existed for 1,330 charges (3.5%). The statistics provided by the EEOC do not distinguish between disparate treatment charges and disparate impact charges. See *Race-Based Charges: FY 1997–FY 2010*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/statistics/enforcement/race.cfm>, (last visited February 14, 2011) (compiling data on race-based discrimination).

237. A member of the EEOC may file a charge when the member believes an unlawful employment practice exists. 42 U.S.C. § 2000e-5(b) (2006); see also BARBARA T. LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1626, 1659–62 (C. Geoffrey Weirich et al., eds, 4th ed. 2007) (discussing a commissioner’s charge).

238. See Boardman, *supra* note 228, at 776 (concluding that this fraction system presents a double bind: any change to avoid finding discrimination in innocent employers risks failing to uncover real discrimination).

His study also supports an inference that the four-fifths rule is underinclusive, failing to capture the employers who are in fact causing an adverse impact.²³⁹

Numerous studies have yielded similar results.²⁴⁰ For example, Professors Marion Gross Sobol and Charles Ellard concluded that in some circumstances "the four-fifths rule signals discrimination when in fact there is none; the four-fifths rule seems to exaggerate true adverse impact."²⁴¹ They also found that in other situations, however, "[t]he four-fifths rule, instead of exaggerating discrimination with large . . . numbers, is not sensitive enough to the discriminatory situation. Thus, under the four-fifths rule, Type II error is committed."²⁴²

Although a majority of the studies on the four-fifths rule were conducted on the heels of the EEOC's promulgation of the rule in 1978, recent studies also confirm the fallibility of the rule. In one study, researchers conducted a statistical survey of the data in *Ricci* and concluded that a fair, non-discriminatory test for either the lieutenant or captain position would fail the four-fifths rule nearly seventy percent of the time.²⁴³ Additionally, fair tests for both positions would fail the four-fifths rule at least sixty percent of the time.²⁴⁴ Researchers using the 0.05 significance level²⁴⁵ found that

239. See *supra* text accompanying notes 234–35.

240. See generally Louis J. Braun, *Statistics and the Law: Hypothesis Testing and Its Application to Title VII Cases*, 32 HASTINGS L.J. 59, 80–81 (1980) ("This rule can easily lead to inaccurate results."); Cohn, *supra* note 235 (arguing that reliance on quantitative data can mislead employment discrimination litigants); Greenberg, *supra* note 233 (showing that the four-fifths rule fails due to both types of errors); Meier et al., *supra* note 63 (comparing two statistical tests and finding the four-fifths rule more helpful for determining substantial discrimination); Sobol & Ellard, *supra* note 48 (finding that, depending on the particular values used, the four-fifths rule can lead to both types of errors); Van Bowen & Riggins, *supra* note 45 (testing the four-fifths methodology for uniformity across employers and finding it lacking).

241. Sobol & Ellard, *supra* note 48, at 395.

242. *Id.* at 396.

243. Joseph L. Gastwirth & Weiwen Miao, *Formal Statistical Analysis of the Data in Disparate Impact Cases Provides Sounder Inferences Than the U.S. Government's 'Four-Fifths' Rule: An Examination of the Statistical Evidence in Ricci v. DeStefano*, 8 L., PROBABILITY & RISK 171, 171 (2009).

244. *Id.*

245. Levels of significance are evidentiary mechanisms of disproving a hypothesis. R.A. Fisher, responsible for developing the concept of "level of significance," regarded

any test of significance that results in a larger than 5% significance level (i.e., less than 1.96 standard errors) as unpersuasive, a difference with significance level between 5% and 2% (i.e., between 1.96 and 2.33 standard errors) as credible, and a difference with significance level more extreme than 2% (i.e., greater than 2.33 standard errors) as clearly indicative of a real, underlying difference.

despite the lower courts' conclusions that both the lieutenant and captain examinations in *Ricci* had a disparate impact, only one of the tests had differences in pass rates that were statistically significant.²⁴⁶ The research concluded that differences in pass rates on the lieutenant examination were statistically significant, whereas the pass rate differences on the captain examination “were not close to statistical significance.”²⁴⁷

What accounts for the high probability of Type I and II errors in these studies has not been explained, but perhaps the probability of errors is related to the four-fifths rule as a threshold for proving disparate impact. The four-fifths rule may be overinclusive and underinclusive depending on the size of the employer.²⁴⁸ For example, “a small employer with a small absolute disparity between male and female applicants might face liability under the rule, while a large employer can have a much greater disparity and still comply with the four-fifths rule.”²⁴⁹

Sample size (the size of the employer, i.e., the number of employees in a business) also affects statistical significance tests.²⁵⁰ “[T]he smaller the sample size, the larger the disparity in rates can be without reaching statistical significance.”²⁵¹ When the sample size is

Meier et al., *supra* note 63 63, at 151. An event found to be significant at the 2% level means a smaller probability that the event resulted from randomness as compared with a 5% level of significance. *Id.*

Researchers generally use a five percent (0.05) level of significance, which is also known as the ninety-five percent confidence level. See Peresie, *supra* note 161, at 785; Elaine W. Shoben, Comment, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof under Title VII*, 91 HARV. L. REV. 793, 800 (1978) (“Statisticians often adopt a 5% rule of thumb, rejecting the null hypothesis if the probability of obtaining the sample pass rate difference by chance is less than 5%.”); Van Bowen & Riggins, *supra* note 45, at 651 (“Statisticians use the five percent figure most often and refer to it as the ninety-five percent level of significance.”). But see Meier et al., *supra* note 63, at 151 n.46 (citing William H. Kruskal, *Significance, Tests of*, in 2 INTERNATIONAL ENCYCLOPEDIA OF STATISTICS 944 (William H. Kruskal & Judith A. Tanur, eds., 1978) (“[T]here is no professional consensus about the proper use of significance levels, or about which level of significance is critical, to claim the law’s particular attention.”). The five percent level of significance has also “been accepted in many legal decisions.” Gatswirth & Miao, *supra* note 243, at 176; Scott W. McKinley, Comment, *The Need for Legislative or Judicial Clarity on the Four-Fifths Rule and How Employers in the Sixth Circuit Can Survive the Ambiguity*, 37 CAP. U. L. REV. 171, 197–98 (2008) (discussing the .05 and .01 confidence levels as “cited with approval by courts as a proper method of measuring statistical significance” (citations omitted) (internal quotations omitted)).

246. Gatswirth & Miao, *supra* note 243, at 173.

247. *Id.*

248. Peresie, *supra* note 161, at 784.

249. *Id.*

250. Meier et al., *supra* note 63, at 155.

251. *Id.* (emphasis omitted); see also Boardman & Vining, *supra* note 229, at 206 (“When samples are very small, large differentials are necessary to obtain statistically significant results.”).

small, there is a greater likelihood of false negatives, indicating the absence of discrimination, when, in fact, it exists.²⁵² On the other hand, the larger the sample size, the more it will amplify any difference.²⁵³ Therefore, "whereas the four-fifths rule could be said to itself have a disparate impact on small employers, the statistical significance rule could be said to have a disparate impact on large employers because even a small disparity may achieve statistical significance."²⁵⁴

As a result of the effect of sample size, the disparate impact provision allows courts to choose sides merely by the measure of disparity selected.²⁵⁵ A small employer has a greater risk of liability under the four-fifths rule than under a statistical significance test, while a large employer faces the opposite risk. On the other hand, a small sample size causes defendants to favor statistical significance

252. Boardman & Vining, *supra* note 229, at 206.

253. Meier et al., *supra* note 63, at 160 ("[L]arge sample sizes will tend to make any difference statistically significant."). Researchers caution that one possible consequence of the effect of sample size on statistical significance tests is the pressure to resort to quotas. *Id.* at 161. Professors Meier, Sacks, and Zabell explain that businesses employing large numbers inevitably will be liable for disparate impact against a group. *Id.* Such businesses will be faced with the choice of expending thousands to validate their selection criteria or avoid the costs of validation by opting to use quotas, rather than the selection criteria. *Id.* (citing Barbara Lerner, Washington v. Davis: *Quantity, Quality and Equality in Employment Testing*, 1976 SUP. CT. REV. 263). For additional discussion about the expense of time and money necessary for validation tests, see *supra* note 152.

The Court has been sensitive to the potential for disparate impact to lead employers to adopt quotas: "We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt prophylactic measures." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992 (1988) (plurality opinion). The *Watson* Court opined, "If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted." *Id.* at 993. *Ricci* reiterated a similar concern: The "focus on statistics could put undue pressure on employers to adopt inappropriate prophylactic measures." *Ricci v. DeStefano*, 129 S. Ct. 2658, 2675 (2009) (quoting *Watson*, 487 U.S. at 992) (internal quotations omitted). *But see* Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487, 1489 (1996) (arguing that the disparate impact provision does not induce quotas).

254. Peresie, *supra* note 161, at 787; see also Boardman & Vining, *supra* note 229, at 216 ("When few individuals are selected the probability that the protected group might claim adverse impact is much higher under the four-fifths rule than under the statistical significance rules. When 200 people are selected, the rules are identical, while for larger selections the statistical significance rules are more stringent for the employer than is the four-fifths rule."); Sobol & Ellard, *supra* note 48, at 393 n.40 (1988) ("For very small sample sizes both the 4/5ths rule and a binomial test, based upon approximation to the normal distribution, are inadequate measures of discrimination. In the case of the 4/5ths rule, the effect of hiring or failing to hire just one person has a grossly disproportionate effect on the determination of discrimination."); Shoben, *supra* note 245, at 809 (describing the importance of sample size in determining whether a discrepancy in pass rates is significant).

255. Peresie, *supra* note 161, at 789.

and plaintiffs to favor the four-fifths rule—but as the sample size increases, that preference switches.²⁵⁶ Applying these results, if a court is pro-defendant, “it will prefer the four-fifths rule where the selection rates at issue are high (because a significant disparity will not be actionable), but not where the selection rates are low.”²⁵⁷ Thus, whether disparate impact is measured by statistical significance tests or the four-fifths rule, the disparate impact provision is prone to be overinclusive and underinclusive.

Another related problem with the four-fifths rule is that it does not assist courts in assessing causation.²⁵⁸ Instead, the rule creates a “high threshold (the four-fifths ratio) necessary to establish a disparate impact in order to provide for the possibility that other factors are causing the disparity. But this at most indirectly evaluates causation and results in a significant false negatives problem.”²⁵⁹ This criticism affects the efficacy of the disparate impact provision in achieving its purpose. As seen in *Parents Involved*, the limited impact the provision has on attaining its asserted goal undermines its ability to satisfy the narrow tailoring requirement.²⁶⁰

If the disparate impact provision, however, takes into consideration sample size and statistical significance, it might avoid the criticism of being underinclusive or overinclusive and not causally relevant. As some researchers suggest, “[t]he 80% rule appears to be a reasonable articulation of a statistical criterion to determine whether statistically significant differences are substantial enough to warrant legal liability.”²⁶¹ The four-fifths rule appears to allow for the effect of sample size by “incorporating a measure of practical significance.”²⁶²

256. *Id.*; see also Sobol & Ellard, *supra* note 48, at 398 (“The error of the four-fifths rule also increases as the size of the hiring population increases. For small numbers of hires the four-fifths criterion is actually more demanding on the employer than the binomial test. For large numbers of hires the binomial test is more demanding on the employer. Thus, in comparison to the binomial test, the four-fifths rule will be *more* likely to find discrimination where it does *not* exist (Type I error) for a *small* firm, and *less* likely to find discrimination where it does exist (Type II error) for a large firm.”); Van Bowen & Riggins, *supra* note 45, at 650 (“[T]he four-fifths or eighty per cent rule is not statistically valid and should not be used because it does not apply consistently to all employers. . . . The eighty percent rule produces different results depending on variables in the percentage of minorities in the relevant labor pool and in the number of selections made.”).

257. Peresie, *supra* note 161, at 789.

258. *Id.* at 791.

259. *Id.* at 791.

260. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 734 (2007) (plurality opinion) (explaining the failed policy of using racial classifications to determine school assignments for minority students).

261. Meier et al., *supra* note 63, at 169.

262. *Id.* at 168. The four-fifths rule provides as follows:

If researchers Boardman, Vining, Sobol, Ellard, and others took the four-fifths rule's allowance for sample size into account and if their results are unaffected, then their conclusions concerning the disparate impact provision's potential for false positive and false negative errors might still show that the provision is vulnerable to underinclusiveness and overinclusiveness. If, however, the four-fifths rule's allowance for sample size was not considered, it might affect the results of the researchers' conclusions about false positive and false negative errors, and consequently the determination of the reasonableness of the disparate impact provision's scope. Thus, whether the provision is narrowly tailored in this regard is unsettled.

C. Exclusion of White Males Would Lead to Underinclusiveness

The purpose of the disparate impact provision may be frustrated if it excludes individuals of a certain racial group from alleging discrimination based on race, despite their historical safety from discrimination. For example, the disparate impact provision may be underinclusive if it excludes white males from making disparate impact claims.²⁶³ No definitive answer to the question of whether the provision allows for claims by white males can be found among the Supreme Court cases involving disparate impact because there have

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. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group. Where the user's evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact.

EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D) (2010).

263. Interestingly, veterans' preference is one of the few, if not the only, neutral selection device that affords African Americans an advantage over whites. See Chamallas, *supra* note 88, at 368 n.310 (citing *Smith v. City of E. Cleveland*, 363 F. Supp. 1131 (N.D. Ohio 1973), *aff'd in part, rev'd in part sub nom.*, *Smith v. Troyan*, 520 F.2d 492 (6th Cir. 1975)). In *Smith*, only thirty-six percent of the white applicants were veterans and entitled to a veterans' preference compared with the seventy-five percent of African American applicants who were veterans and also given the preference. 363 F. Supp. at 1146. The plaintiffs, however, consisted of African Americans and females. *Id.* at 1133.

not been any white male plaintiffs.²⁶⁴ Additionally, there is no consensus among commentators.²⁶⁵

The arguments against applying the disparate impact provision in favor of white males center on the legislative intent of the Civil Rights Acts of 1964 and 1991.²⁶⁶ *Griggs* and *Sheet Metal Workers* suggest that

264. Primus, *supra* note 22, at 527; Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims By White Males*, 98 NW. U. L. REV. 1505, 1524 (2004).

Although *Ricci* is a Supreme Court case that involved disparate impact, *Ricci* does not provide an answer as to whether the provision protects white males because the white male plaintiffs challenged the city's action under the disparate treatment provision and the Equal Protection Clause. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2664 (2009). The disparate impact issue in *Ricci* related to whether the city had "a strong basis in evidence" to believe that African American firefighters had a disparate impact claim. *Id.* at 2681.

While the Supreme Court has yet to address a case involving white males filing disparate impact claims, several lower courts have confronted this issue. See, e.g., *Barnhill v. Chicago Police Department*, 142 F. Supp. 2d 948, 963 (N.D. Ill. 2001) (suit by white-male plaintiffs against police department alleging that an examination had a discriminatory impact on Caucasians in contravention of Title VII); *Foss v. Thompson*, 242 F.3d 1131, 1134 (9th Cir. 2001) (allegation by white male that the employer's requirement that applicants have a nursing degree caused a disparate impact on the basis of sex); *Zottola v. City of Oakland*, 32 F. App'x 307, 309 (9th Cir. 2002) (involving a claim that the city's use of oral interviews as part of an examination for hiring firefighters had a disparate impact on white males); *Sims v. Montgomery County Sheriff's Department*, 887 F. Supp. 1479, 1485-86 (M.D. Ala. 1995) (claim by white male deputy intervenors that inadequate notice of a deadline caused a disparate impact on white males but the court found the claim lacked merit); *Johnson v. Holley*, Nos. 3:07-0979, 3:08-0031, 2008 WL 3163531, at *6 (M.D. Tenn. Aug. 4, 2008) (court recognizing plaintiffs' argument that a police department promotional examination had a disparate impact on white males).

These cases do not directly hold that white males are covered by the disparate impact provision. By allowing claims by white males to proceed and addressing the merits of their disparate impact claim, however, the courts recognized implicitly that white males fall within the protection of the provision. In all of these cases, none of the defendants argued that the disparate impact provision was unavailable to white males, nor did the courts hesitate to conduct its analysis on the merits of the disparate impact claim for want of proper plaintiffs. The courts did not dismiss the cases because the plaintiffs were white males and ineligible to assert disparate impact claim by virtue of race and sex, but rather the courts disposed of these cases for lack of evidence showing a prima facie case of disparate impact. These cases are evidence that white males may proceed under the disparate impact theory if sufficient evidence exists.

265. Primus, *supra* note 22, at 527; Sullivan, *supra* note 264, at 1524. For arguments that disparate impact claims are unavailable to white males, see Chamallas, *supra* note 88, at 366-68; Kate L. Didech, Note, *The Extension of Disparate Impact Theory to White Men: What the Civil Rights Act of 1991 Plainly Does not Mean*, 10 TEX. J. C.L. & C.R. 55, 74-75 (2004). For arguments favoring inclusion of white males, see Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORDHAM L. REV. 523, 558 (1991); Sullivan, *supra* note 264, at 1512; Michael L. Zimmer, *Individual Disparate Impact Law: On the Plain Meaning of the 1991 Civil Rights Act*, 30 LOY. U. CHI. L.J. 473, 501-02 (1999).

266. See Chamallas, *supra* note 88, at 367 (arguing that Congress "was concerned with improving the economic status of blacks"); Didech, *supra* note 265, at 74 (arguing that extending disparate impact theory to white men is "not within the statute's spirit and the intention of its makers"); John J. Donahue III, Comment, *Understanding the Reasons for and Impact of Legislatively Mandated Benefits for Selected Workers*, 53 STAN. L. REV. 897, 898 (2001).

the original intent of the Civil Rights Act of 1964 was to protect minorities only: “Title VII was designed ‘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.’”²⁶⁷

Additionally, *United Steelworks v. Weber*²⁶⁸ can be interpreted as supporting a limitation against extending the disparate impact provision to protect white males.²⁶⁹ In *Weber*, the Court concluded that “Congress’ primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with ‘the plight of the Negro in our economy.’”²⁷⁰ The *Weber* Court decided that “it was clear to Congress that ‘[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them,’ and it was to this problem that Title VII’s prohibition against racial discrimination in employment was primarily addressed.”²⁷¹

Finally, the legislative intent of the Civil Rights Act of 1991 could support a similar interpretation. Because the Civil Rights Act of 1991 adopted the definitions of business necessity and job relatedness from *Griggs*,²⁷² it codified the theory of disparate impact along with the Court’s interpreted limitations.²⁷³

There are, however, problems with the theory that white males cannot avail themselves of the disparate impact provision. While the language of *Griggs* suggests a limitation against white males, *McDonald v. Santa Fe Trail Transportation Co.*,²⁷⁴ *Bakke*, and *Teal* support allowing disparate impact claims by white males. *McDonald* involved a claim of discrimination by a white male who was discharged by his employer and addressed whether Title VII covered intentional discrimination against white employees.²⁷⁵ Justice Marshall, writing for a unanimous court, declared:

267. *Local 28 of the Sheet Metal Workers Int’l Assoc. v. EEOC*, 478 U.S. 421, 448 (1986) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–03 (1971)).

268. 443 U.S. 193 (1979).

269. *Id.* at 199, 209 (permitting under Title VII an affirmative action plan bargained by the union and employer that reserved fifty percent of the openings in a training program for African American employees).

270. *Id.* at 202 (quoting 110 CONG. REC. S6548 (daily ed. Mar. 30, 1964) (statement of Rep. Humphrey)).

271. *Id.* at 203 (alterations original) (quoting 110 Cong. Rec. 6548 (1964) (statement of Rep. Humphrey)).

272. See 137 Cong. Rec. 30630, 30662 (1991) (stating that codifying *Griggs* was one of the purposes of § 3 of the Civil Rights Act of 1991).

273. Sullivan, *supra* note 264, at 1534.

274. 427 U.S. 273 (1976).

275. *Id.* at 278–80.

Title VII of the Civil Rights Act of 1964 prohibits the discharge of “any individual” because of “such individual’s race.” Its terms are not limited to discrimination against members of any particular race. . . . This conclusion is in accord with uncontradicted legislative history to the effect that Title VII was intended to “cover white men and white women and all Americans” and create an “obligation not to discriminate against whites.” We therefore hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and Jackson white.²⁷⁶

Although *McDonald* did not raise a disparate impact claim, the Court’s holding suggests that Title VII is universally available.

Bakke also buttresses an inclusive interpretation of the disparate impact provision to encompass white males. In *Bakke*, the medical school argued that the Court should not apply strict scrutiny because the plaintiff, a white male, is not among a “discrete and insular minority” group that is afforded heightened protection.²⁷⁷ The Court unequivocally declared that “[r]acial and ethnic classifications, however, are subject to stringent examination without regard to these additional characteristics.”²⁷⁸ The Court explained, “[a]lthough many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white ‘majority,’ the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude.”²⁷⁹

Similarly, although Congress passed the Civil Rights Act of 1964 and 1991 with the vision of bringing equality to African Americans,²⁸⁰ the disparate impact provision, too, was framed in universal terms. As *Bakke* demonstrated, the universal language of an act prevails over Congressional intent.²⁸¹ Therefore, because the disparate impact provision was written in universal terms, the provision also affords white males protection.

Additionally, *Teal*’s individual-centered approach also supports an expansive interpretation of the disparate impact provision. In *Teal*, the plaintiffs filed a disparate impact claim because an employment

276. *Id.* at 278–80 (internal citations omitted).

277. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290 (1978).

278. *Id.* (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)).

279. *Id.* at 293 (internal citation omitted).

280. See Ngov, *supra* note 19, at 84–87.

281. See *Bakke*, 438 U.S. at 337–38 (explaining that the broad language of the statute reflects the legislature’s intent for judicial determination of the statute’s applicability).

test that was required for promotion had an adverse effect on African Americans.²⁸² The employer asserted a “bottom-line” theory of defense, arguing that the employer should not be liable for disparate impact caused by the test if the bottom-line outcome of the promotional process achieved racial balance.²⁸³

Teal rejected the bottom-line defense because Title VII’s principle of equality centered on the individual, not groups.²⁸⁴ The Court concluded, “Title VII strives to achieve equality of opportunity by rooting out ‘artificial, arbitrary, and unnecessary’ employer-created barriers to professional development that have a discriminatory impact upon *individuals*.”²⁸⁵ If, as interpreted by *Teal*, the disparate impact provision’s purpose is to protect individuals, not groups, then the provision should not exclude an entire class of individuals—white males.²⁸⁶

Arguably, *Teal*’s individual-centered approach can be construed to restrict white males from asserting a disparate impact claim. It is possible that while *Teal* interpreted Title VII as securing protection for individuals,²⁸⁷ it intended to address only minorities. In *Teal*, the Court stated, “[t]he suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees these individual respondents the *opportunity* to compete equally with white workers on the basis of job-related criteria.”²⁸⁸ *Teal*’s reference to “white workers” may have the same limiting effect as *Griggs*’s reference to “white employees”²⁸⁹ as previously discussed.²⁹⁰

But this argument may be less persuasive in light of the context of *Teal* and *Griggs*. It is important to recognize that *Teal* and the other Supreme Court cases containing language that suggests the unavailability of disparate impact claims for white males all involved minority and female plaintiffs.²⁹¹ Also, although *Weber* and *Sheet Metal*

282. *Connecticut v. Teal*, 457 U.S. 440, 443–44 (1982).

283. *Id.* at 442.

284. *See id.* at 451 (describing Title VII’s purpose of eliminating employment barriers that bar individuals from advancing).

285. *Id.* (emphasis added).

286. *Id.*

287. *Id.*

288. *Id.*

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

290. *See supra* text accompanying note 267.

291. *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231–32 (1989) (female candidate refused partnership position in firm); *Teal*, 457 U.S. at 442–43 (black employees allege discrimination on promotion examination); *Griggs*, 401 U.S. at 426–27 (black employees sue for discriminatory employment practices).

Workers involved white plaintiffs, they did not directly assert a disparate impact claim.²⁹²

Ultimately, even if the legislative intent of the Civil Rights Acts of 1964 and 1991 did not extend protection to white males, precluding white males from asserting a disparate impact claim would raise an obvious equal protection challenge. Such a restrictive interpretation of the disparate impact provision would be contrary to our current notions of what is emblematic of the Equal Protection Clause.²⁹³ The exclusion of white males from the protection of the provision would, in and of itself, involve a classification resulting in unequal application of the provision, which would trigger strict scrutiny and require a compelling interest to justify this exclusion.

Additionally, regardless of the asserted compelling interest, for example, smoking out discrimination, providing role models, attaining the benefits of diversity, meeting operational needs, or removing barriers to equal employment opportunities,²⁹⁴ excluding white males from asserting a disparate impact claim would render the provision underinclusive in meeting any one of these interests. For example, if the disparate impact provision's racial classification was intended to attain the benefits of diversity, excluding white males from the provision's coverage would hamper the furtherance of fostering cross-racial understanding and problem solving.²⁹⁵ Consider another example. If the compelling interest underlying the provision's racial classification rested on removing barriers to equal employment opportunities, that goal would be more effectively achieved if it allowed white males to sue for disparate impact.

In light of the potential Equal Protection Clause violation that a restrictive interpretation of the disparate impact provision would raise, the rules of statutory construction would necessitate that white males be included. The Court has operated under the principle that it will construe a statute in a manner that avoids declaring an act

292. See *Local 28 of the Sheet Metal Workers' Int'l Ass'n*, 478 U.S. 421, 426 (1986) (determining whether a court can compel relief from discrimination that may benefit individuals who have not been subjected to historical discrimination); *United Steelworkers v. Weber*, 443 U.S. 193, 200–01 (1979) (determining the validity of a negotiated affirmative action plan in the hiring policy).

293. See Primus, *supra* note 22, at 496 (explaining the modern notion of equal protection as hostile towards government action that seeks to redress historical discrimination).

294. See Ngov, *supra* note 19, at 19 (discussing possible compelling interests that may justify the disparate impact provision's racial classification under an Equal Protection Clause challenge).

295. See *id.* at 49–52 (discussing asserted benefits of diversity).

invalid if it is fairly possible to do so.²⁹⁶ Reliance on the plain language of the statute provides an expansive interpretation of the provision and would allow the Court to fairly avoid invalidating the provision for failing to include white males.

VI. DURATION

For the disparate impact provision to pass strict scrutiny, it must also be narrowly tailored in duration.²⁹⁷ Duration is a critical factor in evaluating whether a program is narrowly tailored because the Court has established that "all governmental use of race must have a logical end point."²⁹⁸ As the Court has explained, "[t]his requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle."²⁹⁹

A durational requirement has been applied in remedial programs in order to ensure that a program intended to remedy past discrimination is not being used simply to achieve and maintain racial balance.³⁰⁰ In *Croson*, the Court required findings not only to

296. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

297. A normative discussion of whether affirmative action programs should have durational limits is beyond the scope of this article.

298. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003). For example, the Court was reluctant to permit affirmative action programs that had "no logical stopping point" in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 275 (1986) (plurality opinion).

299. *Grutter*, 539 U.S. at 342. In his concurring opinion in *Fullilove v. Klutznick*, Justice Powell wrote that the "temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate." 448 U.S. 448, 513 (1980) (Powell, J., concurring).

300. See *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 475 (1986) (explaining that though a court has discretion to fashion appropriate remedies for Title VII violations, a court "should exercise its discretion with an eye towards Congress' concern that race-conscious affirmative measures not be invoked simply to create a racially balanced work force"). Some courts have dissolved remedial plans that have lasted for thirty years. See Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 764 (2006) (describing the Boston police and fire department's use of remedial hiring plans and their dissolution by the district court after their existence for more than thirty years). These plans were instituted pursuant to consent decrees, which were relied on even after the remedial goals specified in the decrees had been accomplished. *Id.* Other courts, however, have allowed remedial plans to continue after having lasted well over thirty years. In *Cotter v. City of Boston*, the court found that discrimination existed as early as 1972. 323 F.3d 160, 169 (2003). When the city's remedial plan was challenged, the court was persuaded that "remediating past discrimination takes time" and decided that

support a remedial need but also “to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.”³⁰¹ Therefore, although the Court ultimately held that the city lacked a remedial purpose, it envisioned remedial programs as temporary devices.³⁰²

Additionally, *Paradise* and *Sheet Metal Workers* support requiring a durational limit for race-conscious programs, as evidenced by the Court’s conclusions that the challenged programs were narrowly tailored because they were temporary.³⁰³ The Court described the membership goal in *Sheet Metal Workers* as a “temporary measure[]” that would end when the percentage of minorities in the local work force was reflected in the percentage of minorities in the union.³⁰⁴ The Court concluded that the membership goal “operate[d] as a temporary tool for remedying past discrimination without attempting to maintain a previously achieved balance.”³⁰⁵

Likewise, the Court determined that the quota in *Paradise* was “ephemeral” because “the term of its application [was] contingent upon the Department’s own conduct,”³⁰⁶ and explained that the fifty percent quota was “not itself the goal; rather it represent[ed] the speed at which the goal of 25% [would] be achieved.”³⁰⁷ The Court analogized the goal in *Paradise* to the end date imposed in *Sheet Metal Workers*: “In these circumstances, the use of a temporary requirement of 50% minority promotions, which, like the end date in *Sheet Metal Workers*, was crafted and applied flexibly, was constitutionally permissible.”³⁰⁸

In circumstances where the compelling interest is something other than remedial, the Court has been equally insistent on time limits. *Grutter* is one example. Because the race-conscious program in *Grutter* was upheld on a compelling interest of achieving diversity and attaining its benefits, rather than on remedial grounds, one would

“[w]hile the numbers are more representative today, [the court was] not prepared to rule that all effects of past discrimination have been eliminated.” *Id.*

301. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989) (plurality opinion).

302. *Id.*

303. *United States v. Paradise*, 480 U.S. 149, 178 (1987) (plurality opinion); *Sheet Metal Workers*, 478 U.S. at 479.

304. *Sheet Metal Workers*, 478 U.S. at 479 (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 216 (1979) (internal quotations omitted)).

305. *Id.* (internal quotations omitted).

306. *Paradise*, 480 U.S. at 178.

307. *Id.* at 179.

308. *Id.* at 180.

not expect a durational limit on diversity.³⁰⁹ On the other hand, one might expect a time limit for remedial programs because once the discrimination has been remedied, assuming that it can be reliably and readily ascertained, the program may no longer be necessary. Remedial programs seek to redress a “particular quantum of harm” with “clearer, more finite endpoints.”³¹⁰

Setting a durational limit on diversity, however, may be incongruous because it would amount to setting an “expiration date” on diversity.³¹¹ Diversity is not temporal by nature.³¹² As Professor Robert Post explains, “[i]f diversity is necessary in order to train competent professionals, for example, it is necessary at any and all times; there is no intrinsic time horizon when this need for diversity will disappear.”³¹³

Nonetheless, the *Grutter* Court refused to exempt the admissions program from durational limits,³¹⁴ which the Court contemplated could be satisfied by sunset provisions and periodic reviews of the program to assess its necessity.³¹⁵ Consequently, Justice O’Connor anticipated the following:

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of higher education. . . . We expect that 25 years from now, the use

309. See *Grutter v. Bollinger*, 539 U.S. 306, 338, 343 (2003) (extolling the virtues of a “broad range of qualities” outside of solely race as “valuable contributions” to the compelling interest of “student body diversity”).

310. See Bryan W. Leach, Note, *Race as Mission Critical: The Occupational Need Rationale in Military Affirmative Action and Beyond*, 113 YALE L.J. 1093, 1101 (2004) (reporting that the durational limit inherent in remedial programs is attractive to a judiciary that does not want to “endorse open-ended schemes”).

311. See Kevin R. Johnson, *The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171, 173 (2004) (arguing that the Court’s twenty-five-year sunset provision on affirmative action programs does not make sense when applied to student diversity as the compelling interest because “universities could still want to strive for a racially diverse student body even if an institution’s past discriminatory history has been fully addressed”).

312. See Johnson, *supra* note 311, at 183 (“[T]ime limits are normally associated with affirmative action programs designed to remedy past discrimination, not those aimed at ensuring a diverse student body.”); Post, *supra* note 189, at 67–68 n.306 (“[T]he justification of diversity, unlike remedy, has no built-in time horizon; if diversity is necessary for the quality of education, it is necessary at any and all times.”); Christopher J. Schmidt, *Caught in a Paradox: Problems with Grutter’s Expectation that Race-Conscious Admissions Programs Will End in Twenty-Five Years*, 24 N. ILL. U. L. REV. 753, 761 (2004) (describing the Court’s holding in *Grutter* “abrupt” and “puzzling” because a “time limitation requirement contradicts its conclusion that diversity is a compelling state interest since diversity is a non-time sensitive interest”).

313. Post, *supra* note 189, at 67 n.306.

314. *Grutter*, 539 U.S. at 342 (“We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point.”).

315. *Id.*

of racial preferences will no longer be necessary to further the [diversity] interest³¹⁶

In light of the above cases, regardless of the type of compelling interest that might justify the disparate impact provision's racial classifications, the provision must have a durational limit. Arguably, the provision's four-fifths rule can be construed as an end date like the twenty-five percent goal in *Paradise* and twenty-nine percent goal in *Sheet Metal Workers*.³¹⁷ Under this argument, the four-fifths rule sets the pace at which the goal will be met.

One notable difference, however, is that enforcement of the goals in *Paradise* and *Sheet Metal Workers* ceased once the remedial goals were achieved, thereby ensuring the goals' temporary status.³¹⁸ In contrast, even if the disparate impact provision serves a remedial need like that found in *Paradise* or *Sheet Metal Workers*, the four-fifths rule will not be lifted for the employer who has met the four-fifths or eighty percent proportion.³¹⁹ The four-fifths rule continues to be enforced for every aspect of a business's operation and, therefore, is not likely temporary.³²⁰ In effect, the four-fifths rule seeks to maintain a balanced work force, contrary to the Court's prohibition, not merely to attain one.³²¹

If the four-fifths rule is not itself a time limit, then a limit must be set for the disparate impact provision. Because Justice O'Connor contemplated a durational limit for diversity, a similar limit could be

316. *Id.* at 343; see also Johnson, *supra* note 311, at 182–85 (discussing the justifications for time limits, institutional competence to establish time limits, and whether time limits are realistic).

317. See *United States v. Paradise*, 480 U.S. 149, 180–81 (1987) (concluding that a goal of twenty-five percent representation is an appropriate goal to remedy past discrimination); *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 440–41 (1986) (plurality opinion) (refusing to question the lower court's order for twenty-nine percent minority representation).

318. See *Paradise*, 480 U.S. at 176 (acknowledging that judicial oversight would end once the Alabama Department for Public Safety had satisfied the district court's order); *Sheet Metal Workers*, 478 U.S. at 479 (stating that the district court's order was temporary and would end as soon as the "percentage of minority union members approximate[d] the percentage of minorities in the local labor force").

319. See *supra* Part I.C.

320. See *supra* Part I.C.

321. In *Sheet Metal Workers*, the Court disapproved of government programs designed to maintain racial balances. 478 U.S. 421, 476 (1986). In *Johnson v. Transportation Agency*, the Supreme Court emphasized that the approved plan "was intended to attain a balanced work force, not to maintain one." 480 U.S. 616, 639 (1987). Although *Johnson* involved an issue of gender rather than racial discrimination and was reviewed under Title VII because the parties did not raise a constitutional question, the Court's distinction between attaining and maintaining a balanced work force is applicable to the issue at hand. See *id.* at 622 (explaining that the EEOC's challenged plan had an eventual goal of thirty-six percent female representation).

imposed for the disparate impact provision if its intended purpose is diversity. There is, however, some lack of clarity with Justice O'Connor's statement. First, it is not clear whether Justice O'Connor contemplated a twenty-five year durational limit or a fifty year limit because of her reference to Justice Powell's approval of diversity in *Bakke*, which occurred twenty-five years before *Grutter*.³²² Second, it is unclear whether Justice O'Connor would expect a similar limit for race-conscious programs designed to advance other non-remedial interests, like providing role models, meeting occupational needs, and providing equal employment opportunities.

Assuming that Justice O'Connor's expectation also applies to non-remedial goals, it is necessary to assess whether the disparate impact provision complies with the twenty-five year or fifty year durational limit. In the circumstance of race-conscious admissions programs, a school's compliance with the durational limit set by Justice O'Connor could easily be determined from the date of an admissions program's application. For the disparate impact provision, there are three ways to measure its compliance with Justice O'Connor's durational limit: using the year when the Court adopted the disparate impact theory, when the EEOC established the four-fifths rule, or when Congress promulgated the disparate impact provision.

If one measures the disparate impact provision's compliance with the time limit from the year the Court began applying the disparate impact theory in *Griggs* (1971),³²³ the provision has exceeded Justice O'Connor's twenty-five year durational limit. Similarly, if one uses the four-fifths rule's passage date (1978),³²⁴ the provision again would fail the twenty-five year durational limit. If, however, one uses the year of the provision's congressional passage (1991),³²⁵ the provision would be in compliance until the year 2016. If one applies the fifty year durational limit, the disparate impact provision would be in compliance regardless of the method of measurement.

VII. NECESSITY AND RACE-NEUTRAL ALTERNATIVES

A. *The Importance of Race-Neutral Alternatives*

To demonstrate that the use of racial classifications is necessary, the government must show the unavailability or ineffectiveness of

³²². *Grutter*, 539 U.S. at 343.

³²³. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

³²⁴. See *supra* text accompanying note 48.

³²⁵. 42 U.S.C. § 2000e-2(k)(1)(A) (2006).

race-neutral alternatives to achieve its goal.³²⁶ *Croson* required the government to exhaust race-neutral alternatives before resorting to racial classifications.³²⁷ In *Croson*, the city failed to consider any race-neutral alternatives.³²⁸ It seemed logical to the Court that the city should have investigated race-neutral alternatives because the city cited many race neutral barriers to minority participation. The Court suggested race-neutral alternatives, such as city financing for small firms if Minority Business Enterprises disproportionately lacked capital,³²⁹ “increas[ing] the accessibility of city contracting opportunities to small entrepreneurs of all races[,]” and also “[s]implification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races.”³³⁰

Although *Grutter* did “not require exhaustion of every conceivable race-neutral alternative,”³³¹ it held that “[n]arrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives.”³³² Later in *Parents Involved*, the plurality reiterated *Grutter*’s requirement to examine race-neutral alternatives and criticized the districts for failing to make such considerations.³³³

In contrast, the programs in *Sheet Metal Workers* and *Paradise* were narrowly tailored because there were no other alternatives to the race-conscious programs. In *Sheet Metal Workers*, the Court approved of “stronger measures” because the district court had already considered alternative remedies in light of the union’s deliberate

326. See *Grutter*, 539 U.S. at 339 (“Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives”); Robinson, *supra* note 212, at 285 (construing the Court’s rejection of racial classification in *Parents Involved* as a result of “the plans’ limited impact” that “indicated that alternative approaches would accomplish the same goals,” and was thus not narrowly tailored).

327. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (reasoning that the set-aside program was not narrowly tailored because there were multiple race-neutral alternatives that could lead to greater minority participation in the construction industry).

328. *Id.*

329. *Id.*

330. *Id.* at 509–10.

331. *Grutter*, 539 U.S. at 339. The Court’s relaxation of narrow tailoring was perhaps due to a presumption of good faith on the part of the school. See *id.* at 329 (“Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining 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.’”).

332. *Id.* at 339.

333. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735 (2007) (plurality opinion) (quoting *Grutter*, 539 U.S. at 339).

delays in carrying out the district court’s initial remedial order.³³⁴ Because of similar “foot dragging” in *Paradise*, the Court also found that the lower court adequately considered other alternatives.³³⁵ In both *Paradise* and *Sheet Metal Workers*, the proposed alternatives fell short of addressing the long term, pervasive discrimination caused by the government.³³⁶ Thus, when the government uses racial classifications, it must at least show it has considered race-neutral alternatives.

B. Race-Neutral Alternatives for the Disparate Impact Provision’s Racial Classifications

The disparate impact provision’s racial classifications may not be narrowly tailored if there are neutral alternatives available. Consideration of the availability of neutral alternatives depends on the compelling purpose for the provision’s use of race. If the provision is intended to remedy past discrimination, there are possible alternatives to explore such as providing preparatory testing materials,³³⁷ training,³³⁸ or financial aid.³³⁹ If the compelling purpose of the provision is to increase diversity or provide equal opportunities, those same alternatives could be explored. Additionally, sensitivity training could be provided to promote the cross-racial understanding that is believed to derive from diversity.³⁴⁰

Perhaps the one compelling interest where there is no available race-neutral alternative is meeting an operational need. An employer is most likely to show the unavailability of race-neutral alternatives when race-conscious decisions are made for authenticity, such as

334. *Local 28 of the Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 478 U.S. 421, 481 (1986).

335. See *United States v. Paradise*, 480 U.S. 149, 174–78 (1987) (“Not only was the immediate promotion of blacks to the rank of corporal essential, but, if the need for continuing judicial oversight was to end, it was also essential that the Department be required to develop a procedure without adverse impact on blacks, and that the effect of past delays be eliminated.”).

336. *Id.* at 171; *Sheet Metal Workers*, 478 U.S. at 481.

337. The firefighters in *Ricci* were required to purchase their own test materials, which cost approximately \$500. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2667 (2009).

338. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509–10 (1989) (plurality opinion) (suggesting training as an alternative).

339. See *id.* at 510 (suggesting financial aid as an alternative). In *Griggs*, the employer funded two-thirds of the tuition costs for high school training. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

340. See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (discussing the benefits of diversity in the educational context, such as breaking down racial stereotypes, fostering empathy and understanding for those of different races, encouraging livelier class room discussion, and preparing students for diverse workforces).

conducting investigations to infiltrate a racial gang, as Justice Stevens has contemplated.³⁴¹

This discussion is not meant to suggest that there are easy cures for the ills that the disparate impact provision's racial classifications are meant to address. But there must be evidence that the government has considered alternatives before imposing the provision's racial classifications on employers.

VIII. THE SURVIVAL OF THE DISPARATE IMPACT PROVISION

The survival of the disparate impact provision against an Equal Protection Clause challenge rests upon whether the provision's use of racial classifications functions like rigid quotas, is flexible and affords individualized decisions, is overinclusive or underinclusive, is temporary in duration, and is necessary in light of good faith considerations of race-neutral alternatives. The disparate impact provision fails the narrow tailoring requirement under all these criteria.

The provision's four-fifths rule risks being labeled a quota. Legislative history reveals that the predominant concern with the Civil Rights Act of 1991, which codified disparate impact and its predecessor, was this very issue of the Act being a "quota bill."³⁴² The analysis in this Article does not rely on those generalized fears expressed during the passage of the Act but rather on the functionality of the four-fifths rule that was overlooked during the two years of debates preceding the Act. It is difficult to distinguish the four-fifths rule from a quota because it effectively insulates a percentage of applicants from competition and uses race as the only factor in determining prima facie violations, which is antithetical to the characteristics of the permissible goal in *Grutter*.

If the disparate impact provision is a quota, it will naturally fail the requirement for flexibility or individualized decisions that the Court has favored as permissible goals. The provision lacks the flexibility of the goals in *Grutter*, *Paradise*, *Sheet Metal Workers*, and Harvard's program that was endorsed by *Bakke*. The provision, specifically the four-fifths rule, does not fluctuate with the needs of the employer or

341. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 314 (1986) (Stevens, J., dissenting). The Fifth Circuit has approved of using race as a basis of assignment for undercover agents. See *Perez v. FBI*, 707 F. Supp. 891, 912 (W.D. Tex. 1988), *aff'd* 956 F.2d 265 (5th Cir. 1992) (stating that "Title VII may not prohibit the Bureau from assigning Hispanic Special Agents to undercover work in disproportionate numbers").

342. 137 CONG. REC. 30633 (Nov. 7, 1991) (statement of Rep. Mazzoli).

the compelling interest sought to be achieved by the provision. Whether the objective of the provision is to remedy past discrimination, smoke out discrimination, increase diversity, provide role models, meet an operational need, or eliminate unnecessary and arbitrary barriers to employment, the four-fifths rule is constant.

The provision's inflexibility affects its ability to provide the type of individualized decisions that were critical in the Court's approval of *Grutter* and invalidation of *Gratz*. Whether a plaintiff has a prima facie case of disparate impact against an employer is determined on the basis of race alone and does not include a "holistic" review of the case.

Additionally, the provision is not narrowly tailored in duration or scope. Regardless of the compelling interest that may justify racial classifications, the Court has insisted that such classifications be temporary. The disparate impact provision does not provide sunset provisions or indicate "a logical stopping point."

The provision's four-fifths rule also potentially suffers from being overinclusive and underinclusive, which affects evaluation of its scope. Assuming that researchers took into consideration the four-fifths rule's allowance for sample size and statistical significance, the rule's susceptibility to false positive and false negative errors could lead to under-enforcement of the provision when an adverse impact exists and over-enforcement when an adverse impact does not exist. Governmental racial classifications that are overinclusive or underinclusive undermine the necessity of the classifications and suggest that other alternatives are available.

Finally, the provision's racial classifications must be necessary to achieving its compelling interest, which depends on consideration of race-neutral alternatives. Of the six compelling interests identified earlier, only in one circumstance would the provision's racial classifications be necessary to achieve its objective. If there is a compelling need to use racial classifications for authenticity such as for investigative purposes, race-neutral alternatives would not be available. The availability of race-neutral alternatives for the other possible compelling interests would negate the disparate impact provision's justified reliance upon racial classifications.

CONCLUSION

Justice Scalia warned in *Ricci* that "the 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.”³⁴³ The purpose of this Article has been to analyze the disparate impact provision under the doctrinal demands of strict scrutiny and equal protection to determine if peace is possible, rather than to predict the outcome of future cases or make normative arguments.

In my earlier work, I explored the compelling interests that might justify the disparate impact provision’s racial classifications. I preliminarily concluded that the removal of barriers to achieve equal employment opportunities is the most promising compelling interest that might bring peace between the disparate impact provision and the Equal Protection Clause.³⁴⁴ This Article completes the analysis necessary to answer the question posed by Justice Scalia by addressing the second prong of strict scrutiny—narrow tailoring. While remedying past discrimination, smoking out discrimination, enhancing diversity, providing role models, satisfying operational need, and providing equal employment opportunities may be laudable goals, the disparate impact provision’s means of achieving them are inadequate to satisfy the narrow tailoring requirement. An inability to show that the disparate impact provision’s means fit its ends may, in fact, be fatal when “the evil day” comes.

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

344. *See* Ngov, *supra* note 19, at 89.